

CITATION: Sears Canada Inc. (Re), 2017 ONSC 6738
COURT FILE NO.: CV-17-11846-00CL
DATE: 20171109

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC.,
S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES
INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS
INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR
COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO
INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO
LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886
CANADA INC. AND 3339611 CANADA INC.

APPLICANTS

BEFORE: HAINEY J.

COUNSEL: *Jeremy Dacks*, for the Applicants, Sears Canada
Monique Jilesen and *Christopher Yung*, for Middleby Corporation
Adam Slavens, for Canadian Tire Corporation, Limited
Danish Afroz, for the Board of Directors and the Special Committee of the Board
of Directors of Sears Canada Inc.
J. Dietrich and *T. Pinos*, for Term DIP Lenders
Alan Merskey and *Evan Cobb*, for the Monitor, FTI Consulting Canada Inc.
Susan Ursel, Employee Representative Counsel
Lily Harmer, for Superintendent of Financial Services
D.J. Miller, for Oxford Properties
Andrew Hatnay and *Amy Tang*, Representative Counsel for Pensioners/Retirees
Linda Galessiere, for Ivanhoe, Morguard, Triovest, 20 VIC, Crombie, Cominar
Pamela Huff and *Julienne Cawthorne-Hwang*, for Morneau Shepell Ltd., in its
capacity as replacement Pension Plan Administrator

HEARD: November 7, 2017

ENDORSEMENT

[1] Sears Canada Inc. ("Sears Canada") and the other Applicants listed above (collectively "Applicants") obtained relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA") by an Initial Order I made on June 22, 2017 ("Initial Order"). FTI Consulting Canada Inc. was appointed in the Initial Order to act as the court-appointed Monitor ("Monitor") in this CCAA proceeding.

[2] On July 13, 2017, I approved a sale and investment solicitation process ("SISP") to seek bids for the purchase of the Applicants' business and assets to be conducted by the Applicants, under the supervision and oversight of the Monitor.

[3] On October 2, 2017, the Applicants brought a motion to approve an agreement of purchase and sale ("CT Asset Purchase Agreement") between Sears Canada and Canadian Tire Co. ("Canadian Tire"). Pursuant to the CT Asset Purchase Agreement, Sears Canada proposes to sell to Canadian Tire all of its rights in certain trademarks related to the "Viking" trademark and brand ("Viking Trademarks").

[4] It is a condition of the CT Asset Purchase Agreement that a surviving provision of an expired trademark license agreement relating to the Viking Trademarks between Sears Canada and the Middleby Corporation ("Middleby") be disclaimed. The surviving provision is a right of first refusal ("ROFR") in favour of Middleby pursuant to which it has a ROFR to purchase the Viking Trademarks.

[5] Middleby brings this motion to require Sears Canada to honour its obligation to provide Middleby with a ROFR to purchase the Viking Trademarks on the same terms as Canadian Tire is to purchase them under the CT Asset Purchase Agreement.

[6] On September 27, 2017, Sears Canada delivered a notice of disclaimer to Middleby with respect to the ROFR. This was two days before it entered into the CT Asset Purchase Agreement.

[7] Middleby submits that at the time that the CT Asset Purchase Agreement was entered into the disclaimer was not effective. As a result, according to Middleby, Sears Canada was contractually required to honour the ROFR and it did not do so. Middleby therefore seeks specific performance of the ROFR.

[8] On September 29, 2017 Middleby obtained a copy of the CT Asset Purchase Agreement (in which the purchase price is redacted) when it received the Applicants' motion record. In para. (d) of its notice of motion, Middleby seeks the following order:

(d) Directing Sears Canada to forthwith give the Middleby Corporation ("Middleby") notice of the Asset Purchase Agreement dated September 29, 2017 among Sears Canada and the Canadian Tire Corporation Limited and of all terms relating to, in accordance with the term of section 10.06(b) of the License Agreement.

[9] Ms. Jilesen, on behalf of Middleby, submits that Middleby has not yet decided whether it wishes to exercise its ROFR (if permitted by the court to do so) because it does not know the

purchase price that it will have to match. As a result, the remainder of the relief sought by Middleby in its notice of motion may become academic if it decides that it is not prepared to match the price Canadian Tire has agreed to pay.

[10] Sears Canada and the Monitor oppose an order requiring Sears Canada to provide an unredacted copy of the CT Asset Purchase Agreement to Middleby. However, such an order, in my view, will not prejudice either Sears Canada or Canadian Tire and will allow Middleby to make an informed decision whether it wishes to attempt to exercise its ROFR. The balance of its motion will become academic if Middleby decides not to attempt to exercise its ROFR. To decide the balance of Middleby's motion under circumstances in which my decision may be academic would be an unnecessary waste of judicial resources.

[11] For this reason, as a preliminary matter, I have decided to grant Middleby the relief it seeks in para. (d) of its notice of motion. Sears Canada is ordered to forthwith provide Middleby with an unredacted copy of the CT Asset Purchase Agreement. Middleby is to maintain the confidentiality of the redacted provisions of the agreement.

[12] Within five days of receiving an unredacted copy of the CT Asset Purchase Agreement, Middleby shall advise Sears Canada and the court whether it wishes to exercise its ROFR. If it does, I will decide the balance of the issues raised by Middleby on its motion. If it does not, Sears Canada's motion to approve the CT Asset Purchase Agreement will be granted.


HAINEY J.

Date: November 9, 2017