CITATION: Sears Canada Inc. (Re), 2017 ONSC 7038
COURT FILE NO.: CV-17-11846-00CL
DATE: 20171124

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 *Juliene Cawthorne-Hwang*, for Morneau Shepell Ltd., in its capacity as replacement Pension Plan Administrator

HEARD: November 7, 2017

ENDORSEMENT

Background

[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 licence agreement ("Viking Licence 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 brought 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 sought 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, submitted that Middleby had not yet decided whether to exercise its ROFR (if permitted by the court to do so) because it did not know the purchase price that it would have to match.

[10] Although Sears Canada and the Monitor opposed an order requiring Sears Canada to provide an unredacted copy of the CT Asset Purchase Agreement to Middleby, I concluded that an unredacted copy should be provided to Middleby to allow it to make an informed decision whether it wishes to attempt to exercise its ROFR.

[11] I therefore ordered Sears Canada to provide Middleby with an unredacted copy of the CT Asset Purchase Agreement and I gave Middleby five days to determine whether it wished to attempt to exercise its ROFR. I indicated that it if did, I would decide the balance of the issues raised by Middleby on its motion.

[12] On November 14, 2017, Ms. Jilesen wrote to Mr. Dacks, counsel to Sears Canada, and advised as follows:

> Further to the reasons of Justice Hainey dated November 9, 2017, we are writing to advise you that the Middleby Corporation wishes to exercise the right of first refusal to purchase the Canadian Viking Trademark Assets on the same economic terms as the CT Asset Purchase Agreement, *mutatis mutandis.*

Issues

[13] As a result of Middleby's decision to exercise its ROFR, I must decide the following issues:

- Is Sears Canada's disclaimer effective?
- If it is not, should the court order specific performance of the ROFR?
- Should the ROFR be disclaimed pursuant to s. 32(4) of the *CCAA*?

Is the disclaimer effective?

[14] Sears Canada issued its notice of disclaimer pursuant to s. 32(1) of the *CCAA* on September 27, 2017, two days before entering into the CT Asset Purchase Agreement.

[15] Section 32(5) of the *CCAA* provides as follows:

> 32 (5) An agreement is disclaimed or resiliated
>
> (a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);
>
> (b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

> (c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

[16] Section 32(5) of the *CCAA* is explicit about the timing of the disclaimer of an agreement. The earliest date that an agreement can be disclaimed under this section is 30 days after the notice to disclaim is given by the company.

[17] Because Sears Canada delivered its notice to disclaim the ROFR only two days before it entered into the CT Asset Purchase Agreement, I am of the view that the ROFR remained in effect on September 29, 2017, when the CT Asset Purchase Agreement was entered into.

[18] As a result, the disclaimer was not yet effective under s. 32(5) of the *CCAA* when the CT Asset Purchase Agreement was entered into by Sears Canada.

Should specific performance be ordered?

[19] Because Middleby's ROFR was in effect when Sears Canada entered into the CT Asset Purchase Agreement, Sears Canada breached the ROFR by not allowing Middleby to purchase the Viking Trademarks on the same terms as Canadian Tire. Although a breach of a right of first refusal may give rise to damages, in this case I am of the view that damages would be an inadequate remedy. In arriving at this conclusion I rely upon the decision of Blair J. (as he then was) in *GATX Corp. v. Hawker Siddeley Canada Inc.*, 1996 CanLII 8286 (ON SC) in which he concluded that specific performance was the appropriate remedy to address the breach of a right of first refusal. At para. 153 he stated as follows:

> As the Right of First Refusal has been activated by the circumstances which have transpired, the ordinary remedies in such a situation would be an order for specific performance and/or damages. ... Damages, however, are inadequate to redress the wrong in these circumstances, in my view. ... what it seeks in the main is an order enforcing the exercise of its Right of First Refusal. It is the contractual entitlement to exercise that Right, the wrongful attempt by Hawker Siddeley and Procor to circumvent it ... which form the basis for the granting of a remedy in favour of the Applicants. It seems to me that the most suitable remedy is one which rectifies the wrong and the "oppression", and which gives effect to the contractual entitlement. That remedy is a decree of specific performance.

[20] Although Blair J. was also dealing with a finding of oppression by Hawker Siddeley, his conclusion regarding the appropriate remedy for the breach of the right of first refusal applies equally to this case. In my view, the remedy that best rectifies the wrong occasioned by Sears Canada's failure to honour Middleby's ROFR is specific performance.

[21] I am satisfied for these reasons that Sears Canada should be ordered to permit Middleby to exercise its ROFR with respect to the CT Asset Purchase Agreement.

Should the ROFR be disclaimed?

[22] In light of my decision that Sears Canada's disclaimer of the ROFR was not effective and it is required to permit Middleby to exercise its ROFR with respect to the CT Asset Purchase Agreement, it is not necessary for me to decide whether the ROFR should be disclaimed. However, in the event that I am wrong about the previous two issues I also intend to determine whether the ROFR should be disclaimed.

[23] The ability to disclaim an agreement pursuant to s. 32(1) of the *CCAA* is subject to the court's supervision. Section 32(4) sets out the following non-exhaustive factors the court must consider:

> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to the party to the agreement.

Monitor's Approval

[24] The Monitor has approved the disclaimer of Middleby's ROFR for the following reasons:

> (a) It will allow the Applicants to maximize the value of the Viking Trademarks;
>
> (b) The disclaimer does not cause significant financial hardship to Middleby because Middleby's right to utilize the Viking Trademarks has already been terminated; and
>
> (c) Middleby participated in the SISP process and had the opportunity to put its best bid forward in that process and its bid was not the highest bid.

[25] I have concluded that the disclaimer will not allow the Applicants to maximize the value of the Viking Trademarks because Middleby's ROFR allows it to purchase the trademarks "upon the same terms and conditions" as the CT Asset Purchase Agreement. Sears Canada will therefore recover the same amount for the Viking Trademarks if Middleby exercises its ROFR. Further, Middleby has indicated that if its ROFR is disclaimed and it is prevented from acquiring the Viking Trademarks, it will assert a provable claim in respect of its loss pursuant to s. 32(7) of the *CCAA*. As a result, the Applicants will be in a worse position if the ROFR is disclaimed because they will recover the same amount as they would from Middleby for the Viking Trademarks and face a provable claim from Middleby.

[26] Further, I do not agree that Middleby will not suffer financial hardship if the ROFR is disclaimed. I am satisfied that Middleby will suffer significant financial hardship for the reasons outlined at paras. 47–50 of its factum, which I accept.

[27] Finally, although Middleby participated in the SISP process and had an opportunity to put its best bid forward, as the Monitor suggests, it did so on the basis that it reserved its rights under its ROFR. Accordingly, in my view, Middleby's participation in the SISP process should not prejudice its right to enforce its ROFR.

[28] Although I agree that the Monitor is entitled to considerable deference, on the particular facts of this case, I do not agree with the Monitor's reasons for approving the disclaimer.

Would the disclaimer enhance the prospects of a viable compromise or arrangement?

[29] The disclaimer will not enhance the prospects of a viable compromise or arrangement being made in respect of the company because the Viking Trademarks are not being sold to Canadian Tire as part of a going concern. I find that there will be no impact on Sears Canada or the other stakeholders if the Viking Trademarks are sold to Middleby instead of Canadian Tire. In fact, a sale to Middleby will eliminate its provable claim pursuant to s. 32(7) of the *CCAA*. This is one of the reasons that Middleby's motion is supported by Sears Canada's employees and pensioners.

Would the disclaimer cause significant hardship to Middleby?

[30] I have already determined that the disclaimer will cause significant financial hardship to Middleby.

[31] Having considered all of the factors set out in s. 32(4) of the *CCAA*, I have concluded that the ROFR should not be disclaimed.

Conclusion

[32] Middleby's motion is granted. Sears Canada's disclaimer was not effective on September 29, 2017 and it is ordered to permit Middleby to exercise its ROFR with respect to the CT Asset Purchase Agreement. Further, Sears Canada's disclaimer of Middleby's ROFR is not approved.

HAINEY J.

Date: November 24, 2017