

CITATION: Sears Canada Inc. (Re), 2017 ONSC 5862
COURT FILE NO.: CV-17-11846-00CL
DATE: 20171006

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 ELECTRIQUE 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., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531
CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

APPLICANTS

BEFORE: HAINEY J.

COUNSEL: *Jeremy Dacks, Shawn Irving and Karin Sachar*, for the Applicants

Lauren Pearce, for the Financial Services Commission of Ontario

Jesse Mighton, for The Cadillac Fairview Corporation Limited

Edmond Lamek, for RioCan et al.

Sean Zweig, for the Board and Special Committee

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

Joseph Latham and Jason Wadden, for Wells Fargo Capital Finance Corporation
Canada as DIP ABL Agent

Heather Meredith, for WCRE Investments Ltd.

Timothy Pinos and Ryan Jacobs, for DIP Term Agent/DIP Term Lenders

Andrew J. Hatnay, Jules Monteyne and Amy Tang, Pension Representative
Counsel for Active Employees and Retirees of Sears Canada Inc.

Susan Ursel and Kathryn O'Rourke, for the Employee Representative Committee,
Active and Former Non-Union Employees

Mudasir Marfatia, for Oxford Properties Group Inc.

Gustavo Camelino, for 20 VIC Management Inc. on behalf of OPB Realty Inc.,
Ivanhoe Cambridge Inc., Morguard Investments Limited, Crombie REIT, Triovest
Realty Advisors Inc., HOOPP Realty Inc., and Cominar Real Estate Investment
Trust

HEARD: August 22, 2017

ENDORSEMENT

Background

[1] On August 23, 2017 I dismissed the Applicants' motion for an approval and vesting order with respect to an asset purchase agreement ("APA") entered into by Sears Canada Inc. ("Sears Canada") with WCRE Investments Ltd. ("WCRE") as of April 12, 2017. I indicated that I would provide reasons for my decision. These are my reasons.

[2] The Applicants were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") pursuant to an initial order ("Initial Order") that I made on June 22, 2017.

[3] FTI Consulting Canada Inc. was appointed in the Initial Order to act as the Monitor in this CCAA proceeding ("Monitor").

[4] On July 13, 2017, I approved a sale and investment solicitation process ("SISP") whereby BMO Nesbitt Burns Inc. ("Sale Advisor"), under the supervision of the Special Committee of the Board of Directors of Sears Canada and the Monitor, is to seek bids and proposals on behalf of Sears Canada for a broad range of transaction alternatives with respect to the Applicants' assets.

[5] On August 22, 2017, the Applicants moved before me for approval of the APA that was negotiated with WCRE before the CCAA filing commenced. Under the APA, WCRE is to pay \$5 million for property located at the Garden City Shopping Centre in Winnipeg, Manitoba, where Sears Canada currently operates a store ("Garden City Property").

Facts

[6] Prior to the CCAA filing, the Garden City Property was operating at a net loss of over \$1 million per year. As a result of its poor performance and the uncertainty of Sears Canada's future viability at this location, management decided to attempt to sell the property. Over the course of several months, Sears Canada marketed the Garden City Property by contacting a number of buyers including national retailers, property developers and the landlord, RioCan Real Estate Investment Trust ("RioCan"), the owner of the remainder of the Garden City Shopping Centre.

[7] Sears Canada received a few proposals for the purchase of the Garden City Property and concluded that the proposal from WCRE was the most attractive. As a result, Sears Canada entered into the APA with WCRE in April 2017 which provided for a purchase price of \$5 million.

[8] Although the APA was entered into prior to the commencement of the CCAA proceedings, it had not yet closed when the Applicants filed for CCAA protection.

[9] The Garden City Property was listed as a store that the Applicants intended to close in the affidavit sworn in support of the motion seeking the Initial Order. The APA with WCRE was not disclosed at that time.

[10] Paragraph 16 of the SISP provides as follows:

Notwithstanding anything else contained herein, Sears Canada, in its reasonable business judgment and in consultation with the Sale Advisor, the Monitor and the DIP Lenders, may, from time to time, withdraw any Leases or Assets from this Sale Process in accordance with the CCAA, and Sears Canada's rights under the Initial Order.

[11] Sears Canada is of the view that the market for the Garden City Property was fully canvassed prior to the CCAA filing and that the APA with WCRE represents fair market value for the Property and is in the best interests of the Applicants' estate and their stakeholders. According to the Sale Advisor, removing the Garden City Property from the SISP and completing the APA with WCRE now will likely maximize the value to be achieved from the property. Therefore, the Sale Advisor supports its removal from the SISP. The Monitor and the DIP Lenders have been consulted and support this view as well. Accordingly, subject to the approval of the Court, Sears Canada proposes to withdraw the Garden City Property from the SISP, pursuant to para. 16, and to sell it to WCRE on the terms of the APA.

[12] On August 15, 2017, following receipt of the Applicants' motion material for an approval and vesting order with respect to the sale of the Garden City Property to WCRE, counsel to RioCan contacted the Monitor and its counsel and advised that RioCan intended to make a higher offer for the Garden City Property by August 31, 2017.

[13] On August 17, 2017, counsel for RioCan wrote to counsel to the Applicants and the Monitor and provided an offer to purchase the Garden City Property for a purchase price of \$6 million, stating, in part, as follows:

Re: 2311 McPhillips Street, Winnipeg (the "Garden City Property")

As you are aware, we are counsel to RioCan Real Estate Investment Trust ("RioCan"). RioCan and its partner, Bayfield Realty Advisors Inc., ("Bayfield") are the shareholders of 1562903 Ontario Limited (the "Mall Owner"), the entity which is the registered owner of the Winnipeg Garden City Mall appurtenant to the Garden City Property.

I am writing further to service of your Motion Record on August 11, 2017 in the Sears Canada CCAA proceedings seeking the approval of the sale of the Garden City Property to WCRE Investments Ltd. ("WCRE") for a purchase price of five million dollars (\$5,000,000).

...

While it was RioCan's intention to deliver its Binding Bid in accordance with the SISP timelines, given the service of your sale approval motion, I enclose herewith a Binding Bid by the Mall Owner to purchase the Garden City Property for a purchase price of \$6,000,000 on terms substantially identical to those set out in the WCRE agreement, with the **only** remaining condition of Closing being the Court granting an Approval and Vesting Order in favour of the Mall Owner. Concurrently with the transmission of this letter and enclosed Binding Bid, my firm is walking a deposit cheque over to FTI's office in the amount of \$6,000,000, so that the Monitor may confirm receipt of same to the Court on Friday.

...

RioCan is reacting to the service of the sale approval motion in good faith and on an expedited basis, in order to provide Sears Canada and its creditors with certainty of closing and a material financial upside as compared to the proposed WCRE transaction.

Issue

[14] Should I approve the sale of the Garden City Property to WCRE on the terms of the APA and grant the approval and vesting order in the face of RioCan's offer to purchase the property for an additional \$1 million?

Positions of the Parties

[15] The Applicants submit that I should approve the sale of the Garden City Property to WCRE on the terms of the APA because to allow RioCan's "eleventh hour" offer would jeopardize the integrity of the SISP and undermine the sales process.

[16] RioCan and Sears Canada's employees and retirees submit that RioCan's bid should be allowed to proceed in the SISP because it provides an additional \$1 million to the Applicants' stakeholders. They argue that the paramount consideration in deciding whether to approve the sale should be to maximize recovery for all of the stakeholders.

Analysis

[17] There is no dispute that before I can approve the sale to WCRE under the APA I must be satisfied that the factors set out in s. 36(3) of the CCAA have been met. The APA was not the product of the court-approved SISP but the result of efforts by Sears Canada to canvass the market for interested purchasers before the Initial Order. As such, the transaction contemplated by the APA is in effect a pre-packaged sale of the Garden City Property.

[18] It is clear that the court should assess the pre-packaged sale of assets and the sales processes giving rise to them in the same manner in which the court assesses post-filing sale transactions and sales processes. In doing so, I must consider the factors enumerated in s. 36(3) of the CCAA and the *Soundair* principles. In my view, in assessing pre-packaged sale transactions and sales processes, there is a heightened need for a robust and transparent record before the court. Pre-filing sales processes should be subject to greater scrutiny to ensure that the process was conducted in a fair and effective manner given the lack of supervision by the court and the Monitor.

[19] RioCan submits at para. 14 of its factum:

... that the evidence before the Court in support of the Applicants' motion for the Approval and Vesting Order does not satisfy the criteria enumerated in section 36 of the CCAA, nor does it satisfy the principles enunciated in the *Soundair* line of cases and, more specifically, those cases such as *Nelson* and *Sanjel* dealing with sales processes conducted prior to a CCAA filing such as the one conducted by Mr. Champion on behalf of Sears Canada.

[20] Counsel to the Applicants, Mr. Irving, candidly conceded during his reply argument that the sales process leading up to the APA with WCRE was “not a perfect process”. Further, he agreed that “maximum recovery” for the stakeholders should be paramount in a CCAA proceeding.

[21] On the record before me, I am not satisfied that the consideration to be received for the Garden City Property under the APA is “reasonable and fair, taking into account [its] market value” as is required by s. 36(3)(f) of the CCAA.

[22] In this case I must balance the concerns of the Applicants and the Monitor that to allow RioCan’s bid to proceed in the SISF could affect the integrity of the sales process against the stakeholders’ desire to maximize recovery for the Applicants’ estate. RioCan’s bid is 20% higher than the purchase price in the APA. This is a significant amount. It is for this reason that Sears Canada’s employees and retirees submit that I should allow it to proceed in the SISF. It is also the reason that I am concerned that the price in the APA is less than the property’s fair market value.

[23] The pre-packaged sale transaction and the fact that it was to be removed from the SISF was not disclosed to anyone, including the court, until the Applicants’ motion material was served on August 11, 2017. Under these circumstances, I do not consider RioCan’s bid to be an “eleventh hour” bid as Mr. Irving described it. RioCan’s bid complies with the SISF that I approved and contains a significantly higher price than the APA.

Conclusion

[24] For all of these reasons, I have concluded that RioCan’s bid should be permitted to proceed in the SISF so as to achieve the maximum recovery possible for all of the Applicants’ stakeholders.

[25] The Applicants’ motion for an approval and vesting order is, therefore, dismissed. There shall be no costs of the motion.


HAINEY, J.

Date: October 6, 2017