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Restrictions Against Occupancy - Existence of a General Plan - Scholtes v. McColgan

RESTRICTIONS AGAINST OCCUPANCY—EXISTENCE OF A GENERAL PLAN

Scholtes v. McColgan[1]

Appellant brought suit in the Circuit Court for Baltimore County to restrain the appellee from selling a dwelling or any part of a tract of land to any person of the Negro race or from permitting any person of the Negro race to occupy it; an order dismissing the bill of complaint was affirmed by the Court of Appeals.

Although some contradictory evidence was presented at the trial, the Court considered the following facts as substantially correct: The appellant purchased two lots from the appellee, the first in 1940, the second in 1942. Both deeds contained a clause restricting occupation of the property "by any Negro or any person of Negro extraction", except in the capacity of a domestic servant. The lots purchased by the appellant were part of a tract of about 74 acres located on Falls Road in Baltimore County, which had been conveyed to the appellee in 1903 without restriction. Only three other lots had been sold out of this tract during the 40 years in which the appellee had owned it until the sale of a dwelling situated on part of the land in question to Negroes in the early part of 1944 brought the matter into court. In the three other sales referred to, one deed contained no restrictions; the other two were conveyed under restrictions similar to those contained in the deeds to the appellant, although one contained a clause providing that the restrictions were not to bind or apply to any other property of the vendor except that "herein described". The 74-acre tract had for many years been bounded on the south by a group of houses belonging to

[1] 184 Md. 480, 41 A. 2d (1945).

colored people and the appellee had frequently stated he did not want to see any further extension of the colored development; he had made this desire clear to the appellant and the purchasers of two of the other lots, but after he had been unsuccessful in selling another part of the land for the erection of a building to be used as a night-club because of the objections of nearby property owners, he felt his efforts had been unappreciated and accordingly he sold the dwelling in question to Negroes.

Although the restrictions in the appellant's deed applied only to the occupancy of the land, his bill of complaint went further and asked that the appellee be enjoined from conveying any of the land to Negroes, as well as permitting such persons to occupy it. Thus the complaint asked the Court to impose a restriction on alienation which was, of course, refused, the Court relying on established Maryland law.[2] At best, all the appellant could obtain, the Court continued, would be an injunction preventing the appellee from selling the land without putting in the deed or deeds to any parts sold, restrictions as to occupancy only; and under the facts considered it was felt he was not even entitled to that.

The Court cited *McKenrick v. Savings Bank*[3] in which Judge Offutt exhaustively summarized the law and stated that only where such restrictions are part of a uniform general scheme or plan of development and use which affect the land granted and the land retained alike, may they be enforced in equity; the existence of such a scheme is a question of the intention of the parties and the burden of showing such intention is on the party seeking to enforce the restrictions. Applying Judge Offutt's summary, the Court held that as the intention of the parties was a question of fact to be determined from all the circumstances of the case and that from the evidence before it there was no convincing indication that any plan of restricted development of the land was ever intended, the appellant had failed to meet the burden required and that the action of the lower court should be affirmed.

It is difficult to find fault with this result under the facts stated, but the case raises several interesting points

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[2] Clark v. Clark, 99 Md. 356, 58 A. 24 (1904). Modified by Gerke v. Colonial Trust Co., 114 Md. 289, 79 A. 587 (1911), to exclude trust property from the rule. See also Meade v. Dennistone, 173 Md. 295, 196 A. 330, 114 A. L. R. 1227 (1937), noted (1938) 2 Md. L. Rev. 363, where restraints on alienation are clearly distinguished from restraints on use and occupancy.

[3] 174 Md. 118, 197 A. 580 (1938).

which invite comment. The rule is, as stated by the Maryland Court, that the existence of a general plan is a question of fact.[4] It may be evidenced in writing or verbally.[5] In most cases a general plan of restricted development is established by evidence of a plat or diagram of the area containing restrictions.[6] Other factors which have influenced courts to find conclusive evidence of a general plan include the use of advertisements and distribution of circulars by the developer announcing his intent to restrict occupancy and use;[7] also through the existence of various deeds to grantees conveying parts of the same original tract of land, all containing similar restrictions.[8] The tendency in Maryland is to favor the unrestricted use of property; this is illustrated by the recent holding[9] by the Court of Appeals that the existence of a plat describing a general plan, but without restrictions on it, does not indicate the adoption of any uniform restrictive plan of development.

Although proof of a general plan is probably more persuasive to the courts if in writing, the Maryland Court of Appeals in the *Scholtes* case gave some consideration to the aspect of such proof through evidence of oral statements made by the appellee at various times.[10]. The Court found these statements insufficient, but had some of the evidence showing the lack of a general scheme been absent, they might well have played a larger part in the decision. The restriction against occupancy had been inserted in four of the five deeds which had been given to parts of the land sold, and the grantor had made several oral statements of his intention to restrict the use of the property; this expressed desire to keep the tract exclusively for white people could easily be implied to affect his own subsequent use of the part retained as well as the lots sold to the various grantees. The oral expressions of intention made to those to whom he gave deeds carrying the restriction might very well have been regarded as his own agreement to carry out the same restriction on the land re-

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[4] Allen v. Massachusetts Bonding & Ins. Co., 248 Mass. 378, 143 NE 499, 33 A. L. R. 669 (1924)—The A. L. R. comment covers cases in various other jurisdictions.

[5] Edwards v. West Woodridge Theatre Co., 55 Fed. (2d) 524 (App. D. C., 1931); Lewis v. Gollner, 129 NY 227, 29 NE 81 (1891).

[6] Hartt v. Rueter, 223 Mass. 207, 111 NE 1045 (1916).

[7] Kempner v. Simon, 195 NY Supp. 333 (1922).

[8] McNeil v. Gary, 40 App. D. C. 397, 46 LRA (NS) 1113 (1913).

[9] Matthews v. Kernewood, Inc., 184 Md. 297, 40 A. 2d 522 (1944). Case decided three months prior to the Scholtes case.

[10] 184 Md. 480, 484-485, 41 A. 2d 479, 481-482 (1945).

tained. But, as stated, the Court found no agreement on the vendor's part similar to that which he exacted from the purchasers. This is generally regarded as tending to show the absence of a general plan enuring to the benefit of all the purchasers.[11] Conversely, where such an agreeon the vendor's part is found, a vendee may successfully maintain a suit in equity to enjoin the sale of any of the land without such a restriction.[12]

Whether oral expressions of intent, such as found in the *Scholtes* case, are enforceable as a restriction binding on the grantor is complicated by the fact that some authorities regard a restrictive covenant as a contract concerning land, while others think of it as an equitable servitude, appurtenant to the land. To enforce the former a suit for specific performance, or possibly for breach, is the remedy, and whether or not the "contract" is in writing would make no difference, for an agreement concerning land, unlike a contract to sell land or the actual conveyance of property, need not be evidenced in writing.[13] But if regarded as an equitable servitude the Statute of Frauds might require a writing. It can well be argued that a restriction against use, as it imposes a serious encumbrance on the land, must be in writing as this, in effect, is an interest in land. If we accept this view it makes unenforceable all restrictive plans created only by oral statements, their invalidity being attributable to the failure to put them in writing. Thus, had the Maryland Court in the *Scholtes* case adopted this latter approach all consideration of the oral expressions of intent could have been eliminated immediately.

The authorities seem about equally divided between the two theories, with Professor Tiffany,[14] former Chief Justice Stone[15] and Dean Ames[16] following the contract theory; and Dean Pound,[17] along with Professor Pomeroy[18] and Judge Clark,[19] adopting the equitable servitude doctrine. By its nature, a contract is more easily enforced

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[11] Sharp v. Ropes, 110 Mass. 381 (1872). For a general discussion on this point see 3 TIFFANY, REAL PROPERTY (3rd ed. 1939) Secs. 861-869.

[12] *Supra*, n. 5.

[13] Hall v. Solomon, 61 Conn. 476, 23 A. 876 (1892); Thornton v. Schobe, 79 Colo. 25, 243 Pac. 617 (1925).

[14] 3 TIFFANY, REAL PROPERTY (3rd ed. 1939) Sec. 861.

[15] Stone, *The Equitable Rights and Liabilities of a Stranger to a Contract* (1918) 18 Col. L. Rev. 291; (1919) 19 Col. L. Rev. 177.

[16] Ames, *Specific Performance for and against Strangers to the Contract* (1904) 17 Harv. L. Rev. 174.

[17] Pound, *The Progress of the Law*, 1918-1919 (1920) 33 Harv. L. Rev. 813.

[18] Pomeroy, EQUITY JURISPRUDENCE (5th ed. 1941) Sec. 1295.

[19] Clark, COVENANTS AND INTERESTS RUNNING WITH LAND (1929) pp. 148-156.

than an equitable servitude, and thus it follows that the contract theory tends to increase restrictions on the use of property, for the more easily a restriction is enforced the more readily it may be read into transfers of property. On the other hand, adoption of the equitable easement doctrine has the effect of lessening restrictions on the use of property because of the formalities required in creating them. The decision in the *Scholtes* case and the ruling in *Matthews v. Kernewood*[20] indicate that only the most positive evidence of a general plan is strong enough to justify the enforcement of restrictions on use and occupancy in Maryland. Such an attitude is consistent with the equitable servitudes theory of restrictive covenants.

[20] *Supra*, n. 9.