

CITATION: Sears Canada Inc., et al. (Re), 2018 ONSC 5852
COURT FILE NO.: CV-17-11846-00CL
DATE: October 4, 2018

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., 9370-2751 QUEBEC INC.,
191020 CANADA 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., 16886 CANADA INC.,
AND 3339611 CANADA INC.

BEFORE: Hainey J.

COUNSEL: *Jeremy Dacks, Shawn Irving* for the Applicants

Virginie Gauthier, Alan Merskey for the Monitor

David T. Ullman for the Moving Landlords

Susan M. Ursel, Katy O'Rourke for the Employees

D.J. Miller, Paul D. Guy for Oxford Properties

Lily I. Harmer for Superintendent of Financial Services

Natalie Levine for Certain Former Directors and Officers

Sandy Lockhart for ESL Parties

Gustavo F. Camelino for Ivanhoe Cambridge

Andrew J. Hatnay, Amy Tang for Pension Representatives

Pamela L.J. Huff for Morneau Shepell, Plan Administrator

HEARD: SEPTEMBER 20, 2018

ENDORSEMENT

OVERVIEW

[1] Oxford Properties Group (“Oxford”) brings this motion for an order appointing John A. Keefe (“Mr. Keefe”) as arbitrator to determine the current value of property located at 17600 Yonge Street, Newmarket, Ontario (“Newmarket Property”) pursuant to an option agreement between Sears Canada Inc. (“Sears”) and Oxford made as of January 21, 1994 (“Option Agreement”).

[2] Sears and the Monitor bring a cross-motion for an order appointing the Honourable James Farley (“Mr. Farley”) as arbitrator to determine the current value of the Newmarket Property and to determine other claims in relation to the property by Oxford in these CCAA proceedings. Mr. Farley has been appointed by me as a Claims Officer in these proceedings.

FACTS

[3] The Newmarket Property was previously operated by Sears as a department store and is physically connected to the Upper Canada Mall, which is owned by Oxford.

[4] The Option Agreement grants Oxford the right to purchase the Newmarket Property. Oxford executed the Option Agreement on June 29, 2018. As a result, a binding agreement of purchase and sale for the Newmarket Property came into effect between Sears and Oxford pursuant to the Option Agreement.

[5] The purchase price to be paid by Oxford under the agreement of purchase and sale is equal to the “Current Value” of the Newmarket Property as defined in s.1(g) of the Option Agreement.

[6] Section 12 of the Option Agreement prescribes the following three-step process for determining the Current Value of the Newmarket Property:

- (i) **Negotiation:** The parties are first required to use the 7-day period after the Option is exercised to attempt to reach an agreement on the property’s Current Value. Oxford and Sears did so, but were unable to come to an agreement.
- (ii) **Valuation:** If a negotiated agreement is not reached, the parties are then required to each appoint an appraiser to provide an opinion as to the property’s Current Value. If the two appraisals are within 5 percent of each other the purchase price is to be the average of the two appraisals. Oxford and Sears did so, but the appraisals were not within 5 percent.
- (iii) **Arbitration:** As a third and final step, the Option Agreement provides that Current Value is to be determined by a single arbitrator. If the parties cannot agree on an arbitrator within fifteen days then a judge of the Ontario Court (General Division) [now the Superior Court] is to make the appointment. Oxford and Sears have been unable to agree on an arbitrator and have asked me to appoint an arbitrator.

[7] The Option Agreement provides that the arbitrator must render his or her decision within 20 days of his or her appointment. The arbitrator's decision is final and binding on Sears and Oxford and cannot be appealed.

[8] Under the terms of the Option Agreement, Current Value establishes the purchase price for the property. On closing, Oxford is required to accept title to the Newmarket Property and assume (i) any mortgages that may exist, (ii) the Operating Agreement in respect of the Upper Canada Mall, and (iii) any agreements registered on title. Oxford is also required to provide an indemnity to Sears in respect of its assumption of all these obligations.

[9] The Option Agreement also provides that at the closing of the transaction all amounts due by Sears to Oxford or by Oxford to Sears in relation to the Newmarket Property "shall be settled and set-off or paid in full".

[10] By proof of claim dated March 2, 2018, Oxford made the following claims in relation to the Newmarket Property ("Oxford's Claims"):

(a) \$1,821,178 in respect of alleged site work and repair costs pursuant to the Operating Agreement, approximately \$1.77 million of which relates to projected parking lot repairs; and

(b) \$5,596,026 in respect of the present value of alleged lost annual common area maintenance and promotion fund contributions under the Operating Agreement.

[11] Oxford's Claims were rejected by the Monitor's Notice of Revision or Disallowance dated July 27, 2018. In response, Oxford submitted its Notice of Dispute in respect of its claims in the amount of \$7,397,241. ("Oxford's Disputed Claims")

[12] Oxford's Disputed Claims will be determined by Mr. Farley in accordance with the CCAA Claims Procedure Order.

[13] The amount of the financial obligations between Sears and Oxford that will result in an adjustment to the cash paid on closing, as provided for in section 13(c) of the Option Agreement, includes Oxford's Disputed Claims.

ISSUES

[14] The issues that I must decide are as follows:

(a) Should I appoint Mr. Keefe as arbitrator to determine the Current Value of the Newmarket Property pursuant to s.12 of the Option Agreement?

(b) Should I appoint Mr. Farley as arbitrator to determine the Current Value of the Newmarket Property pursuant to the Option Agreement concurrently with his determination of the validity and amount of Oxford's Disputed Claims and any set-off rights under s. 13(c) of the Option Agreement that may affect the cash paid on the closing of this transaction?

POSITIONS OF THE PARTIES

[15] Oxford submits that Mr. Keefe should be appointed arbitrator to determine Current Value of the Newmarket Property in accordance with the provisions of the Option Agreement and the determination of Oxford's Disputed Claims by Mr. Farley pursuant to the CCAA claims process should proceed separately, but simultaneously with Mr. Keefe's determination of Current Value.

[16] Sears and the Monitor submit that a single process in which Mr. Farley will determine all of the outstanding issues between Oxford and Sears "will be the most efficient, fair, expedient and cost-effective path to resolving the issues concerning the Newmarket Property".

DISCUSSION

[17] The following issues are not in dispute:

- (a) The Current Value of the Newmarket Property must be determined by an arbitrator within 20 days of his or her appointment and there is no appeal from this decision.
- (b) Mr. Farley and Mr. Keefe are both qualified to arbitrate the Current Value of the Newmarket Property.
- (c) Mr. Farley will determine Oxford's Disputed Claims relating to the Newmarket Property under the CCAA claims process along with any related set-off rights.
- (d) All parties want these issues determined in the most expeditious and cost-effective manner.

[18] I am satisfied that Mr. Keefe is qualified and appropriate to act as arbitrator, that he has subject matter expertise and no connection to the matter to be arbitrated and that his appointment would be consistent with the wording of the Option Agreement. He is a highly regarded arbitrator.

[19] However, I am persuaded by the submissions of Sears and the Monitor that the outstanding issues related to the Newmarket Property are inextricably linked and should not be determined in a piecemeal fashion. In my view, separate proceedings involving both Mr. Keefe and Mr. Farley to determine these interrelated issues would result in additional cost and delay. There has already been considerable delay. Oxford provided its notice to exercise the Option Agreement over two and a half months ago. The dual-track proceeding proposed by Oxford will result in the additional expense of preparing for and participating in two separate proceedings related to the same property. This will not be efficient or cost-effective.

[20] Oxford's approach will also result in further delay which is of concern to me since Sears incurs monthly carrying costs of approximately \$107,000 in relation to the Newmarket Property.

[21] I do not accept Oxford's submission that I would be re-writing the Option Agreement if I appoint Mr. Farley to arbitrate the Current Value of the Newmarket Property. Section 12(d)(ii) of the Option Agreement specifies that, where the parties do not agree on the arbitrator, he or she shall be appointed by the court. The Option Agreement clearly contemplates that the court may have to choose between two different arbitrators. That is exactly what I am doing on these motions.

[22] Under s. 11 of the CCAA the court has authority to “make any order that it considers appropriate in the circumstances” I have concluded that the most appropriate way to resolve this dispute over the final purchase price for the Newmarket Property is to appoint Mr. Farley as the arbitrator to determine the Current Value of the property pursuant to s. 12 of the Option Agreement and to order that he also determine Oxford’s Disputed Claims in one proceeding. In my view, this will be the quickest and most cost-effective way to determine the amount of cash to be paid on the closing of this transaction.

[23] I should also note that the position advanced by Sears and the Monitor is supported by Sears’ employees and pensioners and the Superintendent of Financial Services, all of whom submit that Mr. Farley should determine all of these issues in one proceeding.

[24] In concluding that Oxford’s proposed approach is not the most efficient and cost-effective way in which to determine these issues I have relied upon the Monitor’s recommendations at paras 32-35 of its Twenty-Third Report which are as follows:

32. In order for any transaction to be completed in respect of the Option, the following issues must be determined: (i) the Current Value of the Newmarket Property; (ii) whether there are any valid and enforceable rights of set-off in the context of these CCAA proceedings; and (iii) if valid, the quantum of such set-offs. Subsequently, the entire transaction must be brought for approval of the CCAA Court.
33. For the sake of efficiency and consistency, the Monitor is of the view these issues should be determined together and not in a piecemeal fashion. Separate proceedings to determine these interrelated issues would likely result in additional cost and delay.
34. Accordingly, the Monitor, together with Sears Canada, seek to have: (i) the Honourable Justice Farley, James Farley Mediation and Arbitration Services, appointed as the arbitrator to determine the issues of Current Value; and (ii) the Honourable James Farley directed to concurrently determine the validity and quantum of the claims asserted in Oxford’s Notice of Dispute and any set-off rights that may be asserted in the context of the CCAA proceedings. In the Monitor’s view, during a CCAA proceeding the interests of the debtor company’s stakeholders in an expedited and value maximizing resolution should be prioritized provided that the material substantive rights of counterparties are respected.
35. The Monitor is of the opinion that Justice Farley, as an experienced arbitrator, a former Commercial List Judge, and the Claims Officer appointed pursuant to the Claims Procedure Order dated December 8, 2017, is uniquely situated to determine these issues, which involve the resolution of an arbitral dispute, a claims dispute, and a set-off dispute in a CCAA context.

[25] I accept and adopt the Monitor’s recommendations.

CONCLUSION

[26] I have concluded that Sears' and the Monitor's cross-motion should be granted and Oxford's motion should be dismissed for these reasons.

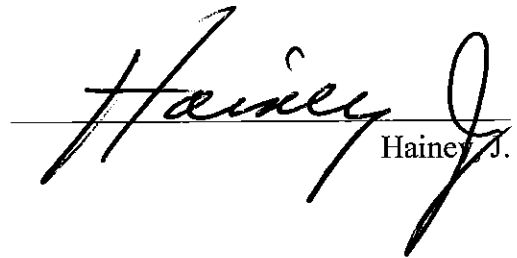
[27] There shall be an order on the following terms:

- (a) Appointing Mr. Farley and James Farley Mediation and Arbitration Services, as arbitrator pursuant to s.12 of the Option Agreement to determine the Current Value of the Newmarket Property within 20 days of the date of this Order; and
- (b) Directing Mr. Farley, in his role as Claims Officer, to determine jointly with the issues raised in the arbitration, Oxford's Disputed Claims and the validity and quantum of any set-off or other deductions resulting from these claims to the amount payable to Sears on closing under the Option Agreement.

COSTS

[28] If the parties cannot agree on costs they may schedule a 9:30 a.m. attendance with me to resolve costs.

[29] I thank all counsel for their helpful submissions.


Haine J.

Date: October 4, 2018