Court File No.: CV-19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

- and -

CLUBLINK CORPORATION ULC

Respondent

- and -

KANATA GREENSPACE PROTECTION COALITION

Intervenor

FACTUM OF THE INTERVENOR, KANATA GREENSPACE PROTECTION COALITION

(Doctrine of Severance)

June 9, 2022

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PART I - OVERVIEW

1. We have had an opportunity to review the submissions of the City of Ottawa. The Coalition supports the City's of Ottawa's position that illegality does not arise in the present circumstances.

2. To the extent that the Court were to find illegality, the Coalition submits first and foremost that any such illegality arises in the performance of the contract and not its formation. This was the effect of the legislative change enacted through the *Perpetuities Act*. Contracts that could violate the Rule and were previously declared void *ab initio* and illegal *per se* were now subject to the modern "wait and see" approach. It is well-established at law that, where the statutory prohibition goes to the performance of a contract and not its formation, a party acting in good faith is entitled to enforce the contract notwithstanding the statutory breach.[1] This is indeed such a case, in relation to both the City and the members of the Coalition.[2]

3. In the event that the court does find illegality that goes to contract formation, the Coalition submits that the doctrine of severance can be used to preserve the essential core of the family of agreements, being the 40% principle and the protection of open greenspace. The doctrine of severance also avoids a windfall to the developer, who acquired land that was heavily burdened, including with an obligation to offer to convey the land for free to the City in the event that it wished to stop operating the golf course. The developer expressly assumed these burdens and registered this assumption on title for all to see.

4. ClubLink now seeks to resile from the essence of these obligations and develop the land. This would result in a massive windfall for the developer at the expense of the nearby homeowners who purchased those premium lots and relied on ClubLink's promise that it would respect the 40%

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[1] *Still v. M.N.R.*, [1998] 1 F.C. 549 (C.A.), 1997 CanLII 6379, citing with approval *Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.*, [1961] 1 Q.B. 374 (C.A.).

[2] Members of the Coalition are entitled to enforce the agreements pursuant to either a restrictive covenant or as a third-party beneficiary: *Brown v. Belleville*, 2013 ONCA 148 at paras. 93-102.

principle. ClubLink is therefore also estopped from seeking to have the key provisions of the 40% Agreement and the remainder of the development agreement implementing the principle declared void.

PART II - FACTS

5. The Coalition relies on the facts as previously found by this Court and the Court of Appeal, supplemented by the facts arising from the existing record, as set out in the argument below.

PART III - LAW AND ARGUMENT

A. Severance is Appropriate in this Case

6. The core of the agreements at bar is the protection of open space. As such, severing s. 5(4) and 9 keeps the bargain at the root of the agreements intact, as the operation of a golf course was but one of several means by which ClubLink or its successors can honour their commitment to preserving open space. Nor does severance alter the consideration underlying the original bargain between Campeau and Kanata, most notably since it was Campeau who conceived of and proposed the 40% principle. Last, the refusal to apply the doctrine of severance in this case would result in an unjustified windfall for ClubLink. Indeed, the main policy consideration at play revolves around ClubLink being unjustly enriched at the detriment of the Coalition's members.

i. General principles

7. Where part of a contract is unenforceable because enforcement would be contrary to statute or common law, it may not be necessary to set aside the entire contract. Rather, courts may sever the offending provisions while leaving the remainder of the contract intact.[3] Generally speaking, severance is available where the contracting parties' original intentions can be

[3] *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152 at paras. 35-36 ("*Cora Franchise*"); see also *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 at para. 6, *per* Arbour J. ("*Transport North American*").

honoured and preserved.[4] Severance is thus appropriate when an illegal contract can be rendered legal by striking out the illegal promises in the agreement.[5] Once those illegal parts have been removed, the resulting set of legal terms should retain the core of the agreement.

8. When assessing whether and how to sever provisions, courts will consider the context of the contract at issue as well as any relevant policy considerations.[6] As a result, any decision on severance is necessarily fact-specific and must be considered in the unique context in which it arises. For example, ClubLink strongly relies upon the Supreme Court's comments in *Shafron*[7] and those of the B.C. Court of Appeal in *Canadian American Financial*[8] in support of the purported limited availability of severance for restrictive covenants (only where the illegality was of a "trivial" or "technical" nature). However, both cases arise in the context of the heavy power imbalance that generally characterizes employer/employee relations.[9] In effect, as Dunphy J. of the Commercial List recently cautioned, *Shafron* "*was an employment law case and its strict approach to the questions of severance and 'blue penciling' must be viewed to some degree in that light*."[10] ClubLink's emphasis on the strict application of severance pursuant to these cases as a general statement of law is therefore misguided.

9. To the contrary, there is ample precedent for severance applying in contracts relating to land, including severing illegal options and positive covenants. For example, *Proto Manufacturing Ltd.*[11] concerned a lease contained an option to purchase. The option was not made subject to the *Planning Act*,[12] resulting in a violation of the Act. The Court found that this did not affect the

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[4] *Cora Franchise* at paras. 35-37.
[5] This is what is known as "blue-pencil" severance: see *Cora Franchise* at para. 36. Notional severance is also available in some instances.
[6] *Cora Franchise* at para. 37.
[7] *Shafron v. KRG Insurance Brokers (Western) Inc*., 2009 SCC 6, *per* Rothstein J.("*Shafron*").
[8] *Canadian American Financial Corp.* (Canada) Ltd. v. King (1989), 60 D.L.R. (4th) 293 (B.C.C.A.),1989 CanLII 252 at para. 3 .
[9] *Shafron*, *supra* at paras. 22-23.
[10] *Mandeville Holdings Inc. v. Santucci*, 2021 ONSC 4321 at para. 42.
[11] *Proto Manufacturing Ltd. v. Deutsch et al.* (1982), 37 O.R. (2d) 528 (H.C.J.), 1982 CanLII 1858.
[12] R.S.O. 1970, c. 349.

validity of the lease because the option could be severed from the agreement. Similarly, in *Waechter v. Tozer*,[13] the Court stated that a positive requirement, e.g. one necessitating the expenditure of money, may be severed from what is otherwise a negative covenant, e.g. a prohibition against storage of materials.

10. The same applies here: ClubLink's obligation to convey the lands to the City at no cost should it desire to discontinue the operation of the golf course may be severed so that the remainder of the contractual obligations remain in place.

ii. The core of the Agreements is the protection of open space

11. Contrary to ClubLink's framing, the core of the 40% Agreement and the related agreements is the protection of open greenspace for recreation and environmental purposes. All courts that have analyzed the agreements have already confirmed this.

12. Indeed, this Court held that the intent of the 1981 Agreement was to ensure that 40% of the parcel of land that the original owner wished to develop would be set aside as open space for recreation and natural environmental purposes ("the 40% principle").[14] This finding was undisturbed on appeal. The Court of Appeal went even further and confirmed that the same core principle was the foundation to all the agreements comprising the development contract ("the Agreements"):

> *The Agreements formed a development contract that allowed Campeau to develop its own land but subject to certain limits to further the City's public policies, most notably, the 40% principle.*
>
> *There is no question that the 40% principle was an important contractual feature that allowed Campeau to advance the development of property and further the City's public policies. The City wanted to ensure that 40% of the property to be developed would remain as open space to be used in certain*

[13] *Waechter v. Tozer,* 2008 CanLII 65588 (Ont. S.C.J.) at para. 28.
[14] *City of Ottawa v. ClubLink Corporation ULC*, 2021 ONSC 1298.

> *ways. One of the ways was the operation in perpetuity of a golf course.*[15] *(emphasis added)*

13. Thus, this Court and the Court of Appeal have already held that the nature or core of the Agreements is the protection of open space for certain uses, only one of which is a golf course. The question that arises is whether s. 5(4) and 9 being declared void and unenforceable disturbs the protection of open space. For the reasons set out below, we say that it does not.

14. Before turning to our next argument, however, we emphasize that ClubLink's claim that the golf club was the core of the parties' bargain is expressly contradicted by s. 11 of the Assumption Agreement.[16] As set out below, the parties turned their mind to the possibility that the golf course might cease operating. In that case, they clarified that the golf course lands would continue to be included within the 40% principle. Indeed, s. 11 states that:

> *The parties to this Agreement acknowledge and agree that nothing in this Agreement alters the manner in which approximately 40% of the total development area of the "Marchwood Lakeside Community" is to be left as open space for recreation and natural environmental purposes (the "Open Space Lands") as referred to in Section 3 of the 1981 Agreement, so that the calculation of the Open Space Lands will continue to include the area of the Golf Course Lands including, without limitation, any area occupied by any building or other facility ancillary to the golf course and country club located now or in the future on the Golf Course Lands. If the use of the Golf Course Lands as a golf course or otherwise as Open Space Lands is, with the agreement of the City, terminated, then for determining the above 40% requirement, the Golf Course Lands shall be deemed to be and remain Open Space Lands.* (emphasis added)

15. ClubLink's characterization of the parties' bargain is thus contradicted by the findings of this Court, as upheld on appeal, and the express wording of the agreement.

iii. Severance keeps the bargain intact

16. The clauses declared void and unenforceable relate to the golf course. Severing these portions would not fundamentally disrupt the bargain struck. Indeed, ClubLink described the

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[15] *Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847 at paras. 56-57.
[16] Assumption Agreement, Exhibit "S" of the Adams-Wright October Affidavit, AR, Vol. III, Tab 2 at p. 789-90. See also s. 3*b*) of the Assumption Agreement.

bargain as follows in its original factum on the application:

> *The Planning Committee recommended approval of the OPA, on the condition precedent that Campeau and Kanata "conclude an agreement that provides for approximately 40% open space in the area of Marchwood-Lakeside Communities and the agreement concluded prior to the By-law being approved by Regional Council".*[17]

17. Indeed, the *quid pro quo* is a) a Planning Committee recommendation, in exchange for b) an undertaking by the developer that 40% of the area in Marchwood-Lakeside remain open space. The open space obligation (or restriction) was to be honoured in four potential (4) ways, including but not limited to the "*proposed 18 hole golf course*."[18] The core of the parties' intention was always about preserving open space.

18. Severing the provisions relating to the golf course preserves the parties' bargain, which consisted of development approval in consideration for the preservation of open space. By contrast, declaring the agreements void does considerable violence to the parties' bargain, which has already been partly performed. Indeed, development approval has been provided for the adjacent lands. The City has held up its end of the bargain. Having received the full benefit of the agreements, ClubLink is now attempting to resile from its obligations before they are fully performed.

iv. Severance does not alter the consideration in the original bargain

19. In assessing whether severance would fundamentally alter the consideration in the original agreement, it is important to recall that the 40% Principle was conceived of and proposed by Campeau, the owner and original developer of the lands.[19]

20. While ClubLink argues that the operation of the golf course was a significant burden that

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[17] ClubLink Application Factum at para. 13.
[18] S. 3, 1981 Agreement, Exhibit "F" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 50.
[19] Affidavit of Donald Kennedy, para. 12, AR, Vol. VI, Tab 6 at p. 1570.

ClubLink would not have accepted without being able to convey the land to the City at no cost, the record does not support this assertion. To the contrary, the ability to satisfy the open space requirement by operating a golf course was something that Campeau, ClubLink's predecessor in interest, bargained for. The use of a portion of the lands as a golf course was viewed as "*very attractive*" to the developer. Campeau believed that the golf course would "*permit us to charge residential builders and/or lot purchasers a premium for the houses or lots we wanted to sell them*."[20] In addition, Campeau also viewed the golf course as having a secondary benefit in that it could earn revenue from operating the golf course.[21]

21. While ClubLink frames the potential off-ramp at s. 5(4) as a "*significant benefit to it*," common sense dictates otherwise. The ability to give away land at no cost is hardly a significant benefit. Moreover, ClubLink ignores that it was obligated under s. 5(4) to search for someone to acquire or operate the golf course before it could even avail itself of the opportunity to offer to convey the land to the City for free. ClubLink's argument also presumes that the City would have refused the conveyance of the land to it at no cost. Again, this assumption belies common sense.

v. A refusal to sever would result in an unjustified windfall to the developer and invokes policy consideration that justifies regard to homeowners' interests

22. If the Agreements were declared void and unenforceable, ClubLink would be unjustly enriched. The potential windfall to one of the parties is one of the factors that a court must consider when a court is determining whether to sever.[22] It is also an important policy consideration. In this case, severance allows the bargain to be maintained as much as possible, while avoiding a windfall.

23. Pursuant to the Agreements, ClubLink could not merely develop the land or sell it,

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[20] Affidavit of Donald Kennedy, at para. 13, AR, Vol. VI, Tab 6 at p. 1570.
[21] Affidavit of Donald Kennedy, at para. 13, AR, Vol. VI, Tab 6 at p. 1570.
[22] *Transport North American*, at paras. 42, 46.

unburdened, to a third party. It was required to operate the golf course, failing which it had to attempt to find another buyer and, if one was not found, then had to offer to convey the land to the City at no cost. Only in the narrow circumstances where none of the above occurred did ClubLink have the right to develop or sell the land, unburdened.

24. If ClubLink's request to effectively have all its current obligations under the Agreements declared void, it will receive a massive windfall. It will have the unconditional right to develop or sell the land. This is not what Campeau or ClubLink bargained for. They bargained for development approval (from the City) and increased property values (paid by homebuilders and the eventual homeowners), in exchange for the 40% principle.

25. The 40% principle was expressly included for the benefit of the surrounding lots and subsequent homeowners that purchased them. In this regard, s. 7 of the 1988 Agreement expressly states that the 1981 and 1988 Agreements "*shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community*" (emphasis added).[23]

26. The Coalition includes many of the purchasers who directly or indirectly purchased and paid a premium for the houses or lots along the golf course. As recognized by MacLeod R.S.J.,

> *…[T]hese homeowners have a basis to be concerned about diminution of property values and loss of green space. In addition, in my view, it is sufficient that the homeowners stand to lose the benefit of 40% green space which they believe was guaranteed. The impact on the nature and character of the neighbourhood if the development proceeds would obviously be profound.*[24]

27. The equities of this case strongly militate in favour of preserving the agreements and the

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[23] 1988 Agreement, Exhibit "J" of the Affidavit of Eileen Adams-Wright, AR, Vol. I, Tab 2 at p. 302.
[24] *City of Ottawa v. Clublink Corporation ULC*, 2019 ONSC 7470 at para. 16.

bargain they represent.

B. ClubLink is Estopped from Seeking to Have the ClubLink Assumption Agreement Declared Void and Unenforceable

28. Estoppel by convention applies here.[25] ClubLink is estopped from contesting the validity and enforceability of the agreements establishing the 40% principle. Although members of the Coalition are not parties to the agreements, the Court of Appeal recently confirmed that this is irrelevant to the estoppel by convention analysis.[26]

29. As established by the Supreme Court in *Ryan v. Moore,* the criteria for estoppel by convention are as follows:

> *(1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of silence (impliedly).*
>
> *(2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.*
>
> *(3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.*[27]

30. The Alberta Court of Queen's Bench recently confirmed that a mistake of law can ground an estoppel by convention.[28] In this case, that mistake of law was that the 40% Agreement in its entirety was enforceable and would operate in perpetuity, subject only to the very narrow path to development set out above. ClubLink's entering into the ClubLink Assumption Agreement and registering it on title for all to see constitutes the manifest conduct in this regard, the conduct which

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[25] The Coalition has brought its own application seeking to establish a restrictive covenant, an interest in land (CV-22-88630). As a result, proprietary estoppel would equally apply: *Cowper-Smith v. Morgan*, 2017 SCC 61 at paras. 15-21.
[26] *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2021 ONCA 201 at para. 157, application for leave to appeal to S.C.C. dismissed, 2022 CanLII 3790.
[27] *Ryan v. Moore*, 2005 SCC 38 at para. 59.
[28] *Mitchell v Pytel*, 2021 ABQB 403 at para. 346.

created the mutual assumption that the agreement would operate in perpetuity.

31. Members of the Coalition have acted on this shared assumption and altered their legal position by purchasing the premium lots close to the 40% greenspace. As explained in the affidavit of Barbara Ramsay, Chair of the Coalition and an owner of one of these premium lots, she and her husband specifically chose to purchase their home in 2010 "*because of its direct access and view to the open greenspace of the Golf Course Lands. We paid a premium for this location and understood upon purchasing the property that this open space was protected by the 40% Agreement*."[29] As noted above, the actions and reliance of Ms. Ramsay and other Coalition members were exactly what was intended by Campeau when it developed the 40% concept and formalized it through the various agreements, all registered on title.[30]

32. In purchasing the lots in question, the homeowners are successors in interest of both Campeau and Imasco, the developer and subsequent purchaser that sold them the lots, directly or indirectly. As already set out above, the landowners will suffer a detriment in that they stand to lose the benefit of 40% greenspace which was guaranteed. The impact on the nature and character of the neighbourhood if the development proceeds would be profound. The homeowners would also lose the value of their premium lot location along or in close proximity to the greenspace.

33. Given this detrimental reliance, it would be unjust and unfair to allow ClubLink to now depart from the shared assumption that the 40% principle would apply in perpetuity.

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[29] Affidavit of Barbara Ramsay at para. 8, AR, Vol. VI, Tab at 11 p. 1776.
[30] Affidavit of Donald Kennedy at para. 13, para. 12, AR, Vol. VI, Tab 6 at p. 1570.

June 9, 2022

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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SCHEDULE "A"

LIST OF AUTHORITIES

I. Case Law

1. *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152
2. *Brown v. Belleville*, 2013 ONCA 148
3. *Canadian American Financial Corp.* (Canada) Ltd. v. King (1989), 60 D.L.R. (4th) 293 (B.C.C.A.),1989 CanLII 252
4. *City of Ottawa v. Clublink Corporation ULC*, 2019 ONSC 7470
5. *City of Ottawa v. ClubLink Corporation ULC*, 2021 ONSC 1298.
6. *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2021 ONCA 201
7. *Mandeville Holdings Inc. v. Santucci*, 2021 ONSC 4321
8. *Mitchell v Pytel*, 2021 ABQB 403
9. *Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847
10. *Proto Manufacturing Ltd. v. Deutsch et al.* (1982), 37 O.R. (2d) 528 (H.C.J.), 1982 CanLII 1858.
11. *Ryan v. Moore*, 2005 SCC 38
12. *Still v. M.N.R.*, [1998] 1 F.C. 549 (C.A.), 1997 CanLII 6379
13. *Shafron v. KRG Insurance Brokers (Western) Inc*., 2009 SCC 6
14. *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7
15. *Waechter v. Tozer,* 2008 CanLII 65588 (Ont. S.C.J.)

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