Court of Appeal for Ontario File No. COA-23-CV-1232
Superior Court of Justice Court File No. 19-81809

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CITY OF OTTAWA

Applicant
(Appellant)

and

CLUBLINK CORPORATION ULC

Respondent
(Respondent in Appeal)

and

KANATA GREENSPACE PROTECTION COALITION

Intervenor

AMENDED NOTICE OF APPEAL

THE APPLICANT (APPELLANT) APPEALS to the COURT OF APPEAL FOR ONTARIO from the Judgment of the Honourable Justice Labrosse (the "**Application Judge**") dated October 13, 2023, made at Ottawa (the "**Judgment**").

THE APPELLANT ASKS that the appeal be allowed, the Judgment be set aside, and a Judgment be granted as follows:

(a) The obligations of ClubLink Corporation ULC in s. 3 of the Assumption Agreement and the underlying 40% Agreement remain valid and enforceable, but for ss. 5(4) and 9 of the 1981 40% Agreement (as defined below);

(b) The City of Ottawa be granted its costs in this appeal and in the second attendance in this application in the Court below; and

(c) Such further relief as counsel may request and this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

The Parties and the Related Contracts

2. This appeal concerns the impact on a series of inter-related contracts of a finding that two provisions in the first contract were void by virtue of the rule against perpetuities. The five contracts, collectively defined as the "**Related Contracts**", were executed in the 1980s and 1990s by Campeau Corporation ("**Campeau**") and the City of Kanata ("**Kanata**").

3. The Applicant (Appellant), the City of Ottawa (the "**City**"), is the successor to Kanata by operation of the *City of Ottawa Act, 1999*, S.O. 1999, c. 14, Sch. E.

4. The Respondent (Respondent in appeal), ClubLink Corporation ULC ("**ClubLink**"), is the current owner of the Golf Course Lands (as defined below), and has assumed Campeau's contractual interests and obligations in respect of the Golf Course Lands.

5. The Related Contracts pertain to the redevelopment of 1400 acres of land in what was then the City of Kanata (the "**Campeau Lands**"), with residential homes, neighbourhoods, and open space for recreation and natural environment purposes.

6. To obtain Kanata's support for the necessary planning applications, Campeau proposed that 40% of the Campeau Lands would be reserved as open space for recreation and natural

environment purposes, consisting of: natural environment areas, lands to be dedicated for park purposes, a storm water management area, and a proposed 18-hole golf course.

7. The Related Contracts consist of:

(a) The "**1981 40% Agreement**" dated May 26, 1981, in which Campeau and Kanata agreed to reserve 40% of the Campeau Lands as open space for recreation and natural environment purposes. The contract identified methods of protection for the 40% open space areas, including: the requirement that the golf course would be operated in perpetuity, subject to Campeau's ability to assign management of the golf course or sell it to new owners, and Kanata's right of first refusal if Campeau received an offer for sale of the golf course.

(b) The "**1988 40% Agreement**" dated December 20, 1988, in which Campeau and Kanata identified precisely where the open space lands for recreational and natural environment purposes would be within the Campeau Lands. Together, the 1981 40% Agreement and the 1988 40% Agreement are referred to as the "**40% Agreement**".

(c) Agreements dated June 10, 1985 and December 29, 1988, in which Campeau and Kanata identified the location of the golf course (the "**Golf Course Lands**") within the Campeau Lands (collectively, the "**Golf Course Agreement**").

(d) The "**Assumption Agreement**" dated November 1, 1996, wherein ClubLink agreed with Kanata and Campeau's successors to assume Campeau's obligations under the 40% Agreement and the Golf Course Agreement.

The Void Provisions of the 1981 40% Agreement

8. The City brought an application to the Superior Court of Justice for a declaration that the obligations of ClubLink in s. 3 of the Assumption Agreement and the underlying 40% Agreement remain valid and enforceable, and related relief.

9. The Application Judge, in reasons dated February 18, 2021, granted the application in part, finding *inter alia* that two provisions of the 1981 40% Agreement were valid and enforceable ("**Sections 5(4) and 9**").

10. The Court of Appeal for Ontario, in reasons dated November 26, 2021, allowed the appeal and found that Sections 5(4) and 9 created contingent interests in land that were void as being contrary to the rule against perpetuities, as the right had not vested in the perpetuity period.

11. ClubLink had argued that, if the rule against perpetuities applied, Sections 5(4) and 9 could not be severed from the 1981 40% Agreement such that the appropriate remedy was to void the contract in whole or, alternatively, all the provisions related to the Golf Course Lands (the "**Severance Argument**").

12. The Court of Appeal concluded it was not in a position to consider the Severance Argument and directed, if the parties could not agree on what effect its determination that Sections 5(4) and 9 were void for perpetuities may have on the Related Contracts, "this larger question should be remitted to the application judge for determination."

The Application Judge's Decision on the Severance Argument

13. The parties returned to the Application Judge and made submissions in respect of the Severance Argument. No new pleadings were filed.

14. In reasons dated October 13, 2023 (previously defined as the "**Judgment**"), the Application Judge understood the direction from the Court of Appeal to be to identify which provisions of the Related Contracts "are so interrelated to ss. 5(4) and 9 of the 1981 40% Agreement and the void contingent interests in land that they must necessarily be inoperative".

15. The Judgment held several provisions of the Related Contracts to be inoperative, and several provisions to be inoperative to the extent that the 40% principle of open space would apply to a redevelopment of the Golf Course Lands by Campeau or its successors (collectively, the "**Inoperative Provisions**").

Errors in Law on the Question of Jurisdiction

16. The Application Judge erred in law in the conception of his jurisdiction, which he found at paragraph 30 of the Judgment was to: "identify which provisions of the Related Contracts *are so interrelated to ss. 5(4) and 9 and the void contingent interests in land that they must necessarily be inoperative*" (emphasis in the Judgment).

17. The Court of Appeal's narrow direction to the Application Judge was for him to consider the Severance Argument.

18. The Court of Appeal did not pre-determine that there was necessarily any impact on the rest of the 1981 40% Agreement, or the other Related Contracts. Further, the Court of Appeal did

not acknowledge or create any new doctrine of "inoperability" that would guide the Application Judge's consideration of the larger question. The Application Judge erred in assuming that the impact of the finding that Sections 5(4) and 9 were void was that any "interrelated provisions" were "inoperative".

19. Having correctly found that the doctrine of severance did not apply, there was no "jurisdiction" for the Application Judge to go any further.

Error of Law in the Findings Regarding the Inoperative Provisions

20. The Application Judge made reversible and extricable errors of law in the findings regarding the Inoperative Provisions, including:

(a) There is no basis in statute or common law for a finding of "inoperability" of contractual terms; and

(b) There is no basis in statute or common law to conclude the Inoperative Provisions are void or unenforceable.

21. The Application Judge did not identify any statute or common law doctrine that would support a finding of "inoperability" of contractual terms. The approach taken is based upon an unknown and incorrect principle.

22. After correctly finding at paragraph 30 that the doctrine of severance did not apply, the Application Judge then effectively applied a "blue pencil" approach to severance, in striking out the Inoperative Provisions from the Related Contracts. To the extent that the Application Judge

indirectly employed the doctrine of severance in his reasons, the approach taken is based upon an incorrect principle.

23. In the alternative, to the extent that this Honourable Court accepts that there is a doctrine of "inoperability" or finds that the doctrine of severance applies, the Application Judge made errors of law and/or palpable and overriding errors in the interpretation of the Related Contacts and in identifying the Inoperative Provisions.

24. In identifying the Inoperative Provisions, the Application Judge failed to consider required elements of the contractual interpretation exercise and/or failed to consider relevant factors, including failing to:

(a) Consider the text of the 1981 40% Agreement as a whole, and in a manner that gives meaning to all of its terms and does not render any of its terms ineffective;

(b) Interpret the 1981 40% Agreement in light of the surrounding circumstances, including the facts known to the signatories when the contract was executed, as well as the text of the other Related Contracts;

(c) Read the text of the 1981 40% Agreement and the other Related Contracts in a fashion that accords with sound commercial principles and good business sense; and

(d) Interpret the text of the Related Agreements in light of the Court of Appeal's findings regarding the parties' intentions regarding the 40% principle and Sections 5(4) and 9 of the 1981 40% Agreement.

25. The parties' overarching purpose and intention was to designate approximately 40% of the Campeau Lands as open space for recreation and natural environmental purposes, subject to the Kanata's contractual right to control the change of use of the Golf Course Lands from open space to a different use. That purpose is not impacted or undermined by the Court of Appeal's finding that Section 5(4) and 9 are now void as the contingent interests in land did not vest in the perpetuity period.

26. In contrast, the Application Judge's identification of the Inoperative Provisions is inconsistent with the fundamental purpose of the Related Contracts and the parties' mutual and objective intentions as expressed in the words of the Related Contracts. The identification of the Inoperative Provisions effectively creates a new contract that is inconsistent with the text of the Related Contracts.

27. Any other grounds that counsel may rely on, and this Honourable Court may consider.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

(a) Section 6(1)(b) and 134(1) of the *Courts of Justice Act*, R.R.O. 1990, c. C. 43;

(b) The Judgment appealed from is final; and

(c) Leave to Appeal is not required.

~~November 13, 2023~~
March 15, 2024

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Proceeding commenced at Ottawa

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