

CANADA / JUDGMENT

## Boyd v. McDermott

2007 BCSC 1793

### COURT

Supreme Court of British Columbia

### DECIDED

12 December 2007

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2007 BCSC 1793 Boyd v. McDermott

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Boyd v. McDermott,

2007 BCSC 1793

Date: 20071212

Docket: S95360

Registry: New Westminster

Between:

Jan Marie Boyd

Plaintiff

And:

Zoe Michele McDermott

Defendant

Before: The Honourable Madam Justice Morrison

Reasons for Judgment

Counsel for the Plaintiff

Donald Boyd

The Defendant

Appearing In Person

**Date and Place of Trial:**

November 28-30, 2007

New Westminster, B.C.

- [1] The plaintiff, Jan Marie Boyd, is a physiotherapist who owned and operated a physiotherapy clinic called Plaza Physiotherapy Ltd. at 228 - 5000 Kingsway Street, Burnaby. The defendant, Zoe Michele McDermott, is a certified athletic therapist who was employed at the plaintiff's clinic from the beginning of September 2004 to the end of August 2005.
- [2] The plaintiff claims there was an oral agreement between the parties, where the defendant would purchase the business of the clinic from the plaintiff for \$100,000, and that agreement was breached by the defendant. The plaintiff seeks specific performance of a contract of purchase and sale, and damages; alternatively, damages in lieu, or alternatively, damages for breach of contract, plus costs.
- [3] The defendant says there was never a completed agreement of purchase and sale, that discussions were held, and she was investigating purchasing the clinic, but in the end, was unable to reach satisfactory financing arrangements.

**Background**

- [4] The plaintiff, Ms. Boyd, operated the Plaza Physiotherapy Clinic (the "Clinic") since October 1, 1987. She met the defendant in late August 2004 when she had advertised for help in the Clinic. At that time, the Clinic was busy and thriving. Ms. Boyd was specializing in pelvic malalignment, as well as sports injury and rehabilitation, with some ICBC and WCB insurance claims.
- [5] Ms. McDermott, with a significant athletic background, had attained her Bachelor of Applied Science in Kinesiology in 2000 from Simon Fraser University, and then an Advanced Athletic Therapy Certificate from Mount Royal College in Calgary in 2003. She had a job as a kinesiologist from January to August, 2004; prior to that she had worked part time as a therapist while completing her schooling. This job with the Clinic was her first full time job. Her work with the Clinic began after the Labour Day weekend, 2004.
- [6] Initially, Ms. McDermott assisted Ms. Boyd with applying hot packs, ice, applying machines, walking people through their exercises, and doing some office duties. Her duties progressed as her experience evolved. Ms. McDermott was being mentored by Ms. Boyd on the techniques with regard to the pelvic malalignment in which Ms. Boyd specialized.
- [7] Ms. Boyd testified that the Clinic generated close to \$200,000 gross a year in revenue. She was going to continue with the Clinic, but by early 2005, had decided to look at a different direction in her career. She was teaching more, and had developed a DVD with a doctor with whom she worked closely. She decided to sell the Clinic, but wanted to ensure that the Clinic continued, as she felt an obligation to her patients.

- [8] The plaintiff stated there were three reasons to sell the Clinic. She had a good staff. She had joined a partnership with Dr. Wolf Schamberger with regard to the new techniques on pelvic malalignment. They were planning to do more workshops, and she wanted to spend more hours on this new business; finally, she stated that physiotherapy is physically demanding, and she had had an earlier back injury. Although she was fine health wise, she realized she was developing a degeneration and this was an opportunity for her to go in a different direction with teaching, videos, presentations, workshops etc. In all, it would be better for her health.
- [9] In early March 2005, Ms. Boyd testified that she told her accountant and her staff that she was going to sell the Clinic, but that she had no intention of leaving it. She was working 75 to 80 hours a week at that time, but intended to remain working part time in the Clinic. According to Ms. Boyd, Ms. McDermott came to her within a few days and expressed an interest in buying the Clinic. However, according to Ms. McDermott, Ms. Boyd approached her to buy the Clinic.
- [10] In any event, in early March the parties were definitely talking about the sale of the Clinic. Ms. Boyd typed a memorandum to Ms. McDermott on March 9, 2005 with "some thoughts about the sale of the clinic." That memo stated, in part:

It is an excellent buy and will definitely sell when I list.

I borrowed \$50,000 18 years ago and had to purchase everything for the clinic. Plus, I had to market myself, gather patients etc.

It truly is a 'turn-key' operation now.

Your Mom may be interested in the investment....

Trudy will be on a lengthy leave of absence and she has no definite desire to stay but will do so if needed....

Your investment will be paid off in six months.

Plaza already has a line of credit of \$50,000 which no new person would be able to do with a bank. This can also be used to purchase 50% of the clinic.

Also the established line of credit gives you the ongoing use of credit cards and we have approval for them all.

I plan to have the sale paid in 4 installments over a 12 month period and my year-end is July 31st. So I want the sale to be around this time. Then the first payment would be August and the next 3 in quarterly instalments.

I will continue to work as needed and make any transition....

I will let you be the first person to decide and then I plan to advertise....

Let me know!!

- [11] Shortly after that there was another typewritten memorandum to Ms. McDermott from Ms. Boyd saying that the Clinic "is perfect for any therapist because I am so out of the mainstream. My work is taught by me, and me alone. It does not have to be physiotherapy."
- [12] The memo also advised that Dr. Schamberger trusted her work and would trust anyone that Ms. Boyd trained. Ms. Boyd indicated she would teach Ms. McDermott about the manual therapy which she would need for every detail of malalignment.
- [13] That was followed by another typewritten memorandum from Ms. Boyd to Ms. McDermott on March 13, 2005. This advised that the lease for the office was straightforward and that when renewal comes, Ms. McDermott could ask for anything, that the lease would never be a concern. Further, that Ms. McDermott could be a proprietor or she could incorporate herself. "I will guide you to my accountant and show you how things are written through the business instead of 'after tax' dollars.... In terms of payment, I am quite flexible re: the time." The memo also stated that Ms. Boyd would not start up a new clinic in competition and that that could be put in writing. But she would like to do a consult one-half day every month in other places. She then wrote, "I would expect that we indicate that you are now owner or co-owner of Plaza and we are "THE TEAM". Anyway, this is the fun part and don't worry about it." It further advised that Ms. McDermott had been given the year-end totals, that there were no accounts payable, no outstanding debts and the banking was already in place. "We can sit down and talk it over but I thought you might want this information soon."
- [14] There is then a document on the letterhead of Plaza Physiotherapy Clinic that was signed by both parties on April 21, 2005. That reads as follows:

I, Jan Boyd agree to work at Plaza Therapy Inc. for a period of two years starting August 1, 2005 and ending July 31, 2007. I also agree that within the two year contract period not to open another clinic in direct competition with Plaza Therapy Inc. In the event that I am unable to work due to injury or illness I will not be held accountable for lost income. I agree to accept payment for the sale of Plaza Physiotherapy Inc. in instalments which will be put into a trust fund, with 50% of the sale price due in August, 2005, 25% due in December, 2005 and the final 25% due in July, 2006.

(Emphasis added)

- [15] According to the evidence of Ms. Boyd, she was asked by the defendant to sign this, that this is common practice. According to the evidence of Ms. McDermott, Ms. Boyd drew up this document, and it was required by Ms. Boyd's banker prior to going over a business plan for Ms. McDermott. Ms. Boyd testified that she had a very old injury, but on legal advice, she had put into this document the phrase with regard to "injury or illness".
- [16] The name was being changed from Plaza Physiotherapy Clinic to Plaza Therapy Inc. Ms. Boyd had gone to the Registrar for the College of Physiotherapists to ensure that a non-physiotherapist could buy her Clinic. It became clear from the College that the business could not be referred to as a physiotherapy clinic if it was being owned and operated by a

therapist who was not a physiotherapist. Ms. Boyd went to her lawyer to begin the name change so that it could be sold to someone other than a physiotherapist, someone such as the defendant. The name was to become Plaza Therapy Inc.

- [17] The plaintiff also went to her bank manager and requested financing for the defendant. Ms. Boyd's banker was Brett Paskar, a senior account manager at the Royal Bank of Canada in New Westminster.
- [18] Ms. McDermott testified that she met Mr. Paskar on one occasion, when they met at Chapters, and there they discussed what Ms. McDermott was looking for, and she handed him her business plan. Ms. McDermott had made up a business plan in order to obtain financing from the bank, through Ms. Boyd's banker and bank. The business plan had the date of April 2005 on the front cover page. Ms. McDermott had no previous experience with business or business plans, but testified she had once worked on a school project with three other students in drawing up a draft business plan.
- [19] The plan set out that Ms. Boyd would continue to work part time with the Clinic, and 50% of her gross would go to Plaza Therapy. Ms. Boyd charged \$160 an hour for her services.
- [20] On May 13, 2005, Mr. Paskar telephoned Ms. Boyd on her cell phone while she was in Alberta. He told her that he had great news, that the bank had agreed to finance the defendant in her purchase of the plaintiff's business. The following week, when Ms. Boyd had returned to Vancouver and met with Mr. Paskar, he then told her that the bank wanted her, Ms. Boyd, to co-sign for the defendant's loan from the bank; and that Ms. McDermott would only be getting \$60,000 toward the purchase price, not the full \$100,000.
- [21] Ms. McDermott had no knowledge of Mr. Paskar's telephone call to Ms. Boyd, and testified that she felt it was a breach of her business interests and privacy and that it indicated that Mr. Paskar was representing the interests of Ms. Boyd, not the defendant.
- [22] Rather than co-sign for the defendant, Ms. Boyd decided to "be the bank", and offered to lend Ms. McDermott the \$100,000 needed to purchase the business.
- [23] Further to Ms. Boyd's suggestion that she would lend the money to Ms. McDermott, the two women went June 20, 2005 to see Ms. Boyd's accountant, Ron Seymour, a certified general accountant whose offices were in New Westminster.
- [24] Mr. Seymour testified that he first met with Ms. McDermott April the 6th at his office; Ms. McDermott has no recollection of that meeting at all. Her first recollection is a meeting with Mr. Seymour on April 26, 2005 when Ms. McDermott had been encouraged by the plaintiff to go and see Mr. Seymour, Ms. Boyd's accountant. That was to assist her with her business plan, to go through the cash flow, budget, etc. The defendant testified that Mr. Seymour helped her, giving her some suggestions, and changed her figures with regard to cash flow, for example. Ms. McDermott was at Mr. Seymour's office for about an hour, and at no time did she receive a bill from Mr. Seymour for that visit, nor was there any mention of that. She was unaware that Ms. Boyd was later billed for that visit. It was following that visit with Mr.

Seymour on April 26, that Ms. McDermott gave her business plan to Ms. Boyd's banker, Mr. Paskar.

- [25] The only other time Ms. McDermott saw Mr. Seymour was at the meeting of June 20, when both parties were at Mr. Seymour's office for approximately two hours.
- [26] Mr. Seymour testified that both parties attended at his office. The plaintiff was his client and she made the appointment. The meeting was two hours. He took no notes and had none to produce. He testified he was representing Plaza Physiotherapy Clinic and Ms. Boyd. There was no follow up memorandum by him to either party following this meeting. He confirmed there was no formal engagement to act on behalf of Ms. McDermott, that he was lending assistance to her as allowed by the plaintiff.
- [27] It was the understanding of Mr. Seymour that the parties were close to or there was an agreement. However, there was no set agreement at that time, no written agreement. This meeting was for discussion.
- [28] At the meeting it was acknowledged that Ms. McDermott had learned from the bank that financing was not as easy to come by as originally anticipated. Ms. Boyd was possibly going to provide financing. At that same meeting, Mr. Seymour suggested an interest rate of 7% payable by the defendant was reasonable, over a term. He said there was basically concurrence, and in his mind a conclusion that that was acceptable. The next step would be for the defendant to go to the bank and set up a bank account. According to Mr. Seymour, the parties were doing this themselves, and then would go to a lawyer or the bank "to finalize".
- [29] Approximately a week later, on June 27, he learned that the defendant was going to have a family member provide financing, that a relative would be co-signing on a loan. That was either June 27 or June 29.
- [30] Mr. Seymour has his own accounting firm and has acted as an accountant for the plaintiff since 2002, and continues to up to this date.
- [31] According to the evidence of Ms. Boyd, in the discussions on June 20 at Mr. Seymour's office, the interest rate of 7% was agreed upon. Ms. Boyd thought Ms. McDermott was positive and pleased, as no negative comments were made at that meeting by Ms. McDermott.
- [32] In cross-examination, Ms. Boyd stated that in discussing the 7% interest, Mr. Seymour had advised a period of "five to seven years". She said that Ms. McDermott had said "Fine. Great". "You seemed to go along with everything", was Ms. Boyd's response in cross-examination by Ms. McDermott. Ms. Boyd indicated that Ms. McDermott was agreeable, that they drove down to the meeting together and they drove back together, and that, as far as Ms. Boyd was concerned, Ms. McDermott had agreed to the financing.

- [33] Ms. Boyd also said that if she had been a co-signor to a loan by Ms. McDermott, that would present a risk, and would earn no money for Ms. Boyd. However, if there was interest, "I'd receive interest and no risk." She said she had discussed this previously with Mr. Seymour, the position of being a lender as opposed to a guarantor. As far as Ms. Boyd was concerned, "We had an agreement.", meaning she and Ms. McDermott.
- [34] About a week after the meeting of June 20, 2005, the defendant advised the plaintiff that she would not be borrowing money from the plaintiff. Ms. McDermott said she was looking to her grandmother to assist in financing her. In her evidence, Ms. McDermott said that she felt uneasy borrowing the \$100,000 at 7% interest from Ms. Boyd, and the rate of interest was a problem for her. Ms. McDermott was concerned as she had no savings, had been working for less than a year, had no assets, but rather debts, student loans. She would have to borrow the entire amount and the more she investigated the financing, the more uneasy she was becoming.
- [35] In the meantime, in April, Ms. Boyd had gone ahead and had her lawyer incorporate a new name for the Clinic, Plaza Therapy Inc., which would overcome the problem of someone who was not a physiotherapist owning the Clinic. Her legal fees for doing this were close to \$500. At no time did Ms. McDermott caution Ms. Boyd not to move so quickly on this, and when asked about this at the examination for discovery on April 26, 2006, Ms. McDermott gave the following answer:

At that point I still really believed that, you know, that things were going to be okay. I wasn't really thinking that I was not going to purchase the clinic at that time. We still hadn't come to any firm, you know, contract agreement or anything but that, you know, she was -- she just pushed that way. She was like Oh, we need to get this done and we need to get this done, and I want to get prepared and -- yeah, I just -- so I just kind of went along with it instead of objecting to it.

- [36] A Clinic inventory was placed in evidence, dated July 31, 2004. Ms. Boyd testified that she sent this to Mr. Paskar, her banker. She said it was a very casual list. That Mr. Paskar had asked for the inventory as part of the business plan that Ms. McDermott was producing, and Ms. Boyd knew that an inventory was required. She said she was trying to help Ms. McDermott, and that Mr. Paskar was trying to help Ms. McDermott as well. That Mr. Paskar was never in conflict. "We were trying to help you. You said nothing but thank you."
- [37] Sometime in July 2005, Ms. Boyd gave a blank draft agreement which was referred to at trial as a template. This appeared to be an agreement between other parties, whose names had been blanked out. It showed a September 1987 date. It was not a complete agreement, containing only portions of what might be required for a contract of purchase and sale. The draft referred to a physiotherapy business known as "Plaza Therapy Ltd.", which had been handwritten over something that had been blanked out. At the examination for discovery on April 26, 2006, Ms. McDermott was asked how she came to be in possession of this document. Her answer was as follows:

Jan gave me this as -- it was a template or an actual contract that she had to purchase the clinic when she purchased it I believe. So she gave it to me and said that, you know, that we could avoid having a lawyer draw up a contract and we could do it ourselves using this template and then have a lawyer look at it and make sure that it was okay and that did she think -- or did I want to use this as a template, and I said, "Sure. This would be great to use as a template."

[38] Ms. McDermott thought that it was given to her maybe sometime in June 2005. She said she looked it over, but "didn't understand half of the stuff in there." She later said in her examination for discovery when she was asked if there were any changes that she wanted to make to the contract:

Honestly I'd never written a contract before, so I didn't really know if there were any changes I wanted to make and that I was hoping that once I had drafted a copy of this, that the lawyer that I'd take it to would be able to make sure that it was, you know, okay. Because I have no understanding of contract law.

[39] In the template, the purchase price of \$100,000 had been written in, not by Ms. McDermott. It said that that sum would be paid as of "the effective date" by cheque drawn on a Canadian chartered bank to the vendor on the closing date. There were no dates filled in, nor were any of the terms of payment specified. Neither party was named, nor were there any signatures.

[40] According to the evidence, Ms. McDermott began to type part or all of that template into the computer at work, but it was never printed out or given to either party, nor ever completed. When Ms. McDermott resigned from the Clinic in mid-July 2005, she deleted it from the computer. Ms. Boyd had the deletion restored prior to this trial. That restoration was not placed in evidence at trial.

[41] Ms. Boyd takes the position that they had completed the agreement, that this template was brought in the beginning of July, and that the only issue was financing. As of June, Ms. Boyd said she was still to do 100% of the financing, as a lender. According to Ms. Boyd, Ms. McDermott was by then acting as an owner, purchasing and adding software to the computer, and hiring a part time receptionist to fill in for Trudy Costa who was going away on an extended leave. But Ms. McDermott said she was simply doing things as an assistant to Ms. Boyd, who remained in total control and was still the sole owner of the business.

[42] In early July 2005, Ms. McDermott telephoned the City of Burnaby to inquire about business licence requirements. She was sent a business licence application on July 4, but never made an application. Around that time she also made inquiries of ICBC with regard to supplier forms, but that went no further.

[43] On July 6, 2005, she and the plaintiff signed a business deposit account form with the Royal Bank. The plaintiff claims this is further evidence that by this time Ms. McDermott regarded herself as an owner and indeed was acting as an owner of the Clinic.

- [44] However, the name of the business is clearly "Plaza Physiotherapy Ltd.", and the name of the owner is Jan Marie Boyd, showing "100% ownership". Ms. McDermott's name mis-spelled, and a Kelowna home address for her were indicated under a section entitled "Owner/Signing Officer". Further down on the front page of that form under "employment information", it indicates "No" to self-employment. Her employer is "Plaza Physiotherapy". Her occupation is shown as "athletic therapist" and the length of time in her present job as 10 months.
- [45] On the third and last page of the form, again it shows the legal name of the customer being Plaza Physiotherapy Ltd., with two signing officers, Ms. Boyd and Ms. McDermott. Where their signatures appear, the name is printed in, "Jan Marie Boyd (owner)" and on the next line, "Zoe Michelle (again spelled in error as "Michelle") Cowan McDermott (assistant to owner)". That form is dated July 6, 2005.
- [46] It was around July 4 or 5, 2005 that Ms. Boyd received confirmation that the Clinic had legally changed its name to Plaza Therapy Inc.
- [47] The financing details and/or arrangements are really at the crux of the dispute between these parties. In her business plan that was drawn up apparently toward the end of April 2005, Ms. McDermott notes that she will need \$100,000 to purchase the Clinic, that 50% of the sale price would be due August 2005, 25% due December 2005 and the final 25% due in July 2006.
- [48] Then it became apparent the bank would not finance the entire amount. Ms. McDermott testified that when she and Ms. Boyd were in Mr. Seymour's office on June 20, and the proposal was that Ms. Boyd would be "the bank", charging 7% interest, "over 5 to 7 years", Ms. McDermott testified that Mr. Seymour said they were to go to the lawyers and work out the details.
- [49] It was after that meeting that Ms. McDermott decided she did not want that financial arrangement or suggestion, and she approached her family, telling Ms. Boyd that she was doing so. She was hoping that her grandmother would be able to assist her, although the grandmother did not have that kind of money, and it would have to be a loan still through the bank, with Ms. McDermott's grandmother signing as a guarantor apparently.
- [50] However, Ms. McDermott's grandmother went to Saskatchewan to her farm for a two week period around the beginning of July. There is no phone at the small farmhouse. Ms. McDermott had no way to get in touch with her grandmother, but in the meantime she had spoken over the telephone to Mr. Paskar, who had told her that he would have to have her grandmother's statement of business affairs. Ms. McDermott was then in contact with her grandmother and told her of this requirement. By this time, her grandmother "was leery" of lending the money to Ms. McDermott, and family financing never occurred.

- [51] It was at this point that Ms. McDermott said she realized that if her family were not behind her, she had no access to any other money. She said she was young, 26, with no savings; she had debts, and was concerned about the interest rates. In any event, if any financing arrangements and other details were to be finalized, it was her belief that they would have to go to a lawyer and have a proper contract drawn up. At no time did Ms. McDermott believe she had entered into a verbal contract with Ms. Boyd, binding or otherwise.
- [52] When asked why she did not tell Ms. Boyd earlier of her concerns or hesitations, she said that Ms. Boyd was her employer and mentor; her income depended on Ms. Boyd, and she did not want to make her angry. She agreed she did not say anything negative at the June 20 meeting, and has no exact recall of what exactly was said. However, "I was intimidated by her. Definitely." Ms. McDermott also had concerns about the agreement that had been signed on April 21. She testified this was no final agreement, but she was concerned if Ms. Boyd did become injured or ill, that Ms. Boyd had been so insistent on having that point put into the agreement. And that had made Ms. McDermott nervous.
- [53] When Ms. McDermott's grandmother told her that she, the grandmother was not comfortable lending any money or co-signing at the bank for Ms. McDermott, it was then Ms. McDermott decided that she could not follow through with the purchase. She lacked suitable financing.
- [54] On January 14, 2005, while Ms. Boyd was away from the Clinic on a week's vacation, she received a telephone call from Ms. McDermott who advised her that she had decided that she did not want to buy the Clinic. Ms. Boyd said that she was shocked, and that it was her clinic, meaning Ms. McDermott's clinic. When Ms. McDermott said that she had changed her mind, Ms. Boyd told her that she wanted her to reconsider, and that she wanted Ms. McDermott to talk to Ms. Boyd's accountant, Mr. Seymour. Ms. Boyd acknowledged she was angry and indicated to Ms. McDermott at that point that she would sue her.
- [55] Ms. McDermott then gave a letter of resignation dated July 19, 2005 to Ms. Boyd, indicating that she would be resigning as of August 31, 2005. The letter stated Ms. McDermott's belief that a further professional working relationship would be untenable. The defendant continued to work full time at the Clinic until the end of August. Ms. Boyd withheld the last two weeks of her pay at that time, indicating Ms. McDermott owed her much more than that.
- [56] Ms. Boyd then closed the Clinic as of September 1, 2005. She had tried advertising it for sale for \$100,000, but no firm offers were forthcoming. Although she indicated she had a very successful practice, Ms. Boyd said she had been given a chance to go in a different direction, that she and Dr. Schamberger were going to be travelling, promoting their new business partnership, and as of September, there was no one to take over her Clinic, and she could not carry on. She said she was forced to close the Clinic. She was also forced to pay the remaining 19 months on her lease, \$2,800 a month for a total of \$54,000.

## The Position of the Plaintiff

- [57] The plaintiff argues she did all she could do to assist with the agreement, and there was a final agreement between these parties. The defendant has breached the contract for sale which was between the parties, according to the plaintiff; the defendant has repudiated the agreement.
- [58] Accordingly, the plaintiff seeks damages. She has now been able to sell her Clinic for \$25,000, so she seeks \$75,000, the difference between the \$100,000 and the present selling price. The plaintiff says she took all possible steps to market the Clinic and mitigate her damages, but was unable to sell it as a going concern.
- [59] In addition, she had to pay 19 months of rent at \$2,800 a month and has had total expenses of \$52,000 which includes the lease and other expenses. There is also \$500 for legal fees for the change of name of the Clinic.

## The Position of the Defendant

- [60] Ms. McDermott says there was never any completed agreement. The terms of financing were never established or agreed upon, which was crucial to the purchase of the business. Ms. Boyd could have carried on her Clinic but chose not to do so.

## Conclusion

- [61] Ms. Boyd is a self-assured, impressive and experienced businesswoman in her 50s. She was obviously extremely eager to sell her Clinic and move on to another direction in her career. From the evidence it seems apparent that her banker and her accountant were trying to assist her in every possible way. They were acting only on her behalf; it certainly cannot be said that Mr. Seymour was in any way acting on behalf of Ms. McDermott, or in her best interests.
- [62] Ms. McDermott is an energetic, enthusiastic young woman, whose background is athletic, not business. She looked up to Ms. Boyd as her employer and her mentor. At no time did Ms. McDermott seek independent legal or accounting advice. Nor was she encouraged to do so by Ms. Boyd. If anything, she was guided in the other direction - to use Ms. Boyd's banker, bank and personal accountant.
- [63] There were some occasions in the testimony where there was a conflict between the evidence of the plaintiff and the defendant. In those instances, I have accepted the evidence of the defendant.
- [64] There was no documentary financial evidence put forward at trial to establish any claim for damages on the part of the plaintiff, had a contract been found. No income tax returns for the relevant years, no financial statements from the business, no bills, receipts, source documents with regard to lease payments, legal fees, accounting fees, or anything else.

- [65] On a balance of probabilities, I have no trouble finding in favour of the defendant in this case. There was no contract.
- [66] At no time did Ms. Boyd give up control and ownership of this business. There was never any agreement reached with regard to financing the purchase of the business. The goal posts changed with regard to financing from the beginning of discussions in early March to the middle of July when Ms. McDermott indicated she was no longer interested.
- [67] First, it was indicated by Ms. Boyd that the \$50,000 line of credit could be used to purchase 50% of the business, and that then the defendant could make arrangements to pay the rest of it. Even though Ms. Boyd had Ms. McDermott consulting Ms. Boyd's banker as well as Ms. Boyd's accountant, this never came to pass. Next, the bank refused to finance Ms. McDermott as a sole purchaser and lend her the full purchase price.
- [68] The bank said it would lend only \$60,000 to the defendant, and only if Ms. Boyd co-signed for the \$60,000 loan. Ms. Boyd declined to do that. So Ms. Boyd proposed she be the sole lender, for \$100,000; but Ms. McDermott was not willing to have Ms. Boyd act as the banker at 7% interest over a rather vague term of "5 to 7 years". At this point, no terms of repayment were suggested by either party, nor were they ever suggested by the accountant or the banker.
- [69] Then attempts at family financing by the defendant proved fruitless.
- [70] Suitable financing arrangements were never reached. They were never agreed upon. There was never a contract in writing, nor was there ever a verbal contract reached between the parties on all material terms. There can hardly be a more material term to a contract of purchase and sale of a business than an unambiguous agreement or clear understanding as to terms of the financing arrangements.
- [71] There was no contract, therefore there was no breach. The plaintiff's claim is dismissed. There will be costs to the defendant.

"Morrison J."

Madam Justice Morrison

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