



SUPERIOR COURT OF JUSTICE

**COUNSEL/ENDORSEMENT SLIP**

COURT FILE NO.: BK-23-03008133-0031

DATE: November 10, 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: BAD BOY FURNITURE WAREHOUSE LIMITED et al

BEFORE: JUSTICE PENNY

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party:**

Name of Person Appearing	Name of Party	Contact Info
Wiffen, Bradley	Bad Boy Furniture Warehouse Limited	bwiffen@goodmans.ca
Caldwell, Brennan		bcaldwell@goodmans.ca

**For Defendant, Respondent, Responding Party:**

Name of Person Appearing	Name of Party	Contact Info
Courtis, Trevor	Laurentian Bank of Canada	tcourtis@mccarthy.ca
Sandler, Tracy	KSV Restructuring Inc., as Proposal Trustee	tsandler@osler.com

**For Other:**

Name of Person Appearing	Name of Party	Contact Info
Kofman, Ben	Proposal Trustee	bkofman@ksvadvisory.com

**ENDORSEMENT OF JUSTICE PENNY:**

[1] Bad Boy Furniture Warehouse Limited has filed a Notice of Intention to Make a Proposal under subsection 50.4(1) of the *Bankruptcy and Insolvency Act*. KSV Restructuring Inc. is the proposal trustee.

[2] The Company sells furniture, appliances and electronics through 12 retail stores across Ontario and through an e-commerce platform. The Company also sells appliances to real estate developers and property

managers. It has approximately 275 employees, including head office, warehouse and store employees. The Company's workforce is not unionized. The Company does not offer a pension plan to its employees at large.

[3] The Company's principal secured creditor is Laurentian Bank of Canada (LBC) which provides the Company with an operating line facility that is margined against accounts receivable and inventory. The outstanding obligations under the operating facility are approximately \$3.8 million. LBC made demand and issued enforcement notices under the BIA. As a result, the Company commenced these NOI Proceedings on November 9, 2023 in order to obtain the benefit of a stay of proceedings under the BIA and to provide stability while the Company reviews and advances its restructuring options. LBC is supportive of these efforts and supports the relief sought on this motion.

[4] The Company is significantly in arrears to many of its vendors, including substantially all appliance vendors. The Company is also in arrears to most of its furniture suppliers. The Company is also having significant challenges sourcing inventory, which is affecting its retail business and its builder business. Some developers in have purported to terminate their contracts with the Company. The Company is in financial crisis.

[5] The Company also takes deposits from customers at the time of sale for the future delivery of merchandise. Customer deposits received by the Company are deposited into the Company's bank account and then applied in reduction of the operating facility, i.e., they are not held in trust. The Company's records reflect that it has received customer deposits totaling approximately \$4.5 million. It is the Company's intention to advise its retail customers who paid deposits and have not yet received their order to contact their credit card company to attempt to obtain a refund of their deposits. Where possible, the Company, in consultation with the Proposal Trustee, also intends to work with customers to complete orders if the cost of the merchandise is less than the balance owing, or if other arrangements can be made with the customer.

[6] The Company seeks two orders today. First, it seeks an order expanding the BIA statutory stay of proceedings by ordering the continuation of services and certain other protections to the Company. Second, the Company seeks an order granting two priority charges, an administration charge and a director's charge.

[7] The proposed order would prohibit any person from discontinuing, terminating or ceasing to perform any contract, agreement, lease, license, purchase order or other arrangement, in favour of or held by the Company, provided that no person would be required to extend any credit to the Company or be prohibited from requiring immediate payment for goods or services provided after the NOI filing date.

[8] While this type of relief has typically been granted in the context of CCAA and receivership proceedings, it has also been granted in the context of NOI proceedings: see *Sanderson-Harold Company Limited, c.o.b. as Paris Kitchens* (8 June 2022), Toronto 31-2835198 (ONSC (Bank & Ins Div)) at paras. 3 and 4, *Nilex Inc.* (8 November 2022) Edmonton, 24-2878531 (ABKB) at paras 3 and 4, and *Scotch & Soda Canada Inc.* (16 May 2023), Toronto BK-23-02941767-0031 (ONSC) at paras. 8-12. The granting of such orders is consistent with the Supreme Court of Canada's decision in *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para. 24, which highlighted the importance of harmonization between Canada's primary insolvency statutes, the CCAA and BIA.

[9] The proposed order would also prohibit any person from using alleged "pre-post set off" to withhold post-filing amounts payable to the Company on account of pre-filing obligations owing by the Company. In particular, it would prohibit any merchant or credit card service provider from setting off any monies that are in its possession as of the NOI Filing Date, or that come into its possession and control subsequent to the NOI filing date, against any amounts that are or may become owing by the Company to the Provider in respect of transactions effected prior to the NOI filing date, including customer chargebacks. Such relief is said to be necessary to ensure that merchant card service providers, customers and other parties continue to pay for goods

and services supplied by the Company during the NOI proceedings. This is because payment of accounts receivable is crucial to funding the efforts necessary for any proposal to be made.

[10] This type of relief is consistent with the Supreme Court of Canada's decision in *Montreal (City) v Restructuration Deloitte Inc.*, 2021 SCC 53 at para 20. There, a majority of the Supreme Court determined in the CCAA context, that "a supervising judge has the discretion to authorize pre-post compensation [set off] only in exceptional circumstances, given the high disruptive potential of this form of compensation." In reaching that conclusion, the majority noted that "the status quo period could be rendered pointless if creditors were allowed to effect pre-post compensation without restraint", since the debtor's inability to obtain revenue from the provision of post-filing services would be a major stumbling block in the restructuring process. The proposed order would preserve the right of any person to bring a motion before the Court seeking the right to exercise pre-post set off.

[11] The Proposal Trustee is supportive of this relief and believes that expanding the scope of the stay of proceedings as requested is appropriate. The continued operation of the Company is beneficial to the stakeholders as a whole and will assist the Company to achieve its objectives in these proceedings.

[12] The Company is seeking an administration charge securing the fees and disbursements of counsel to the Company, the Proposal Trustee and counsel to the Proposal Trustee in the maximum amount of \$250,000.

[13] The Company is also seeking a charge against its property in favour of the director and officers of the Company in the maximum amount of \$790,000. There is only one director, who is also an officer, and one other officer. Both are critical to the success of any proposal. There is no D&O insurance. Thus, as well as incentivizing the directors to remain to assist with the proposal proceedings, this charge will also protect the employees and certain other stakeholders. Again, the Proposal Trustee is supportive of the granting, and proposed quantum, of the director's charge (which has been tailored to the amount of potential liabilities during the proposal proceedings).

[14] This is the first order made in these proceedings. Not all stakeholders were given notice. However, the financial crisis facing the Company, and the need for stability if there is to be any prospect of an orderly proposal, require that an order be made on an urgent basis. To the extent other stakeholders have other issues, they can be addressed in future proceedings as necessary.

[15] I am satisfied that the orders sought are within the jurisdiction of this court to grant and that they are appropriate and necessary in the circumstances. Order to issue in the form signed by me this day.

[16] This matter will return to court on November 17, 2023. Thirty minutes has been booked at 12:30 PM on the Commercial List, as that is all that is currently available. However, the start time may change if more time becomes available on the 17<sup>th</sup>.

A handwritten signature in black ink, appearing to read "Penny J.", with a stylized flourish at the end.

Penny J.