



No. S-121627
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LAWRENCE BRIAN JER, JUN JER AND JANETTE SCOTT

PLAINTIFFS

AND:

RASHIDA SAMJI, RASHIDA SAMJI NOTARY CORPORATION, SAMJI & ASSOC.
HOLDINGS INC., AND SOCIETY OF NOTARIES PUBLIC OF BRITISH COLUMBIA

DEFENDANTS

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

NOTICE OF APPLICATION

Name of Applicants: Plaintiffs

To: The Defendants

TAKE NOTICE that an application will be made by the applicants to the Case Management Judge, the Honorable Madame Justice Gerow, at the courthouse at 800 Smithe Street, Vancouver, B.C., on April 28, 2017 at 10:00 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. The Settlement Agreement between the Plaintiffs and the Defendant, Society of Notaries Public of British Columbia (the "Society") dated for reference January 27, 2017 (the "Notaries Settlement"), as amended by the Amending Agreement dated for reference April 4, 2017, be approved.
2. The Class definition set out in the Certification Order made September 10, 2013 be amended by deleting "(the "Class")" and adding to the end of the Class definition the following underlined words so that the Class definition is now stated as follows:

"The Class is comprised of all persons, other than the Defendants who have provided funds to invest in the "Mark Anthony Investment" scheme promoted by Samji and who have received payments from the scheme which are lesser in total amount than the total principal amount they invested in The Matter of the Bankruptcy of Rashida Samji, BCSC

Vancouver Registry No. B-121430, including those claimants who opted-out of this Action on or before January 14, 2014 and who have not assigned their claim for compensation from the Society of Notaries Public of British Columbia for loss arising out of this investment but excluding those claimants who have completed a separate settlement for their claims for compensation from the Society as of April 28, 2017 (the “Expanded Class”).”

3. Persons who are not residents of British Columbia who provided funds for investments in the “Mark Anthony Investment” scheme, and who were not previously Class members and who have not assigned their claim for compensation from the Society in respect of their investment, may opt-in to this class proceeding to participate in the Notaries Settlement by filing a Claim Form in accordance with paragraphs 21 and 24 of the Notaries Settlement.
4. Members of the Expanded Class may not opt-out of the Notaries Settlement.
5. Notice of the Notaries Settlement, and of the entitlement and requirements to claim under it, shall be given in the form attached as Schedule “C” to the Notaries Settlement and in the manner set out in paragraphs 3 and 23 of the Notaries Settlement.
6. All members from the Expanded Class, including any non-residents who opt-in pursuant to paragraph 3 of the Order, forever release and discharge the Society and its Officers and Directors from any and all claims for any kind of compensation for losses suffered as a result of their investment in the “Mark Anthony Investment” scheme, except those Expanded Class member who have an outstanding action against the Society and have agreed to discontinue that action and provide the Society with a covenant not to sue.
7. Persons who invested in the “Mark Anthony Investment” scheme, but are not members of the Expanded Class, either because they have:
 - a. assigned their claim for compensation from the Society in respect of their investment; or
 - b. are non-residents and did not opt-in to the Notaries Settlement pursuant to paragraph 3 of this Orderare deemed by their actions to waive their right to claim compensation from the Society.
8. Class Counsel’s fees in the amount of \$794,340, plus taxes thereon, and disbursements in the amount of \$9,759.40 are approved and may be paid from the Settlement Fund paid under the Notaries Settlement once it is received by Class Counsel.

PART 2: FACTUAL BASIS

9. The Society was only prepared to enter into a settlement of collective claims against the Special Fund if all claims against the Special Fund are resolved by the settlement.

- Affidavit of Reidar Mogerman, sworn April 5, 2017 (the “Mogerman Affidavit”), para. 11
10. The terms of the Notaries Settlement, as amended, are a fair and reasonable compromise of the claims of investors against the Special Fund, and the Notaries Settlement is in the best interest of those investors.
- Mogerman Affidavit, paras. 24 through 34

PART 3: LEGAL BASIS

Settlement Approval

11. A settlement in a class proceeding must be approved by a Court; *Class Proceedings Act*, s. 45.
12. The principles that govern the Court’s determination of whether a settlement of a class proceeding should be approved are now well settled and have been consistently applied.
- *Jones v. Zimmer GMBH*, 2016 BCSC 1847
 - *Steele v. Toyota Canada Inc.*, 2015 BCSC 1014
 - *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145
13. The overall question in deciding whether to approve a settlement is whether the settlement is fair, reasonable and in the best interests of the class as a whole.
- *Bodnar v. The Cash Store, Inc.* at para. 17;
 - *Jones v. Zimmer GMBH* at para. 34
14. In determining whether to approve a settlement, the Court’s task is not to dissect the settlement with an eye to perfection in every respect. Instead, the Court must determine if the settlement falls within a zone or range of reasonableness.
- *Bodnar v. The Cash Store, Inc.*, at para. 17
 - *Jones v. Zimmer GMBH* at para. 35
 - *Steele v. Toyota Canada Inc.*, at para. 15
15. The Court must consider the litigation risks associated with proceeding with the action, and determine whether there are any disadvantages to the settlement that justify its rejection. The Court should also consider whether refusing to approve the settlement will jeopardize the settlement entirely.
- *Bodnar v. The Cash Store, Inc.*, at para. 17;
 - *Jones v. Zimmer GMBH* at para. 35
 - *Steele v. Toyota Canada Inc.*, at para. 15

16. The Court's power to approve or reject a settlement does not permit it to modify the terms of a negotiated settlement. It may only approve or refuse to approve the settlement.

- *Bodnar v. The Cash Store, Inc.*, at para. 19
- *Jones v. Zimmer GMBH* at para. 37

17. Counsel's recommendation that a settlement be approved should be given significance by the Court. There is a presumption of fairness when a proposed class settlement, negotiated at arm's length by class counsel, is presented to the Court for approval. The proposed settlement should only be rejected if it does not fall within a range of reasonableness.

- *Bodnar v. The Cash Store, Inc.*, at para. 17
- *Jones v. Zimmer GMBH* at para. 36

18. The various factors that the Court should consider in determining whether a settlement is fair and reasonable may be distilled into four broad questions:

- a. Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based on a proper analysis of the claim?;
- b. Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?;
- c. On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation?; and
- d. Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement?

19. These factors support the conclusion that the Notaries Settlement is fair and reasonable:

- a. Class Counsel are experienced class action counsel who have actively pursued this class proceeding for the past 5 years;
- b. the Notaries Settlement was concluded after a trial of the common issue concerning the Society, and the dismissal of the Society's appeal from that determination of that issue, and there is no reason to believe that any extraneous considerations have influenced the negotiations of the settlement that followed this determination;
- c. given the risks and uncertainty in proceeding with individual claims against the Society for compensation from the Special Fund, the investors are well served by accepting the settlement rather than proceeding with that litigation; and

- d. full disclosure and information has been provided to all of the investors pursuant to the Court-approved Notice of the Notaries Settlement, and the representative Plaintiffs have approved the settlement.

- *Jones v. Zimmer GMBH* at para. 43

No Opt-out

20. The Court has the power under s. 19(2) and (3) of the *Class Proceeding Act* to determine whether Class members may opt-out of a class proceeding.

21. Courts have not provided for a right of opt-out of a class proceeding where the right serves no purpose or would be inconsistent with the object of the settlement of the class proceeding.

- *Lockyer-Kash v. British Columbia (Workers' Compensation Board)*, 2013 BCSC 1443 at paras. 84 – 87; rev'd (on other grounds) 2015 BCCA 70

- *Labours Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2013 ONSC 1078, at paras. 36 – 42 and 72 – 80

22. It is appropriate for the Court to provide there should be no opt-out of a settlement of a class proceeding involving claims against a limited fund where the fund is insufficient to pay all claims against it and permitting opt-outs would frustrate the object of the settlement of claims against the limited fund.

- *Lepitre v. Welder*, 2013 ABQB 18

23. The Society has determined, in the exercise of its discretion under s. 20 of the *Notaries Act*, that distribution of the Special Fund in the manner provided by the Notaries Settlement is a fair and reasonable resolution of the claims against the Special Fund arising out of the "Mark Anthony Investment" scheme. An Order that investors that may not opt-out of the Notaries Settlements, and may not pursue claims against the Special Fund other than under the Notaries Settlement, is necessary in order to give effect to the Society's determination under s. 20 and promote the purpose of the Notaries Settlement.

Legal Fees

24. Legal fees charged to the Class must be fair and reasonable. The considerations in approving fees should recognize not only meritorious effort in achieving positive result but also encourage counsel to take on difficult and risky class action litigation.

- *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936 at para. 54

25. Class Counsel's proposed legal fee of 30% of the settlement fund is fair and reasonable, having regard to Class Counsel's retainer arrangements, the time incurred by Class Counsel in pursuing the action and the risks incurred in doing so.

- Mogerman Affidavit at paras. 35 to 40

26. Legal fees equal to 30% of a settlement fund have repeatedly been approved by this Court, and a legal fee of 30% of the settlement fund under the Notaries Settlement is consistent with the percentage legal fee previously approved by this Court in the settlements with the former Defendants in this action.

- *Pro-Sys Consultants Ltd. v. Infineon Technologies AG* at para. 56

- *Bodnar v. The Cash Store* at para. 38 – 41

PART 4: MATERIAL TO BE RELIED UPON

27. Affidavit #4 of Stephanie Chan, sworn on January 27, 2017

28. Affidavit #1 of Reidar Mogerman, sworn on April 5, 2017.

The applicants estimate that the application will take 1 day.

[x] The matter is not within the jurisdiction of a master.

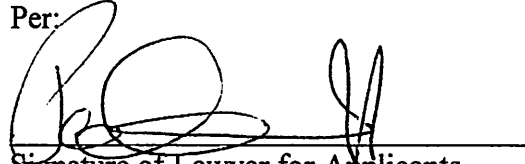
TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: 5/APR/2017

BENNETT MOUNTEER LLP

Per:

A handwritten signature in black ink, appearing to be 'P. Bennett', written over a horizontal line.

Signature of Lawyer for Applicants
Paul R. Bennett

THIS NOTICE OF APPLICATION was prepared by the law firm of Bennett Mounteer LLP, whose place of business and address for service is 14th Floor - Sun Tower Building, 128 West Pender Street, Vancouver, British Columbia, V6B 1R8. Telephone: (604) 639-3680. Fax: (604) 639-3681. Counsel Reference: Paul R. Bennett