Court File No.: CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

FACTUM OF OXFORD PROPERTIES GROUP

(Motion to Appoint Arbitrator, Returnable September 20, 2018)

September 19, 2018

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Lawyers for Oxford Properties Group

PART I - OVERVIEW

1. This is a motion brought by Oxford for an order appointing John A. Keefe ("**Mr. Keefe**") as arbitrator to determine the Current Value of the Newmarket Property pursuant to section 12(d)(ii) of an Option Agreement between Sears and Oxford.

2. Oxford files this factum in support of its motion, and in response to a Joint Cross-Motion brought by Sears and the Monitor[1] for (i) an order appointing Justice James Farley ("**Justice Farley**") as arbitrator, or (ii) in the alternative, an order appointing Justice Hainey or another judge of the Commercial List to act as arbitrator, and (iii) an order that the arbitrator determine not only the Current Value of the Newmarket Property, but also other issues not covered by the arbitration agreement.

3. No one questions the fact that Justice Farley is a superb commercial judge. However, the sole issue in the arbitration is the current value of a commercial property that involves valuation and planning issues, and it is Oxford's position that Mr. Keefe is the person best suited to act as arbitrator due to his experience. A judge, whether sitting or retired, is not in a better position to determine such issues.

4. If the relief sought by Sears and the Monitor in their Joint Cross-Motion was granted, it would result in the Court re-writing the terms of the Option Agreement. It would also be contrary to section 5 of the SISP Approval Order dated July 13, 2017 that Oxford specifically negotiated, which was issued on consent of Sears and the Monitor.

5. To burden Justice Farley with the arbitration of the Current Value of the Newmarket Property will slow down the determination of that issue, in light of the large number of claims to be heard and decided by Justice Farley in his capacity as the Claims Officer.

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[1] Notwithstanding the delivery of a "Joint Motion Record" by Sears and the Monitor, and the filing of a Monitor's Report in support of its own motion, it is Oxford's position that: (i) the Option Agreement and the appointment of the arbitrator thereunder is an issue that is solely between the parties to the Option Agreement, being Sears and Oxford; (ii) the Monitor has no role to assert in the determination of who is appointed as arbitrator.

PART II - FACTS

6. Sears Canada Inc. ("**Sears**") and Regional Shopping Centres Limited (now Oxford Properties Group and OPGI Management Limited, along with Oxford Properties Retail Holdings II Inc. and CPPIB Upper Canada Mall Inc.) (collectively, "**Oxford**") are parties to an Option Agreement made as of January 21, 1994 (the "**Option Agreement**").[2]

7. The Option Agreement relates to a building and property located at 17600 Yonge Street Newmarket, Ontario (the "**Newmarket Property**").[3] The Newmarket Property was previously operated by Sears as a department store, and is physically connected to the Upper Canada Mall which is owned by Oxford.

8. The Option Agreement grants Oxford the right to purchase the Newmarket Property provided certain conditions are met (the "**Option**"). None of those conditions are at issue on this motion.

9. Oxford exercised the Option on June 29, 2018. As a result, a binding agreement of purchase and sale came into effect immediately between Sears and Oxford pursuant to section 11 of the Option Agreement.

10. The purchase price to be paid by Oxford is equal to the "Current Value" of the Newmarket Property, as defined in section 1(g) of the Option Agreement.[4]

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[2] Attached as Exhibit "A" to the Affidavit of Mudasir Marfatia sworn August 29, 2018 (the "**Marfatia Affidavit**"), Motion Record of the Respondent, Oxford Properties Group ("**Oxford Motion Record**"), Tab 2A.

[3] Marfatia Affidavit at para 4, Oxford Motion Record, Tab 2, p 8. The Option Agreement also covered a second Sears-owned property, known as the Newmarket Home Store (Store #1345) located at 17700 Yonge Street, Newmarket, Ontario (the "**Newmarket Home Store**") across the street from the Newmarket Property. Oxford previously exercised its right of first refusal and purchased the Newmarket Home Store in October, 2017. Accordingly, the Newmarket Property in respect of which Oxford exercised its option to purchase on June 29, 2018 is the only property to which the Option Agreement currently applies.

[4] Section 1(g) of the Option Agreement defines "Current Value" as: "[T]he most probable price for [the Sears Property] valued separately (in each case net after deduction of the outstanding principal and interest allocable to each of such parcels pursuant to any mortgages or other financings secured by or encumbering such lands and improvements), which the relevant lands and improvements or interest therein should bring in the current market at the time of determination, if exposed for sale in the open market, allowing for a reasonable period of time to find a buyer, under conditions requisite to a fair and equitable sale between a willing seller and willing buyer, on the basis that [the Sears Property] is capable of independent use provided that such independent use is then viable, and without taking into

11. Section 12 of the Option Agreement prescribes a three-step process for determining Current Value:

(i) ***Negotiation:*** The parties are first required to use the 7 day period after the Option is exercised to attempt to reach an agreement on Current Value. [5] Oxford and Sears did so, but were unable to come to an agreement.

(ii) ***Valuation*****:** If a negotiated agreement is not reached, the parties are then required to each appoint an appraiser to opine on Current Value. If the two appraisals are within 5 percent of each other the purchase price shall be the average of the two appraisals.[6] Oxford and Sears did so, but the appraisals were not within 5 percent.

(iii) ***Arbitration:*** As a third and final step, the Option Agreement mandates that Current Value be determined by a single arbitrator. If the parties cannot agree on an arbitrator within fifteen days then a judge of the Ontario Court (General Division) [now the Superior Court] is to make the appointment.[7] Oxford and Sears have been unable to agree on an arbitrator, hence the motions now before the court.

12. Current Value establishes the purchase price. On closing, Oxford is required to accept title to the Newmarket Property and assume (i) any mortgages that may exist, (ii) the Operating Agreement in respect of the Upper Canada Mall and (iii) any agreements registered on title. It is also required to provide an indemnity to Sears in respect of Oxford's assumption of all of these obligations from and after the closing date.[8]

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account any diminution in the value of the Sears Lands caused by the existence of any Sears lease to the Owner of any part of the Sears Lands, all as determined by a qualified Accredited Appraiser of the Appraisal Institute of Canada."

[5] Option Agreement at s. 12(a), Oxford Motion Record, Tab 2A, p 15.

[6] Option Agreement at ss. 12(a) to 12(d)(i), Oxford Motion Record, Tab 2A, pp 15-16.

[7] Option Agreement at s. 12(d)(ii), Oxford Motion Record, Tab 2A, p 16.

[8] Option Agreement at s. 8, 9, 13(c), Oxford Motion Record, Tab 2A, pp 9, 17.

13. As a result, on closing, from the purchase price all "usual and appropriate adjustments" applicable on any real estate transaction are made, the amount of any "liens, financial encumbrances and work orders which will not be removed on closing" and the "amount outstanding under any permitted mortgage or financing being assumed by [Oxford] under section 8" are deducted from the purchase price on closing.[9] In addition, "at the Closing, all amounts owing by Sears to [Oxford] or by [Oxford] to Sears in respect of the Upper Canada Mall shall be settled and set off or paid in full".[10]

14. The Option Agreement clearly provides that (i) Current Value, which is unrelated to the identity of the purchaser, and (ii) adjustments to the purchase price to be made on closing as between Oxford and Sears, are distinct issues. As the Monitor stated in an earlier Report to the Court in respect of the Newmarket Property specifically: "Under the option to purchase, once the Current Value has been determined, a secondary issue of purchase price adjustment must be considered."[11]

15. The *quantum* of the financial obligations between the parties that may result in an adjustment to the cash paid on closing, as provided in section 13(c) of the Option Agreement, includes the claim filed by Oxford ("**Oxford's Claim**")[12], which will be determined by the Claims Officer as part of the CCAA claims process.[13]

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[9] Option Agreement at ss. 11 and 13(b), Oxford Motion Record, Tab 2A, pp 14-15 and 16-17.

[10] Option Agreement at s. 13(c), Oxford Motion Record, Tab 2A, p. 17.

[11] Monitor's 21st Report to the Court dated July 20, 2018, para. 46.

[12] The Dispute Notice filed by Oxford stipulates that it is without prejudice to and expressly subject to Oxford's rights under the Option Agreement. This is to make clear that the determination of the *quantum* of the claim does not constitute an acceptance by Oxford that it is only entitled to a dividend on such amount, rather than an adjustment to the purchase price on closing, as provided under the Option Agreement.

[13] Marfatia Affidavit at para 8, Oxford Motion Record, Tab 2, p 9.

PART III - LAW AND ARGUMENT

A. Mr. Keefe is Qualified and Appropriate to Act as Arbitrator

16. There is no fixed test to be used by the court on a motion to appoint an arbitrator.[14]

17. There are, however, a number of factors that are typically considered. As set out below, several of those factors confirm that Mr. Keefe is eminently qualified and appropriate to act as the arbitrator in this case.

(i) Mr. Keefe Has Subject Matter Expertise

18. Where the proposed arbitration involves matters in a technical field (such as the value of commercial real estate, as in this case) it is preferable that the arbitrator have subject matter expertise.[15]

19. Sears and the Monitor have raised no issue with Mr. Keefe's qualifications or subject matter expertise, and rightly so, because his recognized experience in this area is significant and unquestionable. He has acted as both counsel and arbitrator in numerous arbitrations involving real estate and commercial leasing disputes, particularly those involving real estate valuations and the determination of fair market value. The only evidence before the Court as to the subject matter expertise of *any* proposed arbitrator is that relating to Mr. Keefe.

20. Justice Farley is a superb commercial judge. However, neither he, nor any particular judge, has subject matter expertise in valuing commercial real estate properties that involve market value and planning issues.

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[14] See for example *Axa Insurance v Belair Direct Insurance Co*, 2003 CarswellOnt 2992 at para 1 (SCJ), Oxford Book of Authorities, Tab 1.

[15] *Gasmo Investments Inc v 112660 Ontario Inc*, 2008 CarswellOnt 8763 at paras 3-6 (SCJ), Oxford Book of Authorities, Tab 2.

(ii) Mr. Keefe has no Connection to the Matter to be Arbitrated

21. An individual should not be appointed as arbitrator if he has any connection to the parties or the dispute that might create the appearance of a conflict or a reasonable apprehension of bias. The applicable test is whether an informed person, viewing the matter realistically and practically – having thought the matter through – would conclude that the potential arbitrator might be perceived as not being able to approach the arbitration with a totally fresh and open mind.[16]

22. As with his subject matter expertise, Mr. Keefe's independence has not been challenged by Sears or the Monitor, and rightly so: Mr. Keefe has no prior or ongoing engagement related in any way to this CCAA proceeding or the parties.

(iii) Mr. Keefe's Appointment is Consistent with the Wording of the Option Agreement

23. The wording of the contract in which the parties originally agreed to arbitrate their dispute is of paramount importance. An arbitrator should not be appointed if his appointment would conflict with the parties' contractual agreement as set out in the wording of the contract.[17]

24. Sears and the Monitor have not raised any objection to Mr. Keefe's appointment on this basis. They have not done so because there is nothing in the Option Agreement that could in any way be said to be inconsistent with the appointment of Mr. Keefe as arbitrator.

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[16] *ICP v JCP*, 2018 ONSC 4075 at para 44 [Comm List], Oxford Book of Authorities, Tab 3.

[17] J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd ed (New York: JurisNet, LLC, 2017) at 84, citing *Heyman v Darwins, Ltd*, [1942] AC 356 at 366 (HL) and *Huras v Primerica Financial Services Ltd* (2001), 55 OR (3d) 449 (CA).

B. The Relief Sought by Oxford is Consistent with the Terms of the Option Agreement and the Legal Principles of Arbitration

25. Fidelity to the words used by Oxford and Sears in the Option Agreement to express their contractual intentions is of paramount importance. As stated in the leading text on Arbitration in Canada: "The essence of arbitration is that it is consensual. … It all starts with what the parties have agreed."[18] Then, citing Lord Macmillan: "[I]t is clear that, as the arbitration clause is a matter of agreement, the first thing is to ascertain according to ordinary principles of construction what the parties have actually agreed."[19]

26. The Option Agreement provides that the arbitrator will answer one question: What is the Current Value of the Newmarket Property?

27. That one question is consistent with the original intention of Oxford and Sears regarding what would be arbitrated under the Option Agreement, by reference to both the overall structure of the Option Agreement, and the explicit language used in the contract's relevant provisions:

- Section 12 of the Option Agreement deals with "Determination of Current Value". The Court's jurisdiction to appoint an arbitrator is found exclusively in section 12(d)(ii) of the Option Agreement in relation to Current Value – and exists *nowhere else*, for any other issue.

- The arbitration provision in section 12(d)(ii) explicitly states that the arbitrator "shall determine the Current Value of the lands over which there is disagreement." There is no reference to the arbitrator deciding anything else, including any adjustments that may affect

[18] Casey, *ibid* at 51.

[19] Casey, *ibid* at 84, citing *Heyman v Darwins Ltd*, [1942] AC 356 at p 376 (HL) per Lord MacMillan.

the cash paid on closing or matters involving set off, which are referenced in other parts of the Option Agreement.

- "Current Value" is defined in section 1(g) of the Option Agreement and the parties provided specific direction to the arbitrator as to what is to be considered.

- References to the setting-off of claims and adjustments that may reduce the cash component of the purchase price on closing are only found in sections 11 and 13(b) and (c) of the Option Agreement. Yet those sections of the Option Agreement are plainly not subject to arbitration.

- The parties could have included a general arbitration clause in the Option Agreement and made any disagreement relating to, or arising under the Option Agreement subject to arbitration. They did not. They agreed to arbitration only in relation to the determination of Current Value in Section 12.

C. The Relief Sought by Sears and the Monitor is Not Consistent with the Terms of the Option Agreement

28. Sears and the Monitor seek to have "all matters relating to the Newmarket Property" determined by one party, whether wearing one hat or multiple hats, on the basis that it is "expedient", "efficient" and "entirely sensible". This is a clear attempt to do indirectly, what the Option Agreement expressly does not permit to be done directly.

29. In his affidavit sworn in support of the cross motion brought jointly by Sears and the Monitor, Philip Mohtadi states:

> Even though the Option Agreement is silent as to how disputes other than Current Value should be adjudicated, where resolution of those disputes ultimately bears on the price Sears Canada is to receive for the Newmarket Property, it is entirely sensible in the current

> circumstances, and fair to both parties, to have all these matters resolved by one qualified person.[20] [underlining added]

30. Put another way, Sears and the Monitor are asking the court to re-write the Option Agreement on the basis that it is "sensible" and "fair" (to them) in the circumstances.

31. The court is required to give effect to the contractual intentions of the parties. The court is not permitted to re-write the Option Agreement by ignoring an explicitly-limited arbitration clause and substituting instead a general dispute resolution provision, applicable to all matters arising under or relating to the Option Agreement. That is plainly not what Oxford and Sears agreed to in the Option Agreement, which is a commercial contract negotiated by sophisticated parties with the assistance of counsel. [21]

32. The court's inability to rewrite the Option Agreement is not changed just because Sears is under CCAA protection. Within the context of a CCAA proceeding, debtors are granted the extraordinary power of disclaiming unfavourable contracts.[22] However, Parliament did not grant debtors the power to retain a contract and then re-write its terms to the debtor's benefit. The rule against a court re-writing a contract applies as much in the context of a CCAA proceeding as in any other.

33. Further, this Court has already, in the SISP Approval Order in this CCAA proceeding, ordered the preservation of the *very rights* that Oxford seeks to protect on this motion, namely its rights under the Option Agreement. Oxford previously served and filed an Affidavit on July 12, 2017, in response to a SISP Approval Order sought by Sears and supported by the Monitor, for the specific purpose of putting the Option Agreement before

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[20] Affidavit of Philip Mohtadi, sworn on September 10, 2018, (the "**Mohtadi Affidavit**") at para. 24, Joint Motion Record of the Applicants and the Monitor dated September 10, 2018 ("**Joint Motion Record**"), Tab 2, pp 18-19.

[21] *G. Ford Homes Ltd. v. Draft Masonry (York) Co*, 1983 CarswellOnt 732 at para 9 (CA), Oxford Book of Authorities, Tab 4. See also *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75 at para 31: "the general rule, of course, is that it is not the function of the court to rewrite a contract for the parties", Oxford Book of Authorities, Tab 5.

[22] The issue of whether a contract such as the Option Agreement is one that is even capable of being disclaimed is not relevant to this motion, and is moot in any event.

the parties and the Court and preserving Oxford's rights thereunder.[23] The draft SISP Approval Order sought by Sears in its motion materials was amended to specifically provide, in section 5 thereof, that nothing shall affect the rights of a party to an agreement containing an option to purchase or right of first refusal (such rights collectively defined as, a "**ROFR**"), and that all such rights "whether statutory, contractual or at common law" would be reserved and unaffected. The SISP Approval Order was issued by the Court on that basis, more than one year ago. [24]

34. The importance of protecting the rights in favour of holders of options to purchase and ROFRs was further recognized by the negotiated inclusion of paragraph 6(a) of the SISP Approval Order, which required Sears to notify all such holders by no later than August 4, 2017 if it intended to take the position that such rights were no longer in force.[25]

35. It is not open to a debtor company or the Monitor to "re-trade" on a term of an Order specifically negotiated by parties for their benefit and protection at the outset of a CCAA proceeding, when it no longer suits them. In the *Target* CCAA proceeding,[26] when the debtor company (supported by the Monitor) sought to ignore the provisions of one paragraph in the Initial and Restated Order that had been negotiated by Objecting Landlords, in similar circumstances to the case at bar, Morawetz R.S.J. stated the following:

> [80] Paragraph 19A [to the Order] arose in a post-CCAA filing environment, with each interested party carefully negotiating its position. The fact that the agreement to include paragraph 19A in the Amended and Restated Order was reached in a post-filing environment is significant [citation omitted]. In my view, there was never any doubt that Target Canada and Target Corporation were aware of the implications of paragraph 19A and by proposing this

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[23] Marfatia Affidavit at paras. 3, 5, Oxford Motion Record, Tab 2, p 8.

[24] See Section 5 of the SISP Approval Order on Schedule "B" hereto. Numerous Monitor's Reports filed in this proceeding since that time have referred to the option to purchase and ROFR rights that exist, including specific reference to the Newmarket Property.

[25] See Section 6(a) of the SISP Approval Order on Schedule "B" hereto.

[26] *Target Canada Co, Re*, 2016 ONSC 316 at paras 73-86 [Comm List], Oxford Book of Authorities, Tab 6.

> Plan, [they] seek to override the provisions of paragraph 19A. They ask the court to let them back out of their binding agreement, after having received the benefit of performance by the landlords… They ask the court to let them eliminate a court order to which they consented, without proving that they have any grounds to rescind the order.
>
> [81] The CCAA process is one of building blocks…. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.
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> …
>
> [85] It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties, or to rescind consent orders of the court without grounds to do so.

D. The Position Advanced by Sears and the Monitor Would Commit the Arbitrator to Jurisdictional Error Before the Arbitration Begins

36. The jurisdiction of any arbitrator is confined by the original agreement to arbitrate, in this case the arbitration provision in section 12 (d)(ii) of the Option Agreement. Quoting from Casey's text: "There is no "inherent" jurisdiction in an arbitral tribunal. The arbitral tribunal takes its jurisdiction to decide a particular dispute from the agreement between the parties."[27]

37. The grounds upon which a final arbitral decision can be set aside by a court are very limited. One of those grounds, however, as set out in the *Arbitration Act*,[28] is that the arbitration decision deals with a dispute that the arbitration agreement does not cover or contains a

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[27] Casey, *supra* note 17 at 195.

[28] *Arbitration Act, 1991*, SO 1991, c 17 [*Arbitration Act*].

decision on a matter that is beyond the scope of what was to be arbitrated under the agreement.[29]

38. The arbitration agreement in the Option Agreement (specifically section 12(d)(ii), read individually and in conjunction with the entire contract), does not include any term providing that the determination of amounts owing by one party to the other, or relating to set-off or adjustments to the cash component paid on closing, will be determined through arbitration.[30]

39. In other words, if granted, the cross-motion brought by Sears and the Monitor will inevitably cause the arbitrator to exceed his jurisdiction.

E. Policy Reasons Support Keeping the Determination of Current Value Separate from the Claims Process

40. A single-issue arbitration is focussed on the determination of a particular issue in order to facilitate a decision that is binding on the parties to an arbitration agreement or clause, to the exclusion of any other issues. Considerations that may be relevant in the "rough justice" nature of a CCAA claims process (particularly one in which the anticipated recoveries to creditors are nominal) and the determination of the quantum and validity of Oxford's claims within that claims context, are entirely irrelevant to the determination of the Current Value of the Newmarket Property under the Option Agreement.

41. There is very good reason to keep the determination of Current Value separate from the adjudication of Oxford's Claim or any consideration as to adjustments that may ultimately affect the cash component paid on closing. Blurring those lines creates a risk that the outcome of one may improperly influence the outcome of the other. The parties agreed to have only the Current Value determined by arbitration.

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[29] *Arbitration Act* at s 46(1)3.

[30] Sears and the Monitor have admitted this in paragraph 24 of the Mohtadi Affidavit.

F. Concerns About Preventing Additional Costs and Delay Support the Appointment of Mr. Keefe — Not Justice Farley

42. Oxford shares the concerns expressed by Sears and the Monitor about preventing unnecessary costs and delay.[31] It has purchased the Newmarket Property and wishes to close the transaction as soon as possible[32]. It advised Sears and the Monitor on June 29, 2018 that it was prepared to close within seven days of Current Value being agreed, and that remains the case following a determination of Current Value by the arbitrator.[33]

43. Any concerns as to timing are best addressed by the appointment of Mr. Keefe as arbitrator, to allow him to immediately commence the arbitration process in accordance with the terms of the arbitration clause in section 12(d)(ii) of the Option Agreement.

44. Section 12(e) of the Option Agreement stipulates that the arbitrator's decision shall be final and binding upon Sears and Oxford and all other persons affected thereby, with no right of appeal. Appointing an arbitrator to decide the sole issue – the Current Value of the Newmarket Property – that the parties to the Option Agreement agreed would be determined through arbitration, is the only means of ensuring that no jurisdictional error is committed and the arbitrator's decision can be implemented without delay.

45. The determination of Oxford's Claims pursuant to the CCAA claims process can proceed separately, but simultaneously with the arbitrator's determination of Current Value, resulting in no delay.

46. If Justice Farley is appointed to determine Current Value, the process for such determination will certainly be slower due to the numerous other claims that Justice Farley is tasked with determining as the Claims Officer, including Oxford's Claim. In addition, claims filed by six landlords in respect of 26 locations are the subject matter of a motion

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[31] Twenty-Third Report of FTI Consulting Canada Inc., as Monitor, dated September 10, 2018, at para 33.

[32] Notwithstanding that section 13(a) of the Option Agreement provides that closing is to occur 30 days after the determination of the Current Value, Oxford is prepared to close within seven (7) days of such determination by the arbitrator.

[33] Exhibit "C" to the Affidavit of Philip Mohtadi, Joint Motion Record, Tab 2C, p 125.

returnable the same day as Oxford's motion, which the Monitor requires be determined by Justice Farley *prior* to the hearing of a deemed trust motion on November 1, 2018. The Monitor has recently reported that it has received 240 Notices of Dispute in response to the Notices of Disallowance it issued, and that it plans to refer those claims to Justice Farley for adjudication, to the extent that they are not resolved consensually and expeditiously. [34]

47. Oxford submitted its Dispute Notice on August 24, 2018, in response to the Notice of Revision or Disallowance issued by the Monitor, in accordance with the Claims Procedure Order. No steps have been taken by the Monitor or the Claims Officer for a determination of Oxford's Claim. No timetable has been set. No procedures have been established for a claims hearing. Any resulting delay cannot be attributed to Oxford.

G. The *Judges Act* Precludes the Alternative Relief Sought by Sears and the Monitor

48. The alternative relief sought by Sears and the Monitor — namely, the appointment of Justice Hainey or another judge sitting on the Commercial List as arbitrator — is explicitly forbidden by section 56(1) of the *Judges Act*, which prohibits a sitting judge from being named as an arbitrator unless:

> (a) in the case of any matter within the legislative authority of Parliament [the within CCAA proceeding is within federal jurisdiction], the judge is by an Act of Parliament expressly authorized so to act or the judge is thereunto appointed or so authorized by the Governor in Council.[35]

49. Neither of these preconditions are satisfied in this case. No further analysis is needed.

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[34] Monitor's 24th Report to the Court dated September 13, 2018 at paras. 26, 29.

[35] *Judges Act*, RSC 1985, c J-1 at s 56(1)(a).

PART IV - ORDER SOUGHT

50. Oxford requests that John A. Keefe be appointed as arbitrator to determine the Current Value of the Newmarket Property pursuant to section 12 of the Option Agreement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of September, 2018.

THORNTON GROUT FINNIGAN LLP
Lawyers for Oxford Properties Group

SCHEDULE "A"

Authorities

No.	Case Reference
1.	*Axa Insurance v Belair Direct Insurance Co*, 2003 CarswellOnt 2992 (SCJ)
2.	*Gasmo Investments Inc v 112660 Ontario Inc*, 2008 CarswellOnt 8763 (SCJ)
3.	*ICP v JCP*, 2018 ONSC 4075 [Comm List]
4.	*G. Ford Homes Ltd. v. Draft Masonry (York) Co*, 1983 CarswellOnt 732 (CA)
5.	*Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75
6.	*Target Canada Co, Re*, 2016 ONSC 316 [Comm List]

Secondary Sources

7.	J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd ed (New York: JurisNet, LLC, 2017)

SCHEDULE "B"

Relevant Statutes and Court Orders

***Arbitration Act*, 1991, SO 1991, c 17**

Setting aside award

46 (1) On a party's application, the court may set aside an award on any of the following grounds:

…

3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.

***Judges Act*, RSC 1985, c J-1**

Acting as commissioner, etc.

56 (1) No judge shall act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry or other proceeding unless

(a) in the case of any matter within the legislative authority of Parliament, the judge is by an Act of Parliament expressly authorized so to act or the judge is thereunto appointed or so authorized by the Governor in Council; or

(b) in the case of any matter within the legislative authority of the legislature of a province, the judge is by an Act of the legislature of the province expressly authorized so to act or the judge is thereunto appointed or so authorized by the lieutenant governor in council of the province.

SISP Approval Order dated July 13, 2017

5. **THIS COURT ORDERS** that nothing in this Order or the approval of the Sale Process shall affect the rights and remedies of any party to an agreement with any of the Applicants affecting lands or premises in which Sears Canada has an interest, including without limitation any lease, any operating agreement, any agreement containing an option or right of first refusal (or other similar right) (such right, a "**ROFR**") ("**Property Agreements**") and all rights and remedies of the Applicants and counterparties to any Property Agreements are reserved and shall remain unaffected by this Order or the approval of the Sale Process. For greater certainty, the rights and remedies and protections in favour of counterparties that are reserved and unaffected herein, (whether statutory, contractual or at common law), if any, including any right to receive full disclosure of information and documentation from the Applicants, the Financial Advisor and the Monitor relating to the Sale Process, including but not limited to the allocation of the purchase price for the property(ies) subject to the ROFR(s) in that particular counterparty's favour, and the

allocation for all property that is subject to any *en bloc* offer to which it may form a part, or be related to by way of condition or otherwise.

6. **THIS COURT ORDERS** that:

(a) by no later than August 4, 2017, on the request of a holder of a Property Agreement, the Applicants shall advise such holder whether the Applicants intend to take the position that the ROFRs [as defined above] subject to such request are no longer in force; and

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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
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(Applicants)

Court File No.: CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

FACTUM OF OXFORD PROPERTIES GROUP
(Motion to Appoint Arbitrator,
Returnable September 20, 2018)

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