See para.. 56

Indexed as:

Mancha Consultants Ltd. v. Canada Square Development Corp.

Between
Mancha Consultants Ltd., Alan Chapple and Michael Manley,
Plaintiffs, and
Canada Square Development Corporation Ltd., Defendant

[1994] O.J. No. 1231

14 B.L.R. (2d) 194

Action No. 15591/86

Ontario Court of Justice - General Division
Toronto, Ontario

Van Camp J.

Heard: October 27-29, November 2-12, December 1-7, 1992.
Judgment: June 6, 1994.

(34 pp.)

Joint ventures -- Creation of relation -- Relations between parties -- General -- Confidence -- Duty to negotiate in good faith -- Equity -- Fiduciary or confidential relationships -- Breach of confidence, what constitutes.

Action for damages. The plaintiffs were asked to negotiate the financing required to complete the purchase of a large industrial property by a third party intending to acquire the property. Perceiving that the transaction might fall through due to financing problems, the plaintiffs asked the defendant, a subsidiary of a major real estate developer, to consider participating in the acquisition of the property. An oral joint venture agreement was reached for acquiring the industrial property and for undertaking another commercial development with which the defendant was involved. The plaintiffs were asked to conduct the negotiations with the vendor. The defendant made an offer to purchase the subject property, basing its offer on the draft offer to purchase earlier received from the plaintiffs. That offer was not accepted by the vendor but the defendant later purchased the property based on a new offer. The issue was whether it was in breach of its duty of confidence and

its commitment to the plaintiffs.

HELD: Action dismissed. An offer to purchase which had not been submitted to the vendor was a confidential document. An obligation of confidentiality arose where, as in this case, such a document was made exclusively for the purposes of furthering the goals of the joint venture. However, the plaintiffs' claim for damages for breach of that confidence could not succeed primarily because the evidence did not meet the onus of showing a clear intent on the defendant's part to deprive the plaintiffs of the benefit of their work on the offer to purchase.

William G. Horton and Markus Koehnen, for the Plaintiffs.
John T. Morin and Michael Round, for the Defendant.

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1 **VAN CAMP J.**:-- In July 1986 the defendant Pursuant to an agreement dated December 19, 1985 completed the purchase from Canadian General Electric Company Limited (CGE) of certain premises in the City of Toronto known municipally as 940 Lansdowne Avenue, 1199 Lansdowne Avenue/180 Brandon Avenue and 1240 Dupont Street (the CGE Real Properties) together with the resin manufacturing business of CGE located on the property as a going concern.

2 The plaintiffs claim that by reason of certain discussions that took place with respect to these properties between July 23 and September 24, 1985, an obligation on the part of the defendant which breached its duty of confidence and its commitment. The defendants deny that there was any confidential information discussed or given; that there was any fiduciary obligation or agreement and submit that if there were any agreement or fiduciary obligation the plaintiffs had terminated it.

3 The plaintiffs Alan Chapple and Michael Manley own 100% of the shares of Mancha Consultants Ltd. through their holding company Ladbrooke Holdings Ltd. The defendant did not learn of Mancha Consultants Ltd. until a draft offer of purchase for the lands in that name was presented by the plaintiffs September 16, 1985. The defendant was a wholly owned subsidiary of a major developer, Canada Square Corporation. The defendant had made a proposal with respect to the redevelopment of the downtown Gray Coach Terminal (the Gray Coach Venture) but no binding agreement had been reached. Some of the difficulties herein arose from the fact that Mr. Moog, the president and sole shareholder of Canada Square Corporation made decisions quickly and left the details to be worked out by Mr. McKerron the vice president and general manager. Canada Square Corporation is a vertically integrated real estate company, all activity is in house and decisions can be made quickly as few people are involved. Mr. Chapple is concerned with detail and moves very slowly in any of his decisions as to investment.

4 Before reviewing the discussions of these parties it is helpful to consider the history of the

lands, Chapple's interest in the lands, and the important of the lands to the defendant.

The CGE lands:

5 These 27 acres are made up of three parcels. Parcel A on the west side of Lansdowne Avenue north of the CP Railway, Parcel B some 5 acres on the east side of Lansdowne running south from Davenport Road, and Parcel C some 3 acres on the west side of Lansdowne Avenue south of the CP Railway. A sketch is attached. [Editor's note: Illustrations could not be reproduced online.] The complex acquired in 1920 had been used over some 65 years for manufacturing and offices and a decision had to be made as to whether it would be renovated or restored. Only 35% of the total floor area was being used. The decision to withdraw from the use of the premises was told to the employees and the unions and to the city. CGE obtained an appraisal of the resinous products plant and of the 27 acres and an environmental appraisal was begun. In 1983 they hired consultants to do an environmental analysis because some soil samples showed contamination. Some interest had been shown by purchasers in those years. In October 1983 there were news releases with respect to the findings and the proposed cleanup and there followed a series of 18 months of local community meetings. For their own use in 1985 they prepared a list of terms and conditions for potential buyers. CGE wanted to keep full control of the contamination with a timetable for withdrawal from each building, and leases until then. Some 25 to 50 copies were distributed among those who had shown interest in a purchase and any new prospects. It was anticipated that the corrective action under way with respect to the three acres of contaminated property would be completed in December 1985 and CGE intended to solicit proposals meeting its criteria whereby the whole would be sold as a total package but title would pass in two phases. The first included the parcels marked B and C; the parcel marked was to be upon completion of the contamination cleanup by CGE.

6 During the transition period there would have to be careful management as the first two parcels drew services from the main parcel such as steam and electricity and security. CGE had a small centralized plant of engineering building maintenance and stationary engineer staff to operate and maintain the property. Any purchaser would be required to recognize the existing applicable union agreements and employee policies. In Parcel A building 28 was the resinous products plant, labs and offices; building 18 had been used for the manufacture of transformers from 1921 to 1977 and the PCB oil had been stored in building 36 to the south of building 18 at the south west corner of Parcel A. CGE was to remain in absolute control of that area until the contaminants were removed or permanently stored; parts would be used for temporary storage but it might prove necessary for a longer term.

The Pozhke agreement:

7 In April 1985 CGE told a real estate agent that they had decided to market and gave the brochure they had prepared. That agent brought a prospective purchaser within a few days. By the end of April after two or three meetings there was agreement in principle. In early May a draft detailed offer was presented but it was poorly drafted. CGE redrafted it and the final agreement was

signed on May 31, 1985 with John Pozhke through his company 131843 Canada Inc. The closing of the first phase was to take place on July 5, 1985 and the final closing on June 30, 1986. The purchase price was $8,300,000 payable in two deposits in a total of $100,000 on June 14, 1985 and $4,100,000 to be paid on the initial closing and the further sum of $4,100,000 to be placed in escrow pending the final closing. The agreement was conditional until June 14, 1985 on the purchaser arranging satisfactory financing and the vendor being satisfied that the financing was adequate to enable the two closings to be made. In addition there was an agreement to purchase certain assets of the resinous products operations in building 28 on July 5, 1985. The purchaser was to offer employment to each employee in that business on the same terms and conditions as then employed and the purchaser agreed to honour any applicable collective agreements. The vendor kept note of inquiries made by others subsequently in case that agreement should fail.

8 On June 19, 1985 the purchaser advised that he had secured financing from Canadian Corporate Funding Limited (CCFL) subject to approval of its Board of Directors on June 25, 1985. CCFL would be an equal equity partner with the purchaser. A request was made to extend closing to July 12 but this was not acceptable as it was the first indication that the purchaser would require financing from other than its partners. Closing was important as CGE had announced on June 20, 1985 to its employees the sale and that all employees would be offered jobs with the purchaser. A news release had been prepared and notice was given to resin products customers and suppliers. In late June CCFL mentioned a mortgage to be given back but this was not acceptable.

9 On July 3, in a discussion with Martin of CGE there was the first mention of Chapple as a fall back source of financing. On July 4, the date of closing was extended to July 9 to permit CGE to meet with Chapple on July 5. On July 3 Chapple had been taken by Pozhke on a tour of the site and told some details of the offer. Chapple's impression was that Pozhke would need financing for the whole of the purchase money. Chapple obtained from Pozhke a copy of the acquisition financing proposal (Tab 10, Ex. 1) giving the history the description of the property, the appraisal report of the resin plant and the financial information of income and expenses, rental income, projected statements of cash flows and operations accounts receivable. At some time he got another copy from Martin the vice president of CGE. He walked around the site again on July 5 with Pozhke noting that there could be an $800,000 to $900,000 profit from the resin plant but there was also the possibility of contamination. Chapple noted building 27 in Parcel B which was suitable for people in the film industry with whom he had some contact (he later took some of them through it).

10 After the second tour on July 5, he had a long meeting with Pozhke and with Martin of CGE. On July 8 after talking to Manley he analyzed the offer noting some 13 points that he wanted to check including the union contracts, the pension fund, the right of CGE to approve some of the tenants, the zoning, that there were only 10 customers including CGE for the resin plant and whether the agreement could be assigned. The detail would indicate that he had the offer in front of him and not just information from Pozhke. As early as July 11 Chapple had told his lawyer that he was not interested in financing Pozhke but rather in acquiring ownership either directly or by an assignment from Pozhke. He was told that the agreement did not permit an assignment and the

lawyer did not recommend an assignment. A detailed study of the offer was made for him including the problem of rezoning for further development, the problem of leasing downtown space, the cost of financing for the escrow, the effect of the contamination on rental income (some 51 points in all).

11 At the July 5 meeting there had been a discussion of further extension. No set date was agreed upon but if possible it was to be before July 25. Martin had agreed to an extension to that date in consideration of a further deposit of $100,000 and revised purchase price and terms of payment which included a second mortgage back and a letter of credit in place of escrow (these were Chapple's suggestions).

12 After meeting on July 12 with Pozhke and Chapple he had sent to Pozhke a memo of agreement for an extension to August 30 with a revision of increased purchase price, and a second mortgage back. Neither of these documents were signed by Pozhke, and no further deposit was paid. Before the meeting with CGE Pozhke and Chapple had met to talk of a joint venture partnership but the degree of participation and control were not settled.

13 Pozhke and Chapple had been unable to agree on terms of participation. Pozhke had said the closing was July 25.

14 On July 16 Pozhke had obtained an offer of financing from someone else and Pozhke had arranged with Martin to meet that other person on July 24. On July 25 the solicitor for Pozhke wrote giving a deadline of July 28, 1985 for the submission of an acceptable agreement or the invitation to participate in the purchase would be terminated. On July 26 Chapple through his solicitor made an offer open to July 30 for assignment of the agreement if CGE consented and subject to it being varied in a number of respects, and upon closing to reimburse Pozhke for any deposit and to pay him $200,000. By letter dated July 29 Pozhke through his solicitor advised that the offer was not acceptable and the invitation to make an offer to participate was terminated. The documents obtained from Pozhke were returned to him on August 1. Chapple had told Pozhke that there was someone interested in participating in the project but did not tell of the meetings with Canada Square on July 25 or July 26.

15 An ultimatum was given by CGE on August 9 to Pozhke to close by, August 30 which Pozhke did not meet. Martin had kept in touch with both Pozhke and Chapple as to how matter were proceeding. He had been impressed with Chapple's foresight as to the problems. Although Chapple had been unable to learn definitely from Pozhke when the final closing date was, I find that he knew the date from August 14, when Martin returned from vacation.

The Gray Coach Venture:

16 In October 1984 Gray Coach Lines Limited had invited proposals to lease certain rights and develop certain lands associated with the Toronto Coach Terminal lands on Bay Street, Toronto. Relocation of the terminal to another site would be considered. The proposals would be received up to February 25, 1985. The proposal by Canada Square Corporation was for the purchase of lands for

development of an apartment tower, commercial office area and Gray Coach area. It was to be a 50 - 50 joint venture development with Gray Coach/Toronto Transit Commission. A presentation was made on April 19, 1985. A press release dated September 6, 1985 indicated that six proposals had been received of which two were being considered, that one problem was the lack of a temporary location for the bus terminal during the construction period, that the contribution required of the vendor might be too much. In February, 1986 the deposit cheque of Canada Square Corporation was subsequently returned.

The discussions with the defendant:

17 Moog, the president of Canada Square Corporation was aware through the news releases that the CGE lands were for sale. An inquiry had been made in June or July but he was advised that CGE could not talk to him but would keep his name on list. He had been asked for financing and to look at the property by Camisso who was interested in acquiring a share in an offer to be made. In late July Manley had told his partner Camisso (who always wanted to know of any investment) of the proposed purchase of the CGE lands. Camisso then asked for a site tour with a friend or advisor and said that he would take 20% of the deal. It was Camisso who brought Moog.

18 On July 23 Moog, Camisso and Chapple made a tour of the property. By this time Chapple had spent some time checking comparable project sales with respect to the cost per square foot. He had also obtained expert advice on the marketing of the premises in light of the contamination area and about the time of the tour had obtained from CGE, their consultant reports on the environmental audit and cleanup program. Moog who had expected to spend only 10 minutes spent some hours as he saw a solution to the problem with respect to the relocation of the bus terminals and was interested in what buildings would be available and the nature of the contamination. Moog looked at the resin plant, could see the good cash flow but also the problem of the union and that the enterprise was messy and smelly.

19 A meeting with the Chapple group was arranged for Thursday, July 25. Moog brought to the meeting his architect, Cooper, Coles the finance officer and McKerron the general manager and led the discussion. It was clear that he was not interested in financing but in having the majority interest and the management. The plaintiffs could take up to 1/3 interest and he would give them a 1/3 interest also in the bus terminal redevelopment if they wished. He gave them the particulars of the proposal. He was quite confident that there would be an announcement that it had been accepted within four to six weeks and told them of the investment that Canada Square would be making in it. A copy of the proposal and some of the drawings were shown at the meeting.

20 At the end of the meeting on July 25 there was agreement to meet the next day as both parties wanted time to consider, though there was a positive feeling. The completion of the CGE purchase would give Moog a strong bargaining point in acceptance of his proposal for the Gray Coach venture. For each of the parties it meant that there would be some money coming in from the vendor lease-backs and the resin plant during the period that it would take to lease the other CGE buildings.

Chapple's participation in the joint venture was important as Canada Square was primarily a developer and Chapple had experience in leasing. They need not bid against each other.

21 In their discussion on July 26 Moog said that he had the concept of a computer centre; the resin plant would be incompatible and would have to be phased out over the years. Canada Square was a non-union company and the continuing union in the resin plant would present a problem. It was agreed that because of the time Chapple had spent with Martin of CGE he would have carriage of those negotiations and Canada Square would continue with the bus terminal discussions.

22 Chapple and Manley had assumed that Moog was a partner with Camisso as to the 20% share but I find that after the meetings on July 25 there was no doubt that Moog wanted a 2/3 share with majority control and management. Camisso's part became somewhat vague thereafter. He was the person that Moog preferred to talk to. In the office he was talking to Manley from time to time keeping up to date on what was happening; there was no further discussion of whether he would take a share of the plaintiffs' interest. As the discussions between Chapple and the defendant continued Chapple did not keep Camisso advised because he thought Camisso was to share part of Moog's interest. Camisso was one of those present at the meeting on July 25 and 26.

23 Moog was told of Pozhke's agreement. Moog left it to the others to draft the joint venture agreement. He wanted it ready when Pozhke's offer ended and the premises came on the market.

24 I find that on July 26 the parties had reached an oral agreement as follows:

(1) The Chapple group and the defendant would acquire the CGE 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.

25 After Pozhke terminated the discussions on July 29 Chapple told both McKerron and Martin. The latter said that he would tell Chapple when he was free to deal if he would phone occasionally. He was aware that Chapple wanted to purchase. At the time Martin thought they would be able to talk in a few days but it was September 3 before Martin said that he could deal. Chapple had phoned Martin who was at his cottage at least three times in the first week of August. He kept McKerron advised of each time that he spoke with Martin. Chapple knew that Moog was frustrated at the waiting.

26 During August little seems to have happened except that Chapple continued work on the contamination problem and on marketing plans. On September 1, he wrote his bank to request a funding for the purchase in the amount of $6,500,000; the tenor of that letter is that there had been

an agreement with CGE. There is no reference to any interest of the defendant. The letter and the subsequent draft offer suggest Chapple intended to make the purchase in the name of his company (Mancha Consultant Ltd.), but I find it would have been on behalf of the joint venture.

27 I find Martin dropped in at Chapple's office on September 3 to say they could talk. I find Chapple did speak to Martin in the following week with respect to the question of the contamination and other terms of a proposed offer. Martin's evidence is that he did not meet with Chapple in September except on September 3 when there were no negotiations. He keeps no notes. Although Chapple's diary records his July 5 and July 12 meetings with Martin there is no note with respect to any meeting during the week of September 9. The notes of Chapple's meeting with his solicitors on September 12 suggested that he was going to discuss certain matters with Martin. Martin does recall discussing a number of those issues with Chapple at some point. It seems reasonable that a discussion took place in that week of September 9 as their two solicitors had almost completed the draft agreement. On September 3 Martin of CGE had heard for the first time that Canada Square was in the joint venture for the purchase of the premises.

28 On September 10 Chapple had received a preliminary draft purchase offer prepared by his solicitors who had provided a clause that the vendor would lease back the contaminated area for a much longer period, and met with them again on September 12. His solicitors were in touch with the vendor's solicitors as to schedules to be attached. Tab 74 would indicate that as early as September 5 the two firms of solicitors were in touch with each about the offer.

The September 16 meeting:

29 A meeting had been arranged with Chapple for September 16 she first date that McKerron was available and Chapple was to bring the draft offer to the meeting. Before that meeting there had been a meeting on September 10 of Mckerron with Canada Square solicitors by which time McKerron had a copy of the Pozhke agreement with him. I find that McKerron advised that they were to take carriage of the CGE offer of purchase. On the meeting of McKerron and Chapple on September 16 McKerron expressed concern at the delay; Chapple said that an offer of purchase had been drafted. They reviewed the matter of a long term lease by CGE of a larger contaminated area and the question of acquiring the property without the maintenance employees. They reviewed the fact that the resin business was a concern to Canada Square because of the union, the fact that it was incompatible with redevelopment, and the financial impact of winding it up. In answer Chapple said that his group had discussed the matter and he suggested that his group take the resin plant for its own account. I accept that McKerron was surprised at the suggestion but thought it would be acceptable and would take it to the executive committee. Chapple may also have proposed reserving the carballoy building for his own group although he had not discussed it with them, and that his group participation be reduced to 25%. 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.

30 McKerron made a copy of the Mancha offer and also of the letter from the solicitors for the Chapple group indicating the amendments that had been made to the Pozhke agreement.

The response to the September 16 meeting:

31 For some reason the reaction to McKerron's report of the meeting to Moog about Chapple's suggestion was not that it was in response to their concern but that it was a repudiation of the old agreement and a condition of a new agreement. Moog ignored the union problems and could only see that Chapple was taking over the advantages of the cashflow; as Moog saw it, the one-third partner would have 100% of the revenue. In addition the purchase in the name of Chapple and Manley's company would mean that ownership was in that company but the finalization of the joint venture agreement had not yet been made. McKerron told Camisso who in turn told Manley of the concern that the deal was not proceeding quickly enough and the changes about the resin plant but that Canada Square was still prepared to proceed on the terms of the earlier agreement. On the morning of September 18 McKerron called Chapple and told him that the proposed changes were unacceptable but that Canada Square was still interested in proceeding as previously agreed; if a prompt response was not forthcoming Canada Square would proceed with the acquisition of the CGE properties independently. Moog intended that it should be a clear short deadline.

32 The evidence differs as to time given for a response in the September 14 phone call. It was McKerron's evidence that Chapple said that he would have to discuss the matter with his partners and would get back around the noon hour. Chapple's evidence was that he told McKerron that it sounded alright to him but he would call him back around noon the next day; that he had to talk to his partners. Chapple agreed that McKerron told him that he was anxious to hear back but indicated that he would not have a problem waiting until the next day for a response. McKerron denied that Chapple had until the following day to reply but at discovery he had said that he had told Chapple that he had until noon of the following day to advise that he was prepared to come back in or continue as the original deal had been structured. I accept that the time limit had been noon the next day.

33 Chapple did not phone back on September 18. The letter tab 78, exhibit 3 dated September 24 states:

> Canada Square was advised that a response would be forthcoming shortly after the noon hour. After waiting a further twenty four hours for a response Canada Square decided to proceed independently since it was clear that the parties were not in agreement.

34 When no response had been received on September 18 there was a meeting the following morning at Canada Square. The concern was that Chapple could be presenting the Mancha offer which there was reason to believe Canada Square would accept. There was also the concern about

an offer from someone else. The solicitors were told that there was a chance that Canada Square would be pursuing the property independently. When noon went by on September 19 McKerron spoke to the solicitor and it was agreed that they would meet at 2:00 p.m. to work out the offer. Chapple's evidence was that he tried to phone McKerron several times that morning to confirm the original but was told that he was in a meeting. After the dead line, around mid-day, Chapple insisted on being put through to McKerron who said that he was not available and hung up. Chapple's subsequent phone calls and messages were unanswered. McKerron admits that he received the call and hung up as the deadline had passed. Chapple had confirmed with the other members of his group that they were prepared to proceed on the original agreement. Chapple never presented his offer to CGE.

35 On September 20 McKerron and Cole on behalf of Canada Square met with Martin of CGE and presented their offer. That offer had been prepared the preceding day using the Mancha offer as the basis. The letter accompanying the offer referred to the joint venture agreement, the unwillingness of the other parties to affirm it and consequently the independent submission of an offer; that they were prepared to consider involving the other interested parties in the project on the same terms and conditions as previously agreed. Martin would not accept the offer at that time but said that he would review it and offer his comments. Martin wished any purchaser to have invested time and effort to acquaint itself with the property. McKerron said that in return for spending this time he would like an exclusive time period during which no other party would enter into a binding agreement with CGE but Martin refused. I accept the evidence that Martin phoned Chapple to advise of the receipt of the Canada Square offer.

36 On September 24 (Ex 3, Tab 78) McKerron wrote to Chapple in answer to phone calls stating that the defendant was not prepared to further discuss the matter; if successful in securing the properties on terms acceptable to it, Canada Square was prepared to offer an opportunity for Chapple and Camisso to participate in the project. He noted that Camisso had known nothing about the proposal made on September 16 and was not in favour of it and Canada Square was concerned about this "lack of cohesiveness among its potential partners".

37 Chapple's (Tab 84) reply to the letter of September 24 was dated October 16. It noted that Canada Square had been introduced to the project by him, the due diligence conducted with respect to the PCB and resin plant, the time and effort expended in negotiation and the preparation of the agreement and that Canada Square had been kept informed. It advised that the actions of Canada Square had interfered with and had prejudiced his relationship with CGE and the matter must be resolved. A copy was bent to Martin. By October 21 Canada Square was telling Chapple that it had negotiated the principles of a mutually acceptable agreement with CGE but the agreement had not yet been executed, CGE was continuing to pursue other potential purchasers and Chapple could negotiate directly with CGE. Canada Square was in need of potential tenants for the premises as the Gray Coach project was being postponed and it recognized the ability of Chapple in this field. In the letter of October 21 it referred to its September 24 letter indicating that it was prepared to consider including ChappIe in the project and it said,

> If you wish to be included and have something to contribute in the form of firm leasing proposals, a meeting may be in order.

38 There was no answer from Chapple. A revised agreement dated October 9, 1985 had been prepared by Canada Square and presented to Martin on October 16. The postponement of the Gray Coach project was one of the reasons that this agreement was not signed and new negotiations commenced. However in late October Pozhke had initiated an action against CGE and later placed a lis pendens on the property. Although substantial agreement had been reached on certain business points of a new proposal any agreement was conditional upon Pozhke not succeeding in his action. By letter dated November 8, 1995 Martin confirmed that CGE would not negotiate with any other parties until November 22. Negotiations resumed on November 29 when the certificate of pending litigation had been vacated. CGE undertook not to negotiate with any other party and agreement was finally executed on December 18, 1985. The purchase price was lower, the closing date changed, part of the purchase price was to be secured by the giving back of a mortgage. The contamination provisions were in much more detail. The resin operation remained part of the offer. The basic wording had not changed otherwise from the first offer tendered by Canada Square.

39 I did not attribute much significance to the fact that in mid December there was a discussion at Canada Square about what was appropriate for Camisso in light of the role he had played. He was given a chance to participate in the transaction or some kind of finders fee. On Camisso's instructions payment of $15,000 was made to Colgate Investment Corporation in Bermuda. The invoice refers to its "services as consultants in respect of the CGE properties".

40 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.

41 It is difficult to assess what damage resulted from the Canada Square statement. On the other hand Chapple presented no offer to Martin even in October when there was some question of whether Canada Square would finalize the agreement. Chapple's only explanation is that he could not compete with Canada Square.

42 There was raised indirectly during the trial the comparison of the relationship between what Canada Square did and what Chapple had done in his relationship with Pozhke. My initial reaction is that it is unimportant. Whatever the relationship between Chapple and Pozhke is a matter for the two of them. No claim has been brought by Pozhke against Chapple. The issue before this court is the relationship between the plaintiffs and the defendants.

Conclusion:

43 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 CGE would be reviewed by both before submission.

44 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 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.

45 I hold that because of the delay of Chapple in the presentation of an offer to CGE it was reasonable for the defendant to expect him to produce a draft offer at the meeting of September 16. 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 CGE. The time limit given by the defendant for confirmation that the original agreement was to be observed was reasonable under the circumstances although the failure to keep the telephone lines open for the answer from Mr. Chapple was unreasonable. On the other hand nothing prevented him from putting the answer in writing and delivering it.

46 I find that it was open in the circumstances for the defendant to present its offer and to

continue negotiations with CGE. It was open to Mr. Chapple to present his offer to CGE and to continue negotiations; the defendant did make it difficult for Mr. Chapple to negotiate with Martin of CGE but he never tried. The probability is that the plaintiffs' would have had the funds to carry it out on their own in the time period that elapsed before a final agreement was reached between the defendant and CGE. CGE kept it open for other offers and there was a time when there was real doubt as to whether Canada Square would continue with its offer. Although the language is not clear the defendant did maintain to CGE 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.

47 I find that up to September 24 neither party terminated the agreement between them, namely the agreement to negotiate to obtain the CGE 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.

Breach of duty of confidence:

48 If there were such a duty by the defendant, it was with respect to the Mancha offer. This must not be confused with the use by the defendant of a copy of the Pozhke offer which after its termination was obtained from CGE.

49 In Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574 the test set out for determining whether there has been a breach of confidence is as follows:

> (a) whether the information conveyed had the necessary quality of confidence about it
> (b) whether the information was imparted in circumstances importing an obligation of confidence and
> (c) whether the confidential information was misused to the detriment of the party communicating it.

50 The first of the above requirements has been met.

51 In Lac Minerals Sopinka J. referred to this excerpt from the judgment in Saltman Engineering Co. v. Campbell Engineering Co., [1948] 65 R.P.C. 203 at p. 215.

> On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by some body who goes through the same process.

52 It is important to distinguish the Mancha agreement from the Pozhke agreement. The Mancha Offer was something different to the Pozhke agreement as a result of the work of Mr. Chapple. Some of the wording of the Pozhke agreement was included but since the time that that agreement had been drafted Mr. Chapple had had conversations with Martin of CGE about changes that might be made in it. He had spent much time in the acquisition of information which would assist in preparing a different offer both as to amounts and as to terms and he had had the assistance of his solicitors in rewording the Pozhke agreement.

53 The test for determining whether or not information is communicated in confidence was set out in Coco v. A.N. Clark (Engineers) Ltd., [1969], R.P.C. 41 at p. 48 which was approved by LaForest J. in Lac Minerals. The test was "it seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realized that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable "obligation of confidence". It seems to me reasonable that an offer to purchase which has not been submitted to the vendor is a confidential document. It seems to me that Mr. Moog would have been reluctant to allow an outsider to see the draft over that was being prepared for him. I am sure that Mr. McKerron when he received that draft offer from Chapple realized that it was being given to him because the defendant was involved in a joint venture for the purchase of the property. An obligation of confidence arose if it were to be used except for the joint venture.

54 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 CGE 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. Unlike the Lac Minerals case the defendant did not use the information it had obtained in its decision to acquire the property. That decision had already been made.

55 The last requirement of whether the information was misused to the detriment of the plaintiff is more difficult to assess. In Lac Minerals LaForest J. speaking for the majority on this point said that a claim for breach of confidence will only be made out when it is shown that there has been a misuse of the information to the detriment of the confider. He distinguished it from the fiduciary law which does not require that harm result. Sopinka J. with MacIntyre J., dissenting in part, had found that no fiduciary duty arose, that there had been a breach of confidence and that there had been misuse of information, but he does not seem to say that the claim is made out if there is a

misuse of confidential information without detriment (quoting from the words of the Court of Appeal in Ontex Resources Limited v. Metalore Resources Limited et al. 103 D.L.R. (4th) 158 at p. 186.), although he does say that the focus is on the loss to the plaintiff, the object is to restore the plaintiff monetarily to the position he would have been in if no wrong had been committed and is generally achieved by an award of damages.

56 The plaintiffs have not satisfied the onus of proving that the misuse was to their detriment. The vendor did not accept the September 20 offer and refused to give an exclusive time period for consideration. No offer was submitted by the plaintiffs. The lapse of time allowed the defendant to obtain all the information that Chapple's work had initially given. The work of the solicitors was work that, given time, the solicitors of the defendant could match. The benefit that the defendant had hoped to obtain from immediate tender of an offer did not result. The plaintiff have not proven that they could not have continue to participate as agreed in light of the offers of the defendant to continue to negotiate if their offer were accepted. The evidence does not meet the onus of showing a, clear intent to deprive the plaintiffs of the benefit of their work on the Mancha offer.

Duty to negotiate in good faith:

57 I accept the plaintiffs statement that the parties owed one another an obligation to negotiate in good faith the remaining terms of the joint venture agreement.

58 I was referred to cases which either deny the existence of a duty or suggest there is no duty to negotiate in good faith, Walford v. Miles, [1992] 1 All E.R. 453; Courtney and Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd. and another, [1975] 1 All E.R. 716; Mallozzi v. Carapelli S. p. A. [1976] 1 Lloyds Rep 407 and Cineplex Corporation v. Viking Rideau Corporation (1985), 28 B.L.R. 212 (Ont. H.C.) and to cases where a duty was found, namely, Empress Towers Ltd. v. Bank of Nova Scotia, [1991] 1 W.W.R. 537 and Lac v. Corona, supra. It is important to see the fact situation in each. In my opinion the cases hold that there is no duty to negotiate in good faith generally especially where a fundamental or material term of the contract is missing. But as stated by LaForest J. in Lac v. Corona at p. 672:

> The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectation of the parties.

59 The duty may be found where the original contract carried an implied term to negotiate in good faith, or where there was a legally binding obligation to negotiate.

60 In both Lac v. Corona, and the Cineplex decision the court was considering restitution for monies expended in reliance in the good faith of the other to complete the contract. However on the facts before me I have found that the plaintiffs have failed to prove any failure to negotiate in good faith or any reliance upon the good faith of the defendant.

61 The parties may speak to me about the question of costs or any question arising from these reasons. The parties had agreed that any assessment of damages might be tried separately from the issues herein.

VAN CAMP J.