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

ONTARIO
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., 69096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ, and CARMEN S. GUTIERREZ as Executor of the Estate of JUAN ARTURO GUTIERREZ

Respondents

WRITTEN SUBMISSIONS OF XELA ENTERPRISES LTD.
(Returnable October 29, 2019)

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TO: SERVICE LIST

1. This dispute relates to the interpretation of paragraph 4 of the Order under which KSV Advisory Inc. was appointed Receiver of Xela Enterprises Ltd. The Receiver seeks an interpretation that is inconsistent with the express language of the Order and the context in which all parties negotiated the consensual Order.

2. The appointment of a receiver was sought by Margarita Castillo to recover her outstanding judgment debt. Xela and Ms. Castillo ultimately agreed that the Receiver could be appointed on the condition that Xela would retain some breathing room to try to attract sufficient funds to pay Ms. Castillo by December 31, 2019. Such funds would arrive through the success or a settled resolution of outstanding international litigation that is potentially worth hundreds of millions of dollars—far more than Ms. Castillo's judgment debt, assessed by the Receiver at $4.1 million.

3. The negotiated Order includes express language protecting this breathing room. Paragraph 4 provides that the Receiver shall not take *any* steps to settle or interfere with any litigation between Xela, its subsidiaries, and/or its affiliates and any third party until December 31, 2019. This prohibition includes engaging in settlement negotiations. There is no ambiguity here. The Order means what it says and says what it means.

4. Nevertheless, the Receiver now seeks direction on the interpretation of this paragraph, arguing that it requires the Receiver to consult on and approve any global settlement of the outstanding litigation involving Xela's subsidiaries.[1] This would effectively grant the Receiver a veto over the settlement of the litigation from which the Receiver is expressly separated. This approval or veto right is provided for nowhere in the Order.

5. Xela has an obligation to cooperate with the Receiver and has done so to date, including by updating the Receiver on matters related to the litigation. But, the Receiver's requested relief goes well beyond what is contemplated by the parties in agreeing to the Order. Instead, the Receiver seeks to re-write the terms of the Order.

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[1] The Receiver has also brought a motion seeking declaratory relief against certain entities, including BDT Investments Inc. and Alexandria Trust Corporation. These entities are unrelated to Xela, and Xela takes no position with respect to this relief.

6. Unless extended by this Court, the limitations on the Receiver's powers will last only another two months. If a global settlement is reached by Xela during this time, it will almost certainly result in sufficient proceeds to pay Ms. Castillo's judgment debt in full, in which case the issue before this Court will be the termination of these receivership proceedings. In the unlikely circumstance that there is a global settlement that will not pay the judgment debt in full, Xela agrees to seek this Court's approval for any such settlement.

Background

7. This case is not a typical receivership. On July 4, 2019, Xela and Ms. Castillo, a judgment creditor of Xela, attended before this Court. Xela was seeking protection under the *Companies' Creditors Arrangement Act* ("***CCAA***"), while Ms. Castillo was seeking the appointment of a receiver over Xela. After an initial case conference with this Court, Xela and Ms. Castillo negotiated the settlement of the Order with the goal of creating a "skinny receivership."

8. As a result of the settlement (i) Xela abandoned its application under the *CCAA* and consented to the immediate appointment of the Receiver; and (ii) Ms. Castillo agreed to provide Xela breathing room, without any interference from the Receiver, to permit the ongoing litigation to bear fruit capable of satisfying her judgment. The breathing room would expire on December 31, 2019.

9. The breathing room was memorialized in paragraph 4 of the Order, which states:

> … notwithstanding any other provision in this Order, the Receiver shall not take any steps to commence, direct, interfere with, settle, interrupt or terminate any litigation between [Xela] and its subsidiaries and/or affiliates and any third party, including the litigation involving or related to the Avicola companies […] Such steps shall include but not be limited to:
>
> (a) selling or publicly marketing the shares of Lisa S.A., Gabinvest S.A., or any shares owned by these entities;
>
> (b) publicly disclosing any information about the above-mentioned litigation and/or the Receiver's conclusions or intentions […]
>
> (c) replacing counsel in the above mentioned litigations; and

> (d) engaging in settlement negotiations or contacting opposing parties in the above-mentioned litigation. [Emphasis added]

The Receiver Seeks an Interpretation That is Contrary to the Order

10. This Court has held that, "[w]hen interpreting an order, a Court will use accepted principles of statutory and contractual interpretation to ascertain the intent of the ordering judge."[2] In essence, the Order must be read in its entire context and in its grammatical and ordinary sense together with the purpose and intention of the Order and the surrounding circumstances giving rise to the Order.[3] Where, as here, the order arises out of a negotiated settlement and is made on consent, the parties must be held to their bargain: "[a] consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud."[4]

11. The ordinary meaning of paragraph 4 is clear: the Receiver was to have no role in the litigation involving the Avicola companies until after December 31, 2019. Xela and Ms. Castillo agreed on broad language in the Order to separate the Receiver from the litigation. There is no room in paragraph 4 for a carve-out that would allow the Receiver to consult on and either approve or reject settlement offers in the litigation:

(1) The Receiver cannot take "*any* steps" to interfere with the ongoing litigation, and this prohibition operates "notwithstanding *any other* provision" of the Order.

(2) The Receiver cannot take any steps to "direct" or "settle" the litigation. Requiring the Receiver's consultation and approval to settle the litigation gives the Receiver a role in both settling the litigation (if the Receiver approves the settlement) and directing the litigation (if the Receiver rejects the settlement and causes the litigation to continue).

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[2] *Canadian National Railway Company v. Holmes*, 2015 ONSC 3038, para. 18, McEwen J., aff'd, 2016 ONCA 148, Authorities in Support of the Written Submissions of Xela Enterprises Ltd. ("XA"), **Tab 1**.

[3] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, para. 26, Iacobucci J., XA, **Tab 2**; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ("*Sattva*"), para. 47, Rothstein J., XA, **Tab 3**.

[4] *Monarch Construction Ltd. v. Buildevco Ltd.*, 1988 CarswellOnt 369 (WL), para. 3, *per curiam* (C.A.), XA, **Tab 4**.

(3) The Receiver also cannot take steps to "interrupt" the litigation, which the Receiver would do if it refused the terms of a settlement.

(4) The parties expressly enumerated that the Receiver cannot "engag[e] in settlement negotiations." Yet, practically, that is what the Receiver's proposed consultation and veto power would allow it to do. Prior to any settlement negotiation, Xela would have to consult with the Receiver to determine what settlement terms would satisfy the Receiver. And, if the Receiver rejected a settlement offer, the Receiver would be dictating to Xela that the terms in that offer were unacceptable. By proposing and rejecting settlement terms in this way, the Receiver would be engaging in settlement negotiations, contrary to the clear terms of paragraph 4.

12. By its interpretation, the Receiver seeks to place itself exactly where it was negotiated not to be: in the settlement discussions.

13. The context of the Order reinforces this interpretation of its terms. The Order was made on consent, as a result of a settlement between Ms. Castillo and Xela. The benefit of the bargain to Xela—in exchange for agreeing to a receivership—was to provide breathing room for the ongoing litigation to be resolved either through trial or settlement. Xela wanted to ensure that it would continue to negotiate with its counterparties as an equal, without the potential dilutive impact of the Receiver's involvement. Xela also wanted to ensure that the Receiver could not act to stymie the litigation or settlement in any way. That is why the Receiver was prohibited from selling or marketing the shares to which the litigation relates. That is why the Receiver was prohibited from replacing counsel in the litigation. And that is why the Receiver was prohibited from *settling* the litigation or *engaging in settlement negotiations*.

14. Ms. Castillo agreed with these terms. And the Receiver consented to its appointment under these terms. It is not the Receiver's role to now question the nature of the restrictions under which it was appointed.

15. It should be noted that the Receiver is not powerless before December 31, 2019. During this limited time, the Receiver is fully capable of investigating Xela's business, affairs, and previous transactions (which, judging by its First Report, is a process the Receiver appears to be

fully engaged in). The Receiver is also still empowered to otherwise administer the receivership. This is completely in line with the "skinny receivership" agreed to by the parties when the Order was issued.

16. The Receiver may argue that it could not have been the intent of the parties or the Court to exclude it from the negotiations of a settlement that is, indirectly, Xela's most valuable asset. However, here too, context is king: attention must be paid to the "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of" the Order.[5] All parties understood that the litigation involved Xela's valuable indirect interest in the Avicola companies. Despite that, paragraph 4 of the Order explicitly prohibits the Receiver from participating in settlement of this litigation until after December 31, 2019.

17. This is explained by the realities of the economics at play. The subject of the litigation, Xela's indirect interest in the Avicola companies, is potentially worth hundreds of millions of dollars. The Receiver assesses Ms. Castillo's judgment debt at $4.1 million. It would be highly unlikely that any settlement of the litigation would result in insufficient funds to repay Ms. Castillo's judgment debt in full. The parties therefore agreed to give Xela breathing room to reach this result.

18. Nonetheless, to give further assurances that Xela will not reach a settlement that is unfairly prejudicial to Ms. Castillo's interests, Xela agrees that it will seek this Court's approval of any global settlement that does not result in Ms. Castillo's judgment debt being paid in full.

19. The Receiver's request for a declaration or an interpretation of the Order providing the Receiver with the power to consult on and/or approve any settlement prior to December 31, 2019 should be dismissed.

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[5] *Sattva*, para. 58.

October 25, 2019

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Proceeding commenced at Toronto

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