

Clerk's Stamp:

COURT FILE NUMBER: 2401-02680  
COURT: COURT OF KING'S BENCH OF ALBERTA  
JUDICIAL CENTRE: CALGARY



APPLICANTS: IN THE MATTER OF *THE COMPANIES' CREDITORS' ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED  
**(Respondents on Application)**

AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.

**DOCUMENT: SUPPLEMENTAL AUTHORITIES OF ALBERTA PETROLEUM MARKETING COMMISSION**

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**SUPPLEMENTAL AUTHORITIES OF ALBERTA PETROLEUM MARKETING COMMISSION**

**For the Application scheduled for April 10, 2024 at 10:00 am**

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### **Table of Authorities**

1. *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224
2. *Trident Holdings Ltd. v. Danand Investments Ltd. et al.*, [1988] O.J. No. 355, 64 O.R. (2d) 65



**SUPREME COURT OF CANADA**

**CITATION:** Valard Construction Ltd. v. Bird  
Construction Co., 2018 SCC 8, [2018] 1 S.C.R. 224

**APPEAL HEARD:** November 7, 2017  
**JUDGMENT RENDERED:** February 15, 2018  
**DOCKET:** 37272

**BETWEEN:**

**Valard Construction Ltd.**  
Appellant

and

**Bird Construction Company**  
Respondent

- and -

**Surety Association of Canada**  
Intervener

**CORAM:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and  
Rowe JJ.

**REASONS FOR JUDGMENT:** Brown J. (McLachlin C.J. and Abella, Moldaver and Rowe  
(paras. 1 to 32) JJ. concurring)

**REASONS CONCURRING IN THE** Côté J.  
**RESULT:**  
(paras. 33 to 41)

**DISSENTING REASONS:** Karakatsanis J.  
(paras. 42 to 72)

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Valard Construction Ltd. v. Bird Construction Co., 2018 SCC 8, [2018] 1 S.C.R. 224

**Valard Construction Ltd.**

*Appellant*

v.

**Bird Construction Company**

*Respondent*

and

**Surety Association of Canada**

*Intervener*

**Indexed as: Valard Construction Ltd. v. Bird Construction Co.**

**2018 SCC 8**

File No.: 37272.

2017: November 7; 2018: February 15.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

*Trusts — Fiduciary duty — Bonds — Whether trustee of trust contained in*

*Marla Construction Co.*, and on *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.* (which relied on *Dominion Bridge*), as somehow establishing the “understanding and practice in the construction industry in Canada”,<sup>26</sup> I say respectfully that these case authorities from a single province neither displace the uncontradicted evidence of Mr. Wemyss nor support my colleague’s broad factual claims.

[24] Additionally, I do not agree with Bird that the existence of s. 33 of Alberta’s *Builders’ Lien Act* eliminates the unreasonable disadvantage that arises from beneficiaries being uninformed about the trust. Section 33 provides that a lienholder, being any individual who has provided work or materials on a project, may at any reasonable time request a copy of a contract between an owner and a contractor or a contractor and subcontractor. While a trustee’s duties may be abridged or modified by statute,<sup>27</sup> nothing in s. 33 indicates that Alberta’s Legislature intended to do so here. The ability of a lienholder to request a copy of a contract between two parties on any project, including those projects which do not involve labour and material payment bonds, is hardly tantamount to a statement that a trustee is absolved of its fiduciary duty to disclose the existence of a trust contained within the bond.

[25] I would also reject Bird’s suggestion that it was merely a “bare trustee” and that, as such, it had no obligation to disclose the existence of the trust until expressly

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<sup>26</sup> Reasons of Justice Karakatsanis, at para. 64.

<sup>27</sup> *Waters’ Law of Trusts*, at p. 912.

requested to do so.<sup>28</sup> At law, a bare trust arises where the trustee holds property “without any duty to perform except to convey it to the beneficiary or beneficiaries upon demand”.<sup>29</sup> This definition assumes, *inter alia*, “that the beneficiary or beneficiaries are able to call for the property on demand”.<sup>30</sup> In my view, a finding that a beneficiary is able to call for the trust property on demand assumes that the beneficiary *knows* of the trust’s existence. As Valard had no such knowledge until the notice period had expired, it is obvious that Valard was unable to call for the trust property at the material time. This trust was not, therefore, a bare trust.

#### B. *The Content of the Duty Generally, and in the Circumstances of This Appeal*

[26] 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.<sup>31</sup> 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.<sup>32</sup> In considering what was required in a given case, therefore, a reviewing court should be careful not to ask, in hindsight, what could *ideally* have been done to inform

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<sup>28</sup> *Ironside v. Smith*, 1998 ABCA 366, 223 A.R. 379, at para. 71.

<sup>29</sup> *Waters’ Law of Trusts*, at p. 33.

<sup>30</sup> *Ibid.*, at p. 34.

<sup>31</sup> *Ibid.*, at p. 906; see also *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315; *Beaudette Estate*, at para. 26; *Oosterhoff on Trusts*, at p. 1058.

<sup>32</sup> *Fales*, at p. 317; *Underhill and Hayton*, at para. 48.1.

Trident Holdings Ltd. v. Danand Investments Ltd. et al.

Indexed as: Trident Holdings Ltd. v. Danand Investments Ltd.  
(Ont. C.A.)

64 O.R. (2d) 65  
[1988] O.J. No. 355

ONTARIO

Court of Appeal

Howland C.J.O., Morden and Tarnopolsky JJ.A.

April 8, 1988.

Agency -- Personal liability of agent -- Court holding principals liable for damages for breach of contract but ordering judgment enforceable against interest of agent in lands -- Not granting judgment for damages against agent -- Order directing enforcement against agent in error.

Contracts -- Formation -- Certainty -- Proposal for provision of electrical equipment stating it embodied complete terms of contract -- Defendant intending that contract on standard form be used -- Proposal was complete contract.

Contracts -- Damages -- Certainty -- Owner's engineer billing supplier for design changes pursuant to alternative under contract -- Amount does not reduce damages for owner's breach.

Contracts -- Performance and breach -- Conditions -- Contract for provision of electrical equipment providing for alternative price subject to approvals -- Alternative was not condition precedent but option if further agreement reached -- Further agreement not concluded.

Trusts and trustees -- Construction of trust instrument -- Beneficiaries -- Liability -- Contracts -- Trustee holding

the circumstances in which beneficiaries may be liable, Mr. Flannigan and Mr. Cullity do agree that if the trustee is a bare trustee the beneficiaries may be liable on contracts made by the trustee. On this point I quote the following from Mr. Cullity's article in 7 E. & T.Q. 35 at p. 36:

It is quite clear that in many situations trustees will also be agents. This occurs, for example, in the familiar case of investments held by an investment dealer as nominee or in the case of land held by a nominee corporation. In such cases, the trust relationship that arises by virtue of the separation of legal and equitable ownership is often described as a bare trust and for tax and some other purposes it is quite understandably ignored.

The distinguishing characteristic of the bare trust is that the trustee has no independent powers, discretions or responsibilities. His only responsibility is to carry out the instructions of his principals -- the beneficiaries. If he does not have to accept instructions, if he has any significant independent powers or responsibilities, he is not a bare trustee ...

The underlying reason why a trustee, who is acting as a trustee in the circumstances, cannot subject the beneficiaries to liability is indicated in the passages I have quoted. The trustee is not acting under a duty of obedience to the beneficiaries but, rather, under a duty to carry out the terms of the trust. Professor Waters has succinctly put the matter this way: "It is because common law trustees [he is comparing the trust with certain civil law institutions] contract in furtherance of their 'ownership' rights to manage and dispose, that the third party can only look to the trustees for damage for breach of such a contract ...": *Laws of Trusts in Canada*, 2nd ed. (1984), p. 1107.

Before returning to the law, I shall deal with the relevant facts. The land involved in this action is registered in the name of Danand Investments Limited, Trustee. The trust terms in question were established by an agreement dated February 5, 1982, between the six beneficiaries and Danand. The recitals in