

CITATION: BBB Canada Ltd., 2023 ONSC 1014
COURT FILE NO.: CV-23-00694493-00CL
DATE: 2023-02-13

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 ARRANGEMENT
OF **BBB BED BATH & BEYOND CANADA LTD.**

Applicant

BEFORE: Chief Justice G.B. Morawetz.

COUNSEL: *Marc Wasserman, Shawn Irving, Dave Rosenblat and Emily Paplawski*, for the Applicant

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

Evan Cobb, for JPMorgan Chase (ABL Lenders)

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

HEARD and

DETERMINED: February 10, 2023

REASONS: February 13, 2023

ENDORSEMENT

[1] At the conclusion of the hearing on February 10, 2023, the Initial Order was granted with reasons to follow. These are the reasons.

Introduction

[2] BBB Canada Limited (the “Applicant”) brings this application for an Initial Order and related relief under the *Companies’ Creditors Arrangement Act* (“CCAA”).

[3] While Bed Bath & Beyond Canada LP (“BBB LP” and together with the Applicant, “BBB Canada”) is not an applicant, the Applicant seeks to have the stay of proceedings and other benefits of the Initial Order under the CCAA extended to BBB LP.

[4] The Applicant also seeks a temporary stay of any proceeding against its parent company Bed Bath & Beyond Inc., (“BBBI”) and together with its various U.S. subsidiaries and BBB Canada, (the “Bed Bath & Beyond Group”) arising out of any indemnity, guarantee or surety relating to a lease of real property by BBB LP or the Applicant.

[5] The evidentiary basis for the requested relief is set out in the Affidavit of Holly Etlin, Interim Chief Financial Officer of the Bed Bath & Beyond Group.

[6] The Bed Bath & Beyond Group has been in financial difficulty for a number of years, suffering significant net losses since 2018 and over this period, BBB Canada has had a decline in revenues.

[7] Ms. Etlin states that in an effort to improve the Bed Bath & Beyond Group’s financial performance, former management embarked on a series of initiatives designed to transform the business. Unfortunately, the financial situation deteriorated. The Bed Bath & Beyond Group’s situation significantly worsened throughout 2022, with declining sales in both the United States and Canada, multiple credit rating downgrades, cash flow constraints, and significant inventory reductions.

[8] Ms. Etlin also states that the financial situation continued to decline in January 2023. The ABL Agent (as defined below) declared events of default and delivered notices of acceleration under both the ABL Facility and BBBI’s then US \$375 million FILO Facility (of which BBB LP is also a borrower and the Applicant is a guarantor), thereby causing the principal amount of such facilities, together with interest and other fees and obligations, to become immediately due and payable. The ABL Agent also declared cash dominion, which restricted the entire Bed Bath & Beyond Group, including BBB Canada, from spending any cash on hand.

[9] Very recently, BBBI announced a proposed underwritten public offering of shares (the “Offering”), which, if all conditions are met, will provide BBBI with additional time to continue its restructuring efforts for Bed Bath & Beyond Group’s business in the United States outside of a bankruptcy filing.

[10] Ms. Etlin states, however, that efforts to identify a going concern solution for Canada have not been successful. The Bed Bath & Beyond Group has concluded that there is not enough capital available to restructure both its business in the United States and properly restructure the Canadian business to achieve profitability.

[11] Ms. Etlin states that BBB Canada is not profitable on a standalone basis and after consideration of all strategic alternatives, the Bed Bath & Beyond Group has determined that it is no longer in a position to provide financial and operational support to BBB Canada. BBB Canada is insolvent and will be unable to satisfy its obligations. BBB Canada has commenced these proceedings in order to effect an orderly liquidation of its remaining inventory with assistance from a third-party professional liquidator and intends to vacate its leased retail stores and premises.

Business Structure

[12] The Applicant is a federal corporation incorporated pursuant to the *Canada Business Corporations Act* and has a registered office in Toronto, Ontario. The Applicant is a wholly owned subsidiary of BBBI, a corporation incorporated in the State of New York with a head office in Union, New Jersey. BBBI is the ultimate parent corporation of the entire Bed Bath & Beyond Group.

[13] BBB LP is a limited partnership formed under the laws of Ontario with its principal place of business in Richmond Hill, Ontario. The Applicant is the general partner and 99% unitholder of BBB LP and while BBB LP is not an applicant in this proceeding, the Applicant seeks to have the stay of proceedings and other provisions of the Initial Order extended to BBB LP. BBB LP is the operating entity in Canada which conducts substantially all of Bed Bath & Beyond's retail operations and is party to all commercial real property leases in Canada.

Business of the Bath Bed & Beyond Group

[14] The Bed Bath & Beyond Group is a retailer that sells a wide assortment of merchandise in the home, baby, beauty and wellness markets. Within Canada, BBB Canada operates 54 Bed Bath & Beyond stores and 11 buybuy Baby stores. As of January 31, 2023, BBB LP employed approximately 387 full-time employees and 1038 part-time employees in connection with its retail operations across Canada.

[15] Ms. Etlin further states that each BBB Canada retail store is located in premises leased by BBB LP. The vast majority of retail leases to which BBB LP is party are indemnified by BBBI.

[16] BBB Canada relies on BBB on for certain administrative and business support services (the "Shared Services") that are integral to BBB Canada's operations. In addition, all procurement of merchandise for BBB Canada is completed by Liberty Procurement Co. Inc., a wholly owned subsidiary of BBBI. Ms. Etlin states that BBB Canada cannot operate or function without the provision of the Shared Services from BBBI.

Financial Position of the Applicant

[17] As at November 26, 2022, the Bed Bath & Beyond banner in Canada had total assets of approximately \$427.4 million, and total liabilities of approximately \$342.8 million. The buybuy Baby banner in Canada has total assets of approximately \$52.7 million in total liabilities of approximately \$86.9 million.

[18] With respect to the secured debt position, Ms. Etlin states that BBBI, certain of its US and Canadian subsidiaries (including BBB LP), JPMorgan Chase Bank, N.A., as administrative agent and collateral agent (in such capacity, the "ABL Agent"), Sixth Street Specialty Lending, Inc. as the "first in, last out" agent ("Sixth Street"), and certain lenders, are parties to an Amended Credit Agreement.

[19] The Amended Credit Agreement provides for aggregate revolving commitments of US \$565 million (the “ABL Facility”) and a “first in, last out” term loan facility of US \$475 million (the “FILO Facility” and together with the ABL Facility, the “Credit Facilities”). Prior to the Second Amendment to the Amended Credit Agreement, (the “Second Amendment”), the aggregate revolving commitments under the ABL Facility were US \$1.13 billion and the FILO Facility was US \$375 million.

[20] In Canada, the Credit Facilities are secured against all present and after-acquired personal property of BBB LP and the Applicant.

[21] On or around January 13, 2023, certain events of default were triggered under the Amended Credit Agreements (collectively, the “Events of Default”) as a result of BBBI’s failure to prepay an over-advance and satisfy a financial covenant, among other things. On January 23, 2023, the ABL Agent informed the Bed Bath & Beyond Group that, as a result of the ongoing events of default, a cash dominion (the “Cash Dominion Period”) had occurred and the ABL Agent had delivered the applicable dominion notices. Ms. Etlin states that such significant restrictions on the Bed Bath & Beyond Groups cash use severely hampered its ability to continue operating in both Canada and the United States. On January 25, 2023, the ABL Agent sent a notice of acceleration and default interest (the “Acceleration Notice”) to the Bed Bath & Beyond Group (including BBB Canada) as a result of the ongoing Events of Default.

[22] The Bed Bath & Beyond Group undertook a further in-depth review of all strategic alternatives. On February 6, 2023, BBBI announced that an equity offering was proceeding in the United States but no acceptable bids were received for any executable transaction involving the Canadian business.

Need for CCAA Relief

[23] Ms. Etlin advises that BBB Canada is in urgent need of protection under the CCAA. BBB Canada is not profitable on a standalone basis. In 2021, both the Applicant and BBB LP reported net losses. For the nine-month period ending November 26, 2022, both the Bed Bath & Beyond and the buybuy Baby banners in Canada reported significant net losses and negative EBITDA. Ms. Etlin further states that BBB Canada does not have the capacity or ability to independently effect a recapitalization or restructuring of the Canadian operations without the support of BBBI. BBB Canada is insolvent from a balance sheet and cash flow perspective.

Discussion

[24] Having reviewed the record and hearing submissions, I am satisfied that the Applicant is insolvent and there are claims against the Applicant in excess of \$5 million. The Applicant is a “debtor company” as defined in the CCAA. In arriving at the conclusion that the Applicant is insolvent, I have taken into account that BBB Canada is not profitable on a standalone basis. For the nine-month period ending November 26, 2022, the Bed Bath & Beyond banner in Canada reported a net loss of \$87.6 million and EBITDA was negative \$81.8 million. For the same period, the buybuy Baby banner in Canada reported a net loss of \$11.9 million and its EBITDA was negative \$10.4 million. In addition, I am satisfied that the Applicant does not have the capacity to

effect a recapitalization or restructuring of its operations without the support of BBBI and finally, the Bed Bath & Beyond Group has determined that it is no longer in a position to provide financial and operational support to BBB Canada.

[25] I am also satisfied that this court has jurisdiction over these proceedings. The chief place of business for the Applicant is Ontario. The Applicant's registered office is in Toronto, Ontario and BBB LP is formed pursuant to the laws of Ontario. The corporate office is located in Mississauga, Ontario and a substantial number of retail stores are located in Ontario.

[26] The Applicant wishes to conduct a controlled and orderly winddown of operations in Canada for the benefit of all stakeholders. The CCAA can be used for the purpose of winding down a business. Examples include *Target Canada Co. (Re)*, 2015 ONSC 303 at para. 31; *Express Fashion Apparel Canada Inc.* and *Express Canada GC GP, Inc. (Re)*, (May 4, 2017) Ontario SCJ (Commercial List), Court File No. CV-17-11785-00CL (Initial Order) at para. 10 and *Forever XXI ULC (Re)*, September 29, 2019, Ontario SCJ, (Commercial List), Court File No. CV-19-00628233-00CL (Endorsement).

[27] With respect to the request for a stay of proceedings and related relief during the Initial Stay Period, section 11.02(1) of the CCAA permits the court to grant an initial stay of up to 10 days, provided such a stay is appropriate and the applicants have acted with due diligence and in good faith. At an initial hearing the relief must be limited to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period.

[28] The CCAA expressly applies to debtor companies, but not partnerships. However, where the operations of partnerships are integral and closely related to the operations of the Applicant, the CCAA Court has jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. Such relief has been granted in *Target*, *supra* above at paras. 42 – 43 and in *4519922 Canada Inc. (Re)*, 2015 ONSC 124, para. 37.

[29] In this case, the Applicant seeks to have the stay of proceedings and other provisions of the Initial Order extended to BBB LP, as it is related to the Applicant, carries on operations that are integral to the business of the Applicant, is party to all Canadian retail leases, and is a guarantor under the Credit Facilities.

[30] I am satisfied that it is appropriate to grant the Stay of Proceedings and to extend such stay to cover BBB LP.

[31] The Applicant also requests a stay of certain derivative claims against BBBI. Most of the retail leases to which BBB LP is a party are subject to an indemnity provided by BBBI in favour of the landlord. Although BBBI is not an applicant, the Proposed Initial Order includes the temporary stay of any proceeding against or in respect of BBBI arising out of or in connection with any indemnity, guarantee or surety relating to a lease of real property by BBB LP or the Applicant. The proposed Initial Order also provides that any landlord claim pursuant to a guarantee in relation to either BBB LP or the Applicant shall be unaffected and shall not be released or

affected in any way in any Plan filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* (“BIA”).

[32] The Applicant submits that the CCAA Court has jurisdiction under section 11 to grant a third party stay and references *Target, supra* at para. 50, *McEwan Enterprises Inc.*, 2021 ONSC 6453 at para. 45, *Laurentian University of Sudbury* 2021 ONSC 659 at paras. 30 – 33 and *Lydian International Limited*, 2019 ONSC 7473 at para. 39. The Applicant submits that section 11.04 of the CCAA does not prevent the court from granting such a remedy in its discretion on the basis that the section is inapplicable, as the indemnities at issue here are not guarantees. In its factum, the Applicant also references that the Alberta Court of Queen’s Bench in *Northern Transportation Company Limited (Re)*, 2016 ABQB 522 at para. 69 took a contrary view. The contrary view was also expressed in *Cannapiece Group Inc. v. Carmela Marzili*, 2022 ONSC 6379.

[33] This issue is not free of doubt and affected landlords have not been served and did not appear at this hearing.

[34] There are outstanding issues as between the Applicant and the landlords that have to be addressed in the near future. In an effort to encourage discussions as between the Applicant and the various Landlords, I am prepared to grant this requested stay of proceedings in respect of BBBI for the initial 10 day period prior to the comeback hearing. To be clear, this stay of proceedings will expire on February 21, 2023, unless further extended at the comeback hearing.

[35] I am also satisfied that it is appropriate to permit the Applicant to make prefiling payments, with the consent of the Monitor, to critical suppliers up to a maximum aggregate amount of \$500,000, on terms set out in the Initial Order.

[36] In addition, the Applicant proposes that the Monitor, its counsel, counsel to BBB Canada be granted a Court-ordered charge as security for their respective fees and disbursements relating to services rendered in respect of BBB Canada (the “Administration Charge”). With the concurrence of the proposed Monitor, the Applicant proposes that the Administration Charge for the first 10 days be limited to \$0.55 million and will be seeking to increase the Charge at the comeback hearing. The court has jurisdiction to grant such relief pursuant to section 11.52 of the CCAA and in the circumstances, I am satisfied that it is appropriate to grant the requested relief.

[37] I am also satisfied that it is appropriate to grant a Charge in favour of the Directors and Officers of BBB Canada (the “D&O Charge”), in the requested amount of \$7.5 million for the first 10-day period.

[38] In summary, an Initial Order is granted with Alvarez & Marsal Canada Inc. being appointed as Monitor. The comeback hearing has been scheduled for Tuesday, February 21, 2023, at 9:00 a.m.



Chief Justice G.B. Morawetz

Date: February 13, 2023