

Court File Number: CV-11-9062-0001

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo Plaintiff(s)
AND
Xela Enterprises Ltd. et al Defendant(s)

Case Management Yes No by Judge: McBwen T

Counsel	Telephone No:	Facsimile No:
<u>(see Counsel Slip)</u>		

- Order Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)
- Adjourned to: _____
- Time Table approved (as follows):

This endorsement deals with the issue of costs with respect to my March 25/21 order.

I have reviewed the written submissions filed by the parties to the motion.

The Receiver, who was largely successful at the motions, seeks costs on a substantial indemnity

28 July 21
Date

McBwen T
Judge's Signature

Additional Pages thirteen

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

basis against Juan Guillermo Gutierrez ("Juan Guillermo") and Arturo's Technical Services Ltd. ("ATS").

In this regard, the Receiver seeks fees expended by its counsel in these proceedings, its counsel in Panama ("Hastings") and its own fees with respect to steps taken to obtain various Court orders - totalling \$319,599.²³

Juan Guillermo and ATS deny that any costs should be paid and, if so, the amount should be nominal - \$5,000.⁰⁰.

I will start with the issue of jurisdiction. Juan Guillermo and ATS contend that I cannot award costs to the Receiver since there was no request for costs in the first two notices of motion. They rely on the case of *Pelletier v Canada* [2006]

**Superior Court of Justice
Commercial List**

FILE/DIRECTION/ORDER

Judges Endorsment Continued

F.C.T No. 1884 (C.A.)

I do not agree with their submission and accept the submission of the Receiver that costs can be awarded in these circumstances based on the decision of the Court of Appeal in *Atapi v. Synergy Corp (2000) Inc* 2015 ONCA 771 at para 14 where the Court squarely dealt with this issue.

Pelletier is distinguishable, wherein no costs were requested in oral argument. This was not the case in the matter before me where costs were requested and I requested submissions.

The second issue to consider is the scale upon which costs ought to be awarded.

In my view, costs ought to be

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

awarded on a substantial indemnity basis with respect to the following:

- ① Against Juan Guillermo with respect to his failure to deliver his electronic devices for analysis contrary to my orders of Aug 28/20 and Oct 27/20.
- ② Against ATS with respect to its failure to allow the Receiver access to certain computer servers contrary to the above-noted Orders.

In both cases as I noted in my March 25/21 endorsement, Juan Guillermo and ATS failed to comply with prior orders. I do not propose to restate my other findings which were critical of both of them.

In the circumstances of the case substantial indemnity is warranted on these two issues. Court order, particularly in acrimonious litigation

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Such as Mine, cannot be ignored without consequence. I do not agree with the position taken by ATS that costs of motion cannot be recovered where fees are provided for in an Appointment order or Juan Guillermo's submission that Receiver's ought not receive costs. If Mine was true in either case it ^{at} would allow parties and stakeholders to ignore Court orders with impunity.

Given the failure to comply with clear orders of the Court and my other criticisms contained in the March 25/21 endorsement I am of the view that Mine is one of those rare cases where substantial indemnity costs are warranted. The actions of Juan Guillermo and ATS are worthy of sanction.

With respect to the remaining

**Superior Court of Justice
Commercial List**

FILE/DIRECTION/ORDER

Judges Endorsement Continued

Orders in my March 25/21 endorsement
I make the following orders:

① With respect to the Receiver's motion to expand its powers I award costs on a partial indemnity basis. Although the motion was opposed by Juan Guillermo and AIS I do not find that their opposition warrants heightened costs. It remains to be seen what the investigations will uncover.¹

② I make no order as to costs with respect to the Foreign recognition order; the order concerning fees of the Receiver and Corwell; or, the order replacing Duff & Phelps with Epig Global. None of these orders were strenuously opposed (the last one was unopposed). Thus, no costs are warranted.

i. I considered awarding substantial indemnity costs given the criminal proceedings commenced in Panama, but did not since Juan Guillermo thereafter co-operated and the expansion of powers deals with a number of issues/investigations - the results of which are yet unknown.

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

This brings me to the issue of quantum and what costs ought to be awarded.

The Receiver seeks its legal costs, along with costs incurred by the Receiver in obtaining orders, and costs of the Hatstone firm in Panama with respect to its involvement in issues surrounding the motion.

Juan Guillermo and AIS oppose any costs being awarded to Hatstone or the Receiver.

I disagree.

Hatstone is one of the Receiver's law firms. Given the actions of Juan Guillermo, as set out in my March 25/21 endorsement, it was reasonable and necessary to seek their assistance at the return of the motion.

Similarly, I agree that the

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Receiver incurred unnecessary and additional costs in responding to the non-compliance and allegations of Juan Guillermo and ATIS. In my view, such costs are compensable as being "incidental" to a step in the proceeding, i.e. the motion *ex parte* s. 13(1) of the Courts of Justice Act. Such relief is particularly sensible where the Court seeks to prevent abuses of the Court's procedure - in this case non-compliance with Court orders and the commencement of the proceedings in Panama against Hotstare which was supported by Juan Guillermo.

Based on the above analysis and considering the criteria set out in Rule 5701, considering the factors in *Boucher v Public Accountants Council*

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

For the Province of Ontario, 2004 CanLii 14579
(ONCA) and taking a holistic view
I have reviewed the submissions on
quantum vis a vis the Receiver, its counsel
and Hatstone.

I note that the objective in fixing costs
is to arrive at an amount that is
fair and reasonable for the unsuccessful
party to pay in the particular
circumstances of this case, rather than
the fixed amount of actual costs
incurred by the successful party.

In this regard, I do not propose
to analyse each item and conduct
what amounts to an assessment.
Instead, I will fix costs keeping
in mind the principle of proportionality
and the factors noted above.

I have reviewed the objections of
Juan Guillermo and ATS. Some I

**Superior Court of Justice
Commercial List**

FILE/DIRECTION/ORDER

Judges Endorsment Continued

have dealt with above.

They have raised certain issues that have already been litigated and dealt with in my previous endorsements and I do not propose to repeat them again.

I agree with them that amounts overall sought by the Receiver are high and there has been some duplication.

On the other side of the coin, the Receiver was put to extra expense as a result of the failure of Juan Guillermo and ATS to comply with my aforementioned order and ^{their} other actions referred to in my Feb 10/21 and March 25/21 endorsements.

I do not agree with ATS that the Rules preclude the Receiver from obtaining costs regarding cross-

**Superior Court of Justice
Commercial List**

FILE/DIRECTION/ORDER

Judges Endorsment Continued

examinations and prefer the Receiver's submission in this regard.

As noted above, I have also rejected the argument that the Receiver is not allowed reimbursement for steps taken to attempt compliance with Order. In addition to what I have outlined this would be unfair to stakeholders and saddle them with costs that ought not to have been incurred.

Taking all of the submissions into account, therefore, I make the following costs orders:

- ① With respect to Juan Guillen's failure to deliver his electronic devices he shall pay the Receiver, on a substantial indemnity basis the following fees:

Lencner Slayht LLP - \$50,000 plus HST

KSV Restructuring Inc - \$30,000 plus

HST.

**Superior Court of Justice
Commercial List**

FILE/DIRECTION/ORDER

Judges Endorsement Continued

② With respect to ATS's failure to allow the Receiver access it shall pay the Receiver, on a substantial indemnity basis the following fees:

Lenczner Slaght LLP - \$30,000 plus HST

KSV Restructuring Inc - \$15,000 plus HST

③ With respect to the Receiver motion to expand its power, Juan Guillermo and ATS, on a joint and several basis, shall pay the Receiver the following fees:

Lenczner Slaght LLP - \$15,000 plus HST

KSV Restructuring Inc - \$7,500 plus HST

Halstare - \$7,500 plus HST

④ Disbursements shall be paid to the Receiver by Juan Guillermo and ATS on a joint and several basis, with Juan Guillermo paying 67% and ATS paying 33%.

Given my previous findings in prior endorsements and the within

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Costs award I have determined that, while I will continue to manage this matter, it would be preferable if another judge conducted the contempt hearing - which is a quasi-criminal proceeding.

I will assume that it is reassigned and the dates are kept.

Costs are to be paid within 60 days.

McE...

COURT FILE NO.: Court File No. CV-11-9062-00CL

DATE: February 10, 2021

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

RE: Margarita Castillo, Applicant

AND:

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH
QUEST INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and
CARMEN S. GUTIERREZ, Executor of the Estate of Juan Arturo Gutierrez,
Respondents

BEFORE: The Honourable Justice McEwen

COUNSEL: Monique Jilesen for KSV Restructuring Inc., the Receiver

Chris MacLeod for Juan Guillermo Gutierrez

Philip Cho for Arturo's Technical Services Ltd. And BDT Investments Inc.

Jeffrey Leon and Jason Woychesyn for Margarita Castillo

Aaron Kreaden for the Avicola Group and each of Juan Luis Bosch Gutierrez,
Felipe Antonio Bosch Gutierrez, Dionisio Gutierrez Mayorga, and Juan Jose
Gutierrez Moyorga

ALSO PRESENT: Bobby Kofman, KSV Restructuring Inc., the Receiver

Carl O'Shea and Alvaro Almengor, Hatstone, Panamanian Counsel to the
Receiver