



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-24-00718993-00CL **DATE:** May 3, 2024

NO. ON LIST: 1

TITLE OF PROCEEDING: TED BAKER CANADA INC. ET AL v YORKDALE SHOPPING CENTRE HOLDINGS INC.

BEFORE JUSTICE: BLACK, J

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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ENDORSEMENT OF JUSTICE BLACK

Overview

1. On April 24, 2024 I made an initial order in this matter granting CCAA protection for the Applicants (in this endorsement I will continue to use terms as defined in my initial endorsement and in the materials filed).
2. This morning's hearing was the "comeback" contemplated in the CCAA and in my initial order.
3. It is evident that since the initial attendance the Applicants, the Monitor, CIBC and various other interested parties and stakeholders have been working diligently and cooperatively to determine the next steps with a view to maximizing value for all concerned.
4. The plan proposed by the Applicants this morning, with the support of the Monitor and other stakeholders, contemplates a realization process to sell the Applicants' remaining Merchandise and FF&E (fixtures, furnishings and equipment) over the course of 12 weeks (the "Sale").
5. The hope is that viable third party going concern transactions will be identified for some or all of the Applicants' business or assets, and the proposed realization process is sufficiently flexible to allow the Sale to be modified to allow for such third party going concern transaction(s).

Realization Process Approval Order

6. Among other features, the proposed Realization Process Approval Order will:
 - a. approve a consulting agreement between Ted Baker NA and Gordon Brothers Canada ULC and Gordon Brothers Retail Partners, LLC (together, the “Consultant”) dated April 30, 2024;
 - b. approve Canadian and U.S. sale guidelines for the orderly realization of the Merchandise and FF&E at Canadian and U.S. locations, stores and warehouses; and,
 - c. authorize the Applicants, with the assistance of the Consultant, to undertake a realization process in accordance with the Realization Process Approval Order, the Consulting Agreement and the Sale Guidelines.

ARIO

7. In addition, the proposed amended and restated initial order (“ARIO”) will, among other things:
 - a. extend the Stay Period until August 2, 2024;
 - b. approve a key employee retention plan (the “KERP”), grant a court-ordered charge as security for payments under the KERP, and grant a sealing order in respect of the KERP;
 - c. authorize the Applicants to enter into the DIP Term Sheet and borrow under the DIP Facility in the maximum (principal) amount of USD \$28 million, secured by the DIP Lender’s Charge; and
 - d. increase the Administration Charge to USD \$1.5 million and the Directors’ Charge to USD \$5 million.

The U.S. Proceedings

8. In terms of the parallel proceedings in the United States Bankruptcy Court for the Southern District of New York seeking an order to recognize and enforce these CCAA proceedings, the Applicants were granted provisional relief in the Chapter 15 Case, including a temporary restraining order to obtain the benefits of a stay of proceedings, on April 26, 2024. The final recognition hearing is scheduled for May 8, 2024, and I am advised that the Foreign Representative intends to seek recognition by the US Court at that time of the ARIO and the Realization Process Approval Order.

Activities Since the Initial Order

9. The Applicants and the Monitor report that, since the granting of the Initial Order, they have been working to stabilize the Applicants’ business and operations, advising stakeholders including landlords, employees, suppliers, license partners and others of the Initial Order, as well as commencing and pursuing the Chapter 15 Case, developing the KERP, negotiating the DIP Term Sheet, developing the Sale Guidelines and working with the Consultant in that regard, and responding to inquiries from numerous creditors and stakeholders.
10. In addition, the Applicants advise that since the Initial Order, they have contacted various stakeholders to communicate their receptiveness to potential going concern transactions, and that they have fielded a number of inquiries, and entered into non-disclosure agreements in that regard.

11. The Applicants and the Monitor also provide details about the process undergone to select the Consultant, and details about the Sale, which is to commence in the near term on a date to be agreed by the Applicants and the Consultant, and to conclude within 12 weeks. The Applicants and Monitor also provide details about the Consultant's fee for this work.

Items for Which Approval Sought

12. Having regard to the evidence about these various steps and activities since the Initial Order, and with the concurrence of the Monitor and without opposition at this stage from any stakeholders, the Applicants ask that the court approve:
 - a. The Consulting Agreement and Sale Guidelines;
 - b. The KERP and the KERP Charge;
 - c. A Sealing Order in respect of the KERP;
 - d. The DIP Term Sheet and the DIP Lender's Charge;
 - e. Proposed increases to the Administration Charge and the Directors' Charge; and
 - f. An extension of the Stay Period until August 2, 2024.

Discussion and Approvals Granted

13. Based on all of the evidence before me, I am prepared to grant the relief sought.
14. I am satisfied that the steps proposed by the Applicants and endorsed by the Monitor meet the criteria set out in Nortel Networks Corp (Re), 2009 CanLII 39492 (ONSC) (the so-called "Nortel Factors") and the criteria enumerated in s. 36(3) of the CCAA.
15. More particularly, it appears that the the Sale is warranted at this time, and is a critical and urgent part of the realization process (the urgency comes in part from the seasonal nature of the Applicants' business and their current liquidity challenges). I am satisfied that the process undertaken to select the Consultant was reasonable and appropriate, and that the assistance of the Consultant is an important element to ensure that the realization process will maximize recoveries. The Consulting Agreement nonetheless affords the Applicants the flexibility to pursue a going concern transaction(s) if any emerge.
16. The terms of the Consulting Agreement, the Sale Guidelines and Sale Approval Order are similar to and consistent with such agreements and orders that have been approved in a number of other retail insolvencies, including Nordstrom, Mastermind Toys, and Bed Bath & Beyond Canada.
17. As noted, the Monitor has been consulted closely with respect to all aspects of the proposed process, and supports the relief sought.

18. The KERP is intended to incentivize the retention of eight key Canadian and U.S. employees who have been identified as critical to a successful realization process. The KERP Charge is proposed in order to secure amounts payable under the KERP up to a maximum of USD \$250,000.00.
19. The court's discretion under the CCAA to approve a KERP and KERP Charge is well established, and the jurisdiction for these elements is found in s. 11 of the CCAA (and the court's broad power thereunder to make such orders as are appropriate in a CCAA proceeding. As the Applicants note, KERPs are often seen in the context of retail insolvencies.
20. Inasmuch as the KERP schedule contains commercially sensitive and personal information about the employees involved, I am satisfied that the sealing order sought for the KERP schedule is reasonable and appropriate in the circumstances.
21. As discussed in my initial endorsement in this matter, CIBC's willingness to continue to provide funding has been indispensable to the continued activities of the Applicants. Since the Initial Order, CIBC has agreed to provide, in the capacity as DIP Lender, additional funding to Ted Baker Canada and Ted Baker Limited as Borrowers, and Fashion Canada and Fashion US, as guarantors under a senior secured, super priority, debtor-in-possession, revolving credit facility (the "DIP Facility"). The DIP Lender's Charge is a necessary precondition to the DIP Facility being available, and the DIP Facility is critical to the steps contemplated in the relief sought.
22. Under s.11.2(1) of the CCAA, the court has authority to grant an interim financing charge in an amount the court considers appropriate, and which is consistent with the pre-filing status quo, upholding the relative priority of each secured creditor. I am satisfied, based on the evidence in the record, that the proposed DIP Facility and DIP Lender's Charge meet these conditions and that the amount (up to a maximum principal amount of USD \$28 million) is appropriate.
23. It was contemplated at the time of the Initial Order that the Administration Charge and the Directors' Charge would have to be increased at the time of the comeback hearing. I am advised that the DIP Lender does not object to the proposed increases, and accordingly I grant them.
24. Given that it is evident to me that the Applicants have been acting diligently and in good faith, and given the concurrence of the Monitor, I extend the Stay Period until August 2, 2024 as requested. This will allow the Applicants, with the assistance of the Consultant and the Monitor, to conduct and complete the Sale. It will also give the Applicants and the Monitor the time and space to continue to explore a potential going concern transaction or transactions.

Conclusion

25. For these reasons, I grant the orders sought by the Applicants, and direct that this matter come back before the court on or about August 2, 2024 (or sooner if additional direction from the court is required).


