



SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

**COUNSEL SLIP/ENDORSEMENT**

COURT FILE NO.: BK-22-02835198-0031

DATE: Sept 29 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: **THE SANDERSON-HAROLD COMPANY LIMITED *et al***

BEFORE JUSTICE: **Justice Osborne**

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

Name of Person Appearing	Name of Party	Contact Info
George Benchetrit	Sanderson-Harold	george@chaitons.com

**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
Stephen Turk	1000296348 Ontario Inc.	sturk@stephenturklaw.com
Bobby Kofman	KSV Restructuring Inc.	bkofman@ksadvisory.com
Steven Graff	KSV, Proposal Trustee	sgraff@airdberlis.com

**ENDORSEMENT OF JUSTICE OSBORNE:**

1. By Endorsement dated April 19, 2023, I directed that the matter of costs arising out of the injunction motion from November, 2022 as between the Proposal Trustee and the Company, SHCL, on the one hand, and the Purchaser, 1000296348 Ontario Inc., on the other hand, be addressed in writing.
2. The relevant background to, and context of, this matter is set out in my Endorsements of November 1, 2022 and November 4, 2022. Defined terms in this Endorsement are as stated in those Endorsements unless otherwise noted.

3. In short, I granted on September 23, 2022 an order approving the sale of the Railway Property. That sale transaction closed on October 24, 2022.
4. On November 1, 2022, the Sanderson-Harold Company Limited (“SHCL”) sought an urgent appearance to address what were described as post-closing issues. In particular, SHCL sought an interim order restraining the Purchaser, 1000296348 Ontario Inc., from interfering with the company’s business operations or attending at the Company’s two business premises until further order of the Court. Given the urgency, the motion was brought on the basis of a record consisting of only a Notice of Motion and the Fourth Report of the Proposal Trustee.
5. The events that precipitated the motion were summarized at paragraph 12 of my November 1 Endorsement but were set out in full in the Fourth Report. In summary, representatives of the Purchaser attended unannounced at the production facility the day after closing, removed certain consigned appliances, there were heated exchanges, and then the day before the urgent appearance, the Purchaser (without notice or warning) disconnected and/or disabled the power supply to the production facility and placed locks on critical electrical component boxes and/or removed the keys from others, with the ultimate effect of rendering it impossible for anyone to restore electrical power.
6. The Purchaser then advised that it would be prepared to enter into contractual terms to operate the machinery on behalf of the Company.
7. For the reasons set out in that Endorsement, I granted the injunctive relief and observed at paragraph 22 the expectation of this Court that sophisticated commercial parties, represented by counsel, would seek the assistance of the Court if issues in an ongoing proceeding arose, rather than resorting to self-help remedies. I declined, however, to prohibit the Purchaser from entering the premises entirely, but rather directed that it do so on terms including reasonable notice.
8. The matter returned for a brief status report on November 4 at which time power had been restored, the parties had reached an agreement for access to the premises by the Purchaser and were cooperating on other matters.
9. On April 19, 2023, the parties appeared for a case conference relating to several matters in the ongoing proceeding, at which time the Proposal Trustee and the Company sought directions with respect to their costs arising out of the above injunction motion and I directed that they be addressed in writing.
10. I have now received those written submissions. In particular, I have:
  - a. costs submissions and a bill of costs from SHCL, which seeks costs on a full indemnity basis in the amount of \$16,375.67;
  - b. cost submissions and outline of the Proposal Trustee, which seeks its costs and those of its counsel on a substantial indemnity basis in the amount of \$57,598.04;
  - c. responding costs submissions of the Purchaser; and
  - d. reply cost submissions from each of SHCL and the Proposal Trustee.
11. All amounts are inclusive of fees, disbursements and HST.
12. SHCL submits full indemnity costs are warranted here since while, costs on such a scale are granted only in rare and exceptional cases, the conduct of the Purchaser and its representatives warrants such an award.
13. It submits that the actions of the Purchaser, and in particular shutting off the power to the manufacturing equipment which brought the operations of SHCL to a halt, was egregious in the circumstances.

14. The Proposal Trustee submits, with reference to the Rule 57.01 factors, that while neither the law nor the facts here were particularly complex, the relief sought by SHCL was necessary to allow it to complete its orderly wind down and maximize the value of assets for the benefit of its stakeholders, and provide for the safety of its employees.
15. The conduct of the Purchaser interfered with this, all in circumstances of a Court-supervised proceeding where the asset purchase agreement had been approved by the Court and Court supervision was ongoing. The motion proceeded on a compressed timeline given the urgency of the relief sought, all in circumstances where the motion ought not to have been required in the first place.
16. In its responding submissions, the Purchaser submits that, in large part due to the compressed timeframe, the motion itself was argued in approximately one hour, the materials were limited and consisted only of the Notice of Motion of SHCL and the Fourth Report of the Proposal Trustee, all with the result that the amounts sought are “excessive, in the extreme”, exceed any reasonable expectation of the Purchaser, should reflect the mixed result on the motion and in any event should be deferred in their entirety to be dealt with by the judge who deals with all issues that have arisen between SHCL and the Purchaser.
17. Alternatively, the Purchaser submits that if costs are quantified, the payment should be deferred and ordered to be made in the cause. The Purchaser submits that in any event, the elevated scale of costs on a substantial indemnity basis are not warranted.
18. The Purchaser also challenges the quantum of the costs sought. It submits that the cost of the Proposal Trustee include professional time for matters unrelated to this particular motion (i.e., before the closing of the transaction) and that the Proposal Trustee prepared no materials beyond the Fourth Report.
19. The Purchaser challenges the costs of SHCL on the basis that it prepared only the Notice of Motion, the hearings were short, and the costs are excessive.
20. Pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, costs are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.
21. Rule 57.01 provides that in exercising its discretion under s. 131, the court may consider, in addition to the result in the proceeding (and any offer to settle or contribute), the factors set out in that Rule.
22. The overarching objective is to fix an amount that is fair, reasonable, proportionate and within the reasonable expectations of the parties in the circumstances: *Boucher v. Public Accountants Council for the Province of Ontario*, (2004) 71 O.R. (3d) 291 (C.A.), 2004 CanLII 14579 (Ont. C.A.).
23. Rule 57.03 provides that, on the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall fix the costs of the motion and order them to be paid within 30 days.
24. In my view, I should fix the costs of the motion now rather than defer either the fixing or the payment of costs in the cause. Rule 57.03 mandates that I should proceed in this way unless I am satisfied that a different order would be more just. I am not so satisfied.
25. It is not clear to me that there needs to or will be any continuing contested proceeding. Issues may arise, but, today, there is no ongoing proceeding arising out of the matters that were the subject of the motion. In short, there is no continuing “proceeding” such as to justify deferring costs to be determined or paid “in the cause”.
26. Moreover, I am satisfied that costs should be addressed now. The conduct giving rise to the motion was discrete and there is no reason to defer the issue, whatever other unrelated issues may arise in the course of this matter and whether or not they arise out of the asset purchase agreement. There is no basis on which

I can conclude that it would be more just to proceed in a different manner, and particularly to defer the issue of costs.

27. I have reviewed all of the submissions of the parties and in particular the bills of costs and costs outlines submitted by the two parties seeking costs.
28. In my view, the activities in respect of which fees are claimed related to the matters that were the subject of the motion. The activities of the Proposal Trustee in particular, to which the Purchaser take specific exception, occurred between October 17, 2022 and the date of the second appearance referred to above, November 4, 2022, and related to these issues surrounding the closing of the transaction and the friction and disputes related thereto.
29. As I observed in my Endorsement of November 4, this Court discourages parties from exercising “self-help” remedies, particularly in the circumstances of an ongoing proceeding, where the disputes arose out of an agreement that had been approved by the Court, and as demonstrated by the emergency hearing that took place, the court would endeavour to make itself available to deal with issues arising out of a court approved sales process. This is particularly true when the rights of non-parties, such as employees and customers, are affected.
30. Here, in short, the Purchaser unilaterally and without notice simply shut down the operations of SHCL by disconnecting the power to all of the equipment, locking the control boxes to remove access necessary to restore the power, and then demanded commercial terms in exchange for its agreement to restore power.
31. The motion ought not to have been necessary in the first place. SHCL was overwhelmingly successful. The Purchaser was successful only to the very limited extent that access to the premises was permitted, albeit on terms. The role of the Proposal Trustee was necessary and appropriate.
32. I do accept that the materials on which the motion was based were relatively limited, although the Fourth Report of the Proposal Trustee set out in detail the facts and circumstances on which the relief being sought was based. But for the involvement of a Court officer like the Proposal Trustee, many of those facts would usually or typically be set out in a supporting affidavit from the moving party. There was no duplication of work.
33. The Proposal Trustee is a Court officer. It is not a party with a vested interest in the outcome of any dispute that may exist between, for example, SHCL and the Purchaser. It does have a clear role, and indeed obligation, to act in a manner so as to maximize the recovery for creditors and other stakeholders.
34. Having considered all of the circumstances of this case, as against the factors set out in Rule 57.01, in my view it is appropriate to award costs in the following amounts and to the following parties:
  - a. to the Proposal Trustee: \$50,000; and
  - b. to SHCL: \$12,000.
35. These amounts are inclusive of fees, disbursements and HST. They are payable by the Purchaser within 30 days.
36. Order to go to give effect to these reasons.

Owen, J.