Bib.

157/87

Case No 379/86

WHN

DANIEL JOHANNES PAULUS MALAN ..... 1st Appellant

ANTONIO CASTANHO ..... 2nd Appellant

and

ARDCONNEL INVESTMENTS (PTY) LTD ..... Respondent

JOUBERT, JA

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

DANIEL JOHANNES PAULUS MALAN ..... 1st Appellant

ANTONIO CASTANHO ..... 2nd Appellant

and

ARDCONNEL INVESTMENTS (PTY) LTD ..... Respondent

Coram: JOUBERT, SMALBERGER, NESTADT JJA et

NICHOLAS, STEYN AJJA.

Date of Hearing: 3 November 1987

Date of Delivery: 2 December 1987

J U D G M E N T

JOUBERT, JA:

/Federated .....

Federated Building Co (Pty) Ltd ("the township owner") applied to the Administrator of the Transvaal under the Townships and Town-Planning Ordinance No 11 of 1931 (T) to establish a township on land owned by it in the district of Germiston. Its application was granted. On 27 August 1952 the Administrator pro= claimed the township of Spartan an approved township by Proclamation No 230 of 1952 issued under section 20(4) of the said Ordinance. The township comprises 263 erven indicated on General Plan S G No A7827/50 (Annexure "H").

/The .....

The conditions imposed by the Administrator in proclaiming the township are divided into two parts : A Conditions of Establishment and B Conditions of Title. Condition A 8 set aside 19 erven to be trans= ferred to the proper authorities by the township owner for government and municipal purposes while erf 259 was to be reserved by the township owner for railway purposes. Condition A 11 obliged the township owner and its successors in title to observe the conditions of establish= ment and to take the necessary steps to secure the enforcement of the conditions of title.

In part B of the conditions the erven are

/grouped .....

grouped under several different categories. According to Condition B 1 all rights to minerals and precious stones in all erven are reserved by the township owner and its successors in title to such rights. These mineral rights are in the nature of personal quasi servitudes which are freely assignable (1959 Tydskrif vir Hedendaagse Romeins-Hollandse Reg p 30). The township owner became entitled in terms of sec 71(1) of the Deeds Registries Act No 47 of 1937 on the opening of a township register for the township to take out a certificate of rights to minerals in respect of the reserved mineral rights. Condition B 2 contains

/provisions .....

provisions which apply to all erven, with the exception of the 20 erven mentioned in condition A 8. They relate to matters such as the prohibition against transfer or lease an erf to any Coloured person, and the sub-division of erven save in exceptional circumstances, elevational treatment of buildings, excavations, the keeping of animals and the discharge or drainage of stormwater. According to Condition B 3 three erven (including erf 184) are described as "special business erven" which are to be used for trade or business purposes only subject to certain restrictions, e.g. they are not to be used for a warehouse or a place of amusement or

/assembly,.....

assembly, garage, industrial premises or an hotel. Furthermore "no business carried on- - - - with persons other than Europeans and no business of a kaffir-eating-house of any description" may be conducted on them. Buildings erected on them are to have a minimum of two storeys and the upper storeys may be used for residential purposes. In terms of Con= dition B 4 erf 258 is to be a "general business erf" which is to "be used for trade or business purposes only provided that it shall not be used for a place of amusement or assembly". Condition B 5 establishes erf 185 as a "special purposes erf" which is to be used

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solely for the business of a motor garage and purposes incidental thereto. According to Condition B 6 erf 127 is a "special erf" on which there are graves. Condition B 7 deals with "industrial erven" which consist of a total of 237 erven. The relevant portion of Condition B 7 provides as follows:

> "All erven except those referred to in Clause B 3 to B 6 shall in addition to the conditions set out in clause B 2 hereof be subject to the following con= ditions:-
>
> (a) The erf and the building or buildings to be erected thereon shall be used solely for such industrial purposes as may be approved in writing by the local authority and for purposes in= cidental thereto, but for no other

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use or purpose, whatever, and no retail trading of any description (save as provided in sub-clause (ii) hereof) shall be conducted thereon. The words ' purposes incidental thereto ' shall be deemed to include -

(i) the erection and use for residential purposes of buildings for managers and watchmen of works, warehouses or factories erected on the said erf, and with the consent, in writing, of the Administrator, given after consultation with the Native Affairs Department and of the local authority, and subject to such conditions as the Adminis= trator in consultation with the local authority may impose, provision may be made for the housing of coloured persons bona fide and necessarily employed on full-time work in the industry conducted on the erf;

/(ii) .....

(ii) the right of the owner to dis= pose of goods manufactured on erf or any other goods permitted in writing by the local authority."

Condition B 8 provides for a servitude of sewerage on all erven in favour of the local authority while Condition B 9 contains definitions of "applicant" and "Coloured person".

The respondent became the registered owner of erf 184 which it acquired directly from the township owner by Deed of Transfer No T23737/1961 (Annexure "B") registered on 6 November 1961. This Deed of Transfer incorporated Conditions of Title B 1, 2, 3, 8 and 9 from the Administrator's Proclamation as conditions (a)

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to (p). Condition of Title B 3 which categorized erf 184 as a special business erf to be used for trade or business purposes only is common to erven 64 and 183 only but not to the other erven (including erf 42) in the township.

On 12 December 1961 the township owner by Deed of Transfer No T26529/1961 transferred erf 42 to Broadacres Investments Ltd. The latter by Deed of Transfer No T21718/1965 (Annexure "C") on 17 June 1965 transferred erf 42 to the first appellant. This Deed of Transfer took over Conditions of Title B 1,2,7, 8 and 9 from the Administrator's Proclamation as

/conditions .....

conditions (a) to (n). It was Condition of Title B 7 which categorized 237 erven (including erf 42) as industrial erven. As I have already indicated, erf 184 does not fall in the category of industrial erven. The counterparts of Condition of Title B 7 are conditions (i) to (k) inclusive in the title deed of erf 42 which are not common to the conditions in the title deed of erf 184. Only Conditions of Title B 1, 2, 8 and 9 are common to erven 42 and 184. Condition of Title B 7 which categorized erf 42 as an industrial erf does not appear in the title deed of erf 184. Likewise Condition of Title B 3 which

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categorized erf 184 as a special business erf was not included in the title of erf 42.

On 2 December 1985 the appellants entered into a written lease in terms of which the first appellant let the buildings on erf 42 to the second appellant for a period of 5 years as from 1 December 1985 "for the pur= pose of general dealer, fishmonger and café keeper only." (Annexure "DJM 9"). The second appellant commenced on 7 April 1986 to conduct the business of a retail food supplier under the style of Benfica Café on erf 42. His clientele consisted almost exclusively of blacks employed in the township.

The respondent brought an urgent application in the Witwatersrand Local Division against the appellants

/for .....

for an interdict restraining them from continuing to conduct the business of a retail food supplier on erf 42 and for an order declaring that the conduct of such business constituted a contravention of Condition B 7(a) of the Township Conditions of Establishment of Spartan Township and its counterpart of condi= tion (i) of the Conditions of Title registered in Deed of Transfer No T21718/65. SPOELSTRA J granted the interdict "for as long as the conditions of title of the said erf do not permit the aforesaid business". With leave of the Court a quo the appellants now appeal to this Court against the judgment. The respondent

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noted a cross-appeal against certain portions of the judgment which it abandoned at the hearing of the appeal in this Court.

The appellants challenged the locus standi in judicio of the respondent to enforce observance by the appellants of Condition 7 (a) of the Township Conditions of Title, incorporated as restrictive title condition (i) in the title deed of erf 42. They submitted that the condition was not one which enured to the benefit of the respondent, but was enforceable solely by the township owner. The condition, it was contended, did not fall

/within .....

within the principles enunciated in Elliston v Reacher, (1908) 2 Ch D 374 and Alexander v Johns, 1912 AD 431. More specifically, it was argued by Mr Nochumsohn on behalf of the appellants that the decided cases show that, in order to be enforceable by lotholders inter se, the restriction sought to be enforced must be one which is common to the lots of all the parties concerned, indicating mutual or reciprocal undertakings in relation to the re= striction. The restriction in Condition 7(a) is not such a restriction.

The rule in Elliston v Reacher, supra, was an

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equitable rule which evolved in the Court of Chancery in England. From the beginning of the 19th century the vast expansion in industrial and building activities in England underscored the practical importance of lay-out and development of townships in order to preserve their character, to regulate the character of the buildings, to prevent industries or trade from encroaching on residential areas etc. "With the growth of urban building from the beginning of the nineteenth century, landowners experienced the need for some form of covenant which would bind, not only the assignee of land,

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but his successors in title, in defence of the amenities of land retained." (The United Kingdom, the Development of its Laws and Constitution, edited by George W Keeton and Dennis Lloyd, 1955, p 137). Conveyancing of freehold land was effected privately by covenant between covenantor and covenantee by creating privity of contract between them. The registries established in 1703 for West Riding of York (2,3 Anne c 4), in 1707 for East Riding and For Kingston-upon-Hull (6 Anne c 35) and in 1708 for Middlesex (6 Anne c 35) were for the registration of documents such as deeds, conveyances

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and wills, and were not land registries. (I may observe in parenthesis that our system of land regis= tration is entirely unknown and foreign to English law. The origin of our system of land registration, ini= tiated by the Placaat of 9 May 1560 (2 G P B 1401-1402), was introduced at the Cape in 1685. Consult Houtpoort Mining & Estate Syndicate Ltd v Jacobs, 1904 T S 105 at p 108-109, Coronel's Curator v Estate Coronel, 1941 AD 323 at p 338-339). The difficulty was that there was no privity of contract between the purchasers of lots

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inter se. The device employed by English lawyers to secure a scheme of development (building scheme) was to require all purchasers of lots to enter into deeds of mutual covenants whereby they and the vendor were brought into immediate contractual relation with each other. An alternative method was to vest the restrictive covenants in the vendor or in some third party as trustee for all concerned. See Lawrence & Others v South County Freeholds Ltd and Others, (1939) 2 All ER 503 (Ch D.) at p 519 E-F. The covenants then in effect formed a sort of "local law" for the estate on which the township was, or was about to be, establish= ed. See Reid v Bickerstaff, (1909) 2 Ch. D 305 at p 319.

/More ....

More often than not all the lots were not sold simul=
taneously in which event it could be very difficult in
practice to enter into deeds of mutual covenants
with all parties concerned. The basic problem remained how
to make the restrictive covenants run with the freehold
land on which the township was, or was to be, established.
The English common law lacked in providing effective
machinery for this purpose. It was in the middle of
the 19th century that the Court of Chancery laid the
foundations of the modern doctrine of restrictive cove=
nants by deciding to enforce them in equity. The
principles thus developed were enunciated by PARKER J
in Elliston v Reacher, supra, at p 384-385
as follows:

/"I .....

"I pass, therefore, to the consideration of the question whether the plaintiffs can enforce these restrictive covenants. In my judgment, in order to bring the principles of Renals v Cowlishaw (1878) 9 Ch D 125, (1879) 11 Ch D 866 (CA) and Spicer v Martin, (1889) 14 App Cas 12 into operation it must be proved (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and the defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands pur= chased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are con= sistent and consistent only with some gene= ral scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether

/or .....

or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the pur= chases were made were to enure for the bene= fit of the other lots included in the gene= ral scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases. I may observe, with reference to the third point, that the vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including in particular the nature of the restrictions. If a general observance of the restrictions

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is in fact calculated to enchance the values of the several lots offered for sale, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he might retain other land the value of which might be similarly enhanced, for a vendor may naturally be expected to aim at obtaining the highest possible price for his land. Further, if the first three points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the three first points; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point. It is also observable that the equity arising out of the establishment of the four points I have mentioned has been sometimes explained by the implication of mutual contracts between the various pur= chasers, and sometimes by the implication

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of a contract between each purchaser and the common vendor, that each purchaser is to have the benefit of all the covenants by the other purchasers, so that each pur= chase is in equity an assign of the benefit of these covenants. In my opinion the implication of mutual contract is not always a perfectly satisfactory explanation. It may be satisfactory where all the lots are sold by auction at the same time, but when, as in cases such as Spicer v Martin, there is no sale by auction, but all the various sales are by private treaty and at various intervals of time, the circumstan= ces may, at the date of one or more of the sales, be such as to preclude the possibi= lity of any actual contract. For example, a prior purchaser may be dead or incapable of contracting at the time of a subsequent purchase, and in any event it is unlikely that the prior and subsequent purchasers are however brought into personal relationship, and yet the equity may exist between them.

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> It is, I think, enough to say, using Lord Macnaghten's words in Spicer v Martin, that where the four points I have mentioned are established, the community of interest imports in equity the reciprocity of obli= gation which is in fact contemplated by each at the time of his own purchase."
>
> (My italics).

It should be observed that in Elliston v Reacher, supra, there was no direct evidence, afforded by the execution of the deed of mutual covenant, that the parties in fact intended a "building scheme". The question was accordingly whether such intention could in all the circumstances of the case be properly inferred (Baxter and Others v Four Oaks Properties Ltd, (1965) 1 All ER 906 (Ch D) at p 914 in fine.) The following

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statement is to be found in The Law of Real Property, by R E Megarry and H W R Wade, 2nd ed, 1959 at p 738:

> "The reservation by the common vendor of a power to release all or part of the land from the restrictions does not negative a building scheme, nor is it essential that the restrictions imposed on each plot should be identical; it is enough that there is some general scheme of development." (My italics).

The Privy Council case of Texaco Antilles Ltd v Kernochan and Another, (1973) 2 All E R 118 (P C), which came on appeal from a judgment of the Court of Appeal for the Bahama Islands, involved a "building scheme" which was mixed since the lots were in general residential whereas some were commercial. The litigation, however,

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concerned a restriction which was common to all the lots.

I now turn to consider the position in the Transvaal after it became a Crown Colony. Proclamation of Townships Ordinance No 19 of 1905 (T) was rather short-lived inasmuch as it was repealed in toto by Townships Act No 33 of 1907 (T). The latter Act pro= vided that a township could be established only on free= hold land. See the definition of "owner" in sec 2 read with sec 11. A townships board could recommend conditions upon which the application to establish a township should be granted (secs 3,6). The Colonial Secretary, or other designated

/Minister .....

Minister, could refuse or grant the application subject to such conditions as he elected to prescribe (sec 6). After the Surveyor-General had approved the general plan for the proposed township the Colonial Secretary, or other designated Minister, could by notice in the Gazette declare the township an approved one (sec 7). No transfer of any lot or erf in the township could be registered until it had been declared an approved township (sec 4). Only after a local authority had been constituted for the township could the Governor by proclamation in the Gazette declared it to be a pro= claimed township (sec 12).

/What .....

Despite the fact that Act No 33 of 1907 (T) did not expressly provide for the inclusion of con= ditions of title in the conditions prescribed by the Colonial Secretary, or other designated Minister, it would seem to have been the practice to include them in the prescribed conditions. This appears from the facts relating to the prescribed conditions nos. 5 and 6 of a township laid out under the provisions of Act No 33 of 1907 which were considered in Ad= ministrator (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd, 1932 AD 25 at p 29-30.

There was apparently, as far as I could ascertain,

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no statutory provision which made the inclusion of the conditions of title obligatory in all cases.

It appears from sec 15(1) of the Townships Amendment Act No 34 of 1908 (T) that a township owner could be the owner of a private leasehold township, situated on unencumbered freehold land, while the registered holders of lots or erven had mere lease= hold titles. Provision was made in sec 15(4) to effect the conversion of leasehold titles to freehold titles.

It is against this background that the decision of this Court in Alexander v Johns,

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supra, as well as the judgment of BRISTOWE J in the Court a quo (reported in 1912 W L D 91) should be approached. The township owner laid out the township of Boksburg North (presumably an approved township) in the Transvaal. On 7 October 1905 the leasehold erven in the township were sold by auction for a period of 99 years from 1 October 1905 according to leases the terms of which were common to all erven. Clause 8 of the leases which prohibited the transfer to, or the occupation by,

/Coloured .....

Coloured persons of the erven was incorporated in the leasehold titles and the freehold titles into which leasehold titles were subsequently converted. Clause 19 of the leases provided for an option to convert the leasehold titles into freehold titles. The land on which the township was established was presumably owned by the township owner in free= hold title. In the Court a quo BRISTOWE J had little doubt that the conditions in Elliston v Reacher, supra, had been satisfied on the facts of the case (p97). In this Court INNES A CJ did not refer to the four points formulated by PARKER J in Elliston v Reacher, supra, but said at p 443-444 :

/"Each .....

"Each original lessee therefore agreed with the ground owner in terms of the lease which he signed, to subject his holding to the burden of this restriction for the benefit of each and every present or future holder of the other lots, and agreed to accept the benefit of the same restriction imposed, or to be imposed, on all the other holdings for his own advantage. Each contract with the common landlord was made for the benefit of third parties, and each involved an accep= tance of similar benefits from time to time from those parties. One would think, therefore, that on general principles such an arrangement should be binding upon and enforceable by the original leaseholders inter se. And the restrictive condition being one directly affecting the user of the lots, it was properly registered against the leasehold titles, and ought therefore to be binding upon all successors of the original lessees."

Moreover the incorporation of clause 8 in the leasehold titles, and the freehold titles by conversion,

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amounted to registered servitudes which were mutually binding on all the successors of the original lessees (p 443-444 and 1912 W L D p 101-102). Owners and tenants of erven who infringed the registered servitudes could be restrained by the owners of other erven by interdict from doing so. Damages were not claimed.

Unlike English law which on the establishing of the four points set out in Elliston v Reacher, supra, had recourse to equity to make restrictive covenants run with the land in townships and to render them reciprocally binding on the owners of lots in townships, our law has the advantage of making restrictive title conditions run with the land in townships as registered servitudes. Moreover, in our law registration of servitudes as real rights dispenses with the necessity of

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proof of knowledge of their existence by third parties.

Per HOEXTER JA in Frye's (Pty) Ltd v Ries, 1957(3) SA 575 (AD) at p 582 A-D:

> "Theoretically no doubt the act of registra= tion is regarded as notice to all the world of the ownership of the real right which is registered. That merely means that the person in whose name a real right is regis= tered can prove his ownership by producing the registered deed - - - If the registered owner asserts his right of ownership against a particular person he is entitled to do so, not because that person is deemed to know that he is the owner, but because he is in fact the owner by virtue of the registra= tion of his right of ownership - - - - Knowledge of a servitude on the part of a buyer is material only when the servitude has not been registered."

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In our law servitudes are classified as personal or praedial. In regard to land, a personal servitude is constituted over a servient tenement in favour of a particular individual (res servit personae) whereas a praedial servitude is established over a servient tene= ment for the benefit of a dominant tenement (res servit rei). It is the existence or non-existence of a dominant tenement which is the decisive factor in differentiating between personal and praedial servitudes.

Vinnius Inst 2.3.2 : Sic autem distinguuntur, non a re, quae servitutem debet, sed ab ea re, cui debetur. Praediorum igitur sunt, quae debentur, praediis; personarum, quae personis.

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The normal procedure for the registration of servitudes in a transfer of land in the Deeds Office is to embody the terms of the servitude with a descrip= tion of the servitude holder (personal servitude) or the dominant tenement (praedial servitude) in the title deed of the servient tenement. As a matter of conveyancing and for convenience the existence of the registered praedial servitude is endorsed upon the title deed of the dominant tenement. See Van Vuuren & Others v Registrar of Deeds, 1907 T.S. 289 at p 295, Worman v Hughes & Others, 1948(3) SA 495 (AD) at p 501 in fine - 502. If the servitude was acquired by means of a notarial

/deed ....

deed the latter is registered in the Register of Servitudes but such registration does not constitute the servitude in law. It is the registration of the servitude in the title deed of the servient tenement that constitutes the servitude in law. Willoughby's Consolidated Co Ltd v Copthall Stores Ltd., 1918 AD 1 at p 16.

In one very important aspect the registration of restrictive title conditions in the title deed of an erf as a servient tenement in a township differs from the normal procedure for the registration of servitudes over land, viz. the title deed of the servient

/tenement ...

tenement incorporates those restrictive title con=
ditions applicable to it as a servient tenement
without any mention of the person or the dominant
erf or erven in whose favour they are constituted.
(Ex Parte Jerrard, 1934 WLD 87 at p 95 in fine, 1960
Tydskrif vir Hedendaagse Romeins-Hollandse Reg p 176).
This also appears from the title deeds of erven 184
and 42 (Annexures "B" and "C" respectively) in the
present matter. Where the registered restrictive title
conditions are personal servitudes they will normally
be constituted in favour of the township owner, as
was held in Ex Parte Jerrard, supra, p 96 to be the
case with restrictive title condition (e) in that case. Where

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the registered restrictive title conditions are, however, praedial servitudes each erf becomes simul= taneously both a servient tenement and a dominant tenement. It is a servient tenement encumbered by the restrictive title conditions in its own title deed in favour of all the other erven as dominant erven. But it is also a dominant tenement in respect of the restrictive title conditions inserted in the title deeds of all the other erven as servient tenements. Compare Ex Parte Johannesburg Diocesan Trustees, 1936 T P D 21 at p 26, Cannon v Picadilly Mansions (Pty) Ltd, 1934 W L D 187 at p 191. This result flowed from

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the circumstance that it was an important element of the general scheme, relating to the sale of erven and the establishment of the township, to insert the restrictive title conditions in all the title deeds of erven in the township for their reci= procal benefit in order to preserve the essential character of the township. It was a matter of inter= pretation to establish whether the restrictive condi= tions were made pursuant to a general scheme for the reciprocal benefit of the erven. In general the object in imposing the restrictive conditions had to be gather= ed from all the surrounding circumstances of the case,

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including the nature of the restrictive title conditions. A practical difficulty that often presented itself was the lack of documentary evidence regarding a general scheme and the imposition of the restrictive title conditions. In these circumstances our Courts often had regard to the four points mentioned in Elliston v Reacher, supra, because they were of practical assistance as a guide to the resolution of the problem without adopting the principle of English law which was derived from an application of the four points. (Norbreck (Pty) Ltd v Rand Townships Registrar, 1948 (1) SA 1037 (W) at p 1040 in fine). It was especially

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the fourth point formulated by PARKER J which was applied by our Courts. See e.g. Eiffel Mansions (Pty) Ltd v Cohen, 1945 WLD 200 at p 205, Ex Parte Will G Hare (Pty) Ltd, 1958 (4) SA 416 (C) at p 419 B.

Ordinance No 11 of 1931 (T) introduced some important innovations. Great importance is attached to town planning and development as appears from secs 11, 13, 14 and 15. Upon receipt of an application for permision to establish a township the Administrator is to refer it forthwith to a Townships Board. The latter is to publish a notice in the Gazette and a local newspaper stating

/that .....

that the application with its plans and documents is at the office of its secretary open to inspection by members of the public who are invited to make recommendations. The Townships Board is required to visit the site of the proposed township and to report to the Administrator on such matters as the need or desirability of establishing the township, the suitability of the site, the suitability or otherwise of the proposed design or lay-out of the proposed township, the allocation of areas or zones within the proposed township for residential,

/commercial .....

commercial, industrial or other purposes, the conditions recommended to be imposed by the Administrator should he grant the application etc. It is evident that the purpose of town planning and development is to control, co-ordinate and harmonize the development of the township area. In Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd, 1978 (2) SA 872 (AD) MILLER J A held at p 888 G:

> " - - - that the fundamental purpose of conditions of establishment of a township is to ensure the orderly development of such township, with due regard to essen= tial services and facilities in the interests of sound local government and control and, of course, in the interests of the future residents thereof. The last-named object

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was clearly stated by SCHREINER J A in Estate Breet v Peri-Urban Areas Health Board, 1955(3) SA 523 (A) at p 531 F-G :

> 'The Ordinance (ie Ord. 11 of 1931 (T)) provides for the establishment of a town= ship by the carrying out of a series of steps designed to protect the interests not only of the applicant but also of persons who will be acquiring property in the township and who will become its residents and the users of its amenities'."

After having approved the application the Administrator by Proclamation in the Gazette declares the township an approved township and in a schedule to the Pro= clamation he sets forth the conditions upon which

/he .....

he granted the application viz conditions of establish=
ment and conditions of title. The conditions of establishment thereupon acquire statutory force. (Peri-Urban Areas Health Board v Breet N O and Another, 1958 (3) SA 783 (T) at p 787 A-B.) The conditions of establishment impose obligations upon the township owner which he must perform. When he transfers an erf in the township to a purchaser he is obliged by law to impose the restrictive title conditions relating to that erf that have been prescribed in the schedule to the Proclamation. Upon registration of the title deed of an erf its restrictive title

/conditions .....

conditions become registered servitudes. In Ex Parte Gold, 1956 (2) SA 642 (T) RAMSBOTTOM J held at p 647 B-C :

> "When the township-owner transfers a lot in the township to a purchaser, he is obliged by law to impose the restrictive conditions that have been prescribed in the proclamation, and he has done so in the present case. Nonetheless, when transfer has been passed, I think that the restrictive conditions are servitudes just as they would have been if they had been imposed by the vendor of his own accord. They can be enforced as such by the vendor himself, and when they enure for the benefit of other lot-holders they can be enforced by such other lot-holders."

Prima facie these registered servitudes will in general be praedial in nature and enure for the benefit of all

/other .....

other erven in the township unless there are indi=
cations to the contrary. They run with the land.
The fourth point mentioned in Elliston v Reacher, supra,
has virtually become superfluous because the restrictive
title conditions are imposed not only in the public
interest for the purpose of town planning and de=
velopment but also to enure for the benefit of all
erven in the township. It was rightly not sugges=
ted in argument that they were personal servitudes.
From a careful study of the Conditions of Title
imposed for the township of Spartan they are in my

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judgment praedial servitudes. From the circumstance that the township of Spartan is a mixed township in the sense that it is comprised predominantly of industrial erven with a few business erven it does not follow that each erf did not become a servient tenement in respect of all the other erven as dominant tenements while each erf is in turn a dominant tenement in respect of all the other erven. Compare Davies v Umtali Board & Paper Mills (Pty) Ltd & Another, 1975 (2) SA 467 (R, AD) at p 471 A-D per LEWIS A J P :

/"The .....

"The establishment of a township in terms of Part III of the Act is only approved after careful town planning consideration has been given to the development of the area as a whole and, in particular, to the number of business sites which will be required to serve the needs of the inhabitants of the township for the foreseeable future. The pur= chaser of a business site is entitled to assume, therefore, that compe= tition will be limited and that the owner of a residential lot in the township, who has paid considerably less for his piece of land than the owner of the business site, will not readily be permitted to con= vert it into a business site and set up a business in the township."

/It .....

It follows in my judgment that the respondent has locus standi in judicio to enforce observance by the appellants of the restrictive title conditions in the title deed of erf 42 which belongs to the first appellant.

Mr Nochumsohn also argued that the business activities of the second appellant on erf 42 did not amount to an unlawful contravention of Condition B 7(a) of the Conditions of Title (registered in the title deed of erf 42 as restrictive condition (i)), since the

/Town .....

Town Council of Kempton Park had in writing (Annexure "J") granted its approval in terms of Condition B 7(a) to the conduct of such business activities. Annexure "J" is a letter, dated 19 December 1985, which the City Engineer wrote to the attorneys of the appellants. Its relevant statements are the following :

> "Toestemming vir die bedryf van voedsel= voorsiening is aan Mr Spartan Take-Away verleen omdat hy sodanige toestemming van die Raad in terme van Item 7(a)(ii) van die Stigtingsvoorwaardes van Spartan ('n afskrif hierby aangeheg) benodig.
>
> In terme van die Kempton Park Dorpsaanleg= skema 1/1952 is die erf vir Spesiale Nywer= heidsdoeleindes gesoneer en is die gebruik van die grond vir besigheidsgeboue en winkels die eienaar se primêre reg ('n Afskrif van die betrokke gedeelte van Tabel "C" word aangeheg)."

/As .....

As regards the second paragraph of the letter it must be borne in mind that a Town Planning Scheme does not overrule registered restrictive conditions in title deeds. Moreover, a consent by a local authority in terms of a Town Planning Scheme does not per se authorize the user of an erf contrary to its registered restrictive title conditions. See Ex Parte Nader Tuis (Edms) Bpk, 1962(1) SA 751 (T) at p 752 B-D; Kleyn v Theron, 1966(3) SA 264 (T) at p 272; Enslin v Vereeniging Town Council, 1976(3) SA 443 (T) at p 447 B-D. I have quoted the relevant portion of Condition B7 supra. The dominant provision of

/Condition .....

Condition B7 is that an erf is to be used solely for such industrial purposes as the local authority may approve of in writing and for purposes incidental there= to but not for other purposes whatever. Furthermore, no retail trading of any description may be conducted thereon save as provided in sub-clause (ii) thereof. The words 'purposes incidental thereto' are then defined in Condition B7 and according to sub-clause (ii) the owner of the erf may dispose of goods manufactured on the erf 'or any other goods' permitted in writing by the local authority. It is clear that sub-clause (ii) makes provision for a qualified permissive right to conduct

/a .....

Lastly, Mr Nochumsohn, relying on the decision of Patz v Greene & Co, 1907 T.S. 427 at p 437, con= tended that the respondent failed to establish that the infringement by the second appellant of Condition B7 caused him damage or injury. That case (which turned on the wrongful interference with the applicant's right to trade without wrongful interference on the part of the respondent who traded illegally in contravention of a statute), is clearly distin= guishable from the present case. In the present case the respondent's right is clear, viz a registered servitude, and the second appel= lants activities constitute an unlawful infringement

/thereof .....

a retail trade on the erf in respect of goods manu=
factured on the erf 'or any other goods'. This
qualified permissive right to trade is not general but
circumscribed. It is also subservient to the dominant
provision of Condition B7. The words 'or any other
goods' must be given a restrictive meaning, that
is to say, they should be connected or associated with
industrial purposes or activities. Condition B7
clearly did not confer on the Town Council of Kempton Park the
right to authorize the conduct of a retail food supply
business by the second appellant on erf 42. The
argument is therefore unsound and must be rejected.

/Lastly .....

thereof. In a long line of cases our Courts have in similar instances granted prohibitory interdicts to protect registered servitudes against the continuance of the unlawful infringement, as well as the perpe= tration of future infringements, without proof of damage or injury. See e.g. Alexander v Johns, supra, p 446; Wyndham & Others v Rubinstein & Another, 1935 C P D 364 at p 378; Cannon v Picadilly Mansions (Pty) Ltd., supra; Van Wyhe v Nothnagel, 1951(3) SA 815 (N) at p 817; Smit v Creeser, 1948(1) SA 501 (W); Siegfried v Tidswell & Another, 1952(4) SA 319 (C); Hall v McKie and Another, 1953(4) SA 350 (N). The

/contention .....

contention is untenable and cannot be sustained.

In the result the appeal is dismissed with costs. The costs are payable by the appellants jointly and severally, the one paying the other to be absolved. The costs of the cross-appeal are payable by the respondent.

C P JOUBERT JA.

SMALBERGER JA)
NESTADT JA)
NICHOLAS AJA) Concur.
STEYN AJA)