Real Property - Equitable Servitude - Application in Situations Not Involving a Building Scheme

Hugh R. O'Connell

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol35/iss2/8

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
Real Property—Equitable Servitude—Application in Situations Not Involving a Building Scheme—The owners of a parcel of land laid out into a number of lots conveyed one of the lots to the appellees (for use as a filling station), by deed providing that the grantors for themselves, their heirs and assigns, conveanted with the grantees, their heirs and assigns that for twenty-five years the only lot in the parcel which could be used for a gasoline station was that conveyed to the grantees. Some time later, the grantors conveyed the rest of the parcel to third persons by deed which recited the basic provisions of the covenant stated above. The grantees of the second deed conveyed three of the lots of the parcel to the appellants by deed containing the following provision: "Subject, however, to a covenant of record against the use as a gasoline station on any part of said lots created in a certain deed [dated March 20, 1942]." In 1949 appellants informed appellees of their intention to erect and operate a filling station on the lots acquired by them. Appellees sought and obtained a decree enjoining such action. This appeal is from that decree and is based chiefly on the contention that the covenant in question is personal to the parties to the original agreement, does not run with the land, and is thus not enforceable against assignees of the grantors. Held: The covenant is enforceable. Citing earlier cases, the Maryland Court of Appeals disposed of the contention that the covenant did not run with the land by stating that a grantor may impose a restriction on land he sells in favor of land retained, or on land retained in favor of land sold, and if the restriction is made binding on heirs and assigns of both the grantor and grantee, it is enforceable against a violating assignee with notice, without respect to the question as to whether the covenant did or did not in legal sense, run with the land. Raney et ux. v. Tompkins et ux., 78 A 2d 183 (Maryland, 1951).

The salient feature of the above noted case is its application of the equitable servitude doctrine to a situation not involving a building scheme. While it is true that the doctrine has been invoked chiefly in the latter situations, it is by no means true that the theory is restricted to such cases. Indeed, the doctrine had its genesis in an action involving restrictions placed upon a single lot.

Equitable servitude is an equitable maxim which provides that one taking land with notice that its use is subject to an agreement such as that in the instant case, will not in equity and good conscience, be permitted to violate its terms. Through the use of the doctrine, equity recognizes rights,

3 Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (Chan. 1848).
"... without profit, which the owner of land has acquired, by contract or estoppel, to restrict or regulate, for the benefit of his own property, the use and enjoyment of the land of another..." and achieves results similar to those obtained through the use of covenants real, namely, binding future assigns of land to the terms of an agreement respecting its use, without regard to whether the restriction touches or concerns the lands affected, and with little, if any, emphasis on the formalities essential to the later type of covenant.

The similarity in result achieved has caused restrictive covenants of this type to be labelled equitable substitutes for, or adjuncts to, the legal rule of covenants running with the land, though the controlling question in equity is, not whether the covenant does or does not so run, but,

"... whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased..."

Whether the maxim is being applied with reference to a situation involving a building scheme, that is, a case where uniform building restrictions have been imposed pursuant to a general plan for improving an entire tract or real estate subdivision, or to limitations of use placed upon a single parcel of land, equity bases its decision on two factors, namely: Did the original parties intend that the restriction should be binding on subsequent owners, and, did the party resisting the limitation take the land with notice of it?

The intent element is examined with great particularity in view of the courts' aversion to unusual restrictions on land, and, "... such covenants are strictly construed in favor of the free use of the premises for all lawful purposes..." In determining the intent element, equity looks to the language of the agreement, giving the words their ordinary and popular sense, unless they are technical; the entire context of the agreement taken as a unity; the circumstances surrounding the agreement; the nature and character of the land; the purpose of the restriction; who is to benefit thereby; and, where a building scheme is involved, to the existence of a uniform plan of development with relatively consistent restrictions intended to bind and be for the benefit of all the lots within a defined area of operation.

---

4 Edward Q. Keasbey, Restrictions Upon the Use of Land, 6 HARV. L. Rev. 280 (1892).
6 Boyden v. Roberts, 131 Wis. 659, 111 N.W. 701 (1907).
7 Supra, Note 3.
8 Supra, Note 2.
10 14 C. J. S. 192.
11 Schneider v. Eckhoff, 188 Wis. 550, 206 N.W. 838 (1926).
covenants recognized in some jurisdictions, the circumstances indicating intent must show the same by necessary and unavoidable implication.

When it has been decided that the restriction was intended to be appurtenant to the land, the court proceeds to determine whether the party denying its validity was aware of its existence when he purchased, or succeeded to, the land. A bona fide purchaser for value without notice of the restriction takes free of the same, but no one taking land with notice of an equity therein, can stand in a different situation from his predecessor in title. The theories of constructive and actual notice are used to determine whether or not an assignee had such knowledge of a restriction so as to be bound by its terms, and equity will enforce a restrictive covenant against a grantee taking title through a deed reciting the covenant, against a grantee taking title with full knowledge of its existence although it be omitted from his deed, or against a grantee with constructive notice of the restriction because reference to it appears in a deed within his chain of title.

In a Wisconsin case, Boyden v. Roberts, an agreement imposing restrictions on the use of land pursuant to a general scheme was executed at the time of granting of a deed. The agreement was by separate instrument, and no reference to the restriction was made in the deed. The court held that the two instruments must be construed together with the result that an equitable servitude was found to exist. They further held that the agreement was a conveyance within the meaning of Section 235.50 of the Wisconsin Statutes, and as such was entitled to be recorded, and when recorded gave constructive notice of its contests to subsequent purchasers. Actual notice, or knowledge of such facts as would put an ordinarily prudent person on inquiry, which if prosecuted with reasonable diligence would disclose a restriction, is also sufficient to bind a purchaser to its terms, though it appears that the latter situation would more usually appear in building scheme cases where uniformity of position or type of home might be said to put a reasonably prudent person on inquiry. One who alleges lack of knowledge has the burden of proving same.

Hugh R. O'Connell

13 Supra, Note 6.
14 Supra, Note 3.
16 Mueller v. Schier, 189 Wis. 70, 205 N.W. 912 (1925).
17 Supra, Note 6.
18 Wis. Stats. (1949), Sec. 235.50, “The term conveyance . . . shall be construed to embrace every instrument in writing by which any estate or interest in real estate . . . may be affected in law or equity. . . .”
21 Pomeroy, Equity Jurisprudence, Sec. 1295 (5th ed. 1941).