



SUPERIOR COURT OF JUSTICE

**COUNSEL SLIP/ENDORSEMENT**

COURT FILE NO.: BK-22-02835198-0031 DATE: November<sup>st</sup> 2022

NO. ON LIST: 2

TITLE OF PROCEEDING: The Sanderson Harold Company Limited

BEFORE JUSTICE: OSBORNE

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party,**

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**For Defendant, Respondent, Responding Party**

Name of Person Appearing	Name of Party	Contact Info
Stephen Turk	Counsel to Purchaser	sturk@stephenturklaw.com
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**ENDORSEMENT OF JUSTICE OSBORNE:**

1. On September 23, 2022, I granted, among other things, an order approving the sale of the Railway Property as that term is defined in my Endorsement of September 23.
2. Today, the Sanderson-Harold Company Limited [SHCL] sought this appearance on emergency basis to address issues that have arisen post-closing. The transaction closed on October 24, 2022.
3. SHCL seeks an interim order restraining the Purchaser, 1000296348 Ontario Inc. or its representatives from interfering with the company's business operations, including prohibiting such parties from

communicating with the company's employees or attending at the company's two business premises until further order of this Court.

4. The two business premises are the Railway Property and the Spruce Property. The Railway Property is the company's production facility.
5. Given the urgency, I have before me only a Notice of Motion and the Fourth Report of the Proposal Trustee.
6. My order of September 23 approved the sale of Purchased Assets pursuant to the terms of the Railway Asset Purchase Agreement [the "APA"].
7. The issue today, put simply, is whether the company can continue to use the equipment in the premises as it winds down its business, or whether the Purchaser is entitled to demand either that it cease doing so immediately or that it enter into an equipment lease and pay some \$3000 per day in equipment rent.
8. The APA provides in section 6.2 that the vendor [the company] shall have an option to occupy the [Railway Property] for a period of up to 60 days after closing, for a total payment to the Purchaser of \$50,000 based on occupation for the full 60 day period, plus payment of all charges for utilities consumed during such occupancy along with prorated [on a daily basis] real property taxes and any other taxes payable by a tenant in occupancy or payable by the vendor in operation of the property.
9. The vendor has the option to shorten the 60 day period by giving 10 days notice, in which case the prorating shall take effect.
10. Section 6.2(b) provides that the Purchaser may begin to move into the [Railway Property] provided that it does not interfere with the vendor's operations.
11. I have not set out in this Endorsement the full text of these contractual provisions. Nor have I repeated all of the information contained in the Proposal Trustee's Fourth Report, although I have read and considered it in its entirety.
12. For the purposes of today's motion for interim relief, I observe the following facts. I also observe that while there is a vigorous disagreement between the company and the Proposal Trustee on the one hand, and the Purchaser on the other, about the rights of the Purchaser under the APA, there is little fundamental disagreement about these essential facts. I also observe that there are other relevant facts as set out in the Fourth Report, and this list is not exhaustive:
  - a. the day after closing, representatives of the Purchaser attended at the production facility, unannounced, removed certain consigned appliances, which were subsequently returned, and, to put it in neutral terms, there were heated and agitated exchanges between representatives of the Purchaser and representatives of the Company;
  - b. the Purchaser sent or caused to be sent via email to the company on October 27 and 28 demands that the company sign an equipment lease, failing the agreement to which, the Purchaser would not allow the use of the equipment; and
  - c. yesterday, the Purchaser without notice or warning, disconnected and/or disabled the power supply to the production facility at the Railway Property 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. The Purchaser then sent an email to counsel for the company and the Proposal Trustee advising that power had been disabled and that the Purchaser remains willing to enter into a contractual arrangement to operate the machinery on behalf of the company. Employees of the company were in the premises and/or using the machinery.
13. There is no disagreement today that the transaction contemplated in the APA closed on October 23 and nor is there any disagreement that the company exercised 60 day leaseback option contemplated in section 6.2 of the APA and referenced above.
14. The Purchaser submits today, in summary, that the company has the right to occupy the premises. It does not, however, have the right to use any of the equipment, which are not part of the Purchased Assets as defined in the APA, and the right to occupy is not exclusive, meaning that the Purchaser is free

to enter the premises as and when it sees fit and use, control access to, and/or remove, also as it sees fit, any equipment inside. It also take the position that it can change the locks and install a new security system. The Purchaser submits that continuing occupancy costs are mounting for which it ought not to be responsible.

15. The Purchaser submits that the company and the Proposal Trustee “made a mistake” and that while they intended the 60 day leaseback period to be utilized for the orderly wind down of the production facility by the company, the APA did not give them the right to do that, with the result that whether they like it or not, the Purchaser is free to do as it pleases with the property that it has now purchased.
16. I observe again section 6.2(b) of the APA referenced above which gives the Purchaser the right to begin to move into the property, provided that it does not interfere with the vendor’s business.
17. Counsel also directed me to documents appended to the Fourth Report, including Appendix A which comprises a text message exchange between the Proposal Trustee and the Purchaser representative [who was present in Court today] and which appears on its face to plainly contemplate the agreement and understanding of both parties that operations of the company would continue during the 60 day leaseback period. [See CaseLines A 73 – A 74].
18. In addition, counsel for the company submitted, and counsel for the Proposal Trustee confirmed, that the \$50,000 fee for the transition period was paid. The company has paid and will continue to pay all utilities the accounts for which remain current. Counsel for the company has withheld in his trust account an additional \$50,000 as against prorated property taxes. All of the occupancy costs, largely as contemplated in section 6.2 of the APA have been and will continue to be paid. Accordingly, the occupancy costs about which the Purchaser says it is concerned are being addressed as contemplated in the APA.
19. Finally, the company and the Proposal Trustee submit that even if there was a *bona fide* dispute with the Purchaser over the right to use the equipment, the proper course of action was to seek advice and directions from this Court, rather than take unilateral action such as shutting off the power supply and restricting or threatening to restrict access to the property, which put at risk the equipment, the employees, the business, operations and value of the company which has operated for over 100 years, including customer relationships.
20. In the circumstances, and on an interim basis, I am satisfied that the first two of the three heads of relief sought by the company should be granted. The Company should have unrestricted access to occupy the property. The power should be restored immediately so as not to risk the equipment and the integrity of the building or the assets as the temperatures get colder. The Purchaser is to have no contact with employees of the company and is not to interfere with the business operations of the company until further order of the Court.
21. I am satisfied that to the extent it applies, the *RJR* test is met. The company has established, for the purposes of interim relief at least, a serious issue to be tried and, even if it were necessary, a *prima facie* case. The balance of convenience clearly favours the relief I am granting today and I am satisfied that the harm, if the relief were not granted, would be irreparable.
22. In sum, this Court would expect sophisticated commercial parties represented by counsel, in circumstances where the Court is already familiar with the situation and has recently approved an asset purchase agreement as here about which disputes have arisen post-closing, to seek relief from the Court which will [as it has done today] endeavour to make time available on an emergency basis, rather than taking matters into their own hands. This is particularly so where, as here, the rights of third parties not before the Court, including employees and customers of the company, are so directly affected by the actions taken.
23. I recognize that the Purchaser has of course purchased the property notwithstanding the leaseback for a limited period of time. I am not prepared to go so far today as to grant the third head of relief sought and conclude that the Purchaser can have no access to the property.

24. Rather, I think the more equitable result is to provide that the Purchaser can have access, provided it does not interfere with the business of the Company as noted above. In my view this is also consistent with the APA. For practical purposes, and given the history of what has occurred over the last few days, attendances by representatives of the Purchaser should be coordinated through the neutral Proposal Trustee to maintain order amid the chaos and reduce the risk of further conflict and confrontation.
25. Time has already been reserved before the Court [and before me specifically] in two days time, on Friday, November 4. As I have advised counsel today, I am prepared to deal with scheduling and timing issues related to the motion in order that the Purchaser can have a reasonable opportunity to prepare responding materials and this dispute can be determined on the basis of a proper record which is not before me today.
26. Order to go in the form signed by me, which is effective without the necessity of issuing and entering.

Oleary, J.