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Building Restrictions - Extinguishment Through Change of Circumstances - Needle v. Clifton Realty Corporation

Casenotes

BUILDING RESTRICTIONS — EXTINGUISHMENT THROUGH CHANGE OF CIRCUMSTANCES

Needle v. Clifton Realty Corporation[1]

Suit was brought by Clifton Realty Corporation against Needle for specific performance of a contract entered into on July 8, 1949, by which Needle engaged to purchase from the Realty Co. seven lots located in block #4 on the plat of the sub-division known as Reis-Villa, located on Reisterstown Road, Baltimore, Maryland. The lots in question at the time of the sale were unimproved ones fronting on Reisterstown Road and designated by the Baltimore City Zoning Board as being in a commercial use district. The contract specified that it was the intent of the vendee to develop the lots commercially. Needle refused to consummate the transaction on the ground that the property in question being a part of Reis-Villa, was encumbered by a valid restriction prohibiting commercial usage. In 1922, when the entire area was a sparsely settled residential district, the A. J. Watkins Realty Co. subdivided the area into 344 lots, designating the division as Reis-Villa. During the ensuing thirteen years the developer sold 287½ of the lots, among which were the lots in question. All of the lots thus sold were encumbered by several restrictions, among which was the principal one to the effect that "no building other than a dwelling shall be erected." Through mesne conveyances the lots in question vested in complainant. Upon the hearing it was found that Reisterstown Road is now a heavily traveled thoroughfare, that all the properties on Reisterstown Road in Reis-Villa are commercial, and that some of the lots in Reis-Villa that are subject to restrictions are nevertheless being used for commercial purposes. The Court, after finding evidence of abandonment of the original scheme as to several lots other than the instant ones, *Held:*

> "Under the existing circumstances the restrictive covenants in the deed of December 17, 1923, are no longer effective for the purpose for which they were imposed. It is clear that the purpose of the restrictions

[1] 73 A. 2d 895 (Md., 1950).

> was to make the locality a suitable one for residences. However, owing to the development of the neighborhood as a business district, this purpose can no longer be acomplished. It would be inequitable and oppressive to give effect to those covenants. It is now settled that a court of equity in a proper case may remove restrictions as a cloud on title by means of a decree for specific performance."[2]

With this decision, the Court of Appeals has reiterated a stand indicated in several prior cases and has demonstrated a firm resolve that certain real covenants may be determined by extrinsic forces.[3] The decision impels a reexamination of the how, when and why of these forces which overcome initially valid contractual property interests.

That one owning a fee may subject it to valid use restrictions or benefits which may survive the interest of the instigator is no longer open to question, i.e., covenants running with the land.[4] These covenants are recognized in both law and equity. With the rapid expansion of urban areas came the concomitant realization of the economic and sociological benefits to be derived from schematic planning in areas of property development. The essence of such a scheme is the imposition of long range restrictions, being enforceable by the present owners after the original party has divested himself from all interest. The real covenant has peculiarly lent itself as the instrumentality to effectuate this result. Such covenants (in lay terminology, building restrictions) may promote development in reference to a predetermined scheme and thereby enhance the value of the entire tract. The validity of any attempt to do this is dependent upon substantive features not pertinent to the problem here.

Why are sundry building restrictions imposed? Clearly the answer is to perpetuate a human aim which at the present, in light of past experience, and future conjecture, seems desirable. Consequently, this aim is satisfied in the form of building restrictions which usually accommodate the present situation admirably, and seek to accommodate

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[2] *Ibid*, 897-8.

[3] Talles v. Rifman, 189 Md. 10, 53 A. 2d 396 (1947); Norris v. Williams, 189 Md. 73, 54 A. 2d 331, 4 A. L. R. 2d 1106 (1947); Gulf Oil Corp. v. Levy, 181 Md. 488, 30 A. 2d 740 (1943); Whitemarsh v. Richmond, 179 Md. 523, 20 A. 2d 161 (1941) *(dicta)*.

[4] Thruston v. Minke, 32 Md. 487 (1870); McKenrick v. Savings Bank, 174 Md. 118, 197 A. 580 (1938).

the future through time limitations or indefinitely by no limitations. Thus it may be seen that during the period when their import is most likely to be controversial, they are based on conjecture, pure and simple. The inherent weakness of such a scheme is apparent. Inevitably there must be a conflict when past human desire runs afoul of present social change. This conflict is primarily the one involved in the instant case and is generally reconciled in a court of equity. Recognizing the basic fallibility of human prowess to appraise the future with any great reliability, it is now conceded by the great weight of authority, that if the extrinsic forces be of sufficient moment, the bonds of the past must give way to the forces of the present.[5] These are the underlying features of this comparatively new problem.

In the instant case the Court concluded that to enforce the restrictions would be "inequitable and oppressive". They were thereby saying that due to the changes occurring during the last twenty odd years the restrictions were rendered nugatory. These words and ones of similar import have appeared in the few Court of Appeals decisions on the point. In deciding an analogous question in *American Weekly v. Patterson*,[6] the Court said:

> "It has likewise long been a rule of equity that where the reason for the enforcement of a restrictive covenant on land has ceased, as where the neighborhood has completely changed, equity will no longer enforce the covenant, as to do so would be to encumber the economic use of land without at the same time achieving any substantial economic benefit to the covenantee."

That these "rules" are so clearly general merely serves to illustrate that the practical considerations in each case are factual and that the "rules" are merely guideposts to evaluating these facts. The tenor of the language employed by the Maryland court is clearly in accord with the prevailing view that when the original purpose for which the covenants were imposed has been frustrated to that degree that it is no longer substantially obtainable, the force of the covenants will cease to be binding. This rule is indepen-

[5] Trustees of Columbia College v. Thatcher, 87 N. Y. 311 (1881); Harrigan v. Mulcare, 313 Mich. 594, 22 N. W. 2d 103 (1946); Elrod v. Phillips, 214 N. C. 472, 199 S. E. 722 (1938). See Annotation 4 A. L. R. 2d 1111; RESTATEMENT OF PROPERTY, SERVITUDES, Vol. 5, Sec. 564.

[6] 179 Md. 109, 115, 16 A. 2d 912 (1940).

dent of the personal defenses to enforcement of release,[7] abandonment[8] and estoppel.[9] In many cases, similar to the one under discussion, a combination of abandonment, estoppel and changing conditions will all be present in various degrees to mitigate against enforcement. Had this proceeding been a suit to quiet title against the other lot owners, these personal defenses would also be involved.

What are the operative facts which warrant consideration in denying enforcement? A review of the cases establishes that some degree of physical change must be present.[10] When the subdivision of Reis-Villa was established the entire area was but sparsely residential. The purpose of the covenants restricting the land to dwellings was to insure its continued residential character thereby enhancing the promotional venture. At the date of this suit it was found that the development and its surrounding area had been given over to business of varying nature. The question raised was whether the original purpose could be substantially fulfilled by preserving a residential island of seven lots in a virtual sea of commerce. The Court properly concluded that circumstances had made this impossible. In a situation where the changes have been so manifest as here, the courts are quite willing to deny enforcement. In *Talles v. Rifman*,[11] the Court said,

> "It is only necessary to say in general that restrictions are not favored in the law, that any inhibitions against the free transfer of land are strictly construed, and that those making them are presumed to have made them with reference to the conditions then existing, and if there has been a material alteration or change in those conditions, the courts will hold that the reason for the restrictions having been removed, the restrictions themselves go with them."

It must be emphasized however that where the intent is clear and the purpose obtainable, the restrictions will be upheld.[12] In *Schlicht v. Wengert*,[13] an injunction was sought by a property owner against a servient owner in

[7] RESTATEMENT OF PROPERTY, SERVITUDES, Vol. 5, Sec. 500.
[8] *Op. cit., supra*, Sec. 504.
[9] *Op. cit., supra*, Sec. 505.
[10] 4 A. L. R. 2d, *supra*, n. 5, 1116. City of Richlawn v. McMakin, 313 Ky. 265, 230 S. W. 2d 902 (1950). Effect of building restrictions is not diminished by less stringent zoning ordinance.
[11] *Supra*, n. 3, 15.
[12] *Infra*, n. 13. Ault v. Shipley, 189 Va. 69, 52 S. E. 2d 56 (1949).
[13] 178 Md. 629, 15 A. 2d 911 (1940).

close proximity, who was operating a saloon on his premises. The subdivision was one of 210 lots being restricted to residential purposes and specifically outlawing saloons, advertisements and construction of wharves in an adjacent cove. At the time of suit at least four saloons were operating without protest, lighted display advertisements were within the area, and several wharves had been constructed, all in violation of the restrictions. In addition there was some evidence of acquiescence by the complainant in a saloon being operated by respondent's predecessor on the servient land, but for a short duration. The court concluded that the quality of the neighborhood was still primarily residential and enjoined the violation. Thus the magnitude of the changes had not overcome the original purpose.

Commercial uses not only surrounded Reis-Villa but had encroached upon it. Such changes both within and without a subdivision will most generally present the strongest case for abatement. Changes within the area naturally lend themselves to suggest a stronger case against enforcement than those without. Since changes within the area most usually result from a breach, the related questions of the personal defenses usually come into play. However, whether breaches or not, they are still forces working toward the ultimate destruction of the original covenants and most definitely relate to the question of changed conditions. However even if there have been no changes within the restricted zone, forces without may be sufficient to render the covenants void. The Court of Appeals was confronted with this problem in *Talles v. Rifman*.[14] There a single block had been restricted to detached dwellings prior to the development of the adjacent area. The surrounding blocks had also been so restricted with time limitations which had expired and the area developed as row houses. On appeal it was contended that the court was constrained to the particular block and was not at liberty to formulate its opinion in reference to the surrounding unrestricted area. In its opinion the Court said, "It seems to us obvious, in this case, . . . that while restrictions themselves may be limited to a single block, when the court examines the reason for their imposition to determine whether that reason continues or has ceased to exist, its consideration should not be confined to the area restricted."[15] Such a result was a definite recognition that

[14] *Supra*, n. 3.
[15] *Ibid*, 16-17.

the original design may be eradicated without fault, and is in accord with the prevailing view.

There are various other operative factors which, while usually insufficient of themselves to overthrow the restriction, are sufficient incidents of change to be considered in every case. The property in this case bounded on Reisterstown Road, a "heavily traveled thoroughfare". The courts have been reluctant to deliver the *coup de grace* to restrictions based on this fact alone,[16] but never reluctant to seize upon it as a circumstance in favor of unrestricted use.[17] The justification for this seems to be grounded on the very plausible fact that at the inception of the plan, this eventuality was an obvious and completely uncontrollable factor in the scheme. In conjunction with other factors it is nevertheless a weighty consideration. In dealing with this problem of destruction of the restrictions there is frequent language to the effect that the fact that land may be more *profitably* employed, but for the restrictions, does not warrant a court of equity in so decreeing, but that the economic standpoint is a worthy factor if supported by other strong evidence of change.[18]

Where no set duration is imposed by the original covenants the courts conclude that the original parties intended the restrictions to last but for a reasonable time.[19] It is equally well settled that even though a specified time may have been stated, if conditions have since frustrated the original purpose beyond repair, the restrictions will be held unenforceable prior to their automatic expiration.[20] The Court of Appeals in *Norris v. Williams,* [21] said in part,

> "We now hold that, even though the duration of a restrictive covenant is expressly limited, equity will not enforce the covenant where a considerable part of the life of the covenant has elapsed, and where, owing to a change in the character of the neighborhood, not resulting from a breach of the covenant, the reason for enforcement of the covenant no longer exists, and such enforcement would merely encumber the land and injure or harass the covenantor without benefiting the covenantee."

[16] Redfern Lawns Civic Ass'n. v. Carrie Pontiac Co., 328 Mich. 463, 44 N. W. 2d 8 (1950); Kenealy v. Chevy Chase Land Co., 72 Fed. 2d 378 (D. C. C. A., 1934).

[17] Hemphill v. Cayce, 197 S. W. 2d 137 (Tex. Civ. Ap., 1946).

[18] Robertson v. Nichols, 92 Cal. Ap. 2d 201, 206 P. 2d 898 (1949).

[19] Norris v. Williams, 189 Md. 73, 54 A. 2d 331, 4 A. L. R. 2d 1106 (1947).

[20] *Ibid.*

[21] *Ibid,* 79.

In this particular case most of the restricted period had elapsed. The decisions frequently seize upon the relatively short period that the covenants will survive to bolster their decisions.[22] It is submitted that this is but a recognition of the thesis that the longer the covenants have been in operation the more likely is the divergence between the developer's anticipation of the future and actual fortuitous happenings. Should the fact that only a brief period has expired between imposition and radically unanticipated changes be a bar to relief?

It has thus been shown that under proper circumstances a court of equity will refuse to enforce restrictions when the benefits have been neutralized by changing conditions. As might be imagined, the equity courts entered their new province with characteristic caution. This caution was exemplified in some of the earlier cases by intimating or flatly asserting that whatever the outcome in equity, the covenants were of continuing vitality at law.[23] This view has not been entirely dispelled in the more recent decisions.[24] Is such a result a reasonable one? If there be any reliability in the arguments earlier advanced in this discussion, it is suggested that, under normal circumstances, a covenant failing in equity should fail at law. At law, suit upon a real covenant is a suit in contract and familiar contract principles are applied. The parties are presumed to have contracted in reference to existing conditions at the time of contract and but for a reasonable time. This thesis should find strong support in the contract principle of increasing application that contracts may fail when there has been a destruction of the subject matter, failure of the contemplated means of performance, or frustration of the contractual objective without culpability of the parties.[25] The doctrine of complete destructibility is supported by some very persuasive authorities. Dean Pound was one of the notable expositors of such a view.

> "It is submitted that the sound course is to hold that when the purpose of the restrictions can no longer be carried out the servitude comes to an end; that the duration of the servitude is determined by its purpose. If imposed for a fixed time, it will last no longer, but it may not last so long if the purpose becomes un-

[22] *Ibid.*
[23] Getchal v. Lawrence, 121 Misc. Rep. 359, 201 N. Y. Supp. 121 (1923).
[24] *Equitable Servitudes — Defenses*, 62 Harv. L. Rev. 1394, 1395 (1949); Lacov v. Ocean Ave. Bldg. Corp., 257 N. Y. 362, 178 N. E. 559 (1931).
[25] RESTATEMENT OF CONTRACTS, Vol. 1, Sec. 281, Vol. 2, Sec. 454.

> attainable in the meantime. When the original purpose can no longer be carried out, the same reasons that established its existence are valid to establish its termination. *There is then nothing left to protect by injunction and nothing for which to award damages.*"[26]

The writer discovered no Maryland cases wherein the court abrogated the restrictions but preserved the remedy at law. Is the language employed in the *Talles*[27] case ". . . if there has been a material alteration or change in those conditions, the courts will hold that *the reason for the restrictions having been removed,* the restrictions themselves go with them"[28] strong enough to indicate a disposition of our high court? It is submitted that such a disposition would be well rooted in principle.

In the instant case, it may be recalled that the operative changes had occurred both within and without the subdivision. The periphery of a restricted division is most vulnerable to the brunt of the first commercial onslaught. In fact, the existence of a strictly residential area will probably prove of great inducement for encroaching commerce. Where this situation results, the fringe area of the development will most certainly prove less desirable for residences. Whether this situation is to be relieved against in equity is a question upon which there is little uniformity of opinion. Of course, if the extrinsic forces are strong enough they may overcome the entire plan from without as has been demonstrated by the *Talles* case.[29] But where the original scheme has not been frustrated beyond repair, should the court indulge in piece-meal destruction of the development? Those courts answering in the affirmative seem to be swayed by the consequent hardship to the first line lots and their virtual disuse for the residential purposes to which they were committed.[30] It is undoubtedly true that their residential value may be seriously impaired. The other line of decisions describes the above principle as in effect a license by equity for the systematic destruction of the entire scheme. Under the view that such destruction does violence to the original scheme, these latter courts regard the periphery as a sort of buffer zone so long

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[26] *The Progress of the Law, Equitable Servitudes*, 33 Harv. L. Rev. 813, 821 (1920). Emphasis supplied.

[27] *Supra*, n. 3, 15.

[28] Emphasis supplied.

[29] *Supra*, n. 3.

[30] Putnam v. Ernst, 232 Mich. 682, 206 N. W. 527 (1925).

as the original scheme is still primarily intact.[31] Upon first impression the latter view may appear unduly harsh. However, it should be considered that the parties conducted their bargain in reference to the known facts. Important among these facts was the knowledge that certain lots in the subdivision bordered on unrestricted land suitable to business usage. With this knowledge is it not reasonable to assume that such was a controlling feature in determining the price of the bargain. By a consistent application of this latter precept the court would effectuate and preserve the restrictions while they are still substantially beneficial for the purpose for which they were imposed.

The older view expressed in some cases that no affirmative relief would be given[32] has been uniformly overruled. It now appears that the question of validity of building restrictions may be tested by suits for injunction,[33] to quiet title,[34] specific performance of contracts of sale,[35] and more recently declaratory judgments.[36] From the nature of these various actions it may be perceived that different proofs and parties are involved. With the exception of the *Schlicht* case which was one for injunction, the remainder of the Maryland cases appear to have been instituted for specific performance. In a restricted subdivision each lot owner has a right of enforcement against every other lot owner, and each lot is servient to every other lot. Now as a practical matter many of these rights are rendered nugatory by the personal defenses of abandonment and estoppel. These personal defenses in conjunction with extrinsic changes are the ones which militate against continued enforcement of the covenant. Thus, any suit in which the court passes upon the validity of the covenants should be subject to the defenses available to any lot owner in the entire subdivision. In cases for specific performance of a contract to sell land within the division are these defenses presented? It must be admitted that in the majority of Maryland cases they are not. The instant case was one for specifice performance. Behind the opinion itself the pleadings sufficiently indicate that it was in fact a "friendly"

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[31] Continental Oil v. Fennemore, 38 Ariz. 277, 299 Pac. 132 (1931); Cuneo v. Chicago Title & Trust Co., 337 Ill. 589, 169 N. E. 760 (1929); 54 A. L. R. 812, 85 *Id.* 980.

[32] Condert v. Sayre, 46 N. J. Eq. 386, 19 A. 190 (1890).

[33] Schlicht v. Wengert, *supra*, n. 13.

[34] Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933).

[35] Ford v. Union Trust Co. of Md., 75 A. 2d 113 (1950).

[36] Md. Code (1951), Art. 31A. Levy v. Dundalk Co., 177 Md. 636, 11 A. 2d 476 (1940).

suit. The respondent had no desire to avoid the contract if the property could be employed commercially without violating the restrictions. The defense was limited in its convincing portions to a flat assertion that the obnoxious covenants did run with the land in the first instance. This was sufficient to bring the question of their current validity before the court. No substantial argument was directed against the changes in the neighborhood or the legal effect thereof. So far as complainant was concerned it obviously sought a finding of invalidity and promoted extensive testimony to demonstrate the far reaching changes that had occurred over the years. The lower court upon dismissing respondent's petition to join the original developer, directed that other interested parties to the suit be joined. It does not appear that any were joined. The point of concern is that the respondent to the suit was not the real party to defend a suit, which in practical result will unavoidably affect other lots in the subdivision. The other property owners may not be said to have been present through the doctrine of representation since it is most obvious that the parties to the suit did not have adverse interests. It is not suggested that in the instant case the court reached an improper result, but the writer merely wants to point out the possibility of error in such a procedure when other interested parties are not joined. It is a familiar principle that a court may only pass on the issue before it. In the motion for rehearing of *Barton v. Moline Properties*,[37] the Florida court added:

> "It may be further stated that the decree in this case must be deemed and considered as applying only to that particular lot of the subdivision upon which the restriction is sought to be lifted and should in no way affect restrictions as applied to other lots in the subdivision."

It is an equally recognized maxim that interests definitely relevant to a question before a court should be litigated in one and the same proceeding where the proofs will permit, thereby giving a hearing to interested parties and concluding litigation. In the actions for injunction to quiet title and declaratory judgment, this purpose would seem better served than in the prevalent use of specific performance.

In some of the earlier cases cited above, both in this jurisdiction and others language appears to the effect that

[37] 121 Fla. 683, 164 So. 551, 557 (1935).

relief will only be granted where changes have occurred, *other than by breach of the restrictions,*[38] which destroy the original intent of the subdivision. The justification for this statement is not immediately evident; but if it is but a manner of stating that when a party seeking relief from the restrictions has been guilty of prior breaches himself he will be denied relief on the "clean hands doctrine", it is a valid consideration. If it is to be literally interpreted, it may well result in a disregard of many of the changes occurring within the subdivision which are the very factors generally conceded to be most potent. If the latter be the true interpretation it is noticeable that the court made no mention of this principle in the instant case.

From this discussion it may be concluded that building restrictions may be determined solely by extrinsic forces. The Maryland decisions and the weight of authority seem firmly dedicated to the principle that originally valid covenants running with the land may be extinguished by changing physical forces beyond the control of the interested parties, which so effectively conflict with the original scheme of development as to make its purpose no longer obtainable and continued enforcement "oppressive and inequitable". That the ultimate application of this principle is primarily a factual one is but a truism. The relevant factors are the size of the restricted property, its location in reference to where the change has occurred, the conduct of the parties and their predecessors, the nature of the change that has taken place, the purpose for which the restriction was imposed, and to some extent the unexpired term of the restrictions.

[38] Norris v. Williams, 189 Md. 73, 54 A. 2d 331, 4 A. L. R. 2d 1106 (1947).