Court of Appeal File No. M44126
Sup Court of Justice File No. CV-14-10518-00CL

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

FACTUM OF TRIMOR ANNUITY FOCUS LIMITED PARTNERSHIP #5

(Motion for Leave to Appeal in writing returnable week of September 8, 2014)

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TO: SERVICE LIST

OVERVIEW

1. Trimor Annuity Focus Limited Partnership #5 ("**Trimor**") seeks leave to appeal the order of the Honourable Regional Senior Justice Morawetz (the "**Motion Judge**") dated August 5, 2014 (the "**TPL Motion Order**").

2. The effect of the TPL Motion Order is, among other things, that the Applicants ("**Cash Store**"), rather than Trimor, are declared to be the owners of loans made by Trimor to customers through Cash Store as broker, which loans and the collections therefrom are currently being held in a segregated trust account.

3. The issue on this appeal is of significance to the parties to this proceeding, as it will determine the rights of Trimor and the other third party lenders (collectively with Trimor, the "**TPLs**") on the one hand, and Cash Store and its DIP Lenders on the other hand, to more than $18 million of TPL loans (as at the CCAA Filing Date) and cash collected therefrom. The issue on appeal is also significant to the practice as it raises important and novel issues including:

a) the extent to which the property of a third party can be expropriated in CCAA proceedings, in contrast to the legal regime that would be applicable under Part XII of the *Bankruptcy and Insolvency Act* in the case of the insolvency of a securities brokerage; and

b) the authority of a CCAA judge to override a written contract to eliminate a proprietary and ownership rights.

4. The proposed appeal is meritorious, and leave ought to be granted. In reaching his decision, the Motion Judge erred in law by applying the incorrect test to fundamentally modify or substitute a written agreement with another one based on the conduct of the parties. Further, even if the Motion Judge had applied the correct legal test, the finding that the parties' conduct in the circumstances gave rise to a replacement of the written agreement establishing a broker-lender agreement with a new one creating a creditor-debtor relationship constituted a further error requiring appellate review.

I. CONCISE STATEMENT OF FACTS

The Broker Agreement

5. On or about February 1 and September 24, 2012, Trimor and Cash Store executed a broker agreement (the "**Broker Agreement**") under which Trimor, as Financier, made $27,002,000 in funds available (the "**Trimor Funds**") to Cash Store, as Broker, for the sole purpose of Cash Store brokering loans (the "**Trimor Loans**") between Trimor and Cash Store's customers.[1]

6. The understanding was that Cash Store would act as a broker by arranging for loans between the customers and TPLs such as Trimor. Over the course of this arrangement and in accordance with the Broker Agreement, it was understood that

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[1] Reasons of the Honourable Regional Senior Justice Morawetz in the matter of *Cash Store Financial Services (Re)*, 2014 ONSC 4326 ("**Reasons for Judgment**"): Motion Record of the Moving Party, Trimor Annuity Focus Limited Partnership #5 ("**Trimor Motion Record**"), Tab 13, p. 804 at ¶59 and 60.

Trimor owned both the Trimor Funds and the Trimor Loans. Trimor was entitled to receive a stated rate of 59 per cent interest under these loans from the Customers.[2]

7. By their nature, the Trimor Loans were risky. Accordingly, Cash Store historically made inducement payments to TPLs – referred to by Cash Store as "retention payments". These monthly retention payments were not set out in the Broker Agreement but formed a collateral agreement between the parties to induce the TPLs to continue to make their funds available to Cash Store, which in turn enabled Cash Store to earn broker fees. In other words, these payments were intended to ensure that the TPLs would receive at least some return commensurate with the considerable risk they were assuming.[3]

8. Trimor received numerous account statements from Cash Store. The "funding excess / deficiency" on these account statements provided a summary of the Trimor Loans. When the Trimor Funds exceeded the amount deployed as loans to customers, Cash Store described the undeployed monies as the "funding excess / deficiency". Cash Store Financial's public disclosure always showed the Trimor Funds as Trimor's property, not the property of Cash Store or Cash Store Financial.[4] This was in accordance with the Broker Agreement, which expressly recognized that ownership of Trimor's property was intended to remain with Trimor.[5]

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[2] Affidavit of Erin Armstrong sworn April 13, 2014 (the "**Armstrong Affidavit** "), Exhibits "A" and "B"; Trimor Motion Record, Tab 2, p. 35 and 69.
[3] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 805 at ¶64.
[4] Supplementary Affidavit of Erin Armstrong sworn May 8, 2014 ("**Supplementary Armstrong Affidavit**"): Trimor Motion Record, Tab 3 at ¶5.
[5] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 814 at ¶119.

9. The ownership of the funds provided by Trimor was also confirmed by Cash Store to its secured lenders and in its public filings. In January 2012, Cash Store offered $132.5 million in Senior Secured Notes due in 2017 through a private placement (the "**Secured Note Offering**"). Cash Store's offering circular dated January 12, 2012 (the "**Circular**") for the Secured Note Offering advised potential investors that Cash Store "currently acts primarily as a broker of short-term advances between our customers and third party lenders, the effect of which is that the loan portfolio we service is not financed on our balance sheets". These statements were repeated in Cash Store's financial statements.[6]

10. In the Circular, Cash Store further advised potential purchasers of its notes that "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" and that "the decision has been made to voluntarily made retention payments to the Lenders to lessen the impact of loan losses experienced by the third party lenders".[7]

Cash Store's CCAA Proceedings

11. On April 14, 2014, Cash Store obtained an initial order pursuant to the *CCAA*, which was amended and restated on April 15, 2014 (the "**Initial Order**").[8]

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[6] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 805 at ¶65-66.
[7] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 805 at ¶66.
[8] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 796-797 at ¶12-13; Amended and Restated Initial Order of Justice Morawetz dated April 15, 2014; Trimor Motion Record, Tab 11.

12. As of April 13, 2014 (the day before the initial CCAA order), Cash Store's records showed Trimor loans and receivables with a value of $16.8 million.[9] Over time, the TPLs had provided over $42 million to Cash Store under the broker agreements.[10]

13. The Initial Order provided, among other things, that Cash Store shall continue to carry on business and retain and use funds received from TPLs, including Trimor's Funds, subject to certain conditions set out in the Initial Order.[11]

14. The Initial Order provided certain protections for the TPLs. These include, among other things, the following:

a) a charge in favour of the TPLs in the amount of Cash Store's cash on hand as of the effective time of the Initial Order, as security for any valid trust or other proprietary claim of a TPL to such cash on hand;

b) a declaration that the TPLs' entitlement to TPL brokered loans in existence at the effective time of the Initial Order is to be determined based on the legal rights as they existed immediately prior to the effective time; and

c) restrictions on the treatment of the amounts collected by Cash Store in relation to the brokered loans after the commencement of the CCAA

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[9] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 798 at ¶22.
[10] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 798 at ¶18.
[11] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 797 at ¶14 and 17; Amended and Restated Initial Order of Justice Morawetz dated April 15, 2014; Trimor Motion Record, Tab 11.

Proceedings (the "**TPL Post-Filing Receipts**"), and requirements to keep certain minimum cash balances.[12]

15. Cash Store's brokered line of credit product was discontinued in Ontario as at February 12, 2014 and no TPL brokered loans were made in Ontario during the CCAA proceedings. New TPL brokered loans were made by the Applicants outside Ontario after the Initial Order until May 12, 2014, at which point it ceased the broker business entirely. During this time, the TPLs brokered loans totaled near $6 million.[13]

16. After the TPL Protection Order was issued, segregated accounts were opened to maintain the Trimor Post-Filing Receipts (*i.e.* the amounts received by Cash Store in relation to the loans brokered on Trimor's behalf after the commencement of the CCAA proceedings). The balance of the segregated account for the Trimor Post-Filing Receipts as of June 4, 2014 was $2,686,089.[14]

The TPL Ownership Motion

17. Trimor brought a motion returnable June 11, 2014 for an Order that, among other things, the Trimor Funds were the property of Trimor (the "**TPL Ownership Motion**"), such that the Applicants were effectively trustees or bailees, and not debtors, in respect of the Trimor Loans and Trimor Funds.[15]

18. On August 5, 2014, the Honourable Regional Senior Justice Morawetz released his reasons dismissing the TPL Ownership Motion (the "**Reasons for Judgment**"). The

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[12] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 797 at ¶14 and 17; Amended and Restated Initial Order of Justice Morawetz dated April 15, 2014; Trimor Motion Record, Tab 11.
[13] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 799 at ¶23-24.
[14] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 799-800 at ¶27-30.
[15] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 794-795 at ¶9.

Motion Judge determined that Cash Store – not Trimor – owns the Trimor Funds, on the basis that the parties had "alter[ed] the relationship from what was set out in the Broker Agreements."[16]

19. Trimor now seeks leave to appeal the TPL Motion Order to the Court of Appeal for Ontario.

II. QUESTION AT ISSUE

20. The only issue on this motion is whether this Court should grant leave to appeal the TPL Motion Order.

III. LAW AND ARGUMENT

A. The Test for Leave to Appeal

21. Leave to appeal should be granted where:

a. the point on appeal is of significance to the practice;

b. the point on appeal is of significance to the underlying parties;

c. the appeal is *prima facie* meritorious and not frivolous; and

d. the appeal will not hinder the progress of the action.[17]

22. The four part test for granting leave to appeal requires that all four elements be satisfied.[18] In this case, all four requirements are met.

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[16] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 815 at ¶127.

[17] *Stelco Inc. (Re)*, 2005 CarswellOnt 1188 at ¶24 (Ont. C.A.): Book of Authorities of the Moving Party, Trimor Annuity Focus Limited Partnership #5 ("**Trimor Book of Authorities**"), Tab 1; *Timminco Limited (Re)*, 2012 ONCA 552 at ¶2, Trimor Book of Authorities, Tab 2.

B. The Point on Appeal is Significant to the Practice

23. Points are significant to the practice when they have precedential value or raise novel and important points,[19] or when they are significant to the parties' industry.[20] Both factors apply in this case.

24. First, the proposed appeal raises at least three important (and novel) points to the practice:

a) **The extent to which the property of a third party can be expropriated in CCAA proceedings, in contrast to the legal regime that would be applicable under Part XII of the *Bankruptcy and Insolvency Act* ("*BIA*") in the case of the insolvency of a securities brokerage.** The effect of the Motion Judge's order is to expropriate property that was clearly held for the benefit of and traceable to the TPLs, and make it available for the use of Cash Store's creditors. This departs significantly from the statutory regime in Part XII of the *Bankruptcy and Insolvency Act* and therefore creates an unfair disadvantage to customers/lenders in a brokerage arrangement under the CCAA as compared to the BIA.

b) **The authority of a CCAA judge to override a written contract to eliminate proprietary and ownership rights.** In this instance, the Broker

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[18] *Statoil Canada Ltd. (Arrangement relatif à)*, 2012 QCCA 665 at ¶4 and 7: Trimor Book of Authorities, Tab 3.

[19] *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 254, 2005 CarswellOnt 6283 at ¶14 (Ont. C.A.): Trimor Book of Authorities, Tab 4; *Resurgence Asset Management LLC v. Canadian Airlines Corporation,* 2000 ABCA 149 at ¶33: Trimor Book of Authorities, Tab 5; *Ketch Resources Ltd. v. Gauntlet Energy Corporation*, 2005 ABCA 357 at ¶14: Trimor Book of Authorities, Tab 6; *Stomp Pork Farm Ltd. (Re)*, 2008 SKCA 73 at ¶16: Trimor Book of Authorities, Tab 7.

[20] *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 at ¶17: Trimor Book of Authorities, Tab 8.

Agreement expressly recognized that ownership of the Trimor Property remained with Trimor at all times. This ownership arrangement was corroborated by evidence in the record (including various aspects of the parties' subsequent conduct, such as Cash Store's public filings and the issued monthly reports), and was even acknowledged by the Motion Judge. These findings negate any suggestion that there was a pattern of conduct by the parties that demonstrates a clear intention to replace their written agreement with a new one. Notwithstanding this, the Motion Judge held that written terms of the agreement did not represent that actual contractual relationship between the parties, and effectively imposed an alternate agreement on Trimor that created a creditor-debtor relationship rather than the lender-broker relationship provided for in the agreement.

c) **The legal test to be applied in setting aside a written agreement in favour of a fundamentally different agreement based on the parties' subsequent conduct, and the factual findings necessary before a new agreement can be imposed on the parties.** It is of substantial importance for parties in CCAA proceedings to be able to rely on the certainty presumed in unambiguous written agreements. If a CCAA motion judge is able to impose on parties an agreement entirely different from the written agreement accepted and relied upon by both parties through to after the initial CCAA filing, this is a principle which needs to be clearly enunciated. Certainty in the law with respect to when an entirely new agreement can legitimately be

found to exist between two sophisticated commercial entities is necessary for the proper functioning of the CCAA framework.

25. Second, the points on appeal are significant to the brokerage industry generally. A broker does not own the funds or property that it invests or manages on behalf of its customers. The customers are the owners of those funds and property. This is a fundamental tenet upon which the entire brokerage industry operates. The Motion Judge's decision to set aside a clear written brokerage contract and declare that a creditor-debtor relationship exists when one was not intended could have very serious consequences for the brokerage industry as a whole in the context of CCAA proceedings. Accordingly, the circumstances in which a CCAA judge may rely on limited and contradictory evidence of a party's subsequent conduct to replace a written agreement with a new one is an issue that must be clearly demarcated. Entities in the brokerage lending industry need to know the manner in which they can operate their businesses without fear that the express terms of their agreements will be superseded by a court's interpretation of the intent behind their conduct in relation to the contract.

C. Point on Appeal is Significant to the Underlying Parties

26. The TPL Motion Order will have a significant impact on this proceeding and the rights of the TPLs. The ability of Trimor to recover any of the funds to which the broker agreement stipulates it is entitled is directly tied to the issue on appeal.

27. The TPL Motion Order has the result of finally disposing of Trimor's position that it has ownership over the Trimor Funds, and puts Trimor in the position of an unsecured creditor of Cash Store. This renders the possibility of Trimor recovering any

of the Trimor Funds to effectively zero, given the magnitude of Cash Store's secured debts. On the other hand, a finding that the written terms of the Broker Agreement govern the relationship between Trimor and Cash Store would result in Trimor being entitled to recover all the funds that are being held in trust by Cash Store on Trimor's behalf.

28. This is a significant amount of money, and the issue on appeal is directly related to the determination of which party within the CCAA proceeding is entitled to those funds.

D. The appeal is Prima Facie Meritorious

29. An appeal is *prima facie* meritorious when the matter is one of first impression.[21] As noted above, several of the issues on appeal are matters of first impression. There are clear errors of law and mixed fact and law made by the Motions Judge, and these errors go to the heart of his decision.

30. In her endorsement dated August 15, 2014, the van Rensburg J.A. held that the appeal is *prima facie* meritorious. Her Honour found that "the motion for leave and appeal raise [a] 'serious issue'", namely, the circumstances in which conduct will prevail over a written argument.[22]

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[21] *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 254, 2005 CarswellOnt 6283 (CA) at ¶14: Trimor Book of Authorities, Tab 4.

[22] Reasons of van Rensburg J.A. dated August 15, 2014 on the Stay Pending Appeal Motion heard on August 25, 2014: Trimor Motion Record, handwritten version at Tab 15, typed version at Tab 16, p. 2.

1. Error of Law Regarding the Legal Test for Novation of Contract between Two Parties

31. The Motion Judge erred in law in his interpretation and application of the legal test for assigning a new contract fundamentally different from the written contract agreed to between the parties. The conduct of the parties was fundamentally consistent with the Brokerage Agreement and, while there may have been collateral arrangements and minor modifications mutually agreed upon between the parties by their conduct that was not sufficient for the Motion Judge to have disregarded the Brokerage Agreement in its entirety.

32. An entirely new agreement between the same parties can be presumed only where new contractual terms are agreed to that are inconsistent with the original contract, which inconsistency goes to the very root of the original contract.[23] While a variation in a contract may occur where the parties, by their words and deeds, entered into a new arrangement different from the original, there must still be "a pattern of conduct" that demonstrates a clear intention of the parties to enter into a new arrangement before the written agreement will be set aside.[24]

33. In his Reasons for Decision, the Motion Judge found that the parties had altered their relationship from what was set out in the Broker Agreement. It is unclear what legal test the Motion Judge used to make this determination, as no test is outlined and no case law at all is cited in connection with the presumed modification or novation of the

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[23] *CIBC World Markets Inc v. Blue Range Resources Corporation*, 2001 ABCA 86 at ¶3: Trimor Book of Authorities, Tab 9; *Kelley v. Pollock Leasing Inc*, 2005 CarswellOnt 4869 at ¶21 (Ont. Sup. Ct.): Trimor Book of Authorities, Tab 10.

[24] *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597 at ¶65-68: Trimor Book of Authorities, Tab 11.

parties' written agreement. However, it appears based on the Motion Judge's reasons that so long as there is evidence of conduct by the parties that is inconsistent with certain terms of the written contract, the agreement can be fundamentally altered or replaced with an entirely separate agreement that is consistent with that subsequent conduct. That is not the test.

34. The Motion Judge made no finding that there was a pattern of conduct that demonstrated the parties' intention to replace their written agreement that provided for a lender-broker relationship with a new agreement that provided for a creditor-debtor relationship. The Motion Judge simply found that there was some subsequent conduct that was at variance with the written terms of the Broker Agreement. That finding alone does not satisfy the legal test for modification or substitution of a new agreement.

35. Had the proper legal principles been applied, the Broker Agreement would not have been set aside for a new one fundamentally different from the parties' written agreement and expressed intentions. This is evidenced by the fact that the Motion Judge himself made various findings regarding the parties' conduct that was *consistent* with the written agreement, and which would necessarily be inconsistent with any modified or new agreement, regardless of how undefined the parameters of this presumed modified or new contract remains. For example, the Motion Judge's finding that Cash Store advised potential investors that it acts as a "broker of short-term advances between our customers and third party lenders", which was repeated in its financial statements up through to its CCAA filing, is evidence of conduct by the Applicants that is consistent with the written terms of the agreement. It certainly refutes any presumption of a pattern

of conduct and a clear intention by the parties to "convert their Broker Agreements into lending agreements."[25]

36. Accordingly, in relying on only certain aspects of the parties' conduct to find that a new agreement was entered into, rather than any consistent pattern of conduct that showed their clear intentions to abandon the written agreement, the Motion Judge applied the relevant law incorrectly.

2. Error of Mixed Fact and Law Regarding the Exercise of Authority under the CCAA

37. Part XII of the *Bankruptcy and Insolvency Act* delineates clear rules with respect to the insolvency of securities brokerage firms. A fundamental tenet of that regime is that segregation and traceability of funds or securities to a specific customer is not necessary in order for customers to have priority against such funds and securities. In fact, Part XII of the *Bankruptcy and Insolvency Act* establishes a customer pool fund whereby all funds and securities not held in the name of specific customers are distributed *pro rata* to the customers who have placed their funds with the brokerage for investment in priority to other creditors of the securities firm, who are paid from a general fund.[26]

38. While Part XII of the *Bankruptcy and Insolvency Act* is not directly applicable in this case, it is analogous as the TPLs placed their funds with Cash Store as broker to be invested in direct loans to customers. Moreover, the loans were traceable to the TPLs as

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[25] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 810 at ¶93.
[26] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss. 261 and 262.

they were made in their names and they remain segregated and traceable to the TPLs pursuant to the TPL Protection Order.

39. The effect of the CCAA Judge's order is to expropriate property that was clearly held for the benefit of and traceable to the TPLs and make it available for the use of Cash Store's creditors, which departs significantly from the statutory regime in Part XII of the *Bankruptcy and Insolvency Act* and therefore creates an unfair disadvantage to customers/lenders in a brokerage arrangement under the CCAA as compared to the BIA.

3. Error of Mixed Fact and Law Regarding the Nature of the Contractual Relationship between Trimor and Cash Store

40. The Motion Judge made a palpable and overriding error in failing to appreciate evidence that was highly relevant to the issue of ownership over the Trimor Funds and the nature of the agreement between Cash Store and Trimor. It is an error of mixed fact and law for a motion judge to fail to consider or appreciate relevant evidence.[27]

41. Even if the Motion Judge had used the proper test for determining that the parties to a written agreement had fundamentally altered their agreement or abandoned it for a new unwritten one, the relevant evidence before the Motion Judge in any event did not support such a finding.

42. The Motion Judge acknowledged in his decision the following facts:

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[27] *Geographic Resources Integrated Data Solutions Ltd. v. Peterson,* 2012 ONSC 7182 at ¶19 and 38 (Ont. Div. Ct.): Trimor Book of Authorities, Tab 12.

a) The Broker Agreement expressly provides that Trimor owns the funds, loans and receivables made available to Cash Store, and that ownership of the TPL property was intended to remain with the TPLs;[28]

b) Cash Store stated in its financial statements that it acted as a broker for loans made by TPLs to its customers, and that the funds servicing these loans are not on its balance sheets (as they are not owned by Cash Store, but rather the TPLs);[29]

c) In its Circular, Cash Store represented to potential bond investors the same reality, which is that the funds used to service the loans between the TPLs and Cash Store's customers are not part of Cash Store's assets;[30]

d) Cash Store, in the Circular, advised potential purchasers of its bonds that it had made the decision to "voluntarily make retention payments to the third party lenders as consideration for continuing to advance funds to our customers";[31] and

e) At the outset, Trimor understood that its funds were segregated from Cash Store's operating funds, which was provided for in the Broker Agreement and confirmed in certain representations made by Cash Store that the funds would

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[28] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 813 at ¶116 and 119.
[29] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 805 at ¶66.
[30] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 805 at ¶65.
[31] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 805 at ¶66.

be maintained in a designated TPL account (although this ultimately did not occur).[32]

43. All of these factual findings support the conclusion that the parties acted in accordance with the written terms of the Broker Agreement. Specifically, Trimor understood that the funds it made available to Cash Store (and received by Cash Store in connection with the repayment of those loans) were its property, and acted on this understanding, which was in line with the clear terms of the agreement. Similarly, Cash Store understood, and made clear public representations to the effect, that ownership over the Trimor funds and receivables at all times remained with Trimor.

44. Notwithstanding these factual findings, the Motion Judge focused entirely on two aspects of the parties' conduct that was purportedly at variance with the Broker Agreement, and neglected to consider or appreciate the evidence of the parties' subsequent conduct that accorded with the express terms of the agreement. The first aspect of the parties' conduct that the Motion Judge focused on was that, despite the understanding by Trimor and the assurances by representatives of Cash Store that Trimor's Funds were kept in a segregated account, Cash Store actually comingled the Trimor Funds with its operating funds. This fact, however, did not give rise to a finding that the parties agreed to abandon their written agreement in favour of a fundamentally different new one. This provision was permissive and at the TPL's option. It was not a condition of the agreement. While Trimor could request that Cash Store's maintain the Trimor Funds in a segregated account, failure to maintain segregated accounts was not required in order to maintain the Brokerage Agreement and does not therefore mean that

[32] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 814 at ¶120.

the entire agreement was set aside in favour of a new one that created a creditor-debtor relationship. To the contrary, both Trimor and Cash Store expressly agreed to the continued operation of the Brokerage Agreement without a segregated account for Trimor.

45. The second aspect of the parties' conduct that the Motion Judge relied upon to fundamentally alter the written agreement was Cash Store voluntary payments to Trimor equivalent to 17.5% of the outstanding loan amounts. The Motion Judge found that this "reflect[ed] a payment of interest", which was inconsistent with the position that the relationship between Trimor and Cash Store was not one of creditor-debtor.[33] In making this finding, the Motion Judge seemingly disregarded all of the other relevant evidence of conduct that indicated that the funds were always owned by Trimor.

46. Examples of conduct that was consistent with the terms of the Broker Agreement include: (a) Cash Store's own representations – in a Circular and its public financial filings – that the 17.5% payment was voluntary, and was made to incentivize Trimor to continue making its funds available for lending to Cash Store's customers (from which Cash Store received broker fees); and (b) the fact that TPL loans to customers that Cash Store considered "bad loans", which were unlikely to be recovered, were booked to the TPLs upon its CCAA filing, evidencing the Monitor's and Cash Store's view that the loans and any amounts received from these debts were the property of the TPLs.[34]

47. A finding that Cash Store made voluntary payments that were not contemplated in the agreement, as found by the Motion Judge, does not warrant a fundamental

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[33] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 815 at ¶126.
[34] Reasons for Judgment: Trimor Motion Record, Tab 13, p. 805 at ¶65-66.

rewriting of the parties' contract. In order for the parties' written agreement to have been replaced with a new one, there needed to be a pattern of conduct, evidencing the parties' clear intentions to that effect.[35] There was no such pattern in this instance. To the contrary, there was significantly more conduct that was in line with the clearly expressed written terms of the Broker Agreement, and which the Motion Judge acknowledged provided for Trimor's continued ownership over its funds that were being held by Cash Store.

48. The Motion Judge's reliance on one mutually agreed upon variance or minor modifications to the agreement (along with Trimor not enforcing a provision regarding the segregation of funds into a trust account), while disregarding or failing to appreciate all of the remaining evidence of conduct consistent with the terms of the Broker Agreement, Cash Store's own public pronouncements and evidence in the CCAA application record as to the nature of the brokerage (as opposed to debtor-creditor) relationship and the Court's own declarations in prior orders in the CCAA Proceedings (including the TPL Protections Order), to effectively declare that the Broker Agreement had been terminated and novated by the parties, constituted an error reversible on appeal.

E. The Appeal will not Unduly Hinder the Progress of the Action

49. As a result of the proposed hearing of the appeal on an expedited basis – as ordered by Justice van Rensburg in the Stay Order dated August 15, 2014 – the appeal

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[35] *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597 at ¶65-68: Trimor Book of Authorities, Tab 11.

will not unduly hinder the progress of the action. If leave is granted, the appeal would be scheduled expeditiously to be argued prior to the end of September 2014.[36]

50. Furthermore, in the interim, the restructuring activities or sale efforts contemplated can proceed as planned. Cash Store currently has access to Debtor-In-Possession financing that is sufficient to fund its operations and CCAA restructuring costs beyond the period in which the appeal is to be heard.

IV. ORDER SOUGHT

51. Trimor therefore requests an order granting leave to appeal the TPL Motion Order, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of August 2014.

per

Brett Harrison and Adam Maerov
McMillan LLP

Lawyers for Trimor Annuity Focus Limited Partnership #5

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[36] *Fantom Technologies Inc., Re*, 2003 CarswellOnt 897 at ¶22 (Ont. C.A.): Trimor Book of Authorities, Tab 13; *Cineplex Odeon Corp. (Re)*, 2001 CarswellOnt 1258 at ¶6 (Ont. C.A.): Trimor Book of Authorities, Tab 14; *Stelco Inc. (Re)*, 2005 CarswellOnt 6283 (Ont. C.A.) at ¶ 14: Trimor Book of Authorities, Tab 4.

SCHEDULE A - AUTHORITIES

1. *CIBC World Markets Inc v. Blue Range Resource Corporation*, 2001 ABCA 86, 248 W.A.C. 172.

2. *Cineplex Odeon Corp. (Re)*, 2001 CarswellOnt 1258, 24 C.B.R. (4th) (Ont. C.A.).

3. *Fantom Technologies Inc., Re*, 2003 CarswellOnt 897, 41 C.B.R. (4th) 55 (Ont. C.A.).

4. *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, 2012 ONSC 7182, 300 O.A.C. 58 (Ont. Div. Ct.).

5. *Kelley v. Pollock Leasing Inc.*, 2005 CarswellOnt 4869, [2005] O.J. No. 3586 (Ont. Sup. Ct.).

6. *Ketch Resources Ltd. v. Gaunlet Energy Corporation*, 2005 ABCA 357, 15 C.B.R. (5th) 235.

7. *Liberty Oil & Gas Ltd. (Companies Creditors Arrangement Act)*, 2003 ABCA 158, 122 A.C.W.S. (3d) 976.

8. *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149, 19 C.B.R. (4th) 33.

9. *Statoil Canada Ltd. (Arrangement relatif à)*, 2012 QCCA 665, 230 A.C.W.S. (3d) 357.

10. *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5, 2005 CarswellOnt 1188 (Ont. C.A.).

11. *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 254, 2005 CarswellOnt 6283 (Ont. C.A.).

12. *Stomp Pork Farm Ltd. (Re)*, 2008 SKCA 73, 43 C.B.R. (5th) 42.

13. *Technicore Underground Inc v. Toronto (City)*, 2012 ONCA 597, 354 D.L.R. (4th) 516.

14. *Timminco Limited (Re)*, 2012 ONCA 552, 219 A.C.W.S. (3d) 11.

SCHEDULE B - RELEVANT LEGISLATION

Sections 13 and 14 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.

Leave to appeal

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

Court of appeal

14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

Practice

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

***Sections* 261 and 262 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.**

Vesting of securities, etc., in trustee

261. (1) If a securities firm becomes bankrupt, the following securities and cash vest in the trustee:

(a) securities owned by the securities firm;

(b) securities and cash held by any person for the account of the securities firm; and

(c) securities and cash held by the securities firm for the account of a customer, other than customer name securities.

Establishment of a customer pool fund and a general fund

(2) Where a securities firm becomes bankrupt and property vests in a trustee under subsection (1) or under other provisions of this Act, the trustee shall establish

(a) a fund, in this Part called the "customer pool fund", including therein

(i) securities, including those obtained after the date of the bankruptcy, but excluding customer name securities and excluding eligible financial contracts to which the firm is a party, that are held by or for the account of the firm

(A) for a securities account of a customer,

(B) for an account of a person who has entered into an eligible financial contract with the firm and has deposited the securities with the firm to assure the performance of the person's obligations under the contract, or

(C) for the firm's own account,

(ii) cash, including cash obtained after the date of the bankruptcy, and including

(A) dividends, interest and other income in respect of securities referred to in subparagraph (i),

(B) proceeds of disposal of securities referred to in subparagraph (i), and

(C) proceeds of policies of insurance covering claims of customers to securities referred to in subparagraph (i),

that is held by or for the account of the firm

(D) for a securities account of a customer,

(E) for an account of a person who has entered into an eligible financial contract with the firm and has deposited the cash with the firm to assure the performance of the person's obligations under the contract, or

(F) for the firm's own securities account, and

(iii) any investments of the securities firm in its subsidiaries that are not referred to in subparagraph (i) or (ii); and

(b) a fund, in this Part called the "general fund", including therein all of the remaining vested property.

Allocation and distribution of cash and securities in customer pool fund

262. (1) Cash and securities in the customer pool fund shall be allocated in the following priority:

(a) for costs of administration referred to in paragraph 136(1)(b), to the extent that sufficient funds are not available in the general fund to pay such costs;

(b) to customers, other than deferred customers, in proportion to their net equity; and

(c) to the general fund.

Where property deposited with securities firm under an EFC

(1.1) Where

(a) a person has, under the terms of an eligible financial contract with the securities firm, deposited property with the firm to assure the performance of the person's obligations under the contract, and

(b) that property is included in the customer pool fund pursuant to paragraph 261(2)(a),

that person shall share in the distribution of the customer pool fund as if the person were a customer of the firm with a claim for net equity equal to the net value of the property deposited that would have been returnable to the person after deducting any amount owing by the person under the contract.

Distribution

(2) To the extent that securities of a particular type are available in the customer pool fund, the trustee shall distribute them to customers with claims to the securities, in proportion to their claims to the securities, up to the appropriate portion of their net equity, unless the trustee determines that, in the circumstances, it would be more appropriate to sell the securities and distribute the proceeds to the customers with claims to the securities in proportion to their claims to the securities.

Compensation in kind

(2.1) Subject to subsection (2), the trustee may satisfy all or part of a customer's claim to securities of a particular type by delivering to the customer securities of that type to which the customer was entitled at the date of bankruptcy. For greater certainty, the trustee may, for that purpose, exercise the trustee's power to purchase securities in accordance with section 259.

Allocation of property in the general fund

(3) Property in the general fund shall be allocated in the following priority:

(a) to preferred creditors in the order set out in subsection 136(1);

(b) rateably

(i) to customers, other than deferred customers, having claims for net equity remaining after distribution of property from the customer pool fund and property provided by a customer compensation body, where applicable, in proportion to claims for net equity remaining,

(ii) where applicable, to a customer compensation body to the extent that it paid or compensated customers in respect of their net equity, and

(iii) to creditors in proportion to the values of their claims;

(c) rateably to creditors referred to in section 137; and

(d) to deferred customers, in proportion to their claims for net equity.

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"

Court of Appeal File No.: M44126

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

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

FACTUM OF TRIMOR ANNUITY FOCUS LIMITED PARTNERSHIP #5

(Motion for Leave to Appeal in writing returnable week of September 8, 2014)

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