

NOVA SCOTIA COURT OF APPEAL

Chipman, Freeman and Roscoe, JJ.A.

**Cite as: Coopers & Lybrand Ltd. v. Portland Lakes
Development Ltd., 1995 NSCA 213**

BETWEEN:

**COOPERS & LYBRAND LIMITED,
Receiver and Manager of certain
lands and property of W.L.M.
CONSTRUCTION LIMITED**

Appellant

- and -

**PORTLAND LAKES DEVELOPMENT
LIMITED, NORTH AMERICAN TRUST
COMPANY, LONDON LIFE INSURANCE
COMPANY, WILLIAM D. ARSENAULT,
and K.H. ANTHONY ROBINSON**

Respondents

) Wendy Johnston, and
) Elizabeth R. Butt

) for the Appellant

) Peter G. Green, Q.C. and
) Cynthia J. Levy

) for the Respondents
) Portland Lakes Development
) Limited and North American
) Trust Company

) Steven Zatzman

) for the Respondent
) London Life Insurance Company

) David G. Coles

) for the Respondent
) K.H. Anthony Robinson

) Appeal Heard:
) November 23, 1995

) Judgment Delivered:
) November 23, 1995

THE COURT: Appeal allowed per oral reasons for judgment of
Freeman, J.A., Chipman and Roscoe, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by:

FREEMAN, J.A.:

This is an appeal by the appellant receiver from dismissal of a chambers application under s. 4 of the **Vendors and Purchasers Act** R.S.N.S. 1989, c. 487, seeking a determination that restrictive covenants in the deed to Lot 3133 in Phase III of Portland Estates Subdivision are void or unenforceable.

The receiver wishes to sell the house built on the lot by W.L.M. Construction Limited (W.L.M), now insolvent. It was built with a four-foot sideline clearance in contravention of a covenant which required eight feet. The respondent had not approved the variation, which it was empowered to do.

The appellant's application was dismissed in a Supreme Court chambers judgment on grounds that the covenant was part of a valid building scheme that had not been made unenforceable by acquiescence.

The covenant requiring a minimum eight-foot sideline clearance reflected a building by-law of the City of Dartmouth which had been amended to require only a minimum four-foot clearance.

On August 18, 1993, W.L.M. had agreed to purchase eight lots in the same area from Portland Lakes Development Limited. It was able to purchase only five, lots 3130, 3131, 3132, 3133 and 3137, and did not buy lots 3134, 3135 and 3136. W.L.M. requested, and was granted, waivers of the eight-foot sideline requirement under the covenant with respect to lots 3130, 3131, 3132 and 3137. Lot 3136 is also built to a four-foot sideline.

William D. Arsenault, president of W.L.M., said in his affidavit

that Campbell Hart, general manager of Portland, agreed to the four-foot sideline clearance for lot 3133 but the site plan, unlike the others, was not stamped to signify Portland's approval. Mr. Hart was ill in late 1993 when the waiver was sought; his illness became terminal and he has since died.

When the appellant sought to sell the house on lot 3133 the irregularity was noticed and Portland refused to waive the requirement.

The covenants in the deed from Portland to W.L.M. include the following:

The Grantee covenants and agrees with the grantor and with the owner or owners from time to time of any other building lot in Phase III of Portland Estates Subdivision, to observe and comply with the following Covenants made in pursuance of a building scheme established by the Grantor

31. Powers of Grantor - Provided always that notwithstanding anything herein contained, the Grantor may alter, waive or modify any of the foregoing building and other Covenants without notice to the owners of any other lot or lots, parcel or parcels of land comprising part of the lands shown on the plan or plans of Portland Estates Phase III, so long as their substantial character is maintained.

The third issue raised in the appellant's factum is that the absence of Portland's stamp of approval on the site plan is mere inadvertence. In fairness to the chambers judge, there were facts before this court that were not before him, although it must be considered a reversible error that the matter was not determined on this basis. Therefore, it is not necessary to consider the first two grounds relating to the validity of the covenants and whether they were unenforceable because of acquiescence. Neither is it necessary to consider further the appellant's application to admit fresh evidence as to other instances of non-compliance and to the effect that Portland still owns additional lots in the relevant part of the subdivision. The latter point has been

acknowledged by the respondent's solicitor. The application to admit fresh evidence, upon which we reserved judgment, is dismissed.

The facts in evidence show a consistent pattern in the dealings between W.L.M and Portland. A waiver of the eight-foot sideline rule was requested and obtained for each of the other four lots. Mr. Arsenault's affidavit evidence that Mr. Hart was asked for, and agreed to, a waiver for lot 3133 is entirely consistent with this. There is nothing to suggest that Portland intentionally refused the waiver at the time, or that W.L.M. intentionally ignored the covenants or any other requirement necessary to obtain a building permit from the City of Dartmouth. Mr. Hart's illness would explain the inadvertence. Portland must have been aware where the house was being built on lot 3133 and in this particular instance acquiesced, as did the purchasers of the adjoining lot 3134. They bought the lot after the four-foot sideline was evident from the footings on lot 3133 and have not objected.

In my view, Portland effectively waived the eight-foot sideline covenant prior to construction; it would be unreasonable to hold otherwise. I would allow the appeal and declare that the site plan relating to the construction of a residence four feet from the side line of lot 3133, Civic Number 87, Portland Estate Boulevard, Dartmouth, N.S., was, and shall be deemed to have been, approved by the respondent, Portland Lakes Development Limited, on or before November 4, 1993.

The award of costs at the chambers hearing is reversed and Portland shall pay to the appellant the \$300 costs awarded at chambers. Portland shall pay costs of this appeal to the appellant receiver which we fix in the amount of \$2,000, plus disbursements, together with costs of

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\$750 each to the respondents, London Life Insurance Company and
K. H. Anthony Robinson.

J.A.

Concurred in:

Chipman, J.A.

Roscoe, J.A.

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Respondents

REASONS FOR
JUDGMENT BY:
FREEMAN, J.A.
(orally)