

ABRAHAM WEINBLATT (*Defendant*) ... APPELLANT;

AND

THE CORPORATION OF THE CITY }
OF KITCHENER (*Plaintiff*) } RESPONDENT.

1968

*Feb. 6
Oct. 1

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Agreement providing for reconveyance in certain events—Whether rule against perpetuities offended—Failure of one party to provide agreed services attributable to default of other party—Subsequent purchaser taking with full notice of vendor's future interest.

An agreement between the plaintiff municipal corporation and one H, a predecessor in title of the defendant in respect of a certain parcel of land, provided for the reconveyance of the said land, upon repayment of the purchase price, if H failed to commence construction thereon of a seven-storey building within a specified period. Under the agreement the city was required to carry out certain undertakings involving the demolition of buildings, the construction of a new roadway and the installation of a sewer and watermain, all of which were to be completed by a given date. An application by the defendant's immediate predecessor in title for a building permit to erect a two-storey rather than a seven-storey building and a similar application made by the defendant, after he had acquired the property, were refused. Subsequently, an action founded on the above agreement was brought by the city to recover from the defendant the land in question on payment of the required sum. The city's claim having been upheld by both the trial judge and the Court of Appeal, the defendant appealed to this Court.

Held: The appeal should be dismissed.

As to the defence that the agreement offended the rule against perpetuities, this was not a case where a contingent interest in property might arise outside the perpetuity period. If it was to arise at all, it had to be on the date stated or within a reasonable time thereafter.

The second defence, *i.e.* that the city had lost its rights by reason of failure to complete the installation of the stipulated municipal services within the specified time, was also without merit, as any default in that regard was directly attributable to the failure of the defendant and his predecessors in title to comply with the terms of the agreement respecting the erection of a building.

The third defence, *i.e.* that the covenant in a reconveyance was a personal contract between the original parties and cannot be enforced against the subsequent purchaser because it does not fall within that class of negative covenants which run with the land and bind subsequent purchases with the burden, did not arise on the facts of this case. The defendant took with full notice of the city's future interest in the property.

[*City of Halifax v. Vaughan Construction Co. Ltd.*, [1961] S.C.R. 715, applied.]

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APPEAL from a judgment of the Court of Appeal for Ontario¹, dismissing an appeal from a judgment of Moorhouse J. Appeal dismissed.

J. J. Carthy, for the defendant, appellant.

D. K. Laidlaw, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by:

JUDSON J.:—This is an action by the Corporation of the City of Kitchener against Abraham Weinblatt to recover from him a certain parcel of land in the city on payment of the sum of \$33,000. The action was founded on an agreement made between the city and Weinblatt's predecessor in title which provided for such a reconveyance in certain events. Both the trial judge and the Court of Appeal¹ have upheld the city's claim. Weinblatt appeals to this Court for a reversal of these judgments and a dismissal of the action. In my opinion, the appeal fails and should be dismissed with costs.

The city assembled a parcel of land in its centre at a cost of \$130,000 for the purpose of redevelopment. It sold part of this land, which had a value of approximately \$75,000, to one Robert E. Hart for the sum of \$33,000. Hart was acting as nominee for Noy Construction Limited. The city's deed to Hart was registered on November 17, 1960, and on the same date Hart conveyed to Noy Construction Ltd. Noy Construction Ltd. conveyed to Abraham Weinblatt on August 3, 1961, nearly eight months later. The deed was registered the same day. Both Noy Construction Ltd. and Weinblatt took with full notice of the agreement made between the city and Hart when the property was conveyed to Hart in November of 1960. This agreement is dated October 25, 1960, between the city, as vendor, and Hart as purchaser. The following are its terms:

1. The Vendor (City) shall demolish to ground level all buildings presently situate on the premises and remove all demolished materials from the said premises.

2. The Vendor (City) further covenants and agrees to construct a new roadway and sidewalk on the Vendor's (City's) property adjacent

¹ [1966] 2 O.R. 740, 58 D.L.R. (2d) 332.

to and fronting on the premises, between Queen Street and Benton Street, and to install Sewer and Watermain and arrange for all other necessary public services along the same, all to be completed by October 1st, 1961.

3. The Purchaser (Hart) or his assigns covenants and agrees to sign all petitions that may be necessary to permit such adjacent roadway to be constructed and such services to be installed and further covenants and agrees to pay all taxes that may be levied against the said Purchaser (Hart) or his assigns pursuant to the provisions of The Local Improvement Act.

4. The Purchaser (Hart) and/or his assigns covenants and agrees to commence the erection upon the aforesaid premises of a building substantially in compliance with the Plan of George A. Robb, Architect, dated August, 1960, under Job No. 6012, attached as Schedule "B" to the aforementioned Offer and forming part of this Agreement, within twelve months from the date of completion of this transaction, namely, October 31st, 1960; failing commencement of construction pursuant to this covenant by the Purchaser (Hart) or his assigns within the time limit specified herein, the Vendor (City) may repurchase the land for the sum of THIRTY-THREE THOUSAND DOLLARS (\$33,000.00) provided the Vendor (City) has fulfilled all covenants made by it herein.

5. The Vendor (City) may extend the time for performance by the Purchaser (Hart) of any of the matters hereinbefore described and agreed to be performed by the said Purchaser (Hart).

6. The Vendor (City) shall be entitled to reserve the necessary land required for the proposed widening of Queen Street, South.

This agreement was registered on June 28, 1961.

Noy Construction applied for a building permit on November 23, 1960. The preliminary plans submitted were not in conformity with those of the architect mentioned in para. 4 of the agreement. They proposed the construction of a two-storey building instead of a seven-storey building and they were not sufficiently detailed to enable the city even to consider the issue of any building permit. There were subsequent discussions between Noy Construction Ltd. and the city but these ended in February 1961. Following this no further attempts were made by Noy Construction Ltd. to procure a permit for the building contemplated in para. 4 of the agreement. On April 12, 1961, Noy Construction Ltd. entered into an agreement to sell the property to Abraham Weinblatt for \$37,000. They gave him a deed on August 3, 1961, and it was registered the same date.

Weinblatt applied for a building permit in the month of July 1961 and had certain discussions with officials of

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the city in the month of August 1961. He too was proposing to erect a building which was not in conformity with the agreement between the city and Hart. He was told that his plans were not acceptable. In the month of October he had further discussions with the city. He was asking to be relieved of the obligation to build in accordance with the agreement. The city rejected his suggestions.

By the end of 1962 the city had completed all the requirements under the agreement as to demolition, construction of new roadway and the installation of the sewer and watermain. The city demanded a reconveyance. The writ was issued on October 15, 1962. The statement of claim was delivered on January 11, 1963. The judgment of Moorhouse J. directing the reconveyance is dated March 3, 1964.

The defence of the action is threefold. First, it was said that the agreement offended the rule against perpetuities; second, that the city had not performed its part of the agreement in time; and third, that Weinblatt was not bound by Hart's covenants in the agreement.

All three defences are without merit. The defence based upon infringement of the rule against perpetuities was rejected by the judgment of this Court in *City of Halifax v. Vaughan Construction Co. Ltd.*². The two cases are indistinguishable both on fact and law. As in the *Vaughan* case, this is not a case where a contingent interest in property may arise outside the perpetuity period. If it is to arise at all, it must be on the date stated or within a reasonable time thereafter.

The second defence is that the city has lost its rights by reason of its failure to perform the matters referred to in para. 2 of the agreement by the stated date, October 1, 1961. I have set out in detail what was done by Hart, Noy Construction and Weinblatt in an attempt to persuade the city to change the requirements of para. 4 of the agreement. It is apparent that there was no effort on the part of these people, nor was there any intention on their

² [1961] S.C.R. 715, 30 D.L.R. (2d) 234.

part, to comply with para. 4. The Court of Appeal has dealt with this point in the following paragraph, and, in my opinion, correctly:

The evidence clearly supports the inference that the defendant and his predecessors in title did not intend to construct a seven-storey building as agreed. They sought permission to amend the agreement to a two-storey building and were refused. Any default by the Plaintiff in failing to complete the installation of the stipulated municipal services within the time specified is directly attributable to the action or rather lack of action on the part of the defendant. To permit the defendant to take advantage of a default which is clearly the result of the expressed intention of the defendant or his predecessors in title would be unjust and cannot be allowed.

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The third defence was that the covenant in a reconveyance was a personal contract between the original parties and cannot be enforced against the subsequent purchaser because it does not fall within that class of negative covenants which run with the land and bind subsequent purchases with the burden. This defence does not arise on the facts of this case.

What the city had by virtue of this contract was an interest in the property to arise at a future date. Weinblatt took with full notice of this future interest. There is here no question of purchase for value without notice. Weinblatt, if he does not perform under the agreement—and he had no intention of performing—must reconvey on the terms of the agreement.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: Allan C. Wilson, Toronto.

Solicitors for the plaintiff, respondent: Bray, Schofield, Mackay & Kelly, Kitchener.