

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST) IN BANKRUPTCY AND INSOLVENCY

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

COSTS SUBMISSIONS OF 1000296348 ONTARIO INC.

Date: May 8, 2023

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Introduction

1. On November 1, 2022, at 11:25 a.m. Counsel for The Sanderson Harold Company Limited ("SHCL") served upon counsel for 1000296348 Ontario Inc. ("1000") a Motion Record containing only a four plus (4+) page Notice of Motion. The Motion was to be argued on an emergency basis 95 minutes later at 1:00 p.m. SHCL essentially sought an Order restraining 1000 from interfering with SHCL's business operations. Days earlier (October 24, 2022) 1000 had purchased SHCL's assets for \$6,650,000.00 and yet was being deprived of said assets, a situation that was ongoing for months and which is resulting in further proceedings.
2. On November 1, 2022, at 11:53 a.m. Counsel for the Proposal Trustee ("KSV"), in furtherance of the 1:00 p.m. motion served the 4th Report of KSV which was ten (10) pages in length and contained numerous attachments¹. The Report indicates that the Proposal Trustee was advised at 4:49 p.m. on October 31, 2022, that power was disabled at the Railway Street ("Railway") location that had been sold to 1000 on October 24, 2022. It was because of the power issue that the motion was brought such as it was, not because of any other event.
3. The Motion was heard at 1:00 p.m., 20 hours after the Proposal Trustee was advised of the disabling of the power at Railway. The Motion was dealt with within approximately 1 hour. A two and a half (2 ½) page Endorsement was released shortly after the Motion was heard and pursuant to paragraphs 20 and 24 of the Endorsement not all the relief sought was granted. The lack of material before the Court was highlighted at paragraphs 5 and 25 of the Endorsement². The Endorsement clearly recognized that disputes had arisen post closing with respect to the transaction in issue.
4. The Order that resulted from the attendance was not extensive in nature, it was balanced in the circumstances, and was fully complied with.
5. Presently, the Proposal Trustee and its Counsel are seeking costs of said attendance in the combined amount of \$57,598.04 on a substantial indemnity basis. In addition, SHCL is seeking costs of \$16,375.67 on a substantial indemnity basis. In total \$73,973.71 is sought for the Notice of Motion, the Trustee's Report, and a short court attendance on an admittedly non-complex matter.
6. As per *Boucher*³, the Court must be fair and reasonable when exercising its discretion to award costs and the parties' expectation concerning the amount of a costs

¹ The 4th Report at section 1.1 indicated that one of its purposes was ***"to direct the Purchaser to negotiate a protocol to transition the Purchased Assets from the Company (SHCL) to the Purchaser on an orderly basis"*** which implicitly admitted that the Purchaser did not get its Purchased Assets on closing and that KSV and SHCL had an issue that they had to deal with.

² Paragraph 25 included the following: ***"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."*** (Emphasis added)

³ *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ONCA).

award is a relevant factor to be considered. The award should reflect what the Court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the actual costs to the successful litigant⁴⁵. 1000 respectfully submits that the costs sought are **excessive, in the extreme**, and exceed any sort of reasonable expectations. Further, given the limited notice and limited hearing that took place, along with the mixed result that occurred, and the ongoing nature of the dispute, it, 1000, submits that it would be just to have costs dealt with by the Judge who ultimately deals with all the issues (and on a full record) that have arisen between SHCL and 1000, or alternatively, if costs are quantified, the payment of the costs should be deferred and made in the cause as between the parties. Finally, given all of the above, 1000 respectfully submits that the matter before the Court does not meet the exceptional criteria of a substantial indemnity award as is being sought.

The Proposal Trustee's Costs

7. KSV has submitted an invoice that details their costs. The said invoice indicates that it is seeking payment for time incurred that post dates the November 1, 2022, Motion and which has nothing to do with said Motion. The invoice also has costs for time incurred that dates to the 17th of October 2022, long before the closing of the purchase and sale transaction relating to Railway.

8. In fact, the invoice indicates that the Proposal Trustee incurred time and costs on October 31 and November 1, 2022, the relevant dates, in the total amount of **\$5,532.50**.

9. It is respectfully submitted that the Proposal Trustee's Costs Outline bears no resemblance to the matter that was before the Court and which was brought on very short notice and which was brought about by an event that had occurred just hours earlier.

The Proposal Trustee's Counsel's Costs

10. The Proposal Trustee's Counsel did not prepare a Motion Record, nor a factum, nor an affidavit in furtherance of the Motion. He made minimal submissions at the hearing of the Motion. In that light Counsel is seeking costs, which are not detailed with dockets which would set out dates and times for said costs, for the following matters:

- a) "Correspondence with proposal trustee, Company's counsel, purchaser and its counsel regarding sale transaction, conduct of purchaser, closing and post-closing closing matters" (\$10,697.00);

⁴ *Zesta Engineering Ltd. v. Cloutier (2002)*, 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.

⁵ In *Miziolek v. Miziolek and Miziolek*, 2018 ONSC 4372, at para. 32, A.J. Goodman J. observed that, ...[t]here must be practical and reasonable limits to the amounts awarded for costs and those amounts should bear some reasonable connection to the amount that should reasonably have been contemplated... I must consider what is reasonable in the circumstances, and all the relevant factors. However, when appropriate and necessary, a court ought to analyze the Bill of Costs in order to satisfy itself as to the reasonableness of the fees and expenses submitted for consideration.

- b) "Legal Research, reviewing, revising and finalizing Proposal Trustee's Fourth Report to Court⁶, prepare for and attend at hearing of motion" (\$15,014.50 for two counsel and a student at law);
- c) Preparation of Costs Outline (\$888.75).

11. It is respectfully submitted that Counsel's Costs Outline is once again excessive, and again bears no resemblance to the matter that was before the Court. Nor does it reflect a) Counsel's sophistication and experience, b) the admitted straightforward nature of the matter, and c) Counsel's limited involvement in the matter.

The SHCL Counsel's Costs

12. Counsel for SHCL did not prepare any material but for a four plus (4+) page Notice of Motion. No factum was prepared, nor an affidavit in furtherance of the motion.

13. The Costs Outline of SHCL's Counsel, which is not detailed with dockets which would set out dates and times for said costs, indicates that it is seeking \$5535 for two (2) counsel with respect to "drafting motion materials, preparation for and attendance at motion". In addition, the Outline seeks \$5474 for "communications with the Purchaser and KSV, preparation for and appearance at comeback hearing".

14. It is respectfully submitted that the "comeback hearing" lasted a matter of minutes in as much as Counsel simply reported that the Order was being complied with and nothing further was needed from the Court at the time.

15. It is respectfully submitted that Counsel's Costs Outline is once again excessive, and again bears no resemblance to the matter that was before the Court. Nor does it reflect Counsel's sophistication and experience, and the admitted straightforward nature of the matter.

In Closing

16. It is respectfully submitted that in the overall circumstances herein it is entirely appropriate for the Court to a) analyze the Costs Outlines in order to satisfy itself as to the reasonableness of the fees submitted for consideration; and b) defer determining any amount for costs to the Judge ultimately dealing with the parties' issues, or alternatively defer the payment of any determined costs by way of an Order of costs in the cause.

All of Which Is Respectfully Submitted



STEPHEN M. TURK, Counsel to 1000296348 Ontario Inc.

⁶ It is to be remembered that it was a ten (10) page report that in part set out material from prior reports.

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