Court of Queen's Bench of Alberta

Citation: Valard Construction Ltd v Bird Construction Company, 2015 ABQB 141

Date: 20150227
Docket: 1003 11170
Registry: Edmonton

Between:

Valard Construction Ltd.

Plaintiff

- and -

Bird Construction Company

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice Gerald A. Verville

Introduction

[1] This decision turns on whether an obligee/trustee under a labour and material payment bond (Standard Construction Document CCDC 222-2002) has a duty to provide notice to sub-contractors of the existence of the bond.

Background

[2] The defendant Bird Construction Company (Bird) as general contractor entered into a subcontract with Langford Electric Ltd. (Langford) which required Langford to obtain a labour and material payment bond (Bond). The Bond was issued by the Guarantee Company of North America (GCNA).

[3] The plaintiff Valard Construction Ltd. (Valard) entered into a subcontract with Langford but was not fully paid for its services. It claimed on the Bond, but GCNA denied the claim on the basis that Valard had not provided timely notice as required under the Bond.

[4] Valard says it had no knowledge of the Bond until after the notice period had expired. It contends that Bird as obligee/trustee under the Bond had a fiduciary duty to inform it of the Bond's existence within the relevant time frame, and that Bird breached this duty. It claims damages against Bird.

[5] Bird admits that it was a trustee under the bond and that as trustee it had certain fiduciary duties, such as responding to Valard's inquiries in a timely fashion. It denies that it had a duty to take the initiative to inform Valard that the Bond existed. Bird claims solicitor and client costs with respect to this action pursuant to the Bond indemnity provisions.

[6] Bird brought an application on December 16, 2014 for summary dismissal of Valard's claim. The matter was returnable before the Master on January 20, 2015. However, due to the illness of Valard's counsel, it was adjourned to January 27, 2015. At that time, the Master declined to hear the matter and directed that it go to special chambers. Dates were not available until late spring 2015.

[7] This matter was set down for trial in May of 2014. Valard opposed Bird's request that its summary dismissal application be heard before the commencement of the trial. Bird was permitted to bring its application, but after hearing short submission from Valard, the Court decided that the most efficient way to proceed would be to hear the mini-trial, and Bird's counsel agreed that its submissions would in effect constitute its opening statement. Three witnesses were called to testify and their combined testimony took less than a day.

Evidence

The Bond

[8] Bird entered into a contract with Suncor Energy (Suncor) with respect to a project described as the Suncor Energy MEM 2 Bay Shop Expansion on a Suncor site near Fort McMurray. Bird entered into a subcontract with Langford whereby Langford was to perform the necessary electrical work. The subcontract required Langford to obtain the Bond, which was issued on November 25, 2008 in the amount of $659,671. It described Langford as Principal, GCNA as Surety, and Bird as Obligee.

[9] The Bond provides in part:

> The Condition of this obligation is such that if the Principal shall make payment to all Claimants for all labour and material used or reasonably required for use in the performance of the Contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:
>
> 1. A Claimant for the purpose of this Bond is defined as one having a direct contract with the Principal for labour, material or both used or reasonably required for use in the performance of the Contract...
>
> 2. 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. Provided that the Obligee is not obliged to do or take any act, action or proceeding against the Surety on behalf of the Claimants; or any of them, to enforce the provisions of this Bond. If any act, action or proceeding is taken either in the name of the Obligee or by joining the Obligee as a party to such proceeding, then such act, action or proceeding, shall be taken on the understanding and basis that the Claimants, or any of them, who take such act, action or proceeding shall indemnify and save harmless the Obligee against all costs, charges and expenses or liabilities incurred thereon and any loss or damage resulting to the Obligee by reason thereof. Provided still further that, subject to the foregoing terms and conditions, the Claimants, or any of them may use the name of the Obligee to sue on and enforce the provisions of this Bond.

3. It is a condition precedent to the liability of the Surety under this Bond that such Claimant shall have given written notice as hereinafter set forth to each of the Principal, the Surety and the Obligee, stating with substantial accuracy the amount claimed, and that such Claimant shall have brought suit or action in accordance with this Bond as set out in sub-clauses 3 (b) and 3 (c) below. Accordingly, no suit or action shall be commenced hereunder by any Claimant;

> (a) unless such notice shall be served by mailing the same by registered mail to the Principal, the Surety and the Obligee ...
>
> > i. in respect of any claim for the amount or any portion thereof, required to be held back from the Claimant by the Principal, under either the terms of the Claimant's contract with the Principal, or under the lien legislation applicable to the Claimant's contract with the Principal, whichever is the greater, within one hundred and twenty (120) days after such Claimant should have been paid in full under the Claimant's contract with the Principal;
> >
> > ii. in respect of any claim other than for the holdback, or portion thereof, referred to above, within one hundred and twenty (120) days after the date upon which such Claimant did, or performed, the last of the work or labour or furnished the last of the materials for which such claim is made under the Claimant's contract with the Principal;
>
> (b) after the expiration of one (1) year following the date on which the Principal ceased work on the Contract, including work performed under the guarantees provided in the Contract ...

[10] Langford entered into a subcontract with Valard on March 2, 2009, whereby Valard was to do, among other things, certain directional drilling. Valard commenced its work on the project on March 17, 2009. Its last day of work on the site was May 20, 2009.

[11] On February 11, 2010, Valard filed a Statement of Claim against Langford. It obtained a default judgment in the amount of $660,000.17 on March 9, 2010.

[12] On April 19, 2010, Valard made an inquiry of Bird as to whether there was a Bond. Bird responded in the affirmative and provided contact information for GCNA. Valard submitted its claim to GCNA on April 19, 2010, which claim was denied on June 14, 2010.

[13] Valard then commenced an action again GCNA on June 30, 2010. In GCNA's statement of defence filed on August 13, 2010, it asserted *inter alia* that Valard was precluded from bringing the action because it failed to give written notice within 120 days after the date upon which it performed the last of the work, and further that GCNA was prejudiced because of the late notice.

[14] Valard subsequently amended its statement of claim on December 15, 2010 to add Bird as a defendant. Bird filed a counterclaim against Valard on February 8, 2011, claiming *inter alia* indemnity for all costs, expenses incurred by Bird in relation to the action.

[15] On October 31, 2013, Valard filed a discontinuance as against GCNA, without costs to either party. It filed a further amended statement of claim on May 14, 2014.

Witnesses

[16] I found all three witnesses to be credible and reliable.

John Cameron Wemyss

[17] Wemyss was Valard's Project Manager on this project. He confirmed that Valard is a large company with five or six hundred employees in Canada, and that it has its own surety or bonding company. He confirmed that Valard does considerable work for various companies in the oilsands.

[18] Wemyss stated that he was approached by Milton Sterling of Langford to perform work, which consisted of directional drilling on the Project. He confirmed that Valard entered into a subcontract with Langford on March 2, 2009 to do the work.

[19] He testified that Valard encountered a limestone deposit which is hard to drill and that extra work was required. Wemyss stated that Suncor attempted to help by ripping a wider trench than was required with a Caterpillar tractor, and that this created substantial additional costs.

[20] Wemyss said that while he dealt directly with Sterling, he was also in contact from time to time with Bird employees who were on the site, namely Eric Champagne and Ed Gauthier.

[21] Wemyss testified that Bird had an onsite office trailer. He was on the site two to three times a week and would go to the trailer for meetings where the progress of the project and safety were discussed. He stated that the onsite Bird employees were aware of the problems encountered because of the limestone.

[22] Wemyss stated that although he had experience with labour and material payment bonds on municipal sites, he had never encountered one on any of the oilsands projects in which Valard was engaged.

[23] He confirmed that he did not compel Langford to complete a credit application, nor did he request details with respect to Langford's relationship with Bird. He knew Bird was working for Suncor, but did not request a copy of the Bird/Suncor contract or the Bird/Langford contract. Further, he did not provide Bird with a copy of the Valard/Langford contract.

[24] Wemyss confirmed that all Valard invoices and supporting information were sent to Langford. He stated that Valard invoiced Langford in the amount of $190,000 for additional work, but that Valard was not paid despite assurances from Sterling that everything would be worked out. He stated that he did not contact Bird or Suncor when he encountered problems with Langford as he did not want to "rock the boat". He confirmed that the companies which are active in the oilsands have close working relationships, and that although he was familiar with builders liens, filing a lien would, again, "rock the boat".

[25] Wemyss stated that he was in the Bird office trailer on several occasions, but never saw a bond posted there. He confirmed that he never communicated to Bird that Valard was having a problem with its Langford accounts. He also confirmed that he did not ask anyone at Bird if there was a bond until April 19, 2010. He confirmed that he was immediately given the information he requested.

Eric Champagne

[26] Champagne confirmed that he was the construction coordinator on the project site for Bird, and that Gauthier was the site superintendent. Champagne stated that his job involved coordinating activities between sub trades and Bird's own forces, as well as liaising with Suncor.

[27] He stated that he reported to Chris Von Klitzing, the project manager. Von Klitzing looked after contracts.

[28] Champagne testified that the project involved the construction of bays for heavy hauler trucks and that it was necessary to run power from a high voltage overhead power line underground to a transformer next to the building.

[29] He stated that he would have meetings with the sub trades in the Bird office trailer each day to discuss the work that was to be done. Those in attendance signed a Bird "Daily Report" sheet. The meetings were referred to as "Tool Box Talk".

[30] Champagne confirmed that he was aware of what Valard was doing after it came onto the site in March 2009, however he gave direction to Langford rather than to Valard. Further, he confirmed that he was aware of the problems encountered when the limestone was discovered. However, he stated that he never saw any time and material sheets or invoices from Valard with respect to this work.

[31] Champagne stated that his communications were with Sterling, and he was able to get $215,000 for the underground limestone work after meeting with representatives of Suncor. He stated that he was unaware of any account issues between Valard and Langford until he received an email from Wemyss on April 19, 2010 which stated in part:

> Eric
>
> Valard never received no payment on the MEM2 Bay project at Suncor from your sub Langford Electric. We currently have a judgment against Langford. Do you know who I can contact at Bird to find out if Langford had a bond on this job?...

[32] Champagne stated that he immediately asked Von Klitzing to respond.

Chris Von Klitzing

[33] Von Klitzing testified that as project manager he dealt with contracts and contract changes. He stated that he was also involved with bonds and that Bird's policy, other than in special circumstances, was to require a labour and material payment bond from a subcontractor in relation to contracts over $100,000.

[34] He confirmed that he obtained the Bond in question and filed it at his office in Edmonton. He stated that Bird did not have a policy of posting bonds in jobsite trailers or anywhere else.

[35] Von Klitzing stated that he did not have any dealings with anyone from Valard, but rather dealt strictly with Sterling. He was aware that the problems encountered with the limestone resulted in additional costs. He stated he understood from Sterling that these costs amounted to $250,000. He confirmed that he was able to negotiate a settlement with Suncor in the amount of $215,000 on August 4, 2009, which information was passed on to Sterling that day by email.

[36] Von Klitzing acknowledged that he received information from Sterling by email on August 10, 2009 advising that Valard had a further invoice in the amount of $190,000. He responded by email on the same date stating:

> Milt
>
> Suncor is already upset with us about the extra costs and it took months to get this first $215,000 approved only as a favor to Bird. Anyone else wouldn't have received near that amount. It is impossible for us to go back to the owner. I'm not sure how Valard could rack up a bill like this, even being as disorganized as they were on site. We would help you if we could, but Suncor was already upset with our last claim.

[37] Von Klitzing stated that there was no follow up from Sterling and that he never saw any invoices from Valard to Langford. He testified that he had no idea that there was an outstanding account between Valard and Langford, or a judgment against Langford, until he received the email on April 19, 2010. He confirmed that he had learned early in 2010 that Langford was in financial trouble.

Positions of the Parties

Bird

[38] Bird admits that it was a trustee and accordingly had fiduciary duties. However, it denies that these duties extended to advising potential claimants of the Bond. Bird says further that Valard's assertion is contrary to existing case law, citing ***Dominion Bridge Co v Marla Construction Co***, [1970] 3 OR 125 (Co Ct) and ***Dolvin Mechanical Contractors Ltd v Trisura Guarantee Insurance***, [2014] ILR I-5595 (Sup Ct J).

Valard

[39] Valard cites a number of cases relating to the law of trusts, including: ***Re Beaudette (Estate)***, 1998 ABQB 689, 229 AR 259, ***Brittlebank v Goodwin*** (1868), LR 5 Eq 545, ***Burrows v Walls*** (1855), 3 W R 327, ***Fales v Wohlleben Estate***, [1977] 2 SCR 302, ***Froese v The Montreal Trust Co of Canada*** (1996), 137 DLR (4th) 725, 76 BCAC 81, ***Hawkesley v May***,

[1956] 1 QB 304, ***Hay's Settlement Trusts, Re***, [1981] 3 All ER 786, ***Herron v Hunting Chase Inc***, 2003 ABCA 219, 330 AR 53, ***Island Realty Investments Ltd v Douglas***, [1985] BCJ No 1118, 19 ETR 56 (SC), ***Johns-Manville Can Inc v John Carlo Ltd*** (1980), 29 OR (2d) 592, [1980] OJ No 3084 (HCJ) and [1983] 1 SCR 513, [1983] SCJ No 37, and ***Reid v Graybriar Industries Ltd***, 2006 ABQB 519, [2006] AJ No 869.

[40] Further, Valard cites the following authorities: DB Parker and AR Mellows, *The Modern Law of Trusts*, 7th ed (London: Sweet & Maxwell, 1998) at 493-501, AH Oosterhoff & EE Gillese, *Commentary and Cases on Trusts*, 4th ed (Toronto: Carswell, 1992) at 13, and DWM Waters, *Law of Trusts in Canada*, 2nd ed (Toronto: Carswell, 1984) at 689-691.

[41] Valard's position is that Bird's fiduciary duties as trustee required it to act for the sole benefit of the beneficiary. Valard notes that the Bond is largely silent as to the trustee's obligations. It submits that the equitable principles governing fiduciary duties extended to informing potential claimants of the Bond's existence. This would be in keeping with the actions of a reasonable man of business acting with honesty, skill and prudence in administering his own affairs.

[42] Valard further contends that this obligation could have been easily met in the instant case by: posting the Bond on the bulletin board in Bird's office trailer on the site, distributing or making available copies of the Bond at mandatory site meetings or site orientations, or contractually requiring Langford to take reasonable steps to notify its subcontractors and material suppliers of the existence of the Bond.

[43] Valard submits that the fiduciary duty was all the more imperative when Bird learned of potential problems resulting in additional costs incurred by Valard because of the limestone problem.

[44] It argues that Bird's breach of trust caused the loss in question.

[45] Valard points to s. 20 of the *Builders' Lien Act*, RSA 2000, c B-7 and s. 17 of the *Public Works Act*, RSA 2000, c P-46 which require certificates and bonds to be posted on the worksite.

[46] Valard submits that ***Dominion Bridge*** is distinguishable and was incorrectly decided. It further argues that the decision lacks any rigorous examination of trust law. As to ***Dolvin Mechanical***, Valard submits that the Court at para 57 simply adopted ***Dominion Bridge*** without any analysis.

Issue

[47] The sole issue is whether Bird, as trustee under the Bond, had an obligation to inform Valard of the Bond's existence.

Analysis

[48] The Bond is in the form of Standard Construction Document CCDC 222-2002, published by the Canadian Construction Documents Committee in 2002: KW Scott and BR Reynolds, *Scott and Reynolds on Surety Bonds* (Scarborough, Ont: Carswell, 1993-) at 11-9.

[49] Pursuant to the terms of the Bond, Valard had to meet three requirements in order to successfully claim under the Bond: 1) fall within the definition of claimant, 2) provide notice to the surety, obligee and principal within 120 days after the date of the last work or provision of

materials under Valard's contract with Langford, and 3) commence an action against GCNA within one year of the date that Langford, the principal, ceased work on its contract with Bird, the obligee.

[50] The Bond was signed in November 2008. At that point, the beneficiaries were an open class of unnamed third party beneficiaries. Valard did not fall within the definition of "claimant" until it had a contract with Langford in March 2009. It did not become a "beneficiary of the trust" in the Bond until it was not paid 90 days after completing the work for which it claims compensation.

[51] The unnamed third party beneficiaries are not parties to the Bond. According to the common law "third party beneficiary rule", only a party to a contract may sue on it.

[52] This rule can obviously produce harsh results, which has led to much academic and judicial commentary and criticism. In a 1987 report, the Ontario Law Reform Commission recommended that the rule be abolished: Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: Ministry of the Attorney General, 1987). In fact, the New Brunswick legislature did eventually abolish the third party beneficiary rule in that province: *Law Reform Act*, RSNB 2011, c 184, s 4(1).

[53] In the absence of such legislative action in other common law provinces, the courts have developed exceptions to the rule in other contexts: ***London Drugs Ltd v Kuhne & Nagel Ltd***, [1992] 3 SCR 299, ***Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd***, [1999] 3 SCR 108, ***Brown v Belleville (City)***, 2013 ONCA 148.

[54] However, the trustee wording of the standard form labour and material payment bonds pre-dates these developments.

[55] The common law has long been clear to the effect that a beneficiary of a trust can sue to enforce the trust or require the trustee to sue: ***Lloyd's v Harper*** (1880), 16 Ch D 290 (CA).

[56] In order to avoid the application of the third party beneficiary rule, the standard bond wording provided, and still provides, that the obligee is "trustee" for the benefit of all beneficiaries/claimants. Significantly, the bond expressly states that the obligee is not obliged to do or take any act, action or proceeding against the surety on behalf of any of the claimants to enforce the provisions of the bond. It provides, however, that claimants may use the name of the obligee to sue on and enforce the provisions of the bond.

[57] The express negation of any requirement on the part of the trustee to take action on behalf of the beneficiaries, combined with the ability of claimants to sue in the name of the trustee support the conclusion that the trustee wording is used in the Bond in order to avoid the obstacle raised by the third party beneficiary rule.

[58] Notwithstanding the trustee wording in the standard labour and material payment bond, concerns remained that it might be unenforceable due to the third party beneficiary rule: *Scott & Reynolds* at 11-10.9. This is understandable, given that the bond expressly negates any duty on the part of the obligee to proceed on behalf of the claimants to enforce the provisions of the bond. One would think that such an obligation would be at the heart of the trustee's duties in the circumstances. These concerns regarding enforceability gave rise to a body of case law.

[59] In ***Johns-Manville****(supra)*, Holland J. considered this issue and held that the intention to create a trust was clear from the labour and material payment bond wording. Holland J. also

suggested that the trust arose by virtue of the contract but was governed by the terms of the trust and not by the terms of the contract, and therefore the plaintiff was not required to comply with the notice conditions imposed by the contract.

[60] On appeal in ***Johns-Manville*** ([1983] 1 SCR 513, [1983] SCJ No 37), McIntyre J. for the Supreme Court agreed that the trust avoided the obstacle created by the third party beneficiary rule, however he also stated that the basis of the surety's liability must be found in the bond.

[61] The Court in ***Dawson Construction Co v Victoria Insurance Co of Canada***, [1986] BCJ No 1959, 19 CCLI 276 (SC), concluded that despite Holland J.'s comments in ***Johns-Manville*** suggesting that the trust was not governed by the terms of the contract, McIntyre J.'s statement in the same case meant that liability would not arise unless the surety, obligee and principal were given notice as required under the bond. In other words, the "trust" does not create a fiduciary relationship separate and apart from the terms of the bond. On that basis, the Court rejected the argument that the claimant was not subject to any of the time limitations provided for in the bond.

[62] In ***Harris Steel Ltd v Alta Surety Co***, [1992] NSJ No 313, 114 NSR (2d) 361, 6 CLR (2d) 33, Tidman J. explained the use of the trust in such bonds:

> I agree with defendant's counsel that Canadian cases dealing with bonding claims appear to continue the fiction established by the English common law that a claimant, not being a party to the bonding contract, derives its right to claim only through the obligee as its trustee. I also agree that there are valid reasons for maintaining this well established fiction.

[63] On appeal in ***Harris Steel*** ([1993] NSJ No 1, 119 NSR (2d) 61, leave denied [1993] SCCA No 89), Roscoe J.A. for the Court upheld the trial decision, noting that a "trustee" is required in the bond because the identities of the claimants cannot be ascertained at the time the bond is entered into, and the third party beneficiary rule would otherwise pose an obstacle to a suit by the claimant.

[64] Some provinces have clarified the issue through legislation, creating a statutory right of action for beneficiaries against the surety: *Construction Lien Act*, RSO 1990, c C 30, s 69(1)), *Law and Equity Act*, RSBC 1996, c 253, s 48.

[65] It is not surprising, in light of the trust wording, that claimants would argue for an expanded view of the duties of the trustee under such bonds. In ***Dominion Bridge****(supra)*, the plaintiff argued that the obligee under a performance and materials bond had a duty as a trustee to notify the plaintiff of the bond. Grossberg J. stated:

> This contention conjures up to my mind many difficulties some of which were discussed in argument. I asked in argument: when did the duty arise? at what point of time? what exactly was that duty? must Sun Oil embark upon inquiries who were the labourers? who were the creditors? who were the suppliers? Must Sun Oil seek out the creditors and suppliers? If the contention of counsel for the plaintiff be upheld, Sun Oil would be obliged to acquire knowledge of all materials purchased, all labourers on the job from day to day and to keep a constant surveillance. The consequence of the submission must be that Sun Oil must seek out material, men, suppliers, labourers, subcontractors, etc., of Marla and acquaint each that there was a bond in existence. No such duty is imposed by

> the bond itself. In the absence of applicable authority I would not imply such duty in law. There has been no custom of the trade pleaded or proved. I find no conflict of interest on the part of Sun Oil as trustee. Sun Oil had a separate independent Performance Bond and did not itself have to rely for indemnity on the Labour and Material Payment Bond. There would of course be a duty on the part of Sun Oil to give information if such information were requested. The evidence of Sun Oil indicates that this is the first time that it was necessary for Sun Oil to call upon a bonding company for indemnity. The plaintiff could have had access to the bond if the plaintiff made a request for it.

[66] Grossberg J. distinguished ***Hawkesley v May***, [1956] 1 QB 304 and ***Brittlebank v Goodwin*** (1868), LR 5 Eq 545, in which the Courts held that there was a duty upon a trustee to notify an infant of his share of a trust fund when the infant became of age. He declined to extend the duty found in those cases to the facts before him.

[67] It is interesting to note that a party initially requiring the contractor to enter into a bond owes no fiduciary duty to advise a subcontractor of the *failure* to maintain a bond. In ***Base Controls Ltd v Bennett + Wright Group Inc***, [2002] OJ No 3083, 20 CLR (3d) 258 (Sup Ct J), aff'd (2003), 24 CLR (3d) 95, [2003] OJ No 1313 (Sup Ct J (Div Ct)), the owner had specified in the bid documentation that the general contractor was to maintain a bond. However, it accepted a bid which did not include provision of a bond. Master MacLeod held at para 10 that the hallmarks of a fiduciary relationship, namely expectations of loyalty, trust, fidelity and confidence were not present in the relationship between owner and subcontractor.

[68] Similarly, in ***Fraser-Brace Maritimes Ltd v Central Mortgage And Housing Corporation***, [1980] NSJ No 506, 42 NSR (2d) (CA), leave denied [1981] SCCA No 287, the Court held that CMHC bore no duty of care which would require it to ensure that the obligee filed a proper bond with CMHC, despite the fact that the claimant assumed that a bond had been filed.

[69] The Court in ***Interborough Electric Inc v MSW Developments Ltd***, [2004] OJ No 4124, 40 CLR (3d) 116 (Sup Ct J) rejected the argument that there was a fiduciary, contractual or other legal relationship between a general contractor and a sub trade of a company involved in bidding on a contract as there was no privity of contract.

[70] Again, these cases support the argument that any fiduciary duties must be found in the Bond, which is the only link between Valard and Bird, and therefore Valard and GCNA.

[71] Claimants who have failed to give notice to the surety within the strict time periods have met in the past with some success in seeking relief from forfeiture under provisions equivalent to s. 520 of the *Insurance Act*, RSA 2000, c I-3, so as to salvage their claims against the sureties.

[72] In ***Falk Bros Indust Ltd v Elance Steel Fabricating Co***, [1989] 2 SCR 778, [1989] SCJ No 97, the Supreme Court decided that the giving of notice out of time constituted imperfect compliance and not non-compliance, and was therefore grounds to apply for relief from forfeiture under the Saskatchewan *Insurance Act*. The Court noted that failure to give notice is less serious than failure to bring an action within a stipulated time, an actual condition precedent, which would not be amenable to relief from forfeiture.

[73] In upholding relief from forfeiture in ***312630 British Columbia Ltd v Alta Surety Co***, [1995] 10 WWR 100, 61 BCAC 208, the Court considered: 1) prejudice to the surety; 2) the

claimants' knowledge and awareness of the bond; 3) the experience and knowledge of the claimant; and 4) the claimants' length of delay in giving notice. The Court held that the most critical question was whether the surety had suffered actual prejudice as a result of the delay in filing the required notice.

[74] In subsequent cases, courts relying on the distinction drawn by the Supreme Court in ***Falk Bros*** have held that relief from forfeiture is not available where there has been breach of a condition precedent: see, for example, ***Stuart v Hutchins***, [1998] OJ No 3672, 40 OR (3d) 321 (CA).

[75] Paragraph 3 of CCDC 222-2002 now expressly describes the written notice as a condition precedent.

[76] Valard did initially seek relief from forfeiture in its original Statement of Claim which named GCNA as a defendant. Counsel advised during oral argument that the claim against GCNA was dropped when it appeared that GCNA could establish actual prejudice.

[77] Of course, whether or not relief from forfeiture was available in this case is not determinative of the issue before this Court.

[78] Valard cites authorities dealing with other types of trust relationships, and argues that a beneficiary is entitled to expect that the fiduciary will be concerned with the beneficiary's interest and always prefer them to his own.

[79] In this case, the sub-contract between Langford and Bird required Langford to obtain the Bond for Bird's own protection. While trust relationships undoubtedly take many forms, it is clear from the case law, and the terms of the Bond itself, that the trust wording serves a limited purpose. Unlike other trust relationships, there is no suggestion in the standard wording, or in the case law, that the Bond creates duties on the obligee to protect the interests of potential claimants. It expressly states that the obligee is not required to take any act against the surety on behalf of the claimants to enforce the provisions of the bond.

[80] I conclude that the sole purpose of the trust wording in the Bond is to address the difficulties that the identities of the claimants cannot be ascertained at the time the bond is entered into, and that the third party beneficiary rule would otherwise prevent a claimant from suing the surety.

[81] Valard points to s. 20 of the *Builders' Lien Act*, RSA 2000, c B-7 and s. 17 of the *Public Works Act*, RSA 2000, c P-46 which require certificates and bonds to be posted on the worksite. Such a requirement could either be a codification of the case law, or the imposition of a requirement to fill a perceived gap.

[82] Valard cites the Hon. Member for Vermilion-Lloydminster, Lloyd Snelgrove (March 6, 2002) regarding the legislative purposes for the *Public Works Amendment Act, 2002*, where he stated that changes to s. 17 would ensure that subcontractors and suppliers could get the information they need should they wish to file a claim for nonpayment. This does not support Valard's argument that the amendment simply codified the law on fiduciary duties under bonds.

[83] In ***Dolvin Mechanical*** *(supra)*, the Court considered ***Don Fry Scaffold Service Inc v Ontario***, [2007] OJ No 3054, 65 CLR (3d) 310 (SC) and ***Dominion Bridge*** in concluding that there was no duty, fiduciary or otherwise, outside of s. 39 of Ontario's *Construction Lien Act*, to inform a subcontractor of a labour and material payment bond.

[84] Valard argues that Bird could easily have posted the Bond on the bulletin board in Bird's office trailer on the site, distributed copies of the Bond, or required Langford to take reasonable steps to notify its subcontractors and material suppliers of the existence of the Bond.

[85] While this may be true, Bird was not obliged to provide notice. In any event, a simple standard inquiry by Valard would be a more reliable means of obtaining the information. While it may be that employees of subcontractors may not always be aware of the possibility of a bond, this does not explain why a large and sophisticated entity such as Valard would not have in place a mandatory protocol under which bond information is requested on all subcontracts, especially given the state of the law on the issue. In this case, we are not dealing with the disadvantaged and infirm, but rather with a large sophisticated company with five or six hundred employees in Canada which has its own surety or bonding company.

[86] Wemyss confirmed that he was familiar with labour and material payment bonds, but stated that he had never encountered one on any of the projects Valard was engaged in the oilsands. While this may be true, it is also true that if you never ask you never know. Simply put, his belief may be simply due to the fact that he never asked. It is clear that he encountered the Bond in question immediately after inquiring if one existed. Further, it is clear that nothing prevented Wemyss from asking the question much earlier and well within the 120 day notice period, as Valard had already encountered problems with invoices rendered to Langford at the time it left the Project site on May 20, 2009.

[87] Valard submits that the duty to provide information was triggered when Bird learned of potential problems arising out additional costs incurred by Valard because of the limestone problem. However, I would note that Champagne and Von Klitzing testified that they were never told, nor were they aware, that Valard's invoices to Langford were not being paid until they received the email from Wemyss on April 19, 2010. I accept their evidence on this point. In my view, it is not significant that Champagne and Von Klitzing were aware of Valard's further invoice of $190,000 for additional work because of the limestone problem. The fact is that they heard nothing further from Sterling after the issue was raised, nor did they ever hear anything about this issue from Valard. The issue was between Valard and Langford. Parties often work out their differences through negotiation and Bird was entitled to assume this was the case. In short, I find that the employees of Bird at all material times acted honestly and had no knowledge of the fact that Valard was a claimant who had not been paid as provided for under the terms of its contract with Langford, the Principal. Therefore, I find that Bird provided information immediately upon becoming aware of Valard's status.

[88] It is clear from the evidence that Wemyss was not aware of the existence of the Bond until he received Von Klitzing's immediate response following his inquiry on April 19, 2010. Champagne and Von Klitzing confirmed that the Bond was not posted anywhere on the jobsite.

[89] As Valard points out, ***Dominion Bridge*** was an oral decision of the Ontario York County Court. However, it has reflected the state of the law for 45 years on the issue of whether the obligee under a standard form performance and materials bond is required to notify potential claimants of the existence of the bond. I am not persuaded it was incorrectly decided.

Costs

[90] Bird claims indemnity pursuant to the terms of the Bond for all legal fees incurred or to be incurred with respect to the defence of Valard's claim.

[91] In ***Vallieres v Vozniak***, 2014 ABCA 384, [2014] AJ No 1288, the Court of Appeal held that costs are presumptively assessed on Schedule C, but a contract providing for a different scale of costs is a recognized exception to that general rule.

[92] The Bond provides in paragraph 2 that if any action or proceeding is taken by joining the obligee as a party, the claimant who takes such action or proceeding shall indemnify and save harmless the obligee against all costs, charges and expenses or liabilities incurred thereon and any loss or damage resulting therefrom.

[93] Valard discontinued its suit as against GCNA in October 2013. However, the entire lawsuit has turned on Valard's ability to claim by virtue of the Bond. Therefore, it was an action taken on the Bond, joining the obligee, Bird, as party. In my view, the action falls within paragraph 2, and Bird is therefore entitled to costs on a full indemnity basis.

Conclusion

[94] Valard's claim against Bird is dismissed.

[95] Bird is entitled to its costs on a full indemnity basis.

Heard on the 18th, 19th and 20th days of February, 2015.
Dated at the City of Edmonton, Alberta this 27th day of February, 2015.

Gerald A. Verville
J.C.Q.B.A.

Appearances:

Mr. Chris Moore and
Michael Preston
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