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Mancha Consultants Ltd. v. Canada Square Development Corp.

Between
Mancha Consultants Ltd., Alan Chapple and Michael Manley,
appellants, and
Canada Square Development Corporation Ltd., respondent

[1998] O.J. No. 2000

110 O.A.C. 52

42 B.L.R. (2d) 289

79 A.C.W.S. (3d) 927

Docket No. C19288

Ontario Court of Appeal
Toronto, Ontario

McMurtry C.J.O., Laskin and Rosenberg JJ.A.

Heard: December 8 and 9, 1997.
Judgment: May 14, 1998.

(21 pp.)

Joint ventures -- Nature of a joint venture -- Duration and termination -- Contracts -- Performance or breach -- Repudiation -- What constitutes repudiation -- Remedies for breach -- Damages -- Wrongful repudiation.

Appeal by Mancha Consultants from the dismissal of its action for breach of contract against Canada Square Development Corporation. Canada Square and Mancha had made an oral agreement to jointly redevelop the Grey Coach property and the Canadian General Electric property. The redevelopment of the Grey Coach property had been deferred, and Canada Square acquired the Canadian General Electric property for itself. The trial judge found that there was a joint venture agreement, and that Mancha had not breached or terminated the agreement, but that Mancha had

lost its contractual rights. The trial judge's finding that Mancha had not lost its contractual rights was based on her finding that Canada Square continuously affirmed that Mancha could take part in the joint venture on the agreed terms, or Mancha could negotiate directly with Canadian General Electric. Mancha felt that it could not compete with Canada Square, and therefore did not negotiate directly with Canadian General Electric.

HELD: Appeal allowed. The trial judge's finding that Canada Square continued to affirm the joint venture agreement after it had begun negotiations to acquire the Canada General Electric property for itself was unreasonable. There was nothing in the conduct of Canada Square that amounted to an affirmation of the joint venture agreement. Canada Square's actions indicated its intention to no longer be bound by the agreement. Canada Square breached the joint venture agreement by repudiating its contractual obligations without justification and acquiring the Canada General Electric property for itself. Because Canada Square repudiated the agreement, Mancha was entitled to have treated the contract as having ended. The failure by Mancha, the innocent joint venturer, to compete with Canada Square, the joint venturer in breach, to acquire the property was no defence to an action for breach of the joint venture agreement.

[Ed. note: Addendum to reasons release February 17, 1999. See [1999] O.J. No. 408.]

Counsel:

William G. Horton and Markus Koehnen, for the appellants.
John T. Morin and Michael J.W. Round, for the respondent.

The judgment of the Court was delivered by

1 **LASKIN J.A.**:-- Rarely does an appellant succeed in this court by overturning a trial judge's finding of fact. This is one of those rare appeals.

2 In July 1985 the respondent Canada Square Development Corporation Ltd. orally agreed with the appellants Alan Chapple and Michael Manley and their company Mancha Consultants Ltd. to redevelop jointly two properties in the City of Toronto, the "Gray Coach property" and the "Canadian General Electric property." In the fall of 1985 the redevelopment of the Gray Coach property was deferred; Canada Square then acquired the Canadian General Electric ("C.G.E.") property for itself. In a judgment dated June 6, 1994, Van Camp J. dismissed the appellants' action for breach of contract and related relief. Although she found that the parties had entered into a joint venture agreement and that the appellants had not breached or terminated the agreement, she nonetheless concluded that the appellants had lost their contractual rights. The appellants appeal on the ground that the trial judge's reasoning is flawed and on the ground that the trial judge made a palpable and overriding error in concluding Canada Square had not repudiated the joint venture

agreement.

Background Facts

3 Although the appellants claim that Canada Square breached its fiduciary duties, its duty of confidence and its duty to negotiate in good faith, in this court Mr. Horton focussed on the appellants' primary cause of action, breach of contract. Therefore, in these reasons, I will address only the appellants' claim that Canada Square breached the joint venture agreement by acquiring the C.G.E. property for itself.

4 The findings and conclusions of the trial judge on the dealings between the parties up until September 19, 1985 are not challenged on appeal. I will briefly trace the parties' dealings and the trial judge's findings.

5 As I have stated, the joint venture agreement concerned two parcels of land: the C.G.E. property, 27 acres of land at the corner of Davenport Road and Lansdowne Avenue, which included a resin business conducted on the property; and the Gray Coach property, the site of the Gray Coach bus terminal at the corner of Bay Street and Dundas Street.

6 In late May 1985 C.G.E. had agreed to sell the C.G.E. property to a numbered company controlled by John Pozhke. During the spring and summer of 1985 Pozhke sought financing for his purchase from several potential investors, including Chapple. Then Chapple became interested in purchasing the property with several of his business associates, including Manley. In early summer, Chapple discussed the business aspects of purchasing the C.G.E. property with Richard Martin, who conducted all the negotiations for C.G.E.

7 In late July 1985 Chapple was introduced to Gerhard Moog, the president and sole shareholder of Canada Square Corporation, the parent of the respondent. (I refer to both Canada Square Corporation and Canada Square Development Corporation Ltd. as "Canada Square".) Canada Square had made an offer on the Gray Coach property to redevelop the bus terminal and build a residential, office and retail complex above the terminal. Moog was confident of being awarded the project because Canada Square was the preferred bidder on a list of two or three. However, Canada Square's proposal to redevelop the Gray Coach property included a storage area for the surplus buses and Moog was having difficulty finding such a storage area. When Moog toured the C.G.E. property with Chapple he saw a connection between that property and the Gray Coach property and a solution to his difficulty. Rather than entering into a bidding war with Chapple, Moog thought that they could purchase the C.G.E. property together. He therefore instructed his General Manager, Ross McKerron, to negotiate a joint venture arrangement with Chapple and Manley.

8 Moog, McKerron and other representatives of Canada Square met with Chapple and Manley on July 25 and 26. Moog indicated that Canada Square required control of any property in which it acquired an interest. He therefore proposed to Chapple that Canada Square take at least a two-thirds interest in the C.G.E. property and that the Chapple group take up to a one-third interest. In return,

Moog offered Chapple's group a one-third interest in the Gray Coach property. The trial judge found that during the meeting on July 26, the parties reached an oral agreement on the following terms:

> (1) The Chapple group and the defendant would acquire the C.G.E. property and the Gray Coach property in a joint venture.
> (2) The defendant would take 2/3 of each and the plaintiffs could take up to 1/3 of each.
> (3) The costs and profits of each would be borne in proportion to the interest of each.
> (4) The defendant would manage each property after acquisition.

9 Later in her reasons, she repeated her finding that the parties had entered into an agreement on July 26:

> I have found that the parties hereto entered into a joint venture agreement on July 26, 1985. There was urgency on the part of each of them to enter into that agreement and they were prepared to have the terms later incorporated into writing. The terms that they had agreed upon were for the purchase of these premises for the respective interest of each of them and each of them intended action to be taken thereunder without waiting for the written agreement. Each of them was aware of what the other had to contribute, each was to carry on negotiations in which he was already involved. The acquisition of either property would be an acquisition on behalf of both. Although I find it difficult to think that the defendant would have consulted Mr. Chapple about any change in its proposal to Gray Coach. I find that it was expected that the offer to be submitted to C.G.E. would be reviewed by both before submission.

10 At trial, Canada Square submitted that no binding agreement had been reached on July 26, that at best there had been "an agreement to agree", but the trial judge rejected this submission:

> I had considered carefully whether on July 26 there was only an agreement to agree; both parties talked of the agreement but their subsequent behaviour has to be considered. There was the offer of July 26 by Chapple to Pozhke but acceptance of it was not expected. The discussion on September 16 indicated some reservations of the defendant about the purchase of the resin plant. But both parties subsequently were still of the opinion that the agreement should continue. There was not the same concern about the written joint venture agreement as it would be difficult to formulate it before the terms of the offer to purchase were known.

11 The trial judge also found that the parties had agreed on the conduct of the negotiations to acquire the two properties:

> It was agreed that because of the time Chapple had spent with Martin of C.G.E. he would have carriage of those negotiations and Canada Square would continue with the bus terminal discussions.

12 McKerron testified that Chapple was to be responsible for preparing a draft offer to purchase the C.G.E. property and that the parties intended to move quickly to acquire this property once it became available. For most of August, however, C.G.E. dealt exclusively with Pozhke and refused to negotiate with Chapple. But in late August or early September C.G.E. terminated its dealings with Pozhke and resumed discussions with Chapple. On September 3, Martin came to Chapple's office to discuss the terms of a proposed offer and for the first time learned of Canada Square's interest in the property.

13 By September 10, 1985, Chapple's lawyers had prepared a draft offer to purchase the C.G.E. property ("the Mancha draft offer"). Chapple and McKerron agreed to meet on September 16 to review the draft offer. McKerron was not available earlier.

14 At the meeting on September 16, Chapple and McKerron discussed the status of the negotiations and the management of the resin business. McKerron said that they were not moving quickly enough to acquire the C.G.E. property and that someone else might purchase it. McKerron also told Chapple that Canada Square had several concerns about the resin business. Canada Square wanted to know who was going to run the business; it was concerned that the maintenance employees of the resin plant were unionized and Canada Square was a non-union company; it was concerned whether the resin business was compatible with the redevelopment of the site; and it was concerned about the financial impact of winding up the business and of the associated severance pay liabilities.

15 Chapple responded to these concerns by proposing to take the resin business out of the joint venture and keep it for his group. McKerron was surprised at the suggestion but thought it would be acceptable. Still, as he had no authority to accept or reject the proposal he said he would discuss it with Canada Square's executive committee and get back to Chapple in a day or two.

16 At the end of the meeting on September 16, McKerron asked Chapple for a copy of the Mancha draft offer, which had been prepared by Chapple and his lawyers. Chapple gave him the draft. McKerron made a copy and returned the draft to Chapple. The trial judge commented on the significance of Chapple having given McKerron the draft to copy:

> At the end of the meeting Chapple gave McKerron a copy of the draft offer of purchase prepared by his solicitors. McKerron had asked for it as he needed something to take back to Canada Square to show progress. I find that Chapple would not have given the draft to him to copy in spite of the joint venture agreement unless he had received reassurance that it was still in effect, and McKerron knew this.

17 Chapple had proposed taking the resin business out of the joint venture in response to concerns expressed by McKerron. But McKerron apparently reported to Moog that Chapple's group had changed the conditions for their participation in the joint venture. At trial, Canada Square argued that Chapple's proposal regarding the resin business had terminated or materially changed the original transaction. The trial judge rejected this argument and concluded that Chapple and his group were still willing to proceed on the terms agreed to in July. She found:

> I find that Mr. Chapple did not terminate the agreement between them when he made the suggestion with respect to the resin plant in answer to the concern that was expressed and which had been expressed since July. I find that the Chapple group was prepared to continue under the terms of the agreement to present the offer to C.G.E.

18 Moog did not like Chapple's proposal about the resin business. If implemented, Chapple and his group would receive most of the cash flow from the C.G.E. property and Canada Square would assume most of the liabilities. Moog decided to give Chapple a short deadline to make up his mind whether to go ahead on the terms of the original agreement. Wednesday morning, September 18, McKerron telephoned Chapple to relay Moog's instructions.

19 Both McKerron and Chapple testified about this telephone call. Mostly they agreed on what was said: McKerron said that Canada Square did not like the resin business proposal and wanted to return to the original agreement. Chapple said this sounded alright but, as a courtesy, he wanted to speak to his partners because since September 16 he had discussed the resin business proposal with them. McKerron said that he expected a prompt response, otherwise Canada Square would pursue the C.G.E. project alone.

20 But, in their testimony, McKerron and Chapple differed on one crucial point: when Chapple was expected to respond. McKerron testified that Chapple volunteered to get back to him by noon that day, September 18. Chapple testified that he said he would call the next day and McKerron had no problem with that. The trial judge accepted Chapple's evidence on this point. She said: "I accept that the time limit had been noon the next day."

21 Later in the day on September 18, Chapple confirmed with the members of his group that they wished to proceed on the terms of the original agreement. On Thursday morning, September 19, Chapple made repeated attempts to speak to McKerron on the telephone but was told that he was in a meeting. Around noon, after insisting that he speak to McKerron, Chapple was put through. McKerron recognized Chapple's voice, advised him that he could not talk and hung up. The trial judge found that McKerron's "failure to keep the telephone lines open for the answer from Mr. Chapple was unreasonable." Chapple's subsequent phone calls and messages for McKerron went unanswered.

22 Between 2:00 p.m. on September 19 and 2:00 a.m. the following morning, McKerron met with Canada Square's solicitors and prepared Canada Square's own offer for the C.G.E. property,

using the Mancha draft offer as a guide. The trial judge commented on Canada Square's use of the Mancha draft offer:

> I find that McKerron with the solicitors of the defendant used the Mancha document in preparing his first offer. The work was done within 24 hours. There were changes made. It is probable that given sufficient time and the use of the Pozhke agreement the solicitors for the defendant would have arrived at a similar document but in addition to the time factor there was the fact that they had the reassurance that many of the paragraphs in the Mancha Offer which differed from the Pozhke Offer were the result of conversations and information that Chapple had acquired. That offer was not accepted but it gave to the defendant what it needed the most, namely the opportunity to put an offer before C.G.E. which it thought would give to the defendant an initial advantage over any other offer. I find that the defendant through its use of the Mancha offer used information which had been created through the application of time, thought and effort which was original and which had commercial value.

23 On September 20 McKerron and another representative of Canada Square met with Martin and submitted Canada Square's offer to purchase the C.G.E. property. Although C.G.E. did not accept this offer the two parties continued to negotiate. By early October Canada Square learned that the proposed Gray Coach bus terminal redevelopment was not going forward. Nonetheless, Canada Square still wanted to acquire the C.G.E. property, though on different terms. By mid-October Canada Square had negotiated "the principles of a mutually acceptable agreement." Canada Square eventually signed an agreement for the purchase of the C.G.E. property on December 18, 1985, which was completed on its terms.

24 Before the meeting on September 20 between Martin and McKerron, Martin had considered Chapple to be a credible and reputable businessman. During that meeting, however, the Canada Square representatives expressed their disapproval of Chapple, causing Martin to change his attitude toward him. The trial judge commented on Martin's changed view of Chapple:

> What was of more interest was the change in Martin's attitude towards Chapple after the discussions with Canada Square at the time of the presentation of its offer. Before that meeting Martin had seen Chapple as a responsible business person who had impressed him favourably during the dealings with Pozhke. He had not questioned his ability to manage and his capacity to finance in part the acquisition. Chapple had raised the question of a mortgage back and of a letter of credit. He recognized that Chapple had foresight in asking for the reports of the clean-up and the audit. He had taken the trouble in early September to tell Chapple that the Pozhke agreement was over. In late July he had begun to detect a lack of integrity in Pozhke but had found Chapple whom he had met frequently during July both prudent and sensible. As late as August 26, he found

> Chapple the best "fall-out" from Pozhke. After September 20 he did not again try to contact Chapple. The Canada Square representatives had told him that there might be a claim by Chapple for real estate commission, it would be their responsibility. He had indicated that he thought he should speak to Chapple but they had said that they would be the ones who would deal with Chapple. Canada Square had expressed its disapproval of Chapple. I find that he probably also took some offence from the description by the Canada Square people of how Chapple referred to his relationship. Their description had been an exaggerated one of a relationship which would give preference to Chapple. I accept Martin's evidence that after the closing of the Canada Square agreement Chapple asked for a finder's fee which was refused.

25 Chapple telephoned Martin several times after September 20 but Martin did not return his calls. Chapple testified that he had little hope of negotiating an agreement when the vendor refused to return his telephone calls.

26 McKerron did not speak to Chapple either, after hanging up on him on September 19. After September 19, the communications between Chapple and the representatives of Canada Square consisted of three letters, two written by McKerron and one written by Chapple.

27 On September 24 McKerron wrote to Chapple that Canada Square "has decided to independently pursue its options with respect to the Canadian General Electric site ..." After proffering several reasons for Canada Square's position, McKerron concluded by saying:

> Canada Square is not prepared to further discuss this matter. If Canada Square is successful in securing the properties on terms acceptable to itself, Canada Square is prepared to offer an opportunity for Mr. Alan Chapple and Mr. Tony Camisso to participate in the project. In light of the problems experienced to date Canada Square requires both control and carriage of the project.

28 Chapple replied to this letter by writing to Moog on October 16. He said that Canada Square's "actions have interfered with our relationship with C.G.E. and have prejudiced us." He said that his group would suffer a "significant loss" and was considering legal action.

29 McKerron responded to Chapple on October 21, 1985. He stated: "At no time have we taken any steps or actions which would affect your 'relationship' with Canadian General Electric. At all times you have been free to negotiate a purchase agreement directly with Canadian General Electric. You are free to do so today." But in the letter McKerron also acknowledged that Canada Square and C.G.E. had already reached an agreement in principle. McKerron concluded his letter by telling Chapple:

> Our 24 September letter indicated that we were prepared to consider including yourself in the project. If you wish to be included and have something

> to contribute in the form of firm leasing proposals, a meeting may be in order. In the meantime, we will continue to take steps which will allow us to proceed to complete the purchase.

30 Chapple never submitted an offer to C.G.E. He testified that he could not compete with an organization as big as Canada Square.

Discussion

31 The trial judge found that the parties entered into a joint venture agreement in July. She found that the agreement was still in effect in September. She found that Chapple's proposal on September 16 to take the resin business out of the joint venture did not terminate the agreement but that Chapple's group was willing to go forward on the terms agreed to in July. She found that McKerron had acted unreasonably in not speaking to Chapple on September 19. And she made no finding that the appellants ever terminated or repudiated the agreement.

32 Yet the trial judge concluded that the appellants had lost their contractual rights. Her conclusion is based on a critical finding. She found Canada Square continuously affirmed that Chapple's group could take part in the joint venture on the terms agreed to in July; or Chapple could negotiate directly with C.G.E. Therefore, in her view, Canada Square did not terminate the joint venture agreement; Chapple and his group simply lost interest in participating further. The trial judge discusses her conclusion in the following passage in her reasons:

> I find that it was open in the circumstances for the defendant to present its offer and to continue negotiations with C.G.E. It was open to Mr. Chapple to present his offer to C.G.E. and to continue negotiations; the defendant did make it difficult for Mr. Chapple to negotiate with Martin of C.G.E. but he never tried. ... Although the language is not clear the defendant did maintain to C.G.E. and repeat to Mr. Chapple that he could continue to take part in the joint venture. The stress in the letter to him is on the obtaining of tenancies which was important to the defendant and had been one of the reasons for the joint venture.
>
> I find that up to September 24 neither party terminated the agreement between them, namely the agreement to negotiate to obtain the C.G.E. properties and the Gray Coach venture. The agreement was not changed by the proposal on September 16, 1985 nor by a breach by either party. The nature of the reply of October 16 and the failure to reply to the letter dated October 21, 1985 can lead only to the inference that the plaintiffs did not wish to participate further.

33 Therefore the key question on this appeal is whether in its dealings with Chapple from September 19 onward, Canada Square continued to affirm the joint venture agreement. The trial judge found that it did and that finding is entitled to deference from this court. In my opinion,

however, that finding is unreasonable or, to use the familiar phrase, in so finding the trial judge made a palpable and overriding error. From September 19 on, nothing in the conduct of Canada Square amounted to an affirmation of the joint venture agreement. Canada Square did not repeat its intention to carry out the agreement. To the contrary it indicated its intention to no longer be bound. In short, Canada Square's actions on September 19 and after unequivocally show that it breached the joint venture agreement by repudiating its contractual obligations without justification and acquiring the C.G.E. property for itself.

34 McKerron's refusal to speak to Chapple on September 19 is not what might be expected of a joint venture partner claiming that it wished to confirm the continued existence of the agreement. Undoubtedly, McKerron did not want to speak to Chapple because he feared Chapple would affirm that the original agreement was still in effect. By September 19 Canada Square had already decided to pursue the C.G.E. property on its own. Canada Square made this decision apparently because it believed the time for Chapple to respond had elapsed, but the trial judge held against Canada Square on this point. McKerron's own evidence in chief shows that by the morning of September 19 he no longer considered Chapple to be a joint venture partner, but instead considered him to be a competitor. He testified:

> Q. Okay. Why did you not wish to speak to Mr. Chapple at that point in time?
> A. We had made a decision that morning that we were going to proceed independently if the time date had passed. That time had passed, and to get involved in a further delay -- to have a further discussion with Mr. Chapple, was going to be counter-productive. And secondly, since we were deciding to proceed independent, at this instance -- instant, we were now competitors. And to alert Mr. Chapple that we were on our way down to submit an offer, perhaps would have had him moving in the same direction.

35 What Canada Square said to C.G.E. on September 20 is also instructive. McKerron wrote to Martin, forwarding Canada Square's offer to purchase the C.G.E. property. In his letter McKerron said:

> Due to an unwillingness of other parties to affirm previously agreed positions we are independently submitting this Offer to Purchase. We are prepared however to consider involving the other interested parties in this project on the same terms and conditions as previously agreed.

Being "prepared to consider involving" Chapple is hardly an affirmation of the joint venture.

36 Similarly McKerron's letter of September 24 confirmed that by then Canada Square was seeking to acquire the property independently, not as a joint venturer. Again McKerron said only that Canada Square was "prepared to offer an opportunity" for Chapple to participate in the project. Such language does not reveal an intention to carry out previously agreed upon terms of a joint venture.

37 Chapple's letter to McKerron of October 16 is not felicitously worded but it does signal that the appellants were treating McKerron's letter of September 24 as a breach of their joint venture agreement. If Canada Square had any doubt it could have sought clarification, but it did not do so.

38 McKerron's reply of October 21 is also inconsistent with the continued existence of the joint venture agreement. When McKerron wrote that Chapple was "free to negotiate a purchase agreement directly" with C.G.E., implicitly he was saying that Canada Square was free to do so as well. A joint venture, however, is a contract of mutual obligations and McKerron's letter renounces this element of mutuality.

39 Moreover, McKerron concluded his letter by attaching a condition to Chapple's inclusion in the project. To be included Chapple must "have something to contribute in the form of firm leasing proposals." Obtaining "firm leasing proposals" was not a condition of the original joint venture agreement. Attaching this condition to Chapple's continued participation further confirmed Canada Square's repudiation of the original agreement, not its affirmation of it. See Netupsky et al. v. Hamilton (1969), 8 D.L.R. (3d) 351 (S.C.C.) at pp.359-60; Wile v. Cook, [1986] 2 S.C.R. 137 at pp.143-4.

40 In my opinion, therefore, the trial judge made a palpable and overriding error in concluding that Canada Square did not breach the joint venture agreement. Canada Square breached the agreement by repudiating it and acquiring the C.G.E. property for itself. The repudiation took place on September 19, 1985 and was confirmed by McKerron's subsequent correspondence. Having repudiated the agreement, Canada Square can gain no comfort from Chapple's unwillingness to negotiate directly with C.G.E. The failure of the innocent joint venturer to compete with the joint venturer in breach to acquire the property is no defence to an action for breach of the joint venture agreement.

Conclusion

41 Because Canada Square repudiated the agreement the appellants were entitled to treat the contract as having ended and sue for damages. I would therefore issue a declaration that Canada Square breached the joint venture agreement. In accord with the agreement of the parties I would direct a reference on damages. Finally, I would award the appellants their costs of the trial and of the appeal.

LASKIN J.A.
McMURTRY C.J.O. -- I agree.
ROSENBERG J.A. -- I agree.

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