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NOTES AND COMMENTS

Equitable Servitudes in Colorado With Emphasis on Pagel v. Gisi

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A class action was brought to enforce a restriction in the form of a condition subsequent with a right of abrogation reserved to the grantor. It was further qualified as a covenant running with the land and binding upon both parties. There was no provision indicating that the restriction was intended for the benefit of the common grantees and, although the defendant had actual notice of the restriction before he purchased, it was omitted from his chain of title.[1] The restriction was never included in more than twenty per cent of the total lots although one block of ten lots was not offered for sale.

The first issue determined by the court was whether this restriction was personal to the grantee or constituted an equitable servitude which was enforceable by all the grantees.

There have been two distinct approaches to construing restrictions. The first is the so-called New York Rule[2] where property values are protected and the harsh rule of revisionary interests are avoided by disregarding the written words and substituting the "more probable intent" of the parties to arrive at a covenant for the benefit of the common grantees. The second is the rule of

[1] Pagel v. Gisi, ___ Colo. ___, 1955 C.B.A. Adv. Sh. No. 13, p. 478. (This quotation was taken from the brief of the plaintiff in error which was filed in the Supreme Court of Colorado, 6 January, 1955.)

This deed is executed by the grantor and accepted by the grantees subject to the following restrictions, reservations, and conditions, viz:

That said premises will be used for dwelling houses only, and that any dwelling that is hereafter erected by party of the second part, his successors and assigns, on this lot to be at a cost of not less than $4,000.00 or to be upon plans to be approved by the grantor, his heirs or assigns, should such dwelling be of less value, and this covenant is to be incorporated in any deed given by party of the second part or second party's grantees, and any violation of these restrictions, reservations, and conditions shall cause said premises hereby to revert to the original grantor or his heirs and assigns, it being understood that the above restrictions, reservations, and conditions are covenants running with the land and binding upon the heirs and assigns of both parties thereto.

[2] Post v. Weil, 1 N. Y. Supp. 807, 22 N. E. 145.

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strict construction[3] which appears to be statutory in Colorado.[4] Colorado has previously followed this rule to the letter, as in the recent case of *Flaks v. Wichman* where the words "private residence" were held to exclude duplexes.

There are no words in this restriction which indicate that anything other than a condition subsequent was intended. Certainly, the provision that such restriction was to be a "covenant running with the land" does not change the nature of the intended condition, because such phraseology was the standard wording of common law conditions, and was only inserted to show that the intent of the parties was that the condition was to run with the land. All of the common law requirements for a condition running with the land are present in the Pagel case, viz: (A) the intention of the parties, (B) a benefit to the land, and (C) privity of estate.

Equity uses more lenient rules in enforcing covenants.[5] The grantee must have notice of the restriction, the grantor must have intended to create a servitude, and the provision must benefit the land. The equitable concept that the intent of the grantor may be determined by viewing all the facts in retrospect[6] is strongly rejected in a few jurisdictions[7] but is the law in Colorado as evidenced by recent cases.[8] A case very similar to the instant case was decided in 1907, the court holding that a condition subsequent could only be enforced by the parties to the deed.[9] The court also gave as dicta (because of the insufficiency of the allegations) to the effect that such a condition could be enforced in equity by the common grantees if these technical requirements were met:

1. a common grantor.
2. proof of a general plan.
3. the covenant has been entered into as part of a general plan.
4. the party has bought with reference to this scheme as to the consideration paid.

[3] Gray v. Blanchard (Mass.) 1829, 8 Pick. 284. Flaks v. Wichman, 128 Colo. 45, 260 P2 737.
[4] Colo. Rev. Stat. Ch. 118, sec. 8-3 (1953).
Building restrictions and all restrictions as to the use of or occupancy of real property shall be strictly construed and restrictions which provide for the forfeiture or defeasance of title to or an interest in real property, and if the parcels of real property being owned by different persons or individuals, then and in that event the restrictions shall be construed as applying only to the property embraced in the restriction and owned by the party on whose property the violation of the restriction occurred.
[5] Tulk v. Moxhay, England, 1848, 2 Phillips 774.
[6] Snow v. Van Dam, 1935, 291 Mass. 477, 197 N.E. 224.
[7] Werner v. Graham, 1919, 181 Cal. 174, 183 P. 945.
[8] Taylor v. Melton, 130 Colo. 280, 274 P2 977. Seeger v. Puckett, 115 Colo. 185, 171 P2 415.
[9] Judd v. Robinson, 41 Colo. 222. Cowell v. Colorado Springs Co., 3 Colo. 82.

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5. is inserted in all deeds.

This case represented the rules of strict construction as applied to equitable servitudes. Colorado's courts have since drastically reduced the technical requirements.

The second issue to be determined was if a scheme existed and has been maintained since its inception.

The restriction expressly stated that the premises will be used for dwelling houses only. The following discrepancies were proven, none, apparently having been more than tacitly approved by the grantor.

1. One of the plaintiffs was a veterinarian and had used part of premises for the treatment of pets.
2. A professional carpenter testified that he performed some of his work on his premises.
3. Several rental units were maintained.
4. A trailer court was allowed to be maintained on one block while workmen constructed an R.E.A. line for a six month period. The line was not connected with the restricted area.
6. In addition, a witness attempted to testify that one of the lots was used as a dumping ground for trash by a filling station.

The grantor testified that the restrictions only came into existence when he sold the lots. The grantor had built granaries upon block six and the court held that it was not a part of the restricted area which was contrary to all of the testimony based on the beliefs of the grantees. The parol evidence rule was disregarded and the grantor's testimony regarding the extent, nature, and limits of the restricted area was allowed to stand. The question which immediately arises is: What would have been the result if the grantor had disavowed the existence of a general plan for the benefit of the common grantees and had entered a cross-claim alleging his right to the property by virtue of a reversionary interest? Surely, if the grantor's testimony could determine the limits of a covenant, it would be equally admissible as a denial of the covenant, in favor of a condition subsequent.

The plaintiff, in his brief, and the learned court quoted the

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Seeger case[10] as authority for the proposition that the restriction in the Pagel case represented an equitable servitude. It does not require careful reading to see that the facts and language used are poles apart. The following quotation is the covenant used in the Seeger case:

> The grantee will erect no unsightly buildings upon said premises or of such nature as to detract from the value of neighboring premises, to keep said premises in a neat and sanitary condition, and to refrain from erecting or causing to be erected thereon any buildings other than a residence and such barns, sheds, and outbuildings as may be necessary in the reasonable enjoyment of said premises as a place of residence.

The case may be further differentiated by the grantor having made public a plat showing the proposed plan of restrictions and by reliance on and adherenee to by all interested parties to a far greater extent than the facts showed in the Pagel case.

The equitable rule again allowing plaintiffs to complain of violations which they, themselves, were also guilty of has not been discussed, even though the court ignored the application of the rule.

Conclusions

This remains a very questionable case. It would be difficult to find another in which so broad an interpretation was given to the rationale of the implied reciprocal servitude. The Colorado Supreme Court probably gave an indication of judicial attitude toward equitable servitudes by this statement, "The record contains nothing which even remotely indicates that the general plan or scheme of the restricted use of these lots have been abandoned or altered.[11]

Probable Law on Equitable Servitudes

1. A restriction in the first deed of a plat is sufficient to bind all who subsequently take with notice.
   a. Notice may be actual, or constructive.
2. The grantor's intention is the controlling factor and may be determined by viewing all of the facts in retrospect.
   a. A nominal amount of acts by the grantor will be held as sufficient to establish his intent.
3. Technical wording may be disregarded despite the clear wording of the Colorado Statute covering restrictions on the use of land.
   a. Any interest subject to defeasance is to be strictly construed in favor of the grantee.

[10] Seeger v. Puckett, 115 Colo. 185, 171 P2 415.
[11] Pagel v. Gisi, ... Colo. ...., 1955 C.B.A. Adv. Sh. No. 13, p. 479.

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