CONTRACTS IMPLIEDLY PROHIBITED BY STATUTE

CONCRETE BUILDINGS OF NEW ZEALAND LTD. v. SWAYSLAND, [1953] N.Z.L.R. 997.

Only now in the light of an article by the former Registrar-General of Land in 1954 N.Z.L.J. 386 have the full implications of this case become apparent. In that article the learned author did not deal with the correctness of the decision, but confined his remarks to the position as far as Land Transfer land is concerned. The present note is an attempt to discuss the principles on which the case was decided.

The question before the Court concerned the effect of s. 332 of the Municipal Corporations Act 1933 (see now ss. 350-353, Municipal Corporations Act 1954, which re-enacts with slight changes the provisions of the earlier Act). Section 332 (1) provided as follows:

> For the purposes of this section any land in a borough shall be deemed to be subdivided if -
> (a) Being land subject to the Land Transfer Act, 1915, and comprised in one certificate of title, the owner thereof, by way of sale or lease, or otherwise howsoever, disposes of any specified part thereof less than the whole, or advertises or offers for disposition any such part, or makes application to a District Land Registrar for the issue of a certificate of title for any part thereof; or . . . .

The other subsections of s. 332 dealt with details of obtaining consent of the local body to the subdivision plan, but s. 332 (7) provided:

> Every person who subdivides any land otherwise than in accordance with a plan of subdivision approved by the Council, or, in case of an appeal, in accordance with a plan of subdivision approved by the Board under this section, and before such plan has been duly deposited

> under the Land Transfer Act, 1915, or in the Deeds Register Office, commits an offence and is liable on summary conviction to a fine of one hundred pounds:
> . . .

Briefly the facts of the case were that the defendant purchased a section through a land agent who was selling sections on behalf of the appellant company. The company had a plan of subdivision prepared, but this had not, at the date of sale, received the consent of the local body in accordance with the provisions of s. 332. The defendant, under his agreement for sale and purchase of the section, paid the full price for the section to the agent. The company went into liquidation, and the defendant, in order to protect his interest in the land lodged a caveat against the company's title. In an action by the liquidator for the removal of the caveat it was pleaded that the contract for sale and purchase was void. The submission was that as no local body consent to the subdivision had been obtained, the contract was impliedly prohibited by s. 332 (7), and that therefore the defendant had no interest in the land. The learned judge, Hay J., adopted this argument, and in the relevant part of his judgment said (at 999):

> It is well settled that a contract made in contravention of a statutory prohibition is illegal, and no rights under it can accrue to either party: Cheshire and Fifoot on Contract (3rd ed. 1952) 286, citing Cornelius v. Phillips, [1918] A.C. 199, 205; Re Mahmoud and Ispahani, [1921] 2 K.B. 716; Bostel Bros. Ltd. v. Hurlock, [1949] 1 K.B. 74; [1948] 2 All E.R. 312. The prohibition may be implied, and whether it is so or not depends upon the construction of the statute. Where it imposes a penalty upon persons who act in a certain way, a material factor is to consider whether the sole purpose of the penalty may be taken to be the protection or increase of the revenue, or whether it is rather designed for the protection of the public, it being only in the latter case that a contract made contrary to the statutory provisions is void: Cheshire and Fifoot, op.cit. 287. In my opinion a contract made in breach of the provisions of s. 332 clearly falls within the latter category.

Can the question whether a contract is impliedly prohibited by Act of Parliament be so simply determined by the application of the test: protection of the revenue or protection of the public? In Whiteman v. Sadler, [1910] A.C. 514, 525, Lord Dunedin made these comments:

> But there always remains the question whether the contract is expressly or impliedly forbidden by Act of Parliament. This is not always an easy question. It is simple enough where a certain contract is prohibited. But what of the cases where nothing is said about the contract as such, but certain duties or prohibitions are imposed on certain classes of persons? Are the contracts made by such persons who have failed in their duties or contravened the prohibitions impliedly prohibited, and therefore made illegal by Act of Parliament? There is a good deal of authority on such matters but I do not know that the question has been really advanced since the judgment of Parke B. in Cope v. Rowlands [(1836), 2 W. & M. 149, 157; 150 E.R. 707, 710] . . . .

Baron Parke's judgment in Cope v. Rowlands (supra) will be considered shortly, but it is interesting to see the way the question was tackled long before that time. In the seventeenth century the rule of interpretation was clear, and Lord Holt C.J. summarized it briefly in an addendum to his judgment in Bartlett v. Vinor (1692), Carthew 252; 90 E.R. 750:

> . . . every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract tho' the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, tho' there are no prohibitory words in the statute.

This is plain. If there had been no change in the law since Lord Holt's time the defendant in this case would undoubtedly have had no claim at all. However, in the early part of the nineteenth century the rule was restated with such modifications as to render Lord Holt's strict dictum no more than a presumption. In Cope v. Rowlands (1836), 2

M. & W. 157, 150 E.R. 707, 710, Parke B. after citing Lord Holt, went on to say (at 158):

> . . And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract? . . . the question for us now to determine is, whether the enactment of the statute [sc. imposing the penalty] is meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it? or whether one of its objects be the protection of the public, and the prevention of improper persons acting as brokers?

While paying lip service to the earlier rule, Baron Parke has not, strictly speaking, followed it, but has added a gloss to the effect that it is a matter of what the statute intends, and such intention is to be gauged from whether the penalty is imposed to protect the public or simply to protect the revenue. Nine years later, in Smith v. Mawhood (1845), 14 M. & W. 452; 153 E.R. 552, he applied his modified rule and in doing so made it clear that the "protection" tests were ancillary to the main question of whether the intention of the statute was to prohibit the contract. He said (at 463; 557):

> . . . I think the object of the legislature was not to prohibit the contract of sale by dealers who have not taken out a licence pursuant to the Act of Parliament. If it was, they certainly could not recover, although the prohibition were merely for the purpose of revenue.

In many ways it is unfortunate that Parke B. ever mentioned the "protection" tests, as in numerous cases since his time these have been used to the almost complete exclusion of the wider test: what is the intention of the legislature in imposing the penalty? Thus in Victorian Daylesford Syndicate Ltd. v. Dott, [1905] 2 Ch. 624, Buckley J. said (at 629):

> I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose statutes may be grouped under two heads - those in which a penalty is imposed against doing an act for the purposes only of protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public.

The case was then determined within these narrow limits, and no mention can be found in any part of the judgment of consideration being given to the intention of the statute in imposing the penalty.

In many cases the "protection" tests are quite sufficient to determine the question, but they cannot be used in all cases where the effect of a penalty in a statute is in issue, to reach a correct conclusion, unless consideration is given to what we may call the wider test - the object of the statute. For instance, if we apply the "protection" tests in the bald way that Buckley J. (supra) applied them, what conclusions do we reach when faced with s. 33 (1) of the Wages Protection and Contractors' Liens Act 1939? This section provides that a contractor who enters into a subcontract for the performance of work under his head contract shall forthwith give notice in writing to his employer, stating the name of the subcontractor, the work to be done, the subcontract price and the mode of payment. By virtue of s. 33 (2) failure to comply with this section makes the contractor liable to a fine of £50. What is the effect of this penalty on the subcontract? It is clear that the penalty is not imposed merely for revenue purposes, but in the interests of the employer, the subcontractor and employees. Applying the test of "protection of the public" we would be forced to the conclusion that where a contractor renders himself liable for prosecution under s. 33 the subcontract is void. This conclusion would rightly be regarded as absurd in any Court of law, but it is the result that may occur through overlooking the fact (as, it is respectfully suggested, Hay J. did in Swaysland's case) that the essential test to apply is the intention of the Act. The question of "protection" may still be of assistance in providing examples of how to ascertain the intention of the statute, but these

distinctions should not be used as substantive rules. Lord Esher in Melliss v. Shirley and Freemantle Local Board of Health (1885), 16 Q.B.D. 446, 451 put them into their correct perspective, and gave one of the best judicial statements of the rule:

> . . . on looking at the cases on this subject, I think that this rule of interpretation has been laid down, that, although a statute contains no express words making void a contract which it prohibits, yet, when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law.

An example of the correct method of approaching penal clauses in statutes can be seen in Hutt Valley Properties Ltd. v. Gamages (N.Z.) Ltd., [1952] N.Z.L.R. 296, where North J. held a contract entered into in contravention of s. 19 of the Tenancy Act 1948 to be unenforceable. In the course of his judgment he carefully examined the provisions of the Act and concluded that the legislature had expressly intended to prohibit the contract concerned.

In Swaysland's case, what would have been the result if the Court had given full consideration to the intention of the statute? The result may have been the same. But there are grounds for believing that if proper consideration had been given to "the whole Act as well as the particular enactment" the result, which seems unjust to the innocent purchaser, may have been different. An examination of s. 332 (1) would have revealed that not only agreements for sale, but also leases and agreements for lease involving subdivision, are caught in the definition of "subdivision". It is common practice for leases of parts of city buildings and shops, which involve "subdivision" within the meaning of the section, to be entered into without local body consent. It is equally common practice for agreements for

sale and purchase to be signed after local body approval but before the subdivision plan has been fully deposited in the Land Transfer Office. Yet the provisions of s. 332 (7) make it an offence if anyone "subdivides" before a plan has been deposited. The Court would have had to decide whether it was the intention of the legislature to render the sales or leases void in these cases.

Finally, assuming the intention of this section of the Act to be to enable local authorities to control subdivision in their areas and to prevent overcrowding and possible slum conditions, then the policy of the Act is effectively served by s. 332 (8). This subsection provides that a District Land Registrar may not deposit any plan of subdivision until it has been approved by the local council. As the District Land Registrar will not allow any transfer of part of the land in any particular Certificate of Title to be registered unless a plan has been deposited or a diagram, approved by the local body, is endorsed on the transfer, it is impossible for a would-be purchaser to obtain legal title unless the provisions of s. 332 are observed. In the case of leases, where registration is sought, the requirements of the District Land Registrar are the same. There is thus ample provision in the machinery of the Land Transfer Office to enable full effect to be given to the section where a legal estate in the land is required. Keeping this in mind, there seems no warrant for the view taken in Swaysland's case that the section destroys equitable interests as well.

The matter is clearly not free from doubt, and until another Court has had an opportunity of considering the effect of s. 332 or its successor, Concrete Buildings Ltd. v. Swaysland must be considered doubtful authority.

NOTE:

Since this article was written, the sections of the Municipal Corporations Act 1933 discussed in Swaysland's case, have been under consideration by the Law Revision Committee of the New Zealand Law Society, and the following decisions have been reached by the Committee, subject to discussions with interested Government Departments:

The effect of contracts for sale and purchase entered into prior to the deposit of the subdivisional plan:

(1) That contracts for the sale of sections in boroughs entered into at any time after the subdivisional plan is approved by the Borough Council should be fully valid, thus bringing the position of boroughs into line with that in counties under the Land Subdivision in Counties Act 1946.

(2) That it should be lawful to enter into conditional contracts for the sale of land in boroughs and counties prior to consent to the subdivision by the appropriate authority, provided such contracts contain a clause to the effect that possession is not to be given until the subdivision plan has been deposited, and that if consent is not given the purchaser should be entitled to a refund of his deposit.

The application of ss. 350-353 to short-term tenancies and leases of parts of buildings.

(1) That neither the consent of the borough council nor the deposit of a plan should be required in the case of leases for a term (including renewals) not exceeding a suggested period of 14 years, the precise term to be subject to discussion with the Municipal Association.

(2) That no subdivisional plan be required in respect of leases except where it is necessary under the Land Transfer Act.

(3) That these two amendments be made retrospective.

(4) That it be declared that no lease of part of a building is within ss. 350-353 of the Municipal Corporations Act 1954 or of the Land Subdivision in Counties Act 1946 or s. 125 of the Public Works Act 1928, unless it carried with it the exclusive occupation of the land below.

These resolutions were subject to reference to interested Departments.

If these proposals are carried into law much will be done to overcome the rigour of the decision in Swaysland's case, as far as agreements for sale and purchase of land are concerned. Difficulties, however, may arise in Clause 2 of the proposals as the local body may find itself obliged to consent to a subdivision through the pressure applied by a number of conditional purchasers of sections in a subdivision. The difficulty of policing such a provision is obvious. It would seem that the position is adequately covered by Clause 1. The proposals on leases would appear to ease the situation particularly by keeping short term leases of city buildings outside the operation of the Act. Unfortunately a full discussion is not possible in this note.