

CITATION: *Neu Solutions v. eSolutions MN*, 2023 ONSC 311
OTTAWA COURT FILE NO.: CV-19-82360
DATE: 2023/05/01

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
NEU SOLUTIONS INC. and CAREY NEU)
Applicants) Patrick Snelling, counsel for the Applicants
)
- and -)
)
)
eSOLUTIONS MN INC., ZORAN)
MICHAEL MILUTINOVIC and ZEEBRA)
CONSULTING SERVICES INC.) Percy Ostroff, counsel for the Respondents
)
Respondents)
) **HEARD:** June 22 and October 25 and 26,
) 2021 (By Video Conference), with written
) submissions in July 2022
)

AMENDED REASONS FOR DECISION
(Part 1 – Status of Neu Solutions Inc.)

The text of the original Reasons for Decision was corrected on May 1, 2023 and the description of the correction is appended.

CORTHORN J.

Introduction

[1] The individual applicant (“Neu”) and individual respondent (“Milutinovic”) have known each other since 2001; they met working in the IT field. They each own a company, through which, respectively, they provide IT services. Neu owns Neu Solutions Inc. (“NSI”) and Milutinovic owns Zebra Consulting Services Inc. (“Zebra”).

[2] In March 2003, Neu and Milutinovic, through their respective companies, founded eSolutions MN Inc. (“eSolutions”). eSolutions provided IT services to clients on a consulting basis. The Articles of Incorporation for eSolutions are dated March 2003 (“the Articles”) and provide that,

- eSolutions is authorized to issue “An unlimited number of Common Shares” (Article 6);
- there are restrictions on the right to transfer shares (Article 8);
- Neu and Milutinovic are the directors (Article 4); and
- the “incorporators” are NSI and Zebra (Article 10).

[3] No other documents related to shares in or the ownership of eSolutions are before the court. It is, however, undisputed that it was Neu’s and Milutinovic’s collective intention that NSI and Zebra would each be a fifty per cent shareholder in eSolutions.

[4] By 2015, eSolutions was experiencing financial difficulties. In the first half of 2016, Neu received a letter from the Canada Revenue Agency (“CRA” and “the CRA letter”, respectively). The CRA letter was sent to Neu in his capacity as a director of eSolutions. In the letter, the CRA sought to address what it alleged was eSolutions’ outstanding income tax liability in the amount of \$265,000.

[5] It is undisputed that, on July 1, 2016, (a) Neu resigned as a director of eSolutions; (b) NSI and eSolutions entered into a consulting agreement (“the Consulting Agreement”); and (c) an agreement was reached pursuant to which Neu would be indemnified by Milutinovic, Zebra, and eSolutions for certain financial liabilities of eSolutions (“the Indemnity Agreement”). Pursuant to the Consulting Agreement, NSI was to provide eSolutions with consulting services in exchange for guaranteed remuneration at a fixed rate.

[6] The parties disagree, however, as to whether, in July 2016, NSI ceased to be a shareholder of eSolutions. NSI’s status – as a shareholder of eSolutions or not – is important for the purpose of this proceeding. NSI relies on status as a shareholder in support of its entitlement to an oppression remedy pursuant to the provisions of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (“the *OBCA*”).

[7] The parties agreed that it is cost-effective, efficient, and necessary, the latter from a substantive perspective, for the court to first determine the issue of NSI's status as a shareholder of eSolutions or not. Following receipt of the court's ruling on that issue, the parties will address the next steps to be taken. In doing so, the parties will consider (a) the derivative nature of the relief, other than an oppression remedy, requested in this proceeding, and (b) the existence of a separate proceeding – an action which also involves the four parties to this application.

[8] There are additional parties to the separate proceeding. There may be overlap between the non-oppression remedy relief requested in this application and the relief requested in the separate proceeding.

[9] For the reasons that follow, I find that NSI remained a fifty percent shareholder of eSolutions from July 2016 forward.

Background

a) NSI and Zeebra

[10] When Neu and Milutinovic first met in 2001, they were each providing IT services through their respective corporations. Neu's uncontradicted evidence is that he and Milutinovic were the sole owners of their respective corporations. The two men took different approaches to the administrative tasks associated with carrying on business through a corporation.

[11] Neu retained a lawyer for the incorporation of NSI in 1998. Neu is a shareholder; he received a share certificate for his shareholdings. Neu's evidence is that, from the date of incorporation of NSI,

- annual shareholders' meetings were held;
- in his capacity as a director, Neu signed shareholders' resolutions on an annual basis; and
- with the assistance of the company's lawyer and accountant, the NSI minute books were updated on an annual basis.

[12] Milutinovic took a different approach with Zeebra. Milutinovic's evidence is that he retained a lawyer for the incorporation of Zeebra. Milutinovic is uncertain whether Zeebra ever had a minute book or whether share certificates were issued. If either type of document exists, Milutinovic is uncertain where the documents are now. Milutinovic's belief is that there are no minute books, resolutions, or by-laws for Zeebra.

b) eSolutions

[13] In 2003, Neu and Milutinovic, through their respective corporations, founded eSolutions. It is undisputed that the parties had an oral agreement that NSI and Zeebra would each be fifty percent shareholders in eSolutions.

[14] The Articles are set out in a standard form document. The standard form document requires the incorporators to fill in certain information – such as the names, addresses, and residency status of the directors.

[15] The standard form document also requires the incorporators to consider shares in the corporation. For example, Article 6 deals with the classes and number of shares in eSolutions: “The classes and maximum number of shares that the corporation is authorized to issue: An unlimited number of Common Shares.”

[16] The standard form wording of Article 7 provides the incorporators with an opportunity to address the “Rights, privileges, restrictions and conditions (if any) attaching to each class of shares and directors authority with respect to any class of shares which may be issued in series”. For eSolutions, the incorporators completed Article 7 by filling in “N/A”.

[17] The issuance, transfer, and ownership of shares in eSolutions is addressed in Article 8:

The issue, transfer or ownership of shares is/is not restricted, and the restrictions (if any) are as follows:

that the right to transfer shares of the Corporation shall be restricted in that no shares shall be transferred without either:

- (a) The previous consent of the directors of the Corporation expressed by a resolution passed by the Board of Directors or by an instrument or instruments in writing signed by a majority of the directors; or
- (b) The previous consent of the holders of at least 51% of the voting shares for the time being outstanding expressed by resolution passed by the shareholders or by an instrument or instruments in writing signed by such shareholders.

[18] Only the first two lines of Article 8 are in standard form wording. The balance of the text is specific to eSolutions, its directors (Neu and Milutinovic), and its incorporators (NSI and Zeebra).

[19] Nowhere in the Articles does it state that each of NSI and Zeebra own fifty percent of the shares in eSolutions. As evidence of NSI's fifty percent ownership stake in eSolutions, Neu relies on communication he had, in 2009, with a lawyer acting for him in matrimonial litigation.

[20] In an email dated September 2009, Neu responds to his matrimonial lawyer's inquiries about a number of matters, including shareholder equity that Neu had at the time. In his reply email, Neu addresses his sole ownership of NSI. Neu tells the lawyer that he believes he provided both NSI's shareholder registry and minute book to one of the lawyer's employees or colleagues.

[21] In his reply email, Neu also refers to eSolutions. Neu tells his divorce lawyer that "[NSI] has 50% of the shares and Zeebra Consulting the other 50%. I have emailed my business partner for a copy of the document." The record does not include any additional communication, from Neu to his lawyer, on the subject of shareholder's equity in eSolutions or any other company. There is no evidence as to whether Neu received the document he requested from Milutinovic and, if so, what that document was.

[22] It was Milutinovic who, on behalf of NSI and Zeebra, retained a lawyer for the purpose of incorporating eSolutions. Milutinovic retained the same lawyer that he had retained when he incorporated Zeebra.

[23] Milutinovic's undisputed evidence is that he is certain that (a) no share certificates for eSolutions were ever issued to either NSI or Zeebra, (b) no annual resolutions for eSolutions were ever signed, (c) no formal meetings of shareholders or directors of eSolutions were ever held, and (d) no minute book was ever prepared for eSolutions.

[24] With respect to the management and operations of eSolutions from 2003 to 2016, Neu and Milutinovic agree that, over time, Milutinovic came to be responsible for the vast majority of the administrative work. That work included management of human resources, payroll, and financial matters. Neu and Milutinovic disagree as to why the allocation of responsibilities evolved as it did.

c) eSolutions in 2015 and 2016

[25] In 2015, Neu became aware that eSolutions was not meeting its financial obligations. In 2015, Neu also became concerned about the manner in which Milutinovic was managing the day-to-day finances of eSolutions. In 2015 and 2016, Neu and Milutinovic communicated with each other, by email and by telephone, about eSolutions' financial situation.

[26] Matters were brought to a head in July 2016 when Neu received the CRA letter. The communication that followed between Neu and Milutinovic and the events that led to a series of agreements involving the parties are material to the issue of whether NSI remained a shareholder of eSolutions after July 1, 2016. That communication and those events are discussed in the Analysis section below.

The Issue

[27] The sole issue to be determined at this stage of the proceeding is whether NSI remained a fifty percent shareholder of eSolutions after July 2016.

The Positions of the Parties

[28] The applicants' position is that the steps taken by Neu on NSI's behalf in 2016 reflect Neu's desire to protect himself, NSI, and his family from the potential consequences of any financial mismanagement or other misconduct on Milutinovic's part with respect to eSolutions. The applicants submit that, at the same time, Neu (a) was proud of the work being done by eSolutions, (b) believed in the viability of eSolutions, and (c) wanted to maintain NSI's fifty percent shareholdings in eSolutions.

[29] The applicants submit that Neu did not, on behalf of NSI, agree to relinquish NSI's ownership stake in eSolutions. The applicants' position is that negotiations towards such an agreement broke down and NSI remains a fifty percent shareholder of eSolutions.

[30] The respondents have a different view of Neu's motivation in 2016 and of the agreements reached at that time. The respondents' position is that Neu acted entirely out of self interest – taking the steps he thought were necessary to protect himself from potential liability.

[31] The respondents assert that the communication and events that followed Neu's receipt of the CRA letter include an agreement that NSI would relinquish its fifty percent ownership of eSolutions. As evidence of that agreement, the respondents rely on email communication between Neu and Milutinovic in late July 2016.

Analysis

a) The Law

i) The law of Contract, Generally

[32] For a contract to be formed, there must be a meeting of the minds. It is not a matter of what one party believed or understood the other party to mean. The court must consider the conduct of the parties from the perspective of the reasonable person: see *Brousseau. c. La Cité Collégiale et al.*, 2021 ONSC 2676, at para. 8.

[33] The test to be met is explained by Fraser C.J.A., at para. 9 of the decision in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.*, 2003 ABCA 221, 35 B.L.R. (3d) 30: “The parties will be found to have reached a meeting of the minds, in other words be *ad idem*, where it is clear to the objective bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty.”

[34] In *Bawitko Investments Limited v. Kernels Popcorn Limited* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.) (“*Bawitko*”), the Court of Appeal for Ontario considered contract negotiations in the context of normal business practice, the requirements for the formation of a contract, and the consequences when negotiations fall short of the formation of a contract. I start with the principles applicable to the formation of a contract. Those principles are set out at p. 12 of the decision:

- Through discussion and negotiations, parties planning to make a formal written document “frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared”;
- The parties’ agreement may be expressed through oral communication or in writing in the form of a memorandum, exchange of correspondence, or other less formal documents;
- The agreement reached between the parties may include a “contract to make a contract”; the parties may bind themselves to execute, at a future date, a formal written agreement in which is contained all the specific terms and conditions to which the parties have agreed; and
- The prerequisites for the formation of a contract are met if the parties (a) have agreed on all the essential terms to be incorporated in the formal document to be prepared at a later date, and (b) intend that their agreement shall become binding. The validity of the agreement is not affected by the timing of the preparation of the document or its execution.

[35] I turn next to the principles relevant to negotiations which fall short of the formation of a contract. These principles are set out at p. 13 of *Bawitko*.

[36] The original or preliminary agreement cannot constitute an enforceable contract where one or more of the following circumstances exists:

- The essential terms intended to govern the contractual relationship have not been agreed upon or settled;

- The contract is too general or uncertain to be valid on its own and is dependant on a formal contract being made; or
- Even if there is certainty between the parties as to their understanding and intention, their legal obligations are to be deferred until a formal contract has been approved and executed.

[37] In the circumstances listed immediately above, “[the] execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself”: *Bawitko*, at para. 13.

[38] The principles delineated in *Bawitko* were summarized by Lang J., at para. 42 of the decision in *3664902 Canada Inc. v. Hudson’s Bay Co.*, 2002 CarswellOnt 22 (S.C.J.):

The question is whether the parties had intended to, and did in fact, reach an agreement on all the terms essential for the performance of the contract. If they did reach such an agreement, then an agreement to reduce those terms to writing would be no more than a formality. It would not diminish the enforceability of a contract already reached. However, if the parties had only an agreement that they would later agree on those terms, and had not reached agreement on all the essential terms, then their agreement would not be enforceable.

[39] In this proceeding, the subject matter of the alleged agreement is the transfer of shares in eSolutions. Section 41 of the *OBCA* states that, “The shares of a corporation are personal property.” Shares of a corporation are transferrable, subject to restrictions imposed by law, including by statute or as set out in the articles of incorporation: *Ontario Jockey Club Ltd. v. McBride*, [1927] 4 D.L.R. 30, at p. 35 (J.C.P.C.) and *Kiely v. Smyth*, 1879 CarswellOnt 106 (Ont. C.C.), at paras. 5 and 6.

b) The Evidence

[40] The parties submit that all of the evidence available with respect to the alleged share transfer agreement is before the court. That evidence is in the form of affidavits from each of the individual parties; transcripts from the cross-examinations of the affiants; exhibits to the affidavits and as entered during the cross-examinations; and a certified transcript of a recording Neu made of a meeting with Milutinovic, in April 2019.

[41] The parties submit that few findings, if any, with respect to credibility are required; credibility assessments are not central to the outcome at this stage of the proceeding. I agree with the parties that there are no credibility issues which preclude determining, by way of application, whether, as of July 2016, NSI ceased to be a fifty percent shareholder of eSolutions.

[42] In addition, I find that there are no factual controversies that preclude determining, by application, the issue of the alleged share transfer agreement.

c) Analysis

i) Article 8 of eSolutions Articles of Incorporation

[43] As of March 2003, when eSolutions was incorporated, both Neu and Milutinovic had several years of experience, respectively, as sole owners of a corporation. While they took different approaches to the administration of their respective companies, they each had at least a basic understanding of the administration of a corporation.

[44] Neu and Milutinovic knew, for example, to retain a lawyer to assist them with the incorporation of eSolutions. They relied on a lawyer to prepare the Articles. Both Neu and Milutinovic signed the Articles – Neu on behalf of NSI and Milutinovic on behalf of Zeebra. Their signatures appear immediately below Article 10 in the space provided for “Signatures of Incorporators”.

[45] For those reasons, I find that Neu and Milutinovic were both aware in 2003 (a) that eSolutions is a corporation, and (b) of the terms of the Articles.

[46] It is undisputed that no share certificates were issued, no formal directors’ meetings held, no shareholder resolutions passed, and no minute book created (let alone updated annually).

[47] Neu’s evidence is that for NSI, the requisite corporate documents were prepared annually. Those documents include shareholders’ resolutions and minute book updates. As the sole owner of NSI, Neu was diligent about the corporation’s paperwork.

[48] Neu acknowledges that, from the inception of eSolutions, he was not diligent about ensuring that eSolutions’ corporate documents were kept up to date. Neu’s evidence is that the division of labour for eSolutions evolved such that Milutinovic was responsible for eSolutions’ financial management and administrative tasks for the corporation. Neu’s evidence is that the evolution in that division of labour resulted in him being responsible for other aspects of the operation of eSolutions.

[49] Milutinovic disagrees with that characterization of an evolution in the division of labour between the two men. Milutinovic’s evidence is that Neu had no interest in the finances and administration of eSolutions; as a result, it was by default that Milutinovic came to be responsible for the finances and administration of eSolutions.

[50] Regardless of how the division of labour evolved between the two men, I find that both Neu and Milutinovic were cavalier in their approach to the administration of eSolutions. That cavalier approach, even if coupled with the failure to issue share certificates, does not entitle the incorporators, the directors, or the shareholders of eSolutions to disregard the requirements of Article 8 with respect to share transfers. There is no evidence of either a directors' resolution (Article 8(a)) or a shareholders' resolution (Article 8(b)) consenting to a transfer of shares in eSolutions.

[51] In the absence of evidence of compliance with Article 8, I find that NSI did not transfer its shares of eSolutions to Milutinovic/Zeebra in 2016.

[52] I will deal next with the respondents' position that the parties reached an agreement, to be reduced in writing, for the transfer from NSI to Milutinovic/Zeebra of fifty per cent of the shares in eSolutions. That alternative argument is considered against the backdrop of Neu's assertion that, as of 2016, he still believed in the viability of eSolutions and its potential to generate revenue.

ii) Neu's Belief in eSolutions

[53] Neu acknowledges and I find that, in June and July 2016, he acted out of self-interest in response to the receipt of the CRA letter. His goal was to avoid personal liability for the outstanding income tax liability of eSolutions, said by CRA to be in the amount of \$265,000. Neu wanted to protect his interests and to protect his family.

[54] Based on Neu's uncontradicted evidence describing his response to the CRA letter, I find that he took the following steps. First, Neu contacted Milutinovic by telephone and asked for an explanation of CRA's position as described in the CRA letter and during subsequent telephone communication between Neu and CRA. Unsatisfied and concerned by Milutinovic's explanation during his initial telephone call with Milutinovic, Neu's next step was to meet with a lawyer.

[55] It is undisputed that as of the summer of 2016, Neu did not have all of the information regarding eSolutions' financial history and current status. eSolutions had, however, been in operation for slightly over thirteen years. In addition, Neu had been operating NSI for approximately eighteen years. Neu was not a neophyte with respect to the operation of a consulting service business in the IT field.

[56] Based on Neu's experience operating NSI, his experience in the field of IT consulting, and his knowledge of eSolutions' business over a thirteen-year period (2003 to 2016), I find that Neu was in a position to make and that he did make an informed assessment of the future revenue-generating potential of eSolutions.

[57] I accept Neu's evidence with respect to the substance of his meeting with his lawyer. I find that during the meeting with his lawyer, Neu expressed his (a) concerns about Milutinovic's management, and potential mismanagement, of eSolutions' finances; (b) desire to cease being a director, so as to avoid personal liability arising from that management and/or mismanagement; (c) belief in eSolutions viability in terms of the work it was doing and its potential to continue to generate revenue; and (d) desire for NSI to maintain its fifty percent shareholdings.

[58] The parties agree that, in 2016, they reached an oral agreement, the terms of which include the following,

- a) Neu would resign as a director of eSolutions; and
- b) in consideration of Neu's resignation,
 - i) Milutinovic, Zebra, and eSolutions would agree to indemnify Neu for any financial liability related to eSolutions; and
 - ii) eSolutions would retain NSI to provide consulting services.

[59] The parties agree that the oral agreement described immediately above was reduced to writing in the form of the Consulting Agreement and the Indemnity Agreement. It is undisputed that both agreements were drafted by Neu's lawyer and signed without any revisions requested by Milutinovic or anyone on his behalf.

[60] I find that the terms of the Consulting Agreement are consistent with Neu's stated belief in eSolutions as of the summer of 2016. I find that the terms of the Indemnity Agreement do not detract from the existence and veracity of that belief. I will briefly review the Consulting Agreement and then the Indemnity Agreement.

▪ ***The Consulting Agreement***

[61] I find that Neu's belief in the work being done by and the future income-generating potential of eSolutions are reflected in the terms of the Consulting Agreement. First, Article 1.2 of the Consulting Agreement prescribes a five-year term. Neu was prepared to and did commit to continue NSI's economic relationship with eSolutions for five years.

[62] Second, through NSI, Neu relied on eSolutions for significant income - \$360,000 per year to be paid at the rate of \$30,000 per month (Article 1.5).

[63] Third, Neu accepted, as terms of the Consulting Agreement early termination of the agreement on the basis of (a) twelve months' notice from eSolutions to NSI, or (b) six months' notice from NSI to eSolutions (Article 4.1). Based on the difference in the notice periods, I find that the continuation of the relationship was of more significance to NSI (and Neu) than it was to eSolutions (and Milutinovic and/or Zebra).

[64] Fourth, the Consulting Agreement provides for renewal – on the parties' mutual agreement – for additional, and potentially repeated, five-year terms (Articles 8.1 and 8.2). I find that the potential for the relationship between and NSI and eSolutions to be continued in that manner is yet another reflection of Neu's belief in eSolutions.

▪ ***The Indemnity Agreement***

[65] The respondents submit that Neu's stated desire for NSI to remain a shareholder of eSolutions cannot be true given the lengths to which Neu went to protect himself *and* NSI from liability related to eSolutions' finances. I reject that submission and find that the Indemnity Agreement is consistent with both Neu's desire to protect himself financially and for NSI to remain a fifty percent shareholder in eSolutions.

[66] The respondents rely on the preamble to the Indemnity Agreement. The preamble is set out in three paragraphs:

WHEREAS the Consultant has entered into a Consulting Agreement, dated July 1, 2016 for the supply of consulting services to the Corporation, as more fully disclosed in the terms of such Agreement, of which Corporation Zebra is a shareholder, and Milutinovic is an officer and director;

WHEREAS it was a term of the Consultant's entering into such Agreement that the principal of the Consultant, Neu, a director of the Corporation prior to resigning as such on July 1, 2021, be indemnified from all liabilities arising out of the failure of the Corporation and its directors to respect their duties under the Ontario and Canada Income Tax Acts, the Canada Excise Tax Act, the Ontario Business Corporations Act, the Ontario Employers Health Tax Act, and such other Ontario and federal statutes, without exception, as may create liabilities of directors of a company ("Accrued Liabilities");

WHEREAS Milutinovic, personally, as well as his company Zebra, and the Corporation have all agreed to indemnify Neu from all liability and for Accrued Liabilities of the Corporation in consideration of the Consultant enter into the Consulting Contract with the Corporation:

[67] In the definition section which precedes the preamble, NSI is defined as “the Consultant”; eSolutions is therein defined as “the Corporation”.

[68] The respondents question why, if NSI was still a shareholder in eSolutions, it was not identified as such in the first preamble paragraph. The respondents highlight that only Zeebra (misspelled “Zebra”) is identified therein as a shareholder of eSolutions. Given the purpose of the Indemnity Agreement and the references therein to NSI as “the Consultant”, it would make no sense and be unnecessary to identify NSI as a shareholder of eSolutions. NSI’s status as a shareholder in eSolutions is irrelevant to the purpose the Indemnity Agreement is intended to serve.

[69] The respondents acknowledge that (a) the Indemnity Agreement does not explicitly state that NSI is no longer a shareholder of eSolutions, and (b) there was no reason to include NSI as a beneficiary of the Indemnity Agreement. There is no mention of NSI in the Indemnity Agreement other than in the preamble and for the purpose of context.

[70] I turn next to the nature of the indemnification that eSolutions, Zeebra, and Milutinovic agreed to provide Neu. The Indemnity Agreement sets out that eSolutions, Zeebra and Milutinovic,

... unconditionally and irrevocably [agreed] jointly and severally to hold harmless and indemnify Neu, from all liability or damage which may arise from the Corporation and its directors acts, negligence or any other cause related to the Purchaser’s failure to comply in a timely manner with the Corporation’s statutory obligations creating Accrued Liabilities for which Neu may be found liable in respect of his term as director of the Corporation.

[71] Without making any finding whatsoever with respect to the enforceability of the Indemnity Agreement, I find that it was logical, reasonable, and prudent for Neu to seek such an agreement – because of his concerns about eSolutions’ liabilities and the unsatisfactory explanation he received from Milutinovic. Neu’s decision to pursue an indemnity agreement of this nature does not detract from his belief in the future income-generating potential of eSolutions.

iii) There is no Enforceable Agreement to Transfer Shares in eSolutions

[72] The parties disagree as to whether they reached an agreement that NSI would relinquish its fifty percent ownership in eSolutions. Milutinovic submits that the parties’ agreement to that effect is expressed in email communication between Neu and him on July 26 and 28, 2016. Neu asks the court to find that the email communication reflects that there was no meeting of the minds, as of the date of the emails, regarding the transfer of NSI’s shares.

[73] On July 26, 2016, Neu sends Milutinovic an email to which are attached agreements that Neu's lawyer had drafted – the Consulting Agreement and the Indemnity Agreement. It is unclear whether a draft of the resignation that Neu would sign as a director, was also attached to the email. The inclusion or omission of a draft resignation form is not material to the issue to be determined at this stage of the proceeding.

[74] On July 28, 2016, at 7:05 a.m., Milutinovic responds to Neu's email, and the attached documents, with the following email:

Hi Carey

Yes I have received this email

I have provided to my lawyer to review and will get back to you shortly

I believe the only items we may need to address is the 5 year term and the 1 year notice for contract end. We had discussed 1 year term with renewal of contract provided 3 months before expiry ie Contract July 1/16 to June 30/17. Renewal for July 1/17 to June 30/18 Provided April 1/17

We can discuss

Thanks

[75] Within eleven minutes, Neu responds with the following email:

We agreed upon 5 years during our discussion. Have no idea what this 1yr term stuff is. This is a deal breaker for me. You put eSolutions in this situation. I have a lot invested in this company and there is no value for me to walk away with a 1 year term. We are best then to discuss dissolving the company. Doing an audit to see what is happening with the books for the last 5 years and then move forward.

This is what we agreed upon from earlier discussions.

Neu Solutions removed from eSolutions MN Inc. Partnership – Effective July 1st, 2016

eSolutions stays in business and ZeeBra/MM 100% Owner

Neu Solutions/Carey Neu not responsible for any investigation or responsible from CRA

Neu Solutions signs 5 year guaranteed contract with eSolutions

Flat rate of \$30K per month

Expenses paid

[76] On cross-examination, Milutinovic acknowledged that there was no further communication – email or otherwise – between him and Neu with respect to the transfer of shares in eSolutions.

[77] I find that the email communication does not constitute evidence of an agreement of “all the terms to be incorporated into [an] intended written document before it is prepared”: *Bawitko*, at para. 12:

- By concluding his email with “We can discuss”, Milutinovic signalled to Neu and was aware that the two men had not yet reached an agreement, including with respect to the transfer of shares in eSolutions;
- Milutinovic did not agree to the terms of the Consulting Agreement provided to him in draft. He was still considering the inclusion of a renewal term;
- As of July 28, 2016, Milutinovic was not prepared, without first having his lawyer review the documents, to agree to the detailed terms in the draft Consulting Agreement and draft Indemnity Agreement;
- What Milutinovic proposed as a renewal term, Neu interpreted as a proposal to limit the guaranteed income term to one year. The email exchange is not evidence of a meeting of the minds; and
- Neu’s use of the phrase, “This is what we agreed upon” is nothing more than his interpretation of the discussion between the two men. That interpretation is not sufficient, without additional evidence of the existence and terms of an agreement – specifically with respect to the share transfer – to support a finding that the parties agreed to the share transfer and to the essential terms upon which the transfer would be made.

[78] With respect to NSI’s shares in eSolutions, Neu’s July 28, 2016 email is evidence that Neu and Milutinovic had discussed the potential for NSI to transfer its fifty percent ownership to Milutinovic and/or Zeebra. There is, however, no evidence of an agreement between the applicants and the respondents as to who would be the transferee of NSI’s shares in eSolutions – one or both of Milutinovic and Zeebra. I find that, in the circumstances in which these parties found themselves in the summer of 2016, the identification of the transferee is an essential term to a share transfer agreement.

[79] I find that there is nothing in the July 28, 2016 email exchange which bound the parties to execute a formal written share transfer agreement at a later date: see *Bawitko*, at para. 12. In addition, I find that the email exchange is not evidence that the parties had agreed on all the essential terms to be incorporated in a share transfer agreement; nor is the email evidence that the parties intended that an oral agreement with respect to the share transfer, if reached, would become binding: see *Bawitko*, at para. 12.

[80] Even if it can be said that the parties had an agreement that they would later agree on the essential terms for a share transfer (and I do not find that such a preliminary agreement was reached), then their agreement would not be enforceable: *3664902 Canada Inc.*, at para. 42.

[81] Subsequent to July 28, 2016, as required, Neu and Milutinovic, in their personal and representative capacities, executed the Consulting Agreement, the Indemnity Agreement, and the Resignation. There is no evidence that either one of them took any step to (a) reduce a share transfer agreement, if reached, to writing, (b) have share certificates issued and otherwise bring the eSolutions corporate records up to date, or (c) comply with Article 8.

[82] Importantly, on this application, there is no document before the court which falls within the categories of documents required by Articles 8(a) or 8(b) to effect a transfer of shares in eSolutions. The documents listed therein are,

- a directors' resolution expressing the directors' consent to the proposed transfer;
- one or more instruments in writing signed by a majority of the directors and expressing their consent to the proposed transfer;
- a resolution of shareholders with at least fifty-one percent of the voting shares, expressing the shareholders' consent to the proposed transfer; and
- one or more instruments in writing signed by at least fifty-one percent of the shareholders expressing their consent to the proposed transfer.

[83] Relying on the language of Fraser C.J.A., at para. 9 of *Ghitter*, I find that it would not be clear to the objective bystander, in light of all the material facts, that the parties intended to contract a share transfer. Nor would the essential terms of a share transfer agreement be capable of determination with a reasonable degree of certainty.

Disposition

[84] In summary, I find that NSI remained a shareholder of eSolutions as of July 2016 and remains as such to the present day.

[85] Counsel for the parties shall contact the office of the Trial Co-ordinator to schedule a case conference before me to discuss the next steps in this and, if appropriate, the related proceeding. The purpose of the case conference is to set a timetable for the next steps.

[86] Counsel shall advise the office of the Trial Co-ordinator whether they wish to proceed with the case conference virtually or in person.

Date: May 1, 2023

Madam Justice S. Corthorn

APPENDIX

May 1, 2023: The file number CV-19-8236 which appears in the citation on the first and back pages of the decision is incorrect. The file number has been corrected to read CV-19-82360.

CITATION: *Neu Solutions v. eSolutions MN*, 2023 ONSC 311
OTTAWA COURT FILE NO.: CV-19-82360
DATE: 2023/05/01

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

NEU SOLUTIONS INC. and CAREY NEU

Applicants

– and –

eSOLUTIONS MN INC., ZORAN MICHAEL
MILUTINOVIC and ZEBBRA CONSULTING
SERVICES INC.

Respondents

AMENDED REASONS FOR DECISION

Madam Justice S. Corthorn

Released: May 1, 2023