
CANADA / JUDGMENT

Miller v. Jellybean Park International Inc.

2013 BCSC 1237

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 1237 Miller v. Jellybean Park International Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Miller v. Jellybean Park International Inc.,

2013 BCSC 1237

Date: 20130711

Docket: S108801

Registry: New Westminster

Between:

Patrick Albert Miller, Ruby Elma Miller

and 377860 B.C. Ltd.

Plaintiffs

And

Jellybean Park International Inc.

a.k.a. Jellybean Park Daycare

Defendant

Before: The Honourable Madam Justice E.A. Arnold-Bailey

Reasons for Judgment

Counsel for the Plaintiffs:

Robert H.J. Burgess

Counsel for the Defendant:

J. Cameron McKechnie

Place and Date of Hearing:

New Westminster, B.C.

January 24, 2013

Place and Date of Judgment:

New Westminster, B.C.

July 11, 2013

Introduction

- [1] The plaintiffs and the defendant both have applications before the Court for summary judgment pursuant to Rule 9-7 of the Rules of Court. Their claims relate to the failed sale of a daycare business and the land upon which it operated.
- [2] Patrick Miller and Ruby Miller ("the plaintiffs") were the registered owners of land and premises located at 21593 Dewdney Trunk Road in Maple Ridge, BC ("the property") upon which a daycare business ("the business") operated.
- [3] The plaintiffs were directors of the plaintiff company, 377860 B.C. Ltd. ("377860"), which operated the business on the property, doing business as "Learn and Play Children's Centre."
- [4] At the material time the plaintiffs operated the business through a private company, Pammer Enterprises Inc. ("Pammer"), of which they were both directors. Pammer provided management services to the business and owned some assets of the business. Pammer has subsequently been amalgamated with 377860 and the latter company has the right to advance any claims of Pammer.
- [5] On a standard "Real Estate Board of Greater Vancouver Contract for Purchase and Sale" made on February 28, 2007, with numerous addenda made subsequently thereto (in total "the Agreement"), the plaintiffs agreed to sell, and the Jellybean Park International Inc. a.k.a. Jellybean Park Daycare ("the defendant") agreed to buy the property and the business for total of \$1,400,000 on the terms and conditions set out.
- [6] By a written addendum, dated April 25, 2007, the parties agreed to extend the date for "completion, possession and adjustment" from May 7, 2007 to June 7, 2007. The defendant (purchaser) paid a deposit of \$20,000.
- [7] The sale did not complete on June 7, 2007 and on June 8, 2007 the lawyer for the plaintiffs wrote to counsel for the defendant and advised that his clients considered the transaction to be terminated based on the defendant's failure to complete. Each party blames the other for the failure to complete the transaction.

- [8] The plaintiffs claim they only received the agreement for the purchase and sale of the business ("the business agreement") after the agreed date of closing, at 5:48 p.m. on June 7, 2007. They say that the obligation to draft the contract for purchase and sale was upon the defendant as purchaser, and the defendant did not fulfill these obligations by the end of the business day on the closing date.
- [9] The plaintiffs originally claimed specific performance, but they have mitigated, and now seek only to retain the \$20,000 that was paid by the defendant as a deposit.
- [10] The defendant seeks the return of the deposit of \$20,000, plus accrued interest, and "reliance" damages to reflect the costs incurred to further the contract (see invoices attached to Mr. Nielsen's affidavit at Tab 7 in the amount of \$24,492.95, plus a claim for a further \$25,000 to compensate for the expenditure of staff time).
- [11] The defendant submits that the negotiation and formalization of the business agreement was a condition precedent to the Agreement, and the failure of the parties to conclude the business agreement was due to the lack of cooperation and negotiation by the plaintiff. The defendant contends it was this breach of contract that caused the failure of the transaction to close.
- [12] Further, the defendant submits that when parties agree to preliminary terms, but contemplate a further formal contract, two "intertwined issues" arise: whether the parties intended to be bound immediately; and if they did, whether the parties agreed with sufficient certainty to all essential terms. Both parties say it is clear that they intended to be bound by the initial agreement. They disagree with regards to the certainty of all essential terms.
- [13] The defendant asserts that the terms to be included in the proposed business agreement set out in the contract of purchase and sale are sufficiently certain that there was a contract and the plaintiffs breached it. Even absent certainty as to the essential terms of the business agreement, the defendant submits there may still be an obligation upon the parties to negotiate in good faith, which the defendant says the plaintiffs failed to do.

The Facts

Terms of the Agreement

- [14] The following is a more detailed account of the terms of the parties' Agreement.
- [15] On February 28, 2007, the plaintiffs signed a contract of purchase and sale whereby the defendant would purchase the property owned by the plaintiffs and the assets related to the business owned by 377860 and Pammer. The contract of purchase and sale stated that the defendant was to pay \$1,400,000 to the plaintiffs, including a deposit of \$20,000 (the "Deposit"), to form part of the purchase price upon the final removal of subject clauses. It also included the following relevant terms:

- The sale will be completed on May 7, 2007.
- The purchase price includes any buildings, improvements, fixtures, appurtenances and attachments thereto and all blinds, awnings, screen door and windows, curtain rods, tracks and valances, fixed mirrors, fixed carpeting, electric, plumbing, heating and air conditioning fixtures and all appurtenances and attachments thereto as viewed by the Buyer at the date of inspection, INCLUDING: 4 vans, all furniture, fixtures and resources in current condition, cliental [sic], business and building.
- Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreement to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and in such event, the amount paid by the Buyer will be absolutely forfeited to the Seller in accordance with the Real Estate Services Act, on account of damages, without prejudice to the Seller's other remedies.
- The Buyer will bear all costs of the conveyance and, if applicable, any costs related to arranging a mortgage and the Seller will bear all costs of clearing title.

[Emphasis added.]

[16] The Deposit was to be delivered to Keller Williams Results Realty and held in trust in accordance with the provisions of the Real Estate Services Act. The contract of purchase and sale further stated:

[]The party who receives the Deposit is authorized to pay all or any portion of the Deposit to the Buyer's or Seller's conveyancer (the "Conveyancer") without further written direction of the Buyer or Seller, provided that: (a) the Conveyancer is a Lawyer or Notary; (b) such money is to be held in trust by the Conveyancer as stakeholder pursuant to the provisions of the Real Estate Services Act pending the completion of the transaction and not on behalf of any of the principals to the transaction; and (c) if the sale does not complete the money should be returned to such party as stakeholder or paid into court.

[17] There was an information sheet attached to the contract. The parties dispute whether this document is part of the Agreement. The plaintiffs seek to have it found to be part of the Agreement. The document outlines basic information about the customary nature of the obligations parties assume when they enter into an agreement of purchase and sale for real estate. The page is headed with the phrase: "This information is included for the assistance of the parties only. It does not form part of the contract and should not affect the proper interpretation of any of its terms." The only reasonable interpretation is that this information sheet is not part of the parties' Agreement.

[18] The parties executed two addenda, both dated February 28, 2007.

[19] One was an addendum setting out a list of documents to be provided by the plaintiffs to the defendants relating to the financial records and an inventory of resources pertaining to the business ("the first addendum"). The purchaser (defendant) was to receive all relevant

documentation "within 7 days of acceptance". Once the documentation was received, the purchaser would require "a full 6 weeks to perform analysis and due diligence." The addendum required the Buyer receive a copy of an "independent evaluation" dated September 30, 2006, to verify property and business values by April 25, 2007. The addendum also required other approvals relating to a feasibility study, insurance, daycare license assignment and financing. The addendum also contained the term that "The purchase shall be subject to the usual adjustments contained in a purchase and sale of a business."

[20] The second addendum appears to have been drafted by the defendant (purchaser) as "you" clearly refers to the plaintiffs (vendors). It sets out further terms, including:

Purchase allocation of costs must be determined by April 25, 2007. (Goodwill, building, land, assets, inventory)

[]

The purchase will require the negotiation and entering into a formal purchase and sale agreement that appears appropriate to your lawyers and ours. The agreement will contain representations, warranties, covenants and other agreements customary for the purchase and sale of a business, including those as to the ownership of the business and the assets. The agreement will also contain a number of conditions to be met at or before closing as hereinbefore stated, and including but not limited to the following:

- a) There will have been no adverse change which adversely affects your business.
- b) You will own at least as much inventory as shown in your last prepared financial statements of the business.
- c) There will be no existing, threatened, or pending lawsuits, tax reassessments or other liability against the business.
- d) There will be no long term employment contracts affecting the business or any employee of the Company.
- e) You will have signed a written non-competition agreement with us in a form acceptable to us containing specific provisions regarding your agreement not to compete anywhere in British Columbia with the Company or the business now carried on by the Company for a period of five years from the date of closing the purchase, within 100 kms of the business.
- f) We will be satisfied with the results of our review of the books and records of the Company.
- g) You will cause to be delivered to the Purchaser any required legal opinions regarding the purchase of the property and the business.

[21] On March 6, 2007, the parties added a third addendum, which added current capital expenditures totalling \$10,000 to the purchase price.

- [22] In a fourth addendum on April 25, 2007, the defendant paid the Deposit of \$20,000 and removed the subject conditions contained in the first addendum relating to information to be provided by the plaintiffs. This addendum contained the earlier "subject to" clause that "the purchase shall be subject to the usual adjustments contained in a purchase and sale of business." The parties dispute whether this term was meant to be removed, or was simply included by mistake.
- [23] On April 25, 2007, the parties also executed a further addendum that changed the completion, possession and adjustment date from May 7, 2007 to June 7, 2007. It also states that "all other terms remain the same."
- [24] The defendant submits that a further extension was contemplated by the parties. However, one of the plaintiffs, Mrs. Ruby Miller, sets out in her affidavit that she did not agree to an extension past June 7, 2007.
- [25] A draft asset purchase agreement sent late in the day on June 7, 2007 from the defendant's lawyer (dealing with the business purchase) to the plaintiffs' lawyer did not contain a proposed allocation of the purchase price of \$1,400,000 as between lands, buildings and machinery, "prepaids", intangible property and material contracts and goodwill.
- [26] The business agreement was never completed by the parties.
- [27] The land transfer Form A sent by the defendant's lawyer dealing with the real estate transaction stated the market value and consideration of the property to be \$1,225,000, which was scratched out and reduced to \$850,000 by the plaintiffs when they signed the document on June 7, 2007. When the parties failed to agree to and execute the business agreement the transaction fell apart. The property was not transferred. Assignments were never signed by all the parties designed to transfer the assets of 377860 and Pammer to the defendant concurrent with the transfer of the property.

Communication between the parties

- [28] The communications between the parties' lawyers have been referred to in the submissions now made on their behalf. The lawyer for the plaintiffs (vendors) was Mr. Schwarz. The defendant had two counsel involved in the transaction: Mr. Kostiuk for the purchase of the business; and Ms. Lee for the purchase of the property.
- [29] On May 7, 2007, Peter Nielsen, the president of the defendant company, wrote a letter to one of the plaintiffs, Mrs. Miller, asking for some information and documentation for the purchase and transition of the business to the defendant. The letter inquired about the ownership of the assets by the different entities, the latest yearly statements and the licensing requirements. Mr. Nielsen also inquired into who was representing the plaintiffs with regards to the Agreement.

- [30] On May 9, 2007, Mrs. Miller replied to Mr. Nielsen. She answered the questions regarding the ownership of different assets and attached voluminous documentation. The email also included the contact information for their lawyer, Mr. Schwarz.
- [31] On May 15, 2007, Mr. Kostiuk called Mr. Schwarz to inform him that he was acting for the defendant in connection with the business and asset purchase components of the transaction. Mr. Kostiuk claims in his affidavit that he made several other attempts to contact Mr. Schwarz by telephone. However, Mr. Schwarz denies any communication from Mr. Kostiuk between May 15, 2007 and June 5, 2007.
- [32] Ms. Stewart, the founder and chief executive officer of the defendant company, deposed that in mid-May 2007 she understood that the defendant had reached an agreement with the plaintiffs to extend the closing to July 31, 2007. At this point, representatives of the defendant had done considerable due diligence to check out aspects of the business.
- [33] In early June, Mr. Kostiuk left a message for Mr. Schwarz expressing his concern about the form of the business agreement and the proposed completion date. Although he did not connect with Mr. Schwarz, from his leaving a voicemail message, Mr. Kostiuk claims that he understood there was to be an extension of the closing to July 31, 2007.
- [34] Ms. Stewart deposed that when attempts to have the plaintiffs sign a further addendum to reflect an extension to July 31, 2007 were unsuccessful, she instructed the defendant's solicitors to prepare the documents necessary to complete the transaction by June 7, 2007.
- [35] On June 6, 2007, Ms. Lee sent a letter to Mr. Schwarz enclosing the documents for review and execution pertaining to the purchase of the property. The letter states that Mr. Kostiuk would be forwarding other documents relating to the business agreement shortly. The letter concludes with a paragraph in bold which stated that Ms. Lee understood from her client that the plaintiffs had verbally agreed to an extension of the completion, adjustment, and possession dates to July 31, 2007. The letter also states that the vendors (plaintiffs) have been difficult to contact and their client had been advised that the vendors no longer wanted to sell the property. The letter states that Mr. Kostiuk was having trouble reaching Mr. Schwarz by telephone.
- [36] On June 7, 2007 at 12:39 p.m. Mr. Kostiuk sent a letter by fax to Mr. Schwarz with assignment of assets agreements between Pammer and the defendant and 377860 and the defendant to be signed, and made a further inquiry for information regarding the ownership of assets.
- [37] On June 7, 2007, Mr. Schwarz met with the plaintiffs to execute the transfer documents provided by Ms. Lee relating to the sale of the property. The conveyance documents were forwarded by rush courier to her land title agents at the New Westminster Land Title Office. The plaintiffs also signed assignments to the defendant on behalf of 377860 and Pammer.

- [38] On June 7, 2007 at about 3 p.m. Mr. Schwarz replied to Mr. Kostiuk. In his reply he enclosed the assignment agreements as amended and executed on behalf of 377860 and Pammer. Mr. Schwarz also included the asset schedules in this communication, but indicated that "we were expecting you to provide a complete document for our client's execution." This pertains to the business agreement yet to be finalized between the parties.
- [39] On June 7, 2007 at 5:49 p.m. Mr. Kostiuk sent by fax the draft asset purchase agreement to Mr. Schwarz for his review and comment. The letter outlined the further information that was still needed to finalize the asset purchase agreement. The letter required a legal opinion from Mr. Schwarz as set out in the contract of purchase and sale. Mr. Schwarz also needed to confirm corporate resolutions, the signing of a non-competition agreement and make an election under the Excise Tax Act. The letter concluded with a paragraph stating that the parties had agreed to extend the closing and that the closing should be not formalized until the contract of purchase and sale was completed.
- [40] The asset purchase agreement relating to the purchase of the business was never signed.
- [41] On June 8, 2007, Mr. Schwarz sent a letter by fax to Mr. Kostiuk and Ms. Lee stating that as the sale proceeds had not been received and no extension had been agreed upon, the transaction was terminated due to their client's failure to complete.

Positions of the parties

The Plaintiffs (the vendors)

- [42] The plaintiffs submit that they entered into a contract on February 28, 2007. They submit that the Agreement met the four pillars of a binding contract: there was clarity as to the parties, subject matter, purchase price and effective date of agreement and the behaviour of the parties is consistent with the existence of a contract.
- [43] According to the plaintiffs, someone on the defendant's side "dropped the ball" in terms of completing the transaction. They claim that the documentation regarding the purchase of the business should have been sent much earlier.
- [44] The plaintiffs also claim that they responded to all of the defendant's requests in a timely fashion. They replied to an information request on the date of sale from the defendant. They did not delay. The plaintiffs were at all times ready, willing and able to close the sale but the documents were not sent in time for their review. The contract of purchase and sale stipulated that time was of the essence. A finalized contract for the business was not sent by the end of the business day on the closing date.
- [45] Therefore, the plaintiffs claim they should be entitled to keep the deposit as the defendant failed to complete the transaction in time.

The Defendant (the purchaser)

- [46] The defendant submits that the Agreement was a contract with a condition precedent that the business agreement would be negotiated by the parties. Counsel for the defendant submits that in the sale of a business the obligation to prepare the documentation and work towards completion is mutual. In this case the inclusion of a business agreement in the Agreement relating to the sale of the property implied a term that the parties would negotiate in good faith, which the defendant submits the plaintiff failed to do.
- [47] According to the defendant, the parties entered into a formal contract; the defendant paid a deposit, sought further information, carried out its due diligence and took other steps toward completion. There was sufficient clarity as to the terms of the Agreement and the parties intended to be bound. The negotiation and formalization of the business agreement was a condition precedent to the completion of the purchase and sale. Therefore, the defendant submits that the plaintiffs' failure to enter into and follow up with timely negotiations amounts to a breach of contract that caused the failure of the transaction.
- [48] The defendant submits that this case turns entirely on whether the completion of the further business agreement was so crucial to the transaction that there was a mutual obligation to ensure that it was finalized and negotiated. Their counsel submits that because of the mutual duty to enter into good faith negotiations, the fact that Mr. Kostiuk sent the draft business agreement to Mr. Schwarz late on June 7, 2007 is not determinative of fault in this matter.
- [49] The defendant submits that the cause of the failure to complete was the plaintiffs' refusal to negotiate in good faith. The contract stipulated that negotiation would be necessary to draft the detailed business agreement and the plaintiffs' failure to negotiate in good faith amount to a breach of the contract. The obligation to negotiate is mutual and the plaintiffs failed to do what was necessary in a timely way. The defendant seeks a return of the Deposit, an order for damages totalling \$49,492.95 and costs.
- [50] In the alternative, the defendant submits that the contract of purchase and sale could be considered an agreement to agree and therefore be unenforceable. If the parties did not agree with sufficient certainty as to all essential terms, there would still be an obligation for the parties to negotiate in good faith. If there was no contract, the Deposit should be returned.

Applicable Law, Analysis and Findings

- [51] The existence of a contract is assessed objectively to protect the reasonable expectations of the parties: *Hoban Construction Ltd. v. Alexander*, 2012 BCCA 75 [Hoban]. If the agreement is in writing, the court should begin its analysis with the text of the agreement. The contract should be read in the context of the agreement as a whole and the words should be given their ordinary, plain meaning; *B.G. Checo International Ltd. v. B.C. Hydro and Power Authority*, [1993] 1 S.C.R. 12.
- [52] To be enforceable a contract must have sufficient clarity as to the content of its essential terms: the parties to the transaction, the subject matter, the purchase price and the effective date of the agreement: *Hoban* at para. 41.
- [53] However, as stated in *Hoban* at para. 47: "the inquiry is not whether the contracts were competently drafted, but rather whether they disclose the parties' intention as to the substance of the agreement (emphasis in original)." In *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* (1968), 1 D.L.R. (3d) 513 (B.C.C.A.), the Court of Appeal explained the test for upholding contractual rights in para. 12:
- [E]very effort should be made by a Court to find a meaning, looking at substance and not mere form, and that difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted... [I]f the real intentions of the parties can be collected from the language within the four corners of the instrument, the Court must give effect to such intentions by supplying anything necessarily to be inferred and rejecting whatever is repugnant to such real intentions so ascertained.
- [54] In *Pacific Hunter Resources Inc. v. Moss Management Inc.*, 2008 BCSC 960, the court confirmed a two stage analysis for whether there was a binding contract. First, the court examined the document to determine whether the document suggested the intention of the parties was to create a legally binding agreement. Second, the court considered whether the conduct of the parties was consistent with a contract having been concluded.
- [55] S.M. Waddams, in *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010) at p. 45, explains that the parties' reasonable reliance on the contract is a relevant factor for the courts in enforcing agreements with uncertain terms. The actions of the parties in relation to the agreement are relevant.
- [56] Considering the above law in the context of this Agreement and the actions of the parties, I do not find it to constitute a binding contract. Although the parties appear to have considered themselves bound by the Agreement, at least in its early stages, the Agreement does not contain terms as to the purchase price of the property. There is no agreed to apportionment of the professed purchase price of \$1.4 million as between the business and the property, although the Agreement clearly contemplates such an apportionment. It is obvious that without further refinement as to the value of the business and its assets and completion of the business agreement the purchase price of the property remained

undetermined. Therefore, there is complete uncertainty as to the price of the property, in relation to which the Deposit was paid. Even when the Deposit was paid and other subject clauses removed by the parties (disregarding the ambiguity that arises regarding the disputed term in the fourth addendum), the terms of the second addendum remained in effect, and they include the following with regards to the business agreement:

The purchase will require the negotiation and entering into a formal purchase and sale agreement that appears appropriate to your lawyers and ours.

[57] In addition, in his letter of June 7, 2007 to Mr. Schwarz, Mr. Kostiuk writes:

The Purchase Agreement addresses a number of matters that need to be agreed upon and dealt with before completion. For example, the parties still have to agree upon the allocation of the purchase price. I understand that Carol Lee specified the appraised value of the real property as the allocation for that portion of the assets being sold and that you or your clients changed that number.

[58] The price of the real property was apparently to be whatever portion of the \$1.4 million not attributed to the purchase of business. As the latter was never agreed to between the parties, the fundamental matter of price for the property was left undecided and hence is uncertain. I fail to see how an agreement such as this could be binding at law absent certainty as to the purchase price of the property.

[59] Therefore, in the present case I do not find that the parties entered into a binding contract, but rather an agreement to agree upon the completion of "a formal purchase and sale agreement" pertaining to the business.

[60] In contracts for purchase and sale, there is sometimes ambiguity as to whether the parties intended to create a binding contract or simply to create a framework for future negotiations. An agreement to negotiate is not generally enforceable under contract law. In *Courtney and Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd.*, [1975] 1 All E.R. 716, Lord Denning concluded:

If the law does not recognise a contract to enter a contract (when there is a fundamental term yet to be agreed) it seems to me that it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through; or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to law.

...

I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation there is no contract.

[61] The present Agreement represents a poorly articulated framework to negotiate the sale of the property contingent upon the successful completion of a contract for purchase and sale of the business that never occurred. It does not constitute a valid contract.

[62] I do note that in British Columbia, the courts have tended toward enforcing agreements despite uncertainties. As long as there is a meeting of the minds as to the essential terms of the agreement, the contract will be enforceable. The courts will essentially imply a term in the agreement that remaining matters that have not yet been settled will be negotiated in good faith: *Empress Towers Ltd. v. Bank of Nova Scotia* (1990), 73 D.L.R. (4th) 400, 50 B.C.L.R. (2d) 126 (B.C.C.A.), leave to appeal to Supreme Court of Canada refused, (1991), 79 D.L.R. (4th) vii (S.C.C.).

[63] However, there must be a clear standard against which such negotiations may be measured, as is articulated by the learned Myers J. in *Neumann Ventures v. Smith*, 2007 BCSC 1664:

53 Where an agreement contemplates the negotiation of a subsequent agreement, it will not be enforceable except to the extent of requiring the parties to attempt to negotiate that further agreement in good faith. However, even that obligation will not be imposed where no objective criteria are set out in the initial agreement against which the negotiations can be judged. Thus where a lease contains a renewal clause which contemplates that the parties will agree on market rent, the courts will construe the lease as obliging the parties to negotiate in good faith and attempt to come to an agreement on market rent. That is because market rent is something which can be ascertained by the court. See *Empress Towers Ltd. v. Bank of Nova Scotia* [Cites omitted].

54 Where, however, no such objective criteria exists, the agreement will be void for uncertainty. See *Mannpar Enterprises Ltd. v. Canada* (1999), 173 D.L.R.(4th) 243, 67 B.C.R. (3d) 64 (B.C.C.A.).

[64] In the present case it is not appropriate to imply a term into the Agreement that the parties were to negotiate the subsequent business agreement in good faith because no objective criteria exist with regards to the price of the property in relation to the price of the business. There is no reliable basis upon which this Court may conclude what the value of the property was to be absent an agreement as to the sale of the business.

[65] I also note that neither party seeks to enforce the Agreement: the plaintiffs now only seek to keep the deposit of \$20,000 paid by the defendant; and the defendant seeks the return of the deposit and damages in relation to costs associated with the failed real estate transaction and due diligence regarding the purchase of the business.

[66] In any event, with regards to the defendant's submission that the plaintiffs failed to negotiate in good faith, I note that the standard of good faith negotiation established in *Empress Towers* is equated with "best efforts" diligence. The term "best efforts" is discussed in *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*, (1994) 89 B.C.L.R. (2d) 356 (S.C.) at para. 71. It is a higher standard than a reasonable effort and includes taking all reasonable steps to achieve the objective, carrying the process to its logical conclusion and

leaving no stone unturned. It is not boundless and must be approached in light of the particular contract at issue.

- [67] The evidence in this case falls short of establishing that the plaintiffs did not make a genuine effort to negotiate an agreement as to the business, which in turn would have resulted in a binding contract regarding the property. It appears on the material filed that the defendant sought a great deal of information about the business and the plaintiffs went to considerable lengths to provide that information. Certain subject clauses with regards to information were removed at the time the defendant paid the Deposit. The plaintiffs signed the property transfer documents, albeit for a price other than as presented by the defendant. They signed the assignment agreements with some amendments. They were apparently awaiting the business agreement. They were not willing to grant an extension upon which the defendant appeared to rely. However, that does not establish they failed in the preceding time period to negotiate in good faith.
- [68] Submissions on behalf of the defendant also refer to a duty upon the plaintiffs to negotiate in good faith. Insofar as this is a reference to a duty of care to negotiate in good faith I note that in *Martel Building Ltd. v. Canada*, 2000 SCC 60, at paras. 72-73, the Supreme Court of Canada determined as a general proposition that no duty of care arises when conducting negotiations and stated that a set of circumstances in which such a duty may arise has not yet arisen. The Court also referred to the fact that while the existence of a duty to bargain in good faith had been alleged in the courts below, the issue of whether or not negotiations are governed by a duty of good faith was a question for another time.
- [69] Further, I note that in *Kosaka v. Chan*, 2008 BCSC 1231, a judge of this Court considered the duty to negotiate in good faith in the context of a failed contract negotiation between the manager and the owner of a greenhouse. Despite negotiations suggesting shared equity, the owner eventually sold the greenhouse and terminated the management agreement with the plaintiff. The initial stages of negotiation never amounted to a contract. The manager brought an action for breach of duty to negotiate in good faith. The action was dismissed. Gropper J. stated:
- [40] Mr. Kosaka considered that the defendants did not put forward any reasonable proposal. However, the court is not in the position to assess the reasonableness of each proposal made in negotiations. Even if they were unreasonable to Mr. Kosaka, that does not necessarily mean that the defendants were not negotiating in good faith. Hard bargaining does not denote a lack of good faith. It would be impossible for a court to supervise negotiations in normal commercial transactions; this is the problem which the court would confront if a duty to negotiate in good faith was implied.
- [70] After reviewing the relevant authorities, Gropper J. concluded:

- [43] There is no duty at common law to negotiate in good faith. While a special relationship may imply such in duty in certain circumstances, those circumstance do not exist here. Mr. Kosaka's claim that the defendants did not negotiate in good faith is dismissed.
- [71] This is not a case where the court should impose a duty to negotiate absent a binding contract. The duty to negotiate in good faith prior to a contract being established has not been readily accepted in law.
- [72] Finally, with regards to the plaintiffs' claim that they are entitled to the Deposit. I note that since this matter was argued, the British Columbia Court of Appeal clarified the law on deposits in contracts of purchase and sale in the context of real estate transactions. The Agreement in this case pertains to a real estate transaction. In *Tang v. Zhang*, 2013 BCCA 52 [Tang], Newbury J.A. for a five person panel, at para. 30, summarized the law:
1. On a general level, the question of whether a deposit or other payment made to a seller in advance of the completion of a purchase is forfeited to the seller upon the buyer's repudiation of the contract, is a matter of contractual intention;
 2. Where the parties use the word "deposit" to describe such a payment, that word should in the absence of a contrary provision be given its normal meaning in law;
 3. A true deposit is an ancient invention of the law designed to motivate contracting parties to carry through with their bargains. Consistent with its purpose, a deposit is generally forfeited by a buyer who repudiates the contract, and is not dependant on proof of damages by the other party. If the contract is performed, the deposit is applied to the purchase price;
 4. The deposit constitutes an exception to the usual rule that a sum subject to forfeiture on the breach of a contract is an unlawful penalty unless it represents a genuine pre-estimate of damages. However, where the deposit is of such an amount that the seller's retention of it would be penal or unconscionable, the court may relieve against forfeiture, as codified by the Law and Equity Act;
 5. A contractual term that a deposit will be forfeited "on account of damages" on the buyer's failure to complete does not alter the nature of a deposit, but may be construed to mean that if damages are proven, the deposit will be applied against ("on account of") them. If no damages are shown, the deposit is nevertheless forfeitable, subject always to the expression of a contrary intention.
- [73] Had I found a binding contract and the defendant (purchaser) had failed to complete, the plaintiffs (sellers) would have been entitled to keep the Deposit: *Tang; Liu v. Coal Harbour Properties Partnership*, 2006 BCCA 385. However, in the present case, absent a binding contract, I find that the plaintiffs are not entitled to keep the Deposit. For them to do so would amount to unjust enrichment.

[74] The Deposit is to be returned to the defendant with accrued interest. It also flows, absent a binding contract, that the defendant is not entitled to its claim for damages, either for costs incurred in doing its due diligence totalling \$24,492.95 or the \$25,000 claimed as "soft costs" for time spent by representatives of the defendant in pursuing this deal.

Conclusion and Costs

[75] The plaintiffs are to return the Deposit of \$20,000 to the defendant with accrued interest. The defendant's claim for damages is dismissed. As the defendant is the successful party, albeit modestly successful, I order that the defendant is entitled to costs at Scale B.

"The Honourable Madam Justice E.A. Arnold-Bailey"

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