CITATION: Castillo v. Xela Enterprises Ltd., 2022 ONSC 5594
COURT FILE NO.: CV-11-9062-00CL
DATE: 20221017

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: Margarita Castillo, Applicant

AND:

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

AND: In the Matter of the Receivership of Xela Enterprises Ltd.

BEFORE: Conway J.

COUNSEL: *Monique J. Jilesen and Derek Knoke* for the Receiver, moving party

Brian H. Greenspan and Michelle Biddulph for Juan Guillermo Gutierrez, responding party

HEARD: September 22, 2022

REASONS FOR DECISION (SENTENCING)

[1] KSV Restructuring Inc. (the "**Receiver**") was appointed as the receiver of Xela Enterprises Inc. ("**Xela**") pursuant to the order of McEwen J. dated July 5, 2019 (the "**Appointment Order**").

[2] The Receiver brought a contempt motion against Juan Guillermo Gutierrez ("**Mr. Gutierrez**") for breach of the Appointment Order. In reasons released June 29, 2022, I held Mr. Gutierrez in contempt for the breach: see *Castillo v. Xela Enterprises Ltd.*, 2022 ONSC 4006. I found that the elements of civil contempt were proven beyond a reasonable doubt. I declined to make a finding of criminal contempt.

[3] This is the penalty phase of the civil contempt motion.

[4] The Receiver seeks an order for 90 days' imprisonment of Mr. Gutierrez, a $25,000 fine and full indemnity costs of the contempt motion. Mr. Gutierrez submits that an appropriate penalty is a $25,000 fine or alternatively, that a fine followed by 12 months of probation with restrictive terms is sufficient.

Factual Background and Contempt Finding

[5] The background facts are described in greater detail in my June 29, 2022 reasons. Briefly, the Receiver was appointed in connection with the efforts of Mr. Gutierrez's sister, Margarita Castillo, to enforce a $4.25 million judgment against Xela, Mr. Gutierrez and their father.

[6] The Receiver, in seeking to obtain information about Xela and its historical transactions, exercised Xela's rights as the sole shareholder of its Panamanian subsidiary, Gabinvest S.A. ("**Gabinvest**") on January 16, 2020. It removed Gabinvest's three existing directors and replaced them with the Receiver's representatives from the Hatstone Group (Panamanian counsel to the Receiver). On March 24, 2020, McEwen J. held that the replacement of the Gabinvest board was a proper exercise of the Receiver's exclusive power under the Appointment Order.

[7] Harald Johannessen Hals ("**Mr. Hals**") was one of the directors of Gabinvest. On January 20, 2021, Mr. Hals filed a criminal complaint against the new Gabinvest directors (the "**Criminal Complaint**") stating that the Receiver's January 16, 2020 shareholder meeting was not properly held and that it constituted a crime. The Criminal Complaint estimated $2 million in provisional damages against the three directors. The sole evidence tendered in support of the Criminal Complaint was a declaration sworn by Mr. Gutierrez on December 3, 2020 (the "**Declaration**").

[8] The Declaration is reproduced in full in my June 29, 2022 reasons. Mr. Gutierrez declared, among other things, that Xela was his client and was not notified of the Gabinvest shareholder meeting; that the three replacement directors had no authority to represent Gabinvest since they were not elected by the shareholder of the company; and that any decisions by those directors were of no value and "are the result of falsehood in form and substance and any other crime that corresponds to the acts committed". He did not say that Xela was in receivership or that the Receiver had the exclusive authority to take actions on behalf of Xela.

[9] On February 10, 2021, McEwen J. ordered Mr. Gutierrez 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, Mr. Gutierrez sent a letter to the Public Prosecutor's general office in Panama enclosing an affirmation withdrawing the Declaration. He also asked Mr. Hals to withdraw the Criminal Complaint. Mr. Hals responded adamantly that McEwen J. had overstepped his powers and that he would not withdraw the Criminal Complaint.

[10] On December 14, 2021, Mr. Gutierrez attended an interview at the Panamanian consulate in Toronto (the "**Interview**"). He told the Public Prosecutor's representative that the case involves a company that he manages in Canada, that he was not present at the Gabinvest shareholder meeting, and that he was a "judicial hostage" because McEwen J.'s orders prevented him from participating in this case.

[11] The contempt motion proceeded before me in May and June 2022. I found that the Receiver established the elements of civil contempt and that, in signing the Declaration, Mr. Gutierrez breached the Appointment Order in numerous respects:

(a) He signed documents on behalf of Xela contrary to the restriction in s. 3(h).

(b) He purported to exercise authority on behalf of Xela contrary to the exclusivity granted to the Receiver in s. 3.

(c) He interfered with the Receiver's exercise of its right to deal with the shareholdings of Xela contrary to the restriction in s. 3(q). The Declaration supported the Criminal Complaint that was filed with the Public Prosecutor in Panama. It was filed for the purpose of challenging, undermining, and undoing the Receiver's action in replacing the board of Gabinvest (a shareholding of Xela).

(d) He was integrally involved in the bringing of a proceeding against the Receiver without seeking leave of this court or the Receiver's consent contrary to s. 9. The Declaration that he swore was the basis for the Criminal Complaint brought against the Receiver's representatives in Panama.

[12] I found that Mr. Gutierrez was not a credible witness. I did not accept his evidence, nor did it leave me with a reasonable doubt. I found 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.

[13] Following the release of my reasons, Mr. Gutierrez's counsel wrote a letter to Mr. Hals on July 6, 2022. He renewed Mr. Gutierrez's "clear and unequivocal request" to Mr. Hals to withdraw the Criminal Complaint and to ensure that Mr. Hals not rely on the Declaration or the Interview as the evidentiary foundation for any proceeding against the Receiver or its agents in Panama.

Law on Sentencing for Civil Contempt

[14] Rule 60.11(5) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that in disposing of motion for a contempt order, the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

(a) be imprisoned for such period and on such terms as are just;

(b) be imprisoned if the person fails to comply with a term of the order;

(c) pay a fine;

(d) do or refrain from doing an act;

(e) pay such costs as are just; and

(f) comply with any other order that the judge considers necessary.

[15] The applicable principles in sentencing for civil contempt are well-established. The purpose of sentencing for civil contempt is different than for criminal contempt. The purpose of a sentence for criminal contempt is primarily about punishment whereas the purpose of a sentence for civil contempt is primarily about coercion and is designed to protect and enforce the rights of a private party: see *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663, at para. 77.

[16] However, the courts have recognized that while gaining compliance with the court's orders is the primary aim of sentencing in civil contempt proceedings, acts of civil contempt, like criminal contempt, undermine the authority of the courts and diminish respect for the law: see *Cavalon*, at para. 78. As stated in *Cavalon*, at para. 81, "[b]ecause civil contempt engages issues of public law and the need to condemn acts which undermine the authority and dignity of the court, punishment has been recognized as a secondary purpose for sentencing in such cases." In *Boily v. Carleton Condominium Corporation 145*, 2014 ONCA 574, at para. 79, the court observed that one of the purposes of a penalty for civil contempt is to "to ensure societal respect for the courts" and "to enforce the efficacy of the process of the court itself."

[17] In *363523 Ontario Inc. v. Nowack*, 2016 ONSC 2518, at paras. 71-72[1], Dunphy J. stated:

> Punishment serves to denounce conduct that requires denouncing and thereby deter the contemnor specifically and others more generally who might contemplate breaches of court orders...
>
> If a party has disagreements or issues with an order that has been made, it must nevertheless be complied with unless validly stayed or reversed on appeal in accordance with the rules. There is no self-help after an order has been issued. [Emphasis added.]

[18] While imprisonment is a common sentence for criminal contempt, it is rare for civil contempt. Ordinarily, a finding of contempt, together with a fine or some other appropriate order, is sufficient to gain compliance and restore the authority of the court. Imprisonment is a sentence of last resort: See *Chiang (Re)*, 2009 ONCA 3, at para. 90. See also *Cavalon*, at paras. 82, 89.

[19] However, "[a] wilful flagrant breach of a single court order that shows a callous disregard for the court's authority, or that causes significant prejudice to the other party may attract a jail sentence": *Cavalon*, at para. 87 (emphasis added). "[S]erious violations of court orders – even if only one order or one instance – can warrant a jail sentence. In determining whether a jail sentence is needed to adequately vindicate the due administration of justice, the context in which the contempt occurs is an important consideration": *Cavalon*, at para. 89 (citations omitted).

[20] Where a contemnor has purged their contempt, there usually is no longer any need or justification for imprisonment: see *Andersson v. Aquino,* 2019 ONSC 886, at para. 31. A contemnor bears the onus of establishing on a balance of probabilities that they purged their contempt: see *Chiang (Re)*, at paras. 50-52.

[21] In fashioning an appropriate sentence, the court is to consider the following factors:

- the proportionality of the sentence to the wrongdoing;
- the presence of mitigating factors;
- the presence of aggravating factors;
- deterrence and denunciation;

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[1] aff'd 2016 ONCA 951, leave to appeal refused, [2017] S.C.C.A No. 37376.

- the similarity of sentences in like circumstances; and
- the reasonableness of a fine or incarceration.

See *Boily*, at paras. 90-113; *Cavalon*, at para. 90.

What is a Fit Sentence in this Case?

[22] I have considered the factors set out above.

Proportionality

[23] Proportionality requires that the punishment fit the wrongdoing: see *Boily*, at para. 91. The circumstances that will warrant a jail sentence depend on the facts of any given case. The more wilful, flagrant, ongoing, and damaging the contempt, the more likely it is that a jail sentence will be imposed: see *Astley v. Verdun*, 2013 ONSC 6734, at para. 36.

[24] In this case, the wrongdoing was extremely serious. The Receiver was appointed as an officer of this court and, through the Appointment Order, was given the exclusive authority to deal with the shareholdings of Xela. In the face of the exclusive authority given to the Receiver, Mr. Gutierrez (i) purported to act on behalf of Xela when he signed the Declaration; (ii) interfered with the exercise of the Receiver's powers under the Appointment Order; and (iii) participated in the Criminal Complaint brought against the Receiver's representatives in Panama.

[25] The sentence must reflect the severity of Mr. Gutierrez's conduct.

Mitigating and Aggravating Factors

[26] A sentence should be increased or reduced to account for aggravating or mitigating factors: see *Astley*, at para. 16.

[27] There is only one mitigating factor: this is Mr. Gutierrez's first offence. Purging one's contempt, pleading guilty, or apologizing can also act as mitigating factors in sentencing: see *Chiang (Re)*, at para. 87; *Cavalon*, at paras. 25, 86. Mr. Gutierrez has not offered any apology or expressed remorse for his conduct. However, he submits that he purged his contempt when his counsel wrote to Mr. Hals on July 6, 2022 reiterating the request that Mr. Hals discontinue the Criminal Complaint and not rely on the Declaration or the Interview. At the sentencing hearing, Mr. Gutierrez's counsel asked, "What else could Mr. Gutierrez have done to purge his contempt?"

[28] I am not persuaded, on a balance of probabilities, that Mr. Gutierrez purged or attempted to purge his contempt, for several reasons. First, Mr. Gutierrez had already sent a letter to Mr. Hals in February 2021, advising him that he had withdrawn the Declaration and requesting that Mr. Hals discontinue the Criminal Complaint. Mr. Hals wrote back in no uncertain terms that he had no intention of discontinuing the proceedings. The translation of Mr. Hals' letter says that McEwen J.'s order was illegal, that he overstepped his powers and that he invaded a foreign jurisdiction in a "boorish and gross way". He said he would appeal to protect "our rights as citizens, including complaining to the Panamanian Chancellery's Office." Indeed, in August 2021, despite Mr. Gutierrez's request that he withdraw the Criminal Complaint, Mr. Hals requested the Public

Prosecutor interview Mr. Gutierrez in connection with the Criminal Complaint, which led to the Interview taking place.

[29] Given such conduct, Mr. Gutierrez knew that Mr. Hals would not back down. The July 6th letter asking him to do so was, in my view, not a genuine attempt to purge his contempt.

[30] Second, after he was found in contempt, Mr. Gutierrez did not attempt to contact the Public Prosecutor to advise (once again) and reinforce that he had withdrawn the Declaration, that they should not rely on the Interview and that he wished to discontinue the Criminal Complaint. Mr. Gutierrez knew the contact information for the Public Prosecutor's representative in Toronto since he had attended the Interview with that individual in December 2021.

[31] Third, after Mr. Gutierrez withdrew the Declaration in February 2021, he proceeded to go to the Interview months later without alerting the Receiver or this court. He also failed to tell the Public Prosecutor's representative that he had withdrawn the Declaration or to ask that the Public Prosecutor not use it to support the Criminal Complaint. Instead, he told the Public Prosecutor's representative that he was a "judicial hostage" of this court. Mr. Gutierrez's actions call into question the sincerity of his withdrawal of the Declaration, both before and after the finding of contempt.

[32] Fourth, to the extent that Mr. Gutierrez had no power to cause Mr. Hals to discontinue the Criminal Complaint (which was based on the Declaration) or to stop the Public Prosecutor from continuing its investigation, that is a situation of Mr. Gutierrez's own making. In signing the Declaration, he assisted in putting the wheels in motion for the initiation of a criminal investigation against the Receiver's representatives. "It is not a defence to an allegation of contempt that it is impossible for the contemnor to purge his contempt or to comply with the court order where such impossibility is the result of the contemnor's own conduct": *Sussex Group Ltd. v. Fangeat*, [2003] O.T.C. 781 (S.C.), at para. 56. See also *Manis v. Manis* (2001), 55 O.R. (3d) 758 (C.A.), at paras. 29-30; *Andersson*, at para. 21.

[33] There are several aggravating factors. It is an aggravating factor when the contemptuous conduct is "blatant, deliberate, wilful and ... unrepentant" as opposed to misguided or accidental and not intended to defy the rule of law: *Chiang (Trustee of) v. Chiang* (2007), 85 O.R. (3d) 425 (S.C.), at para. 38, aff'd *Chiang (Re)*. See also *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic* (2009), 308 D.L.R. (4th) 562 (Ont. S.C.), at para. 32.

[34] I found, as an element of civil contempt, that Mr. Gutierrez intentionally signed the Declaration. I also found that he knew that the purpose of the Declaration was to support the Criminal Complaint against the Receiver's representatives in Panama and that he did so unilaterally, without any regard for this court's supervisory role over its appointed officer. As I held in my reasons:

> [I]f Mr. Gutierrez thought that the Receiver's conduct was illegal or did not conform with Panamanian law, he had other options open to him. He could have returned to this court for direction. He could have asked to have the Appointment Order set aside. He could have asked for the restrictions in the order to be suspended. He could have sought leave to challenge the Receiver's actions in Panama. Mr. Gutierrez was an active participant in

> proceedings before this court throughout the receivership process and was represented by counsel. He knew how to seek relief or direction from this court.

[35] Instead, he took matters into his own hands and engaged in self-help.

[36] I have considered Mr. Gutierrez's conduct in the context of how events unfolded over a period of almost two years. In so doing, I have not considered the Receiver's evidence about Mr. Gutierrez's alleged failure to comply with the production orders of McEwen J. as those were not the subject of the contempt hearing before me.

[37] Mr. Gutierrez's conduct demonstrates an astounding lack of respect for this court. The Receiver replaced the Gabinvest board in January 2020. Two months later, McEwen J. held that this was a proper exercise of the Receiver's authority. Nine months after McEwen J.'s order, Mr. Gutierrez swore the Declaration, purporting to act on behalf of Xela and directly challenging the Receiver's replacement of the board. He did not seek direction from this court before signing the Declaration.

[38] In February 2021, after the Receiver returned to this court, McEwen J. ordered Mr. Gutierrez to withdraw the Declaration and forthwith take all steps within his control to withdraw the Criminal Complaint. Ten months later, Mr. Gutierrez voluntarily participated in the Interview. He did not seek direction from this court before attending the Interview.

[39] As noted above, at the Interview, he failed to tell the Public Prosecutor's representative that he had withdrawn the Declaration or that he did not wish to pursue the Criminal Complaint. To the contrary, he stood by his position. 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.

[40] Finally, in making the Declaration, Mr. Gutierrez interfered with the Receiver's mandate to assist in enforcing Ms. Castillo's $4.25 million judgment against Mr. Gutierrez and Xela, his family's holding company. That works to his financial benefit. Contemptuous conduct that is intended to lead to personal financial gain is also an aggravating factor: see *Cavalon*, at para. 94; *Astley*, at para. 37; *Andersson*, at para. 33.

Deterrence and Denunciation

[41] In *Boily*, at para. 105, Epstein J.A. recognized that deterrence is the most important principle in civil contempt sentencing, citing *Niagara (Regional Municipality) Police Services Board v. Curran* (2002), 57 O.R. (3d) 631 (S.C.), at para. 35:

> The primary purpose of sentencing in contempt proceedings is deterrence: both general and specific. The punishment for contempt should serve as a disincentive to those who might be inclined to breach court orders. Our legal system is wounded when court orders

> are ignored. The sentence must be one that will repair the wound and denounce the conduct.

[42] In *Cavalon*, at para. 81, the court repeated that specific and general deterrence are the most important sentencing objectives in civil contempt cases.

[43] The need for denunciation and deterrence is evident in this case. Mr. Gutierrez must know that he cannot breach an order of this court. He cannot take unilateral action to challenge the conduct of this court's officers. He cannot participate in a criminal complaint against a court officer without seeking any direction from this court.

[44] The penalty in this case must also serve as a general deterrent to others. Litigants must know that they cannot breach a court order, interfere with the mandate of a court officer, and ignore the supervisory role of the court over its appointed officer.

Similar Sentences

[45] As noted above, imprisonment is to be imposed as a sentence of last resort. However, in numerous cases, imprisonment was imposed as a sanction for civil contempt. The court in *Cavalon* listed some cases in which imprisonment was ordered, at para. 88:

> While each case is fact specific, incarceration has been imposed in numerous cases for failure to produce documents or corporate records: see *Sussex Group Ltd. v. Sylvester* (2002), 62 O.R. (3d) 123 (S.C.), at para. 85 (6 months); *Nelson Barbados Group Ltd. v. Cox,* 2010 ONSC 569, at para. 35 (3 months and a fine of $7500); *Cellupica v. Di Giulio,* 2011 ONSC 1715, 105 O.R. (3d) 687, at para. 49 (90 days); *Sussex Group Ltd. v. 3933938 Canada Inc.,* [2003] O.T.C. 683 (S.C.), at para. 15 (2 months); *Nowack,* at para. 114 (1 month).

[46] The imposition of a jail sentence has reflected, among other things, the severity of the contemptuous conduct, the degree of remorse shown by the contemnor, and the number of court orders breached. However, as noted above, imprisonment may be imposed for breaching a single court order.

[47] There are two cases in which a custodial sentence was imposed for interfering with a receiver. In *Fangeat*, the contemnor was imprisoned for six months. The court found that the contemnor's interference was knowing and deliberate, harmed Sussex Group and its investors, and was to the contemnor's own personal benefit. Cumming J. stated, at para. 57, that "it is a contempt to interfere with a receiver acting under a court order, even if the terms of the order clearly are wrong or impracticable. The creditor must attack the receiving order itself through the courts."

[48] In *Central 1 Credit Union v. UM Financial Inc.*, 2012 ONSC 889, the contemnor stole 32 gold bars that he purchased with the debtor's money and was required by court order to provide to the receiver. The effect of the accused's conduct was to deprive the receiver of access to the only asset capable of satisfying the debtor's judgment. The court held that a fine was not appropriate as there was no reasonable basis to believe that the accused would pay the fine. The sentence imposed was six months' imprisonment if the contemnor did not purge his contempt within a week.

[49] While those cases are distinguishable on their facts, it is clear that interfering with a court-appointed officer in the exercise of its mandate is treated as a significant factor in determining an appropriate sentence for civil contempt.

Reasonableness of a Fine or Incarceration

[50] In this case, a fine would not serve the principles of sentencing. It would not reflect the seriousness of Mr. Gutierrez's conduct. It would not accomplish the objectives of general and specific deterrence. Indeed, the appointment of the Receiver was required to assist in enforcing a $4.25 million judgment against Mr. Gutierrez and Xela. A fine of $25,000 in these circumstances would not sufficiently deter Mr. Gutierrez, if at all.

[51] Mr. Gutierrez submits, in the alternative, that a fine and 12 months of probation with restrictive terms is sufficient. He provided no evidentiary support to justify a probationary sentence. In any event, probation would not adequately address the principles of sentencing for the reasons set out above.

[52] Only imprisonment is appropriate to meet the applicable principles. Having regard to those principles and the range established by the case law, I have determined that a sentence of 30 days' imprisonment is a fit and appropriate sentence. I consider 30 days to be a sufficient, but not excessive, period of imprisonment to address the objectives of sentencing. Since the custodial sentence appropriately addresses the need for denunciation and deterrence, I see no need to impose an additional monetary penalty.

Decision

[53] I order that Mr. Gutierrez be imprisoned for a period of 30 days. A warrant for committal shall issue forthwith.

[54] If the parties are unable to agree on costs, I will receive written submissions (no longer than four pages double spaced, exclusive of bill of costs). The Receiver's costs submissions shall be delivered within ten days and Mr. Gutierrez's costs submissions within ten days thereafter. The Receiver may deliver reply submissions of no more than two pages within three days thereafter.

Conway J.

Date: October 17, 2022