

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CITY OF OTTAWA

Applicant
(Respondent in Appeal)

and

CLUBLINK CORPORATION ULC

Respondent
(Appellant)

NOTICE OF APPEAL

THE RESPONDENT (APPELLANT) APPEALS to the Court of Appeal from the Judgment of Justice Labrosse (the “**Application Judge**”), dated February 19, 2021, made at Ottawa.

THE APPELLANT ASKS:

- (a) that the Judgment be set aside and the application dismissed;
- (b) that the Respondent (Appellant), ClubLink Corporation ULC (“**ClubLink**”), be granted its costs in this Court and in the court below; and
- (c) for such further and other relief as this Honourable Court deems just.

THE GROUNDS OF APPEAL ARE AS FOLLOWS:

The 1981 Agreement

1. ClubLink owns and operates a private, for-profit golf course on lands in Ottawa, Ontario, in what was formerly the City of Kanata (“**Kanata**”).
2. The golf course, and adjacent lands in the Marchwood-Lakeside Community, were previously owned by Campeau Corporation (“**Campeau**”). In 1981, Campeau entered into an

agreement with Kanata in connection with its development of the Marchwood-Lakeside Community (the “**1981 Agreement**”).

3. The 1981 Agreement purported to require, among other things, that Campeau operate the golf course in perpetuity and convey other portions of the Marchwood-Lakeside Community lands to Kanata for storm water management, natural environmental areas and parks.

4. If Campeau desired to discontinue operating the golf course, s. 5(4) of the 1981 Agreement required it to convey the golf course lands to Kanata at no cost. Upon accepting a conveyance under s. 5(4), Kanata was required to “operate or cause to be operated the land as a golf course subject to the provisions of paragraph 9”.

5. Section 9 of the 1981 Agreement applied to all of the lands conveyed by Campeau to Kanata, save for lands conveyed pursuant to the parkland provisions of the *Planning Act*. It provides that if Kanata ceases to use any of the lands for recreation and natural environmental purposes, it “shall reconvey [those lands] to Campeau at no cost”.

6. The 1981 Agreement was an express condition precedent to the Regional Official Plan Amendment necessary for Campeau’s development of the Marchwood-Lakeside Community. The former Regional Municipality of Ottawa-Carleton identified the 1981 Agreement as a “*quid pro quo*” for the desired planning approval.

7. In 1988, Campeau and Kanata entered into an amendment to the 1981 Agreement. They agreed that the 1981 Agreement would bind their successors and assigns, and “shall run with and bind” the golf course lands.

8. ClubLink acquired the golf course lands in January 1997 and accepted an assignment of the 1981 Agreement. It has operated the golf course as such for the past 24 years.

9. The Applicant (Respondent on Appeal), the City of Ottawa (the “**City**”), became a party to the 1981 Agreement as Kanata’s municipal successor in 2001.

The City's Application to the Superior Court

10. In October 2019, ClubLink submitted planning applications for a zoning by-law amendment and approval of a plan of subdivision on the golf course lands, which envision single-family homes, townhouses, medium-density housing and new, publicly accessible greenspace. ClubLink had not decided to cease operating the golf course, but made these applications to explore alternate uses of the lands.
11. Shortly thereafter, the City commenced an application against ClubLink, seeking (among other things):
 - (a) a declaration that the 1981 Agreement is valid and binding on ClubLink;
 - (b) an order requiring that ClubLink either withdraw its zoning by-law amendment application and its plan of subdivision application, or offer to convey the golf course lands to the City at no cost pursuant to s. 5(4) of the 1981 Agreement; and
 - (c) a declaration that, if the City accepts the golf course lands under s. 5(4) of the 1981 Agreement, it is not obliged to reconvey those lands to ClubLink under s. 9 as long as they remain as open space for recreation or natural environmental purposes.
12. ClubLink resisted the City's application, arguing (among other things) that:
 - (a) the 1981 Agreement is void as contrary to the rule against perpetuities because ss. 5(4) and 9 create contingent property interests in the golf course lands that did not vest within the applicable 21-year perpetuity period;
 - (b) the 1981 Agreement is invalid as it was an unlawful fetter on municipal council's planning discretion; and
 - (c) if the City accepts a conveyance of the golf course lands under s. 5(4), it is required to operate or cause to be operated a golf course on the lands, or to reconvey the lands to ClubLink under s. 9 of the 1981 Agreement.

The Application Judge's Judgment

13. The Application Judge granted the application in part, deciding (among other things) that:
- (a) the 1981 Agreement is valid and binding, and is not contrary to the rule against perpetuities because it does not give the City a contingent property interest in the golf course lands;
 - (b) the 1981 Agreement is not invalid as an unlawful fetter of municipal council's planning discretion; and
 - (c) the City can only accept a conveyance of the golf course lands from ClubLink under s. 5(4) of the 1981 Agreement if it has a *bona fide* intention to operate or cause those lands to be operated as a golf course. However, it is free to change its mind thereafter without triggering the obligation under s. 9 to reconvey the lands to ClubLink, so long as it uses the lands for recreation or natural environmental purposes.

Errors on the Rule Against Perpetuities

14. The Application Judge made various reversible errors in finding that the 1981 Agreement is not void for perpetuities. Specifically:
- (a) he erred in law by concluding that ss. 5(4) and 9 of the 1981 Agreement — both of which create immediate conveyancing obligations upon the occurrence of a specified triggering event — do not create contingent property interests that are subject to the rule against perpetuities, but instead create rights that are merely contractual in nature;
 - (b) he erred in law in analyzing the element of intention from this Court's decision in *2023201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409. He confused the parties' commercial objective in executing the 1981 Agreement with the intended method for achieving that objective — *i.e.* by creating property interests and not mere contractual rights;

- (c) he failed to consider and apply binding jurisprudence from the Supreme Court of Canada and this Court that apply the rule against perpetuities to contractual provisions that create conditional conveyancing obligations, like those in ss. 5(4) and 9 of the 1981 Agreement;
- (d) he placed undue weight on the consideration of which party has control over the triggering event in ss. 5(4) and 9 of the 1981 Agreement, contrary to binding jurisprudence from this Court; and
- (e) he erred in principle (or alternatively, committed a palpable and overriding error of fact) in failing to apply or even consider that the parties expressly agreed in writing that the 1981 Agreement binds and runs with the land, as evidence of an intention to create property interests and not mere contractual rights.

Errors on the Law of Fettering

15. The Application Judge erred in law in concluding that the 1981 Agreement was not an unlawful *quid pro quo* that fettered municipal council's discretion. Specifically:

- (a) he misdirected himself as to the nature and character of an unlawful fetter, wrongly deciding that it requires some "inappropriate or nefarious" conduct on the part of the municipality;
- (b) he failed to consider and apply jurisprudence from the Supreme Court of Canada holding that an unlawful fetter occurs where a municipality supports a planning approval in exchange for consideration not contemplated by the *Planning Act*; and
- (c) he ignored uncontroverted evidence that the Official Plan amendments necessary for Campeau's development were expressly conditional upon the execution of the 1981 Agreement as a *quid pro quo*.

Error in Interpreting the City's Obligations under the 1981 Agreement

16. The Application Judge erred in concluding that the City can accept a conveyance under s. 5(4) of the 1981 Agreement with the good faith intention of operating the golf course, but can

cease operating the golf course thereafter without any obligation to reconvey the land to ClubLink under s. 9 as long as the land remains open space for natural or recreational purposes. The Application Judge's conclusion on the City's obligations *vis-à-vis* the golf course lands is not consistent with a principled approach to contractual interpretation because it conflicts with the clear language of s. 5(4), which requires the City to operate the golf course or cause it to be operated.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- (a) section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990 c.43;
- (b) the Judgment appealed from is final; and
- (c) leave to appeal is not required.

March 5, 2021

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSO#: 32268B
mgottlieb@lolg.ca
Tel: 416 644 5353

James Renihan LSO#: 57553U
jrenihan@lolg.ca
Tel: 416 644 5344

John Carlo Mastrangelo LSO#: 76002P
jmastrangelo@lolg.ca
Tel: 416 956 0101

DAVIES HOWE LLP
The Tenth Floor
425 Adelaide Street West
Toronto ON M5V 3C1

Mark R. Flowers LSO# 43921B
markf@davieshowe.com
Tel: 416 263 4513

Lawyers for the Respondent (Appellant)

TO: **BORDEN LADNER GERVAIS LLP**
Barristers and Solicitors
100 Queen Street
Suite 1100
Ottawa ON K1P 1J9

Kirsten Crain LSO#: 44529U
kcrain@blg.com

Tel: 613 787 3741

Emma Blanchard LSO#: 53359S
eblanchard@blg.com

Tel: 613 369 4755

Neil Abraham LSO#: 71852L
nabraham@blg.com

Tel: 613 787 3587

Lawyers for the Applicant (Respondent in Appeal)

CITY OF OTTAWA
Applicant
(Respondent in Appeal)

-and- CLUBLINK CORPORATION ULC
Respondent
(Appellant)

Court of Appeal for Ontario File No.
Superior Court of Justice File No. 19-81809

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT OTTAWA

NOTICE OF APPEAL

LAX O'SULLIVAN LISUS GOTTLIEB LLP

Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSO#: 32268B
mgottlieb@lolg.ca

Tel: 416 644 5353

James Renihan LSO#: 57553U
jrenihan@lolg.ca

Tel: 416 644 5344

John Carlo Mastrangelo LSO#: 76002P
jmastrangelo@lolg.ca

Tel: 416 956 0101

DAVIES HOWE LLP

The Tenth Floor
425 Adelaide Street West
Toronto ON M5V 3C1

Mark R. Flowers LSO# 43921B
markf@davieshowe.com

Tel: 416 263 4513

Lawyers for the Respondent (Appellant)