COURT OF APPEAL FOR ONTARIO

CITATION: Castillo v. Xela Enterprises Ltd., 2024 ONCA 141
DATE: 20240228
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Fairburn A.C.J.O., Feldman and Sossin JJ.A.

In the Matter of the Receivership of Xela Enterprises Ltd.

BETWEEN

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

Respondent (Appellant*)

Brian Greenspan and Michelle Biddulph, for the appellant

Monique Jilesen and Derek Knoke, for the respondent KSV Advisory Inc., the Receiver of Xela Enterprises Ltd.

Heard: September 12, 2023

On appeal from the order of Justice Barbara A. Conway of the Superior Court of Justice, dated June 29, 2022, with reasons reported at 2022 ONSC 4006.

On appeal from the order of Justice Barbara A. Conway of the Superior Court of Justice, dated October 17, 2022, with reasons reported at 2022 ONSC 5594.

On appeal from the costs order of Justice Barbara A. Conway of the Superior Court of Justice, dated November 29, 2022, with reasons reported at 2022 ONSC 6696.

Feldman J.A.:

[1] The appellant was found and declared to be in civil contempt of an order appointing a receiver. He was sentenced to 30 days imprisonment and ordered to pay costs of the contempt proceedings on the full indemnity basis in the amount of $563,485.00. He appeals all three orders.

Background Facts

[2] Margarita Castillo, the appellant's sister, obtained a judgment against the appellant, their father (now deceased), and Xela Enterprises Ltd. for $4.25 million in October, 2015. Xela is a privately-owned Ontario family holding company. The appellant is the sole common shareholder and a director of Xela, and since August 2000, its president. Xela oversees the operations of several direct and indirect wholly-owned subsidiaries, mainly in Central and South America. One of the wholly-owned subsidiaries is Gabinvest S.A., a Panamanian holding company which owns all the shares of LISA S.A., another Panamanian company.

[3] In 2019, LISA held, directly or indirectly, a one-third interest in the Avicola Group, a family-owned group of poultry companies in Guatemala, valued by the appellant at close to $1 billion. Cousins of the appellant own the other two thirds.

[4] According to the appellant, LISA obtained a judgment in Panama that orders the payment of a substantial amount of unpaid Avicola dividends. In

February 2020, LISA transferred its interest in the Avicola litigation to a subsidiary of a trust for the benefit of the appellant's wife, mother, and children.

[5] In January 2019, in connection with enforcing her judgment, Ms. Castillo sought the appointment of a receiver over the property and assets of Xela, the debtor, which order was granted by the Commercial List judge on July 5, 2019 (the Appointment Order). KSV Restructuring Inc. was appointed Receiver.[1] The Receiver is investigating the Avicola transfer as a reviewable transaction.

[6] The receiver's appointment covers:

> All of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property").

[7] Paragraphs 3, 9, 17, 30 and 31 of the Appointment Order have particular significance for the contempt issue. Paragraph 3 grants the Receiver broad powers "to act at once in respect of the Property" then lists 18 specific authorizations and empowerments, including paras. 3(h) and (q) which state:

> 3(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order.

[1] Before August 30, 2020, KSV Restructuring Inc. was called KSV Kofman Inc.

> 3(q) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have.

[8] Paragraph 3 concludes by providing:

> [In] each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person. ["Persons" are defined as "(i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order."]

[9] Paragraph 9 provides:

> …no proceeding or enforcement process in any court or tribunal […] shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

[10] Paragraph 17 states that the Receiver:

> shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part…

[11] Finally, paras. 30 and 31 address the potential involvement of foreign courts and provide:

> 30. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, Panama Guatemala, Barbados,

> Bermuda, Venezuela or Honduras to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.
>
> 31. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

[12] A letter dated July 8, 2019 was sent to the appellant by the Receiver's counsel advising him of the Appointment Order and its terms.

[13] As the Receiver was experiencing difficulties obtaining information with respect to Xela's transactions, in order to be able to obtain information from its subsidiaries, Gabinvest and LISA, on January 16, 2020, the Receiver exercised Xela's rights as the sole shareholder of Gabinvest by holding a shareholders meeting where a resolution was passed replacing the three existing directors (the Gabinvest Resolution). Under the Gabinvest Resolution, three new directors who were representatives of the Receiver were elected. They were three lawyers from the Hatstone law firm in Panama. Subsequently, the three lawyers were also added to LISA's board of directors.

[14] Harold Hals is the appellant's brother-in-law. Until his removal by the Receiver, he held the positions of director of Gabinvest and LISA, treasurer of Gabinvest and president of LISA.

[15] When the replaced directors were notified of their removal, they protested and suggested that the three new directors may have committed a crime in Panama by acting without legal authority. A meeting was held that included the Receiver and the appellant but no resolution was reached.

[16] Following a contested Commercial List motion, the Gabinvest Resolution was approved and ratified by order dated March 24, 2020. McEwen J. held that the Gabinvest Resolution was a proper exercise of the Receiver's exclusive power and authority to exercise Xela's shareholder rights under para. 3 of the Appointment Order. The changes to the Board were ratified on April 27, 2020 by a further shareholders meeting directed by the Receiver.

[17] On January 20, 2021, Mr. Hals filed a criminal complaint against the Hatstone directors relating to the January 16, 2020 shareholders meeting of Gabinvest, claiming that the meeting was not properly held and that it constituted a crime causing $2 million in provisional damages chargeable to the Hatstone directors. The Criminal Complaint was based solely on a Declaration that was sworn by the appellant on December 3, 2020, which states:

> Mr. Juan Guillermo Gutierrez Strauss, aware of the penalties related to the crime of perjury, under solemn

> oath in accordance with the law, DECLARES as follows: a) that he acts in his capacity as Director – President of the company XELA ENTERPRISES LTD…..b) that his client is the sole shareholder of the company Gabinvest S.A…..c) Therefore, I DECLARE that my client, the company XELA ENTERPRISES LTD., was not notified or summoned in any way to the participate in the Shareholders' Meeting of the company GABINVEST, S.A., held on January sixteenth, two thousand and twenty, in which the appointments of the recognized Board of Directors of the company GABINVEST, S.A. were rendered null and void, providing in such sense, the appointment of a new board of directors, presided by Mr. Alvaro Almengor as President, MANUEL CARRASQUILLA as Secretary and LIDIA RAMOS as Treasurer. These persons are not known to my client, nor do they have the authority to represent the company GABINVEST, S.A., since they are not members of the Board of Directors proposed and elected by the Shareholder of the aforementioned company. d) I also DECLARE that my client, as sole shareholder of the Company GABINVEST, S.A. has never held a Shareholders' Meeting or been informed of any meeting of this nature BY TELEPHONE held on April twenty-night, two thousand twenty, with Mr. Alvaro Almengor in his alleged capacity as President of GABINVEST, S.A; nor has he ordered the modification of the Articles of Incorporation of the Company GABINVEST, S.A. IN ANY WAY. Therefore, any decision, appointment or order given by Mr. Alvaro Almengor as alleged President, Mr. Manuel Carrasquilla as alleged Secretary and Ms. LIDIA RAMOS as alleged Treasurer of the Company GABINVEST S.A. HAVE NO VALUE WHATSOEVER, and are the result of falsehood in form and substance and any other crime that corresponds to the acts committed.

[18] In response to the filing of the Criminal Complaint in Panama, the Receiver brought an urgent motion before McEwen J., who ordered the appellant on February 10, 2021 to "forthwith take any and all further steps within his control to

effect the withdrawal of the Criminal Complaint and the Declaration." On February 11, 2021, the appellant sent a letter to the Public Prosecutor's general office in Panama enclosing an affirmation withdrawing the Declaration. In addition, he asked Mr. Hals to withdraw the Criminal Complaint, but Mr. Hals refused, and the Criminal Complaint remained outstanding.

[19] On August 16, 2021, Mr. Hals requested the Panama Public Prosecutor's Office to conduct an interview with the appellant to determine whether the appellant ratified his Declaration and whether he had participated in the Gabinvest shareholders meetings of January 16, 2020 and April 27, 2020. The appellant attended the interview at the Panamanian consulate in Toronto on December 14, 2021.

[20] At that interview, the appellant told the Public Prosecutor's representative that the case involved a company that he managed in Canada, but that he was a "judicial hostage" because the court's orders prevented him from participating in the case. According to the Prosecutor's summary, he did not state that he had withdrawn the Declaration. At the trial of the motion, he claimed that he did tell the Prosecutor that he had withdrawn the Declaration.

Findings on the Contempt Motion

[21] The motion judge disbelieved the appellant's testimony on the motion. She made the finding that he was not a credible witness. Specifically, she did not

believe his testimony regarding the circumstances of the creation of the Declaration.

[22] The appellant had testified that when he was in Guatemala with his wife's family following the death of his mother-in-law, his brother-in-law, Mr. Hals asked him to answer some questions before a notary regarding whether he was at the meeting where the Gabinvest directors were replaced, and to sign a document. He answered the questions, then signed the Declaration after it was read to him. He did not discuss it with Mr. Hals and he did not know it was to be used to file a criminal complaint, which he only learned about several months later.

[23] The motion judge specifically rejected the appellant's evidence that he did not know that the Declaration would be used to support the Criminal Complaint. She found it incredible that the appellant, an experienced businessman with a significant economic interest in Xela and therefore in Gabinvest, whose declaration referred to criminal conduct and fraud, did not know what Mr. Hals, his brother-in-law and close business associate, was doing with his Declaration.

[24] The motion judge also specifically rejected the appellant's assertion that the Declaration was in the notary's words and not his and that he had paid no attention to its content. The notary's jurat attests to the fact that he read the document to the appellant, who was well-informed of its content, value and effects, and that the appellant had ratified, accepted and signed it. Further, under cross-examination

on the motion, the appellant admitted that he signed it under penalty of perjury, that it was read to him, and that he did not disagree with anything it stated.

[25] The motion judge concluded her findings on the issue with the following summary:

> I find that Mr. Gutierrez knew exactly what he was doing when he signed the Declaration. He was aware of the contents of the document and swore that they were true. I find that he knew that the purpose of signing the Declaration was to file a criminal complaint in Panama to challenge the Receiver's removal and replacement of the Gabinvest board.

[26] As he does on this appeal, the appellant challenged the jurisdiction of the court over the alleged contempt because the acts complained of occurred in Guatemala and Panama. The motion judge found that the court had jurisdiction based on a "real and substantial link" between the appellant's conduct and Ontario. The motion judge relied on the fact that the Appointment Order was made in Ontario about Xela, an Ontario company, of which the appellant is the sole common shareholder and president. When he signed the Declaration in Guatemala, it was in his capacity as president and director of Xela. The Declaration itself related to Xela and its wholly owned subsidiary, Gabinvest. The Appointment Order was made in connection with the enforcement of an Ontario judgment against Xela and the appellant, so that the alleged breach of the order affects that enforcement. Based on those links, the motion judge concluded that Ontario had a legitimate interest in prosecuting the alleged contempt.

[27] The motion judge also rejected the submission that taking jurisdiction would be contrary to principles of international comity by interfering with an ongoing Panamanian criminal investigation. The issue before the court was not whether the Receiver had complied with Panamanian law or whether the Panamanian authorities were able to investigate the Receiver's conduct in Panama. The issue was whether the appellant respected and complied with an Ontario court order when he signed the Declaration.

[28] Turning to the issue of civil contempt, the motion judge found that the three components of civil contempt had been proved beyond a reasonable doubt. The Appointment Order was clear and unequivocal, in particular paras. 3 and 9; the appellant had knowledge of the Order; and he intentionally breached it: *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79, at para. 32.

[29] On the first component, the motion judge found that the Order, read as a whole, is clear and unequivocal. It gives the Receiver the exclusive authority to take action on behalf of Xela and its Property. Paragraphs 3 and 9 of the Appointment Order are not conditional on the Receiver taking steps under paras. 30 or 31 to request the assistance of a foreign court. The fact that the Receiver did not domesticate the Order under Panama law did not affect its authority under the Order or the requirement of compliance by the appellant. If the appellant had wanted to challenge any action by the Receiver, he could have done so by seeking the direction of the court.

[30] There was no issue or dispute that the appellant had knowledge of the Order.

[31] With respect to intent, the appellant intentionally signed the Declaration in front of the notary, breaching the Order in four ways:

a) He signed on behalf of Xela in contravention of para. 3(h);

b) He acted for Xela contrary to the exclusive authority of the Receiver under para. 3;

c) His action challenged the Receiver's right on behalf of Xela to replace the board of Gabinvest;

d) By participating in bringing a proceeding against the Receiver without seeking consent or a court order, he breached para. 9 of the Order.

[32] Because of her finding that the appellant was guilty of civil contempt by making the Declaration, the motion judge found it unnecessary to determine whether the contents of the Declaration were false, or whether the interview in December, 2021 also breached the Appointment Order.

[33] In addition to the finding of civil contempt, the Receiver asked the motion judge to find the appellant guilty of criminal contempt. She declined to consider criminal contempt because she found that the respondent's notice of motion, referring only to "contempt", did not put the appellant on sufficient notice of an allegation of criminal contempt.

Findings on the Sentence for Civil Contempt

[34] Before the motion judge, the Receiver sought a penalty of 90 days in prison, a $25,000 fine and payment of full indemnity costs. The appellant submitted that a $25,000 fine was appropriate or a fine followed by 12 months probation with restrictive terms.

[35] Rule 60.11(5) of the *Rules of Civil Procedure*, R.S.O. 1990, c. C.43. sets out the orders available for a finding of civil contempt, including a term of imprisonment, a fine, a compulsory order, and the payment of costs. The motion judge discussed the purposes of sentencing for civil contempt, which she stated were primarily coercion and enforcement of the rights of a private party, but also include punishment in order to foster respect for the court and its process. For civil contempt, a sentence of imprisonment is rare and reserved as a last resort.

[36] The motion judge then considered six factors from the two leading cases of *Boily v. Carleton Condominium Corporation 145*, 2014 ONCA 574, 121 O.R. (3d) 670 and *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663, 416 D.L.R. (4th) 269: proportionality, mitigating and aggravating factors, deterrence and denunciation, similar sentences in like circumstances and the reasonableness of a fine or incarceration.

[37] The motion judge found the appellant's wrongdoing to be extremely serious: the Receiver was an appointed officer of the court. In the face of the Appointment

Order that gave the Receiver exclusive authority over Xela, the appellant interfered with the Receiver's actions and powers and participated in a criminal complaint against its representatives in Panama. The sentence had to reflect the severity of the appellant's conduct.

[38] The only mitigating factor was that this was a first offence. The appellant had not purged his contempt, apologized, or expressed any remorse.

[39] The motion judge gave four reasons for rejecting on a balance of probabilities the position that the appellant had purged his contempt by having his counsel write to Mr. Hals on July 6, 2022 after the contempt finding, reiterating the request to discontinue the Criminal Complaint in Panama and not to rely on the Declaration or the interview.

[40] First, Mr. Hals had forcefully rejected the appellant's first request to withdraw the Criminal Complaint in February 2021, and the appellant therefore knew that Mr. Hals would not back down. As a result, the July 6 letter was "not a genuine attempt to purge his contempt."

[41] Second, the appellant could have contacted the Panamanian Public Prosecutor to advise and reinforce that he had withdrawn his Declaration, that they should not rely on the interview from December, 2021 and that he wished to discontinue the Criminal Complaint.

[42] Third, after withdrawing the Declaration, he still went to the interview in December 2021 without alerting the Receiver or the court. He did not tell the Public Prosecutor that he had withdrawn the Declaration and not to use it to support the Criminal Complaint. Instead, he told them he was a "judicial hostage" of the Ontario court, thereby undermining the sincerity of his withdrawal of the Declaration.

[43] Fourth, to the extent that he could not stop the Public Prosecutor from continuing to investigate the Criminal Complaint, that was a situation of his own making, and is not a defence.

[44] The motion judge found several aggravating factors. The contemptuous conduct was "blatant, deliberate, wilful and unrepentant", "not misguided or accidental."

[45] In addition, the appellant's conduct over two years as the events were unfolding demonstrated "an astounding lack of respect for this court." He gave the declaration after the Appointment Order and after the Gabinvest Resolution was confirmed by the court. After being ordered to withdraw the Declaration and take all steps to withdraw the Criminal Complaint, he attended the interview without seeking the direction of the court. At the interview, he did not say that he had withdrawn the Declaration and that he did not want to pursue the Criminal Complaint. Instead, he stood by his position. In the words of the motion judge:

> According to the summary of the Interview, he told the Public Prosecutor that this case involves a "company that

> I manage in Canada" and described Xela as "a company I represent" (contrary to the exclusive authority given to the Receiver under the Appointment Order). He described himself as "a victim and plaintiff". He said that "a commercial judge in the province of Ontario issued an order limiting me from participating or carrying out further proceedings in this case, which makes me feel like a judicial hostage". He did not forthwith take any and all further steps within his control to effect the withdrawal of the Criminal Complaint and the Declaration as ordered by McEwen J. on February 10, 2021.

[46] The final aggravating factor was personal financial benefit from the contemptuous conduct: in making the Declaration, the appellant interfered with the Receiver's mandate to assist in enforcing the Castillo judgment against Xela, his family's holding company.

[47] To arrive at the sentence, the motion judge referred to the case law that holds that deterrence and denunciation are the most important sentencing objectives in civil contempt cases, including two similar cases where jail sentences of six months were imposed: *Sussex Group Ltd. v. Fangeat* (2003), C.P.C. (5th) 274 (S.C.); *Central 1 Credit Union v. UM Financial Inc.*, 2012 ONSC 889, 89 C.B.R. (5th) 91. She found that both specific and general deterrence were needed in this case for the appellant and others to know that they must respect the court and the Receiver appointed by the court.

[48] Further, neither a fine nor a period of probation would serve the principles of sentencing in this case because they would not address the seriousness of the appellant's conduct or be effective as a deterrent.

[49] The motion judge concluded that only a sentence of incarceration would meet the applicable principles, and found that 30 days would be sufficient but not excessive.

The Decision on Costs

[50] The Receiver requested costs on a full indemnity basis in the amount of $628,485.23 for both the Receiver and its counsel. The appellant submitted that costs should be awarded only on a substantial indemnity and not a full indemnity basis. His counsel's fees were $124,110 on that basis.

[51] The motion judge ordered costs on the full indemnity scale, based on the seriousness of the contempt including the interference with a court appointed officer, and the appellant's continuing conduct making allegations against the Receiver and specifically threatening its president Mr. Kofman with criminal liability in Panama. He distracted the Receiver from its job, and did everything knowing that Xela had no funds itself to pay any costs, leaving his sister, the judgment creditor, to fund all the proceedings. The motion judge observed how unfair it would be for the judgment creditor to have to pay for the contempt proceedings.

[52] On the quantum, the motion judge found that the proceedings were lengthy, highly contentious and vigorously opposed. The onus on the Receiver was heavy. The appellant could reasonably have expected that the Receiver's fees would be greater than his counsel's fees.

[53] The fees were discounted by the motion judge to remove amounts that were incurred with reference to the appellant's failure to comply with other court orders, which the motion judge had specifically declined to take into account on the contempt finding. The amount of the reduction was $65,000, leaving $563,485 on a full indemnity basis, inclusive of disbursements and HST.

The appeal of the contempt finding

Issues on the Appeal of the Contempt Finding

[54] The appellant raises two alleged errors by the motion judge on the contempt finding: 1) Did the motion judge err in law by holding that the court had territorial jurisdiction to find the appellant in contempt based on his Declaration that was not made in Canada but in Guatemala? 2) Did the motion judge err in law by concluding that the appellant was in contempt by finding that the appellant breached paragraphs 3 and 9 of the Appointment Order?

Analysis

(1) Did the motion judge err in law by holding that the court had territorial jurisdiction to find the appellant in contempt based on his Declaration that was not made in Canada but in Guatemala?

[55] The appellant submits that because the court found that the contemptuous conduct by the appellant was making the Declaration in Guatemala, the court did not have territorial jurisdiction to make the contempt finding against him. The

appellant relies on the Supreme Court of Canada's decision in *Libman v. The Queen*, [1985] 2 S.C.R. 178, at pp. 199, 212-13, 1985 CanLII 51, at paras. 42, 73-76.

[56] In *Libman*, the Supreme Court set out the test for determining when a Canadian court may take jurisdiction over a criminal offence that occurred in whole or in part outside Canada. LaForest J. summarized the test at pp. 212-12 (para. 74):

> As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well-known in public and private international law.

[57] He concluded at p. 213 (para. 76):

> Just what may constitute a real and substantial link in a particular case, I need not explore. There were ample links here. The outer limits of the test may, however, well be coterminous with the requirements of international comity.

[58] The test also applies to a finding of civil contempt: see *Canada (Human Rights Commission) v. Canada Liberty Net*, [1998] 1 S.C.R. 626, at p. 670, 1998 CanLII 818, at para. 52.

[59] The appellant submits that there can be no sufficient link because the act that was found to amount to contempt took place entirely outside Ontario. He also argues that he obtained no benefit in Ontario from making the Declaration.

[60] The motion judge was correct to reject these submissions. The real and substantial link test broadens the inquiry from looking only at the location of the actions of the alleged contemnor, to the connections or links between the impugned conduct and Ontario. The test is not whether the contemnor has links to Canada, but whether the breach of the law or the court order has a “real and substantial link” to Canada.

[61] This concept was fully explained and applied by this court in *R. v. Greco* (2001), 159 C.C.C. (3d) 146 (Ont. C.A.), leave to appeal refused, [2001] S.C.C.A. No. 656., and more recently in *R. v. Barra*, 2021 ONCA 568, 157 O.R. (3d) 196.

[62] In *Greco*, while he was subject to a probation order following convictions for assault and threatening death which required him to keep the peace and be of good behaviour, the appellant viciously assaulted his girlfriend on a trip to Cuba. The Cuban authorities chose not to become involved, but they alerted Toronto police, and the appellant was charged with breach of probation. He argued that the court did not have territorial jurisdiction to enforce the probation order for conduct that did not take place in Ontario.

[63] Moldaver J.A. explained that there is a difference between “jurisdiction to prescribe” and “jurisdiction to enforce”: at para. 15. Essentially, a state cannot enforce its domestic laws in another state without the consent of that state. However, the principle of territoriality does not prevent a state from enacting laws or issuing court orders that are enforceable locally, but that govern conduct outside the state: at para. 17. As a result, a court in Canada may issue a probation order, enforceable in Canada, that binds the conduct of probationers both in Canada and outside the country: at para. 23. Moldaver J.A. also observed that policy reasons strongly support that approach.

[64] On the issue of whether a probation order binds the probationer’s conduct both in Canada and outside Canada, the court drew the common-sense inference that absent a term indicating the contrary, the order binds the individual’s conduct, no matter where that person is: at para. 29.

[65] Applying the “real and substantial link” test from *Libman*, the court first found that there was no concern regarding comity with Cuba, then stated at para. 42:

> Once it is understood that Canada is the only country that has an interest in ensuring compliance with orders made by Canadian courts, little more need be said in terms of the “real and substantial link” test. The probation order in the instant case was imposed upon the appellant by an Ontario court. It required him to keep the peace and be of good behaviour both at home and abroad. Importantly, the offence in issue arises out of a breach of that order, a factor which I consider to be crucial in the application of the “real and substantial link” test. To the extent that

> he breached that order, Canada alone has an interest in bringing him to justice and it may do so. The requirements of international comity do not dictate otherwise.

[66] The *Libman* analysis was recently applied in the context of a conspiracy charge by this court in *Barra*. Mr. Barra and others were charged with agreeing to bribe officials of India in connection with the awarding of an Air India contract to a Canadian company, Cryptometrics Canada. Territorial jurisdiction was one of the issues at trial and on appeal.

[67] In applying the "real and substantial link" test, the court looked at all the activities that constituted the offence and how many of them were connected to Canada including: the alleged conspiracy was about a Canadian company paying bribes to Indian officials to secure a contract; the appellants were the company's representatives involved in the agreement to pay the bribes; the appellant Barra approved the payments and was the directing mind of the company. The court found to be of particular significance the fact that the substantial fruits of the contract would be obtained in Canada, even though that fact was not strictly part of the acts that constituted the offence: at para. 54.

[68] The court specifically rejected the argument that it should focus on the physical location of the offence rather than the connections to Canada. The connections were what "legitimately gave this country an interest in prosecuting the offence": at paras. 54-55, citing *Libman*, at para. 71.

[69] Applying *Libman*, *Greco* and *Barra* to the facts of this case, the motion judge made no error in focusing on the connections to Canada, rather than the physical location of the appellant when he made the Declaration. She correctly found a real and substantial link based on the significant connections between the swearing of the Declaration and the province of Ontario:

1) The Appointment Order was made in Ontario;

2) The Order applies to Xela, an Ontario corporation;

3) The appellant is the sole common shareholder and president of Xela, the company in receivership;

4) The appellant signed the Declaration in Guatemala in his capacity as the President and director of Xela;

5) The Declaration makes allegations with respect to Xela, an Ontario company and its wholly-owned subsidiary, Gabinvest;

6) The Appointment Order was obtained in connection with the enforcement of a judgment obtained by Ms. Castillo "in lengthy Ontario-based proceedings, against Xela, Mr. Gutierrez and others."

[70] Of particular significance is that no country but Canada is concerned with enforcing the Ontario Appointment Order. In addition, as in *Barra*, there was clearly a benefit to the appellant in Ontario in undermining and interfering with the Receiver's ability to obtain the information it needed about LISA and Gabinvest in order to do its job of enforcing the Ontario judgment against the parent company, Xela.

[71] The appellant also argues that the Appointment Order is limited to Ontario by its terms because para. 31 gives the Receiver the power and authority to apply to any foreign jurisdiction for recognition of the Order and for assistance in carrying it out. I agree with the motion judge that, read as a whole, the Order has no territorial limitation and applies to the persons named in the Order whether in Canada or elsewhere. Paragraph 31 is permissive and gives the Receiver the ability to make use of the legal apparatus of other countries where it is necessary to do so. In this case, there was no evidence offered that the Receiver needed any order or other legal authority in Panama or Guatemala to hold the corporate meetings it held or to take any other steps under the authority of the Appointment Order.

[72] Finally, the appellant argues that the contempt proceedings amount to the Canadian court punishing the appellant for either legitimately or illegitimately participating in the Panamanian criminal justice system, and that either way, that constitutes an interference with Panamanian sovereignty and is contrary to principles of international comity. The motion judge was correct to reject this submission as well.

[73] The doctrine of international comity is that "the Courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect": *R. v. Zingre*, [1981] 2 S.C.R. 392, at p. 401. In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077,

1990 CanLII 29, at p. 1097, the Supreme Court identified the doctrine's twin objectives: order and fairness. The court reiterated those objectives in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, but stated that "order comes first. Order is a precondition to justice": at p. 1058.

[74] In this case, the appellant was free to engage the Panamanian legal system as long as he abided by the provisions of the Order. The contemptuous conduct was making the Declaration to be used to initiate a criminal complaint against the Receiver without seeking leave of the court in Ontario, as required by the Appointment Order, para. 9. In addition, the evidence the appellant provided was misleading, incomplete and untruthful regarding his status with Xela and failed to reveal the appointment of the Receiver. Had the appellant sought and obtained leave and provided truthful evidence to the Panamanian authority, there would have been no basis to find contempt.

[75] I also reject the appellant's argument that the court below "implicitly convert[ed] the Appointment Order into an anti-suit injunction", and that this was a "serious breach of the principles of comity." An anti-suit injunction is a remedy reserved for when a foreign court takes jurisdiction in circumstances that would cause a serious injustice: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at para. 30. Paragraph 9 of the Appointment Order, by contrast, is not concerned with ousting foreign jurisdiction

in favour of Ontario, but rather with protecting the Receiver from inappropriate proceedings, foreign or local.

[76] There was no violation of international comity by making the contempt order against the appellant, which did not constrain the Panamanian authorities from conducting an investigation. The fresh evidence brought to this court is that the investigation proceeded but has now been terminated.

(2) Did the motion judge err in law by concluding that the appellant was in contempt by finding that the appellant breached paragraphs 3 and 9 of the Appointment Order?

[77] The appellant argues that the motion judge did not explain how making the Declaration breached the specific provisions of paras. 3(h) and (q), and the exclusivity clause, as well as the provisions of para. 9 that prohibit interference with the Receiver. He denies that making the Declaration breached of any of these provisions. There is no merit to these submissions.

[78] The motion judge accurately articulated the three criteria for a finding of civil contempt: the order that is alleged to have been breached must be clear and unequivocal, the alleged contemnor must have knowledge of the order, and he must have intentionally breached the order.

[79] The Appointment Order is clear and unequivocal. It gives the Receiver the exclusive authority to execute documents in relation to the Property of Xela (para.

3(h)), to exercise shareholder rights of Xela (para. 3(q)), and if it exercises that authority, others including the appellant and Xela are excluded from doing so and they are precluded from interfering with the Receiver's actions. (para. 3's concluding words). Paragraph 9 prohibits the commencement or continuation of any proceeding in any court against the Receiver without its consent or leave of the court.

[80] By calling and holding the shareholders' meeting of Gabinvest, the Receiver exercised its exclusive authority under paras. 3(h) and (q). As the motion judge found, by signing the Declaration as President of Xela, sole shareholder of Gabinvest, the appellant was purporting to exercise Xela's shareholder's rights, and did so by signing a document on behalf of Xela, contrary to paras. 3(h) and (q) and the exclusivity prohibition.

[81] The appellant tries to distance himself from the content of the Declaration by arguing that it was a mere summary prepared by the notary and not his own words. That submission is belied by the evidence that the notary read the Declaration to him, and that he agreed with it and signed on penalty of perjury. He signed the Declaration knowing, accepting and adopting its contents, and with full knowledge of the Appointment Order.

[82] The appellant also argues that the Declaration was at most an attempt to interfere with the Receiver and no actual interference was proved. First, initiating

a criminal investigation against the Receiver and its agents, the Hatstone lawyers, is actual interference on its own, as the investigation undermines their authority until resolved. There was also evidence that it caused delays in obtaining information. The definition of “interfere” in the Merriam-Webster Dictionary (online) is “to interpose in a way that hinders or impedes.” That is what the appellant did by signing the Declaration to enable Mr. Hals to initiate a police investigation of the Receiver. In any event, the wording of para. 3 “without interference from any other Person” does not differentiate between actions that attempt to interfere and actions that succeed in interfering.

[83] Finally, I reject the appellant’s argument that an investigation is not a proceeding. The investigation was instituted as the necessary first step in a criminal proceeding.

[84] I conclude that the motion judge’s reasons and her finding of contempt are unassailable. I would therefore dismiss the appeal of the finding of civil contempt against the appellant.

The Sentence Appeal

Issues on the Sentence Appeal

[85] The appellant submits that the sentence of 30 days in prison was unfit, it was outside the range, and the motion judge erred by failing to consider a conditional or intermittent sentence.

Analysis

[86] Our courts and the rule of law are sacrosanct in this country, recognized and revered as an essential component of our democracy. Our judges are held in high regard as the custodians of the rule of law and of the fairness of the judicial process. To preserve the sanctity of the judicial system, it is understood and accepted that court orders must be followed and obeyed, with significant consequences for those who fail to do so.

[87] Everyone who participates in the legal system expects and assumes that if they are successful, and the court makes an order in their favour, it will be obeyed by the other party. If it is not, the winner will cry foul. The obvious corollary is that if an order is made against someone, they are similarly obliged to obey the order.

[88] The appellant was found guilty of civil contempt. While the main purpose of sentencing for criminal contempt is punishment, historically the primary purpose of sentencing for civil contempt was viewed as compelling compliance in order to protect and enforce the rights of the party who obtained the order: *Cavalon*, at para. 77.

[89] However, in recent years, our courts have focused on the fact that ensuring compliance with court orders also engages important public law issues, including respect for the authority and dignity of the courts and for the rule of law: *Cavalon*,

at para. 78; *Boily*, at para. 79. As a result, punishment has been added as a secondary purpose of sentencing for civil contempt for breach of a court order.

[90] In this case, the appellant was found in contempt of a receivership order. A Receiver, once appointed, is an officer of the court. The intent and effect of the appellant's contempt of that order was to initiate criminal proceedings against the Receiver and its agents as well as to undermine the Receiver's exclusive authority and power to deal with the Receivership property. It is difficult to think of conduct by a litigant that is more flagrant and disrespectful of the court and the rule of law. The appellant demonstrated his attitude toward the court by describing himself to the Panamanian Prosecutor as a "judicial hostage" of the court. He saw fit to take matters into his own hands, flouting the court's order and process.

[91] This Appointment Order was made by a judge of the Commercial List of the Superior Court. That division of the court deals exclusively with commercial matters and is structured to supervise those cases closely and in a timely manner as commercial remedies often involve remedial transactions that occur very quickly during the process. That does not mean that Commercial List orders are more important or due more respect than other court orders. The added significance is that the court, made up of a small number of Superior Court judges, is more intimately involved in supervising the process, for example, of a receivership and can be immediately aware of a breach of its order and its effects on the ongoing

process. I would add that the Commercial List operates efficiently and effectively based on the full co-operation and respect of the commercial bar and the litigants.

[92] The motion judge, also a judge of the Commercial List, found the appellant's wrongdoing to be extremely serious and "demonstrat[ed] an astounding lack of respect for this court." The only mitigating factor was that it was his first offence.

[93] While purging the contempt and apologizing to the court can also be mitigating factors, the appellant did not apologize or express any remorse for his conduct. The motion judge found that his and his lawyer's letters to Mr. Hals asking to withdraw the Criminal Complaint did not amount to either purging or even attempting to purge his contempt. The motion judge gave four reasons: the appellant knew that Mr. Hals would not back down; he did not attempt to contact the Panamanian Prosecutor after he was found in contempt to discontinue the Criminal Complaint; he went to the interview in December 2021 without telling the Receiver or seeking leave of the court, and did not tell the Panamanian Prosecutor that he had withdrawn the application but instead said he was a judicial hostage of the Ontario court; and to the extent he could not control Mr. Hals, the situation was of his own making.

[94] In addition, there were several aggravating factors. The appellant's conduct was "blatant, deliberate, wilful and …unrepentant", not just accidental or misguided. The motion judge emphasized that the appellant intentionally signed

the Declaration knowing it was to be used to initiate a criminal complaint against the Receiver's representatives in Panama, without complying with the procedure provided in the Appointment Order. He engaged in self-help in the face of the Order. Finally, interfering with the Order was for his financial benefit by interfering with the Receiver's ability to realize on assets to satisfy the judgment against Xela.

[95] In arriving at the sentence of 30-days incarceration, the motion judge considered all of the required sentencing factors including specific deterrence, general deterrence and denunciation, sentences imposed in similar circumstances, and the reasonableness of a fine or incarceration. She found that a fine would not reflect the seriousness of the appellant's contemptuous conduct, and that only a sentence of incarceration would meet the applicable sentencing principles, with 30 days being the fit duration, sufficient but not excessive "to address the objectives of sentencing."

[96] The appellant first challenges the motion judge's finding that he did not purge or attempt to purge his contempt by asking Mr. Hals to withdraw his Declaration and the Criminal Complaint and having his lawyer repeat the request. He argues that the motion judge made factual errors by finding that the appellant could have contacted the Panamanian Prosecutor because he had their contact information. He argues further that the motion judge ignored the appellant's evidence that he told the Panamanian Prosecutor in the interview that he had

withdrawn his Declaration, even though that was not contained in the Prosecutor's summary of the interview.

[97] These arguments have no merit. The motion judge's factual findings are entitled to deference. The motion judge did not believe the appellant and specifically rejected his evidence. The Prosecutor's summary put the lie to it.

[98] The appellant argues further that the motion judge was not entitled to deny the appellant any credit for his attempt to mitigate by his communications with Mr. Hals. The motion judge gave no credit because, for the four reasons she carefully articulated, she rejected the characterization of that communication as an attempt to purge the contempt. Again, her findings are accorded deference by this court.

[99] The appellant also argues that the motion judge erred in law by blaming him for the ongoing Criminal Complaint when it was not within his control to end it. This proposition is rejected. It was the appellant who signed the Declaration that the motion judge found he knew was to be used to initiate the Criminal Complaint. The fact that it may not have been within his control to stop the Panamanian process is a situation of his own making, and cannot be relied on as a mitigating factor in his favour: *Echostar Communications Corp v. Rodgers*, 2010 ONSC 2164, 97 C.P.C. (6th) 177, at para. 45; *Sussex v. 3933938*, 2003 CanLII 49336 (Ont. Sup.

Ct.), at para. 53; and *Manis v. Manis* (2001), 55 O.R. (3d) 758 (Ont. C.A.), at paras. 30-31.

[100] The appellant also challenges the motion judge's finding that he would benefit financially from the contempt, calling it speculative and arguing that he "stands to gain nothing financially if the criminal complaint results in any consequences to the Hatstone lawyers in Panama."

[101] This submission amounts to a baseless challenge to a factual finding by the motion judge. The appellant did not testify at the sentencing hearing. Yet he submits, without evidence, that he would not gain financially by disrupting the Receiver's efforts to obtain important financial information about the holdings of Xela, of which he is the sole shareholder, in order to realize on the Castillo judgment against Xela and him.

[102] Any judicial factual findings are not challengeable on appeal except if they are based on a palpable and overriding error or a misapprehension of the evidence. No such error is alleged or supported. In any event, this finding by the Commercial List judge is obvious and unassailable. The entire action between the parties, and the Receivership imposed by the court to ensure that the funds to pay the judgment are not wrongly diverted, is about the financial gain of the appellant. The appellant's actions to disrupt the Receiver's efforts are for his financial gain and constitute a significant aggravating factor on sentencing.

[103] Finally, the appellant asserts that the motion judge was required to consider a conditional sentence in accordance with s. 718.2(e) of the *Criminal Code*, R.S.C., 1985, c. C-46. This is civil contempt where the penalty is governed by r. 60.11 of the *Rules of Civil Procedure*, not by the *Criminal Code*. Nevertheless, it is clear from the reasons that the sentencing judge considered alternatives to incarceration but determined that only a custodial sentence would serve the principles of sentencing. She specifically rejected a period of probation on strict house arrest terms, which was proposed by the appellant.

[104] The appellant sought to introduce fresh evidence on the appeal regarding anxiety he says he suffered after he was incarcerated for a few hours following the sentencing hearing and before a stay was imposed, including flashbacks to when he was kidnapped in Guatemala. The fresh evidence is opposed by the respondent on a number of bases including due diligence and the fact that the professional he eventually consulted was a psychotherapist under suspension by the College of Psychotherapists. In oral submissions, appellant's counsel stated that the appellant no longer seeks to rely on the psychologist's report but maintains his reliance on the fact that he suffered anxiety in jail as a result of his kidnapping. I would not admit this evidence on appeal. I am not satisfied that it meets the *Palmer* criteria; in particular, given the nature of the evidence, it would not have affected the sentence imposed.

Summary

[105] The motion judge gave full, clear and compelling reasons for imposing a 30 day period of incarceration as the only fit sentence in a case where the contemptuous conduct was egregious and constituted an attempt to undermine and thwart the actions of a court-appointed officer. The appellant's position that he had done everything he could to purge his contempt and to have the Criminal Complaint and investigation withdrawn by the Panamanian authorities was completely rejected by the motion judge as insincere and disingenuous.

[106] This court has been provided with fresh evidence that the Panamanian Prosecutor's office has now closed the investigation on the basis that "the facts complained are not considered the crime of falsehood accused." Therefore, there is nothing further that can be done to purge the contempt by withdrawing the complaint.

[107] However, the motion judge noted that an apology by the contemnor can also be a mitigating factor on sentencing, but the appellant never apologized or expressed remorse.

[108] The motion judge made no error in imposing the 30 day carceral sentence. I would dismiss the sentence appeal.

[109] This receivership is an ongoing matter on the commercial list. It would be appropriate for the appellant to offer that court a sincere apology for his conduct,

express his remorse and give his assurance of respect and compliance with orders going forward. It would be open to the motion judge to consider whether and to what extent that might be viewed as an attempt to purge the contempt.

[110] The appellant began serving his sentence at Toronto South Detention Centre on October 17, 2022, the date of Conway J.'s order, and was released pending appeal later that day by order of Huscroft J.A. As a term of his release the appellant was ordered to surrender his passports to his counsel who was to hold them until the disposition of the appeal. In light of the dismissal of the appeal against conviction for contempt, that condition is extended until the completion of the sentence. The appellant is to surrender into custody at Toronto South Detention Centre by 9 a.m. on Friday March 1, 2024, failing which, a bench warrant for his arrest may issue from this court.

The Costs Appeal

Issues on the Costs Appeal

[111] The appellant seeks leave to appeal the award of full indemnity costs on the basis that the motion judge made factual and legal errors that warrant the intervention of this court. This part of the appeal was heard in writing.

Analysis

[112] First, the appellant argues that the motion judge erred by treating the award of costs by Newbould J. following the decision granting judgment in the underlying

action, and this contempt hearing as comparable. He argues that those costs were awarded to compensate for a five-year long, hotly contested, complex action, while this was a simple, two-day contempt motion. In addition, the motion judge stated that both sides delivered several affidavits with voluminous exhibits, while in fact, the appellant did not deliver an affidavit. The respondent disputes the appellant's objections, pointing out that the Receiver was required by the appellant to produce voluminous documentary disclosure in addition to the appellant's 4207-page amended exhibit book. The appellant also required the Receiver to provide *viva voce* evidence of two witnesses, and in addition, the appellant unexpectedly testified. There were five days of evidence and submissions on the contempt phase as well as two further affidavits from the Receiver on the penalty phase and two further attendances.

[113] There is no merit to the appellant's submission. No one knows better than the motion judge how long or complex the proceeding was and how the conduct of each side contributed to the length and complexity. Her findings are entitled to the deference of this court. It is not this court's role to examine the record to challenge those findings.

[114] The appellant also challenges the motion judge's ability or authority to award full indemnity costs. He argues that the motion judge awarded costs on the highest level to punish the appellant for vigorously defending the contempt charge and to

compensate the Receiver for having to meet the standard of proof beyond a reasonable doubt.

[115] The motion judge made no such error. She referred to a number of Superior Court civil contempt decisions where costs were awarded on the full indemnity scale. She justified her decision in this case based on the extremely serious, egregious wrongdoing by the appellant which "demonstrated an astounding lack of respect for this court." Besides the single breach, the appellant perpetuated the contempt by attending the interview with the Panamanian Prosecutor in December 2021. The motion judge also included the fact that shortly before she gave her costs reasons, the appellant filed a notice of motion that again threatened the president of the Receiver with criminal liability in Panama and made allegations against the Receiver. In addition, the motion judge determined, as a matter of fairness, that no costs of the contempt proceeding should be born by the only source of funding, the unpaid judgment creditor, Ms. Castillo.

[116] Finally, the motion judge observed that the appellant should have expected that the Receiver's costs would be higher than his counsel's because of the heavy onus of proof on the Receiver. She did not say, as submitted here, that the Receiver was entitled to elevated costs because of that onus.

[117] I see no basis to review the costs order by the motion judge. The award is a high one. It was fully justified. I would not grant leave to appeal costs.

Conclusion

[118] I would dismiss all three aspects of the appeal with costs in the agreed amount of $40,000 inclusive of disbursements and HST.

Released: February 28, 2024 “J.M.F.”

“K. Feldman J.A.”
“I agree. Fairburn A.C.J.O.”
I agree. Sossin J.A.”