See pp. 5-7

Indexed as:

Gottcon Contractors Ltd. v. Manzo

Between
Gottcon Contractors Limited and Gottardo Contracting (1980) Inc., Plaintiffs, and
Emilio Manzo, Joseph Maio, Claudio Memme and Maystar Contracting Ltd., Defendants

[1992] O.J. No. 24

92 CLLC 12180

92 CLLC para.14,031 at 12180

49 C.L.R. 233

40 C.P.R. (3d) 498

31 A.C.W.S. (3d) 867

Action No. 23002/87

Ontario Court of Justice - General Division
Toronto, Ontario

McRae J.

January 9, 1992

(13 pp.)

Master and servant -- Torts -- Use of confidential information -- Breach of fiduciary duty -- Conspiracy -- Bidding on constitution contract -- Former employee bidding on some contract as former employer -- Restitution -- Assessment of damages.

The plaintiffs sued for damages for breach of fiduciary duty and for wrongful use of confidential information. The defendant Manzo was a former employee of the plaintiffs. Just under a year before he left their employ Manzo helped to prepare a bid on a job for a commercial building known as the

Applecreek Project. Less than four months after Manzo left the plaintiffs the company he had subsequently formed was asked to bid on the Applecreek Project. Manzo's company, Maystar, brought in the lowest bid and was awarded the contract.

HELD: The plaintiffs succeeded on their claim for misuse of confidential information. The court did not find that a fiduciary relationship existed between Manzo and the plaintiffs, since, in spite of the responsible duties he performed for them, he was a mere employee and could not be said to have held a senior management position. However, the court accepted that Manzo made use of confidential information obtained from his employment with the plaintiffs in preparing Maystar's successful bid and that such conduct is actionable. In assessing damages the court commented that the measure of the plaintiff's damages was not necessarily the amount of the defendant's profit, in this case, at least $256,735. The plaintiff was to be put in the same position it would have been in if it had not sustained the wrong. The court therefore allowed a discount for the possibility that the plaintiff would not have been awarded the contract even absent the defendant's misconduct. The award was also reduced to allow an amount for the defendant's overhead. The court decided that $125,000 would accurately reflect the injury suffered by the plaintiffs by reason of the wrongful use of confidential information by the defendant Manzo and his company.

H. James Marin, for the Plaintiffs.
L Gavendo, for the Defendants.

McRAE J.:-- The plaintiffs are limited companies owned by the Gottardo family. They sue the defendant corporation Maystar Contracting Ltd. (Maystar) and its three principals, Emilio Manzo, Claudio Memme and Joseph Maio, for damages for breach of fiduciary duty and for wrongful use of confidential information. They also allege a conspiracy to commit the same acts.

The plaintiff Gottardo Contracting (1980) Inc. (Gottardo) is a masonry contractor. The plaintiff Gottcon Contractors Limited (Gottcon) is a general building contractor engaged in the construction of commercial buildings.

Commencing in 1981 the defendant Emilio Manzo was employed by Gottardo as a masonry estimator. Through the years he gained proficiency at estimating general contracting costs as well as masonry costs. By 1986 he was Gottardo's chief masonry estimator and was used by Gottcon from time to time as an estimator for general contracting work. In April 1986 the Stonor Group, a client of Gottcon, requested a quotation for the construction in Markham of a new commercial building known as the Applecreek Project. This would have been the fifth building for the Stonor Group built by Gottcon.

The Vice-President of Gottcon, Mr. Aldo Gottardo, assigned the task of preparing the Applecreek quotation to the defendant Emilio Manzo. Although Manzo was employed by Gottardo, it appears that work assignments were handed out to whom ever was available and had the skill rather than on the basis of which company paid the employees' salary. The defendant Manzo did all of the necessary preliminary work and prepared a draft quotation. He did the necessary take-offs with respect to costs and obtained bids from various sub-contractors. He, in his capacity as chief estimator, personally prepared the masonry bid on behalf of Gottardo. He then prepared a spread sheet complete with all the necessary information except for the allowance for overhead and profit. This work Manzo then took to Aldo Gottardo for approval. Aldo Gottardo reviewed the work, generally approved the draft and established the allowance for overhead and the allowance for profit. This quotation was put into letter form dated May 30, 1986, signed by Emilio Manzo and submitted to the Stonor Group. The total price quoted was $2,609,000. The Stonor Group decided not to proceed immediately with the project and nothing was done at that time.

In late December 1986 the senior estimator for Gottcon, Mr. Edward Bryden, was asked to review and update the quotation. The purpose of this review is not clear. Mr. Eric Stone who was running the operations for the Stonor Group testified that they did not request a new quote and did not receive one at this time. In any event, Mr. Bryden (with input from Aldo Gottardo) revised the bid slightly downward to $2,519,578. It may be that business was slow and that the Gottardo group hoped the project would be revived and they wanted to be ready with a competitive bid. Despite Mr. Bryden's and Mr. Aldo Gottardo's belief that this quote was communicated to the Stonor Group, I accept Mr. Stone's evidence that no such quote was requested or received.

In about the middle of February 1987, Emilio Manzo advised Aldo Gottardo that he was leaving Gottardo effective February 27, 1987 and that he intended to establish his own business.

During the first week of March 1987 the defendant Maystar Contracting Limited was incorporated by the three defendants Emilio Manzo, Joseph Maio and Claudio Memme. Maio and Memme were brothers-in-law and partners in Bluestar Contracting and Cap Construction. Bluestar was used by Maio and Memme to build commercial buildings on their behalf either for sale, or to retain for leasing to tenants. Cap Construction was an excavating company. They also owned other companies including an equipment rental company. With the incorporation of Maystar they intended to enter into the field of general contracting along with Manzo.

Emilio Manzo was named President of Maystar, Claudio Memme Vice-President, and Joseph Maio Secretary-Treasurer. Maystar started slowly. Its first project was a two storey building on Keele street for the law firm of Tanzola Sorbara. Its second was a small garage for an apartment building.

In late May 1987, Eric Stone telephoned and asked Emilio Manzo if Maystar would be interested in bidding on the same Applecreek Project which Gottcon had bid on during the previous May. Stone also solicited a new quote from Gottcon and one from Bradsil Limited.

As of May 1987, the Stonor Group had built four buildings; on Alden Road in 1981, on Denison Street in 1983, at Warden and Denison and the fourth on Hood Street in Markham. Of the four previous buildings Gottcon had been the only contractor asked to bid.

Maystar's bid of June 1987 was for $2,710,000; Bradsil's bid was dated June 23, 1987 and was in the amount of $3,582,000; Gottcon's bid submitted June 29, 1987, was in the total amount of $2,829,000.

Maystar was awarded the contract. It immediately began construction and has since satisfactorily completed the project.

ISSUES

There are four issues:

1. Was Emilio Manzo in breach of his fiduciary duty to the plaintiffs when he prepared Maystar's bid and submitted it to the Stonor Group?
2. Did Emilio Manzo make improper use of confidential information?
3. Is there evidence of a conspiracy amongst the defendants?
4. What are the damages sustained by the plaintiff if any?

1. FIDUCIARY DUTY

I am not persuaded that Manzo was in breach of a fiduciary duty. He was a young man, only 33 years of age at the time of trial who arrived at Gottardo Contracting (1980) Inc. at about the age of 21. He was trained by Gottardo as a masonry estimator and by the time he left in 1987 he held the position of Chief Masonry Estimator at Gottardo. He cannot be said to have held a senior management position. Gottcon and Gottardo were family businesses and all decisions were made by Aldo Gottardo. To paraphrase the language of Potts, J. in Dialadex Communications Inc. v. Crammond et al., 57 O.R. (2d) 748 at 749; the most the defendant Manzo can be said to have done is he participated in decisions. He did not make them alone. Manzo did not have the power or authority to direct or to guide the affairs of the plaintiff companies. In spite of the responsible duties he performed, he was a mere employee.

2. CONFIDENTIAL INFORMATION

It is clear however, that the defendant Manzo made use of confidential information obtained from his employment with the plaintiffs in preparing Maystar's successful bid. Such conduct is actionable. See Saltman Engineering Co. v. Campbell Engineering Co., [1963] 3 All E.R. 413, per Lord Greene M.R.:

> If the defendant is proved to have used confidential information, directly or indirectly obtained from the plaintiff, he will be guilty of an infringement of the plaintiff's rights.

See also Lac Minerals Ltd. v. International Corona Resources Ltd. (1989), 61 D.L.R. (4th) 14.

He and he alone prepared the 1986 bid on behalf of the plaintiffs. Even Aldo Gottardo, the chief operating officer for the plaintiffs was not as familiar with the details of the bid as was Manzo. The document used by Manzo to submit Maystar's bid was on a form he took when he left the plaintiffs with only the name of the contracting company changed. In several instances items which were not specified by the Stonor Group were bid according to specifications prepared by the plaintiffs. The defendant Manzo in essentially repeating these specifications must have used information obtained in the preparation of the earlier bid. The contracts between Maystar and its sub-contractors were completed on forms photocopied from a form prepared by the plaintiff's solicitors in the early 1980's. I am satisfied, despite Manzo's denial, that he took blank copies with him when he left. The defendant Manzo undoubtedly knew the amount of each of the sub-contractor's bids. He knew the of amount added for profit and for overhead in the plaintiffs bid of 1986. He obviously prepared the defendant Maystar's bid based on all of this information. The defendant Manzo's denial is simply not acceptable in view of the circumstances.

When a company is invited to tender on a project the practice in the construction industry is to observe the utmost secrecy with respect to one's bid. Knowledge of a competitor's bid would present a tremendous advantage. The defendant Manzo agreed that quotes from sub-contractors and listings made "in house" were confidential. The intimate knowledge he possessed of Gottcon's tender including their sub-contractor's quotes gave him and Maystar a clear advantage over his former employer. He used this knowledge to bid and obtain the contract. The disadvantage to Gottcon is illustrated by the fact that Aldo Gottardo merely "bumped up" the 1986 bid which had been prepared by Manzo since he was not intimately familiar with the earlier bid. This was compounded by the fact that the "spread sheet" upon which the 1986 bid was prepared and which contained all of the details of the sub-contractor's quotes went missing from the files of the plaintiff company's some time between January and June of 1987.

In dealing with the credibility of the defendants generally, I think it's important to point out that I have concluded they would literally say anything if they felt that it would assist their case. All three of the defendants who testified were less than frank and truthful. In August of 1988, each of the defendants swore an affidavit of documents pursuant to the Rules of Practice. Each swore that there were only two relevant documents in their possession. The letter which appears at Tab 1 of the defendants Book of Documents dated March 10, 1986, announcing the new company Maystar Contracting Ltd. and the quotation submitted to the Stonor Group on June 22, 1987 at Tab 2. These affidavits were clearly false. The defendants produced at trial a book of documents with no fewer than 76 separate documents. No satisfactory explanation was given why these false affidavits were submitted.

The evidence establishes that Manzo used information from the Gottcon bid in preparing Maystar's bid. The form used to submit the bid was a slightly altered Gottcon form. The items covered by the bid were very similar to those in the Gottcon bid. The specifications for the roof, the pavement, the drainage, pipes and others were all taken from specifications stipulated by Gottcon and not stipulated by the Stonor Group. I am satisfied that all of the information needed to submit the Maystar bid came from the Gottcon bid.

3. CONSPIRACY

I am not satisfied that there is evidence of a conspiracy amongst the four defendants. Maio and Memme were busy with their own companies and their other projects. The preparation of the bid for the building for the Stonor Group on behalf of Maystar was left by them entirely in the hands of Manzo. That they benefitted in the long run through the profit that Maystar realized cannot be denied. However, in my view, the improper use of confidential information was made by Manzo alone.

4. DAMAGES

The contract resulted in a substantial profit to Maystar. In spite of the defendants efforts to minimize their damages it is clear that Maystar made a net profit in excess of $250,000. The exact amount probably cannot now be calculated because in addition to the amount of mark-up for profit and overhead, contractors routinely negotiate better prices from the sub-contractors after they have been successful in obtaining the contract and since I am unable to rely on Manzo's evidence. An estimate of gross profit at $256,735 as shown on Exhibit 15 is probably low.

I am not convinced, however, that judgment for an amount equivalent to Maystar's profit is the correct way to assess the plaintiff's damages in this case. See Waddams Law of Damages 2nd Ed. p. 5-41:

> The commonest claim for business losses is loss of profits, that is, the profit that the plaintiff would have made if the wrong had not been done. As Lord Watson said in the United Horse-Shoe case: "That, must always be more or less matter of estimate, because it is impossible to ascertain, with arithmetical precision, what in the ordinary course of business would have been the amount of the [plaintiffs'] sales and profits." He went on to say that it was not to be presumed against the defendant that all the defendant's customers would have been the plaintiffs' customers if the wrong had not been done.

See also Lac Minerals Ltd. v. International Corona Resources Ltd., (supra), per Sopinka J. at p. 81, adopting with approval these words in the appellant's factum:

> If it is found that, through misuse of information relating to Corona's

> intentions or otherwise, the loss suffered by Corona was the loss of the opportunity to acquire and to explore the Williams property, Corona would be entitled to damages. However, its loss is not to be measured by LAC's gain. Corona is to be put in the same position it would have been if it had not sustained the wrong.

Eric Stone who, along with his father owned and operated the building and development company known as the Stonor Group, testified that in no case would Gottcon have been awarded the contract. He detailed problems which he saw that arose when Gottcon built other buildings for them and told the court that this contract would not have been awarded to Gottcon in any event.

I am not convinced that that is the case. It seems to me that if Gottcon's bid of June 1987 had been considerably lower than Maystar's it probably would have received the contract. The problems related by Eric Stone would disappear if Gottcon's quote was low enough.

The award in this case should be discounted to allow an amount for the defendant's overhead and a further consideration should be given for the contingency that the Stonor Group would not give the contract to the plaintiffs without a substantial price advantage. Under all of the circumstances including consideration of the obligation upon the plaintiffs to mitigate its damages, I have concluded that an award of $125,000 would accurately reflect the injury suffered by the plaintiffs by reason of the wrongful use of confidential information by the defendants Manzo and Maystar.

Therefore judgment will issue on behalf of the plaintiffs against the defendants Emilio Manzo and Maystar Contracting Ltd. in the amount of $125,000. The claims against Joseph Maio and Claudio Memme are dismissed. Counsel are requested to speak to me about pre-judgment interest and costs.

McRAE J.