to other charges and will not contend that he is estopped in any other proceedings, this does not appear to be a case in which special leave should be granted.

Special leave is therefore refused and the appeal struck out with costs.

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Appeal struck out with costs.

Solicitor for the applicant, *R. C. Kirby.*

Solicitors for the respondent, *Marsland & Co.*

J. B.

[HIGH COURT OF AUSTRALIA.]

ADELAIDE DEVELOPMENT COMPANY PROPRIETARY LIMITED . . . PLAINTIFF, } APPELLANT;

AND

POHLNER . . . . . DEFENDANT, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1933. MELBOURNE, *March* 16, 17. SYDNEY, *April* 21. Rich, Starke, Dixon, Evatt and McTiernan JJ.

Sale of Land—Contract—Illegality—Subdivision—Plan—Approval by town planner—Deposit of plan—Condition precedent to sale of land—Failure to deposit—Illegality of sale—Plan deemed to have been deposited on receipt of letter of approval from town planner—Different plan approved from that subsequently deposited—Non-compliance with statutory requirements—Town Planning and Development Act 1920 (*S.A.*) (*No.* 1452), *secs.* 32, 35—*Town Planning Act* 1929 (*S.A.*) (*No.* 1945), *sec.* 22.

The appellant brought an action against the respondent for damages for breach of a contract for the purchase of certain lots of land on a plan of subdivision in South Australia. The defendant pleaded illegality, relying on the appellant's failure to comply with the requirements of sec. 23 (*c*) of the *Town*

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Planning and Development Act 1920 (S.A.), which makes it unlawful to sell or offer for sale any existing allotment otherwise than in accordance with the provisions of that Act. In this case a plan of subdivision was prepared, but the town planner re-arranged the design, and a further plan (Exhibit A6) was prepared, in respect of which a certificate in Letter Form A was given. Yet another plan (Exhibit A7) was prepared, founded upon and closely resembling Exhibit A6 but varying from it in some particulars, notably in reference to the situation and dimensions of some of the allotments. No new Letter Form A was issued in respect of this plan, but it was approved, and a certificate of approval was issued on 5th May 1927, and this plan was deposited on 18th July 1927, the contract of sale having previously been entered into on 27th June 1927.

Held, by *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), (1) that the provisions of the *Town Planning and Development Act* 1920 had not been complied with as the contract was entered into before the plan was deposited; (2) that the appellant could not rely upon sec. 22 (*c*) of the *Town Planning Act* 1929 (S.A.), which provided that "in any case where . . . (*c*) the said plan of subdivision was subsequently deposited in the Lands Titles Registration Office . . . the said plan shall be deemed . . . to have been so deposited at the time when the said letter in the Letter Form A was received by the applicant," because the Letter Form A, although received before the date of the contract, related not to the plan Exhibit A7 subsequently deposited, but to a different plan, namely, Exhibit A6; and (3) that the sale was not in accordance with the provisions of the Act and was illegal and void.

George v. *Greater Adelaide Land Development Co.*, (1929) 43 C.L.R. 91, applied.

Decision of the Supreme Court of South Australia (*Napier* J.): *Pohlner* v. *Adelaide Development Co. Ltd.*, (1932) S.A.S.R. 346, affirmed.

APPEAL from the Supreme Court of South Australia.

The appellant, Adelaide Development Co. Pty. Ltd., brought an action in the Local Court of Adelaide against the respondent, August Frederick Wilhelm Pohlner, claiming £249 for breach of a written contract dated 27th June 1927 made between the appellant and the respondent for the purchase of certain lots of land in South Australia, and also claimed interest thereon. Alternatively, the plaintiff claimed certain unpaid instalments of purchase money; and, in the further alternative, damages for breach by repudiation, being the contract price less payments and less the value of the land. The defendant alleged (*inter alia*) unreasonable persuasion on the part of a person acting or appearing to act on behalf of the plaintiff within sec. 25E of the *Land Agents Acts* 1925 and 1927 of South Australia, and relied upon the fact that the land was subdivided

land within the meaning of sec. 25 of the said Acts. The defendant also counterclaimed for fraud. The Special Magistrate who tried the case gave judgment for the plaintiff (appellant), for £249 balance of the purchase money with interest, and also gave judgment for the appellant on the counterclaim. An order nisi to review this decision was obtained by the defendant on 27th May 1932, and subsequently, on 16th June 1932 the defendant applied for leave to amend the defence and counterclaim by reason of the discovery of fresh evidence and by pleading the illegality of the contract pursuant to the provisions of the *Town Planning Act* 1920. See *George* v. *Greater Adelaide Land Development Co.* (1).

The further facts were as follows :—(1) The allotments in question are included in the subdivision properly known as Warradale Park South but popularly known as Gardiner's Estate. (2) In November 1926 an application was made under the *Town Planning and Development Act* 1920 for approval to the deposit of a completed plan in accordance with a proposal lodged with the Town Planner. (3) In February 1927 a rearranged design was lodged (Plan A6) and on 17th February the Town Planner signified to the applicant by a letter in the form known as Letter Form A that approval had been given to the proposal for the subdivision shown in the plan A6. (See *Town Planning Act* 1929, sec. 22.) (4) In March 1927 at the suggestion of the Town Planner an alternative design (A7) was prepared and subsequently approved by the Town Planner and by the District Council. The mounted drawings were then submitted in accordance with the amended design, and on 15th May 1927 the final certificate of approval was given. (5) On 18th July 1927 the final plan, a copy of the plan referred to in clause 4 (*supra*)—a copy of plan A7—was deposited. *Napier* J., who heard the appeal from the Special Magistrate, held that there were substantial variations between the proposed design in the plan (A6) and the final plan (A7) ; that the principal, but by no means only, deviation was that the proposed plan (A6) showed a road along the western boundary, and another road—the next to the east—in a straight line from north to south, whereas, in the final plan (A7) there was no road on the boundary, and the second road took a bend to the

(1) (1929) 43 C.L.R. 91.

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west at about two-thirds of the way from south to north, the result being that all the allotments in the western end of the subdivision were re-arranged.

Napier J. held that so far as the appeal depended on the grounds taken in the order nisi there was nothing to justify his interfering with the judgment of the Local Court, but on the subsequent amendment he found that the facts were not brought within the terms of sec. 22 of the *Town Planning Act* 1929, and accordingly allowed the appeal: *Pohlner* v. *Adelaide Development Co. Ltd.* (1).

From that decision the plaintiff now, by special leave, appealed to the High Court.

Thomson K.C. and *Lewis*, for the appellant.

Counsel referred to: *Town Planning Act* 1920 (S.A.), secs. 32, 33, 34, 35; *Town Planning Act* 1929 (S.A.), sec. 22; *Acts Interpretation Act* 1915 (S.A.), sec. 22; *Suffell* v. *Bank of England* (2); *George* v. *Greater Adelaide Land Development Co.* (3); *Boulevard Heights Ltd.* v. *Veilleux* (4).

Hicks and *D. Menzies*, for the respondent.

Counsel referred to *Town Planning Act* 1929, sec. 22; *George* v. *Greater Adelaide Land Development Co.*

Cur. adv. vult.

April 21.

The following written judgments were delivered:—

RICH, DIXON AND MCTIERNAN JJ. This appeal raises two questions. The first is whether before the passing of the *Town Planning Act* 1929 (S.A.) the contract of sale which the appellant seeks to enforce was illegal and void because it involved a sale not in accordance with the provisions of the *Town Planning and Development Act* 1920 and the regulations thereunder. The second question is whether, if so, sec. 22 of the *Town Planning Act* 1929 operates retrospectively to validate it. Sec. 15 of Act No. 2104 was not in force at the time when the judgment under appeal was

(1) (1932) S.A.S.R. 346.
(2) (1882) 51 L.J. Q.B. 401, at p. 405.
(3) (1929) 43 C.L.R. 91.
(4) (1915) 52 Can. S.C.R. 185.

given and could not be relied upon (*Victorian Stevedoring and General Contracting Co. Pty. Ltd. & Meakes* v. *Dignan* (1); *Boulevard Heights Ltd.* v. *Veilleux* (2)).

The facts relevant to the first question differ only in one respect from those upon which the decision turned in *George* v. *Greater Adelaide Land Development Co.* (3). The contract was made after, not before, the Government Town Planner had finally certified his approval of the plan of subdivision under sec. 32 of the *Town Planning and Development Act* 1920. But it was made before the certificate of approval and the plan of subdivision had been deposited in the Lands Titles Registration Office pursuant to sec. 35. The logical consequence of the interpretation placed upon the statute in *George's Case* is that, unless this final step in the adoption of a plan of subdivision had been taken, the sale was not " in accordance with the provisions of " the Act and the Regulations, and, therefore, was prohibited by secs. 23 (*c*) and 44 (2). It follows that before the Act of 1929 came into force the contract was illegal and void.

The second question, whether the provisions of sec. 22 have given validity to the contract, depends upon the requirements of that section. Those requirements are that an application should have been made for approval of a plan of subdivision, that approval of the proposal shown on the plan should have been signified in a departmental form called " Letter Form A " and that the said plan of subdivision should then have been subsequently deposited. The occasion for this provision appears from the judgment of *Murray* C.J. in *Greater Adelaide Land Development Co.* v. *George* (4), particularly at p. 205. The difficulty in satisfying these conditions arises from the fact that the plan of subdivision deposited differs from the plan of subdivision approved by the communication in Letter Form A. The plan of subdivision, so approved, contained a scheme of subdivision which the Government Town Planner himself designed and suggested in substitution for that proposed by the subdividers in their application. The surveyor for the subdividers said in evidence that the Town Planner told him what he wanted and that he roughed it out; that they got Form A on this design;

(1) (1931) 46 C.L.R. 73.
(2) (1915) 52 Can. S.C.R. 185.
(3) (1929) 43 C.L.R. 91.
(4) (1929) S.A.S.R. 199.

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Rich J. Dixon J. McTiernan J.

that they were not satisfied with the plan he had given them Form A on; and that, having seen their principals, they prepared a further plan. The plan was based upon the design of the Town Planner, but it contained variations which were considered improvements. The Town Planner gave his approval to this plan and afterwards certified it under sec. 32. This certificate together with the plan was deposited pursuant to sec. 35. The approval so given was not communicated in Letter Form A and no reliance was, or in our opinion should be, placed upon it as a fulfilment of the express requirement of sec. 22 of the Act of 1929 that the plan should have been approved in Letter Form A. In the Supreme Court, *Napier* J. decided that the plan certified and deposited was not the plan which had been approved by Letter Form A and that by the use of the expression "the said plan" sec. 22 required that it should be the same plan or design. This conclusion has been attacked, substantially in three ways.

First, it is said that the sense of the transaction between the Town Planner and the subdividers when their surveyor submitted the last plan was that the Town Planner agreed to its substitution for the plan he had already approved so that it should be considered the subject of the communication he had already sent in Letter Form A. The language of the statute unfortunately is too precise to admit of this solution of the difficulty. There must have been a signification by Letter Form A of the approval of the plan. Before the letter previously sent could be considered as redelivered in respect of the other plan, it would be necessary to infer that the Town Planner expressly or tacitly communicated a definite intention that the letter should receive this new operation. It is not enough that the Town Planner manifested an intention that the new plan should be the approved design. He must also have shown an intention to adapt his former Letter Form A to the new plan and adopt it as an expression of the new approval (compare per Lord *Sterndale* M.R. in *Koenigsblatt* v. *Sweet* (1)). The evidence does not support such an inference.

Next, it is contended that the last plan was but a modification of the former, amounting to no more than the final step in a continuous

(1) (1923) 2 Ch. 314, at p. 327.

evolution of the plan to be approved as a result of the application, a single proceeding. It may be conceded that modifications made by the Town Planner in a plan already approved by Letter Form A would not destroy the identity of the plan, but, in this case, the applicants appear to have put forward a new proposal as a substitute for that approved. It is true that it was founded upon the design approved which it greatly resembled. But the course taken really amounted to re-opening the application by putting forward a fresh plan.

Thirdly, it was maintained that in fact the last plan departed so little from that which received approval expressed in Form A that it should be considered the same. It was urged that in matters which would be esteemed of most importance in the administration of the statute there was no variation between the plans. The question of substantial identity must depend largely upon the nature of the statutory requirement. It appears to us that, when in validating sales made upon a plan before it is deposited, the legislation requires fulfilment of the condition that the "said" plan shall have been approved and deposited, it must be understood as concerning itself (*inter alia*) with the identity of allotments both in reference to situation and to dimensions. In this respect the two plans are not, in our opinion, substantially identical. For these reasons we find it impossible to say that the plan approved in Letter Form A was certified and deposited.

We are, therefore, of opinion that the appeal should be dismissed.

STARKE J. This was an action for breach of contract made between the appellant and the respondent for the sale and purchase of certain allotments of land. The only defence that concerns us is a plea of illegality based on the provisions of the *Town Planning and Development Act* 1920 of South Australia. By sec. 23 of that Act, it was provided that it should not be lawful for any person to offer for sale or to sell or to convey, transfer or otherwise dispose of any existing allotment or parcel of land except in accordance with the provisions of the Act. The Act and the Regulations made under it require the preparation of a plan of subdivision, a certificate of approval, and the deposit by the owner of the certificate and

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copies of the plan in the Lands Titles Registration Office or in the General Registry Office. In *George* v. *Greater Adelaide Land Development Co.* (1) this Court held unlawful a sale entered into before the certificate of approval was obtained. The only distinction in this case is that the sale was made after a certificate of approval had been given but before the plan was deposited in accordance with the provisions of the Act. But the deposit of the plan is as much a requirement of the Act as obtaining a certificate of approval. *George's Case* is, therefore, decisive in principle of this case, unless the *Town Planning Act* of 1929, sec. 22, has validated the sale now in question. It provides: "In any case where—(*a*) an application was made to the Government Town Planner under the *Town Planning and Development Act*, 1920, for approval of a plan of subdivision under that Act; and (*b*) the Government Town Planner signified to the applicant or his agent by a letter in the Form known as Letter Form A that approval had been given to the proposal for the subdivision shown in the plan; and (*c*) the said plan of subdivision was subsequently deposited in the Lands Titles Registration Office or the General Registry Office, the said plan shall be deemed for all purposes to have been so deposited at the time when the said letter in the Letter Form A was received by the applicant or his agent, and all transactions after that time relating to any land shown on the said plan shall be, and be deemed to have been, of the same force and validity as if the plan had been deposited at that time."

In the present case, a plan of subdivision was prepared, but the Town Planner re-arranged the design, and a further plan (Ex. A6) was prepared, in respect of which a certificate in Letter Form A was given. The Town Planner prepared yet another design, and another plan (Ex. A7) was prepared. This plan was approved, and a certificate of approval was issued on 5th May 1927, and the plan deposited on 18th July 1927. The contract of sale was made on 27th June 1927 before this plan A7 was deposited. The plans A6 and A7 represent a subdivision of the same parcel of land, but the lay-out, the number of allotments, and their dimensions differ materially. It is, as *Napier* J. said, not a case of mere additions,

(1) (1929) 43 C.L.R. 91.

corrections or immaterial variations: the plans are not identical, nor even substantially so. Consequently, the approval in Letter Form A given to plan A6 cannot be applied to plan A7: it is not "the said plan of subdivision" to which approval had been given in Letter Form A.

I have some difficulty, however, about the certificate of approval given to plan A7 on 5th May 1927 and the letter accompanying it. The contract of sale, it will be remembered, was made on 27th June 1927, and therefore after this certificate of approval. Letter Form A is in the following form:—"South Australia, Department of Town Planning, Education Building, Adelaide.....19.. No..... Dear Sir,—With reference to your application dated.....I desire to inform you that approval has been given to the above proposal for new subdivision situated at.....being..... Will you therefore submit to this office two copies of the completed survey of the proposed subdivision in the form of mounted certified drawings which will be reconciled with the original proposal and if found to conform with same passed and be returned to the Registrar-General of Deeds. The certificate of approval authorizing the deposit of the plan in the Lands Titles Office or the General Registry Office will then be forwarded to you. Enclosure: the original cloth tracing of the proposed subdivision is returned herewith. Yours faithfully.....Government Town Planner." The letter of 5th May is as follows:—"Dear Sirs,—A/1382 Warradale Park South S/D.—(1) With reference to the two certified mounted drawings in connection application dated 30/7/26 for subdivision situated at Oaklands being Section 182 Hundred of Noarlunga Volume 11 Folio 46 I desire to inform you that these have been reconciled and approval has been given for the plans to be deposited in the Lands Titles Office. (2) The certificate of approval No. 862 is forwarded herewith and certificate must be lodged in the Lands Titles Office to accompany plans for deposit which plans have been forwarded direct to the Lands Titles Office from this Department. Yours faithfully.....Government Town Planner." The certificate forwarded with this letter was, according to the evidence of the Town Planner, H. C. Day, in the Form No. 2 of the Regulations.

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It certified that plan A7 had been approved by the Government Town Planner in accordance with sec. 32 of the Act of 1920.

If the words of the validating Act are clear, we cannot enter upon any refined consideration of the question whether they carry out the object of the statute, but at the same time the manifest intention of the Act ought not to be defeated by too literal an adhesion to its precise language. Is it the approval of the plan that sec. 22 of the Act of 1929 requires for validating purposes, or approval in the precise form of Letter Form A ? The mischief to be remedied was the invalidation of contracts though approval had been given by the Town Planner to plans of subdivision. In my opinion, it is the approval that is essential, but it may be in a form known as Letter Form A. On the whole, therefore, sec. 22, as applied to the present case, prescribes that plan A7 shall be deemed for all purposes to have been deposited at the time when the letter and certificate of 5th May were received by the applicant, which was before the date of the contract. We were referred to another Act, No. 2104 of 1932, sec. 15, but that Act was passed subsequently to the judgment appealed against and consequently does not affect it.

The result, in my opinion, is that this appeal should be allowed.

EVATT J. This is an appeal, pursuant to special leave, from the judgment of the Supreme Court of South Australia (*Napier* J.) which, upon appeal, gave effect to a defence of illegality in an action brought by the appellant against the respondent in the Local Court of Adelaide.

The alleged illegality consisted in a non-compliance by the present appellant with sec. 23 (*c*) of the *Town Planning and Development Act* 1920, which makes it unlawful to sell or offer for sale any existing allotment otherwise than in accordance with the provisions of that Act.

In my opinion, this part of the case is determined for us by the *ratio decidendi* of *George* v. *Greater Adelaide Land Development Co.* (1). In that case a final certificate of approval, under reg. 44, of the plan of subdivision had not been obtained before the signing

(1) (1929) 43 C.L.R. 91.

of the contract of sale; and that regulation under the Act has been fulfilled in the present instance. But sec. 35 requires that there shall be a deposit in the Lands Titles Office of the certificate of approval and of the plan approved, and the contract sued on by the present appellant was entered into before it had complied with sec. 35. The last-mentioned section is perhaps the predominant provision of the whole Act, and all the other requirements are ancillary to it and lead up to it. Upon the reasoning of *George's Case* (1), therefore, the non-compliance with sec. 35 taints the contract with illegality.

As a consequence, the appellant is forced to rely upon the special validating enactment contained in sec. 22 of the *Town Planning Act* 1929. That section provides that where three prescribed conditions have been fulfilled, a certain plan of subdivision is to be deemed deposited at the time when Letter Form A was received by the person applying to the Town Planner for approval.

Now I gather that in cases like *George's Case* (1), Letter Form A had been received by the applicant before the contract of sale was made; that there was complete identity between the plan provisionally approved in Letter Form A, and the plan finally approved and deposited. Those who promoted the passage of sec. 22 through the Legislature therefore were not concerned with protecting applicants who either had not received Letter Form A at all, or those who had received it in respect of a plan differing from that finally approved and deposited. It is not surprising therefore to find that the Legislature, seeking to accord protection to a particular applicant, has used words appropriate to such applicant, but not readily yielding to an interpretation which will also accord protection to another equally well meaning and equally impatient land "developer." That is why, in my opinion, the appellant, although not making the contract until after final approval had been obtained, is unable to rely upon such final approval. Final, as distinct from provisional, approval could not assist the company interested in the previous litigation precisely because it sold before final approval. In my opinion the words of sec. 22, making the time of the receipt

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of a particular letter (that in Letter Form A) the time to which all subsequent transactions are related back, make it necessary to show that such a letter was actually received.

I agree with *Napier* J. that the third condition of sec. 22, dealing with the deposit of the plan of subdivision after receipt of Letter Form A, was not fulfilled by the present applicant. There was a deposit but it was not of "the said plan of subdivision." A perusal of the plan in respect of which Letter Form A was received, and the plan finally approved and deposited, reveals substantial and material variations and alterations. Indeed, it clearly appears from the evidence that the appellant itself was dissatisfied with and rejected the plan on which Letter Form A had proceeded. Thus the witness J. B. Calder said—

> "Form A was issued on Exhibit A6. I have no doubt of that in my mind. Form A was sent to me on 16th February 1927. I have not got that. It was most likely destroyed. Exhibit A6 is not the design the suburb was subsequently laid out on. When A11 and A6 went in, one was done according to my own design, i.e., A11, and A6 was the Town Planner's design. He told me what he wanted and I roughed it out. I got Form A on his design. We were not satisfied with the plan (A6) he had given us Form A on. We saw Mr. Roach of the Adelaide Development Company and we prepared a further plan. That plan was prepared in my office. It was done by a Mr. L. W. Lewis."

This evidence also destroys the suggestion made, of a progressive evolving of a plan by the Town Planner and the appellant jointly. There was a complete departure from the A6 plan and a fresh start was made. The position, size, and number of the allotments on the plan A6 differ materially from those appearing on the plan finally approved and deposited.

The appellant therefore does not bring itself within the validating section, which was, in my opinion, intended to cover very different circumstances from the present. It appeared, however, on the hearing before us, that the appellant has been instrumental in promoting and carrying through Parliament another validating enactment to meet its own particular difficulties. I would have agreed, in such circumstances, to rescind special leave to appeal, because the main ground upon which it was granted was that the present appeal would test many other contracts relating to the same subdivision. Counsel for the appellant stated that he did not think

that the enactment passed (sec. 15 of Act No. 2104 of 1932) can do the work it was designed to do. Perhaps he is right.

In the circumstances I am content that the appeal be dismissed with costs.

Appeal dismissed with costs.

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Solicitors for the appellant, *Varley, Evan, Thomson & Buttrose.*
Solicitor for the respondent, *D. Menzies.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

THE ROMAN CATHOLIC BISHOP OF PERTH APPELLANT; APPELLANT,

AND

THE PERTH ROAD BOARD . . . . RESPONDENT. RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Rates—Exemption—"Land belonging to any religious body, and used or held exclusively as or for a place of public worship"—Land held by religious body and intended to be used for a church in the future—Whether "used or held exclusively as or for a place of public worship"—Road Districts Act 1919 *(No.* 38 *of* 1919) *(W.A.), sec.* 212 (2).

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MELBOURNE, *Mar.* 10, 27.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

The Roman Catholic Bishop of Perth was registered as the proprietor of a piece of land which was purchased for the purpose of erecting at a future date a place of public worship thereon and for a place of residence of an officiating priest of the Roman Catholic Church and at the date of hearing was still being held for that purpose.

Held, the facts disclosed by the case stated did not establish that the land in question was "used or held exclusively as or for" "a place of public worship"