

CANADA / JUDGMENT

## Frankel Structural Steel v. Goden Holdings

[1971] SCR 250

### COURT

Supreme Court of Canada

### DECIDED

1 February 1971

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Frankel Structural Steel v. Goden Holdings

Collection

Supreme Court Judgments

Date

1971-02-01

Report

[1971] SCR 250

Judges

Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Hall, Emmett Matthew; Spence, Wishart Flett

On appeal from

Ontario

Subjects

Contract

Decision Content

Supreme Court of Canada

Frankel Structural Steel v. Goden Holdings, [1971] S.C.R. 250

Date: 1971-02-01

Frankel Structural Steel Limited (Plaintiff) Appellant;

and

Goden Holdings Limited, Hyacinthine Properties Limited and Gotfrid & Dennis (Defendants)  
Respondents.

1970: May 27, 28; 1971: February 1.

Present: Martland, Judson, Ritchie, Hall and Spence JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contracts—Direction to mortgagee and its solicitors to pay mortgage advances to supplier of structural steel for building—Mortgagee managed and controlled by solicitors' firm—Member of firm assuring supplier that payment would be made front advances—Advances made direct to mortgagor in-stead—Contract between supplier and mortgagee—Liability of solicitors.

H, a company incorporated to erect an apartment building, asked F to supply \$69,000 worth of structural steel. G, an investment company, arranged with H for the interim financing of the building through a one-year mortgage of \$300,000. H directed G and the latter's solicitors to pay "all advances to be made 30 days after delivery of all the steel contracted for". The solicitors sent a copy of the direction to F and retained the original. F was dissatisfied with the form of the direction and telephoned one B, a member of the solicitors' firm, who had charge of the transaction and who agreed that F's account would be paid out of the advances made as the work progressed.

F supplied the steel to the value of \$71,910. The \$2,910 was an addition to the original contract for \$69,000 and was not covered by the assurance given by B. One payment of \$20,700 was made, leaving a balance owing of \$51,210. F made repeated requests and was told that the account would be paid pursuant to the direction. In spite of this, advances were made by B. direct to H in excess of the sum of \$51,210 after all the steel was supplied and during the period that F was being told that it would be paid. F sued G, H and G's solicitors to recover the balance owing for the steel delivered to H. At trial F obtained judgment against both G and its solicitors for \$51,210. On appeal, the judgment against G was affirmed to the extent of \$48,300. The judgment against the solicitors was reversed. F appealed from this reversal.

Held: The appeal should be allowed and the judgment at trial restored to the extent of \$48,300.

The Court agreed with the Court of Appeal that there was a contract between F and G, but it did not accept the conclusion that F dealt with B not as representing the solicitors personally but as representing them as solicitors for G. The solicitors were G to the extent that they were the only shareholders and officers of the company and had the management and control thereof. G had no independent volition.

F asked for and received the personal assurance of B that he would see to it that the client paid. He had full control over the disbursements made by the client. For some reason these disbursements were made on the decision of the firm through B in disregard of the undertaking. This involved liability on the firm of solicitors.

The argument that the direction constituted an equitable assignment binding upon G and the solicitors was not accepted. The unadvanced moneys under the mortgage did not constitute a fund which H could assign. Under the terms of the mortgage, it was for G, acting through its solicitors, to determine when it would make the advances under the mortgage.

APPEAL by the plaintiff from a judgment of the Court of Appeal for Ontario[1], allowing in part the appeal of the defendants Goden Holdings Limited and Gotfrid & Dennis from a judgment of Moorhouse J. Appeal allowed and judgment at trial restored, save as to the amount of damages.

R.F. Wilson, Q.C., and R.A. Smith, Q.C., for the plaintiff, appellant.

**S.L. Robins, Q.C., for the defendants, respondents. The judgment of the Court was delivered by**

JUDSON J.—Frankel Structural Steel Limited sued the three defendants for the price of structural steel delivered to Hyacinthine Properties Limited for the erection of a building in London, Ontario. Goden Holdings Limited had arranged with Hyacinthine for the interim financing of the building through a one-year mortgage of \$300,000. Gotfrid & Dennis are a firm of solicitors who acted for Goden and, to a certain extent, for the builder Hyacinthine. At trial Frankel obtained judgment against both Goden and their solicitors for \$51,210. On appeal,<sup>1</sup> the judgment against Goden was affirmed to the extent of \$48,300. The judgment against the solicitors was reversed. Frankel now appeals from this reversal.

In September of 1964, Hyacinthine asked Frankel to supply \$69,000 worth of structural steel. Frankel refused to supply this steel on credit without some security by way of a direction assuring that it would be paid out of the advances that Goden would be making under the building mortgage. This resulted in a direction which I now set out in full:

To: Goden Holdings Limited

and to: Its solicitors

Gotfrid & Dennis,

133 Richmond Street West,

**Toronto 1, Ontario**

Re: Hyacinthine Properties Limited apartment house project located at Scenic Drive in the City of London, Ontario. Parts of Lot 20, Broken Front Concession B.

YOU ARE HEREBY AUTHORIZED AND DIRECTED to pay to Frankel Structural Steel Limited, 1139 Shaw Street, Toronto 4, Ontario, out of the advances of the above Mortgage from time to time the following:

To pay all advances to be made 30 days after delivery of all the steel contracted for in a contract attached hereto dated September 14th, 1964. Notwithstanding the foregoing and without limiting the generality thereof, this shall include delivery and acceptance at the City of London, Scenic Drive, of all of the open web, steel joist and accessories therefor and for so doing this shall be your good, sufficient and irrevocable authority.

Dated the 21st day of September, 1964.

HYACINTHINE PROPERTIES LIMITED

Per: (sgd) H. Wein

### Hubert Wein

There was some dispute about the origin of this direction but both the trial judge and the Court of Appeal have found that it was typed and prepared in the office of the solicitors. A copy of it was sent to Frankel by the solicitors on September 21, 1964. They retained the original. Frankel was dissatisfied with the form of the direction and telephoned one Burnett, a solicitor in the office of Gotfrid & Dennis who had charge of the transaction and who agreed that Frankel's account would be paid out of the advances made as the work progressed. Burnett knew that Frankel relied upon the direction in supplying the steel.

Again, there was some dispute about this evidence. Burnett denied any conversation with Frankel in September of 1964 to the effect that Frankel would be paid from the advances on the mortgage loan. The trial judge accepted Frankel's evidence on this point and found that Burnett assured Frankel that payment would be made to Frankel from advances on the mortgage loan. The Court of Appeal not only did not interfere with this finding, but made it the basis for its affirmation of the judgment against Goden in that it established the contract between Frankel and Goden.

In November and December of 1964, Frankel supplied the steel to the value of \$71,910. The \$2,910 was an addition made in October to the original contract for \$69,000 and was not covered by the assurance given in September. After the delivery of the steel, Frankel made a number of telephone calls to Burnett asking for payment. One payment of \$20,700 was made on February 24, 1965, leaving a balance owing of \$51,210. At no time did Burnett or anyone on his behalf advise Frankel that the direction would not be honoured. Frankel made repeated requests and was told that the account would be paid pursuant to the direction. In spite of this, advances were made by Burnett direct to Hyacinthine in excess of the sum of \$51,210 after all the steel was supplied and during the period that Frankel was being told that it would be paid. Frankel says that because of these assurances given throughout the transaction, it did not file a lien.

In spite of the denial of Burnett the trial judge found that Burnett knew that Frankel had fully supplied all the steel, that he either had in his hands the invoices or knew the amount of them, and that he also had the architect's report, dated January 12, 1965, saying that Frankel had supplied all its materials. These findings were not disturbed on appeal.

Gotfrid & Dennis received from Hyacinthine a finder's fee of \$15,000 for arranging the mortgage loan from Goden to Hyacinthine and, according to the terms of the mortgage, legal fees for the cost of handling the advances made under the mortgage from time to time.

Frankel, on its appeal before us, alleges this error in the judgment of the Court of Appeal. It says that the Court's holding that Burnett's promise to pay for the steel delivered to Hyacinthine established not only a contract between Frankel and Goden, but a binding contract on the part of Gotfrid & Dennis to see that Frankel was paid out of the advances to be made to Hyacinthine.

The ratio of the decision of the Court of Appeal is found in the following passage from its reasons:

I am of the opinion that the facts accepted by the trial Judge support the establishment of a contract between Frankel and Goden; in elementary terms, an unilateral contract arising out of a promise to pay for steel delivered to Hyacinthine. The act, having been performed, the promise became enforceable. I am not troubled in this case by any such questions as whether the promise would be enforceable if it were withdrawn before delivery of the steel was completed, or whether it would be enforceable in respect of partial delivery without having been withdrawn.

I am in entire agreement with these reasons as far as they go but I do not accept the conclusion reached; in another part of the reasons that Frankel, through Harrison, dealt with Burnett not as representing Gotfrid & Dennis personally but as representing them as solicitors for Goden. My reasons are these: Goden was a very unusual company. Its officers and shareholders were three in number, Mr. Gotfrid, Mr. Dennis and Mr. Burnett, three solicitors associated in practice. Burnett was the one in charge of the transactions with which we are concerned. The company had no separate bank account. It kept no books or records. It was used as a means of making interim building loans on behalf of clients of the law firm. The money contributed by these clients appeared in the trust account of the law firm under the name of Goden Holdings Limited. The legal position appears to be that the clients were creditors of Goden and the law firm was the trustee of these funds. Goden could not act in any way without the solicitors willing it.

How can these solicitors say that their undertaking was given through Burnett on behalf of Goden; that they neglected or refused to carry out their undertaking on behalf of Goden; that this neglect or refusal on behalf of Goden involves Goden in responsibility but not them? They were Goden to the extent that they were the only shareholders and officers and that they had management and control. Goden had no independent volition.

Frankel in its conversations with Burnett was asking for and received the assurance in the only capacity in which it knew Burnett, that is, as a solicitor in a firm who was in charge of the transaction. It was not talking to Burnett in his capacity as solicitor for Goden, which might or might not carry out his undertaking. It asked for and received the personal assurance of an individual that he would see to it that the client paid. He had full control over the disbursements made by the client. For some reason these disbursements were made on the decision of the firm through Burnett in disregard of the undertaking. My opinion is that this involves liability on the firm of solicitors. There is no question that Burnett committed the firm. The evidence of the head

of the firm is that “since advances were being made out of the firm’s trust account, he would be making them as a member of the firm.” He also said that the advances would have been authorized by Goden and to the extent that they were so authorized he may have been acting as an officer of Goden, but I have already pointed out that Goden had no independent volition.

The only other matter that requires mention is the form of the direction dated September 21, 1964, set out above. Frankel still argues that this direction constituted an equitable assignment binding upon Gotfrid & Dennis and Goden. This is not the ratio of the Court of Appeal and I am in agreement with its reasons on this point. The unadvanced moneys under the mortgage did not constitute a fund which Hyacinthine could assign. Under the terms of this mortgage, it was for Goden, acting through its solicitors, to determine when it would make the advances under this mortgage.

I would allow the appeal by varying the judgment of the Court of Appeal to make a finding of liability against the defendant Gotfrid & Dennis to the extent of \$69,000 less the payment of \$20,700, namely \$48,300. For these reasons and these reasons alone I would restore the judgment at trial to the extent of \$48,300. The appellant is entitled to its costs both here and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Wahn, Mayer, Smith, Creber, Lyons, Torrance & Stevenson, Toronto.

Solicitors for the defendants, respondents: Robins & Robins, Toronto.

[1] [1969] 2 O.R. 221, 5 D.L.R. (3d) 15.

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