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EQUITY-INJUNCTION-NONCONFORMANCE OF LUSTRON HOUSE TO BUILDING RESTRICTIONS

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EQUITY—INJUNCTION—NONCONFORMANCE OF LUSTRON HOUSE TO BUILDING RESTRICTIONS—Plaintiffs, as landowners in a restricted Detroit subdivision, sought to restrain the defendants from erecting a Lustron house in violation of restrictions limiting construction to full basement, one-family dwellings, costing a minimum of $6,000 and composed of brick, brick veneer, hollow tile or stucco. These restrictions were imposed on all lots in the subdivision by the original owner in 1925. The Lustron house, although costing approximately $7,500, had no basement and was constructed entirely of steel.[1] After agreeing to remove it should the court enforce the restrictions, defendants erected the house.[2] On appeal from a decree granting an injunction, *held*, affirmed by an equally divided court. *Evergreen Village Civic Assn. v. Oakborn, Inc.*, 327 Mich. 161 (1950).

Decisions in cases involving restrictive covenants reflect a conflict between two strong policies in the law: one against restrictions on the use and enjoyment of a fee, and the other encouraging the development of residential areas. The result has been a series of seemingly inconsistent rules from a policy standpoint. Thus, the courts will construe a restrictive covenant most strongly against the party seeking to enforce it,[3] but at the same time will not require him to show that he will be damaged if relief is denied.[4] Similarly, the plain language of a covenant will not be broadened by construction to give effect to the intent with which it was imposed;[5] neither will the court limit the scope of the covenant unless it can be shown that a radical change of conditions has rendered enforcement futile.[6] The princi-

[1] Principal case, Record on Appeal, p. 59.

[2] Id. at 62.

[3] Woodward Hills Impr. Assn. v. Carey Homes, Inc., 321 Mich. 163 at 165, 32 N.W. (2d) 428 (1948); Gardner v. Maffitt, 335 Mo. 959, 74 S.W. (2d) 604 (1934); Jernigan v. Capps, 187 Va. 73, 45 S.E. (2d) 886 (1948); Lawson v. Lewis, 205 Ga. 227, 52 S.E. (2d) 859 (1949). But see Hoover v. Waggoman, 52 N.M. 371, 199 P. (2d) 991 (1948) noted in 47 MICH. L. REV. 1029 (1949).

[4] Cases cited in 3 TIFFANY, REAL PROPERTY, 3d ed., §858 (1939); 14 AM. JUR., Covenants §339 (1938).

[5] Moore v. Kimball, 291 Mich. 455 at 460-461, 289 N.W. 213 (1939); Davidson v. Sohier, 220 Mass. 270, 107 N.E. 958 (1915).

[6] Carey v. Lauhoff, 301 Mich. 168, 3 N.W. (2d) 67 (1942); Rombauer v. Compton

pal case furnishes an excellent illustration of the problem. Half of the court, while recognizing that relief will be denied where the plaintiff is estopped by his conduct or the purpose of the restriction has failed, could not bring the case within any of the "regular channels of non-enforcement" and were therefore of the opinion that the injunction was properly granted.[7] The other four justices were willing to declare the restrictions obsolete "so far as the rights and interests of the parties to the cause are concerned."[8] In reaching the latter conclusion the justices were influenced by such varying considerations as the fact that the subdivision had been slow to develop; the refusal of the FHA to loan money under the existing restrictions; the willingness of a majority of the lot-owners to modify them; the change over twenty-five years in standards of construction; and the obsolescence of a cost restriction based on the purchasing power of the 1925 dollar.[9] Although equity has denied an injunction on the ground of obsolescence, the courts have required a clear showing that enforcement of the restriction would no longer result in any substantial benefit to the plaintiff.[10] In the principal case, whether the restriction was imposed with the general purpose of developing a substantial and sanitary neighborhood, or specifically to provide for nothing but brick, stucco and hollow tile homes, it seems clear that the purpose of the restriction has not "failed" in the sense that the restrictions are no longer of any benefit to those who have built their homes in the subdivision. It may be argued, however, that although the restrictions are not obsolete, the Lustron house, made of steel, does not violate their purpose. Although the writer feels that there is much force in this argument, the trend of recent decisions is against any deviation from the unambiguous terms of a restriction, either in favor of the covenantee or the covenantor. These authorities indicate that if there is a literal compliance with the terms of the restriction, the covenantor will not be restrained, though his conduct frustrates the purpose of the restriction. Thus, several cases have held that the effect of an inflationary economy upon a minimum cost requirement does not justify an upward revision of the restriction.[11] Yet it has also been held that the covenantee can insist on literal compliance with the restriction although the threatened conduct would not

Heights Christian Church, 328 Mo. 1, 40 S.W. (2d) 545 (1931); Alamogordo Impr. Co. v. Prendergast, 45 N.M. 40, 109 P. (2d) 254 (1942); Deitrick v. Leadbetter, 175 Va. 170, 8 S.E. (2d) 276 (1940).

[7] Principal case at 165, opinion of Justice Sharpe.

[8] Principal case at 161, opinion of Justice Reid.

[9] In a similar Illinois case where 1926 restrictions limited construction to three-apartment brick buildings, the court refused to modify them to permit the erection of one-family dwellings, even though only one building had ever been erected under the restrictions, the government was willing to finance one-family homes, many lots were in default on special assessments, and no prospects for further apartment buildings were in view. Ockenga v. Alken, 314 Ill. App. 389, 41 N.E. (2d) 548 (1942).

[10] Carey v. Lauhoff, supra, note 6, at 172. Cases are collected in 54 A.L.R. 812 (1928) and 85 A.L.R. 985 (1933).

[11] Cases collected in 161 A.L.R. 1131 (1946). See also Moore v. Kimball, supra, note 5, at 461. The court said that where the language of the restriction is unambiguous, "it must be considered without regard to extraneous facts. . . . [T]he terms of the restrictions are conclusive."

violate its purpose. In a striking New Jersey case the chancellor restrained a minor breach of a cost restriction which was caused solely because the defendant had erected twenty-five homes and brought the average cost below the minimum through savings by quantity purchases.[12] The situation is unhealthy. Equity is striving so mightily to give simultaneous effect to policies against limiting the free use of land and in favor of the development of purely residential areas in an industrialized society, that equitable relief is tending toward inflexibility. It is not enough to say that the unambiguous language of a restriction must be applied literally or not at all. The very fact that individuals impose restrictions on the use of land to accomplish special purposes in particular situations creates a need for a flexible system of enforcement to maintain a reasonable relation between the language used and the effect which it was intended to have. At least one court has recognized this problem and has denied a petition seeking complete nullification of a restriction, while strongly indicating that it would not regard the petitioner's proposed action as a breach of the covenant.[13] Whether it is called a contract right or a property interest, it is apparent that the benefit of a restrictive covenant arises only as equity is willing to enforce it.[14] In view of this fact, serious objection could not be made if equity should choose to grant or withhold enforcement only after inquiry as to the purpose of the restriction and as to whether that purpose is threatened.

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[12] McComb v. Hanly, 128 N.J. Eq. 316, 16 A. (2d) 74 (1940); revd. on other grounds in 132 N.J. Eq. 182, 26 A. (2d) 891 (1942).

[13] Fidelity Title & Trust Co. v. Loomis & Nettleton Co., 125 Conn. 373, 5 A. (2d) 700 (1939).

[14] 4 POMEROY, EQUITY JURISPRUDENCE, 4th ed., §1693 (1919).