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

BETWEEN:

VALARD CONSTRUCTION LTD.

APPELLANT
(Appellant)

AND:

BIRD CONSTRUCTION COMPANY

RESPONDENT
(Respondent)

FACTUM OF VALARD CONSTRUCTION LTD., APPELLANT

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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Table of Contents

PART I – OVERVIEW AND FACTS

OVERVIEW

1. Does a trustee under a labour and material payment bond have a duty to take reasonable steps to notify trust beneficiaries of the existence of the bond?

2. In this case, the Respondent, Bird Construction Company, required its subcontractor, Langford Electric Ltd., to purchase a labour and material payment bond (the "L&M Bond").

3. The L&M Bond created an express trust in which Bird was the trustee. The beneficiaries were the sub-subcontractors and material suppliers to Langford. The purpose of the bond was to secure those beneficiaries against non-payment by Langford.

4. Bird received the L&M Bond – then filed it away. Bird did nothing to inform beneficiaries about the existence of the L&M Bond.

5. As a sub-subcontractor to Langford, the Appellant, Valard Construction Ltd., was a beneficiary, but did not know there was an L&M Bond.

6. Valard completed $660,000.17 of work for Langford on the project, but did not get paid. Nine months after its work was completed, Valard obtained judgment in that amount against Langford, but Langford was insolvent.

7. By chance, after obtaining judgment, Valard learned of the existence of the L&M Bond. Valard immediately made a claim for payment under the L&M Bond, but was too late – the 120-day notice period under the L&M Bond had already expired.

8. These facts show that if the trustee does nothing to notify beneficiaries about the existence of the trust, then the beneficiaries remain ignorant and the trust property is lost.

9. In contrast, if the trustee has a duty to take reasonable steps to notify beneficiaries of the existence of the trust, then the beneficiaries are more likely to learn about the trust and fulfill its purpose. In these circumstances, the duty is consistent with fundamental trust principles and the overriding obligation of a trustee to take reasonable steps to advance the interests of the trust and the beneficiaries.

10. The majority of the Court of Appeal below held that Bird, although trustee under the L&M Bond, was not a fiduciary and had no duty to take any steps to inform beneficiaries of the existence of the L&M Bond.

11. In dissent, Justice Wakeling held all trustees owe to beneficiaries certain fundamental trust duties and fiduciary obligations. One of those duties, in circumstances such as this trust, is to take reasonable steps to provide notice to the beneficiaries of the existence of the L&M Bond.

12. Justice Wakeling's decision is consistent with fundamental trust principles. The decision of the majority is not.

13. For the reasons set out below, Justice Wakeling is right.

FACTS

A. The Project

14. This case arises out of a 2009 construction project known as the Suncor Energy MEM 2 Bay Shop Expansion Project in Fort McMurray, Alberta (the "Project"). The owner was Suncor, Bird was the general contractor and Langford was a subcontractor.

15. On March 2, 2009 Valard entered into a sub-subcontract with Langford to supply labour and materials for the Project.[1]

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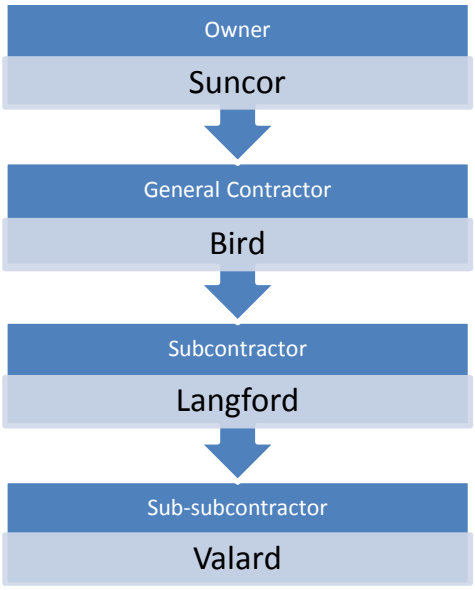
[1] Reasons for Judgment of the Alberta Court of Queen's Bench, dated February 27, 2015, 2015 ABQB 141 ("ABQB Reasons") at para. 10, [Appellant's Record ("AR") p. 4]; Trial Exhibit #1 – Purchase Order [AR p. 227].

16. The contractual chain on the Project was as follows:



17. Valard commenced its work on the Project on March 17, 2009.

18. Valard's last day of work on the site was May 20, 2009.[2]

B. Valard is Left Unpaid

19. Valard performed $660,000.17 worth of work on the Project. Valard submitted at total of 11 invoices for that work, but was not paid.[3]

20. On August 10, 2009, Langford sent an email to Bird (copying Valard) with respect to amounts Valard said it was owed for work performed on site.[4]

21. Bird sent a response, but first it removed Valard from the email chain. In its response Bird told Langford that, in effect, no more money would be forthcoming to pay Valard.[5]

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2 ABQB Reasons at para. 10 [AR p. 4].
3 Trial Exhibit #1, Tab 11 – Valard Invoices [AR pp. 228-39].
4 Trial Exhibit #1, Tab 12 – August 10, 2009 emails [AR pp. 240-41]; Trial transcript, p. 133, lines 3-18 [AR p. 178].
5 Trial Exhibit #1, Tab 12 – August 10, 2009 emails [AR pp. 240-41]; Trial transcript, p. 133, lines 3-18 [AR p. 178].

22. Nevertheless, Langford "kept reassuring" Valard that Langford would get it worked out.[6] Valard remained ignorant of Bird's refusal to pay any more to Langford on account of Valard's work.

C. Valard Elects to Not Escalate the Dispute

23. Companies active in the oil sands have close working relationships.[7] Valard's project manager, Cameron Wemyss, chose not to "escalate the dispute to Bird or Suncor" because he did not want to "rock the boat".[8]

24. Valard was getting a lot of work from Suncor on other projects and Mr. Wemyss believed "you really don't want to be liening the hand that feeds you".[9] For this reason, Valard did not lien the Project as a means of securing payment for its work.

D. Valard Sues Langford

25. Instead, on February 11, 2010, Valard commenced an action against Langford for payment.[10] By this time Langford was insolvent and their phones had been disconnected.[11] Valard had still not been paid by Langford.

26. On March 9, 2010, Valard obtained default judgment against Langford for $660,000.17 plus interest.[12]

E. By Chance Valard Learns about the L&M Bond

27. What Valard did not know was that in the fall of 2008, Bird had required Langford to provide an L&M Bond. The L&M Bond was intended to protect Langford sub-trades against non-payment by Langford.[13]

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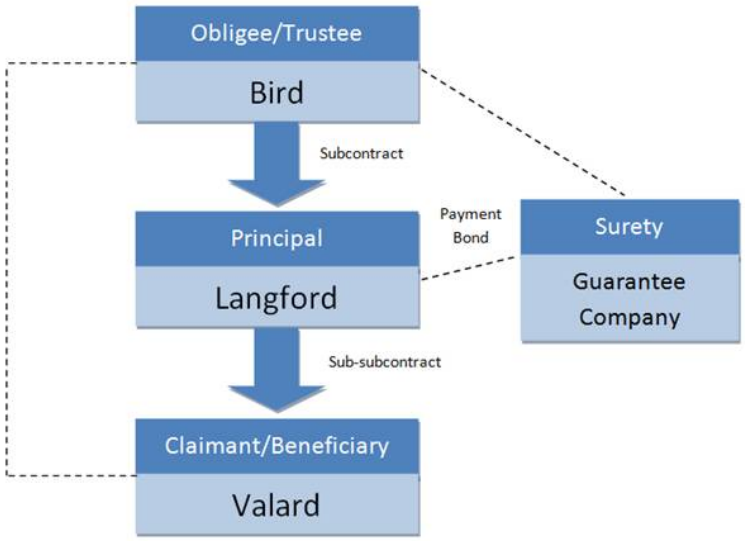
6 Trial transcript, p. 55, lines 4-6 [AR p. 100].
7 ABQB Reasons at para. 24 [AR p. 5].
8 ABQB Reasons at para. 24 [AR p. 5]; Trial transcript, p. 55, lines 8-17 [AR p. 100].
9 ABQB Reasons at para. 24 [AR p. 5]; Trial transcript, p. 56, lines 20-30 [AR p. 101].
10 ABQB Reasons at para. 11 [AR p. 4].
11 Trial transcript, p. 57, lines 19-29 [AR p. 102].
12 ABQB Reasons at para. 11 [AR p. 4]; Trial Exhibit #1, Tab 21 – Default Judgment [AR pp. 244-50].

28. L&M Bonds were unusual on private oil sands projects. Valard's project manager, Mr. Wemyss, had neither been asked to provide nor heard of anyone else using an L&M Bond in his approximately 10 years of working in the oil sands as both a general contractor and a subcontractor.[14]

29. Consistent with Mr. Wemyss' experience, the owner, Suncor, had not requested that Bird provide an L&M Bond.[15] However, Bird had its own internal policy to require all of its subcontractors with a contract amount over $100,000 to provide an L&M Bond.

30. Following its internal policy, Bird had required Langford to obtain an L&M Bond on the Project.[16] The L&M Bond was issued by the Guarantee Company of North America ("GCNA") in November 2008 with a penal sum of $659,671.[17]



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[13] ABQB Reasons at para. 8 [AR p. 2]; Trial Exhibit #1, Tab 26 – Copy of L&M Bond [AR pp. 255-56].

[14] Trial transcript, p. 40, lines 4-28 [AR p. 85]; Trial transcript, p. 55, lines 23-31 [AR p. 100]; Trial transcript, pp. 67-68, lines 11-3 [AR pp. 112-13].

[15] Trial transcript, p. 106, lines 36-37 [AR p. 150].

[16] Trial transcript, p. 115, lines 2-3 [AR p. 160]; Trial transcript, p. 127, lines 35-36 [AR p. 172].

[17] Trial Exhibit #1, Tab 26 – Copy of L&M Bond [AR pp. 255-56].

31. On the weekend of April 17, 2010, Mr. Wemyss was speaking to a friend about his predicament with Langford. The friend told Mr. Wemyss that Bird had required L&M Bonds on other projects and may have required one of Langford on the Project.[18]

32. Mr. Wemyss emailed Bird asking whether there was an L&M Bond provided by Langford on the Project. Bird immediately responded in the affirmative and provided contact information for GCNA.[19]

33. Mr. Wemyss was shocked when he learned this:

> A Because I never thought there would be one out there. Like, they – it's just not – it's, like – I mean, I was – when I found out, I was totally shocked there was a labour and material bond.
>
> I just – like, I've never – you know, ten – ten years of my experience I've been on some larger project, I've been on smaller projects, and everywhere else. I've just never seen a labour and material bond issued on a plant site. I've seen them on municipality works, but not – not on a plant site.[20]

34. In the past Mr. Wemyss had made a claim on one L&M Bond. He was on a job for a pipeline company. The pipeline company went bankrupt. The owner of the project was a municipality. The municipality called him to tell him that they had an L&M Bond and gave him the name of the bonding company. The municipality said he should go to the bonding company to get paid because the municipality had already forwarded all the contract money to the pipeline company. Mr. Wemyss promptly submitted a claim to the bonding company and got paid by the bonding company.[21]

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[18] Trial transcript, pp. 57-58, lines 31-19 [AR pp. 102-03].
[19] Trial Exhibit #1, Tab 22 – April 19, 2010 email [AR p. 251].
[20] Trial transcript, p. 55, lines 23-31 [AR p. 100].
[21] Trial transcript, pp. 40-41, lines 30-17 [AR pp. 85-86].

F. Valard's Claim on the L&M Bond is Too Late

35. On April 19, 2010, the day he found out about the L&M Bond, Mr. Wemyss wrote to GCNA to make a claim.[22] Since Valard's last day of work on the site was May 20, 2009, the deadline for the 120-day written Notice Period under the L&M Bond was September 17, 2009.

36. On June 14, 2010, GCNA denied Valard's claim, citing Valard's failure to provide notice of its claim under the L&M Bond within 120 days.[23]

G. The L&M Bond Created a Trust

37. The L&M Bond created an express trust, which is established in paragraph 2 of the bond form:

> The Principal and the Surety, hereby jointly and severally agree with the Obligee, as Trustee, that every Claimant who has not been paid as provided for under the terms of its contract with the Principal, before the expiration of a period of ninety (90) days after the date on which the last of such Claimant's work or labour was done or performed or materials were furnished by such Claimant, may as a beneficiary of the trust herein provided for, sue on this Bond, prosecute the suit to final judgment for such sum or sums as may be justly due to such Claimant under the terms of its contract with the Principal and have execution thereon. [emphasis added][24]

38. As Obligee, Bird is the Trustee.

H. Bird Did Nothing as Trustee

39. Bird did nothing to notify Valard or any of the other beneficiaries of the existence of the L&M Bond.[25]

40. Bird received the L&M Bond and filed it away. As stated by Bird's project manager, "It just gets filed and put on -- put into our records".[26]

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[22] Trial transcript, pp. 57-58, lines 31-16 [AR pp. 102-03]; Trial transcript, pp. 58-59, lines 30-8 [AR pp. 103-04]; Trial Exhibit #1, Tab 23 – Valard Letter to GCNA [AR p. 252].
[23] Trial Exhibit #1, Tab 26 – Refusal Letter from GCNA [AR pp. 253-56].
[24] Trial Exhibit #1, Tab 26 – Copy of L&M Bond [AR pp. 255-56].
[25] Trial transcript, p. 113, lines 5-10 [AR p. 158].

41. Bird was aware of exactly who was onsite on a daily basis.[27] Bird was aware that Valard was a sub-subcontractor to Langford when Valard came onsite in March 2009.[28]

42. Bird had a site trailer office. Bird held daily "toolbox" meetings in the site trailer office.[29] It was mandatory for a representative of every subcontractor and sub-subcontractor onsite to attend those daily meetings.[30]

43. When Valard's project manager, Mr. Wemyss, attended those meetings, he would look at the notice board and the information posted on the walls of the trailer. He saw information such as schedules, safety information, wildlife management information, mandatory permits, and WCB notices posted in the site trailer.[31] Had the L&M Bond been posted, he would have seen it.[32]

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[26] Trial transcript, p. 129, lines 28-29 [AR p. 174]; Trial transcript, p. 128, lines 8-10 [AR p. 173].
[27] Trial transcript, p. 107, lines 12-13 [AR p. 151].
[28] Trial transcript, pp. 96-97, lines 34-9 [AR pp. 140-41].
[29] Trial transcript, p. 97, lines 31-33 [AR p. 141].
[30] Trial transcript, p. 107, lines 6-13 [AR p. 151].
[31] Trial transcript, p. 49, lines 3-33 [AR p. 94]; Trial transcript, p. 66, lines 12-31 [AR p. 111]; Trial transcript, p. 98, lines 17-27 [AR p. 142].
[32] Trial transcript, p. 66, lines 12-31 [AR p.111].

I. Summary of Key Events

November 25, 2008	L&M Bond created with Bird as trustee
March 2, 2009	Execution of sub-subcontract between Valard and Langford
March 17, 2009	Valard begins work on the Project
May 20, 2009	Valard's last day of work on site
August 10, 2009	By email, Bird made aware of dispute between Valard and Langford over payment for work performed by Valard
September 17, 2009	Expiry of 120-day written notice period
February 11, 2010	Valard files Statement of Claim against Langford
March 9, 2010	Valard obtains default judgment against Langford in amount of $660,000.17
April 17, 2010	A friend tells Cameron Wemyss of Valard that Bird had required L&M Bonds on other projects
April 19, 2010	Valard asks Bird whether there was an L&M Bond on the Project
April 19, 2010	Bird tells Valard about the L&M Bond
April 19, 2010	Valard submits a claim to GCNA
June 14, 2010	GCNA denies Valard's claim because outside of notice period

J. These Legal Proceedings

44. On June 30, 2010, Valard commenced an action against GCNA. In its Statement of Defence, GCNA pled that Valard had missed the deadline for providing written notice of its claim and as a result GCNA had suffered actual prejudice.

45. On December 15, 2010, Valard added Bird as a Defendant claiming damages for breach of its duty as trustee to notify it of the L&M Bond.

46. On October 31, 2013, Valard discontinued its claim against GCNA after GCNA provided evidence of prejudice suffered.

K. Judicial History

47. The trial judge dismissed Valard's action against Bird for breach of trust.

48. The trial judge held that Bird, as trustee under the L&M Bond, did not have any obligation to protect the interests of Valard, a beneficiary, by providing notice to Valard of the existence of the L&M Bond. Rather, the trial judge concluded, it was Valard's duty to inquire.[33]

49. On appeal, the majority of the Alberta Court of Appeal held Bird did not owe a fiduciary duty to Valard and did not have a duty to take steps to notify Valard of the existence of the trust.[34]

50. Justice Wakeling dissented. He concluded the L&M Bond created a trust and that trustees have fiduciary duties to the beneficiaries; that no principled basis exists to hold a trustee under an L&M Bond to a lower standard than applies to any other trustee; and where the beneficiaries, like Valard, would have derived a benefit from knowing that a trust exists, a trustee must undertake reasonable steps to notify a sufficiently large segment of the beneficiaries about the trust's existence.

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[33] ABQB Reasons at para. 85 [AR p. 12].

[34] Reasons for Judgment of the Alberta Court of Appeal, dated August 29, 2016, 2016 ABCA 249 [ABCA Reasons] at paras. 27, 30 [AR pp. 21-22].

51. Given Bird took no steps whatsoever to notify Valard of the existence of the L&M Bond when Valard would have benefited from such knowledge,[35] Justice Wakeling "would have allowed the appeal, set aside the trial judgment and awarded Valard $659,671, the amount of the labour and material payment bond, plus interest".[36]

PART II – STATEMENT OF ISSUES

Issue 1 **Did Bird, as trustee, have a duty to take reasonable steps to notify Valard, a beneficiary, of the existence of the L&M Bond?**

Issue 2 **Did Bird breach its duty?**

PART III – STATEMENT OF ARGUMENT

Issue 1 **Did Bird, as trustee, have a duty to take reasonable steps to notify Valard, a beneficiary, of the existence of the L&M Bond?**

52. The practical reality is that if the trustee files the L&M Bond away and chooses not to tell the beneficiaries of its existence, the trust property stands to be lost and the trustee is left unaccountable:

> The trustees are accountable to the beneficiaries, and this accountability would be meaningless if trustees could choose not to tell the beneficiaries of their beneficial status and their interests.[37]

53. On the facts of this case, the consequence of non-disclosure of the trust's existence is severe – the trust property is lost and the very purpose of the trust is frustrated.

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[35] ABCA Reasons, dissent, at para. 60 [AR p. 26].
[36] ABCA Reasons, dissent, at para. 218 [AR p. 65].
[37] Donovan W. M. Waters, Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 1126 [Appellant's Book of Authorities ("ABA") Tab 15].

A. The L&M Bond Scheme

54. In consideration of a premium, the surety issuing the L&M Bond guaranteed the payment obligations of Langford to its sub-subcontractors and material suppliers. The purpose was to protect Langford's sub-subcontractors and material suppliers against Langford's inability to pay.

55. The general contractor and owner are interested in the subtrades being paid because if there is a payment default, the L&M Bond keeps the subtrades working rather than walking-off the site or liening the project. This was Bird's view of the L&M Bond: it was "[m]ostly for our -- for our own protection. Yeah".[38]

56. The express trust created by an L&M Bond was meant to ensure tradesmen could enforce their rights absent privity of contract.[39] The trust property that the tradesmen are entitled to as beneficiaries is the *chose in action* against the surety.

57. This has evolved into a standardized L&M Bond form as used in the present case: Standard Construction Document CCDC 222-2002 which is used in the construction industry across Canada.

B. The L&M Bond Created an Express Trust

58. Under the standardized CCDC L&M Bond, the party requesting the bond is the named Obligee and acts as the Trustee.

59. The express trust is established in paragraph 2 of the L&M Bond:

> The Principal and the Surety, hereby jointly and severally agree with the Obligee, as Trustee, that every Claimant who has not been paid as provided for under the terms of its contract with the Principal, before the expiration of a period of ninety (90) days after the date on which the last of such Claimant's work or labour was done or performed or materials were furnished by such Claimant, may as a beneficiary of the trust herein provided for, sue on this Bond, prosecute the suit to final judgment for such sum or sums as may be

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[38] Trial transcript, p. 127, lines 38-39 [AR p. 172].
[39] See *Tobin Tractor (1957) Ltd. v. Western Surety Co.*, 1963 CanLII 354 (Sask. Q.B.).

> justly due to such Claimant under the terms of its contract with the Principal and have execution thereon. [emphasis added][40]

60. The 'three certainties' required to create an express trust are present: [41]

- the language of the L&M Bond evidences a clear intention to create a trust;
- the trust property is the chose in action against the surety for any unpaid amounts up to the penal sum of $659,671; and
- the class of beneficiaries are the sub-subcontractors and material suppliers to Langford.

61. The trust was perfected when the L&M Bond was executed and delivered to Bird.

i. Bird is the Trustee

62. The L&M Bond states Bird is the Obligee and acts as Trustee. Bird conceded at trial it was the Trustee.[42]

63. Bird was bound by the legal and equitable obligations placed upon it as trustee.

ii. Valard is a Beneficiary

64. The class of beneficiaries was the sub-subcontractors and material suppliers to Langford. They were 'contingent beneficiaries' whose interests vested if they went unpaid for 90 days or more.

65. Valard was a beneficiary who's interest vested after 90 days of not being paid by Langford.[43]

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[40] Trial Exhibit #1, Tab 26 – Copy of L&M Bond [AR pp. 255-56].
[41] *Waters' Law of Trusts in Canada* at 140 [ABA Tab 15].
[42] Trial Exhibit #1, Tab 26 – Copy of L&M Bond [AR pp. 255-56]; Trial transcript, pp. 169-70, lines 36-7 [AR pp. 215-16]; ABQB Reasons at para. 5 [AR p. 2]; ABCA Reasons, dissent, at para. 96 [AR p. 34].
[43] Trial Exhibit #1, Tab 26 – Copy of L&M Bond [AR pp. 255-56].

iii. This Court's Decision in *Johns-Manville*

66. In *Citadel General Assurance Company v. Johns-Manville Canada Inc.*, this Court assessed an L&M Bond with the same language. This Court adopted the finding of the trial judge that the L&M Bond created a trust:

> the bond created a trust relationship between the obligee and the claimants and conferred on the claimants a right to sue directly.[44]

67. *Johns-Manville* decided that the claimant had a right to sue directly and that so long as imperfect compliance with notice provisions did not prejudice the compensated surety, then the surety remained liable to the claimant.[45] The case did not raise, and this Court did not address, any questions about the obligations of the trustee.

C. The Purpose of the L&M Bond Requires the Trustee to Provide Notice to Beneficiaries

68. The overriding obligation of a trustee is to take the steps necessary to advance the interests of the trust and the beneficiaries.[46] The trustee must act with the skill and prudence that would be expected of the reasonable man of business administering his own affairs.[47]

69. In this case, the entire benefit of the L&M Bond stood to be lost if the beneficiary did not provide notice within the 120-day notice period. In light of this, it is reasonable to require Bird, as trustee, to take steps to inform beneficiaries of the existence of the L&M Bond in a timely manner.

70. Such a duty is necessary because the fundamental core of a trust, indispensable to its existence, is the right of a beneficiary to enforce it.[48]

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[44] *Citadel General Assurance Company v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513 at 518.
[45] *Johns-Manville* at 524.
[46] *Breakspear v. Ackland*, [2008] E.W.H.C. 220 (High Crt. Ch. Div.) at para. 62.
[47] *Waters' Law of Trusts in Canada* at 906 [ABA Tab 15].
[48] See David Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 L.Q.R. 94 at 104-05 [ABA Tab 9]; see also *Armitage v. Nurse*, [1998] Ch. 241 (C.A. 1997).

71. For the beneficiaries to exercise their right of enforcement, they first have to know there is a trust to enforce. As stated by Sir Gavin Lightman is his lecture, "The Trustee's Duty to Provide Information to Beneficiaries":

> it must be plain that the right of enforcement is only rendered effective and meaningful if the beneficiaries first of all know that they are beneficiaries and secondly possess or have access to the required information to render the trustees accountable for their actions. A trust must be both visible to beneficiaries and enforceable by them.[49]

i. Academic Commentary on Trusts is Uniformly Against the Majority and Supports Justice Wakeling

72. Prof. David Hayton writes:

> Unaccountability to the beneficiaries arising from the trustees not letting them know that they are beneficiaries is inconsistent with, and repugnant to, the purposes for which the settlor transferred the trust property to the trustees or the fundamental requirement of accountability to beneficiaries before there can be duties of trusteeship.[50]

73. Prof. David Steele writes:

> The protections that equity affords the beneficiary of a trust are only meaningful if the beneficiary is advised of his or her interest and provided with information regarding the assets of the trust and the activities of the trustees.[51]

74. Prof. Steele notes that, in Canada, the extent of a trustee's duty to volunteer information is not as clear as one might wish; he offers the following principled proposition:

> a trustee is under a duty to volunteer to an adult beneficiary information as to the existence of and details regarding the beneficiary's interest under the trust.[52]

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[49] Sir Gavin Lightman, "The Trustee's Duty to Provide Information to Beneficiaries" [2004] P.C.B. 23 at 25 [p. 2 of Westlaw copy, ABA Tab 11].

[50] David Hayton, "The Irreducible Core Content of Trusteeship" in A.J. Oakley, ed., *Trends in Contemporary Trust Law* (New York: Oxford University Press, 1996) at 5 [ABA Tab 8].

[51] David A. Steele, "The Beneficiary's Right to Know" (Paper delivered at the Law Society of Upper Canada CLE Program, Fourth Annual Estates and Trusts Forum, November 2001) [unpublished] at 1 [ABA Tab 12].

[52] Steele at 10 [ABA Tab 12].

75. In the United States, author George T. Bogert states:

> [If] reasonable regard for the interests of the beneficiaries requires it, the trustee is under a duty to volunteer information to the beneficiary and not merely wait until the beneficiary asks for it.[53]

76. In the *Review of the Law of Trusts: A Trusts Act for New Zealand*, the Law Commission recommends that:

> Trustees have a mandatory obligation to provide sufficient information to sufficient beneficiaries to enable the trust to be enforced.[54]
>
> …
>
> To be able to hold a trustee to account, beneficiaries need to know that they are beneficiaries of the trust and need to be able to be provided with trust information on request.[55]

77. In the United Kingdom, in his 2004 Withers Trust Lecture at King's College, Sir Gavin notes:

> Authority establishes the proposition that in the ordinary course a trustee has no duty to volunteer information: his duty is limited to providing information duly requested by a qualified applicant for it. But there is both a legal and practical reason for an exception in case of disclosure of a beneficiary's entitlement. The legal reason is that a beneficiary's right to monitor the stewardship of the trustees is nugatory unless the beneficiary knows that he or she has an interest under an *inter vivos* settlement or Will. Further only if the beneficiary is so informed can any obligation of executors and trustees to provide trust information on request have any substance. As a practical matter beneficiaries may need to know their entitlement to provide information required on applications, *e.g.* for scholarships and grants and social security benefits, for tax returns, matrimonial and child care proceedings, to make informed decisions relating to finance, and to decide whether, *e.g.* to sever a joint tenancy or vary a trust.[56]

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[53] George T. Bogert. *Trusts*, 6th ed. (St. Paul: West Publishing Co., 1987) at 495 [ABA Tab 5].
[54] New Zealand Law Commission. *Review of the Law of Trusts: a Trusts Act for New Zealand* (2013) Law Commission report no. 130 at p. 103.
[55] NZ Law Commission *Review of the Law of Trusts* at p. 104.
[56] Sir Gavin Lightman at 34 [p. 8 in Westlaw copy, ABA Tab 11].

78. In Sir Gavin's opinion, a trust instrument that is a private document might be unknown to the beneficiaries who can enforce it and hold the trustees to account:

> There is in the circumstances the overriding need to impose on trustees the obligation to disclosure the existence of the trust and its provisions to those entitled to enforce it.[57]

79. In *Lewin on Trusts*, the authors note that in trust law beneficiaries have two rights of disclosure from trustees. One is the right of a beneficiary to be given, without demand, information about the existence of a trust and his interest under it.[58] The second is the beneficiaries' right to demand access to trust documents.

80. In the regard to the first right, the authors state:

> We consider that trustees have a duty to take reasonable steps to inform an adult beneficiary with a future vested, vested defeasible or contingent interest under the settlement of its existence and the general nature of his interest under it, as soon as reasonably practicable after the interest comes into existence, unless the trustees reasonably believe that by reason of the remoteness of the interest the beneficiary has no reasonable prospect of successfully asserting right to information on demand…[59]

81. In *Underhill and Hayton Law of Trusts and Trustees*, the authors state:

> Whether beneficiaries' interests are under fixed or discretionary trusts, whether in income or capital, and whether vested or contingent, trustees are necessarily under a duty to take reasonable practical steps to inform beneficiaries of full age and capacity of their beneficial interests.[60]

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[57] Sir Gavin Lightman at 36 [p. 9 in Westlaw copy, ABA Tab 11].

[58] L. Tucker, N. Le Poidevin & J. Brightwell, eds. *Lewin on Trusts*, 19th ed. (London: Sweet & Maxell, 2015) at p. 907, para. 23-001 [ABA Tab 14].

[59] *Lewin on Trusts* at p. 910, para. 23-008 [ABA Tab 14].

[60] Hayton, David, Paul Matthews & Charles Mitchell, eds. *Underhill and Hayton Law of Trusts and Trustees*, 17th ed. (London: Butterworths, 2007) at p. 822, para. 60.10 [ABA Tab 10].

82. Halsbury's Laws of England states: "A trustee has a duty to inform a beneficiary of full capacity of his interest under the trust, but is under no duty to provide him with legal advice as to his rights".[61]

83. Professor Geraint Thomas writes in "Thomas on Powers" that:

> Trustees are obliged to inform adult beneficiaries of the existence and terms of a trust (which will indicate the interests and rights of the beneficiaries created by the trust instrument), whether or not those beneficiaries have requested the information.[62]

ii. Judicial Authority on Trust Law is Uniformly Against the Majority and Supports Justice Wakeling

84. In *Short Estate, Re*, the trustee of an estate did nothing to inform a beneficiary of his interest. It was only by luck that the beneficiary learned of the trust, but by then the estate was significantly depleted. The British Columbia Supreme Court held the trustee committed a breach by not attempting to seek out the beneficiary. The Court noted:

> After all, a trustee does owe duties to a *cestui que trust* and one of the first of them is to let the *cestui que trust* know of his interest and something about the trust.[63]

85. In *Hawkesley v. May*,[64] Justice Havers for the English Court of Queen's Bench states that adult beneficiaries need to be informed of the existence of the trust and their interest in the trust:

> I hold, therefore, that there was a duty upon the defendants Tidy and Collins, as trustees of the Musgrave settlement, to inform the plaintiff on attaining 21 that he had an interest in the capital and income of the trust funds.[65]

86. The *ratio* of *Hawkesley v. May* is that infants do not have to be informed about the existence of the trust, but adults do. In other words, the general duty to inform beneficiaries of

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[61] *Halsbury's Laws of England*, 5th ed., vol. 98 (London: Butterworths, 2013) at p. 315, s. 402 [ABA Tab 7].
[62] Geraint Thomas, *Thomas on Powers*, 2nd ed. (Oxford: Oxford University Press, 2012) [ABA Tab 13].
[63] *Short Estate, Re*, [1941] 1 W.W.R. 593 at para. 5 [ABA Tab 4].
[64] *Hawkesley v. May*, [1956] 1 Q.B. 304 [ABA Tab 3].
[65] *Hawkesley v. May* at 322 [ABA Tab 3].

the trust is suspended for infants. However, when those infants become adults and are *sui juris*, the suspension is lifted and the duty to notify is engaged.

87. *Brittlebank v. Goodwin*[66] was similar to *Hawkesley v. May*. When the infant beneficiary came of age, the trustee failed to inform them of the trust of which they were beneficiaries. The Court held that the trustee was in breach of her duty to inform the beneficiaries, upon becoming adults, of the state of the trust and their rights to the trust property.[67]

88. These authorities were recently applied by the English Court of Queen's Bench where a plaintiff pensioner alleged maladministration by the pension trustees. The Court stated:

> It is certainly the case that there is an obligation to give information to a beneficiary of the existence of the trust and, by showing him documents, to give information.[68]

89. In the United States, the Texas Court of Civil Appeals held that where the infant beneficiaries had an adult guardian, then the trustee was under an immediate duty to notify that guardian: "it was the duty of the trustee to notify the guardian of the beneficiaries of the existence of the [trust] fund".[69]

90. In the Australian High Court case of *Hawkins v. Clayton*,[70] a law firm was custodian of a will, yet did nothing to try to locate and inform the executor when the testatrix died. The evidence confirmed it would only have taken a few phone calls to locate and inform the executor, yet the law firm took no such positive steps. The law firm did not contact the executor until 6 years passed. The executor sued because over those 6 years, the estate had sustained losses which could have been prevented had the executor been aware of his appointment as executor and residuary beneficiary.

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66 *Brittlebank v. Goodwin* (1868), L.R. 5 Eq. 545 [ABA Tab 1].
67 *Brittlebank v. Goodwin* at 550 [ABA Tab 1].
68 *Hamar and another v Pensions Ombudsman and another*, (October 18, 1995) (Q.B. (E.)) [unreported] at p. 9 [ABA Tab 2].
69 *Moore v. Saunders*, 106 S.W. 2d 337 (Tex. Ct. Civ. Appl. 1937) at 339.
70 *Hawkins v. Clayton*, [1988] H.C.A. 15.

91. The High Court noted the issue was somewhat novel: "Analogous duties are not numerous, for the occasions are few when a person with an interest in property needs to be told of it in order to be able to enjoy it".[71]

92. Justice Brennan opined that in these circumstances there may be a "duty of disclosure":

> It may be that there is a broad principle, founded on general standards of honesty and fair dealing, that some duty of disclosure is imposed on one who holds the property of another or an instrument of title to the property of another as a bare custodian or trustee when the other does not know of his entitlement to the property and the holder has reason to believe that the other does not know of his entitlement.[72]

93. Justice Brennan goes on to state the duty of disclosure would require the trustee to take reasonable steps to try to notify the beneficiary.[73]

94. The principle extracted from these cases is so basic that it is often assumed to be a given. The law establishing the duties of trustees is meaningless if the beneficiary never learns of the existence of the trust; therefore, there must be a duty to take reasonable steps to inform beneficiaries.

D. Canadian L&M Bond Case Law Relied on by the Majority is Not Sound

95. The majority of the Court of Appeal relies upon the 1970 Ontario County Court case of *Dominion Bridge Co. v. Marla Construction*[74] for its proposition that the trustee, Bird, had no duty to notify trust beneficiaries of the existence of the L&M Bond.

96. Dominion was suing in contract for $2,005.36 in damages for unpaid extra work. The trial judge gave unreserved oral reasons for judgment. Those reasons for judgment reflect a mistaken understanding that the trust instrument is the sole source of obligations imposed on the trustee:

> The language of the bond, ex. 4, prepared by Continental is not adequately designed to impose an obligation on Sun Oil to protect a claimant.[75]

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[71] *Hawkins v. Clayton* at para. 11 of Justice Brennan's reasons.
[72] *Hawkins v. Clayton* at para. 11 of Justice Brennan's reasons.
[73] *Hawkins v. Clayton* at para. 13 of Justice Brennan's reasons.
[74] *Dominion Bridge Co. v. Marla Construction*, 1970 CanLII 274 (Ont. Ct. Crt.).

97. The duties of a trustee arise from the office of trustee and do not begin and end with the wording of the trust instrument. The obligation to protect a beneficiary is an obligation imposed by equity on the trustee. As stated by the British Columbia Court of Appeal case of *Froese v. Montreal Trust Co.*, the "contractual responsibilities to the settlor do not tell the whole story".[76]

98. The subsequent case of *Dolvin Mechanical Contractors Ltd v. Trisura Guarantee Insurance Co.*[77] simply followed *Dominion* without any analysis.

99. The adoption of these precedents by the Majority is in error.

100. The conclusion of Justice Wakeling – that *Dominion Bridge* is inconsistent with fundamental trust principles and was wrongly decided – is to be preferred.

E. The Majority – A Trustee is Not a Fiduciary

101. As noted by Justice Southin:

> "fiduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship.[78]

102. Underlying the entire office of the trustee is the fiduciary duty owed to the beneficiaries:

> The hallmark of a trust is the fiduciary relationship which the trust creates between the trustee and the beneficiary. The whole purpose of a trustee's existence is to administer property on behalf of another, to hold it exclusively for the other's enjoyment. The express trustee is expected to put the interests of the trust and the beneficiaries first in his thinking whenever he is exercising the powers, or performing the duties of, his office. His duty is one of selfless service.[79]

103. At trial, Bird conceded that as trustee Bird had certain fiduciary duties.[80]

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[75] *Dominion Bridge* at p. 8.
[76] *Froese v. Montreal Trust Co.*, 1996 CanLII 1643 at p. 32.
[77] *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*, 2014 ONSC 918.
[78] *Girardet v. Crease & Co.*, 1987 CanLII 160 (B.C. S.C.) at p. 1.
[79] *Waters' Law of Trusts in Canada* at 42.
[80] ABQB Reasons at paras. 5, 38 [AR pp. 2, 6].

104. Yet, the majority of the Alberta Court of Appeal held that Bird, as trustee, was not in a fiduciary relationship with Valard, as beneficiary, and owed no fiduciary duty to Valard.

105. In doing so, instead of acknowledging the express trust in the L&M Bond and recognizing the trustee as a fiduciary, they erroneously resorted to an analysis of *Hodgkinson v. Simms*[81] that has no application.

106. The question in *Hodgkinson v. Simms* and its antecedents[82] was whether and in what circumstances the fiduciary duties recognized in established categories of fiduciary relationships – such as trustee-and-beneficiary or director-and-corporation – properly ought to be extended to analogous relationships.

107. This is not relevant to the present case where there is an express trust and an established category of fiduciary relationship imposing fiduciary obligations on the trustee. The express terms of the trust in the L&M Bond in no way qualify such obligations.

108. When trustees accept the position of trustee, they relinquish their self-interest in relation to the trust property. They must protect the interests of the beneficiary who had no say in the creation of the trust and its terms.

109. Yet, the effect of the majority's decision is a trustee can accept the position of trustee but still silently reserve the right to prefer its own interests over those of the beneficiary. Such a finding would throw centuries of trust law into disarray; it cannot be correct.

110. Justice Wakeling's decision is consistent with trust law. He correctly states:

> A trustee-beneficiary relationship is a fiduciary relationship.
> The trustee is the fiduciary.[83]

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[81] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.
[82] *Frame v. Smith*, [1987] 2 S.C.R. 99; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.
[83] ABCA Reasons, dissent, at paras. 106-107 [AR p. 37].

111. Justice Wakeling went on to consider whether there is any basis to treat commercial or business trusts as a separate category where the usual law of trusts does not apply.

112. He concludes that a trust is a trust:

> I see no principle basis, in the absence of an express and unequivocal term in the trust instrument text to the contrary, for holding a trustee under a labour and material payment bond to a lower standard than applies to a trustee under a family trust. Academic commentary of which I am aware does not call for disparate treatment. It calls for comparable treatment. There is no sound reason for establishing a principle that justifies abridging the duties of business trust trustees unless the trust instrument does so. [emphasis added] [84]

113. Professor Flannigan agrees. In his article "Business Applications of the Express Trust" he writes that the trust and fiduciary duties continue to apply to business trusts: "If the trust form is selected, the general rules of trust law apply".[85] Like all trusts, it is only through the express words of the trust instrument that those normal duties are modified.

F. The Majority – the *Builders' Lien Act* Relieves the Trustee of the Duty to Notify

114. The majority of the Alberta Court of Appeal held there is an onus on the beneficiary to ask the trustee in a "clear and unequivocal manner" whether the bond exists. The majority took the view that the Alberta *Builders' Lien Act*[86] provided the means for Valard to obtain information about the L&M Bond.

115. Paragraph 28 of the majority's reasons implies that the bond beneficiary may request information about a bond, not as a beneficiary, but as a lienholder. Invoking s. 33 of the Alberta *Builders' Lien Act*, the majority stated:

> The Canadian cases offered by the respondent are sound in law and principle. In Alberta, a contractor in the position of the respondent has no legal duty to inform any potential claimant about the existence of a labour and material payment bond, unless and until a clear and unequivocal request for information about the bond is made. Alberta's *Builders' Lien Act* provides the method for a

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[84] ABCA Reasons, dissent, at para. 161 [AR p. 52].
[85] R. Flannigan, "Business Applications of the Express Trust", 36 Alta. L. Rev. 630 (1998) at 632, 636 [ABA Tab 6].
[86] *Builders' Lien Act*, R.S.A. 2000, c. B-7 at s. 33.

> potential claimant — a lienholder — to make a demand for information, and imposes consequences upon those who fail to promptly comply with such a demand.[87]

116. However section 33 of the *Builders' Lien Act* does not address, nor does it require, disclosure of the L&M Bond; it only requires the inspection of contracts and a statement of accounts:

> 33(1) A lienholder, by notice in writing, may at any reasonable time demand, …
>
> (b) of the contractor, the production for inspection of
>
> (i) the contract with the owner, and
>
> (ii) the contract with the subcontractor through whom the lienholder's claim is derived, …
>
> and the production for inspection of a statement of the state of accounts between the owner and contractor or contractor and subcontractor, as the case may be.

117. Here, it is unknown whether the project contracts referenced the L&M Bond. Furthermore, it must be observed that the use of L&M Bonds is not limited to projects which are subject to the *Builders' Lien Act*.

118. The error made by the majority was to conflate the position of Valard as having a right of lien against the Project under the *Builders' Lien Act* with its rights as beneficiary under the L&M Bond.

119. On the other hand, Justice Wakeling correctly looks to trust law and the duties placed on a trustee to advance the interests of the trust and the beneficiaries. He concludes:

> As a general rule, if a beneficiary or a potential beneficiary would derive a benefit from knowing that a trust exists and the criteria identifying a beneficiary, a trustee must undertake reasonable measures to make available to a sufficiently large segment of the class of beneficiaries or potential beneficiaries information about the trust's existence and the criteria identifying a beneficiary.[88]

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[87] ABCA Reasons at para. 28 [AR p. 21].
[88] ABCA Reasons, dissent, at paras. 50, 119 [AR pp. 24, 40].

G. The Trust Only Works if Beneficiaries Know About It

120. There is no question Valard would have benefitted from knowledge of the trust's existence. Without it the trust property was lost and Valard left with nothing.

121. This outcome was entirely preventable.

122. The majority's solution is to place the onus on the beneficiary who had no idea of the trust's existence. Justice Wakeling's solution is to place the onus on the trustee who had it in its files.

123. If the majority is correct, then trust law encourages a haphazard result where only a combination of experience and luck would allow a beneficiary to discover the trust. The trust would only serve those beneficiaries savvy enough to protect themselves.

124. If Justice Wakeling is correct, then trust law encourages a result where the trustee – who has knowledge of the trust and the class of beneficiaries – takes reasonable steps to disseminate that information so that all beneficiaries may learn of the trust and secure their interest.

H. Notice to Beneficiaries is Not Onerous

125. Bird had the knowledge and the power to easily communicate the existence of the L&M Bond to the beneficiaries. As trustee, Bird needed only take reasonable measures designed to make information available to beneficiaries about the bond's existence.[89]

126. Justice Wakeling held:

> Bird Construction would have met this test if it had posted the bond at a conspicuous place at the Suncor project to which Langford Electric's subcontractors had access and required Langford Electric to include in its contract terms with subcontractors a notice term.

127. All that was required was "adequate disclosure" to beneficiaries.[90] The information did not need to reach every beneficiary. So long as the communication strategy selected by Bird had the potential to reach a sufficient segment of beneficiaries, it would have met the requisite standard.

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[89] ABCA Reasons, dissent, at para. 55 [AR p. 25].

128. The necessity and reasonableness of the required steps is determined contextually by:

- the criteria identifying a beneficiary;
- the nature of the benefits a beneficiary may receive; and
- the costs to disseminate the information.

129. Here, the criteria identifying beneficiaries was clear – all of Langford's sub-subcontractors and material suppliers.

130. The benefits were high – up to the L&M Bond limit of $659,671.

131. The cost of communicating the L&M Bond's existence to beneficiaries was low – posting a notice in a conspicuous place on the worksite and insisting that Langford include notice of the L&M Bond in their agreements with sub-subcontractors and suppliers.

I. Bird Did Not Take Any Steps

132. Bird was the trustee. Yet, after receiving the L&M Bond, Bird did nothing other than file it away.[91]

133. Bird knew of all Langford's subcontractors because Bird knew exactly who was on the worksite on a daily basis,[92] but Bird did not inform any of those sub-subcontractors.

134. Bird held daily "toolbox" meetings in its site trailer office. It was mandatory for a representative of every subcontractor and sub-subcontractor onsite to attend those meetings. In the trailer office there was a notice board and information posted on the walls, but Bird did not post a copy of the L&M Bond.[93]

135. On August 10, 2009, Langford sent an email to Bird and Valard stating to Bird that Valard had unpaid invoices for extra work. Bird responded by removing Valard from the email chain

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[90] ABCA Reasons, dissent, at para. 57 [AR p. 25].
[91] Trial transcript, p. 128, transcript lines 8-10 [AR p. 173].
[92] Trial transcript, p. 107, lines 12-13 [AR p. 151].
[93] Trial transcript, p. 98, lines 17-33 [AR p. 142].

and telling Langford that there would be no more money to pay Valard.[94] Bird did nothing to notify Valard of the L&M Bond and Valard's interest as a beneficiary.

136. As stated by Bird's construction co-ordinator:

> Q: What steps, if any, did you take to provide Valard with notice of the bond?
> A: I guess I -- no steps at all.
>
> Q: And what about other subcontractors of Langford?
> A: Yeah. None. No steps at all.[95]

137. In *Fales v. Wohlleben Estate*, Justice Dickson (as he then was) stated a trustee must show "vigilance, prudence and sagacity".[96] Taking no steps at all to provide notice of the L&M Bond's existence does not meet this test.

Issue 2 **Did Bird breach its duty?**

138. The facts are clear. Bird:

- did not post the L&M Bond;
- did not require Langford to inform the beneficiaries or create a list of beneficiaries that Bird could use to disseminate information;
- did not take any steps whatsoever to notify any beneficiaries.

139. When Cameron Wemyss, the project manager for Valard, attended the mandatory daily "toolbox" meetings in the Bird site trailer office he saw the information posted: safety information, wildlife management information, mandatory permits, and WCB notices.

140. Had the L&M Bond been posted in the site trailer, Mr. Wemyss would have seen it.[97]

141. On the evidence, Valard would have made a claim under the L&M Bond within time and recovered the penal sum of $659,671.

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[94] Trial Exhibit #1, Tab 12 – August 10, 2009 emails [AR pp. 240-41].
[95] Trial transcript, p. 113, lines 5-10 [AR p. 157].
[96] *Fales v Wohlleben Estate*, [1977] 2 S.C.R. 302 at 318.
[97] Trial transcript, p. 66, lines 12-31 [AR p. 111].

142. Valard is entitled to recover damages in that amount together with interest.

OVERALL CONCLUSION

143. A fundamental element of a trust, indispensable to its existence, is the right of a beneficiary to enforce it.

144. Bird intended to use the trust instrument for its advantage, while ignoring its essential obligation to beneficiaries – to provide notice of the existence of the trust in order that it could be enforced.

145. As Justice Wakeling noted:

> A trustee cannot both assert that the bond features a trust and that the trustee has none of the duties of a trustee. A trust cannot function without a trustee. This is a blatant violation of the equitable principle against approbation and reprobation.[98]

146. Or, as Sir Gavin put it, they cannot have their cake and eat it too.[99]

PART IV – SUBMISSIONS ON COSTS

147. Valard submits costs should follow the event and if its appeal is successful, it seeks its costs here and below.

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[98] ABCA Reasons, dissent, at para. 180 [AR p. 58].
[99] Sir Gavin Lightman at 40 [p. 11 of Westlaw, ABA Tab 11].

PART V – ORDER SOUGHT

148. Valard respectfully requests its appeal be allowed and judgment against Bird in the amount of $659,671 plus interest together with costs here and below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of June, 2017.

Maria-France Major, as Agent for

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Chris Moore
Chris Armstrong
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PART VI – AUTHORITIES & STATUTORY PROVISIONS

Case Authorities **Para.**

Armitage v. Nurse, [1998] Ch. 241 (C.A. 1997)	70
Breakspear v. Ackland, [2008] E.W.H.C. 220 (High Crt. Ch. Div.)	68
Brittlebank v Goodwin (1868), L.R. 5 Eq. 545 [ABA Tab 1]	87
Citadel General Assurance Company v. Johns-Manville Canada Inc., [1983] 1 S.C.R. 513	66, 67
Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co., 2014 ONSC 918	98
Dominion Bridge Co. v. Marla Construction, 1970 CanLII 274 (Ont. Ct. Crt.)	95, 96, 98, 100
Fales v Wohlleben Estate, [1977] 2 S.C.R. 302	137
Frame v. Smith, [1987] 2 S.C.R. 99	106
Froese v. Montreal Trust Co., 1996 CanLII 1643	97
Girardet v. Crease & Co., 1987 CanLII 160 (B.C. S.C.)	101
Hamar and another v Pensions Ombudsman and another, unreported (October 18, 1995) (Q.B. (E.)) [ABA Tab 2]	88
Hawkesley v. May, [1956] 1 Q.B. 304 [ABA Tab 3]	85-87
Hawkins v. Clayton, [1988] H.C.A. 15	90-93
Hodgkinson v. Simms, [1994] 3 S.C.R. 377	105, 106
Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574	106
Moore v. Saunders, 106 S.W. 2d 337 (Tex. Ct. Civ. Appl. 1937)	89
Short Estate, Re, [1941] 1 W.W.R. 593 [ABA Tab 4]	84
Tobin Tractor (1957) Ltd. v. Western Surety Co., 1963 CanLII 354 (Sask. Q.B.)	56

Statutory Provisions

Builders' Lien Act, R.S.A. 2000, c. B-7, s. 33	114-118

Secondary Sources