

CITATION: BBB Canada Inc., 2023 ONSC 2308

COURT FILE NO.: CV-23-694493-00CL

DATE: 2023-04-14

SUPERIOR COURT OF JUSTICE - ONTARIO

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
ARRANGEEMNT OF BBB CANADA LTD.**

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Shawn Irving, Emily Paplawski and Blair McRadu*, for the Applicant Bed Bath & Beyond Ltd.

Jeffrey Levine and Wael Rostom, for Sixth Street Specialty Lending, Inc. (FILO Agent)

Linda Galessiere, for Landlords of BBB Canada, namely, RioCan; Ivanhoe, SmartCentre; Centrecorp and Royop

Max Freedman, U.S. Counsel to the Applicant

Kevin Zych, Michael Shakra and Joshua Foster, for the Monitor, Alvarez & Marsal Canada Inc.

Roger M. Jaipargas, for 1431582 Alberta Inc.

Evan Cobb, for JPMorgan Chase (ABL Lenders)

Nate Fennema, Mike Shakra, Sean Zweig and Joshua Foster, for the Monitor, Alvarez & Marsal Canada Inc.

John C. Wolf, for Sun Life Assurance Company, Heritage Greene Development Corporation, Skyline Retail Real Estate Holdings Inc., and Queensway 427 Centre Inc.

Monique Sassi, for the Hilco Merchant Retail Solutions, ULC, Gordon Brothers Canada ULC, Tiger Asset Solutions Canada, ULC, and B. Riley Retail Solutions ULC

Craig Firth, for Preston West Properties Ltd.

Steven Weisz, for Canadian Tire Corporation

Kyle Plunkett, for DKB Capital

Heather Meredith, for Langley City Square Properties Ltd., Sunstone Opportunity (2007) Realty Trust and Fiera Real Estate Core Fund GP Inc. on behalf of Fiera Real Estate Core Fund LP

Dina Peat, for 1651051 Alberta Ltd., 1826997 Ontario Inc., Yonge Bayview Holdings Inc., Airport Highway 7 Developments Limited, Woodhill Equities Inc. and Winston Argentinia Developments Limited

HEARD AND

DETERMINED: April 11, 2023

ENDORSEMENT

[1] On February 10, 2023, BBB Canada Ltd. (the "Applicant"), along with Bed Bath & Beyond Canada L.P. ("BBB LP", and together with the Applicant, "BBB Canada"), was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the "CCAA") pursuant to an Initial Order (the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed to act as the Monitor (the "Monitor"). On February 21, 2023, the court granted an Amended and Restated Initial Order (the "ARIO") and a Sale Approval Order.

[2] BBB Canada has retained Retail Ventures CND Inc. ("RVC") as its exclusive listing agent for the purpose of facilitating the sale of leases and other property rights for some or all of BBB Canada's retail stores across Canada (the "Leases").

[3] BBB Canada brings this motion for an order approving the Omnibus Assignment and Assumption of Leases, FF&E and Trade Fixtures Agreement, dated March 28, 2023 (the "DKB Capital Agreement") between BBB LP, Bed Bath & Beyond Inc. ("BBBI") and 11607987 Canada Inc., dba DKB Capital ("DKB Capital"). Under the terms of the Amended and Restated Order ("ARIO"), court approval is required for the DKB Capital Agreement.

[4] The Applicant accordingly seeks the following orders:

- (a) an order approving the DKB Capital Agreement;
- (b) an order assigning certain Leases to DKB Capital pursuant to section 11.3 of the CCAA on an unopposed basis;
- (c) an order vesting BBB LP's right, title and interest in and to certain Leases and other purchased assets in DKB Capital free and clear of all Encumbrances other than permitted encumbrances identified in, or pursuant to, the DKB Capital Agreement; and
- (d) an order directing that the unredacted copy of the DKB Capital Agreement be treated as confidential and sealed, and not form part of the public record, until the earlier of: (1) the closing of the DKB Capital Agreement, (2) disclaimer of the Leases subject to the DKB Capital Agreement, or (3) any further order of the Court.

[5] The Applicant submits that the DKB Capital Agreement is the culmination of a marketing process and should be approved on the basis that the criteria set out in section 36(3) of the CCAA are clearly satisfied.

[6] The Applicant further submits that the consideration paid by DKB Capital for the applicable Leases is fair and reasonable in the circumstances. It represents the highest, non-overlapping executable offer received within the marketing process.

[7] The Monitor supports the position of the Applicants and no party opposed the requested relief.

[8] The facts regarding this motion are fully set out in the affidavit of Wade Haddad.

[9] The following issues are raised on this motion:

- (a) should the court approve the DKB Capital Agreement and grant the proposed Assignment, Approval and Vesting Order;
- (b) should the court assign certain Leases to DKB Capital pursuant to section 11.3 of the CCAA on an unopposed basis; and
- (c) should the court grant an order directing that the unredacted DKB Capital Agreement be treated as confidential and sealed, and not form part of the public record, until the earlier of: (1) the closing of the DKB Capital Agreement, (2) disclaimer of the Leases subject to the DKB Capital Agreement, or (3) any further order of this court.

[10] Section 36 of the CCAA sets out the legal test for obtaining court approval that applies where a debtor company seeks to sell assets outside the ordinary course of business during a CCAA proceeding.

[11] The Applicant submits that, taking into account the criteria listed in Section 36(3) of the CCAA, the court should approve the DKB Capital Agreement and grant the proposed Assignment, Approval and Vesting Order.

[12] I am satisfied that the record establishes that the process followed by the listing agent was comprehensive and garnered significant interest from third parties.

[13] Further, the Monitor has been involved in the marketing process and supports the requested relief. The Monitor's views in this respect are entitled to deference.

[14] BBB Canada, RVC, and the Monitor are each of the view that the consideration to be received by BBB Canada under the DKB Capital Agreement is fair and reasonable.

[15] The Applicant submits that BBB Canada and the listing agent undertook a comprehensive sales and marketing process for the sale of the Leases. I am satisfied that the evidence establishes there is ample evidence that the market has been thoroughly tested in order to obtain the best price.

[16] I am also satisfied that the DKB Capital Agreement is beneficial to the creditors and other stakeholders of the Applicant.

[17] The DKB Capital Agreement provides that certain of the Leases will be assigned in accordance with section 11.3 of the CCAA on an unopposed basis.

[18] Section 11.3 of the CCAA gives this Court jurisdiction and the discretion to make an order assigning the rights and obligations of the debtor company.

[19] The Applicants submit that the requested assignments are critical to closing the transactions contemplated in the DKB Capital Agreement and are essential to the ability of the Applicant to realize upon the value of these transactions for the benefit of all stakeholders. In addition, there can be no suggestion that counterparties are being treated unfairly, as each of the requested assignments are proceeding on an unopposed basis.

[20] I accept these submissions and I am satisfied that the assignment of certain Leases should be approved.

[21] It is noted, however, that the parties have expressly agreed that in respect of any leases not subject to this Order assigning leases pursuant to s. 11.3 of the CCAA, the issue of whether the test under s. 11.3 of the CCAA has been met in respect of any future motion under s. 11.3 of the CCAA is to be treated as de novo in respect of any further motion to compel assignment of any other leases. The issuance of this Order assigning leases shall not be directly or indirectly argued as the basis for granting such relief in the future.

[22] Finally, the Applicant requests that the unredacted copy of the DKB Capital Agreement be temporarily treated as confidential and sealed, and not form part of the public record, until the earlier of: (1) the closing of the DKB Capital Agreement, (2) disclaimer of the Leases subject to the DKB Capital Agreement, or (3) any further order of this Honourable Court.

[23] The test for a sealing order was established by the Supreme Court in *Sierra Club*, and subsequently recast in *Sherman Estate*. The test requires the court to consider whether:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measure will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[24] The request for the proposed sealing order is supported by the Monitor.

[25] Having considered the *Sherman Estate* test, I am satisfied that it is appropriate to grant the sealing order. The proposed order is limited both in scope and time and is appropriate in the circumstances.

[26] The motion is granted and the order has been signed.



Chief Justice G.B. Morawetz

Date: April 14, 2023