

COURT OF APPEAL FOR ONTARIO

CITATION: Cash Store Financial Services Inc. (Re) 2014 ONCA 834  
DATE: 20141125  
DOCKET: C59377 & C59379

Hoy A.C.J.O., Cronk and Blair JJ.A.

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 The  
Cash Store Financial Services Inc., The Cash Store Inc., TCS Cash Store  
Inc., Instalogs Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., 1693926  
Alberta Ltd. doing business as "The Title Store"

Robert W. Staley, Jonathan Bell and Ilan Ishai, for 0678786 B.C. Ltd.

Brett Harrison, for Tramor Annuity Focus LP No.5

Andrew Hatnay and Adrian Scotchmer, for Timothy Yeoman

Alan Merskey and Andrew McCoomb, for DIP Lenders and *Ad Hoc* Committee of  
Noteholders

Alan Mark and Brendan O'Neill, for DIP lenders and *Ad Hoc* Committee of  
Noteholders

Jeremy Dacks, for the Chief Restructuring Officer

Heather Meredith, for FTI Consulting Canada Inc., in its capacity as Monitor

Heard: November 18, 2014

On appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court  
of Justice, dated August 5, 2014.

ENDORSEMENT

[1] The appellants, 0678786 B.C. Ltd. and Trimor Annuity Focus Limited Partnership #5, advanced funds to Cash Store Inc. and 1693926 Alberta Ltd. (collectively “Cash Store”) – a payday lending company now operating under the protection of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”).

[2] The appellants brought motions before the Commercial List motion judge seeking a determination that they were the sole legal and beneficial owners of both the proceeds on hand from loan payments made by, and accounts receivable from, Cash Store’s customers at the time that Cash Store sought protection under the CCAA. Loan payments by Cash Store’s customers were commingled with Cash Store’s funds and it was not possible to identify the source of the funds on hand at the time of the initial order under the CCAA. Relying principally on the framework of agreements entitled “Broker Agreements” that they had entered into with Cash Store, the appellants argued that they had loaned funds to Cash Store’s customers, and Cash Store merely operated as a broker to facilitate placement and collection.

[3] The motion judge disagreed. He found that the relationship between the appellants and Cash Store was a debtor-creditor relationship. Effectively, the appellants had loaned money to Cash Store, which in turn made its own loans to its customers. Accordingly, the appellants were required to stand in line with

Cash Store's other creditors. By orders dated August 5, 2014, the motion judge dismissed the appellants' motions.

[4] On this appeal, the appellants argue that the motion judge improperly varied the terms of the Broker Agreements. They cite *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597, 354 D.L.R. (4th) 516 for the proposition that before a court can vary a contract based on conduct, there must be a pattern of conduct by the parties to the contract demonstrating that they did not intend to be bound by its terms. The appellants argue that the motion judge erred in law because he did not apply this test or that, if he did, he made palpable and overriding factual errors in doing so. The appellants say the test could not be met in the face of what they characterize as evidence from themselves and a former officer of Cash Store that the parties intended to be bound by the terms of the Broker Agreements, as well as the description of the parties' relationship in various public disclosures made by Cash Store.

[5] We are not persuaded that there is any basis for this court to intervene with the motion judge's order dismissing the appellants' motions.

[6] *Technicore* – a case where one party to the contract unsuccessfully argued that the other party varied the notice provisions in the contract by its conduct and therefore could not rely on its provisions – was not argued before the motion judge.

[7] We agree with the respondents, the DIP Lenders and the *Ad Hoc* Committee of Noteholders, that, fundamentally, the appellants seek to have this court re-visit the factual determinations of the motion judge.

[8] The task undertaken by the motion judge was to determine – in the context of an insolvency, where third party creditors asserted that the accounts receivable were the property of Cash Store – the true legal characterization of the relationship between the appellants and Cash Store. As the appellant Trimor Annuity Focus Limited Partnership #5 noted in its reply and responding factum before the motion judge:

In determining the issue of ownership, it is important to carefully consider the facts. [Para. 5]

The DIP Lenders correctly note that the Cash Store's legal relationship with the [appellants] is not exhaustively defined by the Broker Agreements. The conduct of the parties is also relevant. [Para. 15]

[9] In our view, there was no error in the approach of the motion judge. He considered the terms of the Broker Agreements and the manner in which the parties actually operated. At para. 37 of his reasons, he concluded that the Broker Agreements “did not accord with reality.” The actual practices followed by the parties were not consistent with the Broker Agreements. In reality, the appellants and Cash Store were in a debtor-creditor relationship, and not the principal-broker relationship contemplated by the Broker Agreements. There were several bases for his conclusion: the ongoing payments at the rate of

17.5% of the outstanding funding that Cash Store made to the appellants reflected a payment of interest, and the payment of interest was inconsistent with the broker position argued by the appellants; loan repayments were co-mingled with Cash Store funds in its operating account; and Cash Store provided "capital protection" to the appellants, insulating them from any credit risk as a result of loan defaults by Cash Store's customers. The motion judge's conclusion is amply supported by the record and is entitled to deference.

[10] This appeal is accordingly dismissed. There shall be no order as to costs.

*Alexander M. ACOD.*

*E.A. Crowley J.A.*

*Pat Blaw J.A.*