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Problems Resulting From Imposing Restrictions On Subdivided Lots By Straw Man Conveyance

Gnau v. Kinlein[1]

In 1947, the appellants, Arthur Gnau and his wife, conveyed an unimproved eight acre tract of land to a straw man by deed, reciting that the grantors had subdivided the tract into 13 lots as shown on a plat filed with and expressly made a part of the deed. It also stipulated that the entire tract was to be subject to certain covenants and restrictions, including the restriction that the land shall be used for private residence purposes only. The deed provided that the covenants and restrictions would be binding on all of the land, that they were to run with the land, and be binding on the heirs, personal representatives, successors or assigns of the parties, and that they should be performed by and be enforceable by all persons owning, occupying or having any interest in any of the land.

The straw man immediately reconveyed the entire tract to the Gnaus subject to the same restrictions. On June 17, 1947, the above mentioned deeds and plat were duly recorded among the Land Records of Baltimore County. On June 21 the Gnaus conveyed lot 9 on the plat by a deed which neither included nor made reference to any of the restrictive covenants. In 1954 the Gnaus repurchased lot 9 by a deed which made no mention of the covenants. In 1949 the Gnaus sold lots 1 and 2, but the deed contained no covenants nor reference thereto. Shortly thereafter, lots 7 and 8 were conveyed by a deed which provided that these lots were to be held subject to the restrictive cov-

[1] 217 Md. 43, 141 A. 2d 492 (1958).

enants set forth in the deed from the Gnaus to the straw man. Lots 5 and 6 were conveyed in 1950 by deed making no reference to the covenants, and the grantee three years later by a similar deed transferred the property to its present owners. Later in 1950, lots 3 and 4 were conveyed by deed subject to the restrictive covenants set forth in the Gnau–straw man deed. Thus, in 1956, when this cause of action arose, four of the eight lots which were held under deeds from Gnau, the common grantor, were not expressly made subject to any restrictive covenants.

In 1956, lots 9 through 13, which were either retained or repurchased by the common grantor, were reclassified by the Zoning Commissioner of Baltimore County from "A" Residential to "E" Commercial, and Gnau procured a permit for, and erected, a sign proclaiming that a professional building would be erected on the land. Thereupon the owners of lots 1 and 2, 3 and 4, and 5 and 6 sought to enjoin the Gnaus from proceeding directly or indirectly in violation of their express covenants, restrictions and agreements relating to that property held by the Gnaus known as lots 9 through 13 of "Loch Knoll Manor". The Chancellor granted the injunction.

The Court of Appeals affirmed, *reasoning* that: (1) the conveyance of a tract of land to a straw man subject to restrictions, and its reconveyance to the grantors, subject to the same restrictions, bound all of the land to all of the restrictions, and after the first deed of one of the subdivided lots the common grantors no longer had power unilaterally to remove the restrictions they had created, or to avoid their full impact on the lots retained by them; (2) all subsequent purchasers of the subdivided lots took with constructive notice of the restrictions and were bound by them; (3) a common scheme of development existed; (4) the restrictions were not waived by virtue of trivial deviations from the specified restrictions by subsequent purchasers; and (5) the neighborhood had not changed so substantially as to require a finding that the restrictions were no longer worthwhile or significant. The first three grounds are somewhat troublesome, and although the result of the principal case is desirable, considerable difficulty is experienced in developing a legal basis which will justify the result.

The Court said that the problem of whether a restrictive covenant is binding on the grantor and grantees, as well as whether a grantor intended to bind the land retained

by him, is a question of intention, and felt that an intention to bind all of the lots in the development, including those retained by the grantor, was plainly expressed. This was deduced merely from the words of the Gnau–straw man conveyance. Judge Hammond relied upon the finding of the Chancellor that a common scheme of development existed, without any discussion other than to say: "We think the record clearly permitted the finding the chancellor made . . . ."[2] The Court felt there was no merit in the contention as to waiver or abandonment of the restrictions by the individual lot owners, for the deviations alleged were trivial. The Court also said that the neighborhood had not changed completely or radically in that the area immediately surrounding the lots in question remained essentially residential in character, although an intersection a short distance away had become commercial.

In this case the Court did not discuss the relative legal relationships of the individual complainants. It is submitted that the Court should have considered the doctrines of merger and implied reciprocal servitudes to determine if the individual complainants had any cause of action. It can be argued that the only complainants in the principal case with any standing in court are the owners of lots 3 and 4, that the owners of lots 1 and 2 may be estopped from asserting any rights under the restrictive covenants by virtue of the operation of the doctrine of merger, and that the owners of lots 5 and 6 do not have sufficient grounds to claim protection under the doctrine of implied reciprocal servitudes.

Considering the problems in their chronological order, it is necessary to discus the legal grounds upon which the owners of lots 1 and 2 may base their claim. Where the owner of a lot in a subdivision purchases his lot without any lots having been previously sold subject to restrictions, he must show three things in order to claim the benefit of restrictions placed in subsequent deeds: (1) that the benefit touches and concerns his lot; (2) that the grantor intended a benefit to attach to said owner's lot, which may be proved by (a) an express stipulation in the deed, or (b) the existence of a uniform building scheme, or (c) special circumstances showing an intention to benefit his lot; and, (3) that he or his predecessor purchased the lot from the developer in expectation that subsequent cov-

[2] *Ibid.*, 50.

enants would be created for the benefit of his lot.[3] This last may be proved by the existence of an express stipulation in his deed that these covenants will be inserted in all future deeds, or by the fact that the subdivision was advertised or represented as restricted, and that he acted in reliance upon such representation.[4]

In the principal case, the owner of lots 1 and 2 could easily prove that the benefit touches and concerns his property, for uniform building restrictions in a residential area are recognized to be beneficial to each subdivided lot, and also that the common grantor intended for a benefit to attach to his lot, due to the existence of a general scheme of development. The difficulty arises in proving that the land was acquired with the expectation and understanding that as a prior purchaser he would be entitled to the benefit of subsequent equitable servitudes created by his grantor in later sales of other lots.

It might be argued in the principal case that the purchaser of lots 1 and 2 knew of the restrictions in the straw man conveyance and the development of a general scheme at that time, relying upon the belief that these restrictions were binding on all subsequent purchasers of lots from the common grantor. This argument fails when it is realized that whatever effect the restrictions may have had when Gnau placed them in his deed to the straw man, they were extinguished by virtue of the operation of the merger doctrine when the Gnaus reacquired title to the entire tract. Therefore, such reliance was unjustifiable unless the Gnaus recreated these restrictions by reference to them in their subsequent sales of the lots. It should be noted also that at the time of the purchase of lots 1 and 2, not only had the restrictions been extinguished by merger, but lot 9 had been sold free of any restrictions. The reasonable assumption at that time, therefore, would be that the common grantor did *not* intend to subject the remaining lots to uniform restrictions.

It is the general rule that the duration of a real covenant is coextensive only with the estate to which it is annexed.[5] A covenant therefore is extinguished when the estate ceases,[6] when the covenant and estate become vested

[3] Summers v. Beeler, 90 Md. 474, 45 A. 19 (1899).

[4] Bealmear v. Tippett, 145 Md. 568, 125 A. 806 (1924); 2 AMERICAN LAW OF PROPERTY (1952) §9.30.

[5] 14 AM. JUR., Covenants, Conditions and Restrictions, 484, §5.

[6] Rector v. Waugh, 17 Mo. 13, 57 Am. Dec. 251 (1852).

in one person,[7] or where there is a reconveyance of the land or estate to the covenantor.[8] It is evident that immediately after the conveyance to the straw man, Gnau could not have enforced the covenants which he had imposed upon the tract in the straw man conveyance, for he no longer had any interest in the property.[9] The covenants were of no force or effect at that time. The next question is whether the covenants were enforceable when the tract was reconveyed to Gnau, the original grantor. The answer must be in the negative, for it is clear that the revesting of the covenantor with the same estate he had conveyed, extinguishes all covenants running with the land.[10] Therefore, after the reconveyance to the original grantor the property could have been sold in toto or in part free and

[7] Muscogee Manufacturing Co. v. Eagle & Phoenix Mills, 126 Ga. 210, 54 S.E. 1028, 1031 (1906).

[8] Brown v. Metz, 33 Ill. 339, 85 Am. Dec. 277 (1864).

[9] It is a fundamental principle in equity pleading that to entitle a party to sustain a bill, he must show an interest in the subject of the suit, or a right to the thing demanded, and proper title to institute the suit concerning it. When an original grantor sells all of his property, he no longer has any interest in the property and therefore cannot enforce restrictive covenants which he has imposed on that property. See Foreman v. Sadler's Executors, 114 Md. 574, 80 A. 298 (1911); Sellman v. Sellman, 63 Md. 520 (1885); Wood v. Stehrer, 119 Md. 143, 86 A. 128 (1912); Bealmear v. Tippett, 145 Md. 568, 125 A. 806 (1924); BEST, THE LAW GOVERNING RESTRICTIONS AND RESTRICTIVE COVENANTS (1934) 16.

[10] A real covenant imposing a servitude which runs with the land loses its character as such and the servitude is extinguished when all the land affected by the covenant becomes vested in one and the same person. This in legal contemplation works a dissolution of the servient and the dominant tenements, and by merger both are swallowed up in the single ownership. See 14 Am. Jur., Covenants, Conditions and Restrictions, 642, 643, §§291 & 293; Spector v. Traster, 270 Mass. 545, 170 N.E. 567 (1930); Stevenson v. Spivey, 132 Va. 115, 110 S.E. 367, 21 A.L.R. 1276 (1922); Craven County v. First-Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E. 2d 620 (1953); 2 AMERICAN LAW OF PROPERTY (1952) §9.32.

The following is a pertinent quote from 5 RESTATEMENT, PROPERTY (1944) 3288, §555:

"Merger—

"(1) The obligation arising out of a promise respecting the use of land is extinguished whenever the right to enforce the promise and the obligation upon it come to be in one person.

"(2) In so far as the right to enforce the promise is dependent upon ownership of an interest in one tract of land and the obligation to perform it is dependent upon the ownership of an interest in another tract, the obligation is extinguished by the coming of the two interests into a single ownership."

On this very question Powell says:

"The existence of a promissory obligation respecting the use of land necessarily involves one person who is entitled to the benefit and another who is subject to the burden. Consequently if the same person becomes the owner of both the benefited and the burdened land unity of ownership extinguishes the obligation by means of the doctrine of merger." POWELL, THE LAW OF REAL PROPERTY (1956) ¶206.

clear from any legal effect of the recorded restrictions. Gnau could have improved his property in any way he wished, subject only to the zoning rules and regulations and the building code of Baltimore County. If the common grantor was desirous of continuing these restrictive obligations upon the various lots, they must have been created anew, since severance of ownership will not cause the once-extinguished covenants to be revived.[11] Therefore, since there were no binding restrictions on the tract when Gnau resumed ownership, and since the deed to lots 1 and 2 made no reference to these restrictive covenants, the present owners of lots 1 and 2 would normally have no standing as complainants to enforce the restrictions.

On the other hand, when the deed to lots 5 and 6 was executed, the restrictive covenants had been recreated by Gnau in his sale of lots 7 and 8 subject to the restrictive covenants set forth in the deed from Gnau to the straw man. Therefore, at this point, lots 7 and 8 became subject to these restrictions, but the subsequent deed to lots 5 and 6 made no similar reference to these restrictive covenants. This raises the problem whether the doctrine of implied reciprocal servitudes is operative in this case to confer upon the owners of lots 5 and 6 any legal interest in the enforcement of the restrictions. To do so it must be determined whether the common grantor effectively created anew uniform restrictions on all of the remaining lots by virtue of the incorporation of such restrictive covenants in the deed to lots 7 and 8.

The case of *Turner v. Brocato*[12] held the doctrine of implied reciprocal servitudes to be applicable in Maryland. In order for this doctrine to be operative, it must be proved, among other things, that a general plan of development existed at the time of the conveyance in question. Whether restrictions in prior deeds were part of a general scheme is to be determined by ascertaining the intention of the parties, as gathered from words used, interpreted in light of all circumstances and pertinent facts known to the parties,[13] and the burden of showing such a general scheme

[11] 3 TIFFANY, LAW OF REAL PROPERTY (3rd ed. 1939) 509, §870; 5 POWELL, THE LAW OF REAL PROPERTY (1956) ¶683; 5 RESTATEMENT, PROPERTY (1944) §555, comment c.

[12] 206 Md. 336, 111 A. 2d 855 (1955), noted 16 Md. L. Rev. 51 (1956).

[13] Scholtes v. McColgan, 184 Md. 480, 41 A. 2d 479 (1945); Schlicht v. Wengert, 178 Md. 629, 15 A. 2d 911 (1940); Club Manor v. Oheb Shalom Cong., 211 Md. 465, 128 A. 2d 405 (1957); McKendrick v. Savings Bank,

is on the party seeking to enforce the restrictions.[14] This burden is extremely difficult to meet in Maryland for our courts have rigidly enforced a presumption resolving all doubts in favor of the free and unrestricted use of land.[15] It seems most unreasonable in the principal case to say that a uniform plan existed when lots 5 and 6 were purchased, at which time only two out of five previously sold lots were subject to restrictions, and if this reasoning is followed, then the owners of lots 5 and 6 also were not proper complainants and only the owners of lots 3 and 4 had any standing in court based on the express restrictions imposed in the deed of their lots. If they had not joined in the suit, it is submitted that it would have been proper to have denied the injunction.

The above discussion indicates the problems which may arise out of the practice of land developers of subjecting their tract to restrictive covenants by way of a straw man conveyance, and the importance of referring to these restrictions in a sufficient number of deeds, especially the first deeds of the subdivided lots, in order to prevent the doctrine of merger from extinguishing such restrictions.

There is merit, however, to this transaction between the common grantor and the straw man, for after the intention of the developer to subject the tract to uniform restrictions is sufficiently proved to rebut the presumption of the free and unrestricted use of property, it is then necessary to prove only that the transferee was on actual or constructive notice of the restrictions, or was put on inquiry and reasonable inquiry would have led to knowl-

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174 Md. 118, 197 A. 580 (1938); 26 C.J.S., Deeds, 1147. §167 (2), text at fn. 34.

[14] Turner v. Brocato, 206 Md. 336, 111 A. 2d 855 (1955), noted 16 Md. L. Rev. 51 (1956), Norris v. Williams, 189 Md. 73, 54 A. 2d 331, 4 A.L.R. 2d 1106 (1947); McKendrick v. Savings Bank, 174 Md. 118, 197 A. 580 (1938).

[15] The principle that doubt must be resolved in favor of the alienability of land, free and unfettered, does not control if clear and satisfactory evidence is persented to prove the existence of a general plan of development, for, wherever possible, effect will be given to an ascertained intention of the parties. To prove such the enforcing party must present evidence showing (1) the intent of the common grantor to develop the land according to a general plan, (2) that such intent was carried out, (3) that the common grantor intended to include in the development the property against which enforcement is sought, (4) that, knowing of this intent to develop, he relied upon representations of the common grantor that like restrictions would be inserted in subsequent deeds, and (5) that the parties purchased with at least constructive notice of the restrictions. 16 Md. L. Rev. 51, 56-57 (1956).

edge of the same.[16] The rule in Maryland that a grantee is bound by express encumbrances on his property which could be found by use of the grantor-grantee index of the land records, even though appearing in deeds not in the direct chain of title, is a harsh one.[17] However, the practice of subjecting the entire tract to restrictions by means of a straw man conveyance eliminates the harshness of such a rule, for each purchaser will discover the restrictions in his direct chain of title. Although this practice may involve many problems, as shown above, it does serve the purpose of conclusively satisfying the requirement of constructive notice.

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[16] Lowes v. Carter, 124 Md. 678, 93 A. 216 (1915); Coomes v. Aero Theatre Etc., 207 Md. 432, 114 A. 2d 631 (1955); King v. Waigand, 208 Md. 308, 311, 117 A. 2d 918 (1955); Easton v. The Careybrook Co., 210 Md. 286, 123 A. 2d 342 (1956); 3 TIFFANY, REAL PROPERTY (3rd ed. 1939) §863.

[17] Lowes v. Carter, 124 Md. 678, 93 A. 216 (1915). The case of Turner v. Brocato, 206 Md. 336, 356, 111 A. 2d 855 (1955), noted 16 Md. L. Rev. 51 (1956), extended this rule to the effect that it raises the implication that the common grantor intended to restrict the entire development, assuming the existence of a general plan. This, it is felt, places an unreasonable burden upon title searchers, especially in Baltimore City. It is to be noted that in the counties of Maryland the grantor-grantee index recording system is employed, which clearly discloses the earlier conveyances by the common grantor of the other lots in the subdivision which do contain express restrictions. Even then it is a considerable burden to a title searcher to require him to search for restrictions in all other conveyances from the common grantor in the subdivision, in order to make an accurate title report. But in Baltimore City the block index recording system is employed, which would make it extremely difficult for a title searcher to ever discover conveyances to all of the other lots in a large subdivision. How would he find conveyances to lots across the street or in an adjoining block? It would be necessary for him to search his title by the grantor-grantee method, reading restrictions in all the deeds from the common grantor. Should the common grantor be a land developer, the title searcher would clearly be faced with an intolerable burden.