1959

*Mar. 16, 17, 18 Apr. 28

OMAR L. TURNEY and GLADYS M. TURNEY (*Defendants*) ..... APPELLANTS;

AND

FRED ZHILKA (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Sale of Land—Description of land—Whether uncertainty of description—No agreement on what to be sold and what to be retained—Whether contract enforceable—Condition that property be annexed by village and subdivision plan approved—Whether condition precedent—Whether right of waiver—The Statute of Frauds, R.S.O. 1950, c. 371.

By a contract of sale of land describing the property as "all and singular the land and not buildings", the vendors T were to retain certain buildings and surrounding land out of the 60-odd-acre parcel sold. The contract contained a proviso that "the property can be annexed to the Village . . . and a plan is approved by the Village Council for subdivision". The date for completion was fixed at "60 days after plans

are approved". Neither party undertook to fulfil this condition and neither reserved any power of waiver. The vendors repudiated the contract because the annexation condition had not been complied with. The purchaser sued for specific performance.

The action was maintained by the trial judge who found that the purchaser could waive the annexation condition as it was made for his benefit. Subsequently, on appeal to a single judge from a report of the Master to whom the trial judge had referred the matter of ascertaining the limits and description of the property, it was found that a reasonable amount of land to be retained by the vendors should be a 10-acre parcel. The Court of Appeal dismissed the appeal of the vendors.

Held: The appeal should be allowed and the action for specific performance dismissed.

The contract was not enforceable in view of s. 4 of *The Statute of Frauds*. The contract did not show what was intended to be sold and to be retained by the vendors and no parol evidence could cure this defect. The evidence made it quite clear that the parties never reached any agreement, oral or written, on the quantity or description of the land to be retained or conveyed.

The parties never agreed on the retention of the 10-acre parcel determined by the Court below, and the purchaser can only get specific performance if the parties have made an enforceable contract. They have not done so and the Court could not do it for them. The principle that uncertainty of description may sometimes be resolved by finding that one party has a right of election did not apply to this contract, which gave no such right of election.

The purchaser had no right to waive the annexation condition which was a true condition precedent—an external condition upon which the existence of the obligation depended. Until the event occurred, there was no right to performance on either side. The parties did not promise that it would occur, and there could be no breach until the event did occur.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Spence J. Appeal allowed.

J. T. Weir, Q.C. and *J. M. Beatty,* for the defendants, appellants.

H. G. Steen, Q.C. and *W. S. Wigle,* for the plaintiff, respondent.

[1] [1956] O.W.N. 369, 815, 3 D.L.R. (2d) 5, 6 D.L.R. (2d) 223.

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The judgment of the Court was delivered by:

JUDSON J.:—The first difficulty in this case arises from the description of the property contained in the offer to purchase made by the plaintiff Zhilka and accepted by the defendant Turney. The description was in these terms:

> all and singular the land and not buildings situate on the East side of 5th Line west in the township of Toronto and known as 60 acres or more having frontage of about 2046 feet on 5th line more or less, by a depth of about .... feet, more or less (lot boundaries about as fenced), being part of west ½ lot 5 Con 5 west.

It is common ground that this description does not mean that the buildings are to be removed but that certain lands around the buildings are to be retained by the vendor, who assumed at the time when the contract was made that he had about 65 acres and that he could retain five acres around his buildings. Actually the vendor only owned 62.37 acres, as he discovered when he had a survey made. This shortage of land caused difficulty between the parties and when eventually the purchaser sued for specific performance, he defined his claim in the writ by metes and bounds in such a way that he left the vendor with only one and a half acres and a barn half on the land claimed by the purchaser and half on the land which the purchaser said the vendor might retain. The purchaser settled his own description with the surveyor and claimed 60.87 acres out of the total of 62.37 acres.

On this branch of the case the defence was non-compliance with s. 4 of *The Statute of Frauds*. If it had been intended to sell the whole of the lands owned by the vendor, the description in the contract would have been adequate. But the contract in this case does not show what is intended to be sold and what is intended to be retained by the vendor and no parol evidence can cure this defect because the admissibility of such evidence presupposes an existing agreement and sufficient certainty of description to enable the property to be identified once the surrounding facts are pointed to. These conditions do not exist here. There is not only lack of sufficient certainty of description but the evidence makes it quite clear that the parties never reached any agreement, oral or written, on the quantity or description of the land to be retained or the land to be conveyed.

The course taken by the litigation emphasizes these uncertainties. The trial judge decreed specific performance and referred it to the Local Master to ascertain "the exact limits and description of the property to be conveyed by the contract." The first order of the Court of Appeal directed the reference to proceed and reserved the final disposition of the appeal pending the outcome of the reference. However, the Local Master, in the following brief report, found that it was impossible to comply with the terms of the reference:

> 1. I find that on the evidence before me it is impossible to determine and state what is a reasonable amount of land immediately surrounding the buildings to be conveyed by the contract set forth in paragraph one of the said judgment.

On appeal to a single judge, the report was varied and a finding made that a reasonable amount of land enclosing the buildings would be a 10-acre parcel, which the order then proceeded to describe by metes and bounds. Following this order, the Court of Appeal[1] finally disposed of the matter and dismissed the appeal.

The reference to the Local Master was to ascertain the exact limits and description of the property to be conveyed. The report departs from this direction in stating that the Local Master is unable to determine what is a reasonable amount of land to be retained surrounding the buildings. It is apparent that the Local Master could not follow the order of reference and define the lands to be conveyed because there never was any agreement on this point. Therefore, what was referred to him as a problem of identification of the lands assumed to have been agreed upon by the parties is eventually solved by the imposition of what the Court considers to be reasonable terms, namely, the retention of a 10-acre parcel.

The reason why the judge, on appeal from the report, found 10 acres to be a reasonable amount of land to be retained was that *The Planning Act* provides that no vendor in the circumstances of a case such as this may convey

[1] [1956] O.W.N. 369, 815, 3 D.L.R. (2d) 5, 6 D.L.R (2d) 223.

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unless the lands retained by him amount to 10 acres, or a plan of subdivision is approved. The parties never agreed on the retention of a 10-acre parcel around the buildings. The purchaser, however, is satisfied with his bargain and will accept the land minus this 10 acres and pay the full purchase price. But, on the other hand, he can only get specific performance if the parties have made an enforceable contract. They have not done so in this case and the Court cannot do it for them.

The purchaser sought to support his judgment on the principle that uncertainty of description may sometimes be resolved by finding that one party has a right of election, a right to choose the land to be retained or the land to be conveyed as the case may be. It is impossible to apply the principle to this contract, which gives no such right of election either expressly or by implication. The case against the defendant was not framed on this basis nor was the argument put forward until the case reached this Court.

The other defence pleaded was that the purchaser failed to comply with the following condition of the contract:

> Providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision.

The date for the completion of the sale is fixed with reference to the performance of this condition—"60 days after plans are approved". Neither party to the contract undertakes to fulfil this condition, and neither party reserves a power of waiver. The purchaser made some enquiries of the Village council but the evidence indicates that he made little or no progress and received little encouragement, and that the prospects of annexation were very remote. After the trouble arose over the quantity and description of the land, the purchaser purported to waive this condition on the ground that it was solely for his benefit and was severable, and sued immediately for specific performance without reference to the condition and the time for performance

fixed by the condition. The learned trial judge found that the condition was one introduced for the sole benefit of the purchaser and that he could waive it.

I have doubts whether this inference may be drawn from the evidence adduced in this case, but, in any event, the defence falls to be decided on broader grounds. The cases on which the judgment is founded are *Hawksley v. Outram*[1] and *Morrell v. Studd*[2]. In the first case a purchaser of a business stipulated in the contract of sale that he should have the right to carry on under the old name and that the vendors would not compete within a certain area. A dispute arose whether one of the vendors, who had signed the contract of sale under a power of attorney from another, had acted within his power. The purchaser then said that he would waive these rights and successfully sued for specific performance. In the second case, the contract provided that the purchaser should pay a certain sum on completion and the balance within two years. He also promised to secure the balance to the vendor's satisfaction. The purchaser raised difficulties about the performance of this promise, and the vendor said that he would waive it and take the purchaser's unsecured promise. It was held that he was entitled to do so. All that waiver means in these circumstances is that one party to a contract may forego a promised advantage or may dispense with part of the promised performance of the other party which is simply and solely for the benefit of the first party and is severable from the rest of the contract.

But here there is no right to be waived. The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party—the Village council. This is a true condition precedent—an external condition upon which the existence of the obligation depends. Until the

[1] [1892] 3 Ch. 359. [2] [1913] 2 Ch. 648.

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event occurs there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur. The purchaser now seeks to make the vendor liable on his promise to convey in spite of the non-performance of the condition and this to suit his own convenience only. This is not a case of renunciation or relinquishment of a right but rather an attempt by one party, without the consent of the other, to write a new contract. Waiver has often been referred to as a troublesome and uncertain term in the law but it does at least presuppose the existence of a right to be relinquished.

The defence to this action succeeds on both grounds that were pleaded. It is unnecessary to consider the third defence based on non-compliance with *The Planning Act* and I express no opinion on this.

The appeal should be allowed with costs both here and in all proceedings before the Court of Appeal. The action should be dismissed with costs, including the costs of the reference and the motion to vary the report.

Appeal allowed with costs.

Solicitors for the defendants, appellants: Bowyer, Beatty & Andrews, Brampton.

Solicitor for the plaintiff, respondent: L. A. Maldaver, Toronto.