

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 THE
CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE
INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926
ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

FACTUM OF TRIMOR ANNUITY FOCUS LIMITED PARTNERSHIP #5
(Motion returnable May 13, 2014)

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PART I - OVERVIEW

1. Trimor Annuity Focus Limited Partnership #5 (“**Trimor**”) seeks to assume administration of the Trimor Loans¹ to ensure that they do not vanish like the millions of dollars in cash and other assets Trimor entrusted to the Applicants.

2. Although there have been a number of suggestions that other stakeholders “may” make claims to the Trimor Loans, since this issue was first raised almost a month ago, not a single claim has been made. The reason for this is that it is clear that Trimor owns the Trimor Loans. These phantom claims should not be used as an excuse to lock the Trimor Loans in a business with no future, which has huge realization costs and which, according to the Applicants’ own evidence, cannot reasonably be expected to maximize recoveries. Trimor should be allowed to realize on its property in the most efficient and effective manner possible.

3. The Applicants have stated that they have already initiated an “orderly cessation” of their brokering business and therefore have no more use for third party lenders’ funds. They are nonetheless insisting that the Applicants be entitled to collect the Trimor Loans despite that fact that, unlike other potential servicers, they are unable, or unwilling, to make new loans available to their former customers.

4. The Applicants’ own evidence is that their inability to make new loans in Ontario has resulted in their “ability to collect outstanding customer accounts receivable [being] *significantly*

¹ “Trimor Loans” means any loan in existence “immediately prior to the effective time of the Initial Order “ (in accordance with paragraph 34 of the Amended and Restated Initial Order): i) for which Trimor is listed as the lender; ii) which are attributable to Trimor according to the Applicants’ records; or (iii) which have been assigned to Trimor. (See paragraphs 3 and 4 of the April 30, 2014 Additional TPL Protection Order).

impaired".² As highlighted in the Monitor's Third Report,³ the difficulties in collecting on accounts in Ontario will now apply to all jurisdictions in which the Applicants previously operated the brokering business.

5. In addition to this significant impairment arising from the fact that the Applicants can no longer make new loans, the Applicants are also unable, or unwilling, to take all steps necessary to ensure collections on the Trimor Loans are maximized. The Chief Restructuring Officer (the "CRO") has indicated that TCS' "ability to collect on Ontario brokered loans *has been curtailed*"⁴ and that outside Ontario he can only take "*reasonable steps* to effect the receipt of outstanding brokered loan receivables in a manner that preserves, to the extent possible, the value of the [TPL] receivables".⁵ The CRO has duties to a number of stakeholders, and is understandably concerned with the costs and management resources necessary to preserve the value of the TPL Loans, his reluctance to take the necessary steps to maximize realizations should not prejudice Trimor when it is willing to assume take all possible steps to do so.

6. Because Trimor owns the Trimor Loans, it is prepared to invest the time and resources necessary to maximize recoveries from those loans in its own interest. Doing so will assist the CRO and the Applicants by eliminating the cost, and the related inconvenience, of collecting the Trimor Loans. The relief sought by Trimor would relieve the Applicants, the CRO and the Monitor of this burden and allow them to focus on restructuring the parts of the business that the

² Affidavit of Steven Carlstrom sworn April 14, 2014 ("Carlstrom Affidavit") at para. 101; Motion Record of the Applicants at Tab 1.

³ Monitor's Third Report at para. 39(c)(i).

⁴ Affidavit of William Aziz sworn May 9, 2014 (the "Aziz Affidavit") at para. 26; Motion Record of the Applicants at Tab 2. We understand that the CRO relies on the Applicants interpretation of section 30.1 of the *Payday Loan Act, 2008* regulations for this position.

⁵ Aziz at para. 38.

Applicants believe continue to be viable. It will also allow Trimor to take the steps that it deems necessary to facilitate the orderly and efficient collection of, and to realize the maximum recovery from, the Trimor Loans at Trimor's expense.

7. Neither the Applicants nor any stakeholder of the Applicants has articulated any legal theory which would suggest that the Trimor Loans, which are in Trimor's name and which were entered into directly between Trimor and the Applicants' customers, do not belong to Trimor. No such theory was advanced in the materials filed, or in the submissions made, when the Applicants obtained the Initial Order or the Amended and Restated Initial Order. No such theory has been advanced in any of the materials filed with this Court since that time. Instead, the Applicants' DIP Lender suggests in its factum filed in response to this motion that "transferring segregated funds will predetermine legal claims to the [TPL Funds], on an incomplete record."⁶

8. Trimor respectfully submits that the time for determination of its entitlement to the Trimor Loans is now while they continue to have value and that, if the record required for such a determination is incomplete, it is solely because neither the Applicants nor any of their stakeholders have seen fit file whatever documents they deem necessary to complete the record.

9. In the past several weeks, the TPL's have witnessed the stated value of their loans and restricted cash reduced from approximately \$42 million to significantly less than half of that value. Trimor is extremely concerned that if the issue of ownership is not determined on a timely basis and administration of the loans is not assumed by an independent party with the capacity to

⁶ Memorandum of Fact and Law of the DIP Lender dated May 2014 at para. 3(a).

make new loans in regulated jurisdictions, then what little value is left will simply evaporate in a cloud of bad debts and fees.

10. Notwithstanding paragraph 35 of the Amended and Restated Initial Order, which directs the Applicants shall continue to ensure that TPLs receive a return of approximately 17.5% per year (or such lesser amount as may be agreed to), no TPL has received any compensation for the use of its TPL Funds since the commencement of these CCAA proceedings (or since February 2014 for that matter). Having now held these funds for close to two and a half months without any compensation to the TPLs, the Applicants, having consulted with one of their DIP Lenders and the Ad Hoc Committee (but not the TPLs) have elected to cease their brokerage business in part because they say that “certain of Cash Store’s secured lenders do not support the continued voluntary retention payments that are being made to the TPLs”.

11. In light of the foregoing, Trimor respectfully requests that this Court order that:

(a) The Cash Store Inc. (“**TCSI**”) and 1693926 Alberta Ltd. (collectively, “**Cash Store**”) forthwith execute and deliver such documentation as is necessary or desirable to evidence the fact that Trimor is the sole legal and beneficial owner of the Trimor Loans; and

(b) The Cash Store forthwith transfer the Trimor Funds to Trimor; and

(c) The Cash Store forthwith, at Trimor’s expense, provide such assistance to Trimor as is necessary or desirable to facilitate the transfer of the administration of the Trimor Loans.

PART II - THE FACTS

12. Cash Store acts as both a broker and lender of short-term advances and offers a range of other products and services to help its customers (the “**Customers**”) meet their day to day financial service needs.⁷

13. Where Cash Store brokers loans on behalf of the Customers, it does so pursuant to broker agreements with third party lenders (“**TPL’s**”), including Trimor, who agree to lend to the Customers directly or to purchase advances originated by Cash Store.⁸

14. Trimor is a TPL and a party to the following broker agreements with Cash Store (the “**Broker Agreements**”):⁹

(a) broker agreement between Trimor and TCSI dated February 1, 2012 and made as of June 5, 2012; and

(b) broker agreement between Trimor and 1693926 Alberta Ltd. dated September 24, 2012 and made as of June 5, 2012.

15. The Broker Agreements are similar (if not identical) to the broker agreements that Cash Store has entered into with other TPL’s, including 0678786 B.C. Ltd. (“**067**”).

⁷ Carlstrom Affidavit at para 4.

⁸ Carlstrom Affidavit at para. 76.

⁹ Affidavit of Erin Armstrong sworn April 13, 2014 (the “**Armstrong Affidavit**”), Exhibits A and B; Motion Record of Trimor, Tab. 2.

16. Pursuant to the Broker Agreements, Trimor advanced Trimor Funds totalling \$27,002,000 to the Cash Store solely for the purpose of brokering the loans to Customers.¹⁰ From time to time Cash Store also assigned to Trimor loans that Cash Store made to its Customers.¹¹

17. The Broker Agreements indicate that Trimor owns the Trimor Property.¹² Section 2.3 of the Broker Agreements provide that Trimor may provide notice to Cash Store that funds held in the “float” should not be advanced by Cash Store to Customers and that Trimor is under no obligation to approve any particular loan or amount of loans.¹³

18. The Broker Agreements provide that all funds advanced by Trimor are to be held in a Designated Broker Bank Account, defined in paragraph 1.1(g) of the Broker Agreements as follows: “the bank account of Broker designated by [Cash Store] for the purposes of temporarily receiving funds from [Trimor] (if loans are made by [Trimor] way of cash advance) before they are advanced to a [Customer[.” Trimor had always understood that any Trimor Funds that were not deployed as loans to Customers were to be held separate and apart from Cash Store’s general operating account.¹⁴

19. The Broker Agreements provide that all payments made by Customers on account of any loans made with the Trimor Funds are to be deposited into the Designated Financier Bank Account, defined in paragraph 1.1(h) of the Broker Agreements as follows: “the bank branch and account designated by [Trimor] from time to time where (and into which) deposits of cash and

¹⁰ Armstrong Affidavit at para. 9.

¹¹ Carlstrom Affidavit at para. 80.

¹² Armstrong Affidavit at para. 14.

¹³ Armstrong Affidavit at para. 13.

¹⁴ Armstrong Affidavit at para. 17.

cheques received from [Customers], in respect of such [Trimor] funded loans, are to be cleared (deposited) from time to time.”

20. The Broker Agreements expressly provide that the TPL’s assumed the credit risk of the loans (*i.e.* that borrowers would not repay), unless a loan was not repaid as a result of Cash Store’s improper performance under the Broker Agreements.¹⁵

21. At any time during the term of the Broker Agreements, Trimor had the right to reduce the funds it was willing to make available to the Applicants’ customers on 120 days notice. As a result, at anytime Trimor could reduce the funds available to \$0 and effectively terminate the Broker Agreements.¹⁶ Paragraph 2.2 specifically states that:

[Trimor] may determine the total amount that [Trimor] is prepared to fund on an ongoing basis to the [Customers]. This limit may be re-established by [Trimor] upon 120 days written notice to [Cash Store].

22. The Broker Agreements also provide that when they are terminated Trimor has the option to allow the Applicants to continue to administer the Trimor Loans, or switch them to a new service provider. Paragraph 6.4 specifically states that: [emphasis added]

Upon the ending of the Term:

a. Unless [Trimor] determines to appoint a new broker (as contemplated by Subsection 6.4(b)), [Cash Store] shall continue to provide the Broker Services with respect to all Loans still outstanding as at the end of the Term;

b. If [Trimor] notifies [Cash Store] that [Trimor] is designating a new broker to handle the Loan portfolio (or [Trimor] is going to administer the Loan portfolio directly or sell the Loan portfolio) and demands that [Cash Store] deliver the Records related to the Loan

¹⁵ Armstrong Affidavit, Exhibits “A” and “B” at para. 7.1.

¹⁶ Armstrong Affidavit, Exhibits “A” and “B” at para. 2.2

portfolio, *[Cash Store] shall*, unless and to the extent that the [Cash Store] elects to otherwise transfer the same under Section 2.10, *immediately deliver to [Trimor] (or the new broker or owner designated by [Trimor]) all original Records related to all Loans and copies of all electronic files containing information relating to the Loans. [Trimor] (or any new broker or owner) shall be entitled to contact and carry out such realization actions against the borrowers of the Loans which [Trimor] (or any new broker or owner) determines in its complete discretion.* The exercise by [Trimor] of this right shall not diminish [Trimor's] right to recover from [Cash Store] as a result of breaches of this Agreement by [Cash Store] and to recover from [Cash Store] under the indemnities set out in Article 7 (if applicable).¹⁷

23. Cash Store's public disclosure indicates that the TPL loans are not owned by the Cash Store. In or about January 2012, TSCI offered \$132.5 million in senior secured notes due in 2017 through a private placement (the "**Secured Note Offering**"). Cash Store's Confidential Preliminary Canadian Offering Circular dated January 12, 2012 for the Secured Note Offering contains the following statements: [emphasis added]

(a) TSCI "serves as an alternative to traditional banks, acting either as a broker between the customer and the third-party lenders or as the direct lender to the customer..."¹⁸

(b) "We currently act primarily as a broker of short-term advances between our customers and third-party lender, *the effect of which is that the loan portfolio we service is not financed on our balance sheet...*"¹⁹

(c) "... our business will remain dependant on third-party lenders who are willing to make funds available for lending to our customers. *There are no assurances that the*

¹⁷ Armstrong Affidavit, Exhibits "A" and "B" at pars. 6.4

¹⁸ Second Armstrong Affidavit sworn May 8, 2014 ("**Second Armstrong Affidavit**"), Exhibit "A" - Preliminary TSCI Circular at p. 1 (internal); Motion Record of Trimor, Tab 3.

¹⁹ Second Armstrong Affidavit, Exhibit "A" at p. 4 (internal).

*existing or new third-party lenders will continue to make funds available to our customers....*²⁰

(d) *“The advances provided by the third-party lenders are repayable by the customer to the third-party lenders and represent assets of the lenders; accordingly, they are not included on our balance sheet...”*²¹

(e) “We have made the decision to voluntarily make retention payments to the third-party lenders as consideration for continuing to advance funds to our customers. The retention payments are made pursuant to a resolution approved by our board of directors (the “Board”) which authorizes management to pay a maximum amount of retention payments per quarter, and the retention payments are recorded in the period in which a commitment is made to a lender pursuant to the resolution...”²²

(f) “While the third-party lenders have not been guaranteed a return, *the decision has been made to voluntarily make retention payments to the lenders to lessen the impact of loan losses experienced by the third-party lenders...*”²³

24. In Cash Store’s recent financial statements and management’s discussion and analysis, Cash Store stated: [emphasis added]

²⁰ Second Armstrong Affidavit, Exhibit “A” at p. 16 (internal).

²¹ Second Armstrong Affidavit, Exhibit “A” at p. 38 (internal).

²² Second Armstrong Affidavit, Exhibit “A” at p. 17 (internal).

²³ Second Armstrong Affidavit, Exhibit “A” at p. 38 (internal).

When the Company acts as a broker on behalf of income earning consumers seeking short-term advances, the funding of short-term advances is provided by independent third party lenders. ***The advances provided by the third party lenders are repayable by the customer to the third party lenders and represent assets of the lenders***; accordingly, they are not included on the Company's balance sheet.²⁴

25. At no time has Cash Store included the TPL Loans as assets on its balance sheet.
26. Cash Store's own affidavit evidence filed in support of this application also confirms that it has always considered the Trimor Loans to be owned by Trimor. Cash Store's affiant makes the following statements:

(a) "Similar to what is described above for brokered payday loans, TPLs provide the funds for the line of credit, Cash Store arranges the line of credit, and Cash Store earns fees on these transactions..."²⁵

(b) In a chart setting out the relationship of certain stakeholders to Cash Store, the TPLs' amount is listed as \$42.0 million with the following note: "Consisting of the TPL Funds originally advanced, including funds deployed in brokered loans, Restricted Cash, and cumulative losses;"²⁶

²⁴ Second Armstrong Affidavit, Exhibit "A" – Notes to the Consolidated Financial Statements for the twelve and fifteen months ended September 30, 2011 and September 30, 2010 at p. F-11; Exhibit "B" – Financial Statements of TSCI for the fifteen months ended September 30, 2010 and for the year ended June 30, 2009 at p. 8; Exhibit "C" – Management's Discussion and Analysis of TSCI for the three and twelve months ended September 30, 2011 at p. 26.

²⁵ Carlstrom Affidavit at para. 34.

²⁶ Carlstrom Affidavit at para. 58.

(c) “Pursuant to the Broker Agreements, the TPLs make loans to Cash Store’s customers and Cash Store provides services to the TPLs related to the collection of documents and information from Cash Store’s customers, as well as loan repayment services. Cash Store collects fees for brokering these transactions...”²⁷

(d) “The Broker Agreements also provide that the TPLs are responsible for losses suffered due to uncollectible advances...”²⁸

(e) “The TPL Funds are deployed by Cash Store to broker customers, subsequently received by Cash Store as repayment for such broker loans (subject to loan losses), and then redeployed, repeating the process;”²⁹ and

(f) “Any TPL Funds received by Cash Store as repayment for any brokered loan [*sic*] that are not currently deployed to Cash Store customers are deposited in Cash Store’s bank accounts.”³⁰

27. Further, Cash Store’s past conduct is consistent with the fact that the Trimor Loans are owned by Trimor:

(a) When TPL Funds are deployed as loans to Customers the creditor or lender is the TPL and Cash Store takes a brokerage fee;³¹

²⁷ Carlstrom Affidavit at para. 76.

²⁸ Carlstrom Affidavit at para. 77.

²⁹ Carlstrom Affidavit at para. 78.

³⁰ Carlstrom Affidavit at para. 79.

(b) When TPL Loans are collected and the TPL Funds are waiting to be redeployed, the TPL Funds are segregated as restricted cash (the “**Restricted Cash**”) on Cash Store’s balance sheet.³²

(c) Until January 2014 a separate bank account was used for deposit of the TPL Funds and for TPL transactions.³³

(d) Senior management of Cash Store has advised that Cash Store has always considered the TPL Funds to be third party funds.³⁴

28. Cash Store’s representations to Trimor and other TPL’s also indicate that it considered the TPL Funds to be owned by the TPL’s. Cash Store represented to Timor that it would not use Trimor’s TPL Funds for any purpose other than advancing loans in accordance with the Broker Agreements.

29. TSCI also assured Trimor that it would treat the Trimor TPL Funds as being held in trust for Trimor’s benefit. In an email from Michael Zvonkovic (former Vice-President, Financial Reporting at TCSI) dated November 9, 2011, Mr. Zvonkovic stated that TCSI “have not use [*sic*] the [TPL Funds] for general operating expenses and is under the trust conditions as outlined in the [Broker Agreements].”³⁵ TCSI also represented to 067, another TPL, that it would hold its

³¹ Draft Report of Pricewaterhouse Coopers dated April 25, 2014 (the “**PwC Draft Report**”) at p. 5; Motion Record of Trimor, Tab 4.

³² PwC Draft Report at p. 5; Affidavit of Murray McCann sworn April 22, 2014 (the “**McCann Affidavit**”) at para. 4; Motion Record of Trimor at Tab 4.

³³ PwC Draft Report at p. 16.

³⁴ PwC Draft Report at p. 5.

³⁵ Second Armstrong Affidavit at para. 6, Exhibit “G” – Email from Michael Zvonkovic dated November 9, 2011.

funds in trust and not co-mingle them with other funds.³⁶ The segregation of funds from general operating funds was at all times assured.³⁷

30. Trimor will suffer serious prejudice if the administration of the Trimor Loans is not transferred to another administrator immediately. The CRO has determined, in consultation with the Monitor, that it is necessary and appropriate to implement a cessation of the brokered loan business and cease brokering new loans.³⁸ In other words, the TPL Funds will no longer be redeployed in any jurisdiction in which Cash Store operates.

31. If Cash Store ceases brokering operations outside Ontario before the administration of the Trimor Loans is complete, it could have a devastating impact on the ability of Trimor to collect those loans. If Cash Store can no longer broker loans, there is little incentive for Cash Store customers to repay the TPL Loans.³⁹ The CRO has already stated that the Applicants' "ability to collect on Ontario brokered loans has been curtailed."⁴⁰ Cash Store admits that "the TPL's will likely encounter some difficulty collecting outstanding loans, as the Ontario Cash Store branches are currently unable to broker new loans for customers"⁴¹ and "its ability to collect outstanding customer accounts receivable has...been significantly impaired."⁴²

³⁶ McCann Affidavit at paras. 4 and 5.

³⁷ Affidavit of Sharon Fawcett sworn April 11, 2014 at paras. 3 and 7, Exhibit 1 to the Affidavit of Sharon Fawcett sworn April 22, 2014, Application Record of 0678786, Tab 2, p.11.

³⁸ Aziz Affidavit at para. 29.

³⁹ Second Armstrong Affidavit at para. 12.

⁴⁰ Aziz Affidavit at para. 26.

⁴¹ Carlstrom Affidavit at para. 175; Transcript of Cross-Examination of Steven Carlstrom held April 22, 2014, questions Q: 286-292, 307 and 314; Motion Record of Trimor at Tab 6.

⁴² Carlstrom Affidavit at para. 101.

PART III - ISSUES AND LAW

32. On this motion, the Court is asked to confirm Trimor's ownership of the Trimor Loans and to allow Trimor or its agent to assume administration of the Trimor Loans to maximize realizations in accordance with Trimor's contractual rights.

A. Trimor Owns the Trimor Loans

33. There is no real issue regarding the ownership of the Trimor Loans. As stated above, all of the evidence in the record clearly demonstrates that the Trimor Loans are owned by Trimor, and no stakeholder has articulated a single theory that would grant them a superior right to the Trimor Loans.

34. The Trimor Funds were made available and lent directly to the Customers pursuant to the Broker Agreements. Cash Store merely facilitated and brokered the Trimor Loans on behalf of the Customers. Cash Store did not acquire an interest in the Trimor Loans.

35. Although proceeds from the Trimor Loans may have been co-mingled with other TPL Funds and Cash Store's general operating funds in breach of the terms of the Broker Agreements, the Trimor Funds have always been accounted for separately. The Trimor TPL Funds were treated as restricted cash such that the Applicant's creditor could always discern the amount of Trimor Funds that were deployed as loans to Customers or held as a float for future loans.

36. The Bondholders, the DIP Lender, and the other secured lenders (collectively the "**Secured Creditors**") have always known the nature of the relationship between Cash Store and

the TPLs. It is absurd for these parties to now claim that the TPL Loans are property of Cash Store and thereby potentially subject the Secured Creditors' security interests.

37. The Secured Creditors have benefitted from the broker fees paid on TPL Loans for years. They had knowledge that the TPL Loans were being made with TPL Funds. They cannot complain when things go badly. Further, the Secured Creditors should not be permitted to benefit from Cash Store's breaches of its Broker Agreements.

38. While the nature of the relationship between the Trimor and Cash Store is not typical, the position of Trimor is analogous to that of a consignor of goods under a true consignment or a purchaser of a true sale of receivables. A secured creditor of a consignee of goods under a true consignment or of a purchaser of receivables under a true sale has no interest in the goods or receivables consigned or sold. Similarly, the Secured Creditors have no interest in the TPL Loans or their proceeds.

i) True sale of receivables

39. The leading decision that sets out the factors that a court is to consider when determining whether a transfer of financial assets is a sale or loan is the decision of the Ontario Superior Court in *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc.*⁴³ In that case this Court considered whether the assignment of certain trade receivables was a true sale or a financing. While the Court is not today being asked to determine the nature of an assignment, the indicia of ownership set out in the case is helpful.

40. In concluding that an assignment of receivables constituted a true sale, the Court considered the following factors:

- (a) The intention of the parties as evidenced by the language of the agreement and subsequent conduct of the parties (para. 40);
- (b) Whether the risks of ownership are transferred to the purchaser and the extent and nature of recourse to the seller (para. 41);
- (c) The right of the seller to surplus collections (para. 51);
- (d) Certainty of determination of the purchase price (para. 57);
- (e) The extent to which the assets are identifiable (para. 61); and
- (f) Whether the seller has a right to redeem the receivables on payment of a specified amount (para. 67).

41. With respect to the forgoing the Court noted the following:

⁴³ (2003), 30 B.L.R. (3d) 288, 2003 CarswellOnt 168 (Sup. Ct.) rev'd on other grounds (2005) 75 OR (3d) 784; 5 B.L.R. (4th) 251 (ONCA) leave to appeal to SCC refused.

(a) When interpreting a contract, one must look not only to the intention of the parties as expressed by the language of the contract itself but also to “the substance of the transaction and not merely to the form” (paras. 38 and 40).

The Broker Agreements and evidence of all parties involved in the implementation of those agreements demonstrate that it was a brokering arrangement, not a financing agreement.

(b) That “[i]n any true sale transaction, there must be a transfer of ownership risk to the purchaser. In the case of the sale of accounts receivable, the risk with regard to the non-payment of the receivable must pass to the purchaser subject to whatever forms of recourse the purchaser may have against the vendor” (para. 41).

Trimor took the credit risk on the Trimor Loans and has over \$8 million in bad loans in its loan portfolio according to Cash Store’s records. The Secured Creditors take the position that any limited capital protection that Trimor was to receive from Cash Store was voluntary and, if they are to be believed, illusory.

(c) The absence of a right of the purchaser to retain the surplus from collection of accounts receivable is not fatal to the transaction being categorized as a true sale (para. 56).

Trimor received the principal and interest paid on the Trimor Loans.

(d) While all the factors must be considered, whether the seller has a right of redemption is “the ultimate test to be applied to determine whether a particular transaction should be interpreted as a secured loan or as a true sale” (para 67).

There is not provision in the Broker Agreements that allows the Applicants to redeem the Trimor Loans. Instead, under the Broker Agreements Trimor has the right both to take back its funds at any time on 120 days notice and to take over the administration of the Trimor Loans upon the termination of Broker Agreement.

42. The Court also made it clear that the fact that the seller acts as the collection agent is not inconsistent with a finding that the transaction was a true sale (para. 66).

ii) Consignment of goods under a non-security “true” consignment

43. The relationship of a credit broker and credit grantor outlined in the Broker Agreements is analogous to that of a non-security consignment, otherwise known as a “true” consignment. In a true consignment the supplier of the consigned goods retains legal title until goods are sold and title passes directly from the consignor to the ultimate purchaser. Similarly, the Broker Agreements establish a commercial and legal relationship whereby the funds available for lending to the Customers are supplied by the TPLs, like Trimor, who enter directly into a debtor/creditor relationship with each of the Customers. In differentiating between a consignment, which is in substance a security interest, and a true consignment which is not, courts have set out several key indicia.

44. In *Access Cash International Inc. v Elliot Lake and North Shore Corporation for Business Development*, the court set out the following key indicia that differentiate a true consignment from a security consignment:⁴⁴

- a) The goods are shown as an asset in the books/records of the supplier and are not shown as an asset in the books/records of the merchant.

⁴⁴ (2000), 1 P.P.S.A.C. (3d) 209, 2000 CarswellOnt 2824 at para. 21 (Sup. Ct.) [*Access Cash*].

- b) It is apparent in the merchant's dealings with others that the goods belong to the supplier rather than the merchant.
- c) Title of goods remains with the supplier.
- d) The supplier has the right to demand the return of the goods at any time.
- e) The merchant has right to return unsold goods to the supplier.
- f) The merchant is required to segregate the supplier's goods from his own.
- g) The merchant is required to maintain separate books and records in respect of the supplier's goods.
- h) The merchant is required to hold sale proceeds in trust for the supplier.
- i) The supplier has the right to stipulate a fixed price or a price floor for the goods.
- j) The merchant has the right to inspect the goods and the premises in which they are stored.

45. A number of the above indicia exist in respect of the relationship between Trimor and Cash Store, including the fact that Trimor has the right to demand the return of the Trimor Funds and the fact that Cash Store is required to hold the Trimor Funds in trust, to segregate the Trimor Funds and to account for them separately. Further, the loan documentation in respect of the TPL Loan is directly between the Customers and Trimor and none of the loans currently in Trimor's name were assigned to Trimor from Cash Store or any TPL. Paragraph 4 of the April 30, 2014 order makes it clear that any non-Ontario loans that were advanced after that Order was made belong to Trimor.

B. Trimor Should be Allowed to Realize on the Trimor Loans

46. The Broker Agreements make it clear that upon termination Trimor has the option to take over the administration of the Trimor Loans.⁴⁵ Despite this fact, the Applicants are seeking to hold on to the Trimor Loans and force Trimor to allow them to realize on Trimor Loans in a situation where it is clear that they are not in a position to maximize recoveries, or minimize costs.

47. Although the CCAA is broad in scope, its scope is not limitless and there are circumstances, such as here in respect of the Trimor Loans, in which the granting of a stay or continuation of a stay is not justified.

48. As Justice Tysoe said on behalf of the British Columbia Court of Appeal in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (“*Cliffs*”),⁴⁶

[...] the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a “restructuring”, a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA’s fundamental purpose.

49. The Applicants are seeking the Courts assistance to allow them to terminate the Broker Agreements, but at the same time refusing to allow Trimor to mitigate its damages by assuming administration of the Trimor Loans in accordance with the terms of the Broker Agreement. This

⁴⁵ Armstrong Affidavit, Exhibits “A” and “B” at para. 6.4

⁴⁶ 2008 BCCA 323, 2008 CarswellBC 1756 at para. 26.

is not conduct that the CCAA stay was intended to accommodate and the Court ought not to extend the ambit of the CCAA stay in this manner to the prejudice of Trimor.

50. *Cliffs* was cited with approval in a recent decision of the Ontario Superior Court in *Romspen Investment Corporation v. 6711162 Canada Inc.*,⁴⁷ where the Court was faced with competing applications by the secured creditor for the appointment of a receiver and the debtor company for an initial CCAA order. In coming to the conclusion that an initial order ought not to be granted, Justice Brown made the following observations:⁴⁸

At a high level, a certain unfairness characterizes the plan of the CCAA Applicants. Under their plan, they would see the development of the Midland Condo Project to its end and use the unit sales proceeds to pay off Romspen in full and, evidently, to pay most of the amounts sought by the lien claimants. They would then develop out the other secured properties to propose a plan to the other unsecured creditors, but according to Soorty most of the unsecured debt consists of shareholders loans from Cocov and himself. Reduced to its essence, the plan seems to be no more than asking the court to impose on Romspen an extension of the term of the Loan beyond its 2-year term and to allow management to continue operating as they have in the past. In other words, the CCAA Applicants do not propose the compromise of debt or the liquidation of part of their businesses – they want to carry on just as they have in the past.

I accept the evidence of Romspen about the unfairness of such an approach. Romspen stated that it had “absolutely no confidence” in the ability of Soorty and Cocov to manage the affairs of the CCAA Applicants during any stay period, pointing to them letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well [...].

51. In concluding that CCAA relief was not appropriate in the circumstances, the Court also cited the decision in *Dondeb Inc. (Re)*,⁴⁹ (“*Dondeb*”), where the Court also determined that

⁴⁷ 2014 ONSC 2781, 2014 CarswellOnt 5836 [*Romspen*].

⁴⁸ *Romspen* at paras. 72 and 73.

⁴⁹ 2012 ONSC 6087, 2012 CarswellOnt 15528 [*Dondeb*].

CCAA relief should not be granted to the applicant company. At the conclusion of his reasons in *Dondeb*, Justice Campbell stated as follows:⁵⁰

The CCAA is a flexible instrument, which with judicial discretion, is capable of permitting restructuring, including in appropriate situations, liquidation.

In my view the use of the CCAA for the purpose of liquidation must be used with caution when liquidation is the end goal, particularly when there are alternatives such as an overall less costly receivership that can accomplish the same overall goal.

52. In his earlier decision in *Romspen Investment Corporation v. Edgeworth Properties et al.*,⁵¹ Justice Campbell determined that a better alternative in that case was to carve the applicant, who held a mortgage over certain of the debtor companies' real property, out of the CCAA proceeding, to make a declaration as to the validity and priority of the applicant's mortgage, and to permit the applicant to proceed with judicial sale/foreclosure proceedings in respect of the real property subject to its security. Justice Campbell made this order over the objections of certain investors in the debtor companies who challenged the validity of the applicant's security.

53. Cash Store does not intend to carry out a restructuring of the brokering business. It intends to close that business down. In fact, it states in its materials that it has already commenced that process without prior consultation with the TPLs. There is no benefit to Cash Store continuing to administer the TPL Loans. There is, however, significant prejudice to Trimor and the other TPLs if the CCAA stay continues to stand in the way of the efficient and effective collection of the TPL Loans. This prejudice arises from, among other things:

⁵⁰ *Dondeb* at paras. 33 and 34.

⁵¹ 2012 ONSC 4693, 2012 CarswellOnt 10902.

- (a) the fact that the Cash Store cannot broker new loans, which will “significantly impair” its ability to collect the Trimor Loans;
- (b) the fact that the Cash Store intends to take no steps to collect in Ontario and only limited steps in other jurisdictions;
- (c) the huge professional fees and other expenses associated with any liquidation conducted under the CCAA; and
- (d) the risk that Cash Store’s restructuring may not succeed and that the task of collecting the Trimor Loans will be left for yet another future (and potentially costly) insolvency proceeding.

54. The fundamental purpose of the CCAA is not advanced by permitting Cash Store to continue to administer the TPL loans as there is to be no restructuring of that business.

55. Trimor should be allowed to take over the administration of its loans at its cost.

ORDER REQUESTED

56. For the reasons set out above, Trimor respectfully requests an order:

- (a) The Cash Store Inc. (“**TCSI**”) and 1693926 Alberta Ltd. (collectively, “**Cash Store**”) forthwith execute and deliver such documentation as is necessary or desirable to evidence the fact that Trimor is the sole legal and beneficial owner of the Trimor Loans; and

- (b) The Cash Store forthwith transfer the Trimor Funds to Trimor; and
- (c) The Cash Store forthwith, at Trimor's expense, provide such assistance to Trimor as is necessary or desirable to facilitate the transfer of the administration of the Trimor Loans.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of May, 2014.



Brett Harrison and Adam Maerov
McMillan LLP

Lawyers for Trimor Annuity Focus LP #5

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Access Cash International Inc. v. Elliot Lake and North Shore Corporation for Business Development* (2000), 1 P.P.S.A.C. (3d) 209, 2000 CarswellOnt 2824.
2. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 323, 2008 CarswellBC 1756.
3. *Dondeb Inc. (Re)*, 2012 ONSC 6087, 2012 CarswellOnt 15528.
4. *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc.* (2003), 30 B.L.R. (3d) 288, 2003 CarswellOnt 168.
5. *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781, 2014 CarswellOnt 5836.
6. *Romspen Investment Corp. v. Edgeworth Properties*, 2012 ONSC 4693, 2012 CarswellOnt 10902.

SCHEDULE "B"
RELEVANT STATUTES

Payday Loans Act, 2008 regulations

30.1 (1) A licensee shall not request or require the borrower under a payday loan agreement to do any of the following or suggest to the borrower that the borrower do any of the following:

1. Repay or pay the advance or any part of it to the lender or anyone else until the end of the term of the agreement.

2. Pay the cost of borrowing or any part of it to anyone until the end of the term of the agreement.

(2) A licensee shall not, directly or indirectly on behalf of any other person, request or require the borrower under a payday loan agreement to do any of the actions described in paragraph 1 or 2 of subsection (1) or suggest to the borrower that the borrower do any of those actions.

(3) If a licensee contravenes subsection (1) or (2), the borrower is only required to repay the advance to the lender and is not liable to pay the cost of borrowing.

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., INSTALOANS INC., 7252331 CANADA INC., 5515433
MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

Court File No. CV-14-10518-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF
TRIMOR ANNUITY FOCUS LP #5**
(Motion returnable May 13, 2014)

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