

SCC File No.: 37272

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

BETWEEN:

VALARD CONSTRUCTION LTD.

**APPELLANT
(Appellant)**

- and -

BIRD CONSTRUCTION COMPANY

**RESPONDENT
(Respondent)**

-and-

SURETY ASSOCIATION OF CANADA

INTERVENER

**REPLY FACTUM OF THE APPELLANT,
VALARD CONSTRUCTION LTD.**
(Delivered pursuant to Order of this Court dated July 11, 2017)

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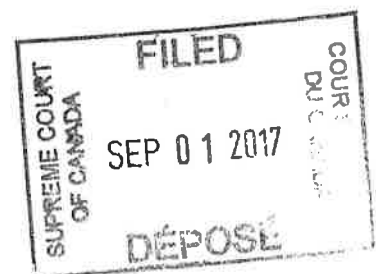
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OVERVIEW

1. The Surety Association of Canada (“SAC”) asks to overturn centuries-old trust principles by proposing that the interests of Bird, the trustee, should supersede those of the beneficiaries.
2. Rather than upend trust law, the correct approach is to apply universal equitable trustee duties to Bird unless expressly modified by the trust instrument.

I. Bird is not a Beneficiary of the Trust

3. SAC says it is Bird who is the intended beneficiary of the trust.¹ The basis for this is Bird asked Langford to purchase the L&M Bond and the trustee duties should be construed according to what is best for Bird. This is absurd. Bird is not in the named class of beneficiaries to the trust.
4. SAC also asserts that Bird “did not intend to take on any liability”.² Bird’s motivations, interests or intentions in agreeing to be trustee are irrelevant. The “trustee exists to administer the property on behalf of the beneficiary”.³ If Bird did not intend to accept any liability, then it should not have accepted the role of trustee.

II. ‘Bare Trusts’ are Irrelevant

5. SAC improperly casts the trust created by the L&M Bond as a ‘bare trust’.⁴ The L&M Bond trust is not a bare trust such as is found in the case law. In the bare trust cases the beneficiaries are aware of the existence of the trust.⁵

¹ Para. 12 of the Factum of the Intervener.

² Para. 10 of the Factum of the Intervener.

³ Eileen Gillese, *The Law of Trusts*, 3rd ed. (Toronto: Irwin Law Inc., 2014) at 154 [Appellant’s Reply Book of Authorities, Tab 2].

⁴ Para. 25 of the Factum of the Intervener.

⁵ See *De Mond Jr. v. The Queen*, [1999 CanLII 466](#) (T.C.C.).

6. In any event, whether the L&M Bond trust can be described as “bare”, “naked”, “simple”, “dry”, or “limited” is irrelevant. All trusts carry equitable duties.⁶ The issue remains – in the circumstances here, did Bird as trustee have a duty to take reasonable steps to notify the beneficiaries?

III. The Authorities Cited by SAC are Irrelevant

7. SAC incorrectly refers to *Base Controls Ltd. v. Bennett + Wright Group Inc.*⁷ for the proposition that “the hallmarks of a fiduciary relationship, namely expectations of loyalty, trust, fidelity and confidence are not present between an Obligee and a Claimant”.⁸ But no L&M Bond was issued in *Base Controls* and no trust was created. The subcontractor’s complaint in that case was the owner had waived the contractual requirement that the general contractor obtain an L&M Bond. The Court correctly concluded, in the circumstances and in the absence of a trust, there was no fiduciary relationship between the owner and the subcontractor.

8. SAC incorrectly refers to *Don Fry Scaffold Service Inc. v. Ontario*⁹ as authority that the trustee under an L&M Bond has limited obligations. That case was about the subcontractor applying to court to add an allegation of fiduciary duty to its statement of claim. The Ontario Court of Appeal dismissed the subcontractor’s application because, among other reasons, the statement of claim neglected to include the prerequisite allegation that owner was a trustee. Without the trust, there could be no fiduciary duty.

9. SAC incorrectly refers to *Ozz Electric Inc. v. Zurich Insurance Company Ltd. et al.*,¹⁰ for the proposition that “there is no basis for a claim by a Claimant against an Obligee under the

⁶ See A. H. Oosterhoff, *Text, Commentary and Cases on Trusts*, 6th ed. (Toronto: Carswell, 2004) at 14-15 [Appellant’s Reply Book of Authorities, Tab 3].

⁷ *Base Controls Ltd. v. Bennett + Wright Group Inc.* (2002), 20 C.L.R. (3d) 258 (Ont. S.C.) [Appellant’s Reply Book of Authorities, Tab 1], affirmed [2003 CanLII 20385](#) (Ont. Div. Ct.).

⁸ Para. 27 of the Factum of the Intervener.

⁹ *Don Fry Scaffold Service Inc. v. Ontario*, [2007 CanLII 31780](#) (Ont. S.C.), affirmed [2008 ONCA 81](#).

¹⁰ *Ozz Electric Inc. v. Zurich Insurance Company Ltd. et al.*, [2016 ONSC 6331](#).

terms of the Payment Bond”.¹¹ In that case, the subcontractor knew about the L&M Bond and did not allege any breach by the owner. The Court rejected the subcontractor’s assertion the owner was liable for the amount of the L&M Bond without any alleged basis on which the owner could be liable.

10. SAC incorrectly refers to *Ironside v. Smith*¹² for the proposition that a bare trustee is not a fiduciary. Notice was not in issue because the beneficiaries were contracting parties who negotiated the very contract which gave rise to the share sale transaction. The Court was using a remedy based in contract to trace the proceeds of Smith selling the shares for his own profit.

IV. The Alberta *Builders’ Lien Act* is Irrelevant

11. SAC says the Alberta *Builders’ Lien Act* codifies “the obligation of an Owner provide [*sic*] a copy of the payment bond if requested by the claimant”.¹³ This is incorrect. Section 33 of the Alberta *BLA* only obliges the owner to provide a copy of its contract with the general contractor and a statement of accounts. It says nothing about an L&M Bond.¹⁴

V. Equitable Duties and the Trust Instrument are Relevant

12. SAC says Bird must respond to a request from a contingent beneficiary inquiring about the existence of the L&M Bond.¹⁵ This is not found in the wording of the trust instrument. The duty to respond arises from equity.

13. SAC says Bird must exercise reasonable care over the property.¹⁶ This is not found in the wording of trust instrument. The duty to care for the property arises from equity.

14. The trust instrument expressly excludes the equitable trustee duty to take legal action where necessary to advance the trust.¹⁷ But for this express statement, Bird as trustee would have

¹¹ Para. 21 of the Factum of the Intervener.

¹² *Ironside v. Smith*, [1998 ABCA 366](#).

¹³ Para. 29(d) of the Factum of the Intervener.

¹⁴ *Builders’ Lien Act*, [R.S.A. 2000, c. B-7](#), s. 33.

¹⁵ Para. 28 of the Factum of the Intervener.

¹⁶ Para. 29(b) of the Factum of the Intervener.

an equitable duty to take legal action against the surety where necessary to enforce the trust for unpaid sub-subcontractors.¹⁸

15. Equitable duties apply to the trustee unless that duty is expressly modified or excluded by the trust instrument.¹⁹ Here, the equitable duty to take reasonable steps to notify the beneficiaries of the trust is not excluded.

VI. The Duty to Provide Notice is not Onerous

16. According to SAC, imposing an equitable duty on Bird, as trustee, to take reasonable steps to notify beneficiaries would be too onerous as the trustee “would have to search out every possible Claimant to ensure that notice of the Payment Bond was received”.²⁰ Imposing such a duty may “deter”²¹ owners from requiring L&M Bonds and this “would consequently reduce the possible recoveries by unpaid” sub-subcontractors.²²

17. The irony is that in this case leaving sub-subcontractors unaware of the existence of the L&M Bond already reduces their ability to recover. Because Valard was unaware of the L&M Bond, it missed the notice period, and the surety avoided payment.

¹⁷ Trial Exhibit #1, Tab 26 – Copy of L&M Bond at para. 2 states: “Provided 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” [AR pp. 255-56].

¹⁸ See *Halsbury’s Laws of England*, 5th ed., vol. 98 at s. 400 (London: Butterworths, 2013) [Appellant’s Reply Book of Authorities, Tab 3].

¹⁹ Donovan W. M. Waters, Mark R. Gillen, and Lionel D. Smith, eds. *Waters’ Law of Trusts in Canada*, 4th ed. (Toronto: Thompson Carswell, 2012) at 984 [Appellant’s Reply Book of Authorities, Tab 4].

²⁰ Para. 29(a) of the Factum of the Intervener.

²¹ Para. 29(b) of the Factum of the Intervener.

²² Para. 29(b) of the Factum of the Intervener.

18. Fortunately, the onerous notice depicted by SAC is not necessary. Justice Wakeling, in his dissent below, puts to rest any such concern:

Reasonable communication measures are not onerous. 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 has access and required Langford Electric to include in its contract terms with subcontractors a notice term.²³

CONCLUSION

19. Once an express trust is created, trust principles apply.

20. A settlor who wishes to exempt a trustee from certain equitable duties can include an express exemption in the trust instrument. As stated by Justice Wakeling in his dissent below:

If labour and material payment bond trustees are convinced that these obligations are onerous and impractical, they should instruct their lawyers to draft labour and material payment bonds that expressly declare the notice obligation that the trustee bears.²⁴

21. Here, the trust instrument does not do so and there remains an equitable duty to take reasonable steps to notify beneficiaries.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of September, 2017.

**Counsel for the Appellant,
Valard Construction Ltd.**

²³ ABCA Reasons, dissent, at para. 189 [AR p. 60].

²⁴ ABCA Reasons, dissent, at para. 165 [AR p. 53].

TABLE OF AUTHORITIES

Case Authorities	Para.
<i>Base Controls Ltd. v. Bennett + Wright Group Inc.</i> (2002), 20 C.L.R. (3d) 258 (Ont. S.C.) [Appellant’s Reply Book of Authorities, Tab 1], affirmed 2003 CanLII 20385 (Ont. Div. Ct.)	7
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Secondary Sources	
Gillese, Eileen, <i>The Law of Trusts</i> , 3rd ed. (Toronto: Irwin Law Inc., 2014) [Appellant’s Reply Book of Authorities, Tab 2]	4
<i>Halsbury’s Laws of England</i> , 5th ed., vol. 98 (London: Butterworths, 2013) [Appellant’s Reply Book of Authorities, Tab 3]	14
Oosterhoff, A. H. <i>Text, Commentary and Cases on Trusts</i> , 6th ed. (Toronto: Carswell, 2004) [Appellant’s Reply Book of Authorities, Tab 4]	6
Waters, Donovan W. M., Mark R. Gillen, and Lionel D. Smith, eds. <i>Waters’ Law of Trusts in Canada</i> , 4th ed. (Toronto: Thompson Carswell, 2012) [Appellant’s Reply Book of Authorities, Tab 5]	15