SUPREME COURT OF NOVA SCOTIA

Citation: *Community Link Medical Clinic v. Figueroa*, 2015 NSSC 278

Date: 20151007
Docket: Hfx No. 333253
Registry: Halifax

Between:

Perkins Business Management Ltd., carrying on business as Community Link Medical Clinic

Plaintiff

v.

Mayelin Figueroa and Dr. Mayelin Figueroa Perez Limited

Defendants

Decision

Judge:	The Honourable Justice Gerald. R. P. Moir
Heard:	February 2, 3, 4, 5, 9, and 10, 2015, in Halifax, Nova Scotia
Final Written Submissions:	March 6, 2015
Counsel:	Matthew J. M. Gibbon, for the plaintiff Brian P. Casey, Q.C. and Geoff Franklin, for the defendants

Moir J.:

Introduction

[1] The parties had a very brief business relationship under an impossibly long-term contract. Operations started on January 4, 2010. The plaintiff terminated part of the contract on February 5, 2010. The individual defendant terminated the other part on March 5, 2010. The term was an unlikely ninety years.

[2] Perkins was to supply premises, make renovations for a medical clinic, and provide equipment and supplies. Dr. Figueroa was to practice family medicine in the clinic with other physicians Perkins would solicit and hire. Her company would manage the clinic. Dr. Figueroa was to pay 20% of her fees to Perkins. Perkins was to pay her company 40% of the net profit generated by clinic operations.

[3] Perkins claims that the management company breached promises made by it under the contract. Perkins terminated the management company's part of the agreement. Dr. Figueroa moved to another clinic. Perkins sued for losses that result from the move.

[4] There are several inconsistent signed contracts. First, I will make findings about which applied at the time of Dr. Figueroa's performance to the termination. I will then discuss the background facts that led to the contracts. I will then interpret substantial provisions of the contract. I will then record my findings on performance, termination of the manager, and termination or abandonment by Dr. Figueroa of the rest of the contract.

[5] Having recorded the findings of fact, I will turn to the issues, which are:

1) Whether Dr. Figueroa is personally liable on the applicable contract?

2) Whether the abandonment by Dr. Figueroa was a breach?

3) If the abandonment by Dr. Figueroa was a breach, what does she owe Perkins for damages?

Applicable Contract

[6] Unhelpfully and inadvisably, the parties signed three differently worded contracts dealing with the same subject, about the same time, and as if each were the original. Inadvisably, Dr. Figueroa and her company did not retain a lawyer. They signed documents initially prepared by Perkins' lawyer and altered on the

three occasions by Perkins to respond to Dr. Figueroa's demands and those of Perkins' lender.

[7] Each of the executed documents is dated "the 24th day of September, 2009". I am satisfied that the first one was signed then. Based on the records of the lender, I find that the second contract, which included both clarifications and substantial alterations, was signed about October 26, 2009. The third was signed about December 3, 2009. Again, clarifications were provided, but there were also alterations to substantial terms.

[8] I find as a fact that the agreement in operation when Dr. Figueroa opened her practice in January 2010 was the one dated September 29, 2009, but signed in December. It is in tab 7 of exhibit one, and the lender's faxed copy is exhibit five.

[9] There is a question about whether Dr. Figueroa signed the third iteration personally. In my assessment, this is entirely a question of fact.

[10] The first and second executed agreements have eight pages. The third has only seven. The result is a contract that ends with the following execution clause:

> IN WITNESS WHEREOF the parties hereto have affixed their hands and seals as of the 29th day of September, 2009.
>
> PERKINS MANAGEMENT LTD.

Carrying on Business as COMMUNITY
LINK MEDICAL CLINIC

[sgd. Gerald Jackson] Per: [sgd. Malcolm Perkins]
WITNESS

[sgd. Gerald Jackson] [sgd. Mayelin Figueroa]
WITNESS Dr. Mayelin Figueroa

DR MAYELIN FIGUEROA PEREZ LIMITED

So, there is no signature under "DR. MAYELIN FIGUEROA PEREZ LIMITED".

[11] The alterations to each of the three iterations were homemade. They were drafted without the assistance of lawyers. (Note the absence of a reference to the earlier contracts and the use of a false date.) The executions were performed without the assistance of lawyers. (Note the absence of seals despite what the execution clause calls for.)

[12] The first iteration has the eighth page, and the execution clause reads, on p. 7 continuing on p. 8:

> IN WITNESS WHEREOF the parties hereto have affixed their hands and seals as of the 29th day of September, 2009.
>
> PERKINS MANAGEMENT LTD.
> Carrying on Business as COMMUNITY
> LINK MEDICAL CLINIC
>
> [sgd. Noelvis Rochela Morffi] Per: [sgd. Malcolm Perkins]
> WITNESS

[sgd. Noelvis Rochela Morffi]	[sgd. Mayelin Figueroa]
WITNESS	Dr. Mayelin Figueroa
	DR MAYELIN FIGUEROA PEREZ LIMITED
[sgd. Noelvis Rochela Morffi]	Per: [sgd. Mayelin Figueroa]
WITNESS	Dr. Mayelin Figueroa

[13] There are drafts of the third iteration in evidence. They have an eighth page with only this on it:

_____	Per: _____
WITNESS	Dr. Mayelin Figueroa.

Thus, the execution clause in the draft third iteration was the same as in the first and second.

[14] Either someone intentionally discarded the eighth page at the time the third contract was executed or it went missing.

[15] The third iteration of the contract has Dr. Figueroa's signature, and the history of the execution clauses shows that the signature was set in the place for her to bind herself personally. Also, she signed after "Per:" when signing for her company on the first and second iterations. Her signature on the third iteration does not follow "Per:".

[16] The substantive text of the contract calls for binding effect on Dr. Figueroa personally and separate binding effect on her company.

[17] Under cross-examination, Dr. Figueroa admitted that new iterations incorporated changes (she calls them "corrections") she wanted in the first contract, which she had clearly signed for herself and her corporation, and in the second iteration, also so signed. Some of these improved her rights, not those of her company. For example, the third iteration dropped a minimum payment she was personally obliged to make under clause 1.04 and a restriction on her personal use of a telephone under clause 7.11.

[18] I find as a fact that Dr. Figueroa signed the third iteration to bind herself personally. It is not argued that her signature fails to bind her corporation as well. (Perkins acted to its detriment in reliance on all three iterations of the contract, but there is no need to discuss estoppel.)

Background to Contract

[19] Malcolm Perkins and Helen Perkins are husband and wife. They developed a successful medical supplies business, with a retail outlet at Woodlawn Mall in Dartmouth. It started in 1999, but the Perkins' always had plans to expand into a pharmacy and a medical clinic. They took steps ten years later, in 2009.

[20] A second floor doctors' office at the mall became available when the physicians moved to new premises nearby. There had been a pharmacy downstairs, but it too moved to new premises. Perkins Business Management Ltd. was incorporated. It leased the former doctors' office in October, 2009. The pharmacy opened a year later.

[21] Mr. Perkins took primary responsibility for developing the medical clinic and pharmacy. Ms. Perkins concentrated on the medical supplies business.

[22] Dr. Mayelin Figueroa Perez and Mr. Noelvis Rochela Morffi are wife and husband. They came from Cuba to Canada fifteen years ago. She is a physician, and he has a background in telecommunications and administration.

[23] Dr. Figueroa studied medicine in Cuba and became qualified as a physician there. She has a physician-sponsor under the terms of her immigration to Canada. The sponsor must approve her choices of work places. She started in Nova Scotia at Twin Oaks Clinic in Musquodoboit Harbour, then moved to Family Focus in Cole Harbour.

[24] Mr. Perkins' first task was to solicit physicians for the clinic. One step was to make inquiries among his medical contacts about what physicians might be interested in moving to a new clinic. A contact suggested Dr. Figueroa.

[25] At the end of a work day in July of 2009, Dr. Figueroa entered the public area of the mall to go home. Mr. Rochela Morffi and their older daughter were there to join up with her. However, Mr. Perkins introduced himself. They spoke for about half an hour.

[26] Dr. Figueroa had a large practice. Mr. Perkins explained his plans for a clinic and a pharmacy at Woodlawn Mall. He suggested a charge of 20% of the physician's billings, which compared favourably with what Family Focus charged her.

[27] Dr. Figueroa, her husband, her daughter, Mr. Perkins, and Ms. Perkins met at the Perkins' home. There was discussion about the 20% charge. Also, Mr. Perkins suggested she might take an equity position in the operating business. Mr. Perkins felt they had hashed out an agreement. He went to his lawyer.

[28] Ms. Lena Diab prepared a draft, which Mr. Perkins gave to Dr. Figueroa. He says he told her to take it to her lawyer. Dr. Figueroa did not retain a lawyer. From time to time, Mr. or Ms. Perkins made changes to the draft without legal advice.

[29] An agreement was signed by Perkins Business Management, Dr. Figueroa, and her company on September 29, 2009. Dr. Figueroa says it contained terms

with which she disagreed. She signed because Mr. Perkins told her she had been taking too long, he needed a signed agreement for financing, and they could discuss further changes later.

[30] The draft left a blank for the term of the agreement. Inadvisably, Dr. Figueroa, who was in her late thirties at the time, agreed to ninety years. Mr. Perkins agreed because he thought it good for him or his company, although performance would be impossible because Dr. Figueroa could not practice that long and because Mr. Perkins was about to secure a lease for the premises with a ten year term.

[31] Although she contracted for these things, Dr. Figueroa disagreed with:

- minimum payments to be made by her if the 20% was less than $800 a month, clause 1.04
- a $100 transfer fee to be paid to Perkins by Dr. Figueroa on her transferring a patient file, in clause 2.01(g)
- a requirement that "the Doctor will not have a separate telephone number of her own, nor will private lines for the Doctor be authorized or permitted", clause 7.11.

These were amended by the October iteration of the contract.

The Contract and Relevant Terms

[32] *Spirit of the Contract*. In essence, the contract calls for three concurrent obligations. Perkins is to establish "Community Link Medical Clinic", by providing premises, leasehold improvements, furniture, medical equipment, and supplies, Dr. Figueroa is to practice there and pay 20% of her billings to Perkins, and her company is to manage the clinic in exchange for 40% of the net profits.

[33] Note that Dr. Figueroa's company was to manage the clinic, not just her practice. In the agreement, various clauses refer to "the facility", which is defined in the first recital to mean "Community Link Medical Clinic". See clause 1.05 on 40% of net profit "from the facility" and clauses 3.01(a), (e), and (f) on management responsibilities.

[34] *Parties*. I am referring to the December iteration, the one in effect when the clinic opened on January 4, 2010. The parties are said to be Perkins Business Management Ltd., Mayelin Figueroa, and Dr. Mayelin Figueroa Perez Limited. Perkins is referred to as "of the one part", and Dr. Figueroa and her company as "of the second part." Perkins is described as "Carrying on business as Community Link Medical Clinic".

[35] Despite describing Dr. Figueroa and her company as "of the second part", the agreement is tripartite. That is to say, Perkins' promises are made to both Dr. Figueroa and her company. And, the company's promises are to both Perkins and Dr. Figueroa.

[36] The independent status of the three parties is reiterated in clause 7.01 despite Dr. Figueroa's ownership of the manager:

> All parties acknowledge and agree that each is independent and that no party shall be agent, representative, partner, master or servant of any other party for any purpose.

[37] *Perkins' Promises*. The terms containing Perkins' significant promises are in clauses 4.01(a), (b), and (c):

> (a) To furnish the Doctor in the performance of her services under this Agreement with such medical supplies, medical instruments and medical equipment of the Manager as the Manager, acting reasonably, deems appropriate for the operation of a general practice. …;
>
> (b) To supply the Doctor with the services of a receptionist for the Facility during the regular operating hours as set by Perkins from time to time which services shall be shared with other doctors in the Facility and whose salary shall be paid for by Perkins;
>
> (c) To supply the Doctor with the administrative services provided at the Facility;

[38] *Term and Termination*. Despite purporting to commence on "the 29th day of September, 2009", the contract could not commence until Perkins leased space,

renovated it, and obtained medical equipment and supplies. Indeed, the parties did not expect commencement until after Dr. Figueroa took maternity leave. Her second child was born in early October.

[39] There is some dispute about whether the opening of Community Link was delayed. The parties contracted for an impossible commencement date and provided no deadline for opening. In those circumstances, complaints about delay are insignificant.

[40] Clause 1.03 provides for length of the term. It reads:

> Subject to the terms and conditions set forth in this Agreement, the term of this Agreement shall be for 90 years commencing on the 29th day of September, 2009 (hereinafter called the "Commencement Date") and terminating on the 29th day of September, 2099 (hereinafter called "Termination Date").
>
> All parties confirm that there shall be no further renewals thereafter unless otherwise agreed to between the parties.

When this clause had blanks in it for the term of years and the commencement and termination dates, it could have made sense and so could have the provision about renewals. The parties filled in the blanks without legal assistance and created something absurd.

[41] The absurd ninety year term could be terminated sooner under Clause 5 – Termination. Clauses 5.01 and 5.02 provide for termination of the entire contract

on death or other cessation of practice. Clause 5.03 provides for termination of the manager for cause. It reads:

> The parties agree that Perkins may discontinue to use the services of the manager without notice for "cause" which shall include but not [sic] limited to incompetence, violations of instructions or rules, breach of trust, theft or breach of any term of this agreement.

[42] Clause 5.04(b) appears to cover Dr. Figueroa's liability on "the termination or non-renewal of this agreement". It reads:

> The Doctor agrees to pay to Perkins all monies owing to Perkins up to the date of termination. In that regard, the Doctor agrees to use her best efforts to collect any outstanding receivables and to remit the appropriate amount, in accordance with the formula set forth in Article 1.03 of this Agreement.

[43] *Termination of Manager for Cause.* Under Clause 5.03, cause for termination of the manager's part of the contract is defined to include "incompetence, violations of instructions or rules, breach of trust, theft or breach of any term of this agreement." We need to take a close look at the management terms.

[44] The parties clause defines Dr. Figueroa's company as the manager. The terms about the manager begin with the fourth recital, "… the Manager agrees that it will ensure that the clinic is staffed by fully licensed physicians at all times and it has personnel with financial and accounting experience."

[45] The manager's obligations are more specifically spelled out in clause 1.02:

> The manager agrees to manage the medical clinic including performing all billings on behalf of all doctors at the facility and all accounting and record keeping services including scheduling and dealing with all staff related issues, controlling the flow of patients and all other services as required by Perkins upon such other terms and conditions as may be provided to the manager.

[46] Clause 3 – Manager's Covenants contains three clauses on management obligations. They are 3.01(a), (e), and (f), which read:

> (a) The Manager agrees to use reasonable efforts to ensure the Facility staff and employees follow said methods and policies prescribed by Perkins from time to time.
>
> (e) To consult with Perkins in connection with matters relating to the Facility and use every reasonable effort to co-ordinate and co-operate with Perkins to ensure efficiency of the Facility.
>
> (f) The Manager shall keep regular and accurate statements of all transactions for or on account of the facility and whenever required to provide a report in detail embracing every item of business done by or through it, and of all moneys collected or received by or through the Manager.

[47] What does subclause 3.01(a) mean by "said methods and policies prescribed by Perkins from time to time"? The word "said" suggests a cross-reference to something already provided in the contract. It can only be a call for clause 2.01(d), in which the physician promises:

> To perform medical services from the Facility in accordance with the general administrative policies and methods established from time to time by Perkins with respect to the operation of the Facility, including, but without limiting the generality of the foregoing, all methods and policies established by Perkins with respect to the Facility staff, hours of operation.

There is no other reference to "methods" or "policies". So, the promise in 3.01(a) concerns performance of medical services in accordance with methods and policies established by Perkins.

[48] *Patient Records*. The agreement seems to assume that Perkins could possess and view patient records. That subject had a role to play when the business relationship broke down.

[49] In clause 2.01(h), Dr. Figueroa agrees "any information relating to the personal or financial affairs of Perkins, the Facility, or any patients attending the Facility … are confidential and at all times shall be the property of Perkins." She also agrees not to divulge "such information to others". Her company, as manager, makes exactly the same agreements in clause 3.01.

[50] I do not think that these promises extend "information relating to the personal or financial affairs of … patients" to medical records. If enforceable at all, these promises have to be restricted to personal information about patients used in the administration of the clinic, such as contact information. This narrow interpretation avoids several absurdities a broader and more literal interpretation would lead to:

- a patient's right to the medical information is curtailed although the patient is not a party
- the patient's right to confidentiality is infringed without consent, or even knowledge
- the physician's, and even the patient's, need to consult other physicians, such as specialists, is curtailed.

Performance

[51] By lease dated October 26, 2009, Perkins took a ten year term in fifteen hundred square feet of retail space in which to establish the pharmacy and 2,677 square feet upstairs for the clinic. As intended, and consistent with the Figueroa contract, the space upstairs was large enough for several full-time physicians.

[52] Renovations for the clinic began at that time. Leasehold improvements were mostly complete by the end of the year. Furniture and equipment for at least one physician were mostly in place.

[53] For her part, Dr. Figueroa notified Family Focus that she would not be returning after maternity leave. The baby was born on October 3, 2009. Dr. Figueroa administered flu shots, and she and Mr. Perkins explored her becoming

the regular physician to a chain of residences for the elderly. Otherwise, she did not work until the beginning of January, 2010.

[54] The plan was for Mr. Rochela Morffi to primarily care for the new child, and secondarily to help out with the clinic. He was not an officer or employee of his wife's company, but he would perform some of its duties. Dr. Figueroa brought her large practice to the clinic. Both sides solicited other physicians, but no prospects for full-time practices appeared.

[55] Dr. Figueroa arranged for her MSI billings to be paid to a Community Link account. Ms. Perkins testified that under that arrangement "we would take our fees" of 20% and remit the balance.

[56] It was Perkins' obligation under the contract to provide a receptionist and administrative services. Dr. Figueroa asked Nicola Ritcey to come with her to Community Link. Ms. Ritcey had worked for several years at Family Focus. She knew Dr. Figueroa well, and Community Link would be closer to home. She considered she had been hired by Dr. Figueroa. Formally, she was hired by Community Link, but Mr. Rochela Morffi was to maintain the payroll records.

[57] Ms. Ritcey had been a medical administrator at Family Focus and other clinics. Her roles at Community Link included scheduling, taking telephone calls

from patients, and filing. She started at Community Link on December 27, 2009, a few days before Dr. Figueroa arrived.

[58] Ms. Shona Hartery was hired to work part-time, mainly to fill in for Ms. Ritcey when she was unavailable. She was hired by Dr. Figueroa and Mr. Rochela Morffi and does not have a clear understanding of who her employer might have been. She gave evidence about perceived deficiencies in the clinic and about the events of the day that led to Perkins terminating the contract with the manager.

[59] Ms. Ritcey found the work overwhelming, especially starting a new clinic and coping with the poor state of filing. Dr. Figueroa had a large practice and her patient records were in boxes. Part of the problem was Perkins failed to provide filing cabinets in the beginning. However, files remained in boxes after shelves were installed for them. Dr. Figueroa's practice appears to have been under-staffed. Eventually, Perkins looked to hire a file clerk, but the business relationship had soured by then.

[60] Ms. Ritcey, Ms. Hartery, Dr. Figueroa, and Mr. Rochela Morffi complain that Perkins failed to provide some necessary equipment, furnishings, supplies, and services.

[61] Delay in installing filing shelves is one part of those complaints. Also, Ms. Hartery says that once the cabinets were installed, the patient files were open to anyone having access to the clinic. They could not be placed under lock and key.

[62] Problems with telephones was another complaint. If the main line was used, an incoming call went directly to recording. Dr. Figueroa wanted a sequenced system like the one at Family Focus. However, the cost of that system is appropriate to a clinic with several practices. Also, Ms. Hartery testified that a backup line solved the problem by early February, 2010.

[63] There is a complaint about the confidentiality of a consultation room near reception. An open space allowed for parts of conversations to be heard beyond the room. However, the clinic was designed for several practices and another room could have been used pending repair.

[64] A long wall in an examination room faced the exterior and was fully glazed. Every panel had a blind, except one. The complaint was that the panel without a blind compromised patient privacy. However, the windows are on the second floor and they are tinted so one cannot see inside from the outside. The blinds allow for control of daylight entering the room.

[65] Another complaint is that the clinic was not kept clean. However, it appears that Mr. Rochela Morffi took responsibility for cleaning, and Perkins was not approached to improve that service.

[66] It is also said that the exterior threshold at the downstairs entry for the clinic was "almost" not accessible for people using a wheelchair. Photographs show that concrete in the threshold had cracked and crumbled in places. Mr. Perkins acknowledged that this was brought to his attention. The concrete could not be repaired until warmer weather arrived.

[67] On January 18, 2010, Ms. Ritcey prepared a list of the complaints. I have described the most serious ones. Perkins did not evade these complaints. Either it was not told, or it responded appropriately.

[68] The preparation of the list of complaints is indicative of a general dissatisfaction that had set in by that time. Two days later, Dr. Figueroa arranged for her MSI payments to be deposited to her own business account.

[69] The evidence does not satisfactorily explain the breakdown of the business relationship. Mr. Perkins suggests he was being set up. I find that Dr. Figueroa and her company acted in good faith. There were, however, some frictions and disappointments that that help explain the souring and eventual terminations.

[70] Dr. Figueroa taking a share of the ownership of physical property associated with the clinic had been a topic of discussion between the parties since October, 2009. It is a subject Mr. Rochela Morffi alluded to several times. Exactly what was said and by whom is not proven. Differences in first languages and perceptions, coupled with the effects upon memory of personal interest in a law suit, leave no one with complete objectivity on what others said or meant.

[71] I must say, I find the references to ownership confusing. Without detracting from the investment made by Perkins, the hard assets were merely a term of years under a commercial lease and the sorts of moveable property that quickly depreciate or disappear into leasehold improvements. There could not have been enough value to interest a thoughtful party.

[72] In any event, Dr. Figueroa and Mr. Rochela Morffi had some resentment about ownership of the physical assets.

[73] There was also friction between Mr. Perkins and Mr. Rochela Morffi. I doubt this had a realistic foundation. Having heard these two under direct and cross-examination, as well as the other witnesses, I would ascribe the friction to different personalities not mixing well.

[74] With all of the talk in the beginning about prospects for development of a vibrant clinic with several practices and with Dr. Figueroa's company having rights to 40% of the profits, it must have been very disappointing to all that not even a second full-time practice was secured. So shortly after contracting, that disappointment had to strain the business relationship.

[75] No doubt, the complaints itemized on January 18, 2010 were also irritants that contributed to the souring of a business relationship. However, once explained in the ways summarized above, these irritants could not have been major causes on their own. Cumulatively, they would not have justified termination.

[76] So I make no finding of bad faith. It is just a fact that the good relationship quickly soured.

Perkins Terminates Manager's Contract

[77] On January 21, 2010, Dr. Figueroa arranged to have her MSI payments credited to her own business account instead of Community Link.

[78] Mr. Perkins claims that Dr. Figueroa did not tell him about the change. He says he was dumbfounded when he heard of it. He said, "Billing was supposed to be into the clinic." He found out about the change by calling the MSI

administrator. The call was made because no payment had been made into the clinic account.

[79] Dr. Figueroa says she informed Mr. Perkins of the change. Ms. Perkins says she became aware about the time the change was made. Her evidence made it clear that she did not want Dr. Figueroa having "the power of her controlling the money". She was of the mistaken belief that the problem would be solved once a second doctor joined the clinic. Then, MSI would insist on paying the clinic when physicians practiced together there.

[80] There are problems with the testimony and positions of Mr. and Ms. Perkins on this subject. We heard from Ms. Betty Foster of Blue Cross, which administers MSI payments on behalf of the government. The physician chooses the account into which payments are made. There is no requirement that physicians who practice together use a group account. Ms. Foster has a record of Mr. Perkins calling on January 28, 2010, but she does not discuss physicians' accounts with others.

[81] Further, the assertion that Dr. Figueroa was obligated to pass her MSI revenues on to Perkins is contrary to the written agreement. MSI is paid every

second week to the physician. Under the contract, Dr. Figueroa's obligation was to calculate 20% of all her revenue and pay that to Perkins monthly.

[82] I find that Perkins was informed of the change well before January 28 and Mr. Perkins called MSI to see what could be done to reverse it. It was not a coincidence that a week after the call Perkins terminated the rights of Dr. Mayelin Figueroa Perez Limited under the contract

[83] Ms. Ritcey, the receptionist, took a long planned vacation to Mexico at the end of January, 2010. When she returned in early February, she found the relationship between Dr. Figueroa and Ms. Perkins to be "toxic". And, Mr. Rochela Morffi and Mr. Perkins were not seen at the clinic.

[84] *Blow-up*. This occurred on Thursday, February 4, 2010. Mr. Perkins was there for the beginning and Ms. Perkins, the end. Ms. Hartery was present for all of it, Mr. Rochela Morffi was present for most of it. Dr. Figueroa attended to patients in her office when the blow-up occurred in reception, but came out to confront the commotion from time to time.

[85] Mr. Perkins' daughter was ill that day. He took her into the clinic in the afternoon.

[86] According to Mr. Perkins, Ms. Hartery and Mr. Rochela Morffi were both in the reception area. They behaved very oddly. The telephone was ringing but neither answered. Ms. Hartery stood silently in a corner facing the wall. Mr. Rochela Morffi was "playing with" his cell phone.

[87] Mr. Perkins took it upon himself to answer the line. A patient was calling. The patient wanted to know whether her test results were in. Mr. Perkins looked through recent faxes and told the patient the results were there. He offered to have someone call back to make an appointment.

[88] According to Mr. Perkins, Ms. Hartery said, "Doctor Figueroa, Doctor Figueroa, Malcolm is answering the phone." repeatedly as she went from standing in the corner to entering the consulting room. Mr. Perkins left to go to his car, where his son had been waiting. Mr. Rochela Morffi chased after him saying, "This is how it has to be, you being the kind of person you are."

[89] Mr. Perkins went back up to the clinic to deliver a paper with the name and number of the patient who had called. Again, he found Ms. Hartery in the corner, staring at the wall. Inexplicably, she said, "Don't yell at me."

[90] When asked on direct why he answered the telephone, Mr. Perkins said that he is the owner and he can answer the telephone. In cross-examination, he agreed

that he said to the others, "It is my clinic, I can answer the phone if I want." Mr. Perkins consulted his wife, and they agreed she would try to work things out. She is very diplomatic, and Mr. Perkins thought the dispute would be worked out.

[91] The others recall a very different encounter. Ms. Hartery, the least interested of the witnesses, said that she was at her reception desk when Mr. Perkins came in with his daughter. The problem with the telephones had been resolved by then, such that she was talking to a first caller, with a second on hold.

[92] According to Ms. Hartery, Mr. Perkins pressed the button for the second call and dealt with the patient. He went through faxes containing the results of ultrasound appointments, various test results, and reports from consulting specialists. Ms. Hartery ended her call and said, "You can't do that." After a few words, Mr. Perkins said, "It's my clinic." Ms. Hartery pointed out that the patients were Dr. Figueroa's, not his. The exchange became heated, including repeated references to "my clinic".

[93] According to Ms. Hartery, Mr. Rochela Morffi was not in the reception area when Mr. Perkins came in. He was working inside an office. Dr. Figueroa came out of the consulting room and Mr. Rochela Morffi came out of the office when they heard the commotion. They backed what Ms. Hartery was saying.

[94] According to Mr. Rochela Morffi, the blow-up occurred late in the day. He was in the clinic to pick up his wife and to clean. He saw Mr. Perkins, his son, and his daughter come in. He chatted briefly with them, then returned to an office.

[95] Mr. Rochela Morffi came out and backed Ms. Hartery when she challenged Mr. Perkins' answering the telephone. Mr. Perkins' response was, "Who told you that? Who told you that? This is my clinic. I can do what I want." The encounter escalated.

[96] Dr. Figueroa was in a consulting room. She heard loud voices and Ms. Hartery's call for her. She says she quickly became concerned with Mr. Perkins looking at patient records. Ms. Hartery was protecting her.

[97] Dr. Figueroa's practice did not lend itself to an environment in which the receptionist would stand in the corner and act silly or in which the man who had a role, second to child care, of helping out with the clinic would be seen "playing" with his cell phone. The likelihoods, and my assessment of the testimony on this subject, lead me to find that the scene was as Ms. Hartery described when Mr. Perkins came into the clinic.

[98] I find there was no silly behaviour on Ms. Hartery's part. Mr. Perkins gratuitously and needlessly accessed a call from a patient. I accept that he looked

only for the patient name and contact information when he looked through the confidential documents, but those subjects are part of the confidence.

[99] I find that Mr. Perkins told the other he had a right to information that was subject to physician/patient confidentiality. He could access the information by answering calls, or by looking at documents, whenever it pleased him. He never retracted those positions.

[100] Ms. Perkins says she came to the clinic later that afternoon to mediate the dispute that had arisen. She sat down in an office with Dr. Figueroa and Mr. Rochela Morffi. She told them she was there to work out the differences and move forward.

[101] However, the subject of the dispute changed from physician/patient confidence to ownership of the hard assets of the clinic and Dr. Figueroa's obligation to account for her fees, the 20%, and offsets for expenses outstanding or paid for by Dr. Figueroa.

[102] Ms. Perkins says that Mr. Rochela Morffi claimed that the hard assets in the clinic belonged to Dr. Figueroa, not Perkins Business Management. Although she said, "I am just here to mediate", Ms. Perkins rejected the position on ownership saying, "It is just ridiculous." (This is in the context of Mr. Perkins having just

asserted ownership of all aspects of the clinic including physician/patient confidences.)

[103] It was Ms. Perkins who brought up accounting. She said she had a call from the telephone company wanting payment and she needed to see the invoice. Mr. Rochela Morffi said she was not entitled to them. He would see that what needs to be paid is paid. Ms. Perkins told him that this is "once again, ridiculous."

[104] Then she demanded, "Where is all the paperwork?" Mr. Rochela Morffi and Dr. Figueroa assured her that the former is very organized and everything is properly recorded on spreadsheets. She asked for copies of these and the invoices. Mr. Rochela Morffi refused. He retorted that nothing belonged to Perkins. Again, she pointed out that his position was "ridiculous". He invited her to leave.

[105] Clearly, there was little diplomacy exercised by either side.

[106] Mr. Rochela Morffi was not an officer of Figueroa Perez Limited. The scope of his employment duties was not great. He was not on the payroll. His primary job was child care, and his involvement with the clinic involved part-time, unscheduled work to relieve stress on his wife by keeping accounts, doing some cleaning, and performing other tasks. No evidence suggests broader ostensible

authority. I find he was in no position, actually or apparently, to bind Figueroa Perez Limited on anything to do with the Perkins contract.

[107] Further, what he said on the day of the blow-up to Ms. Perkins has to be understood in the context of her husband's provocation, his overblown assertion of authority in the clinic.

[108] I find that Figueroa Perez Limited said nothing on that day inconsistent with its obligations under the contract. If Perkins wished to make a demand under the contract, establish a policy as permitted by the contract, or demand documents, it needed to address Dr. Figueroa. To its knowledge, she was the only person with concomitant authority in Figueroa Perez Limited.

[109] *Demand, Termination, Change of Locks*. No time was allowed for discussions between the only corporate official of Perkins and the only corporate official of Figueroa Perez Limited about Perkins' assertion of rights to confidential information or the subjects broached by Ms. Perkins with Mr. Rochela Morffi, ownership and accounting. The blow-up occurred late in the day on Thursday, February 4, 2010 and Perkins demanded a full accounting the next morning. Ms. Perkins confirmed it was delivered the next day after the blow-up.

[110] The demand was delivered on Friday, February 5, 2010. It is addressed to Dr. Mayelin Figueroa Perez Ltd. and is signed for Perkins by Malcolm Perkins. It reads:

> It is requested by Perkins Business Management Ltd. that you supply a detailed record of all transactions for account of this facility. Report is to include all monies collected & every item of business done by or through Community Link Medical Clinic. These records are to be provided to Perkins Business Management Ltd. by 1pm on Feb. 5, 2010. It is requested that Dr. Mayelin Figueroa-Perez Ltd. contact Helen Perkins at phone #489-8826 when documents are ready for pick up.

[111] Note that the demand is for production of a full accounting by one o'clock. Perkins knew that Dr. Figueroa had a very busy practice. On the morning of February 5, 2010, she was running behind. Someone delivered the demand personally to Dr. Figueroa between patients. It was in an envelope. She opened the envelope at lunch. She was surprised by what she read.

[112] Needless to say, the accounting was not prepared by one o'clock. (Despite what happened next, Figueroa Perez Limited did prepare an accounting at the end of February.) After four o'clock on February 5, 2010, Perkins changed the locks. Ms. Perkins assured Dr. Figueroa that she could get access to the clinic whenever she wanted, and systems were put in place that made that so. However, she never got her own key, and others could access records without her consent or control.

[113] Perkins also delivered a document titled "Termination of Manager". It was dated February 5, 2010. It was signed for Perkins by Malcolm Perkins. It reads:

> Re. Termination of Manager due to Dr. Mayelin Figueroa-Perez Ltd not following said methods and policies prescribed by Perkins Business Management Ltd.
>
> On this the 5th day of February 2010, Perkins Business Management acting on behalf of Community Link Medical Clinic at 114 Woodlawn Rd. Dart. NS, herby [sic] gives notice to Dr. Mayelin Figueroa-Perez Ltd. that the management services provided to Community Link Medical Clinic are to be terminated immediately. The terminated manager is not to remove any items including equipment, furnishings, books of account, document vouchers and or papers connected with the business or anything else that is in the premises of Community Link Medical Clinic.

[114] The ground for the termination is stated in it as being "not following said methods and policies". As discussed, the contractual requirements captured by that phrase concern the performance of medical services. In direct examination, Ms. Perkins sought to extend cause to

- failing to keep records
- failing to manage staff
- shutting off phone ringers
- failure to provide accounting
- MSI payments not made to Perkins

- failing to submit invoices.

Figueroa Terminates Her Contract with Perkins

[115] *Access and Confidentiality*. Late in January, 2010, Dr. Figueroa did what she should have done the previous September before she started signing contracts. She consulted a lawyer. Following that consultation, she supplied the MSI administrator with the form naming her own bank account instead of the clinic's.

[116] Then came the blow-up, the impossibly short fused demand for accounting, Perkins' termination of the management part of the agreement, and the change of locks. Dr. Figueroa and Mr. Rochela Morffi retained Mr. John Young, Q.C.

[117] Mr. Young wrote to Ms. Perkins immediately after the termination of his corporate client's part of the contract. The contents of that letter are not in evidence because it was marked without prejudice. Ms. Perkins called Mr. Young and advised that he would hear from a lawyer on behalf of Perkins Business Management. A week went by, but Mr. Young had not heard from any lawyer. He wrote again to Ms. Perkins, this time not without prejudice.

[118] Ms. Lena Diab wrote without prejudice to Mr. Young on February 12, 2010. Mr. Young replied on February 16, 2010 and did not mark his letter without

prejudice. He said he would review Ms. Diab's without prejudice comments with Dr. Figueroa. Then he wrote:

> In the interim, I am advised that my client has not been given a key to the premises and I would ask that you instruct your client to provide one as our client, being a physician, is required to have 24 hour a day access to her patient files.
>
> As well, our client is required by the College of Physicians and Surgeons to ensure the safety and confidentiality of the patient records and in this regard I would note that your clients are strictly prohibited from accessing these patient records without the express prior written consent of both the patient and the physician.
>
> Your client's assistance in ensuring that Dr. Figueroa can both have access to and maintain the confidentiality of these patient records is most appreciated.

[119] When Dr. Figueroa hired Ms. Ritcey and Ms. Hartery, she obtained confidentiality agreements from them. During February, Perkins took steps to hire a Frances Durland as a filing clerk without consulting Dr. Figueroa. Ms. Durland signed a confidentiality agreement prepared by Perkins. It contained terms very different from those of Ms. Ritcey and Ms. Hartery.

[120] Dr. Figueroa never got keys. Perkins provided her with access as assured, but the second part of Mr. Young's demand was never heeded. The patient records were in wood cabinets and not under lock and key. Thus, the person who had control of the premises had control of the records.

[121] Mr. Young wrote to Ms. Diab twice on February 25, 2010. He was alarmed at the confidentiality agreement Perkins had drafted for Ms. Durland. It said that

confidential information "is the exclusive property of the Employer". It defined employer as "Community Link Medical Clinic of A Div. of Perkins Business Management" and it defined confidential information to include "all patient records, files and … medical records".

[122] Perkins' assertion that it owned the medical records amplified the need for Dr. Figueroa to have control of the facility where the records were kept. So, Mr. Young wrote about the assertion and reiterated the demand for keys.

[123] On the subject of Perkins' assertion of ownership of the medical records, Mr. Young wrote to Ms. Diab:

> Perkins Business Management is not a professional corporation and it cannot be a professional corporation pursuant to the *Medical Professional Corporations Act*. The law in Nova Scotia and, indeed, Canada is well established that the patients' medical records are the property of the physician and no third party can have access of any kind to these records without the express written consent of the patient and the physician.

And on the subject of keys, he wrote in the separate letter:

> I met with Dr. Figueroa yesterday and she advises me that your client has yet to provide her with a key so that she can access her files when required on a twenty-four hour basis, seven days a week as she is required to do pursuant to her license to practice medicine in Nova Scotia.
>
> Failure of your client to permit our client to have such access to her files is a fundamental breach and we require that your client take immediate action to give Dr. Figueroa a key enabling her to have constant access to her files.

[124] Ms. Perkins maintains that she called Mr. Young in response to his February 16, 2010 letter to Ms. Diab and explained that Dr. Figueroa was not going to get keys but that Perkins assured her twenty-four hour access to the clinic. Otherwise, it does not appear that Perkins made any response to Mr. Young's letters. Particularly, the alarm about confidentiality and the allegation of fundamental breach went unanswered.

[125] *Figueroa Moves Out*. Soon after the termination of her company's management services, Dr. Figueroa decided to search for another clinic in which to practice. On Tuesday, February 9, 2010, she contacted her physician-sponsor and requested a consultation, which led to an introduction.

[126] Mr. Mohammed "Billy" Sheikh is the Senior Director for Institutional and Medical Care at Lawtons. The pharmacy chain has an interest in establishing pharmacies in locations that include physician clinics. Serving that interest in this end of the country is part of Mr. Sheikh's job.

[127] Mr. Sheikh received a call from Dr. Figueroa and they met shortly afterwards. At discovery, Mr. Sheikh suggested this happened in January, 2010. However, before trial he looked more closely at his records and saw that the meeting was held on Friday, February 12, 2010, one week after Perkins terminated

the management part of the contract. The telephone call was placed that day or shortly before.

[128] Mr. Sheikh was a credible witness. He was precise in his testimony. I accept his evidence given at trial. I find that the telephone call and the meeting shortly afterwards occurred in mid-February, not January. I also find that Dr. Figueroa's complaints and the other disappointments discussed earlier may have started her thinking about ending the relationship, but the blow-up, the termination, and unresponsiveness to her counsel led to her decision to move out.

[129] Dr. Figueroa wanted to stay in Dartmouth. Mr. Sheikh had several clinics to offer immediately. None appealed to Dr. Figueroa very much, but a new clinic Lawtons planned for Penhorn Mall seemed right. It would be ready in six months.

[130] Mr. Sheikh helped Dr. Figueroa find temporary space in a clinic on Tacoma Drive. She wrote to her physician-sponsor on March 2 and March 4, 2010, got permission, and moved out on March 5. She signed a lease with Lawtons in May and moved into the new clinic in August, 2010.

[131] *Losses*. In Dr. Figueroa's view, the physicians at Tacoma Drive did her a favour while she was there temporarily. She could use their space when other physicians did not need it. She only worked a fraction of the time and would have

worked full-time from March to August if she could have. Also, she paid 30% instead of the 20% at Community Link.

[132] Dr. Figueroa provided a calculation of 20% of her MSI income for the two months and proof of expenses covered by her or her company that were to be reimbursed by Perkins. I accept both. I find the amount due by her was $2,596.12. She claims set-off for $14,249.74, her reduced income while at Tacoma Drive.

[133] As for Perkins, the Woodlawn space never attracted another full-time physician. There are three physicians there now, and the pharmacy is in operation, but the physicians do not generate fees at the same levels as Dr. Figueroa does. In any case, the space was designed so that they could have joined without displacing Dr. Figueroa.

[134] Perkins calculates its loss at $5,850 a month, being 20% of what it says Dr. Figueroa would earn from MSI. Perkins limits its claim to a five year term in light of the impossible ninety years in the contract. It claims $70,000. However, this is gross and an allowance would have to be made for expenses of Perkins attributable to Dr. Figueroa's practice. It also claims $25,000 for profits lost from the pharmacy due to the absence of Dr. Figueroa's practice.

Personal Liability of Dr. Figueroa

[135] In the circumstances of this case, the question of personal liability is one of fact. I provided my resolution of the conflicting versions of the agreement under "Applicable Contract" at paras. 6 to 18. I made findings explaining the partial execution of the applicable contract. I found as a fact that Dr. Figueroa signed it personally.

Whether Figueroa Breached

[136] *Introduction*. I see the resolution of this issue as having three bases. Firstly, I questioned whether it was possible to terminate the services of Figueroa Perez Limited without terminating the liability of Dr. Figueroa. I am grateful to counsel for providing me with written submissions on that subject after trial. Second is the issue of whether Perkins had cause to terminate the management services. Third is whether Dr. Figueroa was justified in treating her part of the contract as at an end.

[137] *Did Figueroa's Obligations Continue or Terminate?* The termination of a multi-party contract against one party, and not others, may bring problems with it. Parties are an essential term: *Badesha v. Snowland Sporting Goods Ltd.*, 2015 BCSC 1229 at para. 121. So, one asks about the effect of the termination of one party on the liabilities under the contract of others.

[138] I have not been referred to, nor have I found, any authority that deals directly with the issue of liability of a remaining party after another party's rights under a multi-party contract are terminated. Perhaps this is because a multi-party contract will seldom provide one party a right of termination against one other without a mechanism for determining the rights of the remaining party.

[139] Mr. Casey helpfully drew an analogy between termination in a multi-party contract and assignment of a personal service contract, such as Dr. Figueroa's side of the present contract. Also, she had a personal interest in having her management company administering aspects of her practice.

[140] Mr. Gibbon helpfully referred me to the discussion at pp. 181 to 183 in G.H.L. Fridman, Q.C., *The Law of Contract in Canada*, 6th ed. (Toronto, Carswell, 2011). That discussion addresses joint, several, or joint and several liability under contracts for advancement and repayment of debts. However, the principles are not restricted to that field. The discussion ends on a general note, at p. 183:

> Thus, while the law recognizes that there may be a plurality of parties on one side or other of a contract it has had to provide special rules relating to the nature, scope, extent, and duration of the liabilities and rights of different parties.

[141] The "special rules" apply to both joint or several debts specifically and joint or several contracts generally. See *Baldwin v. Chalker* (1983), 43 Nfld. & P.E.I.R.

203 (N.S.C., T.D.) at para. 9, *Kary Investment Corp. v. Tremblay*, 2005 ABCA 273 at paras. 35 and 36, and the authorities referred to in those decisions. The special rules are about judgment against, or settlement with, one party extinguishing (joint) or not extinguishing (several) the liability of another. In my opinion, termination of one party's rights under a contract has to follow a similar course.

[142] The "special rules" do not provide a general principle, or even a cohesive doctrine, that guides the present question of continuing liability under a contract terminated against one of the parties but not another. For example, the discharge of a joint contractor, debtor, or tortfeasor by judgment against another of them is based on merger: *Singer v. J.H. Ashdown Hardware Co.*, [1953] 1 S.C.R. 252.

[143] To borrow from another context, the question that confronts us requires an answer that protects "the substance of the bargain or consideration involved": Justice Arbour in *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 at para. 33. Is it possible to sever the rights and obligations of the manager and leave Dr. Figueroa's rights and obligations in tact so as to preserve the substance of the bargain or does termination of the manager do violence to the substance of the bargain?

[144] Two points need to be made before we get to the substance of the question.

[145] First, this is an exercise in contractual interpretation. It does not turn on joint, several, or joint and several categories, except to the extent that the contract points to the effects of these. We are "giving meaning to the words in their context": Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed. (Markham, LexisNexis, 2012).

[146] Second, the fact that the contract gives Perkins the right to separately terminate the manager's part of the contract does not, in itself, tell us what effect the exercise of that right has on Dr. Figueroa's part of the contract. On that subject, the contract is silent.

[147] I have provided my survey of the contract under "The Contract and Relevant Terms" at paras. 32 to 50. I do not propose to repeat that here. Let us take a critical look at the provisions for termination, parties, and promises.

[148] The termination provisions include the absurd ninety year term, termination of all parties' rights on Dr. Figueroa's earlier leaving practice, and termination by Perkins of "the services of the manager" for breach of any term in the contract. So, the agreement contemplates termination of the manager's rights and obligations separate from those of Dr. Figueroa. However, that poses some serious problems for the rest of the contract.

[149] Except for the repetition of "of the second part", the terms about parties treat them as three separate entities contracting with each other, not just with one of the others. This appears again in the operative terms. Each of the three undertakes separate obligations and benefits separately from the promises made by the others.

[150] The promises cannot be reconciled with the proposition that one party remains bound after another is dismissed. I described the spirit of the contract. It is clearly three way. Two sides cannot stand without the third. So, too, the detailed promises.

[151] The manager promised to "ensure that the clinic … has personnel with financial and accounting experience". That promise directly benefits the physicians and benefits Perkins only indirectly. Both physicians and Perkins directly benefit from "performing all billings on behalf of all doctors", although the interests in this promise are not the same. The physician gets the billing done, and Perkins gets its 20%. The physicians benefit directly, and Perkins only through the physicians, by the promises for record keeping, accounting, staffing, and scheduling made by the manager.

[152] Some promises, such as to perform medical services in accordance with Perkins' policies and to cooperate with Perkins, are primarily for Perkins' benefit.

But, Dr. Figueroa is, and future doctors are to be, the primary beneficiaries of many of the promises in the three party contract.

[153] Termination by Perkins of the manager deprives Dr. Figueroa of important promises made to her by the manager. There may be some overlap with Perkins' obligation under clause 4.01(c), but the manager's promises to Dr. Figueroa are independent and any overlap is partial.

[154] Termination of the manager has a striking impact on Perkins' own promises to Dr. Figueroa. I am referring to clause 4.01(a). It is the manager, not Dr. Figueroa and not Perkins, who determines the supplies and equipment Perkins is required to provide.

[155] It is impossible to sever the manager from the contract without doing violence to Dr. Figueroa's interests under the contract. That is to say, the contract is substantially changed if the manager's services are terminated but Dr. Figueroa is held to what remains.

[156] In conclusion, the contract allows Perkins to terminate the manager's part of the contract, it does not expressly provide what happens to Dr. Figueroa's rights in that event, but it is clear that the termination would undermine important promises made by both the manager and Perkins to her. The correct interpretation of this

contract is that termination of the manager's rights and obligations terminates Dr. Figueroa's obligations. She and Perkins could have made a new contract, but they did not do that.

[157] I would, on account of the termination of the manager's rights and obligations alone, dismiss the claims against the defendants except for Dr. Figueroa's obligation to pay the balance owing under clause 5.04(b).

[158] *Cause for Dismissal of Manager*. As discussed under "Perkins Terminates Manager's Contract" at paras. 77 to 114, the reason given in the notice of termination, "not following said methods and policies prescribed by Perkins", misunderstands the contract. The notice seems to be premised on the proposition that the manager promised to do whatever Perkins told it to do. Rather, the manager promised to follow methods and policies prescribed for the delivery of medical services. As far as I know, no such methods or policies were ever prescribed. There was no complaint about the services in any case.

[159] The other alleged causes are failing to keep records, failing to manage staff, shutting off phone lines, failure to provide accounting, MSI payments not made to Perkins, and failing to submit invoices. The first three are not proven, and it would be difficult to find a breach had any been proven.

[160] As discussed, causing MSI Payments to go to Perkins is not a contractual requirement.

[161] As for accounting and invoices, Perkins made a demand on Dr. Figueroa that was impossible for her to comply with. Perkins knew she had a busy practice. Perkins purported to set a deadline that would expire a few hours after delivery to Dr. Figueroa while she managed the busy practice. Shortly afterwards, Perkins repossessed. The contract does not authorize any of this.

[162] At one time, behaviour of this kind would be dealt with under the line of cases starting with *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726. Today, we would discuss the duty of good faith performance recognized by *Bhasin v. Hrynew*, 2014 SCC 71. Termination was not justified, and the method of termination was wrongful in any case.

[163] If Perkins relied on the outlandish statements made by Mr. Rochela Morffi the day before termination, I would also reject that ground. As discussed, Mr. Rochela Morffi had no real or apparent authority to bind the manager. Further, his outlandish statements were provoked by Mr. Perkins' equally outlandish statements.

[164] The termination was unlawful.

[165] *Repudiation*. Perkins repudiated its contract with Dr. Figueroa and her company when Mr. Perkins declared his supposed rights to answer Dr. Figueroa's telephone, to look at her mail, to access information that was subject to physician/patient confidentiality. "This is my clinic. I can do what I want."

[166] The declaration was made against a background in which Perkins supplied shelves for patient files that could not be secured, that were not protected from prying eyes. The seriousness of the declaration was reinforced after it was made when Perkins purported, in a confidentiality agreement, to own all patient records and when Perkins failed to respond to Mr. Young's alarm in that regard.

[167] As I said at para. 32, the spirit of this contract consisted in three interdependent components: premises, equipment, and supplies by Perkins; medical practice by, and 20% of medical fees from, Dr. Figueroa, and; clinical management by her company for 40% of the profits. Even before Perkins tore a third of the contract away by terminating the manager, it took aim at the heart of the contract by denying an essential component of Dr. Figueroa's promise to practice medicine, her obligation of physician/patient confidence.

[168] When Dr. Figueroa took the Hippocratic oath, she swore "Whatsoever I shall see or hear in the course of my profession … if it be what should not be published

abroad, I will never divulge." No physician can practice medicine under the conditions Perkins declared.

[169] So, the declaration by Perkins and the subsequent behaviour that was consistent with the declaration, the claim to own patient records and the failure to respond to the alarm sounded by Mr. Young, made it impossible for Dr. Figueroa to perform her most essential promise, to practice medicine at the clinic. This was a repudiation in both senses discussed by Justice Cromwell in the concurring opinion in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at para. 156. It constituted an immediate breach of Perkins' duty to cooperate in Dr. Figueroa's performance and an anticipatory repudiation for the future. For the duty to cooperate and the broader duty of good faith performance, see *Bhasin v. Hrynew*, 2014 SCC 71.

[170] *Conclusion*. The automatic effect of the termination of the manager on the obligations of Dr. Figueroa, the wrongful dismissal of the manager justifying Dr. Figueroa's move, and the repudiation and its acceptance by Dr. Figueroa each independently ended Dr. Figueroa's obligations to Perkins.

Damages

[171] Dr. Figueroa is not entitled to damages for her loss of income during the four months she waited for the new clinic to be constructed. Other clinics were available to her immediately. The termination of the Perkins contract was not an opportunity to choose the most pleasing environment. Both the measure of damages for breach of contract and the duty to mitigate point to the clinics she could have moved to immediately. She owes Perkins $2,596.12.

[172] Had I found that Dr. Figueroa was the party in breach, I would not have assessed damages as Perkins proposed, revenue from Dr. Figueroa's medical fees over a five year term. The award would have had to be assessed on a loss of profits. Further, the parties agreed to an absurd term of years. To change that to a five year term would be to rewrite their contract for them. If the absurd term failed, the contract was either terminable at will or on reasonable notice.

[173] I would not have assessed any damages in relation to the pharmacy. There is no mention of it in the contract, and it was not established until well after termination. If there was a causal connection between Dr. Figueroa leaving and the future pharmacy making less profit, the loss exceeds the limit for remoteness in *Hadley v. Baxendale*.

[174] *Costs*. As usual, the parties may make written submissions on costs, if they cannot settle that issue. I request they address an unusual circumstance that might have an impact on costs. It seems to me this dispute resulted from a failure to take sufficient legal advice when the contract was made.

[175] Some tentative thoughts. When Perkins made changes to the draft and saw to execution, it did not return to its lawyer. The result was at least one absurd term and an array of inconsistent "contracts" that took years to sort out. When Dr. Figueroa was presented with the draft, she did not even hire a lawyer. In the result, she signed the inconsistent documents with at least one absurd term, and both parties lost the opportunity for the kind of improvement always realized when commercial lawyers representing opposite interests discuss a draft.

Moir J.