

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N :**

**IN THE MATTER OF THE RECEIVERSHIP OF BENDING LAKE IRON  
GROUP LTD.**

**COSTS SUBMISSIONS OF LEGACY HILL RESOURCES LTD.  
(Returnable May 30, 2016)**

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**PART I - INTRODUCTION**

1. Legacy Hill Resources Limited (“**LHR**”) seeks an order for costs on a partial indemnity scale against Bending Lake Iron Group Ltd. (“**BLIG**”) and Henry Wetelainen personally for costs incurred by LHR to participate in a motion and cross-motion in this receivership.
2. Mr. Wetelainen, in his role as President, CEO and major shareholder of BLIG, caused BLIG to oppose a motion by the Receiver and to bring its own cross-motion. BLIG’s position in the motion and cross-motion had major implications for the business and reputation of LHR. LHR was accordingly forced to incur legal fees participating in the motions.
3. Despite BLIG’s scandalous representations to the Court, the Receiver’s motion for court approval of a sale of BLIG’s assets to LHR was granted and the relief

sought by BLIG was denied. In his reasons for judgment, the Honourable Justice Shaw noted that BLIG had acted improperly and in violation of a court order.<sup>1</sup>

4. In the circumstances, it is appropriate to grant a costs order in favour of LHR against BLIG and Mr. Wetelainen personally on a partial indemnity scale for the legal costs that LHR incurred responding to the untenable, scandalous and ultimately unsuccessful position advanced by Mr. Wetelainen through BLIG, which acted as his nominee and surrogate in these motions.
5. LHR adopts the position and legal arguments in the Costs Submissions of the Receiver.

## **PART II - THE FACTS**

6. Henry Wetelainen is the President, CEO and a major shareholder of BLIG.<sup>2</sup>
7. Farber & Partners Inc. was appointed receiver (the “**Receiver**”) over the property, assets and undertaking of BLIG pursuant to the Order of Justice Shaw, dated September 11, 2014 (the “**Receivership Order**”).<sup>3</sup>
8. The Receivership Order provided the Receiver with broad powers to deal with the property of BLIG. These powers were granted to the Receiver to the exclusion of BLIG.<sup>4</sup>
9. In violation of the Receivership Order, BLIG’s management, including Mr. Wetelainen, conducted a parallel sale and investment process. BLIG’s

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<sup>1</sup> Reasons of Justice Shaw for Decision on Motion, dated January 8, 2016 [Reasons for Decision] at 79.

<sup>2</sup> Reasons for Decision at 7.

<sup>3</sup> Reasons for Decision at 1.

<sup>4</sup> Reasons for Decision at 80

management, including Mr. Wetelainen, courted LHR as an investor without disclosing this fact to the Receiver and without directing LHR to the Receiver, as they were required to do by the Receivership Order.<sup>5</sup>

10. On November 27, 2014, the Receiver brought a motion before the Court for the approval of *Sale and Investor Solicitation Procedures* for the marketing and sale of BLIG or its assets (the “**SISP**”). The Receiver’s motion was not opposed by BLIG or Mr. Wetelainen. The SISP was approved pursuant to the Order of Justice Pierce, dated November 27, 2014 (the “**SISP Order**”).<sup>6</sup> The SISP Order granted the Receiver the power to solicit offers to purchase or invest in BLIG or its property.<sup>7</sup>
11. The Receiver conducted the SISP in accordance with its terms and the SISP Order. LHR participated in the SISP and presented the only proposal for the acquisition of BLIG’s assets at the conclusion of the SISP.<sup>8</sup>
12. The Receiver brought a motion for court approval of the sale of BLIG’s assets to LHR (the “**Approval and Vesting Order Motion**”). BLIG opposed the Approval and Vesting Order Motion and also brought a cross-motion for various relief, including an order enjoining LHR from dealing in the property of BLIG (the “**BLIG Cross-Motion**”).<sup>9</sup>

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<sup>5</sup> Reasons for Decision at 23, 79, 88 and 107.

<sup>6</sup> Reasons for Decision at 18.

<sup>7</sup> Reasons for Decision at 82.

<sup>8</sup> Reasons for Decision at 42-44.

<sup>9</sup> Reasons for Decision at 4.

13. In its written materials and in open court, BLIG and Mr. Wetelainen accused LHR of various forms of misconduct. The unsupported and scandalous accusations levelled against LHR by BLIG and Mr. Wetelainen threatened to jeopardize the legitimate business interests and reputation of LHR as well as the approval of the sale of the assets of BLIG to LHR as a legitimate purchaser. The position taken by BLIG and Mr. Wetelainen forced LHR to participate in the motions and for its legal counsel to fly to Thunder Bay to attend a two day hearing on short notice.
14. The Honourable Justice Shaw heard the two motions on December 29 and 30, 2015. Justice Shaw granted the Approval and Vesting Order Motion and dismissed the BLIG Cross-Motion.<sup>10</sup>
15. LHR has incurred substantial legal costs to respond to the position taken by BLIG and Mr. Wetelainen in the two motions, which it would not have otherwise incurred.<sup>11</sup>

### **PART III - ISSUES AND THE LAW**

16. The issues to be determined on this motion are:
  - (a) Whether BLIG should pay the costs of LHR on the Approval and Vesting Order Motion and the BLIG Cross-Motion on a partial indemnity scale; and,
  - (b) Whether Mr. Wetelainen should be jointly and severally liable for the costs of LHR.

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<sup>10</sup> Reasons for Decision at 144.

<sup>11</sup> Costs Outline of LHR, dated 16, 2016.

**A. LHR Should Receive its Costs on the Motions**

17. Section 197 of the *Bankruptcy and Insolvency Act* gives the Court broad discretion to award costs in accordance with what is just and reasonable in the circumstances. Courts have granted costs awards in favour of purchasers in Court supervised sales processes in receiverships where a third party has acted obstructively.<sup>12</sup>
18. In the present case, LHR was compelled to take an active position in the Approval and Vesting Order Motion as well as the BLIG Cross-Motion in order to refute the scandalous allegations made against it by BLIG and Mr. Wetelainen. If LHR took no position on the motions, it would have potentially jeopardized its legitimate business interest as a purchaser in the approval of the sale of BLIG's assets to LHR. It also would have left serious allegations of misconducts against LHR unchallenged.
19. While LHR is not seeking substantial indemnity costs, Courts have consistently awarded costs on the substantial indemnity scale where a party conducted itself in an abusive manner, took positions that were devoid of merit, unnecessarily ran up the costs of litigation, or made unfounded allegations of improper conduct.<sup>13</sup>
20. In their written submissions on the motions and in open court BLIG and Mr. Wetelainen accused LHR of breach of a fiduciary duty,<sup>14</sup> the deliberate misuse of

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<sup>12</sup> *York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc.*, [2009] O.J. No. 3036 at 80.

<sup>13</sup> *Standard Life Assurance Co. v. Elliot* (2007), 86 O.R. (3d) 221 (S.C.J.) at 9.

<sup>14</sup> Factum of BLIG at 78-80.



confidential information,<sup>15</sup> breach of a duty of good faith,<sup>16</sup> and various other forms of improper conduct.<sup>17</sup> These allegations were wholly without merit, attributed BLIG's own misconduct to LHR, and were ultimately rejected by Justice Shaw. These are sufficient to support a costs award in favour of LHR.<sup>18</sup>

21. LHR is seeking \$25,771.59 as partial indemnity for the legal costs that it was forced to incur on the motions because of the position taken by BLIG and Mr. Wetelainen against the Receiver and LHR. This is a reasonable amount given the number and complexity of the issues that were raised. BLIG and Mr. Wetelainen should have expected that they would have to compensate LHR for its legal costs on the scale sought if they did not succeed on the motions.

**B. Mr. Wetelainen Should be Jointly and Severally Liable for LHR's Costs**

22. Section 131(1) of the *Courts of Justice Act* gives the Court broad powers to award costs, including against an individual or entity that is not a formal party to the proceedings but is driving the litigation.<sup>19</sup>
23. Mr. Wetelainen caused BLIG to take an aggressive position on the motions because he wished to stymie the court-approved sales process under the SISF Order to preserve his own personal interests in BLIG as its president, CEO and major shareholder. Mr. Wetelainen used BLIG as his "nominee and surrogate" to

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<sup>15</sup> Factum of BLIG at 97.

<sup>16</sup> Factum of BLIG at 169.

<sup>17</sup> Factum of BLIG at 60, 128 and 167.

<sup>18</sup> *Jazz Air LP v. Toronto Port Authority*, [2007] O.J. No. 809 at 10; *Lawson v. Toronto Hospital Corp.*, [1991] O.J. No. 1586 at 8-10.

<sup>19</sup> *Party City Ltd., Re*, (2002), 114 A.C.W.S. (3d) 378 at 38.

pursue his own interests. In similar cases, Courts have granted costs awards against such non-parties.<sup>20</sup>

24. Mr. Wetelainen's considerable efforts to attack the reputation and legitimate business interests of LHR, while using BLIG as his sword and shield, constitute an exceptional case that merits a cost award against Mr. Wetelainen personally.<sup>21</sup>

#### **PART IV - ORDER REQUESTED**

25. An Order for costs in favour of Legacy Hill Resources Ltd. on a partial indemnity scale payable jointly and severally by Bending Lake Iron Group Ltd. and Henry Wetelainen in the amount of \$25,771.59.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of May, 2016.

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Caitlin Fell  
McMillan LLP

Lawyer for Legacy Hill Resources Ltd.

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<sup>20</sup> *Party City Ltd., Re*, (2002), 114 A.C.W.S. (3d) 378 at 37-38.

<sup>21</sup> *Party City Ltd., Re*, (2002), 114 A.C.W.S. (3d) 378 at 38.

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc.*, [2009] O.J. No. 3036
2. *Standard Life Assurance Co. v. Elliot*, (2007), 86 O.R. (3d) 221 (S.C.J.)
3. *Jazz Air LP v. Toronto Port Authority*, [2007] O.J. No. 809
4. *Lawson v. Toronto Hospital Corp.*, [1991] O.J. No. 1586
5. *Party City Ltd., Re*, (2002), 114 A.C.W.S. (3d) 378

**SCHEDULE "B"**  
**RELEVANT STATUTES**

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 197

**197(1) Costs in discretion of court**

Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

2. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131

**131(1) Costs**

Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

**2403177 ONTARIO INC.**  
Applicant

and

**BENDING LAKE IRON GROUP LIMITED**  
Respondent

Court File No.: CV-14-274

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Thunder Bay

**FACTUM OF**  
**LEGACY HILL RESOURCES LTD.**  
**(Returnable May 30, 2016)**

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