

CITATION: Sears Canada Inc. (Re), 2017 ONSC 6476
COURT FILE NO.: CV-17-11846-00CL
DATE: 20171027

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

D.J. Miller and Mudasir Marfatia, for Oxford Properties

Danish Afroz, for the Board of Directors and the Special Committee of the Board
of Directors of Sears Canada Inc.

J. Dietrich, for DIP Term Agent and Lenders

Alan Merskey and Evan Cobb, for the Monitor, FTI Consulting Canada Inc.

Jesse Mighton, for Cadillac Fairview Corporation

Jules Monteyne and Andrew Hatnay, Representative Counsel for
Pensioners/Retirees

Saneliso Moyo, Employee Representative Counsel

Elizabeth Rathbone, for Superintendent of Financial Services

David Ullmann, for Bentall Kennedy and Primaris Management Inc.

Linda Galessiere, for Ivanhoe, Morguard, Triovest, 20 VIC, Crombie, Cominar

HEARD: October 27, 2017

ENDORSEMENT

[1] On October 27, 2017, I granted the applicants' motion for an Approval and Vesting Order with respect to property located at 17700 Yonge Street, Newmarket, Ontario (the "Newmarket Home Property").

[2] At para. 11 of my Order, I directed the Monitor to distribute a Termination Fee (as defined in the Motion Record) to Serruya Private Equity Inc. ("Serruya").

[3] Oxford Properties Group ("Oxford") objected to the approval of the Termination Fee for reasons set out in a letter to the Monitor dated October 26, 2017. Oxford's counsel, Ms. Miller, also made submissions during the argument of the motion urging me not to approve the Termination Fee.

[4] Despite Ms. Miller's able submissions I approved the payment of the Termination Fee and indicated that I would provide an additional endorsement setting out my reasons for doing so. This is my additional endorsement.

[5] On October 4, 2017, as a result of the SISP process that I approved, Sears Canada entered into an Agreement of Purchase and Sale with Serruya for the sale of the Newmarket Home Property.

[6] The Agreement of Purchase and Sale with Serruya provided for the Termination Fee because the Newmarket Home Property is the subject of an operating agreement between Sears Canada and Oxford that contains a right of first refusal ("ROFR") in favour of Oxford with respect to any prospective sale of the Newmarket Home Property.

[7] On October 19, 2017, Oxford exercised its ROFR and an Agreement of Purchase and Sale was entered into between Sears Canada and Oxford on substantially the same terms as the earlier agreement with Serruya.

[8] This transaction triggered the payment to Serruya of the Termination Fee provided for in its Agreement of Purchase and Sale.

[9] The Monitor recommended that I approve the payment of the Termination Fee for the following reasons at para. 27 of its Sixth Report:

27. The Monitor supports the Applicants' request for approval to pay the Termination Fee to Serruya as:

(a) Serruya was only willing to enter into the Original Newmarket Agreement if the Termination Fee was a feature of that agreement, as Serruya was aware that its bid would be delivered to the Mall Owners and there was a significant risk that its bid could be matched;

(b) the amount of the Termination Fee was arrived at through good faith negotiation between Serruya and the Sale Advisor;

(c) due to the existence of the Newmarket ROFR, it is unlikely that a party other than the Mall Owners would have engaged in significant due diligence and negotiation to arrive at an executable transaction respecting the ROFR rights that would maximize value to the Applicants without a Termination Fee, as all bidders would know that their bids would serve only to set the price that may ultimately be matched by the Mall Owners;

(d) the Original Newmarket Agreement served a useful purpose in the circumstances as it maximized the price that would be paid by the Mall Owners for the Newmarket Home Property;

(e) the Monitor notes that the Termination Fee in this case is, on a percentage basis, at the high end of the range of break fees observed in other CCAA transactions. However, the Monitor believes that there are important distinctions between the current case and a traditional break fee scenario. First, the beneficiary of the break fee will generally have an opportunity to submit a further bid for the subject asset, whereas in this case no such opportunity is provided. Second, the value of the asset sold in this case is significantly lower than the value in other precedent transactions that are often sales of entire going concern businesses. On a dollar-value basis, the Termination Fee in this case is significantly lower than break fees observed on other transactions; and

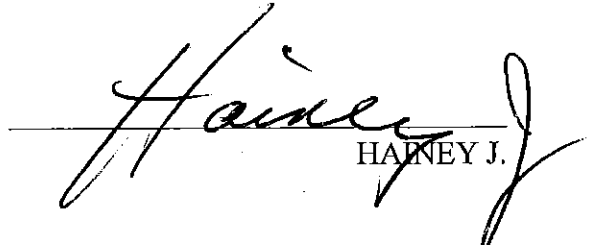
(f) even after account for the cost of the Termination Fee, the net proceeds of this transaction remain within reasonable proximity to the appraised value of the Newmarket Home Property and remain the highest recovery available for the Newmarket Home Property based upon the results of the SISP.

[10] Ms. Miller argued that the Termination Fee could have the effect of unfairly “inflating the price” to be paid by Oxford. However, she specifically stated that Oxford “is not taking the position that the Serruya offer to purchase is not a *bona fide* offer”. She submitted, however, that in future the actual amount of any termination fees sought to be approved should be disclosed in the applicants’ motion material. This submission has merit.

[11] In view of the Monitor’s recommendation, which I accept, and Ms. Miller’s concession that Serruya’s offer to purchase the Newmarket Home Property is *bona fide*, I am prepared to approve the payment of the Termination Fee with respect to the Newmarket Home Property.

[12] In view of Ms. Miller’s submission, the approval of any future termination fees will be dealt with on a case by case basis as to whether the actual amount of the termination fee should be disclosed in the motion material.

Date: October 27, 2017


HARNEY J.