

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

VALARD CONSTRUCTION LTD.

APPLICANT
(Appellant)

AND:

BIRD CONSTRUCTION COMPANY

RESPONDENT
(Respondent)

REPLY TO THE RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(VALARD CONSTRUCTION LTD., APPLICANT)
(Pursuant to Rule 28 of the *Rules of the Supreme Court Act*)

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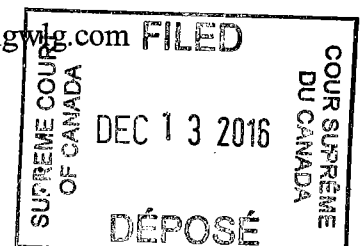
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REPLY OF APPLICANT

A. “Emerging Test” – the Unreasonable Disadvantage of the Beneficiary Not to be Informed

1. The Respondent, at paragraph 29 of the Response, states that according to Professor Waters’ text, “there is no general obligation to seek out and supply knowledge of the trust or its terms to beneficiaries”.¹

2. This is an inaccurate depiction of Professor Waters’ writing. Taken in its entirety, Professor Waters’ statement goes directly to the heart of the issue raised in this case:

The apparent silence of the courts hitherto on this matter has led to the widely held conclusion that, while trustees must always respond on request by a trust beneficiary, they have no obligation – at the expense of the trust fund – to seek out and supply knowledge of the trust and its terms to person who only in the future will or may be entitled to benefits from the trust. Today, however, courts throughout the Commonwealth appear to be moving away from the more technical positions, such as immediate vesting of property interests or whether the beneficiary as beneficiary has a proprietary interest in trust documents, to look at how reasonable it is that in the circumstances the particular beneficiary be granted the information that the beneficiary seeks. The test may be emerging of whether it could be said to be the unreasonable disadvantage of the beneficiary not to be informed. (emphasis added)²

3. This case presents the emerging test: does Bird as trustee have a duty to take reasonable steps to notify beneficiaries about the trust’s existence? Particularly in circumstances where, as here, the beneficiary’s ignorance of the trust will result in the expiry of the trust and loss of the trust property.

B. Speciation of Trusts

4. The Respondent affirms that, “the proposed appeal does not raise novel issues regarding the law of trusts”.³ However, this assertion is contradicted within the Response itself.

¹ Response to Application for Leave to Appeal, at para. 29.

² D. Waters, M. Gillen & L. Smith, *Waters’ Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Carswell, 2012) at 906 [Tab 2A]

³ Response to Application for Leave to Appeal, at para. 2.

5. According to the Respondent, the Bond created a “limited trust”⁴ that “has certain unique characteristics which distinguish it from a business or reliance based fiduciary trust”.⁵

6. The Respondent asserts a speciation of trusts – the formation of a new and distinct species in the course of evolution – previously unknown in trust law.

7. In contrast, our appeal from the majority decision of the Court of Appeal is that a trust is a trust. It carries the hallmarks of any trust with the constituent fiduciary relationship and derivative duties on the trustee. This was the result of the careful analysis by Justice Wakeling who found a trust – whether business or otherwise – gave rise to fiduciary obligations and in these circumstances those fiduciary obligations placed the trustee under a duty to take reasonable steps to provide notice of the existence of the trust.

8. In contrast, the majority of the Court of Appeal concluded there was no such duty to notify. They arrive at this conclusion by creating a previously unheard of species of trust – a limited trust where the trustee is under no fiduciary duty.

9. This raises a novel question that is important to the law. Is there such a thing as a trust where the trustee owes no fiduciary obligation to the beneficiary? If a trust is created for a “limited” purpose, does that mean it is a “limited trust” and therefore may be free of fiduciary obligations?

C. The Reliance Test

10. The Respondent, at paragraph 32 of the Response, refers to the decision of this Court in *Hodgkinson v. Simms*⁶, as having held that a trustee’s duties are determined on a meticulous examination of the facts. But it must be remembered that the analysis in *Hodgkinson v. Simms* was to determine whether a non-categorical relationship might have fiduciary obligations similar to that of a trustee.

⁴ Response to Application for Leave to Appeal, at para. 1.

⁵ Response to Application for Leave to Appeal, at para. 5.

⁶ *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 [LTA Tab 5H].

11. The Respondent then states that the relationship of trustee and beneficiary in this case was “characterized by self-interest rather than a fiduciary or reliance based trust relationship”.⁷

12. Can a trust be “characterized by self-interest”? Surely not. But that is what the majority of the Court of Appeal ruled.

13. In their effort to find the trustee was under no duty to try to notify, the majority of the Court of Appeal held that this trust allowed for the advantages afforded by a trust, but did not come with any of the responsibilities. In doing so, a new species of trust was created which was previously unknown to law.

14. This novel species of trust, the Court of Appeal ruled, created beneficiaries and used the trust to avoid the third party beneficiary rule, but did not prohibit the trustee from acting in “self-interest” because a fiduciary relationship was absent.

15. Yet the majority of the Court of Appeal do agree that if the trustee had been asked by a beneficiary whether a trust existed, then the trustee would have a duty to respond. But if no fiduciary relationship existed and the trustee was free to act in self-interest, what is the legal basis for imposing such a duty to respond?

D. The “True” Issue

16. The Respondent, at paragraph 27 of the Response, states that the true issue here is not whether business trust principles dealing with a trustee’s notification obligations apply to this trust.

17. But that is exactly the issue. This is a trust – the three certainties are present. Why would “business trust principles” not apply absent language in the trust instrument to that effect? And assuming they do apply, does that place the trustee under a duty to take reasonable steps to try to notify the beneficiary of the very existence of the trust?

18. The Respondent states that the reason business trust principles do not apply is because this trust is something different: this is a “narrow limited trust”.⁸ But what is a “narrow limited

⁷ Response to Application for Leave to Appeal, at para. 33.

trust”? What are the criteria to create such a trust? How does it differ from a “business trust” or “testamentary trust”?

19. This appeal raises an important issue with implications for all trusts: does a trustee have a duty to take reasonable steps to notify a beneficiary of the existence of the trust?

E. Legislative Intent and Contractual Incursions

20. The Respondent states, at paragraph 45 of the Response, that to abide by the reasoning of Justice Wakeling would “usurp” the “clear legislative intent” reflected in the *Builders’ Lien Act*⁹ and the *Public Works Act*¹⁰. This conclusion requires a finding that the legislature determined that trustees under labour and material payment bonds (which are usually the owner or the general contractor) should be free of any obligation to try to notify those below them of the existence of the Bond *except on Public Works projects*. This is a fallacy. The legislature’s decision to provide lien claimants with *rights* to information and to mandate posting of bonds on government projects in no way shows a “legislative intent” to free owners and general contractors from duties that arise from the law of trusts.

21. The Respondent also states that there would be “an unprecedented incursion into private contractual arrangements”. This, again, is a fallacy. The duty on the trustee may direct the behaviour of the trustee when the trustee negotiates a contract. In other words, the trustee may insist on certain terms in its contracts, but this in no way impacts the freedom of contract.

F. One Issue; Two Courts; Three Answers

22. Providing reasons for judgment is not terribly different from writing a math test. It’s not sufficient to simply state the conclusion; you have to show your work.

23. Justice Wakeling provides the framework for the imposition of a duty on the trustee. This is a trust; all trusts – commercial or otherwise – create a fiduciary relationship; in these circumstances the fiduciary obligation owed by the trustee to the beneficiary required some reasonable attempt to notify the beneficiary.

⁸ Response to Application for Leave to Appeal, at para. 28.

⁹ *Builders’ Lien Act*, RSA 2000, c B-7

¹⁰ *Public Works Act*, RSA 2000, c. P-46

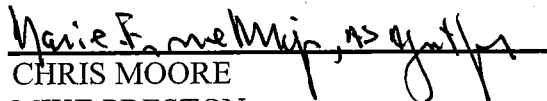
24. In contrast, the Majority of the Court of Appeal provides a different, novel approach. They agree a trust is created but assert that due to the absence of reliance, there was no fiduciary relationship between the trustee and the beneficiary. As a result, there was no duty on the trustee to notify but, curiously, there was a duty to inform once “specifically asked”¹¹ by the beneficiary about the existence of the trust.

25. In the course of wrestling with this question we have had two courts provide three different answers:

- a. Trial Judge – the trustee was in a fiduciary relationship, but that did not give rise to a duty to try to notify.
- b. Majority of Court of Appeal – the trustee was not in a fiduciary relationship, therefore there was no duty to try to notify.
- c. Dissent at Court of Appeal – the trustee was in a fiduciary relationship, and that fiduciary obligation required the trustee to take reasonable steps to try to notify.

26. This important issue calls for clarification by this Court. Does such a duty exist?

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13 day of December, 2016.


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¹¹ Reasons of Court of Appeal, para. 30.

TABLE OF AUTHORITIES

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STATUTORY PROVISIONS

Builders' Lien Act, RSA 2000, c B-7

Public Works Act, RSA 2000, c. P-46

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Fourth Edition

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As a fee simple owner of a house, I have a duty to pay property taxes. As the donee of a power of appointment exercisable among my children, I can appoint or not appoint, as I choose. That is to say, not only can I choose which among my children is to have benefit from the property, and how much each appointee is to have, I can also give the matter no thought and appoint to no one. The position of a trustee or other fiduciary is different. The whole purpose of the office of trustee is the administration of property on behalf of others, and therefore the office holder must be compellable to perform his task. In other words, the essence of the trustee's position is obligation, an obligation owed to the trust beneficiaries. It is this situation which focuses attention upon the relationship between a trustee's powers and his duties. For example, if the settlor gives a power of appointment to the trustee, does the trustee have exactly the same freedom as the donee of a power who is not a trustee? Is the trustee permitted to give no thought to the matter?

The obligation which lies at the base of trusteeship has resulted in there being three fundamental duties applicable to all trustees. First, no trustee may delegate his office to others; second, no trustee may profit personally from his dealings with the trust property, with the beneficiaries, or as a trustee; third, a trustee must act honestly and with that level of skill and prudence which would be expected of the reasonable man of business administering his own affairs. These might be called the "substratum" duties, to which the duties associated with the particular trust are added. For example, in a trust for sale the trustee has the duties of assembling all the assets making up the trust property, of selling those assets, and of holding the proceeds of sale upon the trust terms. If those terms provide for a retention of the capital over a period of time, the trustee will also have the duty of investment of the proceeds of sale.

II. ADMINISTRATIVE POWERS AND DUTIES

The powers of the trustee will also be governed by the particular nature of the trust. For example, if the trust fund consists in part of land and the trust property is to be administered as an investment, the trustee will no doubt be given a power of sale, a power of mortgaging, and a power of leasing. Each of these activities is associated with active estate management, as are powers of insuring, of repairing at the estate's expense, and of discharging all taxes upon the property. As between successively entitled trust beneficiaries, the trustee may well have to determine whose interests are ultimately to share the burden of these outgoings, and in what proportion, but the trustee must have the immediate power to keep the property intact and to meet all financial claims of third parties against the trust.

Each of these powers of administration, for such they are, is an authority to a trustee to act, if need arises, in the manner set out by the power. However, in exercising each power the trustee is subject to the "substratum" duties. For example, if a power of sale needs to be exercised he cannot get another to carry out the sale and subsequently wash his hands of any responsibility on the grounds that he had nothing to do with the choice of purchaser or the actual sale. Neither can a trustee sell the property in question to himself, or to a beneficiary or stranger with the