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*Feb. 21
May 29

QUEENSWAY CONSTRUCTION LTD. AND FRANCES TRUMAN (*Respondent*) ..... APPELLANT;

AND

TRUSTEEL CORPORATION (CANADA) LTD. (*Applicant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of land—Contract made in contemplation of compliance with planning statute—Whether contract illegal as being in contravention of statutory prohibition—The Planning Act, 1955 (Ont.), c. 61, s. 24.

The vendor who had entered into a contract for the sale of 95 building lots subsequently moved for a declaration that the contract was one that was prohibited by s. 24 of *The Planning Act*. Subsection (1) of the section prohibits agreements for the sale and purchase of land in an area of subdivision control unless the land is described in accordance with and is within a registered plan of subdivision. The lots, which were within such an area, were described by reference to a plan which was to be registered in the county Registry Office. At the hearing the declaration was made as asked and affirmed on appeal. The assignee-purchaser appealed to this Court.

*PRESENT: Kerwin C.J. and Locke, Abbott, Martland and Judson JJ.

Held (Martland J. dissenting): The appeal should be allowed.

Per Kerwin C.J. and Locke, Abbott and Judson JJ.: The contract was not void for illegality as being made in contravention of a statutory prohibition. On the contrary, the contract was entered into in contemplation of compliance with the statute, which, by s. 24(3)(*c*), provides for this very situation by way of exception to the prohibition. The statute permits vendor and purchaser to enter into a contract subject to the condition of subsequent consent of the planning board. This was all that the parties had done in this case. *Zhilka v. Turney*, [1956] O.W.N. 369 and 815; *Re Karrys Investments Ltd.*, [1959] O.W.N. 325, approved; *Glenn v. Harvic Construction Co.*, [1958] O.W.N. 406, disapproved.

Per Martland J., *dissenting*: The entering into the agreement was prohibited by subs. (1) of s. 24 of *The Planning Act*. The fact that it contemplated future registration of a plan did not take it out of that prohibition. The agreement was not saved by subs. (3)(*c*) of s. 24 because the necessary consent of the planning board was not obtained, nor was the agreement conditional upon its being obtained. *Boulevard Heights, Limited v. Veilleux* (1915), 52 S.C.R. 185; *George v. Greater Adelaide Land Development Co. Ltd.* (1929), 43 C.L.R. 91, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming an order of Wilson J. declaring a certain agreement to be illegal in view of s. 24(1) of *The Planning Act* (Ont.). Appeal allowed, Martland J. dissenting.

W. J. Smith, Q.C., for the respondent, appellant.

J. J. Robinette, Q.C., for the applicant, respondent.

The judgment of Kerwin C.J. and of Locke, Abbott and Judson JJ. was delivered by

JUDSON J.:—The appellant Frances Truman is the assignee from the trustee-in-bankruptcy of Queensway Construction Company Limited of a contract for the purchase of land. It is admitted that she has all the rights of the original purchaser. The contract was for the purchase of 95 building lots which were described by reference to a plan which was to be registered in the Registry Office of the County of Halton. The contract was made in February 1956, and in April 1959 the respondent-vendor moved, pursuant to Rule 605 of the Consolidated Rules of Practice, for a declaration that the contract was one that was prohibited by s. 24 of *The Planning Act*, 1955, c. 61. At the hearing the declaration was made as asked and affirmed on appeal[1]. The assignee-purchaser now appeals.

[1] [1960] O.W.N. 183, 22 D.L.R. (2d) 616.

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The purchase price for the 95 lots was $285,000. $2,500 was paid as a deposit on the signing of the contract; $62,500 was to be paid within 30 days of the installation of certain services later referred to in the contract. This date is called "the date of completion". The balance of the purchase price was to be paid within 12 months after the date of completion.

To find the date of completion one has to turn to para. 14 of the contract, which reads:

> 14. It is a condition of this Agreement that the following installations and services will be furnished in respect of the said lands at the sole cost of the Vendor, graded and gravelled roads, watermains, main sanitary sewers, as may be required by the Township.
>
> (*a*) The Vendor will, on or before the time of granting a deed to the Purchaser, have paid to the Township of Trafalgar the sum required by them in respect to contributions to the parks and schools, sewage scheme, sidewalks and roads.
>
> (*b*) The purchaser shall pay to the vendor for sewer and water connections the sum of ($200) TWO HUNDRED dollars for each lot at the time of taking up a deed.

The statutory prohibition in s. 24 upon which the judgment of the Court of Appeal is founded is not an absolute one. The section first permits a municipality by by-law to designate any area within the municipality as an area of sub-division control. Then follows the prohibition. After the passing of such a by-law

> no person shall convey land in the area by way of a deed or transfer on any sale, or enter into an agreement of sale and purchase of land in the area, . . . unless the land is described in accordance with and is within a registered plan of subdivision,

These are the parts of the prohibition relevant to this appeal. Then the exception is stated in the following terms:

> (3) Nothing in subsection 1 or 2 prohibits any conveyance or agreement respecting land
>
> (*c*) if the consent,
>
> (i) of the planning board of the planning area in which the land lies, or
>
> (ii) where the land lies in more than one planning area, of the planning board designated by the Minister from time to time, or
>
> (iii) where there is no planning board, of the Minister,
>
> is given to the conveyance or agreement.

In addition to the exception by way of consent to the conveyance or agreement there are two other well defined exceptions where no consent is needed. These are not

relevant to this appeal. The section ends with a penalty provision. A person who contravenes the section is guilty of an offence and is liable on summary conviction to a fine of not more than $500.

With respect, I differ from the conclusion of the Court of Appeal. I do not think that this contract is void for illegality as being made in contravention of a statutory prohibition. On the contrary, this contract was entered into in contemplation of compliance with the statute and, as I read s. 24, the statute provides for this very situation by way of exception to the prohibition. The exception speaks of consent to a conveyance or agreement not of consent to a proposed conveyance or agreement. The statute permits vendor and purchaser to enter into a contract subject to the condition of subsequent consent and this is all that the parties have done in this case.

The conditional nature of the contract is shown by an analysis of the terms of payment and the obligations assumed by the vendor. After the payment of the deposit no further performance is required of the purchaser before the date of completion and before that date arrives the vendor must have complied with para. 14—a performance which presupposes a compliance with *The Planning Act* and the completion by the vendor of the application for registration of the plan of subdivision. The consent provision in the Act permits the parties to enter into a contract of this kind and the contract itself provides for no illegal performance. Beyond the payment of the deposit, there is to be no further performance until the Act has been complied with. This is not illegality. The purpose of the prohibition is by the very terms of the section defined as subdivision control and there is nothing in this contract to do anything but carry out this purpose.

The course of judicial decision in Ontario on this statutory prohibition has not been uniform. In *Zhilka v. Turney*[1], the vendor agreed to sell a farm property with the exception of an ill-defined area on which the buildings stood. The purchaser obtained a decree for specific performance at the trial subject to compliance with *The Planning Act* within

[1] [1955] O.R. 213, 4 D.L.R. 280; on appeal, [1956] O.W.N. 369, 3 D.L.R. (2d) 5, and [1956] O.W.N. 815, 6 D.L.R. (2d) 223.

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a reasonable time. The defence of illegality for non-compliance with s. 24 of *The Planning Act* was raised at the trial and also argued on appeal and there is no suggestion in the reasons of either Court that the contract could be declared void for illegality. The case was before the Court of Appeal on two occasions. On the first occasion the Court suspended judgment until the final disposition of the application for consent under *The Planning Act*. On the second occasion, when the appeal had to be re-argued because of the death of one of the appellate judges, the consent had still not been obtained, no doubt because of the uncertainty of the description of the property excepted from the sale. Nevertheless the Court allowed further time for it and directed a reference to the Local Master to ascertain the description.

Implicit in the reasons of the Court of Appeal up to this point, with the defence of illegality squarely raised, is the principle that parties may make a contract and subsequently obtain the consent under s. 24 of the Act. On appeal to this Court[1] it was held that the contract could not be enforced because of the uncertainty in the description of the lands to be retained and non-performance of a condition precedent. The Court declined to express any opinion on the defence based upon non-compliance with *The Planning Act*. Schatz J. in *Re Karrys Investments Ltd.*[2] correctly, in my respectful opinion, followed the principle which underlay the judgment of the Court of Appeal.

The contrary line of authority in Ontario is to be found in *Glenn v. Harvic Construction Company*[3] and in the case presently under appeal. In the *Glenn* case the plaintiff was the vendor of a landlocked 5 acre parcel. The case was one where the consent of the planning board was required. The plaintiff applied for and obtained this consent to the conveyance of this land. The consent of the board was given upon the condition that the purchase of the parcel in question was for the purpose of land assembly. The plaintiff had mistakenly but innocently represented to the board that Harvic owned adjoining land. The board then withdrew its consent. The action for specific performance at the suit

[1] [1959] S.C.R. 578, 18 D.L.R. (2d) 447.
[2] [1959] O.W.N. 325, 19 D.L.R. (2d) 760.
[3] [1958] O.W.N. 406.

of the vendor and the counterclaim for the return of the deposit were both dismissed on the ground that the agreement of sale was illegal when entered into.

The judgment of the Court of Appeal raises certain difficulties. The Court did not decide the case on the simple ground of illegality. Its first finding was that the planning board had no power to give a conditional consent. Then followed the conclusion that, with the withdrawal of the consent, the contract was one prohibited by the section and therefore illegal. I can, of course, understand the result in the *Harvic* case. Without the consent, the vendor could not succeed in a claim for specific performance. I can also understand as an alternative basis for the decision a finding of illegality in the making of the contract. I cannot understand why illegality in the making of the contract should be made to depend upon the withdrawal of a conditional consent.

For the reasons I have given, I am of the opinion that a contract may be made in contemplation of planning board approval and that on this point the *Zhilka* case was well decided rather than *Glenn v. Harvic* and the case presently under appeal. This is all that has to be decided on this appeal and I express no opinion on the rights and obligations of the parties relating to the performance of the contract.

I would allow the appeal with costs both here and in the Court of Appeal. Judgment should be entered dismissing with costs the motion for the declaration of illegality.

MARTLAND J. (*dissenting*): The circumstances giving rise to this appeal and the relevant portions of s. 24 of *The Planning Act*, Statutes of Ontario 1955, c. 61, have been set out in the reasons for judgment of my brother Judson.

In my opinion the conclusions reached by the learned trial judge and by the Court of Appeal were correct. Subsection (1) of s. 24 expressly prohibits any person from entering into an agreement of sale and purchase of land in an area in a municipality which the council of that municipality, by by-law, has designated as an area of subdivision control, unless the land is described in accordance with and is within a registered plan of subdivision. The lands in question here were within such an area and were

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not described in accordance with a registered plan of subdivision. The description is of a number of lots on a plan "to be registered in the County Registry Office of Halton".

Subsection (3)(c) of s. 24 enacts that nothing in subs. (1) prohibits any agreement respecting land if the consent of the planning board of the planning area in which the land lies is given to the agreement. However, no such consent was given to this agreement. Furthermore there is nothing in the agreement to indicate that there was any intention that application should be made to the planning board to give its consent to the agreement. The agreement did contemplate that, pursuant to s. 26 of the Act, an application would be made to the Minister of Planning and Development for the approval of a subdivision plan. But that approval could only be granted by the Minister. It could not be given by the consent of the planning board. In my view, therefore, this is not the case of an agreement for sale of lands made conditionally upon consent being given pursuant to s. 24(3).

My conclusion is that the entering into the agreement in question here was prohibited by subs. (1) and that the fact that it contemplated the future registration of a plan does not take it out of that prohibition. The agreement is not saved by subs. (3)(c) of s. 24 because the necessary consent was not obtained, nor was the agreement conditional upon its being obtained. I find some support for the conclusion which I have reached in the judgment of this Court in *Boulevard Heights, Limited v. Veilleux*[1], and in the judgment of the High Court of Australia in *George v. Greater Adelaide Land Development Company Limited*[2].

For these reasons, in my opinion, the appeal should be dismissed with costs.

Appeal allowed with costs, MARTLAND J. *dissenting.*

Solicitors for the respondent, appellant: Prouse & Mackie, Brampton.

Solicitors for the applicant, respondent: Cameron, Weldon, Brewin, McCallum & Skells, Toronto.

[1] (1915), 52 S.C.R. 185.

[2] (1929), 43 C.L.R. 91.