

CANADA / JUDGMENT

Zimmerman v. Maximick

2021 BCSC 1741

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Supreme Court of British Columbia

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2021 BCSC 1741 Zimmerman v. Maximick

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zimmerman v. Maximick,

2021 BCSC 1741

Date: 20210902

Docket: S15046

Registry: Campbell River

Between:

Donald Robert Zimmerman

Plaintiff

And

Rhonda Jean Maximick and Kenlyn Contracting Ltd.

Defendants

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for Plaintiff:

H.A. Wenngatz

Counsel for Defendant Maximick:

J. Marrie

Place and Date of Hearing:

Campbell River, B.C.

March 30, 2021

July 16, 2021

Place and Date of Judgment:

Campbell River, B.C.

September 2, 2021

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I. Overview

- [1] In this summary trial proceeding, the plaintiff Donald Robert Zimmerman, seeks an order requiring the defendant Rhonda Jean Maximick to transfer all of her shares in the corporate defendant Kenlyn Contracting Ltd. ("Kenlyn" or "the Corporation"), to the plaintiff unconditionally.
- [2] Ms. Maximick has already agreed to transfer her shares to Mr. Zimmerman. The narrow question before me is whether or not Ms. Maximick is entitled to receive indemnification from the plaintiff, as a condition of the transfer. The resolution of this dispute turns on whether the plaintiff entered into a binding settlement agreement with Ms. Maximick to provide the indemnification clause, and if not, whether Ms. Maximick is a bare trustee and therefore not entitled to indemnification.

II. Orders Sought

- [3] Mr. Zimmerman commenced this litigation by filing a Notice of Civil Claim on May 5, 2020 (the "NOCC"). Ms. Maximick filed a Response to Civil Claim and Counterclaim on June 5, 2020 (the "Counterclaim").
- [4] There are two applications before me. The first is a Notice of Application filed by Ms. Maximick on March 10, 2021 (the "Maximick NOA"), seeking the following relief:
1. a declaration that the plaintiff is in breach of a contract formed between Zimmerman and Maximick on or about April 9, 2020 (the "Contract");
 2. specific performance of the contract;
 3. alternatively, damages for breach of contract in lieu of specific performance; and
 4. costs
- [5] The second Notice of Application was filed on March 11, 2021, by Mr. Zimmerman (the "Zimmerman NOA"), in which he seeks:
1. an order directing Maximick to transfer all her Kenlyn shares to Zimmerman, forthwith and without condition; and
 2. special costs
- [6] In addition to various third party affidavits filed by each party, the parties also rely on their own affidavit material.
- [7] Mr. Zimmerman has made three affidavits in this proceeding as follows: May 19, 2020 (the "first Zimmerman affidavit"); June 15, 2020 (the "second Zimmerman affidavit"); and March 19, 2021 (the "third Zimmerman affidavit").
- [8] Ms. Maximick has made one affidavit, on June 9, 2020 ("Maximick affidavit").

III. Suitability for Summary Trial

- [9] This is a summary trial application brought pursuant to Rule 9-7 of the Supreme Court Civil Rules ("Rules"). Rule 9-7 permits the court to grant judgment in favour of any party, either on an issue or generally, unless it determines that it is not appropriate to do so. The relevant factors when considering suitability for summary trial, are set out by the court in *Gichuru v. Pallai*, 2013 BCCA 60, paras. 28-31.
- [10] I agree with the parties that this matter is suitable for summary determination. Neither party will be prejudiced by a summary trial proceeding. Proceeding summarily allows the matter to be completed more quickly than a conventional trial, and at lower cost to the parties. This matter is not complex and the amount of documentary evidence relied on by the parties is minimal. Many of the facts in this case are not in dispute. On matters that are in dispute, the court can find the facts necessary to achieve a just outcome by having regard to the usual considerations for determining the reliability of evidence and credibility of witnesses. These include the existence of other corroborating evidence, internal or external inconsistencies in an affidavit, and the plausibility of a particular version of events.

IV. Background

- [11] Mr. Zimmerman is a logging truck driver who ordinarily lives in Campbell River, B.C. He works for extended periods of time in northern Alberta, and as a result, spends a substantial amount of time away from his residence in Campbell River.
- [12] Mr. Zimmerman was previously married to Sandra Wright ("Ms. Wright") with whom he has two children (the "Children"). Mr. Zimmerman and Ms. Wright separated in 2011.
- [13] Kenlyn was incorporated in December 2013 by Ms. Wright as a holding company for the ultimate benefit of the Children. Although both Ms. Wright and Mr. Zimmerman contributed to the Corporation's holdings, Ms. Wright remained the sole shareholder, director, and officer of Kenlyn until 2018.
- [14] In 2017, Ms. Wright and Mr. Zimmerman had discussions about transferring all of Ms. Wright's shares in the corporation to Mr. Zimmerman. However, because Mr. Zimmerman was placed into bankruptcy in September 2017, he was unable to hold the Kenlyn shares pending discharge.
- [15] Mr. Zimmerman and Ms. Maximick (collectively referred to as "the parties") dated for a short period of time. After their romantic relationship ended, they continued to remain friends up until the events leading to this litigation.

- [16] The parties agreed that Ms. Maximick would help Mr. Zimmerman out by temporarily assuming total ownership of the company from Ms. Wright. It was the intention of the parties that Mr. Zimmerman would continue to operate Kenlyn for his own purposes, and that Ms. Maximick would transfer the Kenlyn shares to Mr. Zimmerman on demand (the "Zimmerman Transfer").
- [17] There is some dispute as to whether Ms. Maximick was aware of Mr. Zimmerman's bankruptcy prior to assuming ownership of the shares. I have rejected Ms. Maximick's account on this issue. The text messages attached to the second Zimmerman affidavit support his contention that Ms. Maximick was aware of the bankruptcy when she agreed to the share transfer into her name.
- [18] Ms. Wright retained TKS Lawyers ("TKS") to act as corporate counsel for Kenlyn and assist with the transfer of all of her shares to Maximick (the "Share Transfer"). The Share Transfer occurred on February 13, 2018. On the same day, Ms. Wright resigned as sole officer and director of the company, in place of Ms. Maximick. There is no dispute that Ms. Maximick was not asked to, nor did she provide, any valuable consideration for the Share Transfer.
- [19] At the time of the Share Transfer, Kenlyn owned the following assets: a mobile home in Campbell River (the "Mobile Home"); several vehicles (the "Vehicles"); and an account at Scotiabank (the "Scotia Account") (collectively "the Kenlyn Assets").
- [20] Following the Share Transfer, Mr. Zimmerman exclusively controlled the Kenlyn Assets until certain events that occurred in early 2020. Those events lead to this litigation.
- [21] On July 29, 2020, the parties entered into a standstill agreement on terms agreed to between their counsel.

V. Evidence of the Parties

- [22] Mr. Zimmerman was discharged from bankruptcy in June 2018. The parties have competing versions of what transpired afterwards.

A. Zimmerman's Account

- [23] It is Mr. Zimmerman's evidence that he asked Ms. Maximick to make the Zimmerman Transfer on two occasions after June 2018, but she failed to do so.
- [24] The first request was made in September 2018, when the annual corporate documents for Kenlyn came due for filing. In the first Zimmerman affidavit, he explains that when the Annual Returns and corporate minutes were being prepared for filing by TKS, he instructed Ms. Maximick "to transfer the Kenlyn shares in the corporate minutes" to him (para. 35). He assumed that this share transfer had been accomplished, and says that he did not know that he "had to sign documents to acknowledge and accept the transfer" (para. 36).

- [25] The second request was made a year later, when the Annual Returns came due for filing again in September 2019. The corporate documents were once again prepared by TKS, and sent to Ms. Maximick for her signature as the sole director. It was then that Mr. Zimmerman says he noticed that his name did not appear as a shareholder on the Kenlyn corporate documents. He "once again instructed Maximick that she was to list [him] as the owner of the Kenlyn shares in those corporate minutes" (para. 37).
- [26] Acting on his belief that he was a shareholder of Kenlyn, Mr. Zimmerman says that instructed the company's bookkeeper, Barbara Forberg, to issue him dividends from Kenlyn (the "Dividends"). It was his expectation that the bookkeeper would not issue the Dividends or file them with the CRA, without first making sure that the Zimmerman Transfer had occurred.
- [27] The bookkeeper was a personal friend of Ms. Maximick's. At some point, Ms. Forberg stopped communicating with Mr. Zimmerman, and started only taking instructions from Ms. Maximick.
- [28] According to Mr. Zimmerman, sometime in early 2020, Ms. Maximick "went rogue" and took actions that caused harm to himself and the Company.
- [29] Without his knowledge or instructions, Ms. Maximick told the bookkeeper to file the Dividends with the CRA. This action was detrimental to Mr. Zimmerman, and caused him difficulties as he was not a shareholder of Kenlyn. He could not file his personal tax returns without having the Dividend filings retracted and reversed. He also lost his personal GST Tax Credit.
- [30] Ms. Maximick also failed to sign the annual corporate filing documents in 2018 and 2019, and return them to TKS. Consequently the 2018 and 2019 annual returns were never filed. This is despite the fact that Mr. Zimmerman "made certain that both accounts of TKS Lawyers" were paid by Kenlyn (first Zimmerman affidavit para. 38).
- [31] In early 2020, Kenlyn was at risk of being struck for failing to file its annual returns when due. On April 5, 2020 Mr. Zimmerman confronted Ms. Maximick with this information and demanded return of the Kenlyn shares forthwith. They had a heated argument later that day, which resulted in a physical altercation in which he says that Ms. Maximick was the aggressor (the "alleged assault"). Ms. Maximick was subsequently charged with assault with a weapon contrary to s. 267(a) of the Criminal Code.

B. Maximick's Account

- [32] Ms. Maximick avers that she and Mr. Zimmerman often discussed putting the Company into his name once he was discharged from bankruptcy "but Zimmerman was never in town to carry that out" (para. 15).

[33] In early 2020, the company's bookkeeper, Barbara Forberg, notified Ms. Maximick that there were some irregularities in the company's operations. Specifically:

1. Ms. Forberg had been instructed by Mr. Zimmerman in late 2019 not to pay a goods and services tax ("GST") debt;
2. Mr. Zimmerman had instructed Ms. Forberg in late 2019 and early 2020 to prepare dividends to be submitted to WorksafeBC, but not to send them to the Canada Revenue Agency ("CRA"); and
3. Mr. Zimmerman had instructed Ms. Forberg in early 2020 to prepare a false record of employment ("ROE") to assist an associate of Zimmerman in obtaining employment insurance ("EI").

(the "Irregularities")

[34] Ms. Forberg told Ms. Maximick that as the sole shareholder, officer and director of the Company, she was at personal risk for liability in relation to the Irregularities. Ms. Maximick believed this, and resolved to extricate herself from involvement with the company.

[35] In order to limit her own personal liability and bring the company in compliance with its tax obligations, Ms. Maximick instructed Ms. Forberg to file GST returns for the company and pay the outstanding GST. Ms. Maximick also supported Ms. Forberg's decision not to comply with the instruction to prepare the ROE for Mr. Zimmerman's associate.

[36] Ms. Maximick raised her concerns about the Irregularities with Mr. Zimmerman while he was out of town. She told Mr. Zimmerman that she thought that what he was doing was fraudulent. Mr. Zimmerman denied that he had done anything wrong, and made disparaging remarks about Ms. Forberg. In Ms. Maximick's words, Mr. Zimmerman "lost his mind" and made threats against Ms. Forberg. Ms. Maximick told Ms. Forberg not to meet with Mr. Zimmerman because he was not happy with her and was threatening her.

[37] Mr. Zimmerman was also extremely upset with Ms. Maximick, and told her he was taking back his business. Ms. Maximick advised him that the paperwork would be ready when he returned home in March 2020. The parties began negotiating with their counsel to have the Zimmerman Transfer completed.

[38] In April 2020, they had a violent altercation in which she says Mr. Zimmerman was the aggressor and that she acted in self-defence.

C. Forberg's Evidence

[39] Ms. Maximick's version of events related to the Irregularities is supported by the affidavit evidence of Ms. Forberg. In her first affidavit made June 8, 2020, Ms. Forberg avers to the following:

1. She began working as a bookkeeper for Kenlyn during the fiscal year ending August 31, 2013. Her duties included bookkeeping and preparing corporate tax returns and GST filings for the company.
2. She initially took instructions for the company from Ms. Wright. However, in July 2014, Ms. Wright instructed Ms. Forberg to take instructions from Mr. Zimmerman on all business matters.
3. Following Ms. Maximick's assumption of ownership of the company in February 2018, Ms. Forberg continued to take instructions from Mr. Zimmerman.
4. Mr. Zimmerman told Ms. Forberg that Ms. Maximick would take care of paying income taxes and GST for the company.
5. From the outset, Mr. Zimmerman expected her to perform "aggressively creative accounting" to accomplish his goal of the company paying "very little to no taxes".
6. Year ends for the company were generally completed "two at a time", meaning that the Company would only file every other year.
7. In 2018 and 2019 the company generated revenues that far exceeded those of previous years, and was facing a GST payment of about \$10,000.
8. Around late 2019, the CRA asked the company for its corporate filings for the 2018 and 2019 fiscal years.
9. While Ms. Forberg was completing the year ends, Mr. Zimmerman was placing pressure on her to reduce the tax liability of the company. Mr. Zimmerman instructed Ms. Forberg to prepare dividends slips so that he could present a higher income WorksafeBC for his personal benefits under review. She told him that he could not receive dividends because he was known as shareholder of the company. Mr. Zimmerman persisted, and Ms. Forberg prepared the dividends slips as instructed. She submitted them to both the CRA and WorksafeBC. Mr. Zimmerman later told her that she was not supposed to file the dividend slips with the CRA but rather only show them to WorksafeBC.
10. In early 2020, Mr. Zimmerman instructed Ms. Forberg to prepare an ROE under the name of the company for a friend of his who needed extra hours to qualify for claim for EI. Ms. Forberg suspected Mr. Zimmerman's instruction was fraudulent, and shared it with Ms. Maximick. Ms. Maximick instructed her not to comply.
11. Ms. Forberg had concerns about Ms. Maximick's potential personal liability and shared them with Ms. Maximick.
12. On instructions from Ms. Maximick, on April 6, 2020 Ms. Forberg cancelled the dividends paid to Mr. Zimmerman because he was not a shareholder. The GST returns for the company were filed on April 7, 2020, and the outstanding obligation to the CRA was subsequently paid.

13. Ms. Forberg ceased working as a bookkeeper for the company on August 14, 2020.
- [40] In his affidavit made June 15, 2020 ("second Zimmerman affidavit") Mr. Zimmerman denies that he was reluctant to pay what was due. He says that he simply wanted to minimize his tax obligations, and that Ms. Forberg showed a "flexible willingness" in this endeavour. As evidence in support, he attaches various messages between them. Those messages do suggest that at least for some time, Ms. Forberg was a willing participant in some of Mr. Zimmerman's tax endeavours that she later questions in her affidavit as irregularities. However, I note that many of the details provided in Ms. Forberg's affidavit are not directly challenged by Mr. Zimmerman.

D. Conclusion

- [41] I reject Mr. Zimmerman's evidence that he believed that the shares had been transferred into his name when he asked Ms. Forberg to issue dividends to him. I find it implausible that he would not know that a legal transfer could not occur unless specific corporate documents were prepared, executed, and filed. In arriving at this conclusion, I note that:
1. Mr. Zimmerman was an experienced businessman, who had incorporated and operated his own company Maaxco Contracting Ltd. before it went into receivership.
 2. Mr. Zimmerman would have been alive to the issue of what documentation was necessary in order for the Zimmerman Transfer to occur, since the Share Transfer had occurred just earlier that year.
 3. Mr. Zimmerman was in regular communication with the bookkeeper for Kenlyn and could easily have ascertained whether the Zimmerman Transfer had occurred.
- [42] There were also inconsistencies in Mr. Zimmerman's evidence which lead me to reject his version of events. In response to Ms. Maximick's contention that he was too busy to effect the transfer, Mr. Zimmerman suggests at para. 16 of his second affidavit, that his schedule was not a problem. However, in his third affidavit at para. 28, Mr. Zimmerman avers that he was in Campbell River on a sporadic basis "at best".
- [43] The evidence leads me to conclude that while Mr. Zimmerman did have discussions with Ms. Maximick after June 2018, about transferring the Kenlyn shares to himself, he did not demand that she transfer the shares to him until around March 2020. This is because:
1. Mr. Zimmerman was never in town long enough in 2018 and 2019 to effect the Zimmerman Transfer;
 2. Mr. Zimmerman was content with leaving the shares in Ms. Maximick's name until it was convenient to organize the paperwork to effect the transfer; and

3. the failure to effect the Zimmerman Transfer did not effect him as he was able to continue operating the Company for his own purposes, and did not have any difficulty with accessing the Kenlyn Assets.
- [44] I also conclude that Mr. Zimmerman took actions in relation to Kenlyn which Ms. Maximick believed could potentially expose her to personal liability. In coming to this conclusion, I find that Mr. Zimmerman made requests of Ms. Forberg that she considered irregular and against generally acceptable accounting or bookkeeping practices. Whether Ms. Forberg was complicit for some time with Mr. Zimmerman's requests to perform these or other irregularities, does not alter the fact that at some point, she felt uncomfortable with some of his instructions and relayed her concerns to Ms. Maximick. I accept Ms. Forberg's evidence that her decision to relay her concerns to Ms. Maximick was primarily motivated by her belief that by complying with Mr. Zimmerman's instructions, Ms. Maximick could potentially be exposed to personal liability as she was the sole shareholder, director, and officer of Kenlyn.
- [45] I conclude that on learning about the Irregularities from Ms. Forberg, Ms. Maximick gave instructions to Ms. Forberg that were contrary to those provided by Mr. Zimmerman. While some of these instructions may have caused Mr. Zimmerman difficulties with the CRA, Ms. Maximick took these steps in order to bring the Company into compliance, and limit her own potential liability.
- [46] It is not possible nor necessary for me in these Reasons, to resolve whether it was Mr. Zimmerman who attacked Ms. Maximick on April 5, 2020, or vice versa. What I can conclude on the evidence is that by April 5, 2020 Ms. Maximick and Mr. Zimmerman were extremely upset with each other, and ended up in a physical altercation which was violent. This added to their desire to terminate all business dealings with each other, as soon as possible.

VI. Was There a Binding Settlement

- [47] In April 2020, the parties had some communications through legal counsel regarding transfer of ownership and control of the company back to Mr. Zimmerman. According to Mr. Zimmerman, they did not reach an agreement as Ms. Maximick was asking for an indemnity against personal liability for any irregularities with the Company. According to Ms. Maximick, the parties arrived at a binding agreement on April 9, 2020, which Mr. Zimmerman subsequently repudiated.

A. Facts

- [48] On April 7, 2020, on instructions from Ms. Maximick, TKS sent various documents to Mr. Zimmerman which he was asked to sign and return in order for the share transfer to occur (the "Share Transfer Documents"). The Share Transfer Documents included a draft Share Purchase Agreement ("draft SPA"), and a draft Indemnity Agreement (the "draft Indemnity").

- [49] The draft SPA included at paragraph 1 certain representations and warranties from the Vendor regarding her legal ownership of the shares and ability to enter into the agreement (the "Representations and Warranties"). At paragraph 4 of the draft SPA, was an indemnity clause in case the Vendor breached the Representations and Warranties.
- [50] Mr. Zimmerman was recommended to get independent legal advice ("ILA"), which he sought from CR Lawyers. Ms. Maximick retained Simonett Law for her ILA.
- [51] According to Mr. Zimmerman, he had concerns with the Share Transfer Documents such as:
1. Clause B of the draft SPA stated that the Vendor, Ms. Maximick, was the "legal and beneficial owner" of the shares in Kenlyn. He did not agree that she was the beneficial owner.
 2. The draft Indemnity provided at clause C that Ms. Maximick agreed to transfer her interest in Kenlyn to Zimmerman and to resign as its director, on the condition that she would be indemnified for any liability arising during the period February 13, 2018 to April 7, 2020 (the "Term"), during which effective management and control of the company was exercised by Zimmerman. He did not agree to this blanket indemnity because it included protecting Ms. Maximick for wrong-doings what she might have committed when she was instructing the bookkeeper to take steps contrary to his instructions.
 3. The draft Indemnity included at paragraph 1, a release of all claims against Ms. Maximick, which he did not agree to as this included his potential claim against Ms. Maximick for the alleged assault.
- [52] On April 9, 2020, the counsel for the parties exchanged several emails regarding the Zimmerman Transfer and related steps. In addition to the transfer of the Company shares, the parties discussed the Scotia Account and payment of certain liabilities using the Scotia Account funds.
- [53] In an email sent at 4:35 pm on April 9, 2020, by Mr. Simonett, acting for Maximick, to Stewart Carstairs, acting for Zimmerman (the "Simonett Email"), he proposes that Maximick will: email transfer \$3,800 to Zimmerman; pay the GST liability for the Company and Mr. Simonett's legal account; and change the password for the Scotia Account in a manner suggested by Mr. Simonett in an earlier email.
- [54] At the conclusion of the Simonett Email, Mr. Simonett poses the following question to Mr. Carstairs: "How are we going to get the amended Indemnity Agreement signed?"
- [55] In direct response to the Simonett Email, Mr. Carstairs sends the following email at 4:53 pm, (the "Carstairs Email"):

My client approves of this.

My client looks forward to the email transfer on Monday.

I confirm that, as of this acceptance, you and I both hold signed documents in trust. We agree that the SPA will be amended to delete the references to beneficial ownership. An enforcement clause will be added to the Indemnity Agreement. We will strive to file everything on Tuesday.

Thank you for all your help Kevin.

(the "Agreement")

[56] On April 14, 2020, counsel for Ms. Maximick sent documents to effect the transfer, including an executed copy of the draft SPA. However, later the same day, Mr. Zimmerman instructed his counsel not to proceed with the completing the terms of the Agreement.

[57] On April 22, 2020, Mr. Zimmerman's counsel sent a demand letter to Ms. Maximick demanding that she transfer the shares in Kenlyn without the indemnity that she was seeking.

[58] On April 29, 2020 Ms. Maximick provided an Amended SPA, which removed the reference to "beneficial" in relation to Maximick's holding shares in the Company.

B. Analysis

[59] The evidence in this case supports a finding that on April 9, 2020, the parties agreed to the following:

1. Maximick would transfer her interest in Kenlyn to Zimmerman.
2. The parties would each execute all necessary documents to effect the transfer.
3. The parties would each execute the SPA in the same form as what was forwarded to them by TKS on April 7, 2020, with the exception that the draft SPA would be amended by deleting the reference to beneficial ownership (the "Amended SPA").
4. As a condition of the transfer, Mr. Zimmerman would provide Ms. Maximick with indemnification for liability arising from her role with Kenlyn. The indemnification would take the form of the draft Indemnity forwarded to Zimmerman by TKS on April 7, 2020, with the exception that an enforcement clause (the "enforcement clause") would be added to the draft Indemnity ("Amended Indemnity").
5. Ms. Maximick would also do the following using funds from the Scotia Account:
 - a) transfer \$3,800 to Zimmerman by Monday April 13, 2020;
 - b) pay the outstanding GST for the company in the amount of \$7,328.35; and
 - c) email transfer \$840.00 to Mr. Simonett to pay his account for legal fees.

(the "money transfers")

6. Once the money transfers had been made, Ms. Maximick would provide a password to Mr. Zimmerman for the Scotia Account so that he could assume control of it.

7. The parties would endeavour to have all the documents filed by Tuesday April 14, 2020 to complete the share transfer.
- [60] The above terms of settlement are evidenced by the Carstairs Email and the Simonett Email. The evidence leads me to conclude that the parties had a meeting of minds in relation to most of the substantive terms of the Agreement, including the Amended SPA. In arriving at this conclusion, I reject Mr. Zimmerman's argument that the need to amend the SPA means that the parties did not have a meeting of minds on what form the final Amended SPA would take. The only change that needed to be made to the SPA was for counsel to delete the reference to beneficial ownership. The amendment that was required to effect the intention of the parties was clear and unambiguous.
- [61] However, the agreement regarding the Amended Indemnity was not so clear. Aside from agreeing that an enforcement clause would be incorporated into the Amended Indemnity, the emails give no insight into the actual terms of the enforcement clause that the parties were agreeing to. There is no proposed wording of the enforcement clause exchanged by the parties prior to April 14, 2020. Nor is there any indication of what process they would follow to arrive at the wording, or what would happen if they could not agree to the wording of the enforcement clause. The parties' failure to specify the words of the enforcement clause that would be incorporated into the Amended Indemnity, prevents me from concluding that they had a meeting of minds on this issue.
- [62] Having regard to all of the evidence, I conclude that the parties did not arrive at a binding settlement. The enforcement clause was a fundamental term of the Amended Indemnity. In turn, the Amended Indemnity was integral to the Agreement. The parties did not have a meeting of minds on the final form of the Amended Indemnity. Accordingly, the Agreement was vague and unenforceable.

VII. Remedy

- [63] Mr. Zimmerman asks that I make an order directing Ms. Maximick to transfer all her Kenlyn shares to him, forthwith and without condition, on the grounds that she was a bare trustee and is not entitled to indemnification.

A. Was Maximick a Bare Trustee

- [64] After having regard to all of the evidence in this case, I conclude that Ms. Maximick was not a bare trustee.
- [65] A bare trust exists when a person is vested with legal title to property but does not have any independent duties, responsibilities, or powers to exercise as the trustee. The bare trustee's only responsibility is to carry out the instructions of the beneficiary of the trust. If a trustee does not have to accept instructions from the beneficiary, or if the trustee has any significant powers or responsibilities, then she is not a bare trustee: *Scoretz v. Kensam Enterprises Inc.*, 2018 BCCA 66 at para. 33.

- [66] A bare trustee has the duty to convey the trust property to the beneficiary on demand, and to exercise reasonable care over the property: Scoretz at para. 23.
- [67] A bare trustee is not entitled to demand indemnification before complying with the request to transfer the trust property: Scoretz v. Kensam Enterprises Inc., 2018 BCCA 66 at paras. 38-40.
- [68] There is no dispute that when Ms. Maximick assumed ownership of Kenlyn, the parties both expected that she would only be holding onto the shares for about four months before transferring them to Mr. Zimmerman. However, this did not occur. Mr. Zimmerman was not available or not willing to make the time to take the necessary steps to have the appropriate documentation prepared and executed. In addition, based on their friendship, both parties were content to put off the Zimmerman Transfer. Mr. Zimmerman did not press the issue to have the shares transferred to him, since he continued to be able to make use of the Kenlyn Assets and operate the Company to his benefit.
- [69] Mr. Zimmerman describes Ms. Maximick's role as minimal, saying that all that was required of her was to "do nothing, say nothing, and do as told" when asked to transfer her shares. However, this was not the case. As a director and officer of the company, it fell to her to oversee the management of the business and affairs of the Company: B.C. Business Corporations Act, R.S.B.C. [Act] ss. 136 and 142.
- [70] Section 137(1) of the Act permits a company to transfer to someone else, in whole or in part, the powers of the director to manage or supervise the management of the business and affairs of the company. Section 137(1.1) provides a process for this to occur. It stipulates that the transfer of powers can be done through a provision included in the articles of the company, either at the time of its incorporation, or later by special resolution. If the powers are transferred in the manner contemplated in s. 137(1) of the Act, the rights, powers, duties and liabilities of directors of the company are transferred to the other party that has assumed those powers.
- [71] Though Mr. Zimmerman operated the Company solely at his own discretion with the consent of Ms. Maximick, there is no evidence that the Company's articles contain a provision which provides for the transfer of powers to Mr. Zimmerman as per s. 137 of the Act. Absent such a provision, the legal obligation fell to Ms. Maximick to oversee the management of the business and affairs of the company, in order to ensure its compliance with the law.
- [72] In addition, even if such a delegation of powers to Mr. Zimmerman had been expressly provided for in the Company's articles, this does not absolve Ms. Maximick of her legal responsibilities or liabilities. In accordance with s. 142(3) of the Act:
- (3) No provision in a contract, the memorandum or the articles relieves a director or officer from
- (a) the duty to act in accordance with this Act and the regulations, or

- (b) liability that by virtue of any enactment or rule of law or equity would otherwise attach to that director or officer in respect of any negligence, default, breach of duty or breach of trust of which the director or officer may be guilty in relation to the company.
- [73] It is evident that Mr. Zimmerman was aware that Ms. Maximick did have some obligations to the Company that went beyond those of a bare trustee. For example, he averred to having an expectation by the fall of 2018, that Ms. Maximick would sign and return the annual returns for filing by TKS. Indeed he blamed her for not doing so and putting the company at risk of being struck. The fact that Ms. Maximick did not follow through with her obligation to ensure that the annual returns were filed in 2018 and 2019, does not diminish the fact that she had responsibilities to the Company that existed independent of what Mr. Zimmerman required of her.

B. Is Maximick Entitled to Indemnity from Zimmerman

- [74] Ms. Maximick did not become aware of her duties and obligations as a director until early 2020. At that time, she became concerned that she was at risk of personal liability as a result of Mr. Zimmerman's actions with respect to the Company. In my view, given Ms. Forberg's evidence regarding the Irregularities, Ms. Maximick's concerns were reasonable. As the sole director, officer, and shareholder of the Company, Ms. Maximick risked exposure to personal liability in the event that the CRA concluded that the Company had committed financial irregularities.
- [75] The CRA Bulletin attached as Exhibit E to the first Zimmerman affidavit (the "Bulletin"), does not support Mr. Zimmerman's argument that Ms. Maximick faces no exposure for personal liability. The Bulletin simply provides confirmation that the CRA does not consider a bare trustee to be the owner of the trust property. In so doing, the CRA relies on a similar definition of a bare trustee as that contained in Scoretz. As I have noted above, that definition does not apply to Ms. Maximick's circumstances.
- [76] I conclude that it is reasonable and in the interests of justice and fairness, to require that Mr. Zimmerman provide Ms. Maximick with indemnification for any actions taken by Mr. Zimmerman from February 13, 2018 onwards to the date of this judgment.
- [77] However, there is no basis upon which Ms. Maximick can demand that Mr. Zimmerman provide her with indemnification flowing from the alleged assault. It is therefore appropriate to limit any indemnification clause to Mr. Zimmerman's actions related to Kenlyn.

C. Is Zimmerman Entitled to Indemnity from Maximick

- [78] Based on the evidence in this case, I conclude that Mr. Zimmerman is not entitled to indemnification for any steps that Ms. Maximick took to rectify the Irregularities, minimize her own exposure to liability which arose by virtue of any enactment or rule of law or equity, or to bring the Company into compliance with its legal obligations. This includes most, but not all, of the "unauthorized actions" taken by Ms. Maximick which Mr. Zimmerman has raised in his evidence.
- [79] In his third affidavit, Mr. Zimmerman alleges at para. 31 that Ms. Maximick took a number of unauthorized actions on behalf of Kenlyn, which are in contravention of the original agreement between the parties, and breach of her authority as bare trustee. Ms. Maximick has not provided any affidavit evidence responding to the third Zimmerman affidavit. As such, I conclude that Ms. Maximick took the steps that Mr. Zimmerman alleges at para. 31. These include:
1. Committing Kenlyn to paying corporate dividends to Mr. Zimmerman;
 2. Paying the GST on a quarterly installment basis, rather than annually; and
 3. Preparing the GST remittance without regard to any input tax credits that may have been available to Kenlyn.
- [80] Some of the unauthorized actions are justifiable in light of the events that transpired, and Mr. Zimmerman is not entitled to any indemnity for the same. These include the items listed at para. 31(b), (c), (d), (h), and (i).
- [81] Other items are what I would call "over-reactions" but still within the realm of reasonable conduct on the part of Ms. Maximick acting in her role as director. They were a response to her concern that Mr. Zimmerman was causing the company to break the law through accounting irregularities. They include seizing control of the accounting records and telling third parties not to take instructions from Mr. Zimmerman. These are listed at para. 31(f) and (j). Mr. Zimmerman is not entitled to indemnity regarding these items.
- [82] Some of the unauthorized actions complained of have no financial consequence on Mr. Zimmerman. Rather, they are what I would term as "bad behaviour" on the part of Ms. Maximick. These items are listed at para. 31(k), (l) and (m), and include such things as accessing Zimmerman's personal mail. Zimmerman is not entitled to any indemnity in relation to these.
- [83] However, there are steps that Ms. Maximick took which appear to go beyond what was necessary to protect Kenlyn and herself, and could have financial implications for Mr. Zimmerman. These include cancelling the insurance for some of the Vehicles and Mobile Home, cancelling the rental pad payment for the Mobile Home, and closing Mr. Zimmerman's access to the Scotia Account. They are listed at para. 31(a), (e), and (g). In my view, it is appropriate for Ms. Maximick to be required to indemnify Mr. Zimmerman for

these specific actions.

VIII. Orders

[84] I therefore order the following:

1. Ms. Maximick is directed to transfer all of her Kenlyn shares to Mr. Zimmerman forthwith upon receipt of the following consideration from Mr. Zimmerman:
 - a) An executed copy of the Amended Share Purchase Agreement dated April 29, 2020; and
 - b) An executed copy of an Indemnity Agreement in the form provided by counsel for TKS on April 7, 2020, with the following amendments:
 - (1) Clause A is amended to change the end date of the "Term" to the date of this Order; and
 - (2) Clause 1 is amended to exclude any liability for the alleged assault;
2. Ms. Maximick is directed to provide indemnification to Mr. Zimmerman, in a form similar to the Indemnity Agreement referenced at clause (b) above, for the matters listed at items 31(a), (e), and (g), in the affidavit of Mr. Zimmerman made March 19, 2021.

[85] Costs ordinarily follow the event. In this case, the result was split. Subject to any settlement offers or other matters that I am not aware of, each party is to bear their own costs of these proceedings.

[86] Should a party wish to seek a different costs award, they may do so by forwarding written submissions up to a maximum of five (5) pages in length, for my consideration. These are to be submitted to Supreme Court Scheduling via email, within 30 days from the date of this judgment.

"Shergill J."

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Prepared on 26 October 2026 · Esheria