CITATION: In the matter of the Notice of Intention to make a proposal of the Sanderson-Harold Company Limited, C.O.B as Paris Kitchens
COURT FILE NO.: BK-22-02835198-0031

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF THE SANDERSON-HAROLD COMPANY LIMITED, C.O.B AS PARIS KITCHENS

BEFORE: Kimmel J.

COUNSEL: *George Benchetrit & Laura Culleton*, for The Sanderson-Harold Company Limited

Michael Mazzuca, for United Brotherhood of Carpenters & Joiners of America Local 1072

Matilda Lici, for KSV Restructuring Inc., Proposal Trustee

Matthew Vella, Stephen Turk & Laura Freitag, for 1000296348 Ontario Inc.

HEARD: June 16, 2023

ENDORSEMENT

The NOI Proceedings

1. On or about May 31, 2022, The Sanderson-Harold Company Limited carrying on business as Paris Kitchens ("SHCL" or the "Debtor"), filed a Notice of Intention to File a Proposal ("NOI") pursuant to s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985 c. B-3 (the "BIA"). SHCL filed an NOI for the stated purpose of providing stability to and continuing an ongoing sales process for its business. The Proposal Trustee, an affiliate of KSV Restructuring Inc. ("KSV"), was conducting the SHCL sales process.

2. All proceedings against SHCL were stayed effective May 31, 2022 (the "BIA Stay") as a result of the NOI filing.

3. SHCL and 2486666 Ontario Inc. ("248 Ontario") entered into an Asset Purchase Agreement ("APA") on August 26, 2022. 248 Ontario assigned the APA to 1000296348 Ontario Inc. ("100 Ontario" or the "Purchaser"). The court approved the sale transaction through an approval and vesting order dated September 23, 2022 (the "AVO").

4. At the time of the AVO, the court made the following supplementary endorsement:

> For greater certainty, and on the consent of all parties present, nothing in the orders I have made today in this proceeding eliminates or otherwise determines any claims or rights which the Carpenters Union Local 1072 may have under the collective agreement or pursuant to the *Labour Relations Act* against the purchasers in the sale transactions approved today.

<u>The Motion to Lift the BIA Stay</u>

5. The United Brotherhood of Carpenters and Joiners of America, Local 1072 ("Local 1072") seeks an order pursuant to s. 69(4) of the BIA lifting the BIA Stay for the sole purpose of permitting Local 1072 to commence and, as applicable, continue an application to the Ontario Labour Relations Board (the "OLRB Application"). Local 1072 seeks to do this primarily under the sale of business provisions of the Ontario *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A (the "LRA") naming SHCL as a necessary responding party.

6. SHCL and KSV ask for terms to be included in any order lifting the BIA Stay such that:

a. Local 1072's sole recourse with respect to any OLRB Application as against SHCL shall be to seek a declaration that there has been a sale of business or part of a business from SHCL to 248 Ontario and 100 Ontario within the meaning of s. 69 of the LRA; and

b. Local 1072 shall not, without further order of the court, seek any oral or documentary production or discovery against SHCL or KSV in its personal capacity or in its capacity as Proposal Trustee or as trustee in bankruptcy of SHCL, and none of these parties shall be required to incur any costs or take any steps to defend the OLRB Application.

7. The Purchaser is agreeable to Local 1072's request for an order lifting the BIA Stay; however, it objects to the additional provisions set out in the preceding paragraph and asks that they be omitted.

8. Local 1072 has presented two forms of order that correspond with the positions of SHCL and the Proposal Trustee on the one hand ("Draft #1") and the Purchaser ("Draft #2") on the other. Local 1072 takes no position on which form of order should be granted. It simply wishes to proceed with its OLRB Application.

9. No party opposes lifting the BIA Stay. It is only the terms or qualifications that the court is being asked to impose as a condition of doing so that require the court's direction.

<u>The Test for Lifting the BIA Stay</u>

10. Section 69(1)(a) of the BIA provides that "no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy".

11. The court has the discretion under s. 69.4 of the BIA to declare that the stay no longer operates in respect of a creditor or person and its claims, subject to any qualifications that the court considers proper, if the court is satisfied "(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or (b) that it is equitable on other grounds to make such a declaration."

The Position of the Debtor and the Proposal Trustee

12. SHCL submits that the terms it proposes to restrict the scope of relief and its participation in the OLRB Application are consistent with the balancing that the court engages in when deciding whether to lift a stay under the BIA. The objective is to ensure that proceedings in which a debtor (or its trustee) is a necessary party can proceed without recourse or further involvement and cost to the debtor (or its trustee), absent further leave of the court.

13. SHCL relies on what it describes as the usual protections afforded in these circumstances. In other words, to a trustee in bankruptcy that has taken possession of the debtor's assets, and by analogy here to the debtor itself, that has remained in possession. SHCL points *to Catahan (Re)* (2003), 40 C.B.R. (4th) 3 (Ont. S.C.), at para. 18 wherein the court held that "[t]he usual provision that the Trustee shall not be liable to discovery, documentary or oral, or for costs, unless it defends or takes a position in the Action, should be sufficient to protect the Trustee's position herein. If not, the Trustee is at liberty to move before the Court for further terms or directions": see also *Ma, Re* (2000), 19 C.B.R. (4th) 117 (Ont. S.C.), at para. 49.

14. SHCL and the Proposal Trustee argue that adopting this same approach allows the Purchaser and/or Local 1072 to come back and seek further directions from the court if a need for production and discovery or further participation of SHCL or the Proposal Trustee in the OLRB Application is demonstrated.

15. The Proposal Trustee makes the additional submission that, because it was never in possession of the property or assets of SHCL (as a matter of fact or law), the Debtor has been and remains free to deal with its property: see *Metrocan Leasing ltée v. François Nolin ltée* (1984), 55 C.B.R. (N.S.) 192 (Que. C.A.), at para. 14;[1] *Re: Lee (Consumer Proposal)*, 2004 ABQB 307, 375 A.R. 174, at para. 19. This is said to be exemplified by the fact that the Debtor was the one to sign the AVO and seek the court's approval of it. On this basis, the Proposal Trustee argues that there is no *prima facie* reason to believe that KSV would even have any relevant documents or information.

[1] This decision of the Court of Appeal of Quebec is written in French. Translated to English, para. 14 reads as follows: "[i]t is also now accepted that the provisions of the Act leave the debtor-proposor with full administration of his assets, with the trustee having no authority over them unless expressly provided for in the proposal."

<u>The Position of the Purchaser</u>

16. The Purchaser retorts that because an affiliate of the Proposal Trustee was involved with this company for a period of time before the NOI and its appointment, the lines may be blurred in this case. It asks the court to reject the inference that the Proposal Trustee suggests, namely that there is no *prima facie* reason to believe it would have relevant documents or information in light of its affiliate's historical involvement with SHCL.

17. The Purchaser further argues that the approach and cases relied upon by SHCL and the Proposal Trustee all arose in the context of a debtor or trustee being drawn into ongoing litigation before the court. The Purchaser contends that is different than the potential involvement in a statutory procedure under the LRA, pursuant to which the Ontario Labour Relations Board ("OLRB") has broad powers to order relief in the context of a sale of a business and broad procedural powers including with respect to production and evidence.

18. The Purchaser maintains that the "typical" cases and "usual protections" relied upon by SHCL and the Proposal Trustee do not involve the fettering of the powers of a statutory tribunal such as is being proposed in this case.

19. Further, the draft OLRB Application contends that the Purchaser is both a s. 69 "successor employer" and s. 1(4) "related employer" under the LRA. The latter contention could expand the scope of relief against the Purchaser to include pre-sale liabilities to employees. However, as I understand it, and notwithstanding that this may not be just a successor employer application but also a related employer application, there is no possibility of any order or remedy against SHCL or the Proposal Trustee arising out of the OLRB Application that could have any economic impact on the Debtor or its estate beyond the cost associated with their participation in it.

20. The Purchaser argues that the nature and scope of the issues raised on this type of OLRB Application will necessarily require information and documents relating to the period in which the business was being operated before and after the NOI and even after the sale transaction because of the provision in the APA that provides that certain employees would remain employed by the Debtor (vendor) even after closing.

21. The Purchaser attempted to buttress this argument with a late-filed affidavit, sworn June 15, 2023, from one of the lawyers for the Purchaser, Mr. Lee, filed just prior to the hearing. In this affidavit, the lawyer cites examples, largely on information and belief, of missing information and documents from the records assumed by the Purchaser. This affidavit was objected to by SHCL and KSV not only on grounds of relevance but also because it was late without a compelling explanation for its delay.

22. The Purchaser maintains that, even without these specific examples of missing information and documents, it is not a stretch for the court to expect that there will be a need for some evidence and disclosure from SHCL and/or KSV given the breadth and scope of the OLRB Application.

<u>Analysis</u>

23. The Purchaser's main argument is that the Supreme Court of Canada ruled in *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 that the protection from delay, inconvenience and cost of proceedings outside the receivership for receivers under the BIA (in that case, a receiver in possession, so more analogous to the debtor (SHCL) in this case) is not absolute, and the bankruptcy court should not hamper the conduct of proceedings before the OLRB.

24. In *GMAC*, at para. 77, the court reviewed what a successor employer application under s. 69 of the LRA would entail, including that it "requires an examination of 'the nature of the predecessor business and the nature of the successor business' to determine whether the business of the predecessor is being performed by the successor": citing *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 676, per McLachlin J (as she then was). This involves the consideration of factors such as the work being performed by the employees before and after the AVO transaction and the continuity of management.

25. At para. 33 of *GMAC*, the court summarized the Court of Appeal for Ontario's conclusion (upheld by the Supreme Court of Canada) that the bankruptcy judge did not have the jurisdiction to immunize the receiver from potential declarations by the OLRB.

26. The Purchaser points to other cases that make this same point: that insolvency proceedings do not inoculate a trustee, receiver, proposal trustee or debtor, as the case may be, from labour relations proceedings: see *Romspen Investment Corporation v. Courtice Auto Wreckers Limited*, 2017 ONCA 301, 138 O.R. (3d) 373, at para. 37, citing *GMAC*, at paras. 50-51; *Deloitte Restructuring Inc. v. United Food and Commercial Workers Int'l Union, Loc. 175*, 2021 ONSC 1260, 83 C.L.R.B.R. (3d) 1 (Div. Ct.), at para. 3.

27. Further, the determination of the relevance and scope of disclosure in the OLRB Application is within the exclusive jurisdiction of the OLRB: see *GMAC*, at paras. 22, 33, 45, 53.

28. As a practical matter, the points of contention in this case come down to:

a. Should the court defer to the discretion of the OLRB on the question of the scope of relief and disclosure that may be sought against SHCL and the Proposal Trustee, or should what the OLRB determines necessary and appropriate for the conduct of its proceedings remain subject to oversight and review by this court?

b. Should SHCL (and its estate and creditors) be put to the expense of making any disclosure that is sought or ordered from SHCL and/or KSV?

29. On the first point, since there is no dispute that the BIA Stay will be lifted to permit the OLRB Application to proceed with SHCL named as a necessary party (but without the possibility of any relief being sought in the OLRB Application directly against SHCL or KSV), the court needs to step aside and allow the OLRB to do its job and exercise its authority and powers as it deems appropriate for the proper conduct of that proceeding. This is a statutory

process that operates entirely outside of the court; the court cannot and should not be put into the position of supervising it or having oversight over steps that may be determined to be necessary within that non-judicial proceeding.

30. I am advised that while the scope of relief that may be sought in the OLRB Application may not be as limited as the restrictions proposed by SHCL and KSV in Draft #1 of the Order, there will be no risk of the scope of relief extending to SHCL (or its Proposal Trustee) even though named as a necessary party. Thus there is no need for this court to fetter the scope of relief that may be sought in the OLRB Application was proposed.

31. Nor do I consider it to be appropriate for this court to determine the scope or sources of production and disclosure and evidence that may be relevant to the determination of the OLRB Application. However, on the second point, this court does have a legitimate interest and concern that the cost of any participation by SHCL and/or the KSV (in any of its capacities) in the OLRB Application not be borne by the creditors of the SHCL estate.

32. Counsel advised that there are no costs awarded at or by the OLRB. Local 1072 relies on the reverse production onus at the OLRB that requires the respondents to make the production. That would theoretically put the production onus on both the Purchaser and SHCL if the stay is lifted to allow SHCL to be named as such. However, as a qualification or term of the lifting of the BIA Stay, the court can exercise its discretion to impose conditions to ensure that this burden not be borne by SHCL or its estate.

33. The Purchaser and Local 1072 are the primary antagonists in the OLRB Application. As a term or qualification to lifting the BIA Stay to allow the OLRB Application to proceed against SHCL, I order that the costs and expenses, if any, associated with the involvement or participation of SHCL and/or KSV (in any of its capacities) in the OLRB Application shall be borne by the primary antagonists in that statutory proceeding and not by SHCL or its estate.

34. Local 1072 is asking for the BIA Stay to be lifted but was prepared to agree to the proposed terms or qualifications that SHCL and the Proposal Trustee requested (e.g. that any participation required of them be subject to further leave, and therefore possible further terms or qualifications to be imposed by the court). It is the Purchaser that has objected to these terms or qualifications, pointing to the potential scope of the OLRB Application and the likelihood that there will be a need for further production given the timeline of employment relationships that are expected to be in issue.

35. Even without considering the Lee affidavit (which I have not done given the objections to it), it is apparent from the caselaw that the scope of production could entail at least a search for records that may not be within the Purchaser's possession and control (and thus potentially within the possession and control of SHCL and/or KSV), and the production if any such records that are located. I do not consider it to be just or expeditious to defer the inevitable production and disclosure requests from SHCL and/or KSV to a further motion.

36. Therefore, I am ordering and directing now, as a term or qualification to lifting the BIA Stay, that any party that requests production or disclosure or evidence from SHCL and/or KSV

(in any of is capacities) in the context of the OLRB Application shall be responsible to pay the reasonable costs and disbursements of the response to any such request(s) on a full indemnity basis.

37. Further, at least in the first instance, the Purchaser shall bear the responsibility to fund the reasonable full indemnity costs and disbursements of SHCL and/or the KSV (in any of its capacities) to respond to any other disclosure or evidence requirements that may be imposed by the OLRB in the OLRB Application. This is without prejudice to any relief that may be available to the Purchaser within the OLRB Application, or under the APA, to seek contribution or indemnity or reimbursement for such costs and disbursements.

Final Disposition

38. The order arising from this motion shall:

a. Use the template of Draft #1 of the Order modified as indicated below.

b. To include paragraph 2 from Draft #1 of the proposed form but (out of an abundance of caution) replace the second sentence thereof with: "For clarity, absent further order of this court, the BIA Stay is not lifted in respect of any declaratory, consequential or ancillary relief or for any monetary or economic award to be sought directly against SHCL by any party to the OLRB Application."

c. To include a revised paragraph 3 from Draft #1 to read as follows:

> THIS COURT ORDERS that, absent further order of the court, any party to the OLRB Application who requests any oral or documentary production or discovery or evidence from SHCL, or from KSV Restructuring Inc. in its personal capacity or in its capacity as trustee in the BIA proposal of SHCL or as trustee in bankruptcy of SHCL ("KSV"), in the context of the OLRB Application shall pay SHCL's and/or KSV's reasonable full indemnity costs and disbursements incurred to respond and provide any such production, discovery or evidence in response to such request (whether it is ordered by the OLRB or agreed to with SHCL and KSV). If any oral or documentary production or discovery or evidence is required by law or regulation to be made by SHCL or KSV, or ordered by the OLRB on its own initiative or at the request of any other person, the reasonable full indemnity costs and disbursements of SHCL and /or KSV shall be paid, at first instance, by the Purchaser, subject to any other or further order of the OLRB to require Local 1072 to bear some or all of the responsibility for same.

d. To add a new paragraph 4 as follows:

> THIS COURT ORDERS that, for clarity, the intention of this order is that SHCL and KSV shall not be required to incur any costs or expenses to

> defend or respond to or participate in the OLRB Application as a result of the lifting of the BIA Stay. If the Purchaser has recourse in the context of the OLRB Application to require Local 1072 to contribute to, indemnify or reimburse it for any amounts it pays, or if it has any recourse under the APA and/or the AVO, this order does not derogate from those rights, although the costs and disbursements ordered herein shall be paid and shall not be set-off against any responsibilities or liabilities of others.

Costs

39. No one seeks costs of this motion from Local 1072, nor does it seek costs of this motion from any party. No costs are ordered to be paid by or to Local 1072.

40. The Purchaser seeks $2,500 in all-inclusive costs of this motion from each of SHCL and the Proposal Trustee, and they each likewise seek $2,500 in costs from the Purchaser. The amounts sought are reasonable. However, I do not see any clear "winner" in the ultimate result. While the restrictions requested by SHCL and the Proposal Trustee were not included in the final order, other terms or qualifications were included. This situation was complicated and needed to be sorted out. There are not always "winners" and "losers" under such circumstances.

41. Accordingly, and in the exercise of my discretion under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and having regard to the applicable factors under r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, there shall be no costs of this motion.

42. Counsel for Local 1072 shall prepare a new form of order that revises paragraphs 2 and 3 and adds a new paragraph 4 of Draft #1 in accordance with my directions herein and revises what will now be paragraph 6 of Draft #1 to provide that there shall be no costs of this motion payable to or by any participating party. Paragraphs 1 and what is now paragraph 5 of Draft #1 and the preambles shall remain as per Draft #1.

43. The parties may attend on a case conference if they are unable to settle the order.

Kimmel J.

Kimmel J.

Date: July 11, 2023