Court of Appeal File Nos.: M44123/M44126

COURT OF APPEAL FOR ONTARIO

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

BRIEF OF AUTHORITIES
(Responding to motion by third party lenders ("TPL") for leave to appeal)

August 29, 2014

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Court-appointed representative counsel to class action plaintiffs

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TAB 1

CITATION: Cash Store Financial Services (Re), 2014 ONSC 4567
COURT FILE NO.: CV-14-10518-00CL
DATE: 2014-08-26

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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, 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"

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks*, for the Chief Restructuring Officer of the Applicants

Heather Meredith, for the FTI Canada Consulting Canada Inc., Monitor

Robert W. Staley and *Raj S. Sahni* and *Jonathan Bell,* for 0678786 B.C. Ltd.

Alan Merskey and *Orestes Pasparakis*, for Coliseum Capital Partners LP, Coliseum Capital Partners II LP, Blackwell Partners LLC, Alta Fundamental Advisors Master LP and the Ad Hoc Committee of Cash Store Noteholders in their representative capacities as DIP Lenders, First Lien Noteholders and Holders of Senior Secured Notes

Brendan O'Neill, for the Ad Hoc Committee of Cash Store Noteholders

Andrew Hatnay, *James Harnum* and *Adrian Scotchmer*, for Tim Yeoman,

Brett Harrison, for Trimor Annuity Focus LP, No. 5

HEARD: June 16, 2014

ENDORSEMENT

[1] This motion was brought by Mr. Timothy Yeoman, Plaintiff in the class proceeding, *Timothy Yeoman* v. *The Cash Store Financial Services Inc. et al*, Court File No. 7908/12 CP (the "Class Action") for an order appointing him as representative (the "Class Representative") of the Class Members in this CCAA proceeding, and for an order appointing Harrison Pensa LLP as representative counsel to the class members, and Koskie Minsky LLP as agent to Harrison Pensa LLP ("Representative Counsel").

[2] Other than 0678786 B.C. Ltd. ("McCann") and Trimor Annuity Focus LP No. 5 ("Trimor"), no party opposed the motion.

[3] The Statement of Claim was filed on August 1, 2012 in London, Ontario. The Class Action is being managed by Grace J. who has scheduled a motion for certification on September 15, 2014.

[4] On April 14, 2014, Cash Store Financial Services Inc. and other entities obtained protection from their creditors under the *Companies' Creditors Arrangement Act* ("CCAA"). As a result, the Class Action and the certification motion have been stayed pending further order.

[5] The Class Action alleges, *inter alia*, that the Defendants' practice of charging fees for various financial products which are tied to their loan products, as well as interest on those fees, is unlawful and in contravention of the *Ontario Pay Day Loans Act* ("PLA").

[6] In the case of Mr. Yeoman, it is alleged that he engaged in a "Pay Day Loan" transaction offered by Cash Store for a loan of $400 and for a duration of 9 days. Mr. Yeoman claims that he was charged $68.60 in "fees and service charges" and was required to pay $78.72 in interest, for a total cost of borrowing of $147.32.

[7] The Class Action asserts the following causes of action against the Applicants:

a. breach of the PLA;

b. breach of the *Competition Act*;

c. conspiracy; and

d. unjust enrichment.

[8] Mr. Yeoman seeks to represent all customers of Cash Store who entered into similar loan transactions in Ontario. Mr. Yeoman estimates that there are thousands of individual borrowers in the Class. Counsel to Mr. Yeoman submit that damages for the Class Members are estimated at over $50 million, based on publicaly available information.

[9] Counsel for Mr. Yeoman referenced section 6(3) of the PLA which states that the consequence of a breach of the PLA by a lender is that borrowers are only required to repay the principal loan advanced to them and are not required to pay any additional costs of borrowing (i.e., interest and fees) charged by a pay day lender. Accordingly, they alleged that any collections in respect of interest and fees are unlawful under the PLA.

[10] McCann, supported by Trimor, take the position that the relief requested by Mr. Yeoman is a waste of the Court's resources and time. McCann and Trimor (collectively, "Third Party Lenders" and referenced as "TPLs") point out that Mr. Yeoman is an unsecured contingent creditor of the Applicants for an amount less than $150. They argue that Mr. Yeoman's motion is premature. Further, given the approximately $150 million of secured creditor claims that must be satisfied first, they submit these insolvency proceedings have not contemplated any recovery for unsecured creditors let alone unsecured contingent creditors and to permit Mr. Yeoman's motion would prejudice these proceedings and other parties, such as McCann and Trimor, through unnecessary costs, delay and diversion.

[11] The issue to be determined is whether the Court should appoint a representative for the members of the Class Action and Representative Counsel in the CCAA proceeding.

[12] Both parties agree that the Court has the authority to appoint representative counsel. The authority for such an appointment is found under Rules 10.01 and 12.07, as well as s. 11 of the CCAA (see: *Nortel Networks Corporation (Re)*, 2009 Carswell Ont. 3028).

[13] The factors that have been considered by Canadian Courts when issuing representative counsel orders in insolvency proceedings were summarized by Pepall J. (as she then was) in *Canwest Publishing Inc. (Re)*, 2010 Carswell Ont. 1344 (S.C.):

a. the vulnerability and resources of the group sought to be represented;

b. any benefit to the companies under CCAA protection;

c. any social benefit to be derived from representation of the group;

d. the facilitation of the administration of the proceedings and efficiencies;

e. the avoidance of a multiplicity of legal retainers;

f. the balance of convenience and whether it is fair and just, including to the creditors of the estate;

g. whether representative counsel has already been appointed for those who have similar interest to the group seeking representation and who is also prepared to act for the group seeking the order; and

h. the position of others stakeholders and the Monitor.

[14] Pepall J., in *Canwest*, held that it is preferable to grant a representation order early in CCAA proceedings, both for the parties to be represented and for the CCAA Applicants.

[15] Counsel to McCann responds that irrelevant facts, circumstances and equities indicate that the motion should be dismissed. Counsel submits that the representation order is premature, that the proposed Class Action is unlikely to be certified, that the intent of the motion is to protect Class Counsel fees not proposed Class Members and, finally, that the *Canwest* factors fail to support Mr. Yeoman.

[16] Turning first to the *Canwest* factors, I am satisfied that the Class Members are a vulnerable group who individually lack the financial resources to pursue litigation. I accept the argument of counsel to Mr. Yeoman that without a representation order, these individuals will likely not have representation in the CCAA proceeding. It is recognized that the Class Members are an economically vulnerable group. As pointed out by counsel to Mr. Yeoman, pay day lenders are typically used by people of low financial means and the Class Members in this case are thousands of individual who, according to counsel to Mr. Yeoman, have entered into pay day loan transactions with the Applicants and were charged unlawful cost of borrowing in contravention of the PLA. Individually, it is acknowledged that their claims are relatively small,

but collectively, the total of their claims is very significant. In my view, a consideration of the *Canwest* factors favours Mr. Yeoman's position.

[17] I accept the submission of counsel to Mr. Yeoman that it is not cost effective or practical for borrowers to engage in individual actions against the Applicants, which would likely involve a multiplicity of Small Claims Court actions. Counsel to Mr. Yeoman submits that the only practical recourse for such individuals to advance their claims for compensation is through a class proceeding with class counsel advancing their collective claims.

[18] Given the size of each individual claim, I accept the submission that without a representation order, the individual class members will not have representation in the CCAA proceedings.

[19] I also accept that the appointment of representative counsel will benefit the Applicants insofar as they will be able to deal with the adjudication of the Class Action in a consistent and streamlined manner.

[20] I am also satisfied that a representation order will facilitate the administration of the CCAA proceeding and enhance its efficiency. The appointment of representative counsel will avoid the need for the Applicants to deal with a potentially large number of individual unrepresented borrowers advancing individual and possibly inconsistent claims.

[21] Turning now to the arguments raised by counsel to McCann, I cannot accept that the making of a representation order is premature. The CCAA proceedings are ongoing. There is an ongoing sale and investment process being conducted by Rothschild. The sale and investment process will likely be followed by some sort of claims process and a distribution process. The adjudication of the Class Action may have an impact on the CCAA proceedings. In my view, there is no reason to delay the Class Action proceeding.

[22] Counsel to McCann submits that Mr. Yeoman has no legitimate role to play in these proceedings and further, that the appointment of Mr. Yeoman as legal representative of the Class would cause direct and tangible prejudice to these proceedings and interested parties. I have not been persuaded by these submissions. There is an administrative benefit to be realized if proceedings are coordinated and since there is no funding request for Representative Counsel at this time, I question the alleged prejudice. I also note that the Chief Restructuring Officer, the Applicants and the Monitor, the parties having a direct interest in the outcome of this motion, do not oppose the granting of the requested relief.

[23] With respect to the submission that the proposed class action is unlikely to be certified, this is an issue to be addressed by Grace J. in September 2014.

[24] With respect to the argument that the motion is to protect Class Counsel fees not proposed class members, this argument has to be considered with the statement that the moving party is not seeking funding for the cost of Representative Counsel at this time.

[25] Finally, it seems to me that motions of this type are very fact-specific. Counsel to McCann relies on *Muscletech Research and Development Inc. (Re)*, 2006 Carswell Ont. 4929; *Muscletech Research and Development Inc. (Re)*, 2006 Carswell Ont. 7877 and *Re Canadian*

Red Cross Society, 1999 Carswell Ont. 3234. Counsel submits that Mr. Yeoman has failed to cite a single reported decision where a CCAA court considered and granted a contested representation order, for a proposed uncertified class action.

[26] In my view, a complete response to the case law cited by counsel to McCann is contained in the Reply Factum filed by counsel for the Class Action Plaintiffs, at paragraphs 5 – 11. In this case is also important to note that the issue before this Court is whether to grant a representation order. It is not to make a determination as to whether the Class Action should be certified.

[27] In the result, I am satisfied that this is an appropriate matter in which to appoint a class representative and representative counsel. The motion is granted and an order shall issue appointment Mr. Yeoman as the Class Representative of the Class Members in the CCAA proceeding and an order appointing Harrison Pensa LLP as representative counsel to the Class Members and Koskie Minsky LLP as agent to Harrison Pensa LLP ("Representative Counsel").

Morawetz, R.S.J.

Date: August 26, 2014

TAB 2

Canadian Contractual Interpretation Law

SECOND EDITION

Geoff R. Hall
B.A. (McGill), M.A., LL.B. (Toronto), LL.M. (Harvard)

Partner, McCarthy Tétrault LLP

LexisNexis®

Gutierrez v. Tropic International Ltd.,[183] an alleged collateral agreement (referred to in the case as the "Collateral Agreement") was found to have been excluded by an entire agreement clause because of the relevant chronology:

> Their own evidence indicates that the Collateral Agreement was made prior to the date of execution of the Redemption Agreement and the Guarantee. Thus, even if the evidence concerning the Collateral Agreement is accepted at trial, it is no answer to the express language of the integration clause subsequently agreed upon in the Redemption Agreement. Moreover, its reconfirmation after execution of the Redemption Agreement and the Guarantee, if proven, does not alter the fact that *after* entering into the Collateral Agreement the parties agreed to an overriding contractual integration clause.[184] [Emphasis in original.]

While there is a certain logic to limiting entire agreement clauses to pre-contracting events in that a party can hardly be expected to be able to know what future events will occur, a chronological approach can severely undermine an intention to have the parties' relationship defined solely by the terms of a written document. This is particularly the case if there is an ongoing business relationship after a contract is executed, because many post-contracting events could be found to be representations or collateral agreements giving rise to liability not created by the contract itself.

8.10.4 Entire agreement clauses will not prevail over an oral agreement where the written document was not intended to encompass the parties' complete relationship

Related to the principle that an entire agreement clause applies only to events which have already occurred at the time of contracting is the well-accepted notion that an entire agreement clause will not prevail over an oral agreement (especially a subsequent oral agreement) where the written agreement was not intended to encompass the entire relationship between the parties:

> To be sure, courts have not always given effect to entire agreement clauses. See, for example, P.M. Perell, "A Riddle Inside an Enigma: The Entire Agreement Clause" (1998) 20 Advocates' Q. 287; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533, 226 D.L.R. (4th) 577 (C.A.). But they have not done so where, for example, *after signing a written contract, parties have entered into an oral agreement and by their conduct have shown that they did not intend to be bound by their previous written contract.*[185] [Emphasis added.]

A good example of the application of this principle is *Turner v. Visscher Holdings Inc.*[186] The parties executed a written agreement including an entire agreement clause. That contract was then followed by two oral agreements. The

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183 [2002] O.J. No. 3079, 63 O.R. (3d) 63 (Ont. C.A.).

184 *Ibid.*, at para. 24.

185 *Transamerica Life Canada Inc. v. ING Canada Inc.*, [2003] O.J. No. 4656, 68 O.R. (3d) 457 at para. 96 (Ont. C.A.), *per* Laskin J.A., dissenting in part.

court found the parties to have conducted themselves in accordance with the two collateral agreements, and concluded that they had evidenced a clear intention not to have the written document encompass all of their contractual relations, notwithstanding the entire agreement clause it contained.

While in theory it is easy to state that a subsequent collateral contract should not be excluded by a prior entire agreement clause if the parties did not intend the written agreement to encompass their whole relationship, the application of this theory in practice has created very inconsistent results. *Turner v. Visscher Holdings Inc.* was a split decision, and in *MacMillan v. Kaiser Equipment Ltd.*[187] the same court refused to follow the majority decision and instead applied the dissent to enforce the entire agreement clause in that case:

> In my view both Turner, supra, and Zippy Print, supra, are distinguishable on their facts. In Turner, the parties acted on a collateral agreement, and by doing so, gave every indication that the written agreement containing the entire agreement clause did not actually constitute the entire agreement. Similarly, in Zippy Print, it was clear that the oral representations were made in order to induce the defendants to enter into the written contract and that the defendants relied on those representations.[188]

8.10.5 Entire agreement clauses will not exclude false representations which induced entry into the contract

In *Zippy Print Enterprises Ltd. v. Pawliuk*,[189] the British Columbia Court of Appeal refused to enforce an entire agreement clause in the face of misrepresentations that had induced the party receiving the representations to enter into the contract. The court began its analysis with the proposition that the parol evidence rule cannot be used to exclude a misrepresentation that induces a party to enter into a contract:

> In short, apart from the application of an exclusion clause, a commercial enterprise cannot make an intentional oral representation designed to persuade a customer or other party to enter into a standard form contract of adhesion and then, by invoking the Parol Evidence Rule, rely on the fact that the contract is in writing to escape liability flowing from the fact that the representation is untrue. In those circumstances the oral representation will be regarded as forming an essential element in the relations between the parties, either on the basis that the written document was not intended to form the entire agreement between the parties (the one contract theory), or, alternatively, on the basis that the oral representation, when it was acted upon by the person to whom it was made entering into the written contract, became a separate or collateral contract on which liability may be founded (the two contract theory).[190]

The court then went on to say that an entire agreement clause (or more generally an exclusion clause: the case speaks generically of "exclusion clauses", although

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[187] [2004] B.C.J. No. 969, 33 B.C.L.R. (4th) 44 (B.C.C.A.).

[188] *Ibid.*, at para. 46.

[189] [1994] B.C.J. No. 2778, 100 B.C.L.R. (2d) 55 (B.C.C.A.).

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Court-appointed representative counsel to class action plaintiffs