Court File No. CV-11-9062-00CL

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

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

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES LTD.

CASE CONFERENCE BRIEF OF THE RECEIVER

(September 27, 2022 Case Conference)

September 26, 2022

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Lawyers for the Receiver

TO: **THE SERVICE LIST**

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CASE CONFERENCE MEMORANDUM OF THE RECEIVER

(Case Conference returnable September 27, 2022)

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A. INTRODUCTION

1. KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed receiver and manager (in such capacity, the "**Receiver**") of Xela Enterprises Ltd. ("**Xela**"), provides this case conference memorandum to update the Court on the status of the receivership, to provide submissions on Juan Guillermo Gutierrez's ("**Juan Guillermo**") request to schedule a motion to replace the Receiver, and to seek dates for a further case conference.

2. The parties last attended at a case conference on September 13, 2022. The Receiver advised of a funding issue in respect of its fees and costs (including those of its legal counsel) and advised that it was considering asking the Court to schedule a motion to conduct a sales process. Mr. Gutierrez sought to schedule a motion to replace the Receiver. This Court deferred the scheduling because "funding may become available for the Receiver and…to see Mr. Gutierrez' Notice of Motion and review the status of compliance with prior order." A case conference was schedule for September 27, 2022.

3. On June 29, 2022, Conway J. held that Juan Guillermo breached the July 5, 2019 Order of McEwen J. (the "**Appointment Order**") when Juan Guillermo swore a declaration on December 3, 2020 (the "**Declaration**") in support of a criminal complaint against the Receiver's representatives in Panama ("**Hatstone**"). The sentencing hearing was heard on September 22, 2022. Justice Conway is to provide her decision on October 17, 2022.

4. The Receiver asks this Court to schedule a further case conference at the end of October or early November, 2022, to allow for additional time to:

(a) obtain the sentencing decision;

(b) address longer term funding for these proceedings; and

(c) address Juan Guillermo's motion to replace the Receiver, which the Receiver believes is an abuse of process and lacks any evidence.

B. UPDATE

5. On July 21, 2022, the parties and the Receiver attended a case conference before McEwen J. Juan Guillermo sought to schedule his motion to replace the Receiver. Justice McEwen declined to schedule Juan Guillermo's motion because:

(a) the notice of motion was only provided in draft form;

(b) costs remained outstanding;

(c) a finding of civil contempt against Juan Guillermo had been made by Conway J. on June 29, 2022; and

(d) Juan Guillermo "has still, inexplicably, failed to comply with my productions orders, long outstanding, nor did he provide any explanation … for failing to do so".[1]

6. On July 26, 2022, Juan Guillermo paid the outstanding costs order in the amount of $5,000.[2]

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[1] July 22, 2022 Endorsement of McEwen J., Brief of Documents to the Receiver's September 26, 2022 Case Conference Memorandum (the "**Brief**"), Tab 1.
[2] These costs were ordered by the Divisional Court on May 6, 2022 following Juan Guillermo's abandoned motion for leave to appeal this Court's March 25, 2022 Order.

7. On August 30, 2022, Juan Guillermo provided the Receiver's IT agent ("**Epiq**") with the password to unlock the hard drive containing images of Juan Guillermo's devices (the "**JG Hard Drive**")—as required by this Court's March 25, 2021 Order and its March 25, 2022 Order.

8. On September 12, 2022, Juan Guillermo delivered a final version of his notice of motion.

9. On September 13, 2022, Arturo's Technical Services Ltd. ("**ATS**") provided Epiq with Juan Guillermo's emails on ATS's servers—as required by the March 25, 2021 Order and the March 25, 2022 Order.

10. In light of the funding issues, the Receiver has not asked Epiq to process the JG Hard-Drive or the emails from ATS. Epiq cannot yet advise whether it has been provided with the data in the format it requires to upload the data to Relativity (the document review platform).

11. On September 22, 2022, Juan Guillermo and the Receiver appeared before Conway J. for the penalty phase of the contempt hearing. Her Honour is scheduled to deliver the decision on October 17, 2022.

12. At present:

(a) Hatstone continues to face criminal jeopardy. The Panamanian investigations are proceeding slowly and are not expected to conclude soon;

(b) the Receiver has made significant progress resolving the funding issues, but due to the significant expense resulting from the numerous disputes in these proceedings, the Receiver requires certainty that funding is available for its future fees and costs in these proceedings. If the Receiver is unable to finalize satisfactory funding

arrangements, it intends to make a recommendation to the Court as to its views of the appropriate next steps in these proceedings; and

(c) Justice Conway's decision on penalty remains outstanding.

C. SUBMISSIONS REGARDING JUAN GUILLERMO'S MOTION

13. The Receiver submits that Juan Guillermo should not be permitted to schedule a motion to replace the Receiver considering the nature of Juan Guillermo's allegations, the lack of any evidence, and the finding of contempt. Although this issue can be addressed at a later case conference, brief submissions are set out below.

(i) Juan Guillermo is in Contempt of this Court

14. A party to litigation ought not to be able to schedule motions when they are in contempt of the Court. It is the Receiver's position that Mr. Gutierrez has not purged his contempt. It is expected the issue of whether the contempt has been purged will be addressed in Conway J.'s penalty decision. No motion ought to be scheduled prior to that decision.

(ii) Juan Guillermo's Motion is an Abuse of Process

15. The September 12, 2022 notice of motion:

(a) alleges that the Receiver is uninterested in Xela's beneficial interest in the dividends owed to Xela's wholly-owned, indirect subsidiary, LISA S.A. ("**LISA**").[3] This is unsupported by any facts and is contrary to the Receiver's actions to-date. The Receiver is interested in obtaining information from LISA to

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[3] Juan Guillermo's September 12, 2022 Notice of Motion, at para. n, Brief Tab 2.

consider the *bona fides* of transactions that deprived Xela of all its assets (the "**Reviewable Transactions**") in order to consider whether Xela still indirectly owns the interest in the Avicola Group, or whether that interest was properly conveyed to the ARTCARM Trust to the benefit of Juan Guillermo's family. The Receiver has explicitly and repeatedly stated that it has not made a determination as to the appropriateness of those transactions and has been seeking disclosure from Juan Guillermo, ATS, Gabinvest S.A., and LISA (and others) since the early days of these proceedings. It is the Receiver's view that Juan Guillermo intentionally interfered with the Receiver's efforts to investigate the Reviewable Transactions, including when he swore the Declaration in support of the criminal complaint;

(b) alleges that the Receiver is engaged in a "fishing expedition in coordination with" Juan Guillermo's cousins (or nephews)[4] because the investigation into the Reviewable Transactions involve assets in which Xela had (or has) no beneficial interest. It further alleges that the Receiver has "engaged in numerous regular discussions with the Cousins [or Nephews] throughout the course of the receivership."[5] This allegation was made at the March 25, 2021 motion. There is no substance to these allegations. This Court has addressed and refused to schedule motions with these allegations in the past.[6] The March 25, 2022 Endorsement,

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[4] Juan Guillermo's September 12, 2022 Notice of Motion, at para. m, Brief Tab 2.
[5] Juan Guillermo's September 12, 2022 Notice of Motion, at para. o, Brief Tab 2.
[6] March 25, 2022 Endorsement (unofficial transcription) of McEwen J., at paras. 6, 9, and 14, Brief Tab 3; March 25, 2021 Endorsement (unofficial transcription) of McEwen J., at paras. 32, 40-41, Brief Tab 4.

provides that "there is no reasonable basis to suggest that the Receiver has in some way colluded with 'the Nephews'";[7]

(c) alleges that the Receiver's reports are "riddled with inaccurate" statements, such as "unfairly casting" Juan Guillermo as "uncooperative."[8] The failure to comply with production orders for over two years can fairly be described as uncooperative. This Court has described the failure to comply as "inexplicable";[9]

(d) alleges that the Receiver's attempts to achieve compliance with this Court's August 28, 2020 Order, October 27, 2020 Order, March 25, 2021 Order, and March 25, 2022 Order are an improper attempt to access Juan Guillermo's "emails and his personal electronic devices".[10] These are Orders made and repeatedly affirmed by this Court (in some cases after contested motions) and cannot form the basis for a motion that the Receiver acted improperly. Juan Guillermo sought leave to appeal the March 25, 2021 Order and the March 25, 2022 Order. The Divisional Court dismissed the former, and Juan Guillermo abandoned the latter;

(e) alleges that the Receiver interfered with a 2019 loan to pay the judgment owed to Ms. Castillo.[11] Juan Guillermo has been making this allegation for years, including in the motion heard in March 2021 and the case conference held on March 25, 2022.[12] In the March 25, 2021 Endorsement, this Court directed that, if the loan

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[7] March 25, 2022 Endorsement (unofficial transcription) of McEwen J., at para. 14, Brief Tab 3.
[8] Juan Guillermo's September 12, 2022 Notice of Motion, at para. r, Brief Tab 2.
[9] July 22, 2022 Endorsement of McEwen J., Brief Tab 1.
[10] Juan Guillermo's September 12, 2022 Notice of Motion, at para. s, Brief Tab 2.
[11] Juan Guillermo's September 12, 2022 Notice of Motion, at para. v, Brief Tab 2.
[12] March 25, 2021 Endorsement (unofficial transcription) of McEwen J., at para. 32, Brief Tab 4; March 25, 2022 Endorsement (unofficial transcription) of McEwen J., at paras. 7 and 19, Brief Tab 3.

was legitimate, "full particulars and terms of payment should be provided. To date this has not occurred."[13] The March 25, 2022 Endorsement, again makes clear that no particulars about any loan had been provided;[14]

(f) alleges that the motion for contempt was a "retaliation" and alleges that Conway J. erroneously concluded that Mr. Gutierrez was in criminal contempt. This is an improper collateral attack against the finding of Conway J.; and

(g) alleges that "Mr. Kofman has admitted under oath that KSV instructed Hatstone. Consequently, KSV and/or Mr. Kofman may themselves be exposed to potential criminal prosecution in Panama."[15] This appears to be a not so veiled threat against the Receiver and should not be countenanced.

16. The doctrine of abuse of process "engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some way bring the administration of justice into disrepute."[16] Juan Guillermo's motion is an abuse of process and should not be scheduled.

D. DIRECTION REQUESTED

17. The Receiver respectfully requests that:

(a) a case conference be scheduled subsequent to the contempt sentencing decision;

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[13] March 25, 2021 Endorsement (unofficial transcription) of McEwen J., at para. 41, Brief Tab 4.
[14] March 25, 2022 Endorsement (unofficial transcription) of McEwen J., at para. 19, Brief Tab 3.
[15] Juan Guillermo's September 12, 2022 Notice of Motion, at para. aa, Brief Tab 2.
[16] *Currie v. Halton Regional Police Services Board*, 179 O.A.C. 67 (ONCA), at para. 16, Brief Tab 5.

(b) Juan Guillermo's motion be barred as an abuse of process; and

(c) in the alternative, Mr. Gutierrez should deliver any evidence in support of the motion, prior to this Court considering whether the motion be scheduled.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of September 2022.

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Applicant Respondents

Court File No. CV-11-9062-00CL

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PROCEEDING COMMENCED AT TORONTO

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(Case Conference returnable September 27, 2022)

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SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-11-00009062-00CL **DATE:** 22 July 2022

NO. ON LIST: 03

TITLE OF PROCEEDING: CASTILLO V XELA et al

BEFORE JUSTICE: MCEWEN

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Jason Woycheshyn	Margarita Castillo	

ENDORSEMENT OF JUSTICE MCEWEN:

25 July 22

I conducted a case conference on July 22/22. At the case conference Mr. Gutierrez sought to schedule a motion to have KSV Restructuring Inc. recused as Receiver.

I declined to schedule the motion[1]. I agree with the Receiver that the motion ought not to be scheduled when currently:

1. Mr Gutierrez has not served a Notice of Motion (although he has provided a draft);
2. costs remain outstanding (although he has promised to pay);
3. a finding of civil contempt has been made against Mr Gutierrez by Justice Conway by way of her June 29/22 decision; and,
4. significantly Mr Gutierrez has still, inexplicably, failed to comply with my production orders, long outstanding, nor did he provide any explanation in his case conference brief for failing to do so, or at the hearing for that matter.

This matter will return before me on Sept. 13/22 to review o/s issues and next steps.

1. As per Rule 60.12.

McEwen J.

Court File No. CV-11-9062-00CL

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Respondents

NOTICE OF MOTION

The Respondent Juan Guillermo Gutierrez ("**Mr. Gutierrez**"), will make a Motion to the Honourable Justice McEwen presiding over the Commercial List on _______________ at 10:00 a.m., or as soon after that time as the Motion can be heard.

PROPOSED METHOD OF HEARING: The Motion is to be heard

[ ] In writing under subrule 37.12.1(1) because it is [insert on consent, unopposed or made without notice];

[ ] In writing as an opposed motion under subrule 37.12.1(4);

[ ] In person;

[ ] By telephone conference;

[X] By video conference.

at the following location:330 University Avenue, Toronto, Ontario

THE MOTION IS FOR:

a) An Order varying the appointment Order dated July 5, 2019 (the **"Appointment Order"**) to substitute Albert Gelman Inc. in place of KSV Restructuring Inc. (**"KSV"**) as receiver;

b) An Order for costs in favor of Mr. Gutierrez, payable on a priority basis over the Applicant from funds collected by the receivership; and

c) such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

d) Pursuant to the Appointment Order, KSV was appointed receiver and manager over Xela Enterprises Ltd. ("**Xela**") pursuant to the *Courts of Justice Act* to enforce a judgment dated October 28, 2015 (the **"Castillo Judgment"**), and a series of outstanding costs orders, in favour of the Applicant, Margarita Castillo (**"Ms. Castillo"**);

e) Mr. Gutierrez is also a judgment debtor pursuant to the Castillo Judgment and the sole shareholder of Xela;

f) At the time of the Appointment Order, approximately $1.568 million had been paid against the Castillo Judgment – all from the liquidation of Mr. Gutierrez's personal assets – and approximately $4 million remained outstanding in respect of the Castillo Judgment;

g) In its First Report to the Court dated October 17, 2019, KSV reported that Xela's most

significant asset was its indirect one-third interest in certain businesses in Central America, referred to as the "Avicola Group," and which was the subject of multi-year, multi-jurisdictional litigation relating to shareholder disputes (the **"Avicola Litigation"**);

h) KSV further reported that it was investigating certain transactions that it alleged had the effect of transferring the potential value of the Avicola Litigation to third parties (referred to as the **"EAI Transaction"** and the **"Assignment Transaction"**);

i) The EAI Transaction occurred in April 2016 and relates to the transfer by a Barbados corporation (EAI) of shares in two other Barbados corporations – BDT Investments Inc. (**"BDT"**) and Corporacion ARVEN Limited – to Mr. Gutierrez' father, Juan Arturo Gutierrez (now deceased) (**"Arturo"**), and then subsequently to a Barbados trust, the ARTCARM Trust, as part of Arturo's estate planning.

j) The Assignment Transaction occurred in January 2018 and describes a transaction between a Panamanian corporation, LISA S.A. (**"LISA"**), assigning its interest in the Avicola Litigation to BDT in consideration for BDT's past and continued funding of the Avicola Litigation;

k) Xela was not a party to the EAI Transaction nor the Assignment Transaction, both of which involved foreign corporations;

l) A mutual lack of trust has developed between Mr. Gutierrez and KSV that has infected the proceedings. As a practical matter, it has become impossible under KSV's authority to achieve the objective of the receivership, which is to satisfy the Castillo Judgment.

m) Mr. Gutierrez asserts that KSV has failed to act objectively and in good faith to seek satisfaction of the Castillo Judgment but has engaged in a fishing expedition in coordination

with Mr. Gutierrez's cousins (the **"Cousins"**) – with whom Mr. Gutierrez and his family have been embroiled in highly contentious multi-jurisdictional Avicola Litigation for more than twenty years – that has no nexus to the potential receipt of funds and instead appears designed solely to inflict financial injury on Mr. Gutierrez.

n) During meetings with Mr. Gutierrez in the early days of the receivership, KSV's Bobby Kofman explicitly refused to discuss the only monies realistically available to satisfy the Castillo Judgment, which are the claims for an estimated US$400 million in dividends improperly withheld by the Cousins from LISA, an indirect Panamanian subsidiary of Xela. After more than three years as receiver, KSV has yet to articulate a plan to address collection of the unpaid dividends but has rejected multiple requests by Mr. Gutierrez to discuss a coordinated, cooperative approach.

o) KSV has engaged in numerous regular discussions with the Cousins throughout the course of the receivership without disclosing the nature of those communications. Mr. Gutierrez became aware of the coordination between KSV's lawyers and the Cousins' lawyers solely as a result of billing records submitted by KSV to this Court for approval. Despite inquiries from Mr. Gutierrez, KSV refuses to disclose the content of or reasoning behind those discussions.

p) Rather than pursue the dividends withheld by the Cousins from LISA, KSV has focused exclusively on certain "reviewable transactions" that, even if reversed, would have no bearing on the potential collection of funds. Although KSV has already incurred more than a million dollars in professional fees investigating those transactions, it has not collected a single dollar in the receivership.

q) Conversely, KSV has taken no steps to collect an unpaid $400,000 promissory note in favor

of Xela from a company owned by Ms. Castillo's husband. Neither has KSV investigated the evidence supplied by Mr. Gutierrez suggesting that Ms. Castillo received the full benefit of a US$4.35 million loan in 2010 that was repaid with LISA dividends wrongfully pledged as collateral by the Cousins, effectively satisfying the Castillo Judgment.

r) KSV's official reports are riddled with inaccurate and/or incomplete statements and omissions, unfairly casting Mr. Gutierrez as uncooperative and giving little if any consideration to Mr. Gutierrez's legal rights. Although Mr. Gutierrez has corrected the record repeatedly with both sworn testimony and documentary evidence, KSV has not amended its reports accordingly. Further, KSV has made of practice of making sensitive documents public, seemingly without reason. For example, KSV recently posted on its website a copy of a SWIFT electronic funds transfer confirmation that contained personal information belonging to a Russian third-party lender who was transferring funds to Mr. Gutierrez's counsel to satisfy the Castillo Judgment. Those funds were subsequently held up by the U.S.-based intermediary bank identified in the SWIFT, further preventing satisfaction of the Castillo Judgment.

s) KSV has abused its broad discovery powers in search of documents potentially useful to the Cousins. Most notably, under the premise that it required additional information to review the transactions, KSV continued to insist on access to all of Mr. Gutierrez's emails and his personal electronic devices in a manner not available to ordinary civil litigants. Yet without advising the Court or the stakeholders, KSV had already commenced a civil claim in Ontario against Mr. Gutierrez and his family relating to the same "reviewable transactions" under investigation by KSV in the receivership. Consequently, KSV has now exposed highly confidential and personal information belonging to Mr. Gutierrez – not to Xela – to the risk of security breach, knowing that Xela's entire electronic database had been stolen and delivered

to the Cousins at least once before.

t) KSV has articulated no potential nexus between information in Mr. Gutierrez's emails/personal devices and the collection of funds. KSV's efforts to obtain the information over the last three years has been grossly disproportionate to any potential relevance of the evidence expected to be contained therein. The data uploaded to an electronic database maintained by KSV's agent constitute more than 60 gigabytes and hundreds of thousands of separate emails spanning more than 20 years. Proper review calls for a massive outlay of time and resources in the days ahead – all of which will undoubtedly be charged to Mr. Gutierrez, who has already lost all his personal assets to Ms. Castillo, including his family home and his ability to support his aging mother in Toronto, who receives no financial assistance from her daughter Ms. Castillo.

u) KSV took possession of all of Xela's physical documents without cataloguing them, creating unnecessary chain-of-custody concerns. KSV subsequently refused to address tax issues of certain Xela subsidiaries whose documents were seized by KSV.

v) In 2019, LISA secured a third-party loan commitment that would have satisfied the Castillo Judgement and all receivership expenses (the **"LISA Loan"**). KSV objected to the Lisa Loan on the ground that it could not evaluate the impact of the loan on the remaining Xela creditors (*i.e.,* other than Ms. Castillo). KSV has never explained the logic of that reasoning considering Paragraph 25 of the Appointment Order, which places the onus on Ms. Castillo to argue that the Receiver should not be discharged even if the Castillo Judgment were satisfied.

w) More importantly, in response to LISA's disclosure of the LISA Loan and its request for a payoff amount, the Receiver intentionally interfered with the loan and prevented its funding.

Even while KSV's lawyers were in discussions with LISA's lawyers concerning the LISA Loan, KSV quietly hired the Hatstone law firm in Panama (**"Hatstone"**) and instructed it to take over LISA without first going through the process of seeking recognition in Panama consistent with Paragraph 30 of the Appointment Order. In order to achieve that objective, Hatstone filed an official public writing with the Panamanian corporate registry falsely representing that Gabinvest, S.A. (**"Gabinvest"**), LISA's parent company, had properly notified and conducted a shareholder meeting in Panama during which the Gabinvest board of directors was ostensibly reconstituted to give Hatstone representatives control. The public writing filed by Hatstone made no reference: (1) to Xela; (2) to KSV; (3) to the fact that – at least in Ontario, Canada – KSV had replaced Mr. Gutierrez as the acting shareholder of Xela; or (4) to the fact that the Appointment Order had not been recognized in Panama, and that KSV's authority to act as Xela's sole shareholder therefore did not extend to Panama.

x) Thereafter, Hatstone sought to cause Gabinvest to reconstitute the LISA board of directors to give Hatstone control of LISA. The scheme was uncovered by LISA's and Gabinvest's Panamanian lawyers before the changes could take effect. Still, the public controversy over LISA's board caused the third-party funder to withdraw its loan commitment. Consequently, Mr. Gutierrez was prevented from satisfying the Castillo Judgment and bringing a motion to discharge the receivership, and KSV's onerous investigation into the "reviewable transactions" took on new life and continues to the present.

y) As the Court knows, Hatstone is now facing criminal charges in Panama stemming from the misconduct. In the process, Mr. Gutierrez – still the only Xela shareholder recognized in Panama – truthfully affirmed that he had not participated in the Gabinvest shareholder meeting alleged by Hatstone. In response, this Court ordered Mr. Gutierrez to withdraw his affirmation

and to direct LISA to withdraw the criminal complaint in Panama, which he did. However, LISA declined on the ground that it was under a legal obligation in Panama to report criminal activity, and the prosecution against Hatstone continues.

z) KSV has never acknowledged its own misconduct in Panama. Instead, in apparent retaliation for the outcome in that country, KSV sought a finding of criminal contempt and incarceration against Mr. Gutierrez, which was heard before Justice Conway on May 30/31 and June 2, 2022. Although Justice Conway (erroneously) concluded that Mr. Gutierrez was liable in civil contempt, she found that he had not engaged in criminal conduct. However, sentencing is pending, and the potential injury to Mr. Gutierrez is still unknown.

aa) Although KSV failed to give Hatstone a power of attorney as required under Panama law, creating the appearance that Hatstone was acting alone, Mr. Kofman has admitted under oath that KSV instructed Hatstone. Consequently, KSV and/or Mr. Kofman may themselves be exposed to potential criminal prosecution in Panama, exacerbating the conflict between KSV and Mr. Gutierrez. KSV should not continue to act as an Officer of the Court in a receivership where KSV and/or its principal may be charged criminally in connection with the conduct of the same receivership.

bb) The foregoing developments have created serious tensions and a mutual lack of trust between KSV and Mr. Gutierrez. There is a conflict of interest – or, at the very least, an appearance of conflict – with respect to KSV's mandate as receiver given the undisclosed relationship with the Cousins, the potential for criminal sanctions in Panama, and the singular focus on Mr. Gutierrez's personal emails and data. Under these circumstances, Mr. Gutierrez has found it challenging to fulfill his responsibilities under the Appointment Order while

safeguarding his own legal rights. All parties would seemingly benefit from a new receiver.

cc) Albert Gelman Inc. is a licensed insolvency trustee with extensive experience under similar mandates and has agreed to act, subject to satisfactory payment terms.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

dd) Affidavit of Juan Guillermo Gutierrez to be sworn; and

ee) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

September 12, 2022

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Arturo's Technical Services Inc.

MARGARITA CASTILLO -and- XELA ENTERPRISES LTD. et al.
Applicant Respondents

Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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Lawyers for the Respondent
Juan Guillermo Gutierrez

Court File Number: CU-11-9062-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Castillo
Plaintiff(s)

AND

Xela Enterprises et al
Defendant(s)

Case Management ☑ Yes ☐ No by Judge: McEwen J.

Counsel	Telephone No:	Facsimile No:
see counsel slip		

☐ 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):

A further case conference was convened today at my request to deal with the ongoing and protracted dispute concerning compliance with my earlier orders of Aug 28/20, Oct 27/20 (two orders) and March 25/21.

As I have previously noted the first three orders were

25 March 22
Date

McEwen J.
Judge's Signature

☑ Additional Pages twelve

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granted on consent. The last order, March 25/21, resulted from a contested motion and leave to appeal was denied.

Since then Mr. Gutierrez has raised several objections concerning the methods that should be used with respect to the provision of his passwords to Epiq. As a result ATS has also not provided the emails that I have ordered be produced.

I convened the case conference today to rule on the protocol given Mr Gutierrez's most recent objections.

At today's case conference counsel for Mr Gutierrez advised that they wished me to defer the issues concerning access and production as they wished to

Judges Initials TM

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Judges Endorsment Continued

bring a motion for injunctive relief staying the enforcement of my aforementioned order, based on a draft Notice of Motion provided shortly before the case conference began.

The draft Notice of motion generally speaking, repeats historical complaints Mr Gutierrez has raised against the Receiver, and the "appearance" that the Receiver is being "funded by "the Nephews" with whom Mr Gutierrez has been locked in litigation outside Canada for several years.

Further, once again, Mr Gutierrez submits that he has secured funding to satisfy the Castillo judgment, which has now been held up given recent actions

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FILE/DIRECTION/ORDER

Judges Endorsment Continued

of the Receiver - generally involving information published on its website.

Mr Gutierrez also raises other issues in the draft Notice of Motion concerning the Receiver's recent conduct concerning the access/production issues. He alleges they have failed to cooperate with him.

Overall, amongst other things, Mr Gutierrez submits there is reason to believe that if access to passwords and documents is ordered as per the protocol suggested by Epiq, it could fall into "the Nephews'" hands, thus causing him great prejudice. This is particularly so, says Mr. Gutierrez given recent developments concerning "the Nephews" in Panama

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FILE/DIRECTION/ORDER

Judges Endorsment Continued

where Mr Gutierrez alleges they face criminal charges that are escalating in significance.

As I advised the parties at the case conference I am not prepared to defer the access / productions any further, and I ordered at the case that the passwords and emails referenced in my earlier orders and endorsements (and specifically my endorsement of March 17/22) be provided to Epiq no later than Monday March 28/22 @ 5 p.m.

I made the above order for a number of reasons.

First the Receiver is an officer of the Court and Epiq operates under the Receiver's mandate thus making it accountable to

Judges Initials TM

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FILE/DIRECTION/ORDER

Judges Endorsment Continued

this Court.

Epiq has proposed a sensible and secure manner to secure the passwords and ATS's documents.

Second, there is no reasonable basis to suggest that the Receiver has in some way colluded with "the Nephews" or that "the Nephews" can somehow engage in "corporate espionage" to secure the data that Epiq will secure. Mr Gutierrez, in some fashion or another, for some time has made these allegations without proof. In this regard it bears noting that the Receiver has consistently denied these long standing allegations.

Third, it bears noting that Mr Gutierrez has for several months contested production of

Judges Initials TM

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FILE/DIRECTION/ORDER

Judges Endorsment Continued

the passwords. Notwithstanding the three consent orders of Aug /20 and Oct 27/20 (2) Mr Gutierrez did not make any production or provide passwords. This lead to the March 15/21 order where I again ordered the disclosure of Mr. Gutierrez's passwords (amongst other things). Again, there has not been compliance.

Fourth, it bears noting that the Oct 27/20 order has a built-in protocol that allows only Mr. Gutierrez access to the Platform to allow him the opportunity to review the documents and assert any objections to disclosure.

Until that occurs, no one else, (not Epiq, the Receiver, or the Applicant, or any other person) can

Judges Initials PM

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Judges Endorsment Continued

have access. The protocol was well thought out, negotiated and addressed Mr. Gutierrez's concerns at the time.

Fifth, compliance with my aforementioned Orders took a backseat in the fall of 2021 when Mr Gutierrez claimed to have financing to pay the Castillo judgment. I paused the access/production issues to determine if the funding could lead to resolution.

Many months have passed with Mr Gutierrez offering various excuses as to why payment has not been made and financing not secured. The latest blames the actions of the Receiver in Feb /22, but several months passed before that date

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without the promised funding arriving - which was first promised in Sept/21.

It also bears noting that Mr. Gutierrez also proposed in March/21, when the motion was argued, that the motion concerning access/production should not be pursued as the Receiver had received a settlement offer. I rejected that submission as the offer, in my view for the reasons given, was no offer at all.

It may be that the currently promised financing may arrive, but that cannot form the basis of a stay given the above.

Sixth, I have made no findings of any misconduct against the Receiver. I have however been critical of Mr Gutierrez

Judges Initials PM

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Judges Endorsment Continued

particularly with respect to the initiation of a criminal complaint in Panama against the Receiver's agents which I ordered be withdrawn. Mr Gutierrez's involvement in the Panama matter was initiated without his Canadian solicitor's knowledge and I was of the view that the criminal complaint was a prima facie attack on my previous order in which specific rights were granted to the Receiver concerning the Panamanian company Gabinvest S.A.
Seventh, it was only today that Mr Gutierrez raised the issue of an injunction, after previous attempts to restrict Epiq's access failed. None of the issues raised in the draft Notice of Motion

Judges Initials [initials]

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Judges Endorsment Continued

were mentioned in the earlier only conferences. Of all the issues, the elevated criminal charges against "the Nephews" has surfaced in the past few days.

In my view, given all of the above, I believe that the latest proposed motion is an attempt to further delay the compliance with my earlier orders concerning access/production.

The protocol suggested by Epiq as set out in Mr Knoles' email of March 23/22 @ 5:22 pm is fair and reasonable and shall be followed by Mr Gutierrez and ATS – and completed as noted, by March 28/22 @ 5 p.m.

Therefore, in accordance with Mr. Knoles' email the following shall

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Judges Endorsment Continued

occur:

(1) Mr Gutierrez and/or his solicitor shall attend a videoconference with Epiq (with the Receiver and counsel absent) and provide the passwords to Epiq. After which Epiq will re-lock the hard drive.

(2) ATS will provide Epiq with Mr Gutierrez's email using Epiq's secure FTP. Thereafter the data will be subject to the aforementioned privilege protocol (as will the data in (1) above) set out in my Oct 27/20 order.

Last, I am releasing this endorsement today via a handwritten endorsement given the timeline imposed and Mr Gutierrez's counsel's comments about considering an appeal

[signature]

Judges Initials TM

COURT FILE NO.: CV-11-9062-0CL

DATE: March 25, 2022

ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

RE: Margarita Castillo, Plaintiff

AND:

Xela Enterprises Ltd., Tropic International Limited, Fresh Quest, Inc., 696096 Alberta Ltd., Juan Guillermo Gutierrez and Carmen S. Gutierrez, as Executor of the Estate of Juan Arturo Gutierrez, Defendants

BEFORE: The Honourable Justice Thomas J. McEwen

COUNSEL: (see Counsel Slip)

ENDORSEMENT

[1] A further case conference was convened today at my request to deal with the ongoing and protracted dispute concerning compliance with my earlier orders of Aug 28, 2020, Oct 27, 2020 (two orders) and March 25, 2021.

[2] As I have previously noted the first three orders were granted on consent. The last order, March 25, 2021, resulted from a contested motion and leave to appeal was denied.

[3] Since then Mr. Gutierrez has raised several objections concerning the methods that should be used with respect to the provision of his passwords to Epiq. As a result ATS has also not provided the emails that I have ordered be produced.

[4] I convened the case conference today to role on the protocol given Mr. Gutierrez's most recent objections.

[5] At today's case conference counsel for Mr. Gutierrez advised that they wished me to defer the issues concerning access and production as they wished to bring a motion for injunctive relief

staying the enforcement of my aforementioned orders, based on a draft Notice of Motion provided shortly before the case conference began.

[6] The draft Notice of Motion generally speaking, repeats historical complaints Mr. Gutierrez has raised against the Receiver, and the “appearance” that the Receiver is being funded by “the Nephews” with whom Mr. Gutierrez has been locked in litigation outside Canada for several years.

[7] Further, and again, Mr. Gutierrez submits that he has secured funding to satisfy the Castillo judgment, which has now been held up given recent actions of the Receiver generally involving information published on its website.

[8] Mr. Gutierrez also raises other issues in the draft Notice of Motion concerning the Receiver’s recent conduct concerning the access/production issues. He alleges they have failed to cooperate with him.

[9] Overall, amongst other things, Mr. Gutierrez submits there is reason to believe that if access to passwords and documents is ordered as per the protocol suggested by Epiq it could fall into “thee Nephews” hands, thus causing him great prejudice. This is particularly so, says Mr. Gutierrez given recent developments concerning “the Nephews” in Panama where Mr. Gutierrez alleges they face criminal charges that are escalating in significance.

[10] As I advised the parties at the case conference I am not prepared to defer the access/productions any further, and I ordered at the case that the passwords and emails referenced in my earlier orders and endorsements (and specifically my endorsement of March 17/22) be provided to Epiq no later than Monday, March 28/22 @ 5 p.m.

[11] I made the above order for a number of reasons.

[12] First, the Receiver is an officer of the Court and Epiq operates under the Receiver’s mandate thus making it accountable to this Court.

[13] Epiq has proposed a sensible and secured manner to secure the passwords and ATS’s documents.

[14] Second, there is no reasonable basis to suggest that the Receiver has in some way colluded with “the Nephews” or that “the Nephews” can somehow engage in “corporate espionage”. To secure the data that Epiq will secure. Mr. Gutierrez, in some fashion or another, for some time has made these allegations without proof. In this ● it bears nothing that the Receiver has consistently denied these longstanding allegations.

[15] Third, it bears noting that Mr. Gutierrez has for several months contested production of the passwords. Notwithstanding the three consent orders of Aug/20 and Oct 27/2020(2) Mr. Gutierrez did not make any production or provide passwords. This lead to the March 25/21 order where I again, ordered the disclosure of Mr. Gutierrez’s passwords (among other things). Again, there has not been compliance.

[16] Fourth, it bears noting that the Oct 27/20 order has a built in protocol that allows only Mr. Gutierrez access to the Platform to allow him the opportunity to review the documents and assert any objections to disclosure.

[17] Until that occurs, no one else, (not Epiq, the Receiver, or the Applicant, or any other person) can have access. The protocol was well thought out, negotiated and addressed Mr. Gutierrez's concerns at the time.

[18] Fifth, compliance with my aforementioned Orders take a backseat in the fall of 2021 when Mr. Gutierrez claimed to have financing to pay the Castillo judgment. I paused the access production issues to determine if the funding could lead to resolution.

[19] Many months have passed with Mr. Gutierrez offering various excuses as to why payment has not been made and financing not secured. The latest blames the action of the Receiver in Feb/22, but several months passed before that date without the promised funding arriving which was first promised in Sept/21.

[20] It also bears noting that Mr. Gutierrez also proposed in March/21, when the motion was argued, that the motion concerning access/production should not be pursued as the Receiver had received a settlement offer. I rejected that submission as the offer in my view for the reasons given, was no offer at all.

[21] It may be that the currently promised financing may arrive, but that cannot form the basis of a stay given the above.

[22] Sixth, I have made no finding of any misconduct against the Receiver. I have however been critical of Mr. Gutierrez particularly with respect to the initiating of a criminal complaint in Panama against the Receiver's agents which I ordered be withdrawn. Mr. Gutierrez's involvement in the Panama matter was initiated without his Canadian solicitor's knowledge and I was of the view that the criminal complaint was a prima facie attach on my previous order in which specific rights were granted to the Receiver concerning the Panamanian company Gabinvest SA.

[23] Seventh, it was only today that Mr. Gutierrez raised the issue of an injunction, after previous attempts to restrict Epiq's access failed. None of the issues raised in the draft Notice of Motion were mentioned in the earlier conferences. Of al of the issues only the elevated criminal charges against "the Nephews" has surfaced in the past few days.

[24] In my view, given all of the above, I believe that the latest proposed motion is an attempt to further delay the compliance with my earlier orders concerning access/production.

[25] The protocol suggested by Epiq as set out in Mr. Knoke's email of March 23/22 @ 5:22 p.m. is fair and reasonable and shall be followed by Mr. Gutierrez and ATS – and completed as noted, by March 22/22 @5 p.m.

[26] Therefore, in accordance with Mr. Knoke's email the following shall occur:

1. Mr. Gutierrez and/or his solicitors shall attest a videoconference with Epiq (with the Receiver and counsel absent) and provide the passwords to Epiq. After which Epiq will re-lock the hard drive.

2. ATS will provide Epiq with Mr. Gutierrez's email using Epiq's secure ETP. Thereafter the data will be subject to the aforementioned privilege protocol (as will the data in 1 above) set out in my Oct 27/20 order.

[27] Last, I am releasing this endorsement today in a handwritten endorsement given the timeline imposed and Mr. Gutierrez's counsel's comments about considering an appeal.

McEwen J.

Court File Number: CV-11-9062-00CL

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: McEwen J

Counsel	Telephone No:	Facsimile No:
(see attached.)		

☐ 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 motion, brought by the Receiver KSU Restructuring Inc ("the Receiver"), seeks a number of orders.
I will deal with each below.
① The first deals with the Receiver's attempts to have Juan Guillermo Gutierrez (Juan Guillermo) deliver his electronic devices for analysis.
I previously granted an order, to

25 March 21
Date

McEwen
Judge's Signature

☑ Additional Pages 21

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Judges Endorsment Continued

which Juan Guillermo consented, on August 28/20 in which Juan Guillermo was to (amongst other things) deliver to the Receiver all company devices.

Thereafter, I granted another order on October 27/20, to which Juan Guillermo also consented, setting out a protocol for the imaging and review of Juan Guillermo's devices.

Juan Guillermo, contrary to the terms of the above orders, has refused to permit the devices to be imaged, without being uploaded to a password protected drive. He primarily submits that he wishes to review the data, provide the Receiver with a mirror image and then advise what he is prepared to produce - subject to claims of privilege and relevancy.

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FILE/DIRECTION/ORDER

Judges Endorsment Continued

I am not prepared to alter the terms of my previous order where a protocol has been agreed to by the Receiver and Juan Guillermo.

The relationship between the Receiver and Juan Guillermo has become extremely acrimonious (as will be outlined further below). To allow for further alterations to my order will delay matters and possibly undermine the Receiver's legitimate investigation.

I urge the Receiver and Juan Guillermo to work co-operatively on this issue and to proceed in an economic fashion, but the terms of the above negotiated consent order stand and shall be adhered to. Thus, Juan Guillermo is to provide the

Judges Initials [initials]

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Judges Endorsment Continued

password so that Epiq Global (who I agree will succeed Duff + Phelps) can load the data onto the Relativity platform. Thereafter, the protocol concerning Juan Guillermo's objections can proceed, as per the Order.

(2) The second issue concerns access to certain computer servers.

By way of background, Arturo's Technical Services Inc. ("ATS") purchased certain assets from Xela in June/17, subsequent to the judgment against Xela, Juan Guillermo and others. Juan Guillermo's sons – Thomas and Andres – are directors and officers of ATS.

The Receiver has asked ATS to deliver, amongst other things, digital records.

The August 28/20 order (which was made on notice to ATS, but

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Judges Endorsment Continued

ATS did not appear) provided, inter alia, that the Receiver be entitled to conduct forensic examinations of Xela devices; and that ATS provide assistance; and that no privilege claim could be asserted in respect of any Xela documents or devices.

It has now been ascertained that Xela servers were transferred to ATS. These Xela servers have been called the "blue network" by ATS and contain data related to Xela's business. This includes the Xela.com server, financial records and information concerning former clients of Xela.

The Receiver seeks unrestricted access to the blue servers in accordance with the terms of the August 28/20 order and the 2nd October 27/20 order (the October

Judges Initials DM

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Judges Endorsment Continued

order was not opposed and was obtained after negotiations between counsel for the Receiver and ATS)

An impasse has arisen between the Receiver and ATS.

ATS has suggested a protocol, taking the position that the blue servers also contain information of third parties and thus is not captured by the Appointment Order.

I do not agree with ATS.

First, the third party information identified by ATS (and in Andres' cross-examination) consists of information regarding Xtla's subsidiaries/customers including Greenpack - a related Company/officers and employees who uploaded personal information onto the blue servers.

In my view, this is captured

Judges Initials PM

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FILE/DIRECTION/ORDER

Judges Endorsment Continued

by paragraph 6 of the Appointment Order which refers to unfettered access to records of any kind related to the business or affairs of Xela.

It is not surprising that client records are on those servers as they were related to Xela's business.

The Receiver's position is supported by the decision of D. Brown J., as he then was, in GE Real Estate vs. Liberty Assisted Living 2011 ONSC 5741 at para 19, wherein he held that the company's records were not limited to documents owned by the company. He added that it was "inevitable" that the Receiver in that case would have to inspect and consider documents owned by companies related to the company in question.

I do not accept ATS's

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FILE/DIRECTION/ORDER

Judges Endorsment Continued

position that G.E Real Estate is distinguishable as it speaks to broad principles.

Second, without casting aspersions at this time, it cannot be ignored that ATS is operated by Juan Guillermo's Sons. They have been the beneficiaries of what the Receiver has identified as being Reviewable Transactions. In these circumstances the provisions of my earlier orders should be adhered to without modification by ATS or Juan Guillermo.

I should note that at the motion, a debate broke out about the process should be carried out and whether ATS and/or the Receiver was acting reasonably. ATS referred to what

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FILE/DIRECTION/ORDER

Judges Endorsment Continued

I considered to be, a complicated protocol. It is expected that ATS and the Receiver and their experts can agree on a sensible method of providing the Receiver with access to the blue servers.

Third, I also do not accept the argument of ATS / Juan Guillermo that the nature of the Receivership should fetter access. The Receivership was granted pursuant to s. 101 of the CJA which allows for broad powers if appropriate – it is appropriate here to grant unfettered access to the blue servers.

Last, with respect to both issues ① and ② I should note that Juan Guillermo has submitted that the Receiver should not be pursuing access to devices, or granted access

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Judges Endorsment Continued

to devices, since it has received a settlement offer from BOT.

I disagree.

BTS, a Barbadian company, is a former subsidiary of Xela. It has refused to attorn to the jurisdiction of this Court. Andres, Juan Guillermo's son, is a director.

The offer does not involve a payment but rather a promissory note, conditional on the future receipt of proceeds [initialed: JM] of an apparent Panamanian judgment involving the oft-noted "Arturola Litigation" (involving Juan Guillermo and others) that has been going on for over two decades.

I accept the Receiver's position that the offer ought not be accepted where there is no payment, no timeline for payment, [initialed: JM] is

Judges Initials JM

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Judges Endorsment Continued

likely unenforceable and involves a related company in which Andres is a director.

(3) The third issue involves the Receiver seeking to expand its powers.

This requires some discussion about the above noted acrimonious relationship between the Receiver and Juan Guillermo / Xela.

Juan Guillermo and ATS take the position that the Receiver has acted inappropriately and failed to pursue sensible ways of collecting funds.

These include:

- Prioritizing the pursuit of LISA dividends.
- Communicating with "the Nephews" who Juan Guillermo accuses of wrongfully withholding dividends owed

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Judges Endorsment Continued

to LISA, which is Xela's subsidiary
· Preventing LISA from closing a loan which would have satisfied the Castillo Judgment
· Rejecting the aforementioned BDT proposal
· Focusing on the Reviewable Transactions which may not result in realization
· Generally, inappropriately pursuing Juan Guillermo and his family, including the scheduled contempt motion.

In addition to the above Juan Guillermo (and ATS) make a number of other allegations which I have reviewed.

The Receiver submits that it has not had any real, legitimate co-operation from Juan Guillermo, Xela or ATS.

The Receiver points to a ~~[illegible]~~ [illegible]

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Judges Endorsment Continued

number of instances, including but not restricted to:

- Contradictory evidence received from Juan Guillermo and his sons concerning electronic devices/servers
- Juan Guillermo exercising control over Xela subsidiaries and related companies
- Suspicious financial dealings involving Lisa/Xela/BDT/Arven
- Juan Guillermo's brother-in-law (Hals) who is the President of Xela's subsidiary LISA filed a criminal complaint against the Receiver's agents in Panama when they attempted to implement an order made by me. The complaint was based on a declaration sworn by Juan Guillermo. I subsequently ordered that Juan Guillermo and Hals take steps to withdraw the complaint as

Judges Initials DM

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Judges Endorsment Continued

being, prima facie, a collateral attack on my order.

Additionally, the history of the litigation cannot be ignored.

Justice Newbould, in his Oct/15 decision made substantial findings of oppression in granting judgment to Castillo.

Subsequently, shares of the Xela subsidiaries BDT & Arca were transferred to a trust (the EAI Transaction) benefitting Juan Guillermo's family. ATS was incorporated as a subsidiary to BDT with the sons as directors and officers. Xela was essentially shut down with certain assets sold to ATS. LISA assigned most of the proceeds from the Arcola action (the Assignment Transaction) to BDT.

Judges Initials DM

Court File Number: ___

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Subsequently the Receiver was appointed.

In light of all of the above it is reasonable to expand the investigative powers of the Receiver.

It is not up to Xela/Juan Guillermo to dictate how the Receiver, a court officer, should direct its investigation. If, in fact the LISA loan or BDT offer is meaningful, full particulars and terms of payment should be provided. To date this has not occurred.

The EAI and Assignment Transactions are worthy of further investigation, as is the LISA transfer concerning the assignment of Lisa's interest in the Avicola Group to BDT.

Accordingly, I am authorizing the relief sought in paragraph (a)

Judges Initials PM

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Judges Endorsment Continued

(i) - (ii) of the Notice of Motion.

I am not, at this time, authorizing examinations under oath of any person as requested in subpoena (iii). If problems arise concerning co-operation of witnesses I can be spoken to. Subpoena (ii) provides for the ability to conduct interviews.

I am also authorizing that the information sought in subpoena 1(f) be granted. It is consistent with my previous orders and Gabinvest, a Vela subsidiary, wholly-owns LISA.

For similar reasons I am granting the relief sought in subpoena 1(g). AFRA was LISA's/Gabinvest's registered agent in Panama until Feb/20. It maintained those companies' share register and other information. They have advised that they require a

Judges Initials TM

Court File Number: ______

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Court order to release the information.

In my view, the above expanded powers are reasonable, fair and the Receiver has demonstrated that there is sufficient reason to believe that a financial benefit will be gained. The expansion, therefore, is consistent with the C.A. jurisprudence in Weig vs Weig 2012 ONSC 7262 and Akagi v Synergy Group (2000) 2015 ONCA 368.

Overall, I am satisfied that the extensive inter-corporate transactions involving Xela related companies warrant further investigation, particularly where there is evidence in the record of ongoing participation by Juan Guillermo and his family in those companies.

(4) I am also satisfied that a foreign recognition order is fair

Judges Initials PM

Court File Number: ______

Superior Court of Justice
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FILE/DIRECTION/ORDER

Judges Endorsment Continued

and reasonable particularly in light of what transpired in Panama with respect to the Receiver's agent.

Neither Juan Guillermo nor JATS strenuously object although they submit that one should have been sought earlier. That may be the case, but the Receiver cannot be faulted for not anticipating the problems that have developed in this Receivership, which now warrant such an order.

(5) The fees of the Receiver and its counsel. In my view, they should be approved.

I have considered the relevant factors: CIBC v. Urbancorp 2017 ONSC 4205 at para 57; Re Nortel 2017 ONSC 673 at paras 14-15

The Receiver's undertaking is a

Judges Initials [initials]

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FILE/DIRECTION/ORDER

Judges Endorsment Continued

significant as given the complicated structure of the Xela related corporations, the after judgment transactions and LISA's Aurcola interest.

I also agree that the Receiver has faced a number of hurdles in dealing with Juan Guillermo, the Xela subsidiaries and Hals.

While I am concerned about the amounts expended, I am not of the view that the Receiver or its counsel has acted in anything other than a neutral position, to date. In this regard I rely on my comments above, particularly concerning the alleged LISA loan and BTS settlement offer.

I also reject Juan Guillermo's submission that the costs issue should be directed to a reference.

Judges Initials DM

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Judges Endorsment Continued

This would only add more costs and delay to an already complicated situation.

(6) I agree that Duff + Phelps be replaced with Epiq Global. This relief is unopposed and settles a debate over whether Duff + Phelps had a conflict of interest, which was denied.

There were a number of Orders included in the Receiver's materials. The Order beginning at p. A183 of the materials, requesting assistance, appears to accord with this endorsement. I am prepared to sign it unless parties wish to make submissions as to form and content.

The Order beginning at p. A176 deals with a number of issues also appears to accord with this endorsement. Again I am prepared to sign it

Judges Initials [initials]

Court File Number: ______________________

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FILE/DIRECTION/ORDER

Judges Endorsment Continued

subject to submission as to form and content.

Last, the Order beginning at p. A1626 deals with the replacement of Duff + Phelps. It should go as it is unopposed subject to submission as to form and content.

I stress, however, that the review of the Orders is not an invitation to relitigate issues that have been before me, and decided upon, on at least one occasion.

If the parties cannot agree on costs I can be spoken to.

[signature]

Judges Initials: PM

McEwen, Mr. Justice Thomas John (SCJ)

From: Derek Knoke <dknoke@litigate.com>
Sent: March 22, 2021 2:03 PM
To: McEwen, Mr. Justice Thomas John (SCJ); Anissimova, Alsou (MAG); JUS-G-MAG-CSD-Toronto-SCJ Commercial List
Cc: Monique Jilesen
Subject: Counsel Slip - CV-11-9062-00CL [LS-LSRSGDOCS.FID635496]

Dear Justice McEwen,

The following counsel appeared at the hearing:

- *Counsel for the Receiver*: Monique Jilesen and Derek Knoke
- *Counsel for ATS*: Philip Cho and Michael Ly
- *Counsel for Juan Guillermo Gutierrez*: Chris MacLeod and Joan Kasozi
- *Counsel for Margarita Castillo*: Jeff Leon and Jason Woycheshyn
- *Counsel for the Avicola Group and each of Juan Luis Bosch Gutierrez, Felipe Antonio Bosch Gutierrez, Dionisio Gutierrez Mayorga, and Juan Jose Gutierrez Moyorga*: Aaron Kreaden

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This e-mail may contain legally privileged or confidential information. This message is intended only for the recipient(s) named in the message. If you are not an intended recipient and this e-mail was received in error, please notify us by reply e-mail and delete the original message immediately. Thank you. Lenczner Slaght Royce Smith Griffin LLP.

COURT FILE NO.: CV-11-9062-00CL
DATE: March 25, 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, as Executor of the Estate of Juan Arturo Gutierrez, Respondents

BEFORE: **The Honourable Justice Thomas J. McEwen**

COUNSEL: *Jeff Leon and Jason Woycheshyn* for Margarita Castillo
Monique Jilesen and Derek Knoke for the Receiver
Philip Cho and Michael Ly for ATS
Chris MacLeod and Joan Kasozi for Juan Guillermo Gutierrez
Aaron Kreaden for Avicola Group, Juan Luis Bosch Gutierrez, Felipe Antonio Bosch Gutierrez, Dionisio Gutierrez Mayorga and Juan Jose Gutierrez Moyorga

HEARD BY ZOOM HEARING: **March 22, 2021**

ENDORSEMENT

[1] This motion, brought by the Receiver KSV Restructuring Inc. (the "Receiver"), seeks a number of orders. I will deal with each below.

Electronic Devices

[2] The first deals with the Receiver's attempts to have Juan Guillermo Gutierrez ("Juan Guillermo") deliver his electronic devices for analysis. I previously granted an order, to which Juan Guillermo consented, on August 28, 2020 in which Juan Guillermo was to (amongst other things) deliver to the Receiver all company devices.

[3] Thereafter, I granted another order on October 27, 2020, to which Juan Guillermo also consented, setting out a protocol for the imaging and review of Juan Guillermo's devices.

[4] Juan Guillermo, contrary to the terms of the above orders, has refused to permit the devices to be imaged, without being uploaded to a password protected drive. He primarily submits that he wishes to review the data, provide the Receiver with a mirror image, and then advise what he is prepared to produce – subject to claims of privilege and relevancy.

[5] I am not prepared to alter the terms of my previous orders where a protocol has been agreed to by the Receiver and Juan Guillermo.

[6] The relationship between the Receiver and Juan Guillermo has become extremely acrimonious (as will be outlined further below). To allow for further alterations to my orders will delay matters possibly undermine the Receiver's legitimate investigations.

[7] I urge the Receiver and Juan Guillermo to work co-operatively on this issue and to proceed in an economic fashion, but the terms of the above negotiated, consent orders stand and shall be adhered to. Thus, Juan Guillermo is to provide the password so that Epiq Global (who I agree will succeed Duff & Phelps) can load the data onto the Relativity platform. Thereafter, the protocol concerning Juan Guillermo's objections, can proceed, as per the Order.

Computer Servers

[8] The second issue concerns access to certain computer servers.

[9] By way of background, Arturo's Technical Services Inc. ("ATS") purchased certain assets from Xela in June 2017, subsequent to the judgment against Xela, Juan Guillermo and others. Juan Guillermo's sons – Thomas and Andres – are directors and officers of ATS.

[10] The Receiver has asked ATS to deliver, amongst other things, digital records.

[11] The August 28, 2020 order (which was made on notice to ATS, but ATS did not appear) provided, *inter alia*, that the Receiver be entitled to conduct forensic examinations of Xela devices, and that no privilege claims could be asserted in respect of any Xela documents or devices.

[12] It has now been ascertained that Xela servers were transferred to ATS. These Xela servers have been called the "blue network" by ATS and certain data related to Xela's business. This includes the Xela.com server, financial records end information concerning former clients of Xela.

[13] The Receiver seeks unrestricted access to the blue servers in accordance with the terms of the August 28, 2020 order and the 2nd October 27, 2020 order (the October order was not opposed and was obtained after negotiations between counsel for the Receiver and ATS).

[14] An impasse has arisen between the Receiver and ATS.

[15] ATS has suggested a protocol, taking the position that the blue servers also contain information of third parties and thus is not captured by the Appointment Order.

[16] I do not agree with ATS.

[17] First, the third party information identified by ATS (and in Andres' cross-examination) consists of information regarding Xela's subsidiaries, customers (including Greenpack – a related company) officers and employees who uploaded personal information onto the blue servers.

[18] In my view, this is captured by paragraph 6 of the Appointment Order which refers to the unfettered access to records of any kind related to the business or affairs of Xela.

[19] It is not surprising that client records are on those servers as they were related to Xela's business.

[20] The Receiver's position is supported by the decision of D. Brown J., as he then was, in *GE Real Estate v. Liberty Assisted Living* 2011 ONSC 5741 at para 19, wherein he held that the company's records were not limited to documents owned by the company. He added that it was "inevitable" that the Receiver in that case would have to inspect and consider documents owned by companies related to the company in question. I do not accept ATS' position that *GE Real Estate* is distinguishable as it speaks to broad principles.

[21] Second, without casting aspersions at this time, it cannot be ignored that ATS is operated by Juan Guillermo's sons. They have been the beneficiaries of, what the Receiver has identified as being, Reviewable Transactions. In these circumstances, the provisions of my earlier orders should be adhered to without modification by ATS or Juan Guillermo.

[22] I should note that, at the motion, a debate broke out about the process [that] should be carried out and whether ATS and/or the Receiver was acting reasonably. ATS referred to what I considered to be a complicated protocol. It is expected that ATS and the Receiver and their experts can agree on a sensible method of providing the Receiver with access to the blue servers.

[23] Third, I also do not accept the argument of ATS/Juan Guillermo that the nature of the Receivership should fetter access. The Receivership was granted pursuant to s. 101 of the CJA, which allows for broad powers if appropriate – it is appropriate here to grant unfettered access to the blue servers.

[24] Last, with respect to both issues 1 and 2, I should note that Juan Guillermo has submitted that the Receiver should not be pursuing access to devices, or granted access to devices, since it has received a settlement offer from BDT.

[25] I disagree.

[26] BTS [BDT], a Barbadian company, is a former subsidiary of Xela. It has refused to attorn to the jurisdiction of this Court. Andres, Juan Guillermo's son, is a director.

[27] The offer does not involve a payment, but rather a promissory note, conditional on the future receipt of proceeds of an apparent Panamanian judgment involving the oft-noted "Avicola Litigation" (involving Juan Guillermo and others) that has been going on for over two decades.

[28] I accept the Receiver's position that the offer ought not be accepted where there is no payment, no timeline for payment, is likely unenforceable and involves a related company in which Andres is a director.

Powers of the Receiver

[29] The third issue involves the Receiver seeking to expand it powers.

[30] This requires some discussion about the above noted acrimonious relationship between the Receive and Juan Guillermo/Xela.

[31] Juan Guillermo and ATS take the position that the Receiver has acted inappropriately and failed to pursue sensible ways of collecting funds.

[32] These include:

- Prioritizing the pursuit of LISA dividends
- Communicating with "the Nephews" who Juan Guillermo accuses of wrongfully withholding divides owed to LISA, which is Xela's subsidiary.
- Preventing LISA from closing a loan which would have satisfied the Castillo Judgment
- Rejecting the aforementioned BDT proposal
- Focusing on the Reviewable Transactions which may not result in realizations
- Generally, inappropriately pursuing Juan and his family, including the scheduled contempt motion.

[33] In addition to the above Juan Guillermo and (and ATS) make a number of other allegations which I have reviewed.

[34] The Receiver submits that it has not had any real, legitimate co-operation from Juan Guillermo, Xela or ATS.

[35] The Receiver points to a number of instances, including but not restricted to:

- Contradictory evidence received from Juan Guillermo and his sons concerning electronic devices/servers
- Juan Guillermo exercising control over Xela subsidiaries and related companies
- Suspicious financial dealings involving LISA/Xela/BDT/Arven
- Juan Guillermo's brother-in-law ("Hals") who is the President of Xela's subsidiary LISA filed a criminal complaint against the Receiver's agents in Panama when they attempted to implement an order made by me. The complaint was based on a declaration sworn by Juan Guillermo. I subsequently ordered that Juan Guillermo and Hals take steps to withdraw the complaint as being, *prima facie*, a collateral attack on my order.

[36] Additionally, the history of the litigation cannot be ignored.

[37] Justice Newbould in his October 2015 decision made substantial findings of oppression in granting judgment to [Ms.] Castillo.

[38] Subsequently, shares of the Xela subsidiaries BDT & Arven were transferred to a trust (the "EAI Transaction") benefitting Juan Guillermo's family. ATS was incorporated as a subsidiary

to BDT with the sons as directors and officers. Xela was essentially shut down with certain assets sold to ATS. LISA assigned most of the proceeds from the Avicola action (the "Assignment Transaction") to BDT.

[39] Subsequently, the Receiver [was] appointed.

[40] In light of all of the above, it is reasonable to expand the investigative powers of the Receiver.

[41] It is not up to Xela/Juan Guillermo to dictate how the Receiver, a court officer, should direct its investigation. If, in fact the LISA loan or BDT offer is meaningful, full particulars and terms of payment should be provided. To date this has not occurred.

[42] The EAI and Assignment Transactions are worthy of further investigation, as is the LISA transfer concerning the assessment of LISA's interest in the Avicola Group to BDT.

Disposition

[43] Accordingly, I am authorizing the relief sought in paragraph 1(a)(i)-(ii) of the Notice of Motion.

[44] I am not, at this time, authorizing examinations under oath of any person as requested in subpara (iii). If problems arise concerning co-operation of witnesses I can be spoken to. Subpara (ii) provides for the ability to conduct interviews.

[45] I am also authorizing that the information sought in subpara 1(f) be granted. It is consistent with my previous orders and Gabinvest, a Xela subsidiary, wholly-owns LISA.

[46] For similar reasons, I am granting the relief sought in subpara 1(g). AFRA was LISA's/Gabinvest's registered agent in Panama until February 2020. It maintained those companies' share registers and other information. They have advised that they require a Court order to release the information.

[47] In my view, the above expanded powers are reasonable, fair and the Receiver has demonstrated that there is sufficient reason to believe that a financial benefit will be gained. The expansion, therefore, is consistent with the CA jurisprudence in *Weig v. Weig,* 2012 ONSC 7262 and *Akagi v. Synergy Group* (2000), 2015 ONCA 368.

[48] Overall, I am satisfied that the extensive inter-corporate transactions involving Xela related companies warrant further investigation, particularly where there is evidence in the record of ongoing participation by Juan Guillermo and his family in those companies.

Foreign Recognition Order

[49] I am also satisfied that a foreign recognition order is fair and reasonable particularly in light of what transpired in Panama with respect to the Receiver's agents.

[50] Neither Juan Guillermo nor ATS strenuously object although they submit that one should have been sought earlier. That may be the case, but the Receiver cannot be faulted for not anticipating the problems that have developed in his Receivership, which now warrant such an Order.

The Fees of the Receiver and Counsel

[51] The Fees of the Receiver and its counsel. In my view, they should be approved.

[52] I have considered the relevant factors: *CIBC v. Urbancorp*, 2017 ONSC 4205 at para 57; *Re Nortel*, 2017 ONSC 673 at paras 14-15.

[53] The Receiver's undertaking is a significant one given the complicated structure of the Xela-related corporations, the after judgment transactions and LISA's Avicola interest.

[54] I also agree that the Receiver has faced a number of hurdles in dealing with Juan Guillermo, the Xela subsidiaries and Hals.

[55] While I am concerned about the amounts expended, I am not of the view that the Receiver or its counsel has acted in anything other than a neutral position, to date. In this regard, I rely on my comments above, particularly concerning the alleged LISA loan and BTS [BDT] settlement offer.

[56] I also reject Juan Guillermo's submissions that the costs issue should be directed to a reference. This would only add more costs and delay to an already complicated situation.

Orders Sought

[57] I agree that Duff & Phelps be replaced with Epiq Global. This relief is unopposed and settles a debate over whether Duff & Phelps had a conflict of interest, which was denied.

[58] There were a number of orders included in the Receiver's materials. The order beginning at p. A183 of the materials, requesting assistance, appears to accord with this endorsement. I am prepared to sign it unless parties wish to make submissions as to form and content.

[59] The order beginning at p. A176 deals with a number of issues [and] also appears to accord with this endorsement. Again, I am prepared to sign it subject to submissions as to form and content.

[60] Last, the order beginning at p. A1626 deals with the replacement of Duff & Phelps. It should go as it is unopposed, subject to submissions as to form and content.

[61] I stress, however, that the review of the orders is not an invitation to relitigate issues that have been before me, and decided upon, on at least one occasion.

[62] If the parties cannot agree on costs I can be spoken to.

____
Justice Thomas J. McEwen

Date: March 25, 2021

DATE: 20031127
DOCKET: C38818

COURT OF APPEAL FOR ONTARIO

WEILER, ABELLA and ARMSTRONG JJ.A.

B E T W E E N:	)	
	)	
ORIENA CURRIE	)	Peter K. McWilliams, Q.C.
	)	for the appellant
Plaintiff	)	
(Appellant)	)	
	)	
- and -	)	
	)	
HALTON REGIONAL POLICE SERVICES BOARD, OWEN GRAY, KIM DUNCAN, and MICHAEL JAEGER	)	Graydon Sheppard for the respondent Michael Jaeger
	)	
Defendants	)	
(Respondent)	)	
	)	
	)	Heard: April 14, 2003

On appeal from the order of Justice E. R. Kruzick of the Superior Court of Justice dated August 20, 2002.

ARMSTRONG J.A.:

[1] The appellant was arrested on July 5, 2001 on a charge of fraud over $5,000. She was in custody until released on bail on July 9, 2001. On December 31, 2001, she commenced this action against the respondent and others for damages for false arrest, false imprisonment, and abuse of process. On a motion by the respondent before Justice E. R. Kruzick of the Superior Court of Justice the action was dismissed. The appellant appeals from the order dismissing her action.

Background

[2] The criminal charge, which is central to this action, relates allegedly to an unsuccessful business deal which the appellant had entered into with one Petre Caragioiu. The respondent was the lawyer for Caragioiu and had acted against the appellant in at least two other civil actions.

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[3] The appellant, as part of a plea bargain, entered a plea of guilty to charges other than the fraud charge, which was stayed at the request of the Crown attorney.

[4] The appellant commenced this action against the Halton Regional Police Services Board, two individual police officers and the respondent. The statement of claim contains the following allegation against the respondent: "[The respondent] repeatedly and unlawfully urged and requested the defendant Owen Gray [a detective with the Halton Regional Police Services Board] to arrest the [appellant]."

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[5] The respondent moved *inter alia* for the following relief:

> a. An Order for security for costs as against the plaintiff in the amount of $25,000.00 or such other amount as this Court may deem necessary;
>
> b. Alternatively, an Order striking out the statement of claim as against the defendant as frivolous, vexatious and an abuse of process of the Court;
>
> c. Alternatively, an Order dismissing the action against the defendant as failing to disclose a reasonable cause of action; and granting leave to introduce affidavit evidence, if necessary;
>
> d. Alternatively, an Order for summary judgment dismissing the plaintiff's action against the defendant;
>
> e. An Order declaring the plaintiff to be a vexatious litigant within the meaning of s. 140 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

[6] On the proceedings before the motions judge, each of the parties filed affidavit evidence. The transcript of some of the evidence of the appellant's bail proceedings was also before the court. The motions judge accepted the evidence of Detective Gray of the Halton Regional Police at the bail hearing that it was he who instructed Constable Duncan to arrest the appellant and that the urging of the respondent that the appellant be arrested had no effect on his decision to do so.

[7] In dismissing the action, the motions judge stated:

> Counsel for Mr. Jaeger referred me to *Mishra v. Ottawa*, [1997] O.J. No. 4352 a decision of this court where Sedgwick J. enumerated some seven characteristics of what constitutes a

> vexatious proceeding (relying upon and quoting *Lang Michener and Fabian* (1987), 59 O.R. (2d) 353 (H.C.J.).
>
> Essentially I came to the conclusion that the plaintiff's action, on the material before me has no chance of success and fits under the rubric of [rule] 21.01 (3)(d) as being an action that is frivolous, vexatious and generally an abuse of the process of the court.

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The Appeal

[8] Counsel for the appellant submits that the motions judge had, in effect, dismissed the action on the basis that the statement of claim disclosed no reasonable cause of action pursuant to rule 21.01 (1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Counsel for the appellant further submitted that the motions judge erred in relying upon the affidavit evidence. Rule 21.01 (2)(b) makes it clear that no evidence is admissible on a motion brought pursuant to rule 21.01 (1)(b).

[9] It is perhaps not entirely clear from the above language of the motions judge whether he based his decision, in part, on a failure to plead a reasonable cause of action pursuant to rule 21.01 (1)(b). If he did, I agree that he was not entitled to consider any extrinsic evidence.

[10] I think the better view of the motions judge's decision is that it was based entirely upon the application of rule 21.01 (3)(d) that the action was frivolous, vexatious and an abuse of the process of the court. Under that rule, extrinsic evidence is admissible.

[11] In reaching his decision, one of the factors the motions judge considered was whether it is obvious that the action cannot succeed. In this respect, he relied upon *Mishra, supra* at paragraph 39 where Sedgwick J. stated:

> In *Lang Michener et al. and Fabian et al.*, (1987) 59 O.R. (2d) 353, Henry J., summarized the characteristics of vexatious proceedings in the following passage:
>
> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceedings;
>
> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no

reasonable person can reasonably expect to obtain relief, the action is vexatious;

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings. (358-9)

[12] The motions judge did not expressly relate the circumstances of this case to the factors set out by Henry J. in *Lang Michener*. I take from his endorsement that he accepted the evidence of Detective Gray as determinative of the main factual issue, i.e. that the conduct of the respondent had nothing to do with the arrest and incarceration of the appellant. It is also apparent that he relied upon factor (b) referred to by Henry J. in *Lang Michener*.

[13] I turn to a consideration of whether there is a basis on the record before the court upon which the motions judge could conclude that the action is frivolous, vexatious or an abuse of process. A review of the case law under rule 21.01 (3)(d) does not provide precise definitions of the terms frivolous, vexatious or abuse of process. The majority of

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the cases cited by the editors of Ontario Annual Practice and Ontario Civil Practice either refer to abuse of process alone or to all three terms together.[1]

[14] Black's Law Dictionary defines "frivolous" as: "Lacking a legal basis or legal merit; not serious; not reasonably purposeful".[2]

[15] In *Foy v. Foy (No. 2)* (1979), 26 O.R. (2d) 220 at 226, Howland, C.J.O. considered the meaning of "vexatious" under the *Vexatious Proceedings Act*, R.S.O. 1970, c. 481:

> The word "vexatious" has not been clearly defined. Under the Act, the legal proceedings must be vexatious and must also have been instituted without reasonable ground. In many of the reported decisions the legal proceedings have been held to be vexatious because they were instituted without any reasonable ground. As a result the proceedings were found to constitute an abuse of the process of the Court. An example of such proceedings is the bringing of one or more actions to determine an issue which has already been determined by a Court of competent jurisdiction: *Stevenson v. Garnett*, [1898] 1 Q.B. 677 at pp. 680-1; *Re Langton*, [1966] 3 All. E.R. 576.

[16] In discussing the inherent power of the court to invoke the doctrine of abuse of process, apart from rule 21.01 (3)(d), Finlayson J.A. for the majority in *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), rev'd on other grounds (2002), 220 D.L.R. (4th) 466, [2002] S.C.C. 63 at para. 31 stated:

> The court can still utilize the broader doctrine of abuse of process. Abuse of process is a discretionary principle that is not limited by any set number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy.

Goudge J.A. for the minority in the same case, stated at paras. 55 and 56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine un-

[1] J.J. Carthy, W.A.D. Millar & J.G. Cowan, Ontario Annual Practice 2003 – 2004 (Aurora: Canada Law Book, 2003) at RULE-222 to RULE-224; G.D. Watson & M. McGowan, Ontario Civil Practice 2004 (Toronto: Thomson Canada, 2003) at 535 to 538.

[2] B.A. Garner, ed., Black's Law Dictionary, 7th ed., (St. Paul: West Publishing, 1999) at 677.

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> encumbered by the specific requirement of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All. E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

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It is obvious that Finlayson and Goudge JJ.A. were *ad idem* in respect to the nature of the doctrine of abuse of process. The majority judgment was reversed in the Supreme Court of Canada but not in respect to the discretionary nature of the doctrine.

[17] It is apparent that there is a degree of overlap in the meaning of the terms frivolous, vexatious and abuse of process. What I take from the authorities is that any action for which there is clearly no merit may qualify for classification as frivolous, vexatious or an abuse of process. The common example appears to be the situation where a plaintiff seeks to relitigate a cause which has already been decided by a court of competent jurisdiction.

[18] I am mindful that when the court invokes its authority under rule 21.01 (3)(d) or pursuant to its inherent jurisdiction to dismiss or stay an action, it does so only in the clearest of cases. See *Sussman v. Ottawa Sun*, [1997] O.J. No. 181 (Gen. Div.) at paragraph 21.

[19] In my view, the motions judge did not err in his application of rule 21.01 (3)(d) on the record that was before him.

[20] The statement of claim contained the following allegations against the respondent:

> The defendant Michael Jaeger repeatedly and unlawfully urged and requested the defendant Owen Gray to arrest the plaintiff Currie.
>
> The defendant Michael Jaeger had a conflict of interest in that he was the solicitor of record in three civil actions involving the plaintiff.
>
> The defendant Michael Jaeger had oblique motives in requesting the defendant Owen Gray to have the plaintiff arrested.
>
> Furthermore, the conduct of the defendants as aforesaid, was malicious, high handed and deliberate and calculated to cause

> the plaintiff damage. Accordingly, an award of punitive or exemplary damage is warranted.

[21] The evidence relevant to the issues of false arrest, false imprisonment and abuse of process before the motions judge came from the appellant, the respondent and Detective Gray.

[22] The appellant filed an affidavit in which she stated that the respondent "initiated pressure on Detective Gray to lay criminal charges against me." She also swore that the respondent sent a false document to Detective Gray but did not specify the document or its content.

[23] The appellant also testified that during the course of a recess in a judgment debtor examination that the respondent said, "after I put you behind bars lady, you'll have lots of time to study law." On the record before us there does not appear to be a denial by the respondent of this statement.

[24] The respondent testified by way of affidavit that he had not arrested the appellant and referred to the evidence of Detective Gray at the appellant's bail hearing.

[25] Neither the appellant nor the respondent were cross-examined on their affidavits.

[26] Both the appellant and the respondent filed portions of the transcript of the evidence of Detective Gray at the bail hearing. Counsel for the appellant before the motions judge and in this appeal, Mr. McWilliams, was also counsel for the appellant on the bail hearing. He cross-examined Detective Gray on the circumstances of the arrest of his client and the communications which had taken place between Detective Gray and the respondent.

[27] The cross-examination of Detective Gray revealed that the police carried out their own investigation. However, he conceded that he was contacted by the respondent and urged by him to arrest the appellant. The following excerpt from the cross-examination by Mr. McWilliams is informative:

> Q. And have you discussed the case with him [the respondent], any of these cases?
>
> A. I don't discuss it with him. I just listen to what he has to tell me.
>
> Q. Oh you listen?
>
> A. That's correct.

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Q. So you have met him?

A. Yes, I have.

Q. And when did you last speak to him?

A. I'd have to make – if I may check my notes for a quick second. I think I've made – I do my best to make notations every time.

Q. Well, I'm sure. What I want to know is whether you spoke to him prior to the arrest of Oriena Currie last Thursday? I put it to you that he approached you and urged you to have her arrested and that he's behind her arrest, even though he's the solicitor for these people, the Gosses and Caragioiu, who are involved in civil litigation against her.

A. Actually I can answer your question. You've got three in there.

Q. Yes.

A. The first part of your question is yes he has asked me to arrest her and this started way back I think prior to Peter Caragioiu getting involved because he represents the Williamsons.

Q. Oh you know that too?

A. I'm very familiar with that.

Q. Now, that's another lawsuit where he is the solicitor for the plaintiff suing Oriena Currie and Sheri Duff, who was their own daughter…

A. That's right.

Q. …and the various companies. So you know he's behind that lawsuit too?

A. Yes, I do.

Q. And did it not concern you that he might have a private axe to wield, that he might have a conflict of interest and he

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might be prepared to go to any lengths to have my client arrested in order to pursue his designs in these various lawsuits?

A. The merits of this investigation are on my investigation and my investigation only and the decisions made are based on my findings through my investigation.

Q. Were you not at all concerned that you or the police were being used for the private purposes of this solicitor from Hamilton…

A. No.

Q. …to pursue these various vendettas against my client?

A. Not in the least. Not in the least.

Q. Not in the least.

A. Not at all.

Q. Did you not even acknowledge that there was a conflict of interest on his part?

A. You'll have to explain that to me because he was always coming at me from the civil side. I mean, if he mentions anything to me he's telling me from his civil standpoint which is basically no use to me.

Q. Oh. Well, it was obvious that he wanted to pursue these civil actions, the one by the Williamsons against Oriena Currie?

A. That's correct.

Q. And he wanted to pursue the civil action by Caragioiu against her?

A. Well, he is pursuing all those.

Q. Yes.

A. Yes.

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> Q. And he wanted additional assistance to the point of having her arrested so as to make life difficult for her to defend herself in these civil actions?
>
> A. That's correct.
>
> Q. And you saw no conflict of interest in all that?
>
> A. Well no, because I didn't arrest her on his terms. I arrested Mrs. Currie and Charlie and Sheri on my terms. It has nothing to do with Michael Jaeger or his civil action whatsoever.

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[28] Both the appellant and the respondent relied upon the above portion of the cross-examination by Mr. McWilliams. Not surprisingly, their submissions as to the legal conclusion to be drawn from Detective Gray's evidence were markedly different.

[29] *Simpliciter*, the appellant argued that the conduct of the respondent attracted liability for false arrest and false imprisonment. The respondent, on the other hand, submitted that his conduct did not attract liability for the torts of false arrest and false imprisonment.

[30] Counsel for the appellant submitted that in an action for false arrest, the plaintiff need not prove the defendant actually made the arrest. It is sufficient that the defendant simply use his power or influence in urging the police to do so. He relied upon the following authorities: *Vanderhaug v. Libin* [1954], 13 W.W.R. 383 (Alta. C.A.); *Pike v. Waldrum*, [1952] 1 Lloyd's Rep. 431 (Q.B.D.); *Dendekker v. F.W. Woolworth Co. Limited*, [1975] 3 W.W.R. 429 (Alta. S.C.); *Mann v. Rasmussen* (1928), 3 D.L.R. 319 (Alta. S.C. (A.D.)); and *Hinde v. Skibinski* (1994), 21 C.C.L.T. (2d) 314 (Ont. Gen. Div.). None of these authorities is binding upon the court. All of them are distinguishable from the case at bar. The one Ontario case, *Hinde*, is a malicious prosecution case which left open the question whether the plaintiff could succeed where the defendant had not actually laid a criminal charge.

[31] It is unnecessary, in the circumstances of this case, to decide whether a person who does no more than urges the police to arrest another can ever be liable for false arrest or false imprisonment. In the case at bar, the detective testified at the bail hearing that the respondent had called him more than once to urge him to arrest the appellant. However, the detective conducted his own investigation, made his own decision to arrest the plaintiff, and instructed the constable to execute the arrest. In my view, in these circumstances, the motions judge had before him sufficient evidence upon which to conclude that the action had no chance of success.

[32] While I might have been inclined to dispose of this matter as a summary judgment motion pursuant to Rule 20 on the basis that no genuine issue for trial was raised, the motions judge chose not to do so. However, his conclusion does appear to be tantamount

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to a finding that there was no genuine issue for trial. Nevertheless, counsel before us did not argue the applicability of Rule 20.

[33] Counsel for the appellant also raised the issue of the respondent's failure to comply with rule 2.02(4) of the *Rules of Professional Conduct* of the Law Society of Upper Canada which provides:

> A lawyer shall not advise, threaten, or bring a criminal or quasi-criminal prosecution in order to secure a civil advantage for the client.

While the respondent's conduct as a member of the Law Society, may deserve review by his professional body that issue is not before us. I cannot discern, on this record, that such conduct establishes a basis for civil liability.

Disposition

[34] In the result, I would dismiss the appeal with costs to the respondent on a partial indemnity basis in the amount of $6,000 including interest and Goods and Services Tax.

RELEASED:

"NOV 27 2003"

"KMW"

"Robert P. Armstrong J.A."
"I agree K.M. Weiler J.A."
"I agree R.S. Abella J.A."

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MARGARITA CASTILLO -and- XELA ENTERPRISE LTD. et al.
Applicant Respondents

Court File No. CV-11-9062-00CL

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CASE CONFERENCE BRIEF OF THE RECEIVER
(September 27, 2022 Case Conference)

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