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WHITE LAW TWINING UPDATE

Valard Construction Ltd. v. Bird Construction Co., 2018 SCC 8

On February 15th, 2018, the Supreme Court of Canada released its anxiously awaited decision in *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8. The issue before the Court was whether the obligee under a Labour and Material Payment Bond (the "Bond") had an obligation to provide notice of the existence of the Bond to potential beneficiaries of the trust created by the terms of the Bond. Bird was a general contractor for the construction of a project in the oil sands.

By way of background, Bird sub-contracted with Langford and required Langford to obtain the Bond naming Bird as trustee. Valard was a sub-contractor to Langford who was not aware of the existence of the Bond until several months after the deadline for making a claim under the Bond had expired. Significantly, the evidence demonstrated that it was unusual for a Labour and Material Payment Bond to be issued on a privately owned oil sands project.

In its decision, a majority of the Court held that whenever a beneficiary of a trust would be "unreasonably disadvantaged" by not being informed of the trust's existence, the trustee's fiduciary duty includes an obligation to disclose the existence of the trust to potential beneficiaries. The court held that the extent of the trustee's duty must be considered in light of the nature and terms of the trust and the social or business environment in which it operates and in light of the beneficiary's entitlement. Having found that Valard was unreasonably disadvantaged by not being informed of the trust's existence, the Court went on to consider what was required of Bird to discharge its obligation to give notice of the existence of the trust. The standard to be met by the trustee was articulated at paragraph 26 of the majority judgement in the following terms:

"Having found that Bird, as trustee, had a duty to disclose the existence of the trust to its beneficiaries, I must now consider what action on Bird's part would have discharged that duty. Like all duties imposed upon trustees, the standard to be met in respect of this particular duty is not perfection, but rather that of honesty, and reasonable skill and prudence. And the specific demands of that standard, so far as they arise from the duty to disclose the existence of a trust, are informed by the facts and circumstances of which the trustee ought reasonably to have known at the material time. In considering what was required in a given case, therefore, a reviewing court should be careful not to ask, in hindsight, what could have *ideally* been done to inform potential beneficiaries of the trust. Rather, the proper inquiry is into what steps, *in the particular circumstances of the case* – including the trust terms, the identity of the trustee and of the beneficiaries, the size of the class of potential beneficiaries and pertinent industrial practices – an honest and reasonably skillful and prudent trustee would have taken in order to notify potential beneficiaries of the existence of the trust. But, where a trustee can reasonably assume that the beneficiaries knew of the trust's existence, or where practical exigencies would make notification entirely impractical, few, if any, steps may be required by a trustee."

There was evidence that Valard was required to attend daily "toolbox" meetings in a site trailer maintained by Bird at the construction site. The Court found that Bird could have easily satisfied its duty to inform beneficiaries of the trust by posting a notice of the Bond in its site trailer where other notices and directives were posted. By contrast, however, Bird did nothing to give notice of the Bond where the evidence demonstrated that the existence of such a Bond in the industry was unusual.

Key takeaways from the Valard decision for sureties are as follows. The decision considers the trust obligations of an obligee under a Bond to potential claimants under the Bond. What is required of the obligee will be dependent upon the particular circumstances in each case. The duty is not one of perfection but one of honesty, reasonable skill and prudence. From the surety's perspective, the recognition of an obligation on the part of its obligees to take reasonable steps to bring the existence of the trust to the attention of potential beneficiaries who would be "unreasonably disadvantaged not to be informed of trust's existence", may result in sureties receiving claims from claimants who would not otherwise have known of the existence of a Bond.

Should you have any questions or require further information, please do not hesitate to contact us:

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