

TAB 1

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Most Negative Treatment: Distinguished

Most Recent Distinguished: [Chemainus Team Development Training Trust \(Trustee of\), Re](#) | 2004 BCSC 1605, 2004 CarswellBC 2853, 135 A.C.W.S. (3d) 1188, 43 C.C.P.B. 197, 13 E.T.R. (3d) 203, [2004] B.C.J. No. 2519, [2005] B.C.W.L.D. 554, [2005] B.C.W.L.D. 555 | (B.C. S.C., Dec 3, 2004)

1989 CarswellBC 507
British Columbia Supreme Court

Mohr v. C.J.A.

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MOHR (ON BEHALF OF MOHR ON BEHALF OF LOCAL 2213 (MISSION)) et al. v. THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA IN BRITISH COLUMBIA et al.

Coultas J.

Heard: April 27 and 28, 1989
Judgment: November 16, 1989
Docket: Doc. No. Vancouver C862660

Counsel: *Scott Stewart* and *Michael Hoogbruin*, for plaintiffs.

Bruce Laughton and *Joan Gordon*, for defendants Colin Snell, Malcolm Brixham and the British Columbia Provincial Council of Carpenters.

Susan Paish, for defendants Kent Nielsen and John Kettlewell on behalf of the Carpentry Apprenticeship Joint Board and the British Columbia Construction Association.

Subject: Estates and Trusts

Related Abridgment Classifications

Estates and trusts

II Trusts

II.1 General principles

II.1.b Trust distinguished from other relationships

II.1.b.iii Contract

Headnote

Trusts and Trustees --- Trust distinguished from other relationships — Contract

Trusts and trustees — Nature of trust — Trust distinguished from other relationships — Contract — Agreement between employers' association and union creating fund for training in industry — Agreement not creating a trust.

Practice — Summary judgment — Availability of summary judgment — Application of principles — British Columbia Rules of Court, r. 18A.

The plaintiffs were, respectively, a journeyman carpenter and an apprentice carpenter and they claimed to sue as representatives of journeymen and apprentice carpenters in the defendant union. Their claims related to the fund established by a levy payable by employers for the training of apprenticeship and journeyman carpenters (the Apprenticeship Plan). The disbursement of money from the fund was determined by the Board established by the agreement between an employer's association and the council — the governing body of the union.

The plaintiffs claimed that the money had been disbursed from the fund for purposes not provided in the agreement and in an inequitable manner. They sought damages for breach of trust, breach of constructive trust and for inducing breach of trust, an

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accounting, and an injunction restraining the defendants from using the funds for any purpose other than that provided for in the agreement. The defendants sought an order, pursuant to r. 18A of the Rules of Court, that the plaintiffs' claim be dismissed. There were 3 issues: (1) whether it was a proper case for determination under r. 18A; (2) whether the Apprenticeship Plan and the agreement enshrining it were created by collective agreement and, if so, whether any issue concerning rights emanating from the agreement should be governed solely by industrial relations, the Court declining to take jurisdiction; and (3) whether the fund was a trust fund and whether rights and duties associated with the fund arose from contract or trust.

Held:

The plaintiffs' action was dismissed.

(1) The matter raised in the application was suitable for determination under r. 18A.

(2) The Apprenticeship Plan was created by collective bargaining.

(3) The agreement did not, for the reasons that follow, create a trust. Rather, the agreement constituted a contract between the employers and the council of the union to benefit the construction industry generally, not to confer an enforceable benefit on any individual employee or employer.

(i) Although the agreement referred throughout to "trustees" and used the terminology of trust, that was not determinative.

(ii) Representatives of both the union and the employers confirmed that the Plan was not designed or administered to confer an enforceable benefit on any individual worker or employee.

(iii) The agreement gave the right to either party to it to alter its terms or to cancel the Plan without any reference to "beneficiaries" of it.

(iv) There was no provision in the agreement preserving the assets of the fund on termination of the agreement; there was nothing to prevent them from being returned to the employers.

(v) Unlike a pension fund in which an employee can point to a sum of money contributed by him or contributed on his behalf as a condition of employment, there were no specific beneficiaries in this fund. It was, rather, established for an industry-wide program.

(4) The issues raised in the action were governed by the law of industrial actions and the Court declined to take jurisdiction.

Table of Authorities**Cases considered:**

Bethel, Re, [1971] 2 O.R. 316, 17 D.L.R. (3d) 652 (C.A.) — *considered*

Boe v. Alexander (1987), 28 E.T.R. 228, 15 B.C.L.R. (2d) 106, 41 D.L.R. (4th) 520 (C.A.) — *distinguished*

C.A.W., Local 458 v. White Farm Manufacturing Can. Ltd. (1988), 66 O.R. (2d) 535, 30 E.T.R. 202, 24 C.C.E.L. 188, C.E.B. & P.G.R. 8069 (H.C.), additional reasons at (1989), 66 O.R. (2d) 535 at 542, 31 E.T.R. 252 (H.C.) — *referred to*
Greenwood Shopping Plaza Ltd. v. Beattie, [1980] 2 S.C.R. 228, 39 N.S.R. (2d) 119, 71 A.P.R. 119, 10 B.L.R. 234, 111 D.L.R. (3d) 257, [1980] I.L.R. 1-1243, 32 N.R. 163 — *followed*

Hotra v. Hotel, Restaurant Union, Local 40 (16 October 1987), Doc. No. Vancouver C852645 (B.C. S.C.) — *referred to*
Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 C.P.C. (2d) 199, 36 B.C.L.R. (2d) 202 (C.A.) — *followed*

Johnson v. Carpentry Workers' Welfare Plan (Trustees of) (21 January 1988), Doc. No. New Westminster F851900 (B.C. Co. Ct.) — *referred to*

MacDonald v. Thompson (1988), 26 C.C.E.L. 269 (B.C. S.C.) — *referred to*

Marshall v. Health Labour Relations Assn. of B.C. (1988), 31 B.C.L.R. (2d) 359 (C.A.) — *referred to*

Massaro v. Labourers' Pension Plan of B.C. (Trustees of) (15 February 1988), Doc. No. Vancouver A873063 (B.C. S.C.) — *referred to*

Placer Development Ltd. v. Skyline Explorations Ltd. (1985), 67 B.C.L.R. 366 (C.A.) — *referred to*

Schebsman, Re; Ex parte Official Receiver; Trustee v. Cargo Superintendants (London) Ltd. & Schebsman, [1944] Ch. 83, [1943] 2 All E.R. 768 (C.A.) — *referred to*

Sorochan v. Sorochan, [1986] 5 W.W.R. 289, 2 R.F.L. (2d) 225, 46 Alta. L.R. (2d) 97 (S.C.C.) — *referred to*

St. Anne Nackawic Pulp & Paper Co. v. C.P.U., Loc. 219, [1986] 1 S.C.R. 704, 86 C.L.L.C. 14,037, 28 D.L.R. (4th) 1, 73 N.B.R. (2d) 236, 184 A.P.R. 236, 68 N.R. 112 — *followed*

Syndicat Catholique des Employés de Magasins v. Paquet Ltée, [1959] S.C.R. 206, 18 D.L.R. (2d) 346 — *followed*

Tobin Tractor (1957) Ltd. v. Western Surety Co. (1963), 42 W.W.R. 532, 40 D.L.R. (2d) 231 (Sask. Q.B.) — *applied*

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61 The plaintiffs point to these factors, inter alia, which they say must lead me to conclude that the Agreement is a trust document creating an enforceable trust:

62 (1) The Agreement clearly evinces an intention to create a trust property, clearly describes the trust property, and clearly delineates the objects of the trust. (See D.M.W. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 107.)

63 (2) The words "in trust", or "as trustee for", or expressions close to them are found in the Agreement, and they reveal an intention to set up a trust. (See Waters, p. 109.)

64 (3) While this trust is revocable without the consent of the beneficiaries, courts have held this power is not fatal to the concept of trust.

65 The case relied upon is *Wilson v. Darling Island Stevedoring & Lighterage Co.*, [1956] 1 Lloyd's Rep. 346, 95 C.L.R., High Court of Australia. In his reasons, Mr. Justice Fullagar said, at p. 67 [C.L.R.]:

That the common law rule was a rule which could operate unjustly in some circumstances may be conceded, but equity could and did intervene in many cases by treating the promisee as a trustee of a promise made for the benefit of a third party, and allowing the third party to enforce the promise, making the promisee-trustee, if necessary, a defendant in an action against the promisors. A well known example is *Lloyds v. Harper*. It is difficult to understand the reluctance which courts have sometimes shown to infer a trust in such cases. ...

I cannot see why it should be necessary that such a trust should be irrevocable: a revocable trust is always enforceable in equity while it subsists.

The defendant company in the present case does not rely upon any trust. It says that there is a rule of the common law which entitles it to rely on the exceptions from liability contained in the bill of lading.

66 That statement of law concerning a revocable trust being enforceable is obiter.

67 (4) It is not necessary that beneficiaries be "identified" at any particular time. It is sufficient to show that one is an object of the trust (*Re Bethel*, [1971] 2 O.R. 316, 17 D.L.R. (3d) 652 (C.A.)).

68 In *Bethel*, a testator left a sum of money to the executive officers of the T. Eaton Company to be used as a trust fund for "any needy or deserving" Toronto members of the Eaton Quarter Century Club. This club had no separate identity. Employees became members after 25 years of service with the company, and employees who were members had been transferred throughout Canada by the company. The trial Judge found the trust void for uncertainty. On appeal, the majority of the Court found a clear charitable intention. The Court prevented a gift failing for uncertainty by application of cy-pres.

69 (5) At any given time, individual apprentices and journeymen can be identified and each have an entitlement to training and upgrading programs pursuant to the Agreement, and therefore it creates a trust for their benefit.

70 (6) There are numerous examples of trust created in the business world. Examples are:

71 (a) Pension plans

72 At p. 439 of his *Law in Trusts in Canada*, 2d ed., Professor Waters writes of pension plans:

A major concern to nearly all persons, whether employed by another or self-employed, is adequate provision for the period of retirement. Pension plans set up by employers, usually on the basis of a contribution both by the employer and the employee, have for many years been conducted through insurance companies. This still continues, whether the plan takes the form of individual employee annuity contracts, group annuity contracts, or deposit administration, but another and increasingly favoured pension arrangement is the trusteed pension plan.

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To establish the existence of a trust in this case the plaintiff must prove affirmatively that the contractor and the municipality intended to create a trust for the benefit of persons, such as the plaintiff, who would come within the ambit of said par. 14. See *Vandepitte* case, *supra*, at p. 579.

Again, could the said contract be altered or terminated without the plaintiff's consent? *Cheshire & Fifoot's Law of Contract*, 5th ed., at p. 375, deals with 'the fundamental inconsistency between the concept of Trust and the concept of Contract' as follows:

A trust, once it is constituted is irrevocable without the beneficiary's consent; a contract may be altered or discharged by the agreement of the contracting parties irrespective of the wishes of the beneficiary.

83 Judge Disbery concluded, at p. 543:

I can find nothing to indicate that either the contractor or municipality ever intended to create a trust for the use of the plaintiff or anybody else. The power given in the contract to the municipality to unilaterally cancel the contract, whether the contractor was in default or not, is completely repugnant to the concept of trust.

84 In his *Law of Trusts* to which I have referred, Professor Waters comments upon this statement of Judge Disbery [W.W.R., at 540]:

The interpretation of either facts or documents must not be warped, distorted or given undue emphasis in order to find the existence of a constructive trust,

and says of it [p. 51, n. 93]:

By this term (Judge Disbery) means a trust arising out of the construction of the language of the instrument.

85 Professor Waters [pp. 52-53] wrote of the "dividing line" referred to by Lord Green in *Re Schebsman; Ex parte Official Receiver, Trustee v. Cargo Superintendents (London) Ltd. & Schebsman*, [1944] Ch. 83, [1943] 2 All E.R. 768 (C.A.):

Here is the heart of the matter; a 'dividing line' is drawn between trust and such a contract. Unhappily, however, enquiry by the courts into the location of this line has proceeded along the lines that it lies between contract and trusts of express or construed intent only. That is to say, the courts are concerned to discover whether the parties to the contract intended, as revealed by the language of the contract, that the promisee became a trustee of the benefit for the contract for the third party.

If this is the extent of the inquiry, the line is not hard to find, at least in law if not on the facts of a particular case. The point has been made that, if A and B can vary their contract without the consent of C, then there is clearly no intention to create a trust. And this was echoed by Disbery J. in the *Tobin Tractor* decision, when he quoted Cheshire and *Fifoot's Law of Contract*:

A trust, once it is constituted, is irrevocable without the beneficiary's consent; a contract may be altered or discharged by the agreement of the contracting parties irrespective of the wishes of the beneficiary.

This is a distinction of crucial significance and it arises from the fact that contract is obligation, while trust is transfer. The terms of a contract are binding on the parties to it, and cannot be unilaterally varied, but the parties may agree at any time to vary those terms, even after the contract has taken effect. He who is not a party to that contract, even if he is to be the beneficiary of the promisee's performance, cannot object. Once the trust instrument or declaration of trust has taken effect, and the property is vested in the trustee, however, alienation on the terms of that trust has taken place. Therefore no variation can be made by the settlor, or the settlor and the trustee, without the consent of the beneficiary, who now has the right of enjoyment in the trust property. If the contract also creates a trust of the benefit of that contract, the terms will show that no subsequent variation may be made without the beneficiary's consent. Few contracts demonstrate such

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an intention, and therefore it is only the occasional contract which through the medium of trust affords the third party a right of action against the promisee.

Disbery J. makes the point in his citation of Cheshire and Fifoot that there is a difference between trust and contract because trusts are irrevocable. However, it has been said that [in *Wilson v. Darling Island Stevedoring & Lighterage Co.*, supra] as the revocable trust is enforceable by the beneficiary if there has been no exercise of a power of revocation reserved by the settlor, in effect the beneficiary has a right of action despite the fact that the settlor can cancel the transfer at any time and at will. This is correct, but such a power must appear in the trust instrument or the evidence of declaration of trust. If it does not, the settlor cannot later revoke or amend the trust terms in any way, either unilaterally or by some purported agreement with, or consent of, the trustee. Though the revocable trust is even closer in result to that of the contract than is the irrevocable trust, it does not meet the point that without reservation in the trust instrument or declaration there can later be no variation of a trust.

86 (iii) There is no provision in the Agreement preserving the Fund on termination of the Agreement. The Agreement speaks of the Fund being disbursed through a liquidation trust proviso in keeping with the "current *Trust Act*" of British Columbia. No proviso has been produced and there is no evidence that one was ever prepared, agreed to or entered into. The *Trustee Act* of British Columbia [R.S.B.C. 1979, c. 414] does not assist, for it does not provide for disbursement of funds held in trust upon liquidation of that trust.

87 In the circumstances of this case, there is nothing in the Agreement to prevent the balance of monies in the Fund being returned to the contributing employers, and this is inconsistent with the concept of trust.

88 (iv) The Fund is not akin to a pension fund to which a specific beneficiary can point to his contribution or a right to an individual benefit. The Fund was established to benefit the construction industry generally by developing a well trained workforce, not to confer an enforceable benefit on any individual worker or employer.

89 (See Nielsen affidavit sworn February 3, 1989, para. 21 and Snell affidavit sworn February 3, 1989, para. 5).

90 (v) The Union is not a trust or analogous to a trust. If it were, trust law would govern every aspect of its business, including the administration of a collective agreement. To the extent that the Union is a fiduciary to its members, it is governed not by the law of trusts, but by the rules of the labour statute, and its own constitution and bylaws. (See *Hotra v. Hotel, Restaurant Union, Local 40* (16 October 1987), Doc. No. Vancouver C852645 (B.C. S.C.), a decision of Mr. Justice Gibbs; see also *Industrial Relations Act*, R.S.B.C. 1979, c. 212, s. 7.)

91 (vi) This is not a proper case to find a constructive trust. It is not alleged in the pleadings nor is there any suggestion in the pleadings that any defendant has been unjustly enriched. Unjust enrichment lies at the heart of constructive trust. (See *Sorochan v. Sorochan*, [1986] 5 W.W.R. 289, 2 R.F.L. (2d) 225, 46 Alta. L.R. (2d) 97 (S.C.C.).)

92 (vii) A terminology of "trust" in the Agreement does not make it a trust. (See *Hotra*, at p. 2; see also *Waters' Law of Trusts in Canada*, at p. 109.)

93 At p. 109, Professor Waters writes:

The words employed to set up a trust, therefore, must show that the transferee is to take the property not beneficially, but for objects which the transferor describes. The words which nearly always reveal the intention are 'in trust', or 'as trustee for', but it is well established in common law courts, including those of Canada, that these words are neither conclusive nor indispensable.

94 I find that the Agreement does not create a trust — it is not a trust document. It is a contract entered into between employers and the Council to benefit the construction industry generally, not to confer an enforceable benefit on any individual employee or employer.

95 I so find for these reasons:

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96 (1) The representatives of both the Union and employers, Snell and Nielsen, for many years associated with the Apprenticeship Plan and both members of the committee that negotiated the 1979 Agreement, both confirm that the Plan was not designed or administered to confer an enforceable benefit on any individual worker or employee.

97 (2) The parties to the Agreement could alter its terms without reference to the "cestui que trusts". The Court in *Greenwood* spoke of the power to so alter terms as a determinating factor in an inquiry to find whether a trust has or has not been created.

98 (3) The Agreement gives the right to either contracting party to cancel the Plan, without any reference to the beneficiaries.

99 It is true that in *Tobin*, supra, and *Greenwood*, the Court was considering a constructive, not an express trust. Counsel for the plaintiffs submits that these cases have no application, for we are dealing with an express trust. I cannot agree. The issue that I must resolve is — did the Agreement create a trust? The onus of proving it rests on the plaintiffs. The factors that the Courts in *Tobin* and *Greenwood* considered to determine if a trust did or did not exist are relevant to this inquiry.

100 (4) There is no provision in the Agreement preserving the monies in the Fund on termination of the Agreement — nothing to prevent them from being returned to the employers. In his affidavit sworn February 20, 1989, the plaintiff Steven Mohr deposes that the Fund received monies from the federal government for the purposes of training apprentices and upgrading journeymen. There is nothing in evidence to suggest that those monies so advanced could not be repaid to the government.

101 Mr. Mohr further deposes (in para. 32) that the Apprenticeship Trust Agreement and the Apprenticeship Joint Board have been terminated. He speaks of a Carpenters Joint Advisory Committee having been established in its place, but with terms of reference "yet to be determined".

102 (5) Unlike a pension fund to which an employee can point to a sum of money contributed by him or contributed on his behalf as a condition of employment, there are no specific beneficiaries to this Fund. It was established for an industry-wide program.

103 (6) While the Agreement throughout refers to "trustees" and uses the terminology "trust", that is not determinative.

104 (7) In the *Greenwood* and *Tobin* cases, the issue of trust was before the Court; in *Wilson v. Darling Island Stevedoring*, supra, it was not, and the remarks of Fullagar J., to which I have referred, were pure obiter.

105 (8) In *Boe v. Alexander*, supra, it was not disputed that a trust had been created. This is not surprising when one considers the Agreement under consideration in that case. In its preamble, it read:

And whereas to affect the aforesaid purpose, the parties desire to create a trust and establish a fund to be used in the manner hereinafter set forth.

106 In the case at Bar, the parties wished to administer a fund.

107 The jurisdictional issue was not raised in the *Boe* case, nor in other cases referred to by the plaintiffs, nor was existence of a trust, an issue in them. (See: *Massaro v. Labourers' Pension Plan of B.C. (Trustees of)* (15 February 1988), Doc. No. Vancouver A873063, per Macdonald J. (B.C. S.C.); *MacDonald v. Thompson* (1988), 26 C.C.E.L. 269 (B.C. S.C.); *Johnson v. Carpentry Workers' Welfare Plan (Trustees of)* (21 January 1988), Doc. No. New Westminster F851900, per Hogarth Co. Ct. J.) (B.C. Co. Ct.).

108 In *C.A.W., Local 458 v. White Farm Manufacturing Can. Ltd.* (1988), 66 O.R. (2d) 535, 30 E.T.R. 202, 24 C.C.E.L. 188, C.E.B. & P.G.R. 8069 (H.C.), additional reasons at (1989), 66 O.R. (2d) 535 at 542, 31 E.T.R. 252 (H.C.), no jurisdictional issue was raised, although existence of a trust was disputed by the parties and found to exist by the Court.

The Results That Flow from My Finding on the Second Issue