SUPREME COURT OF NOVA SCOTIA
Citation: Lloyd MacLellan Construction Services Limited v. Halifax (Regional Municipality), 2014 NSSC 118

Date: 20140515
Docket: Hfx. No. 276935
Registry: Halifax

Between:

Lloyd MacLellan Construction Services Limited

Plaintiff

-and-

Halifax Regional Municipality

Defendant

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: March 24, 25 and 27, 2014 at Halifax, Nova Scotia

Written Decision: May 15, 2014

Counsel: Counsel for the Plaintiff - Brian Casey and Megan Russell
Counsel for the Defendant - Martin Ward, Q.C. and Katherine Salsman

Wright, J.

INTRODUCTION

[1] This is an action for damages by the plaintiff Lloyd MacLellan Construction Services Limited against the defendant Halifax Regional Municipality ("HRM") arising out of a failed proposal that ultimately prevented the development of an industrial park in the Goodwood area. The case centres on a road easement over lands owned by HRM which the plaintiff needed to acquire for necessary access to facilitate the development of the site as an industrial park.

[2] The parties have agreed to sever the issues of liability and damages for purposes of this trial. The plaintiff's damages are to be dealt with in a second phase of this trial should there be a finding of liability.

OVERVIEW OF FACTS

[3] The history of the dealings between the parties relating to the intended development site dates back to 1999 when the plaintiff first took an interest in developing this property. The chronology of events from that point onward to 2006 is set out in the defendant's pre-trial brief and both counsel have confirmed to the court that the designated paragraphs can be treated as a partial agreed statement of facts. Those paragraphs are reproduced as follows:

> 5. CHUM Radio Group owned about 300 acres off the Prospect Road at the boundary of the old city on which it had two radio towers (see map Plaintiff Brief, p. 2). The property straddled the old city/county boundary with a primarily residential county zone RB-1 along Prospect Road and a city industrial zone I-3 off the road and behind that. There were homes along the road and industrial uses or vacant land behind them. The property was bisected by an old Water Commission pipeline right of way now owned by the Municipality and also encompassed a wetland known as Drysdale's Bog (see map Plaintiff's Brief, p. 4).

6. In October 1998, CHUM had applied to rezone the RB-1 portion of its lands to C-2 but did not follow through because there was no policy in the Municipal Planning Strategy which would support a rezoning and a plan amendment would have been necessary.

7. In December of 1999 MacLellan had applied for and received a permit for a private air strip to be located on the I-3 portion of the CHUM lands, however, the air strip was never developed.

8. On November 7, 2000, MacLellan entered into an agreement of purchase and sale to purchase a 32 acre parcel of land (Block 213-A) and a 94 acre parcel of land from CHUM with the latter parcel conditional upon acquiring access from HRM by way of acquisition of land or an easement. In addition, MacLellan obtained a right of first refusal to the remaining lands of CHUM consisting of approximately 194 acres.

9. On November 24, 2000, MacLellan made an application for subdivision approval to consolidate a portion of Lot 2 with a sliver of land adjoining Prospect Road to form Block 2-B and a portion of Lot 2 with similar sliver to form Block 213-A. (see map Plaintiff's Brief page 2). The application was a paper process wherein the development officer had no contact with MacLellan. The application which MacLellan filed did not give details of the intended use aside from noting that the current use was vacant and its proposed use commercial. Lot 2 currently had a pre-existing commercial use of an access road to the CHUM towers. The RB-1 zone did allow for some limited commercial uses so the approval was granted. The approval specified that the granting of the approval offered no guarantee that a building permit would be issued. The consolidation of the lots did nothing to change the essential features of the land, the fact that it straddled two zones, or make it more or less difficult to develop, aside from the fact that it now had road frontage.

10. MacLellan says that they intended to build an office and a lay down area for his equipment on one of the consolidated lots. However, MacLellan had no direct contact with the development officer and did not provide this information.

11. After the subdivision approval, but before applying for a building permit, MacLellan completed the purchase of Block 213-A for $30,000 in accordance with the agreement of purchase and sale. On September 10, 2002, MacLellan applied for a building permit to construct an office building and warehouse on the lot. The application was denied on the ground that MacLellan was intending to cross the RB-1 zoned lands with a driveway for a commercial use which was not permitted by the by-law.

12. MacLellan approached his city Councillor, Steve Adams, and appeared at Western Community Council who passed a motion directing staff to work with him to try to find a way to help him develop his lands. The Councillor and staff met with him and suggested two possible alternatives: MacLellan could apply to rezone the RB-1 portion of the land or he could construct a public road through the property which could then be handed over to the Municipality.

13. MacLellan chose to explore the possibility of constructing a public road rather than a zoning amendment as he was concerned about the length of time that a rezoning could take and the uncertainty of its result in a public process.

14. The public road option had its own challenges. The length of road required to access the industrially zoned portion of the lands was longer than the maximum length of cul-de-sac. Putting in road reserves at the end of the cul-de-sac was one potential solution to the length of the road, that would allow the road to eventually be joined at the other end, but it was unclear where the road reserves would lead. The price of building the road to public standard was also estimated, and MacLellan concluded that it was too expensive.

15. MacLellan decided to explore other business opportunities to subsidize the cost of building a public road. Having longer term plans for the development of the remainder of the CHUM lands, including a through road, he proposed continuing the driveway as a public road across the entire property and the development of an industrial park. However, this would require him to acquire from the Municipality access across the pipeline right of way, which was now reserved for a future recreational trail, in two places and also access over another lot owned by the Municipality to intersect with Evergreen Place at the far side of the property.

16. The proposal was supported by the Manager of Business Parks and circulated to other business units for commentary. The Real Property staff became involved because of the access issue and expressed concern because the proposed industrial park would abut the Western Common land which was anticipated to be developed for residential use. Discussion between the developer, staff and at times Councillor Adams, continued intermittently over the next couple of years. In the spring of 2005 an agreement was reached between MacLellan and staff that would allow staff support for a request to Regional Council for access in exchange for a 100 ft. reciprocal buffer along the boundary of the property. However, staff made it clear and MacLellan clearly understood that while staff could support the proposal, the decision on access would rest with Regional Council.

17. In early 2006, MacLellan was negotiating with Canada LaFarge as a prospective tenant to operate an asphalt plant in the proposed industrial park and concluded an agreement. In February 16, 2006, MacLellan completed the purchase of a 45 acre parcel and a 94 acre parcel of land from CHUM pursuant to their agreement of purchase and sale

> or an extension thereof. MacLellan completed the purchase because further extensions would increase the price and he felt that the proposal would be approved notwithstanding that it had not been considered by Regional Council.
>
> 18. In early 2006, the local residents along Prospect Road learned of the proposed industrial park and asphalt plant. They had been living with increased industrial development in the I-3 zone and were very sensitive to the environmental impact of any additional development on their community and the Drysdale Bog. They approached their local Councillor, Reg Rankin, who expressed their concerns. LaFarge tried but was unable to satisfy the councillor's concerns. In contrast, Councillor Adams continued to support the proposed industrial park with LaFarge as a tenant.
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> 19. Staff advised MacLellan against proceeding with the matter to Regional Council without the support of the local councillor. MacLellan chose to retain LaFarge as a tenant for the proposed industrial park notwithstanding the stated concerns of Councillor Rankin and the local community. On being pressed by MacLellan, staff made the decision to proceed to Council for a decision on the request for access.
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> . . .
>
> 27. On October 21, 2008, Regional Council rescinded the June 13, 2006 resolution and directed the completion of a zoning study of the area. Following completion of the rezoning study and the public hearing process, Regional Council rezoned the area residential.

[4] Although the partial agreed statement of facts was limited to the above, the events which followed in the spring of 2006 are not substantially in dispute. Those events lead to a meeting held on April 12th attended by Lloyd MacLellan, owner of the plaintiff company, Paul LeBlanc, an engineer in the employ of the plaintiff, and two city officials, one of whom was Peter Bigelow (the manager of Public Lands and Planning for HRM).

[5] At that meeting, both parties discussed various aspects of the proposed access to facilitate the development of the site and the easement that would be required across HRM lands in building a road that would link to another public road at the far end of the property known as Evergreen Place. This discussion was

based on the draft agreement reached between the plaintiff and HRM staff in June of 2005 (referred to in paragraph 16 above recited).

[6] Strangely, the notes of that meeting taken by Mr. LeBlanc and the *viva voce* evidence taken at trial of the attendees are all consistent in reflecting that the environmental concerns raised by Mr. Rankin on behalf of his local constituents were not then discussed. As Mr. Bigelow put it, he had taken the matter as far as he could without resolving those environmental concerns and felt it was time to put a staff report and recommendation before Council and let it decide the matter.

[7] Thus it was that Mr. Bigelow prepared a staff report dated May 30, 2006 for presentation to Council at its meeting to be held on June 13th. In that report, Mr. Bigelow set out all the background of the proposed development as well as the concerns expressed by staff on various issues, namely, the proximity of heavy industrial use to neighbouring watershed lands, protection of the trail connection over the pipeline, connections to future residential lands, impact on the Goodwood community, traffic on the Prospect Road, and environmental protection.

[8] More specifically, Mr. Bigelow referred to concerns that the asphalt plant proposed by LaFarge would add an obnoxious use to the area but that staff determined that the impact would be minor. He further reported that staff intended, with the approval of Council, that a letter be sent to the Nova Scotia Department of Environment and Labour expressing this concern and that all proper and environmental reviews and assessments be carried out as they pertained to the proposed development.

[9] The recommendation ultimately made by staff to Council read as follows:

> (1) Authorize the Mayor and Clerk to enter into a temporary construction agreement with Mr. Lloyd MacLellan to cross municipal lands to permit the construction of a permanent public street serving a future heavy industrial park in Goodwood;
>
> (2) The easement will be subject to municipal construction standards with final street design to be approved by the municipality in exchange for considerations outlined in this report.

[10] This confidential report was circulated to Council members a few days in advance of the meeting in the ordinary course. Upon reviewing it, Mr. Rankin felt that the course of action proposed by staff did not go far enough to address the environmental concerns which he shared with his constituents. Accordingly, at the outset of the in camera meeting of Council on June 13th , Mr. Rankin presented a proposed amendment to the staff recommendation, through a motion, that would require the granting of an easement to be subject to receiving an agreement from the provincial Department of Environment that the development proposal be subject to a full environmental review, taking into account the nature of the intended uses, including the proposed asphalt plant.

[11] As Mr. Bigelow put it, things changed quickly at the meeting with the introduction of Mr. Rankin's motion. Mr. Rankin clearly wanted the granting of the easement to be subject to the condition of the performance of a full environmental review by the Minister of Environment, which was obviously a much higher level of review than recommended in the staff report.

[12] Opposition to this stipulation was voiced by another councillor, Stephen Adams, who was the representative from the district in which Mr. MacLellan resided. Indeed, Mr. Adams had worked to help the plaintiff resolve the outstanding access issues ever since 2003. Mr. Adams' position was one of support for the staff recommendation which would have stipulated only that all proper environmental reviews and assessments be carried out as they pertained to the proposed development. Having been informed at that Council meeting that a full environmental assessment by the Department of Environment was not necessary for the establishment of an asphalt plant, Mr. Adams held the view that the proposed environmental condition could not be met, meaning that the motion would fail and no easement could be granted.

[13] Mr. Adams further addressed the motion by noting that at the time of the zoning of the lands intended to be acquired by LaFarge, there would have been a public process. He further stressed that the decision for Council that day was whether or not a temporary road construction easement should be granted to the plaintiff, not the appropriate use of the site later on by LaFarge.

[14] Notwithstanding this opposition, Mr. Rankin's motion was put and passed that morning. However, later in the meeting, councillor Adams gave Notice of Reconsideration of the decision that had been made.

[15] What next transpired was that Messrs. Adams and Rankin went out for lunch together to discuss their differences. They attempted to reach a compromise in their opposing positions over the level of environmental review that should be attached as a condition of the motion.

[16] Apparently, the two councillors believed at the time that they had worked out an acceptable compromise. However, subsequent events proved that they had not. In fact, Mr. Rankin continued to hold the view that a full environmental assessment needed to be stipulated as a condition to the granting of the easement. He was only prepared to tweak the wording of his original motion, not the substance. Mr. Adams, on the other hand, came away with the understanding that a full assessment would not be stipulated as a condition in the motion, but rather that the environmental concerns could be addressed by a public consultation process.

[17] Mr. Adams did not recall any specific wording being agreed upon in their discussion, but Mr. Rankin said they had. He then presented a revised motion in the afternoon session of Council in which the wording was tweaked in four respects:

1. The terminology of "a full environmental review" was changed to "an environmental impact assessment";

2. The easement would be subject to receiving an "acknowledgement" for same from the Department of Environment as opposed to an agreement;

3. The condition was to be limited only to the prospective asphalt plant; and

4. Mr. Bigelow's suggestion was accepted that the words be added "and further that public consultation be included as part of the permitting process".

[18] Mr. Rankin was firm in his evidence, which I accept, that his intention in advancing this revised motion was to stipulate that HRM would grant the easement which the plaintiff needed for access to the land only if HRM got an acknowledgement from the Minister of Environment that a full environmental impact assessment would be carried out, in the event that LeFarge should make application for approval for an asphalt plant. He knew that that level of environmental review was not necessarily required under the existing regulations but that the Minister of Environment had a discretion to order the higher level of scrutiny which he sought. Mr. Rankin testified that his intention was not to impose anything on the Minister of Environment but rather to convey Council's concerns to that department to be considered in its due diligence.

[19] Mr. Rankin went on to express his view that the proposed easement was HRM's asset to give and that Council had to decide what it wanted in return. He considered that the easement was the leverage through which the community's environmental concerns should be properly addressed by way of a full environmental assessment.

[20] Mr. Adams, on the other hand, believed that the intention of the revised motion was only to require a public consultation process rather than a full environmental assessment. He testified that had he known otherwise, he would not have supported the revised motion.

[21] There is only one significant discrepancy in the evidence in this case which heightens the misunderstanding between councillors Adams and Rankin. It was the evidence of Mr. Adams that when the in camera meeting resumed in the afternoon of June 13th, councillors were informed by Wayne Anstey, who was then Deputy Chief Administrative Officer, that he had ascertained that although the Minister of Environment always retained the discretion to order a full environmental assessment, he would not be doing so in this instance. This reinforced Mr. Adams' view that since the proposed condition was not going to be able to be met, the motion would inevitably fail and no easement would ever be granted.

[22] This evidence is directly contradicted by the testimony of both Mr. Rankin and Mr. Bigelow, who denied that Mr. Anstey ever said any such thing at the June 13th meeting. Mr. Bigelow knew, from his prior inquiries to the Department of Environment, that the Minister held the discretionary power to order a full environmental assessment in these circumstances. He further testified that he thought this project was a likely candidate for an affirmative exercise of that discretion. Mr. Rankin, as I have already recounted, also knew about this ministerial discretion and

confirmed that he had no knowledge whether or how the Minister would exercise that discretion.

[23] There is in evidence minutes of both the morning and afternoon sessions of the June 13th meeting, a partial transcript thereof, and minutes of the subsequent Council meeting held on June 20th. There is only one recorded reference bearing on this point which is a sentence from the June 20th minutes that Mr. Anstey explained that staff at the Department of Environment had already indicated that they would not recommend an environmental assessment in this instance. I conclude that Mr. Anstey could only have gained that understanding from the back and forth communications that took place between HRM and the Department of Environment during the week between the June 13th and June 20th meetings.

[24] I do not accept Mr. Adams' testimony on this point, not because of any deliberate falsehood on his part, but rather out of confusion as to exactly what was said, and when, in respect of this ministerial discretion. I conclude that nothing more was said at the Council meetings about whether it would be exercised, other than the later comment made by Mr. Anstey at the June 20th meeting above referred to. It simply does not stand to reason that the Minister of Environment (or staff) would take such a position and communicate it to HRM over a lunch hour in such an informal and undocumented manner. The significance of this finding of fact will be revisited later in this decision when addressing the plaintiff's bad faith allegation.

[25] In any event, the replacement motion that was put and passed in the afternoon session of the June 13th meeting reads as follows:

> MOVED by Councillor Rankin, seconded by Councillor Adams, that Council:
>
> 1. Authorize the Mayor and Municipal Clerk to enter into a temporary construction agreement with Mr. Lloyd MacLellan to cross municipal lands to permit the construction of a permanent public street serving a future heavy industrial park in Goodwood;
>
> 2. The easement will be subject to receiving an acknowledgement from the Provincial Department of Environment and Labour that should an application for an asphalt plant come forward that an environmental impact assessment be carried out and further that public consultation be included as part of the permitting process.
>
> 3. The easement be subject to receiving acknowledgement from the Department of Transportation that an appropriate transportation review is in place taking into account the nature of the intended uses including a proposed asphalt plant, and that the review includes the advisability of the installation of acceleration/deceleration lanes and traffic signals at the intersection of Evergreen Road and Prospect Road.
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> 4. The easement will be subject to municipal construction standards with final street design to be approved by the municipality in exchange for considerations outlined in the May 30, 2006 report.
>
> 5. The report may be released to the public upon ratification of Council.

[26] In fairness to Mr. Adams, it became apparent in the following days that there was confusion as to exactly what Council had approved by the replacement motion. It is recorded in the evidence that Mr. Anstey shared Mr. Adams' view that all that was intended by the condition inserted in the motion was to require a public consultation process only, and that staff was now seeking clarification of Council's intention relative to that motion.

[27] Subsequently, Council obtained minutes of the June 13th meeting and a partial transcript thereof, whereupon it became clear that the import of the motion was to stipulate, as a condition of granting the easement, that the Minister of Environment exercise his discretion to order a full environmental impact assessment (including public consultation) should an application for an asphalt plant come forward. The motion therefore stood as passed.

[28] Accordingly, the Mayor of HRM wrote to the Minister of Environment by correspondence dated June 29th, July 5th and July 21, 2006 requesting that his department require an environmental impact assessment for the proposed asphalt plant in Goodwood. By reply correspondence dated August 4, 2006 the Minister advised that the proposed plant did not require an environmental assessment as per the *Environmental Assessment Regulations*. Rather, it would only require environmental approval per the *Activities Designation Regulations* to construct and operate the facility. The Minister went on to note that as part of LaFarge's application, his department did require public consultation which had been carried out.

[29] In the result, the second condition stipulated in the HRM motion passed on June 13th could not be fulfilled. HRM therefore declined to grant the easement to the plaintiff which was essential for the access needed to enable the development of an industrial park.

[30] The plaintiff's response to that turn of events was to commence a legal proceeding claiming that it was entitled to the access sought. It then brought an interlocutory motion seeking a declaration that the condition (No. 2) was invalid and for an order directing HRM to grant the access needed to enable development of the site.

[31] That motion was heard before Chief Justice Kennedy in July of 2008. In an oral decision delivered on July 31, 2008 the court essentially ruled that HRM did not have jurisdiction to address its environmental concerns by imposing the subject condition to a permission for access the way it did. The court also decided that there was no public duty owed to the plaintiff under legislation or the common law to grant the access sought over its lands. With that, the court issued a declaration that the condition was invalid and it refused to grant an order that would direct access to the property by way of the easement sought.

[32] The salient passages from Chief Justice Kennedy's oral decision are set out as follows:

> The municipality was prepared to accept that business development park; otherwise prepared to agree to it. That's what the permission was all about, to allow the access to be built that would ultimately allow for that development to go ahead. The ability to construct a public road to a compliant business development.
>
> So, that's what the resolution was basically all about. That was the essence of the resolution. But they tacked on to that permission this requirement that a third party, LaFarge, if it wished to do something within the park, get approval from the provincial government, approval firstly to deal with and obtain a permission to proceed with a separate and distinct development in a particular way to satisfy the provincial government with relation to its

> environmental consequences. But LaFarge was also to obtain that approval in a specific manner. In a manner that satisfies the city, in a manner directed by the Municipality.
>
> Not only was LaFarge a tenant within the park that is the subject of the resolution required to get approval, but it was required to get approval in a specific way.
>
> Frankly, that directive, that condition was presumptuous. Simply put, the developer MacLellan, cannot provide, cannot accomplish that the potential tenant, LaFarge, gets the province to grant approval for the asphalt plant but in doing so only after adopting a process, required not by the province, but by the municipality - - couldn't do that.
>
> That's a convoluted - - I refer to it as an ill conceived condition. Nothing cited, nothing argued by HRM convinces me that the city has the authority, statutory or otherwise to require that kind of action.
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> . . .
>
> The city cannot directly, nor indirectly force the provincial minister to do what he does not intend to do. Whether the - - a provincial assessment is to be carried out is entirely within the minister's authority and discretion under s. 35(3)(c) of the Act. This is a condition that is, bottom line, not legally sustainable, and I am prepared to make the order by way of declaration that it is invalid.

[33] In concluding his decision, Kennedy, C.J. declined to grant the discretionary remedy of mandamus. He recognized that such an extraordinary remedy is only granted where there is an imperative public duty, which must exist either under common law or under statute. He found that HRM owed no such duty to the plaintiff under the legislation or the common law in this specific, and none had been identified.

[34] In light of this finding that there was no public duty owed to the plaintiff, and in concluding that no contract existed between it and the plaintiff, HRM rescinded the subject motion on October 21, 2008 and ultimately re-zoned the area as residential as above noted. Thus ended the proposed development once and for all.

ISSUES

[35] The issues to be now decided by the court have been aptly framed in HRM's brief as follows:

a. Was the Municipality in breach of a contractual duty to grant MacLellan an easement over its lands following the decision invalidating the environmental condition?

b. Did the Municipality act in bad faith by taking into account environmental concerns in dealing with its lands and if so, is it liable for damages?

FIRST ISSUE - BREACH OF CONTRACTUAL DUTY

[36] The plaintiff's lead argument on this issue is that the passing of the revised motion in the afternoon session of the June 13th meeting served to form a binding contract between the parties for the granting of the easement. It is argued that this was an ordinary commercial agreement, whereby HRM agreed to grant an easement over its property for access to the plaintiff's property if the plaintiff promised to build the specified road over it. The argument is pressed that this obligation was assumed by HRM by the passing of the motion with the same effect as an exchange of letters or an agreement of sale would have between private citizens.

[37] The plaintiff's further argument on this issue is that once the environmental condition was struck down by the court as being invalid, the rest of the agreement survives as a binding obligation; that is to say, that HRM remained bound to grant the easement without any environmental protection condition being attached.

[38] There are a number of difficulties with this argument which are fatal to the plaintiff's position.

[39] I begin the analysis by making reference to the well known text authored by Ian Rogers on *The Law of Canadian Municipal Corporations*, 2nd ed. (Carswell, 2009). After stating the fundamental principles that the essential elements of a valid contract must be present in order to bind a municipal corporation and that there must be an offer and acceptance and a meeting of minds, the author goes on to say:

> Generally speaking, a mere resolution or by-law whereby a corporation agrees to do something, without more, does not give rise to a legal obligation on the part of the corporation. A resolution authorizing a contract or accepting a tender is to be regarded as a mere expression of willingness to enter into an agreement but not necessarily as a contract itself.

[40] The author then goes on to say that on the other hand, the courts have on occasion given contractual effect to a by-law or resolution, depending on the circumstances. This principle was recognized in **Bay Village Shopping Center Ltd. v. Victoria (City)**, 1974 Carswell BC 97, a case in which the plaintiff sought to rely on a municipal resolution to enter into a land use contract for the development of a property. Attached was a condition precedent requiring registration of the land use contract as a first charge on the subject property.

[41] The court had this to say in its analysis (at para. 35):

> It seems to me that where a council may exercise its powers merely by resolution, the issue of whether the resolution amounts to the completion of a binding agreement or merely to "a mere expression of willingness to enter into an agreement" depends on the circumstances, and, in particular, on the nature of the proposed contract. Having regard to all the circumstances, I have come to the conclusion that the resolution of the council on 10th June 1971 was a mere expression of willingness to enter into an agreement.

[42] There is another useful case reference to be noted although it did not involve a resolution by a municipal corporation. I refer to the decision of the Nova Scotia Court of Appeal in **Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.** [2000] N.S.J. No. 257. That case involved a Memorandum of Understanding between two private corporations, the purpose of which was to settle all outstanding disputes in order to allow an ongoing joint project to go forward.

[43] In its analysis, the Court of Appeal stated (at para. 67) that an agreement is not incomplete simply because it calls for some further agreement between the parties or because it provides for the execution of a further formal document. The question is whether the further agreement is a condition of the bargain, or whether it is simply an indication of the manner in which the contract already made will be implemented. This is a matter of the proper construction of the agreement.

[44] There was a clear finding in **Mitsui** that both parties intended to and thought that they had achieved their purpose by signing the document in question. No missing terms essential to the achievement of that objective were identified. In the result, the court held the Memorandum of Understanding to be a binding contract.

[45] In the present case, the court must therefore determine the intent of the parties in the passing of the subject motion; that is to say, whether both parties intended to and thought that they had entered into a binding agreement by virtue of the motion passed.

[46] Mr. MacLellan in his evidence points to the June 11, 2005 draft agreement with staff (referred to in para. 16 of the partial Agreed Statement of Facts) as setting out the terms he was in agreement with. He felt that this agreement was affirmed during the preparatory meeting with members of HRM staff on April 12, 2006 whereupon it was agreed that a report and recommendation would be prepared by Mr. Bigelow for presentation to Council for approval. Ultimately, that staff report was broader than, but consistent with, the terms of the June 11, 2005 agreement with staff.

[47] Mr. MacLellan readily acknowledged, however, that he knew that the final decision on his proposal rested not with staff, but with Council. What he did not anticipate, however, was the introduction of Mr. Rankin's motion at the Council meeting of June 13th which sought to impose an environmental protection condition.

[48] In my view, it is clear from the language of the motion itself that there was never any intent on the part of HRM to treat that motion as a binding agreement with the plaintiff. Rather, the language is an expression of willingness to enter into an agreement down the road if and when the Minister of Environment ordered a full environmental assessment respecting the proposed asphalt plant. As Mr.

[49] Rankin put it in his evidence, a motion by Council is a direction to staff to take further steps. It was not to serve as a binding agreement in and of itself here because a number of things first had to happen. Accordingly, the wording of the motion contemplates a further agreement as a condition of the bargain.

[50] Coupled with this is the fact that it cannot be said that the parties ever reached a *consensus ad idem* on the terms of the proposed agreement. Council wanted to impose, and did impose at the time, an environmental protection condition. Mr. MacLellan in his evidence candidly acknowledged that he did not ever agree to the requirement of an environmental assessment in connection with the proposed asphalt plant as a condition of the deal.

[51] Moreover, I also conclude that the essential contractual elements of making an offer and a corresponding acceptance are missing in this case. All the plaintiff had was a draft agreement from June 11, 2005 with HRM staff that it would make a recommendation to Council for the granting of the easement on the proposed terms. Ultimately, that proposal as drafted was never even put to Council. Rather, it was Mr. Rankin's motion that was put forward for approval at the June 13th Council meeting.

[52] As we have seen, that motion introduced two new conditions, one relating to traffic implications (which never became an issue) and more importantly, the impugned environmental protection condition. Mr. MacLellan at no time agreed with the latter condition without which there cannot be said to have been a corresponding offer and acceptance, by implication or otherwise.

[53] Furthermore, in order to be enforceable, an agreement must contain all essential terms. Relevant to that question of certainty is the parties' intention to create legal obligations. In my view, this motion was only a step along the way towards the creation of a binding agreement, leaving other terms still to be worked out. The motion really only reflects an agreement to agree, which was subject to the fundamental condition of there being a full environmental assessment ordered by the Minister of Environment in relation to the proposed asphalt plant.

[54] Neither do I accept the plaintiff's argument that with the declaration of invalidity of this condition by this court as above recited, the remaining terms in the motion thereby became a binding obligation on HRM. The fact that the condition was declared to be invalid does not change HRM's intent that this motion was to serve as a mere expression of willingness to enter into an agreement for the granting of the easement on the subject conditions. *Consensus ad idem* remained missing as an essential ingredient of the contract and it is clear that HRM never would have passed this motion to grant the easement without the attachment of the stipulated environmental protection condition.

[55] For all the foregoing reasons, I find that a binding contract between the parties was never formed by virtue of the passing of the June 13, 2006 motion and the surrounding events. The plaintiff's claim in contract therefore fails.

SECOND ISSUE - BAD FAITH CLAIM

[56] The plaintiff advances, as an alternate basis for liability, a claim in damages for bad faith. This claim is advanced on two alternate footings:
(a) HRM intentionally and deliberately imposed the environmental assessment condition with the objective of blocking the planned development because of the proposed asphalt plant, knowing at the time that the Minister of Environment would not order such an assessment, and thereby exercising bad faith; or
(b) HRM exercised bad faith in the technical administrative law sense by taking into account improper factors for an ulterior purpose in the discharge of its public duty. More specifically, it is argued that what occurred here was in bad faith because the environmental assessment condition did not relate to the plaintiff's development *per se*, but rather to what LaFarge intended to do as a future occupant of the industrial park. By so taking into account something that Council was not authorized to consider in its dealings with the plaintiff, is said to constitute bad faith.

[57] On the latter footing, plaintiff's counsel characterizes damages for bad faith as an administrative law remedy which is not subject to the conventional tort analysis. This characterization of damages for bad faith as an administrative law remedy perhaps reflects that a number of Canadian courts have considered the issue of whether a tort of bad faith exists, such as to permit an award of damages without proof of any elements other than bad faith on the part of government causing damages. Thus far, Canadian courts have determined that no such tort exists and that where bad faith is alleged, the only applicable tort is abuse of

public office (see *The Law of Municipal Liability in Canada* authored by David Boghosian and J. Murray Davison at s.9.22.2).

[58] A leading case example is the Supreme Court of Canada decision in **Alberta v. Elder Advocates of Alberta Society** [2011] S.C.J. No. 24 where Chief Justice McLachlin stated (at para. 78):

> The law does not recognize a stand-alone action for bad faith . . . [The] bad faith exercise of discretion by a government authority is properly a ground for judicial review of administrative action. In tort, it is an element of misfeasance in public office and, in employment law, relevant to the manner of dismissal. The simple fact of bad faith is not independently actionable. . . .

[59] It is not surprising therefore that the plaintiff frames this alternate footing for bad faith damages as an administrative law remedy.

[60] All of this leads to a discussion of the nature of the municipal function being exercised and how the scope of liability is thereby affected.

[61] It is clear from another leading decision of the Supreme Court of Canada in **Welbridge Holdings Ltd. v. Greater Winnipeg (Municipality)** [1971] S.C.R. 957 that the scope of municipal liability will depend on the nature of the function being exercised. As the court stated (at para. 19):

> The defendant is a municipal corporation with a variety of functions, some legislative, some with also a quasi-judicial component (as the **Wiswell** case determined) and some administrative or ministerial, or perhaps better categorized as business powers. In exercising the latter, the defendant may undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence. There may, therefore, be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a quasi-judicial duty.

[62] Briefly, that case involved a different fact situation where a real estate developer had sued a public body, asserting that there was a duty of care in making a zoning by-law. After the by-law was declared invalid, the developer claimed that the public body was liable in damages. The action was brought solely in negligence and was ultimately dismissed by the court.

[63] This classification of municipal powers was reiterated in the more recent Supreme Court of Canada decision in **Shell Canada Products Ltd. v. Vancouver (City)** [1994] S.C.J. No. 15. It was there affirmed that a municipality may be liable in contract or tort in respect of the exercise of its business functions, unlike the exercise of its legislative or quasi-judicial functions.

[64] I have no hesitation in finding that the function that was exercised by the Council motion passed on June 13, 2006 is properly characterized as a business function. The motion set out the terms upon which HRM was prepared to grant an easement to the plaintiff to facilitate the planned development of an industrial park. Even though exercised at the highest decision making level of HRM, this motion was nonetheless in the nature of a business operational decision as a step along the way towards reaching a final agreement with the plaintiff. This was not a true policy decision (as argued on behalf of HRM) even though it was based on a number of policy considerations set out in the staff report.

[65] The conclusion that follows from these findings is that HRM is not immune in law from the common law claims here advanced if they can be proven.

[66] I have already made the finding that HRM has no contractual liability to the plaintiff on the facts of this case. It remains to decide whether the plaintiff has made out its case against HRM for the tort of abuse of public office or an administrative law remedy in damages for bad faith.

[67] It is conceded that the plaintiff's claim is not founded on misrepresentation, because it always knew there was a possibility that Council would not approve the development.

[68] In order to succeed in a tort claim for abuse of public office, the plaintiff must establish some element of intentional fault that represents the deliberate exercise of bad faith. It may also suffice if the plaintiff can establish recklessness on the part of HRM Council that implies a fundamental breakdown of the orderly exercise of authority, to the point where absence of good faith can be deduced and bad faith presumed (see **Finney v. Barreau du Quebec**, 2004 S.C.C. 36 (at para. 39).

[69] Those requirements are not met on the facts of this case. Having accepted the reliability of the evidence of Mr. Bigelow and Mr. Rankin over that of Mr. Adams in their recollection of events from the June 13, 2006 Council meeting, I am satisfied that Council was then informed that an environmental assessment for the proposed asphalt plant would not be automatically required but that under provincial legislation, the Minister of Environment had a discretion to order one to be performed and could have done so in this instance. I accept the evidence of Mr. Bigelow, the key staff member on this project reporting to Council, that he thought

that an environmental assessment would likely be so ordered but that the planned development of an industrial park would ultimately go ahead.

[70] I am further satisfied that HRM did not, by virtue of the passing of this motion, set out to block the establishment of an asphalt plant by LaFarge in the proposed industrial park. Had that been the true objective, HRM could have accomplished it through a re-zoning process without repercussion. What HRM was obviously trying to achieve, through the subject motion, was a balancing of the interests of the developer with the interests of the local residents in voicing their environmental concerns. Such concerns are commonly addressed by HRM in protecting various community interests.

[71] It cannot be said that there is anything inexplicable or incomprehensible about the action taken by HRM in passing the subject motion. It was trying to strike a compromise between the interests of the developer (promoted by Mr. Adams) and the interests of the local residents (promoted by Mr. Rankin). I agree with the closing submission made by counsel for HRM that the passing of the subject motion was done with the legitimate objective of taking environmental concerns into account and not for any improper purpose. Rather, Council chose the wrong means by attaching a condition that this court ultimately found it had no authority or jurisdiction to impose.

[72] In the result, I find that the tort of abuse of public office does not lie on the facts of this case.

[73] These same considerations bear upon the plaintiff's alternate claim for an administrative law remedy in damages for bad faith. As noted earlier, this argument rests on the proposition that it is bad faith, in the administrative law technical sense, for Council to have prevented the plaintiff from developing its industrial park as a means of indirectly regulating the establishment of an asphalt plant by LaFarge.

[74] In support of this claim for damages for bad faith, the plaintiff relies on the Supreme Court of Canada decision in **Enterprises Sibeca Inc. v. Frelighsburg (Municipality)** [2004] S.C.J. No. 57. Like **Welbridge**, this case is distinguishable on its facts in that it involved the exercise of a legislative regulatory function by the municipality (the amendment of a zoning by-law). It should also be noted that it was an action based on certain provisions of the Civil Code of Quebec which are essentially framed in the language of negligence. This decision actually confirms and extends to the law of Quebec the holding of the Supreme Court in **Welbridge**.

[75] The **Sibeca** case also involved a zoning by-law amendment which foiled a planned development project. Although the plaintiff developer was successful in the claim for damages at trial, it was unsuccessful in successive appeals to the Court of Appeal in Quebec and the Supreme Court of Canada. In the latter decision, the Supreme Court ruled that a municipality may not be held liable for the exercise of its regulatory power if it acts in good faith or if the exercise of this power cannot be characterized as irrational. It went on to say that the declaration on judicial review that a by-law is invalid because it is founded on a consideration determined to be irrelevant does not necessarily expose the municipality to extra-

contractual liability and that a municipality has a margin of legitimate error (see para. 23).

[76] The Supreme Court further said (at para. 26) that the concept of bad faith can encompass not only acts committed deliberately with intent to harm, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. I take the plaintiff's argument to be that the court can likewise conclude there was an absence of good faith when a business function is exercised in an improper way, which should sound in damages.

[77] I am not persuaded that the **Sibeca** case or any of the other authorities cited by the plaintiff stand for the proposition that there is an administrative law remedy for damages for bad faith in the exercise of a business function, separate and apart from the tort of abuse of public office. Even if that were a sustainable proposition in law (and the court has not been provided with any case authority directly on point to support it), I have concluded on the whole of the evidence that HRM Council has not acted in bad faith in this matter in any actionable way. Granted, it chose the wrong means to try to achieve its objective by inserting in the motion what Chief Justice Kennedy characterized as an ill-conceived condition beyond its statutory authority. However, its objective was not to block the proposed development of an industrial park because of the proposed asphalt plant, but rather to strike a balance between the legitimate interests of both the developer and the local residents. The fact that the environmental protection condition imposed in

the motion was subsequently declared by this court to be invalid does not necessarily attract liability.

[78] In the absence of any deliberate or intentional exercise of bad faith, and where Council's mistake was simply choosing the wrong means in trying to promote a legitimate objective, I conclude that the plaintiff is not entitled to a remedy in damages for bad faith. The case law to which I have been referred does not support such a finding of liability. This result is also consonant with Chief Justice Kennedy's finding that HRM owed no public duty to the plaintiff under statute nor the common law.

[79] It should be added that proving causation of damages is a further impediment to the plaintiff's case. It is clear from the evidence that the plaintiff's expenditures in anticipation of developing an industrial park, including the acquisition of lands and various related studies, were all incurred prior to the passing of the June 13th motion.

[80] Mr. MacLellan readily acknowledged that he incurred these costs knowing all the while that approval of his proposed development was subject to gaining access to the lands from HRM Council who had no obligation to grant it. Mr. MacLellan simply made the business judgment that he would ultimately get that approval, buoyed by a favourable response by HRM staff. Unfortunately, with the turn of events at the June 13th Council meeting, the approval for the necessary easement never materialized and the project collapsed.

CONCLUSION

[81] It is most unfortunate that Mr. MacLellan is left in the position he is in through no real fault of his own. It is obvious from his unassailable testimony that he worked earnestly, patiently and in good faith in working with HRM staff to get the necessary approvals for his planned development of an industrial park, only to have the project foiled by the imposition of a condition in the subject motion later declared to be invalid. However, hardship cases cannot be permitted to make bad law and the plaintiff's claim must be dismissed.

[82] Although costs normally follow the result, the court always retains a discretion in making an award of costs to do justice between the parties. Because the plaintiff's misfortune is largely attributable to the misstep by HRM Council in passing the subject motion the way it did, I decline to make an award of costs in its favour. Instead, I exercise the Court's discretion in directing both parties to bear their own costs.

J.