Citation: Terracon Development Ltd v Winnipeg (City of), 2025 MBCA 36
Date: 20250423
Docket: AI23-30-10026

IN THE COURT OF APPEAL OF MANITOBA

2025 MBCA 36 (CanLII)

Coram: Chief Justice Marianne Rivoalen
Mr. Justice Marc M. Monnin
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

	)	***R. L. Tapper, K.C.*** *and*
	)	***A. E. Verhaeghe***
TERRACON DEVELOPMENT LTD.	)	*for the Appellant*
	)	
(Plaintiff) Appellant	)	***D. G. Giles*** *and*
	)	***A. M. Hanson***
- and -	)	*for the Respondent*
	)	
THE CITY OF WINNIPEG	)	*Appeal heard:*
	)	***January 8, 2025***
(Defendant) Respondent	)	
	)	*Judgment delivered:*
	)	***April 23, 2025***

On appeal from *Terracon Development Ltd v The City of Winnipeg*, 2023 MBKB 155 [*Terracon Development*]

PFUETZNER JA

[1] The central issue in this appeal is whether the plaintiff (Terracon) and the defendant (the City) agreed to the essential terms of a contract creating a joint venture between them for the development of a parcel of land owned by the City.

[2] The trial judge considered the history of dealings between the parties, applied the relevant law regarding the formation of contracts and

found that the parties did not make a binding contract. In my view, the trial judge made no palpable and overriding errors in his assessment of the evidence or in his application of the legal principles to the facts as he found them. For the reasons that follow, I would dismiss the appeal.

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Background

[3] Terracon is a real estate development company based in Winnipeg. Among other properties, it had previously developed an industrial park in Winnipeg called the Waters Business Park (the Waters). At the relevant times, the City owned a 237-acre parcel of land (referred to as the Prairie lands) located adjacent to the Waters.

[4] By 2008, Terracon had identified the Prairie lands as a potential site for industrial development. The Prairie lands were appropriately zoned and had access to the City's sewer and water services—however, they were effectively landlocked with limited road access.

[5] In late 2008, representatives of Terracon presented a proposal to the City for development of the Prairie lands. Importantly, the plan contemplated that the City would retain title to the land until parcels were sold to the ultimate end-users, thereby avoiding property taxes during development. Additionally, Terracon proposed using a "hybrid design" standard of development to offset the higher costs of construction under the City's usual development standard. This was meant to make the project financially competitive with the less rigorous design standards used in the rural municipalities surrounding the City. For example, under the hybrid design, drainage ditches would be used in place of drainage piping and asphalt would be used for road surfaces instead of concrete.

[6] As a first step toward achieving the plan, the parties entered into an agreement setting out the terms for the southward extension of Mazenod Road in order to unlock the Prairie lands for development (the Mazenod Road Agreement). The extension of Mazenod Road also benefitted Terracon by providing a direct connection between the Waters and Dugald Road. The construction of the Mazenod Road extension was completed and opened in July 2009.

[7] In addition to providing that the parties would share the cost of constructing the new road, the Mazenod Road Agreement contained the following provision under the heading "JOINT VENTURE DEVELOPMENT" [emphasis in original]:

> [The City] and [Terracon], or a related company to [Terracon], agree to enter into discussions to draft the business terms of a possible joint venture to develop and market the [Prairie lands] as industrial/employment lands. [Terracon] understands and agrees that any such joint venture or similar arrangement will require the approval of Council.

[8] Between 2010 and 2013, representatives of Terracon and the City attempted to negotiate the terms of a joint venture agreement. The City sent the first of five drafts of an agreement to Terracon for review on November 18, 2010. The draft included two proposed clauses, which, as I will later explain, proved to be contentious. First, at paragraph 1(c)(q), that "realty taxes and assessments on subdivided lots and subdivided blocks" be included as a cost of development to be incurred by Terracon. Second, at paragraph 5(c)(i), that "the City shall retain title to all of the [Prairie] Land until . . . transferred and conveyed to purchasers".

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[9] The proposed paragraph 5(c)(i) reflected the parties' intention that the City would hold title to the Prairie lands until lots were sold to end-users, resulting in no property taxes being paid by Terracon. Terracon considered paragraph 1(c)(q) to be unnecessary and inconsistent with this intention. However, the City maintained it in each ensuing draft, despite Terracon's requests that it be removed.

[10] In early 2013, the City's Standing Policy Committee on Property and Development approved an administrative report recommending "[t]hat a Joint Venture Agreement . . . subject to terms and conditions deemed necessary by the Director of the Planning, Property and Development Department and the Director of Legal Services/City Solicitor . . . be approved" and "[t]hat the Property Officers of the City do all things necessary to effect the intent of the foregoing." City Council adopted the Committee's recommendation on January 30, 2013.

[11] Between 2013 and 2014, negotiations between Terracon and the City focused on the City's Public Works and Water and Waste Department's concerns regarding Terracon's proposed hybrid design. Those issues were not resolved until the spring of 2015.

[12] In 2013, at about the same time that Terracon's application for subdivision of the Prairie lands was approved, Parmalat Canada Inc. (Parmalat), a milk-processing company, expressed interest in purchasing a lot in the Prairie lands. Between 2013 and 2015, various communications took place between Parmalat and representatives of Terracon and the City. These included an email from Terracon's representative to the City on

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January 29, 2015, stating that "[o]nce we have a signed deal with Parmalat, Terracon will sign the Joint Venture Agreement."

[13] In early 2015, a City solicitor determined that the contemplated structure of the joint venture would result in Terracon being liable for property taxes under *The Municipal Assessment Act*, CCSM c M226, as it would be an "occupier" (*Terracon Development* at para 24) of the Prairie lands, even if title were retained by the City. Although the City was willing to waive collection of its portion of the property taxes, Terracon would still be required to pay school taxes and the provincial education levy to the Province.

[14] Terracon considered this to be an unacceptable financial burden and it advised the City, in early June 2015, that it would not move forward with the proposed joint venture. Eventually, the City proceeded to develop the Prairie lands without Terracon.

Trial Proceedings

[15] Terracon filed a statement of claim seeking damages based on several causes of action, including that the City breached an oral joint venture contract resulting in loss of profits and that the City breached a fiduciary duty owed to Terracon.

[16] At trial, Terracon argued, as it did on appeal, that an agreement was reached on all essential terms of the joint venture. Terracon maintained that the Mazenod Road Agreement was itself proof of the existence of an agreement and that the exchange of drafts of a formal joint venture agreement merely reflected an attempt to reduce to writing the terms of the contract previously reached.

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[17] The trial judge rejected Terracon's characterization of the evidence. He found that the Mazenod Road Agreement was an unenforceable "agreement to agree" (*ibid* at para 37) and that no joint venture contract was agreed to. He wrote (*ibid* at para 36):

> Viewing the parties' communications and conduct from 2009 to 2015 from the perspective of a reasonable and objective onlooker, it is clear to me that from one year to the next, the parties' basic position never changed: no agreement was reached because there were always essential terms that had yet not been settled. There is ample support for this conclusion having regard to the evidence as a whole.

[18] The trial judge dismissed the claim that Terracon was owed a fiduciary duty by the City. This finding was not appealed.

[19] Finally, the trial judge provisionally assessed general damages in the amount of $10 million if liability had been established. He found that Terracon would not be entitled to either special or punitive damages.

Issue

[20] Terracon asserts that the trial judge focused on the wrong evidence and made palpable and overriding errors leading to his finding that the essential terms of the joint venture were not agreed to.

Analysis

[21] There is no dispute as to the applicable legal test for the formation of a contract. As noted by the trial judge, this Court recently summarized the principles in *Cement Accents Manitoba Inc v Wagner Construction*, 2023 MBCA 59 at para 33, where Spivak JA wrote:

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> Three elements are required for a binding contract: the intention to contract; settlement of essential terms; and sufficiently certain terms. These elements should be considered from the viewpoint of an objective reasonable bystander in light of all the circumstances and taking into account all material facts, such as written or oral communications and the conduct of the parties, including subsequent conduct. The subjective intentions of the parties are not relevant to this analysis. The law is not concerned with the parties' subjective intentions but with their manifested intentions. An agreement is binding if it contains the essential terms, even if the parties agree that it will be subsequently recorded in a formal document (see *Bawitko Investments Ltd v Kernels Popcorn Ltd* (1991), 79 DLR (4th) 97 (Ont CA); *Olivieri v Sherman*, 2007 ONCA 491 at para 41; *Matic et al v Waldner et al*, 2016 MBCA 60 at paras 55-64, 71; *Agropur MSI, LLC v The Winning Combination Inc*, 2020 MBQB 188 at para 18; and *Aleshka v Fettes et al*, 2021 MBQB 14 at para 19).

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Position of Terracon

[22] Terracon argues that the circumstances of the present case are very similar to those in *Matic v Waldner*, 2016 MBCA 60 [*Matic*], where this Court found that the parties had reached a binding contract despite their subsequent inability to agree on the terms of a written agreement. Terracon submits that it and the City agreed to the essential terms of the joint venture agreement, including "parties, property and price" (*ibid* at para 60) and that they were in fact carrying out the terms of the joint venture.

[23] Terracon points to several pieces of evidence that were before the trial judge in support of its submission that he misapplied the objective reasonable bystander test described in *Matic*. In essence, Terracon contends that the trial judge gave too much emphasis to certain evidence and failed to consider other evidence. Having said that, in its written argument, Terracon

indicates that it accepts virtually all of the factual findings made by the trial judge.

[24] Next, Terracon asserts that the trial judge erred in his findings relating to the effect of the Mazenod Road Agreement. It argues "that the entire purpose of Terracon building this road in a partnership with the City was the intent to create a partnership, not just for the road itself but a partnership for the development and use of the [Prairie lands]."

[25] Finally, it maintains that the trial judge erred by declining to draw an adverse inference against the City for failing to call certain individuals to give evidence who were involved with the municipal tax issue and the exchange of drafts of the joint venture agreement.

Position of the City

[26] The City asserts that in determining "whether the requirements for an enforceable contract have been met", the trial judge properly undertook the required "contextual analysis, taking into account all the material facts" (*ibid* at para 63). It says that the trial judge made no palpable and overriding errors in doing so. The City submits that the trial judge properly declined to draw an adverse inference against it for failing to call additional individuals to give evidence on matters that were already addressed in detail by the witnesses that did testify.

Discussion and Decision

[27] The decision faced by the trial judge was highly fact-driven. The parties agreed on the legal principles to be applied and the facts themselves

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were not seriously in dispute. The trial judge was tasked with determining the legal effect of the facts—whether the parties had reached agreement on the essential terms of a joint venture to develop the Prairie lands.

[28] The trial judge carefully considered all of the evidence and the arguments of the parties. He made credibility findings, as he was entitled to do, and applied the correct legal principles to the facts that he found. His reasons for decision were clear, thorough and responded to the arguments raised by the parties.

[29] In my view, Terracon's arguments amount to a request to have this Court re-weigh the evidence and come to a different conclusion. As there is nothing that amounts to a palpable and overriding error in the trial judge's reasons for decision, there is no basis for this Court to intervene. All of the trial judge's credibility and factual findings are supported by the record. He made no reversible error in applying the legal principles to the facts. Moreover, I am not persuaded that the trial judge made any error in his characterization of the Mazenod Road Agreement as an unenforceable "agreement to agree" (*Terracon Development* at para 37) or in declining to draw an adverse inference against the City.

[30] It is clear that Terracon was deeply dissatisfied with the outcome of its dealings with the City and the result at trial. However, I have not been persuaded that the trial judge made any reversible errors that would invite appellate intervention.

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[31] As a result, I would dismiss the appeal with costs.

_____ JA

I agree: _____ CJM

I agree: _____ JA

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