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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

TERRACON DEVELOPMENT LTD.,	)	Robert Tapper, K.C.
	)	Amanda Verhaeghe
plaintiff,	)	for the plaintiff
- and -	)	
THE CITY OF WINNIPEG,	)	Dean Giles
	)	Ari Hanson
defendant.	)	Emily Rempel
	)	for the defendant
	)	
	)	Judgment Delivered:
	)	October 20, 2023

BOCK J.

Introduction

[1] Terracon Development Ltd. ("Terracon") claims it entered into a joint venture agreement with The City of Winnipeg (the "City") for the development of a business park on a large parcel of land owned by the City. Terracon says the City not only breached this contract, but also misconducted itself in a manner which merits a historically large award of punitive damages.

[2] For the reasons that follow, Terracon's claim is dismissed. As I will discuss, I find the parties never concluded a legally binding agreement. As for Terracon's claim for punitive damages, there is no evidence to support the conclusion that the conduct of the City in its dealings with Terracon was in any way untoward.

The facts which give rise to the claim

[3] Terracon is a development company headquartered in Winnipeg. It was established in the early 1980s by its principal, Norbert Hansch. (Terracon is one of several corporate affiliates controlled by Mr. Hansch. For the purposes of this decision, it is not necessary to distinguish one affiliate from another, and I will simply refer to all of these companies as "Terracon".) Over the last 40 years it has earned a reputation for innovative and successful property development in a wide range of applications, including business and industrial parks, residential subdivisions, public works and public/private partnerships.

[4] The 237 acre parcel of land with which this dispute is concerned – the "Prairie lands" – is owned by the City. It is located in the vicinity of a commercial district in Winnipeg commonly known as the St. Boniface Industrial Park.

[5] The St. Boniface Industrial Park opened in the 1970s. By 2008, the City had only 12 acres left in that park for sale and development, and a dwindling supply of serviced industrial land elsewhere within its limits.

[6] In the meantime, nearby rural municipalities had succeeded in attracting large commercial tenants away from Winnipeg to their own industrial and business parks through a combination of lower construction costs (owing to less stringent design

standards) and lower property taxes levied under ***The Municipal Assessment Act***, C.C.S.M. c. M226. ("Property taxes" is not a term used in ***The Municipal Assessment Act***. I use it here to refer to the combination of taxation levied by a municipality and taxation for school purposes under that Act.)

[7] It was Terracon who first identified the Prairie lands as a potential site for a new business park development in Winnipeg. The Prairie lands were favourably zoned for commercial and industrial development, but had never been put to any commercial use. Their access to City sewer and water services gave them a significant advantage over rural competitors. From Terracon's perspective, the Prairie lands had the added benefit of being adjacent to its latest business park, "The Waters Business Park". By 2008, construction of one multi-tenant building in that park was already underway.

[8] Other factors weighed against development of the Prairie lands, however. They were virtually landlocked, only partly accessible by a short gravel road, Mazenod Road. They were also subject to the City's design and construction standards, which, because they were more stringent than the standards imposed on business and industrial park developments in rural municipalities, resulted in higher construction and maintenance costs. The potential "absorption rate" for the Prairie lands – a term used to describe the rate of land sales over time – presented another risk. The slower the absorption rate, the longer a developer would need to carry financing and construction costs. Finally, while the Prairie lands were exempt from property tax under ***The Municipal Assessment Act*** so long as they were owned by the City, they would be subject to taxation if ownership were transferred to a private developer like Terracon. That added

tax burden would increase the developer's carrying costs. As I will discuss, this difference in property tax treatment depending on ownership of the Prairie lands became a significant factor in the parties' efforts to strike a joint venture agreement.

[9] It was against this background that Mike Falk, Terracon's vice president, approached Barry Thorgrimson, the City's Director of Planning, Property and Development, in 2008 with a proposal to jointly participate in a cost-shared, $3.7 million project to extend and improve Mazenod Road southward, to the southern limit of Winnipeg's aqueduct. The new road would work to the mutual benefit of the parties. It would connect the Waters Business Park to Dugald Road, a major Winnipeg roadway. It would also unlock the Prairie lands for future development, which Mr. Falk suggested could be pursued through a joint venture between Terracon and the City. As envisioned by Mr. Falk, such a joint venture would give Terracon special access to develop the City-owned Prairie lands as a new business park. In return, the City would gain access not only to Terracon's development experience and expertise, but also to its capacity to finance such a project. A successful new business park on the Prairie lands would generate profits for Terracon and the City from the sale of the lots, and would generate further revenue for the City by expanding its municipal tax base.

[10] Mr. Thorgrimson was impressed with Mr. Falk's proposal. They soon settled on the terms contained in the "Mazenod Road Agreement" (Exhibit 3-85), drafted by Mr. Falk. It was executed on behalf of the City and Terracon on April 29 and May 4, 2009, respectively.

[11] The possibility of a future joint venture agreement for the development of the Prairie lands was cautiously expressed in the Mazenod Road Agreement in terms that imposed no legal obligation on either party:

> 8. JOINT VENTURE DEVELOPMENT
>
> Winnipeg and the Waters [an affiliate of Terracon], or a related company to the Waters, agree to enter into discussions to draft the business terms of a possible joint venture to develop and market the City Lands as industrial/employment lands. Waters understands and agrees that any such joint venture or similar arrangement will require the approval of Council.

[12] On July 1, 2009, the newly improved and expanded Mazenod Road, constructed in accordance with the terms of the parties' agreement, was opened to the public. Terracon and the City then turned their attention to negotiating a potential joint venture for the development of the Prairie lands.

[13] From Terracon's perspective, the economic viability of a joint venture would depend in large part on two important factors: property tax liability and design standards.

[14] As mentioned earlier, because the City owned the Prairie lands they were exempt from property tax under ***The Municipal Assessment Act***. It was important to Terracon that it not be liable for property tax because it could be many years before all of the Prairie lands might be absorbed – that is, sold. Terracon's solution to this problem was to leave the City as the legal title holder to the Prairie lands, on the premise that this would preserve the lands' tax-exempt status. Terracon described the concept at p. 12 of its "Business Plan" dated March 9, 2011 (Exhibit 3-161):

> **A Strategy for Realty Taxes** — the City will hold title on the JV Land until a final sale to end user. Upon transfer of title to the end user, realty taxes will then

> be the responsibility of the end user. At no time during the development of the JV Land will the JV Partners be responsible for the payment of any realty taxes.

[15] Terracon knew that the costs of developing the Prairie lands would not be competitive with the costs of developing land in surrounding municipalities if the City insisted on strict adherence to its current design standards. In answer to this competitive challenge, Terracon proposed what it called a "hybrid design" or "alternative design model" – essentially, the application of less stringent, and therefore less costly, design standards to the development of the Prairie lands.

[16] With those two important factors in mind, thus began five years of negotiations. Broadly speaking, those negotiations can be divided into two phases.

[17] During the first phase, from November 2010 to January 2013, Mr. Falk and Mr. Thorgrimson worked on developing a proposal for a future joint venture agreement which could be presented to Council for its approval.

[18] In November 2010, the first draft joint venture agreement was prepared by the City and sent to Mr. Falk for his review. Several more drafts were exchanged in the years that followed, but the parties were never able to come to agreement on any one of them.

[19] In March 2011, Mr. Falk sent Mr. Thorgrimson Terracon's Business Plan for the proposed joint venture. The "basic terms" for a joint venture agreement, contained in 11 bullet points, were sent by Mr. Falk to Mr. Thorgrimson by e-mail dated December 9, 2011 (Exhibit 3-187). They included (as written by Mr. Falk): "50/50 JV partners"; "City to hold title on land until 'Sold to end user' [which was understood by Mr. Falk and Mr. Thorgrimson to incorporate Terracon's strategy for realty taxes]"; "Terracon to

make development application (based on "sustainable development standards" following the principles of Our Winnipeg) [which was understood by Mr. Falk and Mr. Thorgrimson to allow for incorporation of Terracon's hybrid design]"; "Terracon to be managing partner – fee at 6.5%"; "Profits split 50/50"; "JV agreement to be finalized".

[20] On August 22, 2012, Mr. Thorgrimson reported to Mr. Falk that after meeting with his colleagues, "support was given to proceed with our alternative design model." He asked Mr. Falk to "…work with John Zabudney [one of Mr. Thorgrimson's colleagues at the City] on reaching an agreement on land values for our report to Council." (Exhibit 3-218). In the months that followed, the parties settled on a land value of $8,100 per acre.

[21] A detailed Administrative Report was prepared by the Planning Property and Development Committee. That report contained several recommendations, including that City Council approve the negotiation of a joint venture agreement between Terracon and the City for the development of the Prairie lands (Exhibit 3-335). On January 15, 2013, the Standing Policy Committee on Property and Development concurred in the recommendation and recommended the Report to Council (Exhibit 3-335). Council accepted and adopted the Committee's recommendation on January 30, 2013 in the following terms (Exhibit 3-352):

> 1. That the Council decision of November 23, 2005 in regard to the proposed sale of the subject City property and the economic incentive package in favour of Olywest Consortium be rescinded.
>
> 2. That a Joint Venture Agreement between Terracon Development Ltd. (Terracon) and the City of Winnipeg, 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, which will be consistent with other successful Council approved Joint Ventures previously negotiated and approved between developers and the City of Winnipeg in other areas of the City, be approved.
>
> 3. That the City lands shown on the attached Misc. Plan No. 14362 be declared surplus to the City's needs and reserved for the Joint Venture with Terracon Development Ltd.
>
> 4. That the Chief Administrative Officer be authorized to finalize and approve the terms and conditions of all agreements required to implement matters as directed by Council.
>
> 5. That the Property Officers of the City do all things necessary to effect the intent of the foregoing.

[22] During the second phase of negotiations, from January 2013, when Council gave its approval to the recommendations contained in the Administrative Report, to July 2015, when Council rescinded its approval, the parties attempted to settle the terms of a joint venture agreement. To that end, on February 6, 2013, Phil Sheegl, the City's Chief Administrative Officer, issued a memorandum to Mr. Thorgrimson (Exhibit 3-352), whereby he delegated to Mr. Thorgrimson his authority "as described in No. 4 above" – that is, "to finalize and approve the terms and conditions of all agreements required to implement matters as directed by Council."

[23] Through 2013 and 2014, the parties focused much of their attention on negotiating terms and conditions that would meet with the approval of the City's Planning, Property and Development Department and Legal Services Department, as contemplated by paragraph 2 of Council's resolution. This proved to be a challenging exercise, because the City's Public Works and Water and Waste Departments had serious concerns about various elements of Terracon's hybrid design, particularly road width, thickness and elevation, the material to be used for base composition, and issues

related to the water main. The history of those concerns is outlined accurately in a briefing note dated January 27, 2015 to the City's Acting Chief Administrative Officer from the City's Acting Director of Planning, Property and Development (Exhibit 3-579), and they were not ultimately resolved until the spring of 2015.

[24] Negotiations with the Legal Services Department did not meet with the same success, however. In early 2015, a City solicitor tasked with reviewing the latest version of the draft joint venture agreement reported that Terracon's strategy for dealing with property tax (or "realty taxes") was not feasible, because it would still leave Terracon as an "occupier" of the Prairie lands within the meaning of ***The Municipal Assessment Act***. As an occupier of the Prairie lands, Terracon would be liable for property taxes.

[25] Terracon was not prepared to assume the financial risk posed by liability for property tax on the Prairie lands for the indefinite term of the joint venture. Alternative arrangements were proposed and considered, but none of these was satisfactory to both parties. This led to a telephone call between Mr. Hansch and Mr. McNeil on June 3, 2015, in which Mr. Hansch confirmed that Terracon would no longer be pursuing a joint venture agreement. Mr. McNeil reported this development to senior members of the City's administrative staff by e-mail on June 4, 2015 (Exhibit 3-835). On July 15, 2015, Council formally rescinded the approval of the Administrative Report recommending the joint venture which it had granted on January 30, 2013.

[26] As I will discuss further in these reasons, during this second phase of their negotiations, the parties also took other steps to advance their proposed development

of the Prairie lands. In 2013, Terracon's application for subdivision of the Prairie lands was approved. At about the same time, Parmalat, a major milk processing company, expressed interest in acquiring a 17-acre parcel of property in the Prairie lands for the construction of a new facility. Eventually, Terracon and the City both became involved in negotiations with Parmalat.

[27] Since 2015, the City has proceeded to develop the Prairie lands without Terracon and at its own expense. As of February 6, 2023, the Prairie lands were almost fully serviced and had been subdivided into multiple smaller parcels of land. Some of these individual parcels, comprising 95.01 acres, had been sold to third parties, beginning with Parmalat in 2015. As of the date of trial, approximately 101 developable acres remained unsold.

The parties' positions

[28] Terracon's primary position is that it entered into a binding joint venture agreement with the City to develop the Prairie lands, which the City breached.

[29] Terracon takes strong exception to the City's assertion that the parties were prevented from coming to agreement because of the property tax issue. According to Terracon, from the outset the parties had agreed that Terracon would not be liable for any property tax. Terracon argues the City only balked when it discovered that it could not comply with that term of the contract without itself incurring some liability for property taxes. Terracon characterizes the City's refusal to take whatever steps were necessary to fulfill its obligation as outrageous, given the time, effort and resources

which it had expended since 2008 to advance the Prairie lands project. According to Terracon, it is this conduct which demands an historic award of punitive damages.

[30] Terracon seeks damages in an amount sufficient to put it in the position in which it would have been had the joint venture agreement for the development of the Prairie lands been carried out in accordance with its terms. It quantifies its damages as at February 6, 2023 to be in the order of $20 million, comprising special damages of $2,562,356 and general damages in the range of $16.7 to $18.4 million.

[31] The City submits the parties never came to agreement on the essential terms of a joint venture agreement. As a result, no contract was ever made. The parties' failure to come to agreement is evidenced by the history of their communications, negotiations and conduct. The City therefore denies Terracon is entitled to any damages.

[32] In the alternative, if the parties are found to have made a binding contract for the development of the Prairie lands, and if the City is found to have breached it, the City quantifies Terracon's general damages as at February 6, 2023 to be in the order of $7.9 million.

[33] Terracon also advances an alternative argument with respect to the City's liability, based on the premise that the City owed it a fiduciary duty with respect to the development of the Prairie lands. In response, the City denies that it owed any fiduciary duty to Terracon.

Discussion and disposition

[34] I have organized my discussion and disposition of the issues around these conclusions:

a) the parties did not make a contract;

b) the City did not owe Terracon a fiduciary duty;

c) assuming liability, I would provisionally assess Terracon's damages at $10 million;

d) assuming liability, the City did not misconduct itself in a manner that attracts punitive damages.

a) The parties did not make a contract

[35] Determining whether the parties made a contract involves first principles of contract law. In a recently released decision, ***Cement Accents Manitoba Inc. v. Wagner Construction & Cement Accent Inc.***, 2023 MBCA 59, [2023] M.J. No. 182 (QL), the Court of Appeal provided this succinct summary of those principles:

> 33. An agreement to settle a claim is a contract. 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. [add citations from quote]

[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. For the purpose of these reasons, I will focus my discussion on the following events: the exchange of draft joint venture agreements from 2010 to 2015; Terracon's application for subdivision in 2013; ongoing negotiations with the City's Public Works and Water and Waste Departments with respect to Terracon's hybrid design; negotiations with Parmalat, particularly in 2015; and the parties' negotiations with respect to the property tax issue.

(i) The exchange of draft agreements from 2010 to 2015

[37] In clause 8 of the Mazenod Road Agreement the parties recorded their intention "to enter into discussions to draft the business terms of a possible joint venture to develop and market the City Lands as industrial/employment lands". Such an agreement to agree is itself void and unenforceable (***P.P. (Portage) Holdings Inc. v. 346 Portage Avenue Inc.***, [1999] 138 Man.R. (2d) 217, 177 D.L.R. (4th) 358, at para. 24), and I expect this was known to both parties. Good faith discussions did ensue, however, and over the next six years several draft agreements were exchanged.

[38] A first draft of the joint venture agreement was prepared by the City in November 2010 (Exhibit 3-148) and sent to Mr. Falk for his review and comment. Mr. Falk responded by e-mail dated December 6, 2010, attached to which was a black line copy with comments (Exhibit 2-78). In his e-mail, Mr. Falk told Mr. Thorgrimson that he "[w]anted to get the business terms down" before sending the draft to

Terracon's solicitor, Mr. Klein, for comment. In fact, it was over four years before Terracon involved Mr. Klein, in April 2015.

[39] Negotiations continued in 2011 and 2012, but little progress was made toward finalizing a joint venture agreement, as Mr. Falk acknowledged in an e-mail to Mr. Thorgrimson dated October 6, 2012 (Exhibit 3-239), in which he asked whether "it is really necessary to obtain Council approval of a deal that is not yet negotiated?" (underlining added).

[40] As previously noted, in January 2013, Council approved the Administrative Report recommending the City enter into a joint venture agreement with Terracon (Exhibit 3-352). Nevertheless, in the communications that followed Council's approval, the parties continued to refer to the joint venture agreement not as a *fait accompli*, but as a work in progress. So, for instance, in an e-mail sent to John Zabudney of the City on May 7, 2013 (Exhibit 3-361), Mr. Falk expressed his frustration over the fact that a joint venture agreement had still not been concluded, because in the meantime he was being asked to "participate in negotiations to sell land and I cannot confirm to the purchasers solicitors I am the JV manager … hence they do not know who the vendor is or if they are talking to the right guy!?" Mr. Falk continued, "Can we please get a JV agreement so we can do our job?" Mr. Falk himself confirmed, on cross-examination, that at this point the parties still did not have a joint venture agreement.

[41] On December 31, 2013, Joedi Pruden, the City's Senior Negotiator in its Real Estate Division, sent Mr. Falk the most recent draft version of the joint venture agreement with a request that he review it and provide his comments (Exhibit 2-904).

Nine months later, Mr. Falk had still not responded. On October 6, 2014, Ms. Pruden asked Matt Glavin, one of Mr. Falk's colleagues at Terracon, about the status of the joint venture agreement. On October 9, 2014, Mr. Glavin wrote back, "We are still working on it. Unfortunately, our priorities have been focused on getting Public Works to sign off on our servicing drawings" – a reference to obtaining that department's approval for Terracon's hybrid design. Mr. Glavin continued, "I will try and get it [i.e. a response to the last draft joint venture agreement] to you once these issues are resolved" (Exhibit 3-530).

[42] The draft joint venture agreement continued to languish. On February 4, 2015, Ms. Pruden sent the "most recent version of the Joint Venture Agreement" to Mr. Swandel and Mr. Falk (Exhibit 3-601), the same one she had sent more than a year earlier, on December 31, 2013, updated only to "correct typos and reflect current dates, i.e. 2015." Two more months passed before Terracon sent a draft agreement to Mr. Klein, Terracon's solicitor, for his review.

[43] Both parties had indicated at different times that any joint venture agreement would be subject to approval by their respective counsel: Terracon as early as December 6, 2010, and Council when granting its approval in January 2013. In the end, no version of a draft joint venture agreement ever received the approval of the parties and their counsel.

(ii) Reimbursement of subdivision fees

[44] In 2013, Terracon commenced an application for subdivision of the Prairie lands, identified as file DAS 19/2013, which resulted in a payment of $144,199 by it to the City

on account of subdivision and dedication fees. But Terracon and the City had made an agreement that these fees would be repaid to Terracon if the parties failed to conclude a joint venture agreement. This agreement was described by Mr. Pittet, the City's acting Director of Planning, Property and Development, in his testimony, and was confirmed by him in his communications with Terracon. In an e-mail on February 25, 2015, for instance, Mr. Pittet reminded Mr. Swandel of Terracon that Terracon would be repaid these fees "in the event the JV does not proceed" (Exhibit 3-625). Terracon admits this sum was repaid – further evidence that no joint venture agreement was ever concluded.

(iii) Negotiations with respect to Terracon's hybrid design

[45] In their testimony, Mr. Falk and Mr. Hansch both made it clear that Terracon was not prepared to enter into a joint venture agreement for the development of Prairie lands unless its hybrid design was accepted by the City. While Mr. Thorgrimson was supportive of the hybrid design, both the Public Works Department and the Water and Waste Department had serious reservations. At trial, Mr. Falk, Mr. Hansch and Mr. Thorgrimson all confirmed these reservations hindered them in their efforts to complete of an agreement.

[46] So, for example, in e-mails dated December 17, 2014, the Director of Public Works and the Director of Water and Waste expressed their ongoing concerns about issues related to road construction, fire protection and water quality to Terracon (Exhibit 3-579).

[47] Mr. McNeil, who assumed the position of Chief Administrative Officer in early 2015, testified that by the time of his arrival the City was feeling pressure to conclude a joint venture agreement, primarily because of Parmalat's growing impatience to begin construction on a new facility, and the risk that any further delay might cause it to leave Winnipeg and relocate its operations. Mr. McNeil therefore gave this matter his personal attention. His involvement ultimately led to Public Works and Waste and Water Departments giving their approval to the hybrid design as required by the terms of Council's resolution, but not until April 2015.

[48] By Terracon's own admission, it was not prepared to make a joint venture agreement unless the City accepted its hybrid design. On its view of the matter, therefore, the very earliest date by which a joint venture agreement could have been made was April 2015. But, as I will discuss, two other obstacles to the finalization of a joint agreement still remained.

(iv) Negotiations with Parmalat in 2015

[49] Angelo Girotto, Parmalat's vice president of manufacturing, gave evidence with respect to Parmalat's involvement in the Prairie lands, which I accept.

[50] Parmalat had been operating a milk processing plant in the St. Boniface Industrial Park for some 90 years. By 2009, it was seeking a new location for the construction of a modern replacement. Although it had identified potential locations in Manitoba and Saskatchewan, for a variety of reasons its preference was to remain in Winnipeg.

[51] Mr. Girotto contacted Leo Prince, a provincial officer within the Department of Agriculture, about Parmalat's needs. Mr. Prince referred him to Gary Holmes, the Manager of Economic Development, an agency within the City's Planning, Property and Development Department. According to Mr. Girotto, Parmalat informed Mr. Holmes of its interest in acquiring a 17-acre parcel of property in Prairie lands for the construction of a new fluid milk processing plant; it was Mr. Holmes who then referred Parmalat to Terracon.

[52] Around this same time, Terracon, acting in its capacity as "Managing Partner for J.V. Land with City of Winnipeg", appointed Colliers International as the exclusive agent to sell lots in the Prairie lands by a written listing agreement dated June 20, 2014 (Exhibit 10, Schedule 4).

[53] Mr. Girotto recalled that between 2013 and 2015, there were various communications, meetings and discussions between members of the Parmalat team and representatives of Terracon, the City, the Province and Colliers. He also recalled that by early 2015, Parmalat was growing increasingly frustrated with the delay in finalizing a sale.

[54] I find two aspects of Terracon's involvement in the Parmalat negotiations weigh very heavily against its assertion that it had made a joint venture agreement with the City.

[55] First, in clause 13 of the listing agreement with Colliers, Terracon reserved the right to "terminate without any liability in event the J.V. or Development Agreement are not executed between TERRACON and CITY OF WINNIPEG."

[56] Second, on January 29, 2015, Mr. Swandel, who had served as a City councillor for 10 years before joining Terracon in November 2014, informed the City that Terracon would not enter into a joint venture agreement until "we have a signed deal with Parmalat" (Exhibit 3-586). Mr. Swandel continued to press this position vigorously as negotiations with the City continued in the following weeks. Eventually, the City did have a signed deal with Parmalat, but by that time, Terracon had withdrawn from the Prairie lands project.

[57] To summarize. Terracon relied on the absence of an executed joint venture agreement to limit its liability to Colliers under the listing agreement, and it made the formation of a joint venture agreement with the City conditional on "a signed deal with Parmalat". Terracon's own conduct in these instances makes it very clear that in the absence of such a deal, there was no joint venture agreement with the City.

(v) The parties' negotiations with respect to the property tax issue

[58] In early 2015, the City's solicitor discovered a new, and ultimately insurmountable, obstacle to a mutually acceptable joint venture agreement.

[59] Recall that Terracon had devised a strategy to deal with property tax. By that strategy, the City would hold title to the Prairie lands, so preserving their tax-exempt status. Property taxes would only become payable in respect of the Prairie lands upon the sale and transfer of a parcel of land to a third party, and then only by that third party. As conceived by Terracon, neither it nor the City would ever be responsible for the payment of any property taxes during the life of the development. As Terracon stated in its Business Plan (Exhibit 3-161), "At no time during the development of the JV

Land will the JV Partners be responsible for the payment of any realty [i.e., property] taxes."

[60] This proved to be impossible, the City's solicitor concluded in early 2015, because under the terms of the joint venture agreement as drafted Terracon would be considered to be an "occupier" of the Prairie lands, and therefore liable to pay property tax under ***The Municipal Assessment Act***. The City communicated that conclusion to Terracon's solicitor, Mr. Klein, in April 2015. There is no evidence that Mr. Klein's opinion of the situation was any different than the City's solicitor, from which I infer he came to the same conclusion. In any event, Mr. Falk effectively conceded the point in a memorandum to Mr. McNeil dated May 8, 2015 when he wrote (reprinted here as it appears in the original), "… we accept the argument put forth by your legal department, that, as a party to the Joint Venture Agreement, if it were to be executed, Terracon would be considered an "occupier" of the land as defined in the Municipal Assessment Act and as "occupier" Terracon would be liable to pay Municipal and School Division taxes (the "Realty Taxes")" (Exhibit 3-794).

[61] Although efforts were made to restructure the joint venture agreement, none of them was satisfactory. While the City was willing and able to waive the portion of the tax levied by it, it had no legal authority to waive the school tax because it fell under provincial jurisdiction, and it was not willing to indemnify Terracon for that cost. As for Terracon, it could not avoid the obligations with respect to property tax which flowed from its status as an occupier of the Prairie lands unless it gave up its role as managing partner of the joint venture, which it was not willing to do.

[62] With no solution at hand, in a phone call on June 3, 2015, Mr. Hansch informed Mr. McNeil that Terracon would no longer be pursuing a joint venture agreement.

(vi) Terracon's arguments in response

[63] I find the arguments advanced by Terracon in support of the existence of a binding joint venture agreement unpersuasive.

[64] Terracon raises three prior projects between the City and Terracon which were apparently completed without a written agreement as evidence that the parties also entered into an unwritten joint venture agreement in respect of the Prairie lands: the Charleswood Bridge, the Public Works Yard and the extension of the Chief Peguis round-about. But even if I accept Terracon's version of events in respect of these three projects, the fact that the parties were willing to enter into a contract without a written document on other occasions does nothing to assist me in determining whether they did so on this occasion.

[65] Terracon cites ***Gendis Inc. v. Richardson Oil & Gas Ltd.***, 2000 MBCA 33, 148 Man.R. (2d) 19, and ***Matic v. Waldner***, 2016 MBCA 60, 330 Man.R. (2d) 107, as authority for the proposition that even complex contracts involving millions of dollars can be made verbally, on a handshake. With respect, that fails to address the central issue in this trial. The City does not dispute that a contract can be made orally, in writing, by course of conduct, or by some combination of those three means. At issue in this case is whether the parties made a contract for the development of the Prairie lands by any means. The City argues, and I accept, they did not do so.

[66] That aside, the parties' exchange of draft joint venture agreements between 2010 and 2015, discussed earlier, leaves me with no doubt that a written joint venture agreement satisfactory to the parties and their counsel in both form and content was regarded by them as an important and necessary pre-condition to the formation of a binding contract, and that they failed to come to such an agreement.

[67] Terracon argues that the Mazenod Road Agreement was itself proof of the existence of a joint venture agreement, because in the absence of a joint venture agreement, it never would have entered into the Mazenod Road Agreement. Mr. Hansch elaborated on this position in his testimony with three observations: first, that Terracon had other design options for an access road to Waters Business Park, and therefore did not need to improve Mazenod Road; second, that Terracon's original design of the Waters Business Park had to be altered to accommodate access from Mazenod Road; third, that the improvement of Mazenod Road would only make the surrounding lands more desirable to potential competitors to Terracon, to Terracon's detriment.

[68] I do not accept either Terracon's argument or Mr. Hansch's evidence on this point. First, they are flatly contradicted by clause 8 of the Mazenod Road Agreement, drafted by Terracon, which refers explicitly to the possibility that the parties might make a joint venture agreement in the future, not that the parties had made a joint venture agreement. Further, while Terracon may have had other options for an access road to Waters Business Park, there is no evidence that the City was prepared to share in the cost of any of those alternatives, whereas it did share in the cost of the Mazenod

Road improvements. Such a cost-sharing arrangement presumably worked to Terracon's financial benefit. Finally, the developer in the best position to take advantage of an improved Mazenod Road was not any of Terracon's potential competitors, but Terracon itself.

[69] Terracon also argues that the conditions contained in Council's approval – "terms and conditions deemed necessary by the Director of the Planning, Property and Development Department and the Director of Legal Services/City Solicitor" – were actually satisfied after January 2013, so bringing a joint venture agreement into force. I disagree. While the concerns raised by the Planning, Property and Development Department about Terracon's hybrid design were resolved by the spring of 2015, the City's solicitor never approved of the terms of a joint venture agreement, primarily because of the problems surrounding the property tax issue, a point confirmed by both Mr. Thorgrimson and Mr. McNeil in their evidence.

[70] Terracon points to the fact that Ms. Pruden asked Mr. Falk on December 31, 2013, whether Terracon was prepared to sign the most recent version of the draft joint venture agreement, which implies that the requisite approvals of the contents of that version of the agreement must have been given by the Director of the Planning, Property and Development Department and the City solicitor. Mr. Thorgrimson, who was then the Director of Planning, Property and Development, denied this. But even if that were not so – that is, even if I do not accept Mr. Thorgrimson's evidence, though I have no reason not to do so – since Terracon was not prepared to sign this version of the agreement, what does it matter? Terracon was obviously not prepared to accept

that version of the joint venture agreement presented on December 31, 2013, and the parties were never able to reach agreement after that, either.

[71] Terracon also argues its demands with respect to property tax could have been easily met by the City, relying on the bare assertions to that effect made by Mr. Swandel in the course of his testimony. I find Mr. Swandel's evidence on the point unpersuasive, because he did not offer any explanation as to how those demands could be met given the legal impediments identified by the City's solicitor and conceded by Mr. Falk. Moreover, Mr. Swandel's assertions were denied by Mr. Thorgrimson and Mr. McNeil, both of whom explained in some detail why the City could not meet Terracon's demands.

[72] Terracon urged me to draw an adverse inference against the City because it did not call other witnesses with knowledge of the property tax issue to testify. With respect, there is no basis for that argument. An adverse inference might be drawn against a party who fails to lead evidence on a material point, but here the City did lead evidence on the point, from not one but two material witnesses, Mr. Thorgrimson and Mr. McNeil.

[73] In any event, implicit in Terracon's argument is an acknowledgement that the property tax issue did prevent the parties from reaching a joint venture agreement along the lines originally conceived by Terracon. At best, Terracon's argument is reduced to a claim that the City could have made an agreement on different terms had it wished to do so. The City might raise the same argument against Terracon. For the

purposes of this decision, it is enough to say that the parties never agreed on alternative terms with respect to the property tax issue.

[74] Finally, I dismiss the arguments Terracon made to the effect that certain phrases in a handful of e-mails from Mr. Thorgrimson to Terracon were proof of the existence of an enforceable joint venture agreement – phrases such as "It's a go" (March 27, 2009, Exhibit 3-74); "Agreed!" (December 15, 2010, Exhibit 3-157); "I agree to proceed with our partnership as stated below" (December 12, 2011, Exhibit 3-187); "Approved" (February 2, 2012, Exhibit 3-196). I find Terracon's argument takes these short messages, each of which comprises part of a longer e-mail thread, out of context and stretches them well past any reasonable interpretation.

[75] In the end, the parties had done exactly what they said they would do in clause 8 of the Mazenod Road Agreement: they had entered into discussions to draft the business terms of a possible joint venture to develop and market the Prairie lands. Unfortunately, despite reasonable efforts on both sides, those discussions ended in failure.

(vii) Conclusion with respect to the formation of a contract

[76] To conclude this portion of my reasons, the evidence as a whole, when considered from the viewpoint of an objective reasonable bystander in light of all the relevant facts and circumstances, leaves me in no doubt that the parties failed to make a binding joint venture agreement for the development of the Prairie lands.

b) The City did not owe Terracon a fiduciary duty

[77] Terracon argues the City owed it a fiduciary duty with respect to the development of the Prairie lands, which it breached, so giving rise to a claim for damages.

[78] In support of its argument, Terracon points to ***Bibeau v. Chartier***, 2019 MBQB 189, [2019] M.J. No. 361 (QL), where the court observed that a " … fiduciary duty arises in a commercial context when one party has total control over the decision making." (para. 103). Notably, in ***Bibeau*** the trial judge found the evidence did not support the existence of a fiduciary relationship between the parties. I am drawn to the same conclusion in this case – the evidence fails to support the existence of a fiduciary relationship between the City and Terracon.

[79] In ***Filkow v. D'Arcy Deacon LLP***, 2019 MBCA 61, [2019] M.J. No. 147 (QL), the court observed that fiduciary relationships may be categorized as either *per se* or *ad hoc*. A *per se* fiduciary relationship is simply " … one of a recognised category of fiduciary relationships giving rise to the obligation of one party to act for the benefit of the other" (para. 58, citing ***Alberta v. Elder Advocates of Alberta Society***, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 33 (QL)), while an *ad hoc* relationship is " … not recognised by the courts as fiduciary per se, but rather, arise[s] out of the specific circumstances of a case." (para. 63).

[80] The relationship between joint venturers does not fall within the category of *per se* fiduciary relationships (***Stewart v. 6551450 Manitoba Ltd.***, 2023 MBCA 72, [2023] M.J. No. 234, at para. 86). Indeed, as the court noted in ***Filkow*** (para. 78),

"[t]here is a general principle that fiduciary duties or fiduciary relations should be the exception rather than the rule in commercial relations (see Angela Swan & Jakub Adamski, *Canadian Contract Law*, 3rd ed (Markham: LexisNexis, 2012) at 937)."

[81] In order to determine if an *ad hoc* fiduciary relationship arose between Terracon and the City, one must consider the specific circumstances of the case. Those circumstances must satisfy the three hallmark elements of a fiduciary relationship identified by Wilson J. in ***Frame v. Smith***, [1987] 2 S.C.R. 99, 1987 CanLII 74 (SCC) (at para. 60):

> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[82] In ***Elder Advocates***, McLachlin C.J.C. augmented Justice Wilson's criteria with three additional elements (para. 36):

> In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the bests interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[83] Here, the evidence fails to satisfy the criteria set out in either ***Frame*** or ***Elder Advocates***.

[84] The relationship between Terracon and the City lacks the necessary element of vulnerability described in ***Frame***. To the contrary, the parties operated on an equal

footing. Both were sophisticated, experienced and independently advised as they worked to negotiate the terms of an arm's length agreement with respect to the future development of the Prairie lands. Terracon controlled its legal and practical interests throughout the course of those negotiations. It was not in a vulnerable position relative to the City.

[85] Also missing from Terracon's case is evidence to support the first of the three elements identified in ***Elder Advocates***: an undertaking by the City to act in Terracon's best interests with respect to the Prairie lands. There is no evidence of "a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party" (***Hodgkinson v. Simms***, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161; see also ***Galambos v. Perez***, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 71 and ***Stewart***, at para. 88). In the absence of such evidence, there is no basis to impose a fiduciary duty on the City.

[86] To summarize this portion of my reasons: the City did not owe Terracon a fiduciary duty in respect of the Prairie lands because Terracon was not in a vulnerable position relative to the City, and because the City never undertook to act in Terracon's best interests.

c) Assuming liability, I would provisionally assess Terracon's damages at $10 million

[87] Terracon's claim for damages comprises two components: special damages incurred by it to advance the project, including its share of the costs incurred to construct Mazenod Road, and general damages to compensate it for the profits it expected to earn from the development of the Prairie lands. I will discuss each in turn.

(i) Special Damages

[88] Terracon's special damages are summarized in Tab H of Exhibit 5. Daniel Mills, Terracon's "Asset Manager", employed by it since 2016, prepared portions of that summary and gave evidence to explain its contents. Terracon claims $1,630,573 on account of its contribution to the construction of Mazenod Road; $829,525 on account of professional fees (primarily engineering fees, but also including the sum of $144,199 paid by Terracon on account of subdivision and dedication fees; since this was reimbursed, it should be deducted from the claim for $829,525); and "other expenses" of $246,457.

[89] Had I found that the parties had concluded a joint venture agreement, I would not award Terracon anything on account of these amounts. As I will explain, my primary reason for this is conceptual, and relates to the manner in which Terracon framed its action against the City.

[90] Terracon's claim for general damages is based on the premise that it would have earned revenue from the sale and development of the Prairie lands in excess of the offsetting costs it would have incurred in the course of development, resulting in a loss of expected profits. To the extent Terracon incurred the costs in Mr. Mills's summary, therefore, those costs ought to be included as offsets to its claim for general damages, and not as a separate claim for special damages.

[91] My approach to the assessment of damages would be different had Terracon framed its action as a breach of contract which entitled Terracon to treat itself as discharged from any further liability to perform its own obligations under that contract.

In that scenario, I assume Terracon would have claimed recovery of all amounts which it had expended in furtherance of that contract, as summarized by Mr. Mills, but not a loss of future profits. Since Terracon did not frame its action in this manner, no more need be said on this subject.

[92] Aside from this conceptual flaw in Terracon's claim for special damages, I have other concerns which prevent any award in respect of the amounts claimed.

[93] One concern relates to Terracon's claim for its share of the cost to construct Mazenod Road. As I have already indicated elsewhere in these reasons, Terracon paid that amount in accordance with a binding agreement which it made with the City (Exhibit 3-85). Given that, and the absence of any allegation to the effect that the City breached the Mazenod Road Agreement, I see no legal justification for this aspect of the claim.

[94] I also have a concern with respect to the claim for $131,250 which forms part of the $246,457 claimed as "other expenses". Mr. Mills testified this was the amount of the real estate broker's fee that would have been payable to Colliers in respect of the Parmalat sale. But Colliers never presented a claim for payment to Terracon, Terracon never paid any amount to Colliers, and any claim Colliers might have had in respect of services rendered in connection with the Parmalat sale would now be statute-barred. There is simply no evidentiary or legal basis for this part of Terracon's claim.

[95] The City raises another concern with respect to the professional fees, but it is one which I do not accept. The City argues the claim should be rejected simply on the basis that no supporting documentation was tendered to support the amounts claimed.

While that is so, there was no dispute that supporting documents had been produced in the course of the litigation, nor was Mr. Mills challenged on his testimony that all of the amounts claimed had been charged in the amounts and by the parties identified on his summary, and paid by Terracon. In the circumstances, I have no reason to doubt, and therefore find, Terracon did incur professional fees as summarized by Mr. Mills.

[96] Nevertheless, I find Terracon is not entitled to recover any portion of the professional fees which it incurred, nor any of the other amounts which comprise its claim for special damages.

(ii) General damages

[97] The parties each tendered expert evidence with respect to the issue of general damages. Both witnesses – Brett Ferguson for Terracon, and Jason Schellenberg for the City – are accredited members of the Appraisal Institute of Canada. Both have extensive experience in the field of valuation, including in the area of land development. Neither party challenged the qualifications of the other's expert, and I found both qualified to provide opinion evidence on the issue of damages. I was impressed by their efforts to be fair and objective in their analysis, and to keep within the area of their expertise. Their respective reports were very helpful in arriving at my conclusions with respect to general damages.

[98] I note parenthetically that Mr. Schellenberg did criticize certain elements of Mr. Ferguson's report, but I find those criticisms to be irrelevant to the substance of Mr. Ferguson's opinions and conclusions.

[99] Mr. Ferguson, testifying for Terracon, described the purpose of his report to be, in part, to "[d]evelop a financial model that estimates the present value of the aggregate development profits to date, and future anticipated profits from the development of the subject lands" as at February 6, 2023 (Exhibit 6, p. 3). Mr. Schellenberg identified the same purpose, albeit in different terms: to "[p]rovide an estimate of Net Present Value of Cash Flows of the subject property as of February 6, 2023" (Exhibit 10, p. 10).

[100] Mr. Ferguson presented two different scenarios, which he called "Financial Model 1" and "Financial Model 2". Mr. Schellenberg did likewise, and he called them "Opinion of Net Present Value of Cash Flows as at June 1, 2015" and "Opinion of Net Present Value of Cash Flows as at February 6, 2023".

[101] I find Mr. Ferguson's "Financial Model 2" to be unreasonably optimistic with respect to the assumed sales rate of the Prairie lands. I find Mr. Schellenberg's opinion with respect to value as at June 1, 2015 unhelpful because it does not take into account the City's actual sales experience for the period 2015 to 2022. Therefore, for the purpose of the following discussion, I compare Mr. Ferguson's "Financial Model 1" to Mr. Schellenberg's "Opinion of Net Present Value of Cash Flows as at February 6, 2023".

[102] Mr. Ferguson approached his analysis on the basis of actual revenues from the sale of 94.1 acres in the Prairie lands sold between 2016 and 2022, plus future projected revenues based on an average annual sale of 13.44 acres at $300,000 per acre (which would result in a notional sale period for the balance of the Prairie lands from 2023 to 2034), less costs of development. (In fact, 95.01 acres were sold

between 2015 and 2022, but this difference is not material to my decision.) In order to present his conclusion as a current value as of February 6, 2023, he applied an interest rate of 1.6% to historic financial results (2016 to 2022) and a discount rate of 5% to future financial results (2023 to 2034).

[103] Mr. Schellenberg followed the same approach, but applied different values to certain assumptions.

[104] Mr. Ferguson's Financial Model 1 quantified the net present value of past and future annual cash flows as at February 6, 2023, to be $33,430,368, whereas Mr. Schellenberg arrived at a value of $14,735,000.

[105] Both experts readily and fairly conceded that their reports contained inadvertent errors in their historical sales figures. Mr. Ferguson overstated historical sales by $1.6 million by relying on the asking price, rather than the sale price, for sales in 2022. Although Mr. Ferguson did not recalculate his numbers, I conclude the effect would be to reduce his total by approximately $1.6 million, to $31.85 million (in round figures). Mr. Schellenberg understated historical sales by $2.625 million by not including the amount of the City's sale to Parmalat in 2015. After accounting for that error he adjusted his opinion on value as of February 6, 2023 to $15.8 million.

[106] For reasons I will explain, I accept Mr. Schellenberg's conclusions on value as of February 6, 2023, subject to one adjustment.

[107] First, Mr. Schellenberg based his average annual sale rate of 11 acres on actual sales of 95.01 acres between 2015 and February 6, 2023 – a period of slightly more than eight years. Mr. Ferguson inadvertently failed to include 2015 in his calculations,

and therefore incorrectly based his annual sale rate of 13.44 acres on a period seven years.

[108] Second, while Mr. Ferguson was left to infer the City's costs of development from various publicly available sources, Mr. Schellenberg had access to the City's current and up-to-date financial records. As a result, I find his calculations with respect to the City's costs of development to be more accurate.

[109] Third, Mr. Schellenberg applied a discount rate of 9.5% to future financial results, compared to Mr. Ferguson's discount rate of 5%. Mr. Schellenberg's rate compares favourably to the rate of 8.5% which Terracon chose to use for the purpose of its 2012 Business Plan (Exhibit 3-161), while Mr. Schellenberg's rate of 5% matches the rate used in the financial analysis of the proposed joint venture contained in the Administrative Report presented by the Standing Policy Committee on Property and Development to Council in January 2013. Some compromise between the 9.5% and 5% discount rates is therefore justified.

[110] Taken as a whole, I find Mr. Schellenberg's analysis, opinions and conclusions to be reasonable. As I have noted, the one adjustment I would make is to use a discount rate between his figure of 9.5% and Mr. Ferguson's of 5%. I was not provided with fresh calculations based on different discount rates to arrive at a precise conclusion, and was instead invited to make some reasonable assessment of my own.

[111] I conclude $20 million is reasonable, given that I am only adjusting Mr. Schellenberg's conclusion for one of several variables, the discount rate. In my opinion, this represents a reasonable compromise between Mr. Schellenberg's of $15.8

million and Mr. Ferguson's of $31.85 million (after the adjustments described above). As a 50/50 joint venturer, Terracon's provisional damages would amount to one-half of $20 million, $10 million, as of February 6, 2023. Pre-judgment interest at the statutory rate would accrue from February 6, 2023.

[112] The City did not plead a failure to mitigate by Terracon, nor did it lead any evidence of a failure to mitigate. I therefore make no adjustment to Terracon's provisional damage award on account of any failure to mitigate.

d) Assuming liability, the City did not misconduct itself in a manner that attracts punitive damages

[113] The final issue raised by Terracon can be dismissed summarily. There is no basis for Terracon's assertion that the City misconducted itself in a manner that was "high-handed, malicious, arbitrary or highly reprehensible" or that departed " … to a marked degree from ordinary standards of decent behaviour." (***Whiten v. Pilot Insurance Co.***, 2002 SCC 18, [2002] 1 S.C.R. 595 (QL), at para. 94). Mr. Falk himself accurately described the unfortunate situation in which the parties had found themselves in his memo to Mr. McNeil dated May 8, 2015 (Exhibit 3-794): "Terracon would like to make it absolutely clear that we believe both parties have acted in good faith and this conundrum [that is, the property tax issue] is the result of a legal technicality that has only been recognized in recent days. We appreciate the work that has been done over the last few days to try and resolve this matter."

Conclusion

[114] Terracon's claim is therefore dismissed. As the successful party in this litigation the City is entitled to costs. The parties may make further submissions to me with respect to the issue of costs, either in writing or in person, if necessary.

_____ J.