

CANADA / JUDGMENT

Aldercrest Developments Ltd. v. Hamilton Co-Axial Ltd.

[1974] SCR 793

COURT

Supreme Court of Canada

DECIDED

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Aldercrest Developments Ltd. v. Hamilton Co-Axial Ltd.

Collection

Supreme Court Judgments

Date

1973-05-07

Report

[1974] SCR 793

Judges

Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Laskin, Bora

On appeal from

Ontario

Subjects

Bills of exchange

Decision Content

Supreme Court of Canada

Aldercrest Developments Ltd. v. Hamilton Co-Axial Ltd., [1974] S.C.R. 793

Date: 1973-05-07

Aldercrest Developments Limited and Charles A. Cecil, Official Receiver, Bankruptcy District Number 7, acting Trustee in Bankruptcy of Hudson R. Elmore (Plaintiffs) Appellants;

and

Hamilton Co-Axial (1958) Limited (Defendant) Respondent.

1972: October 5, 6; 1973: May 7.

Present: Judson, Ritchie, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negotiable Instruments—Demand note—Transfer unendorsed—Equitable assignment—Lack of notice to debtor—Bills of Exchange Act, R.S.C. 1952, c. 15, ss. 2(1), 61, 74.

On February 1, 1961, Elmore then President and sole beneficial shareholder of the respondent Hamilton Co-Axial (1958) Limited and Alderson the President and sole beneficial shareholder of the appellant Aldercrest entered into negotiations to raise money for their respective companies. Aldercrest agreed to convey to Elmore certain lands, agreements of purchase and sale, and mortgages for \$100,000, this indebtedness to be secured by the assignment of a promissory note to mature on February 15, 1962. The note given was in form a demand note by the respondent, dated February 15, 1961, payable to Elmore and it was delivered by Aldercrest unendorsed. No notice of the delivery was given to the respondent. There was no reference in the books of the respondent to the existence of the note. Elmore ceased to be a director of the respondent in November 1963 and defaulted in his agreement with the appellant. Subsequently he filed in bankruptcy. In January 1967 the appellant took action against the respondent on the note. The trial judge dismissed the action and an appeal was likewise dismissed.

Held: The appeal should be dismissed.

Per Judson, Ritchie, Spence and Pigeon JJ.: The evidence relied on indicated that Aldercrest though in possession of the note at no time became holder of it. The note was not a note payable to bearer but a bill payable to order and could only be negotiated by endorsement completed by delivery. The case involved an action by an equitable assignee against one allegedly indebted to the assignor where, before notice of the existence of the debt was given to the debtor, the assignor, in terms sufficiently general to include the note in question, released the debt.

Per Laskin J.: The appellant never became a holder of the note, not being either the payee or the endorsee. The appeal can be disposed of on the single issue whether the payee (Elmore) could have sued on the note. There is the finding of fact that there was no consideration for the note as between the payee (Elmore) and the respondent company. This is a defence open to the respondent against the appellant.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Thompson J. Appeal dismissed.

W.B. Williston, Q.C., and J.F. Evans, for the plaintiffs, appellants.

C.F. Tallis, Q.C., for the defendant, respondent.

The judgment of Judson, Ritchie, Spence and Pigeon JJ. was delivered by

JUDSON J.—The main issue in this litigation is the nature of the rights of a transferee of a promissory note payable to order who holds the note unendorsed. The particular note is dated February 15, 1961, made by Hamilton Co-Axial (1958) Limited in favour of its President, Hudson Elmore, and payable on demand in the sum of \$160,000. The plaintiff in the action and the appellant in this Court is Aldercrest Developments Limited, which holds this note unendorsed.

Aldercrest was a company engaged in the construction of single family dwellings. Hamilton Co-Axial was in the business of supplying cable television. The payee of the note, Hudson Elmore, was the President and sole beneficial shareholder of the company and had complete control over its management and affairs. The company was financed primarily by loans from its President, and on August 31, 1960, the company's statement showed an indebtedness to him of \$289,444.97.

Late in 1960, Elmore and one Alderson, the President and beneficial owner of all the shares of Aldercrest, entered into negotiations with a view to raising money for their respective companies. By agreement dated February 1, 1961, Aldercrest agreed to convey to Elmore certain lands, agreements of purchase and sale, and mortgages, for a consideration of \$100,000. The agreement provided that the indebtedness of Elmore to Aldercrest would be secured by the assignment of a promissory note, maturing on February 15, 1962, made by Hamilton Co-Axial in favour of Elmore in the sum of \$160,000. This note was subject to a prior claim in the sum of \$60,000 in favour of Hamilton Co-Axial's bank. This left available security on this note in the sum of \$100,000. Elmore mortgaged for \$160,000 the properties that had been transferred to him by Aldercrest. The agreement provided that as Elmore reduced his indebtedness to British Mortgage and Trust Company, the lands would be reconveyed to Aldercrest. By April of 1963, Elmore had reduced his indebtedness to Aldercrest to \$40,000. For a consideration of \$2,400, he secured a year's extension for the payment of this sum. However, he failed to pay at the due date. Aldercrest obtained judgment against him on June 19, 1964, for \$42,400 and costs. British Mortgage and Trust Company foreclosed its mortgage, and on October 7, 1964, a receiving order was made against Elmore.

The business reason for these complicated dealings between Elmore and Aldercrest is very difficult to understand. The trial judge made a clear finding that Aldercrest was dealing with Elmore in his personal capacity and not with him as an agent or officer of Hamilton Co-Axial. He was unable to find any proof that the money received by Elmore from the British Mortgage and Trust Company ever reached Hamilton Co-Axial. There does appear to be one certainty in this case and the trial judge so found that the promissory note was transferred by Elmore to Aldercrest as collateral security only for the payment of \$100,000, namely, the indebtedness created by the agreement dated February 1, 1961. This was the same indebtedness on which Elmore was sued and which is the subject-matter of the judgment for \$42,400 which resulted in Elmore's bankruptcy. If there is any claim on the note at all, this figure must be its limit.

On the record before us a number of questions arise for which no satisfactory answer is to be found:

- (a) Why was this note a demand note and not one payable February 15, 1962, as required by the agreement?
- (b) Why was the note unendorsed when it was delivered by Elmore to the solicitor who was acting for both parties when the agreement of February 1, 1961, was settled? The trial judge found that this was no mere mistake or oversight on Elmore's part.
- (c) Why did the joint solicitor or Alderson on behalf of Aldercrest make no effort at any time to secure Elmore's endorsement of this note?
- (d) Why was there no reference in the books of Hamilton Co-Axial to the existence of this note, either in the books of account or the proceedings of the directors?
- (e) Where was the original of the directors' resolution which purported to authorize the issue of this note? An attempt was made to prove the original by the use of a photostatic copy. The trial judge found as follows: "I am driven to the conclusion that this document is not genuine and that it in some way is simulated." (f) Why did Alderson, when proving Aldercrest's claim in bankruptcy against Elmore's estate, deny that any security was held for the indebtedness?

It appears, therefore, that both Elmore and Aldercrest deliberately concealed the existence of this note. The importance of this is that early in 1963, Elmore entered into negotiations with Famous Players Corporation to sell his shares in Hamilton Co-Axial. This proposed purchaser made a most careful examination of the company's books and found no evidence that this note had ever been issued or authorized.

On January 17, 1963, Elmore gave to Co-Axial a release in terms which were clearly sufficient to include any claim under this note. The release was required by the purchaser of Elmore's shares. Two months later, this purchaser was informed of the existence of the note, that it was in the hands of Aldercrest, and that payment was being demanded.

Section 61(1) of the Bills of Exchange Act provides as follows:

61. (1) Where the holder of a bill payable to his order transfers it for value without endorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the endorsement of the transferor.

My opinion is that Aldercrest was never the holder of this bill. "Holder" means "the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof." This was not a note payable to bearer but a bill payable to order and it could only be negotiated by endorsement of the holder (Elmore) completed by delivery.

Until the endorsement takes place, the position of the transferee, in this case Aldercrest, is no better than that of the assignee of an ordinary chose in action. This was the opinion of the trial judge and the Court of Appeal in this case. It was also the opinion of the unanimous Ontario Court of Appeal in *Morgan v. Bank of Toronto*[2]. It is also the law of England—see: 3 Hals., 3rd ed., p. 182:

In such a case the date when the instrument is indorsed is deemed to be the true date of negotiation; and until the indorsement takes place the position of the transferee is no better than that of the assignee of an ordinary chose in action.

In the United States, s. 49 of the Uniform Negotiable Instruments Law, reads as follows:

Section 49. - Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

The comment of Williston on Contracts, 3d. ed., vol. 10, para. 1142A, is as follows:

The effect of this section is to give the transferee the rights of an assignee of a tangible non-negotiable chose in action who has power to sue in his own name. But he is not a holder in due course.

Only two cases are out of line with these principles. The first is *Hood v. Stewart*[3], where it was held that the transferee had a good title to the bill without endorsement and might recover from the acceptor although he could not have done so at common law. *Banque Mercantile du Canada v. Edmond*[4], is to the same effect. These are anomalous decisions. *Hood v. Stewart* was distinguished, and disapproved, by Cave J. in the Queen's Bench Division in *Good v. Walker*[5], and is not mentioned in any of the three editions of Halsbury. The present action was commenced with Aldercrest Developments Limited as sole plaintiff against Hamilton Co-Axial. Before the case came to trial, the trustee in bankruptcy of Elmore was added as a party plaintiff. With the addition of this party, there appears to be no doubt that the action was properly constituted and there is no need to consider the technicalities of an action in the sole name of a transferee without endorsement. There is authority in Ontario for saying that such a transferee, as an equitable assignee, may sue in his own name under the Ontario Rules of Practice. This problem does not arise here.

Reduced to its simplicities then, this case is an action by an equitable assignee against one who was indebted to his assignor. Before any notice of the existence of the debt could be attributed to the company, the assignor (Elmore) released the debt. This is good against the assignee; 4 Hals. (3rd) 499; *Stocks v. Dobson*[6].

Elmore was acting throughout in his personal capacity and not as an agent or officer of the company. Indeed, he was deliberately concealing the existence of this note from anybody who might make enquiries of the company. In my opinion, notice of the existence of this document did not come to the attention of the company until two months after the release, when the solicitor for Aldercrest wrote to inform the new purchaser of the existence of the note in the hands of Aldercrest.

I agree with the judgments at trial and the Court of Appeal and I would dismiss this appeal with costs.

LASKIN J.—This appeal is concerned with the liability of the respondent company on a promissory note made by it in favour of its president and sole beneficial shareholder, one Elmore, and by him transferred unendorsed but for value to the appellant company. The note, payable on demand and dated February 15, 1961, was given allegedly to secure an indebtedness to Elmore by his company; and, in turn, it was transferred to secure an indebtedness by Elmore to the appellant as a result of an agreement between them for the sale to Elmore of certain lands.

At the time the note was transferred unendorsed to the appellant, the latter received through its president copies of the respondent's financial statements showing an indebtedness to Elmore and what purported to be a certified copy of a resolution of the respondent's board of directors authorizing the note to Elmore. There was, however, no record of the note in the books of the respondent.

In January, 1963, the respondent was in negotiations with Famous Players Canadian Corporation Ltd. for a loan, and to facilitate the negotiations Elmore, on January 17, 1963, by deed released the respondent from all claims and demands in his favour. It is common ground that the release was broad enough to cover the respondent's liability on its promissory note to Elmore which was then in the appellant's hands. Control of the respondent passed thereafter to Famous Players and Elmore ceased to be a director of the respondent in November, 1963.

Elmore fell into default under his agreement with the appellant and an extension of time was agreed to on April 5, 1963. On September 6, 1963 the appellant sought payment of the note by the respondent but liability was denied. In the meantime the appellant had brought suit against Elmore for \$42,400, the remaining amount of his indebtedness, and obtained judgment for this sum on June 19, 1964. A few months later a receiving order was made against Elmore and the appellant filed a proof of claim in the bankruptcy in the amount of its judgment but did not claim to be a secured creditor. In March of 1966 the appellant again demanded payment of the note by the respondent and finally brought action on January 6, 1967. At the opening of the trial, Elmore's acting trustee in bankruptcy was added as a co-plaintiff.

Although some of the occurrences in the course of events that led to this litigation are susceptible of conflicting explanations of either innocent oversight or fraudulent dealing, the centre piece of the legal issue is s. 61(1) of the Bills of Exchange Act, R.S.C. 1952, c. 15, which reads as follows:

61 (1) Where the holder of a bill payable to his order transfers it for value without endorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the endorsement of the transferor.

Clearly, the appellant never became a holder of the note, not being either the payee or the endorsee. The question that arises, in the circumstances of the present case, is what was the title that the appellant obtained at the time that Elmore transferred the note to it for value but without endorsement. Any procedural defect in the right to sue can be taken as cured by the adding of Elmore's acting trustee in bankruptcy as co-plaintiff.

In my opinion, this appeal can be disposed of on the single issue whether Elmore himself could have successfully sued the respondent on the note. There is the finding of fact by the trial judge that there was no consideration for the note as between Elmore and the respondent company. This is a defence open to the latter against the appellant. I agree, therefore, with the conclusion of my brother Judson that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Evans, Philp, Gordon, Leggat & Evans, Hamilton.

Solicitors for the defendant, respondent: Robertson, Lane, Perrett, Frankish & Estey, Toronto.

[1] [1970] 3 O.R. 529.

[2] (1917), 39 O.L.R. 281.

[3] (1890), 17 S.C. (4th ser.) 749.

[4] [1964] Que. S.C. 591.

[5] (1892), 61. L.J.Q.B. 736.

[6] (1853), 4 DeG. M. & G. 11.

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