

CITATION: Cash Store Financial Services (Re), 2014 ONSC 2372
COURT FILE NO.: CV-14-10518-00CL
DATE: 2014-04-23

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 Special Committee of the Board of Directors of the
Applicants

Robert Chadwick, for the Ad Hoc Committee of Noteholder

Heather Meredith and James Gage for FTI Consulting Canada, proposed Monitor

Brett Harrison for Timor Fund

Orestes Pasparakis and Alan Merskey for Coliseum Capital, proposed DIP
Lender

HEARD: April 15 and 16, 2014

ENDORSED: April 16, 2014

REASONS: April 23, 2014

ENDORSEMENT

[1] On April 14, 2014, at the conclusion of argument, I granted CCAA protection to the Applicants. Typed reasons were released on April 15, 2014 (*Cash Store Financial Services (Re)*, 2014 ONSC 2372).

[2] The Notice of Application and the supporting record make clear the Applicants were moving for approval of a Debtor in Possession ("DIP") Financing Order and a DIP Financing

Charge on a priority basis, as well as priority for an Administration Charge and a Directors' Charge.

[3] I did not determine the issue of DIP financing and any priority charges on April 14, 2014. My Endorsement contained the following:

[31] The materials in support of this application were provided only recently to the parties in attendance at Court. The parties have not, in my view, had sufficient time to respond to this application on the merits. I am therefore treating this application as if it is being presented on no notice.

[32] At this stage, I am of the view that urgency has been demonstrated and that creditor protection is required to stabilize the operating environment for the Applicants. I am satisfied that it is both necessary and appropriate to make declaration that the Applicants qualify for protection under the CCAA and a stay of proceedings is granted. With respect to the remaining relief, while I recognize that the Applicants have a liquidity crisis, I am not prepared to entertain the application for a DIP Financing Order until such time as the other stakeholders have had an appropriate time to respond.

[33] Counsel are to re-attend at 10:00 a.m. tomorrow, Tuesday, April 15, 2014 to finalize a draft order for my review.

[34] I understand there are two competing DIP Financing proposals. It would be helpful if the Monitor could prepare a report prior to the April 15, 2014 hearing which compares the merits of the two proposals.

[4] The Monitor did prepare and filed its first report to the Court on April 15, 2014. The Monitor referenced definitive term sheets that had been received from each of Coliseum Capital Partners LP, Coliseum Capital Partners II LP, and Blackwell Partners LLC (collectively, "Coliseum") and a committee of certain holders of the Applicants 11.5% senior secured notes (the "Ad Hoc Committee").

[5] The Notice of Application referenced a \$20.5 million proposal from Coliseum. I indicated at the initial hearing that I felt a more modest proposal would be more appropriate at the initial stage of the proceedings. This comment was reflected upon by the parties such that at the hearing on April 15, 2014, the DIP Financial Proposal submitted for the Court's consideration was in the amount of \$8.5 million. The Monitor made the following observations:

- The relative cost of the two proposals are similar;
- The funding conditions and availability provisions are more flexible and less uncertain in the Coliseum Proposal;
- Based on the company's cash flow projections, the Company will require more than \$8.5 million of funding by week 3 of the proceedings; the

Coliseum Proposal offers a commitment for further financing, subject to Court approval;

- Under the Coliseum Proposal, the Company has an option for further financing. If a better proposal can be found in the very near term, the Company is under no obligation to extend the Coliseum financing.
- It is encouraging that both key stakeholder groups have demonstrated strong support for the Applicants by offering urgently needed financing; hopefully, over the next couple of weeks, there can be a productive dialogue with the two stakeholders and other interested parties to build on common interests and work toward a successful outcome. Both interim financing proponents have indicated a desire and willingness to cooperate and work with the Applicants.

[6] The Monitor recommended that the Coliseum Proposal be accepted.

[7] With respect to notice to affected parties of the request for a DIP Financing Charge on a priority basis, I am satisfied that the request for this relief has come to the attention of senior lenders and the senior secured noteholders.

[8] With respect to the senior lenders, paragraph 60 of Mr. Carlstrom's affidavit of April 14, 2014 provides a breakdown of the lenders. I am satisfied that the requested relief has come to the attention of 424187 Alberta Limited, a company controlled by Cash Store Financial's CEO and one of its directors, Mr. Gordon Reykdal. Coliseum is undoubtedly aware of the requested relief. The remaining lender, 8028702 Canada Inc., which loaned \$5 million of the \$12 million draw, is, according to Mr. Carlstrom a company controlled by the same person who controls the McCann Family Holding Corporation ("McCann"), one of Cash Store Financial's principal Third Party Lenders ("TPLs").

[9] From a review of affidavits of Mr. Patrick Riesterer and from submissions made by counsel to the Applicants, I am satisfied that counsel to McCann was aware of the Notice of Application on April 14, 2014 and that counsel had also received a copy of the draft initial order which requested an order for DIP financing on a priority basis. Counsel to McCann did not attend on April 14th or April 15th, 2014. I do note that although counsel to McCann is based in Alberta, the law firm involved has offices in Toronto and, in my view, counsel to McCann could have attended, had they wished to do so.

[10] Turning now to the issues to be considered on a motion to approve a DIP financing charge on priority basis, Mr. Carlstrom states it is abundantly clear that Cash Store Financial cannot restructure its business without interim financing. It requires such financing in order to continue to operate during the post-filing period while it considers the best options to maximize recovery for all stakeholders. He further states that the DIP Financing, as originally requested in the amount of \$20.5 million, is intended to provide the Applicants with adequate liquidity to

satisfy their working capital requirements and to seek a complete restructuring as part of a CCAA proceeding.

[11] Mr. Carlstrom further states that at the time of preparing his affidavit, the terms of the DIP Facility were subject ongoing negotiations, but it was clear that the DIP Facility would be secured by a priority charge over the assets of Cash Store Financing (the "DIP Lenders Charge") that would rank ahead of existing security interests, including the senior secured lenders and the senior secured noteholders, and *pari passu* with the TPL Charge. It was contemplated the DIP Lenders Charge would rank behind the Administration Charge and the Directors' Charge.

[12] Section 11.2 of the CCAA gives the court the statutory authority to grant a DIP financing charge.

[13] Section 11.2(4) of the CCAA sets out the factors to be considered by the court in deciding whether to grant a DIP financing charge.

[14] Counsel to the Applicants submits that the following factors support the granting of the DIP Lenders Charge, many of which incorporate the considerations enumerated in section 11.2(4):

- (a) The Cash Flow Forecast projects that the Applicants will require the additional liquidity afforded by the DIP Facility in order to continue to operate through the pendency of the proposed CCAA proceeding;
- (b) It is anticipated that the DIP Facility will provide the Applicants with sufficient liquidity to implement restructuring initiatives;
- (c) To the extent that the court must still weigh relative prejudices in determining whether to grant the DIP Lenders Charge, any prejudice to secured creditors is minimal because the proposed DIP lender is one the senior secured lenders and one of the senior secured noteholders; moreover, the amount of proposed DIP Facility is within the permitted "basket" under the Note Indenture;
- (d) Any prejudice to the secured creditors must be weighed against the stark reality that the only alternative to a CCAA restructuring is a liquidation, which counsel submits would likely result in significantly worse recoveries, even for the secured creditors;
- (e) The DIP Lenders Charge will not secure any pre-filing obligations;
- (f) Secured lenders have either been given notice of the DIP Lenders Charge, or are not affected by it; and
- (g) The Monitor has filed a report addressing the DIP Facility and has recommended that it be granted.

[15] I accept these submissions and have concluded that the DIP Facility is necessary and it is approved in the modified amount of \$8.5 million and that the DIP Lenders Charge is also necessary and it is approved.

[16] The Applicants also seek authorization for Cash Store Financial to make, if necessary and with the consent of the Monitor, limited payments – up to \$700,000 to critical suppliers – whether such obligations were incurred prior to or after the filing date.

[17] Counsel submits that there is authority to support the court's general jurisdiction to permit the payment of pre-filing obligations to persons whose services are deemed "critical" to the ongoing operations of the debtor.

[18] Further, section 11.4 of the CCAA gives the court specific authority to declare a person to be a critical supplier and to grant a charge on the debtor's property in favour of such critical supplier.

[19] I accept these submissions.

[20] The requested authorization to make payments, with the consent of the Monitor, to certain critical suppliers is granted.

[21] The Applicants also request that the Monitor, along with its counsel, counsel and the financial advisor to the Special Committee, counsel to the Applicants and counsel and the financial advisor to the DIP Lender be protected by a court-ordered charge on all the present and future assets, property and undertaking of the Applicants (the "Property") as security for their respective fees and disbursements (the "Administration Charge"). The Administration Charge is to have first priority over all other charges.

[22] Section 11.52 of the CCAA expressly provides that the Court has jurisdiction to grant an administration charge.

[23] In *Re Canwest Global*, (2009) 59 C.B.R. (5th) 72 and *Re Canwest Publishing* (2010), 63 C.B.R. (5th) 115, Administration Charges were granted pursuant to section 11.52(1). Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[24] Having reviewed the affidavit of Mr. Carlstrom and having considered the submissions of counsel set out at paragraphs 86 – 88 of the factum, I am satisfied that this is an appropriate circumstance for the court to grant the Administration Charge and it is granted.

[25] The Applicants also seek an Officers and Directors Charge (the “Directors Charge”) in the amount of \$2,500,000. The Directors Charge would be secured by the Property of Cash Store Financial and would rank behind the Administration Charge and ahead of the DIP Lenders Charge.

[26] Section 11.51 of the CCAA provides the specific authority to grant a “super priority” charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain statutory obligations.

[27] Counsel submits that Cash Store Financial maintains directors and officers’ liability insurance (the “D&O Insurance”) for the directors and officers of the Applicants. The amount of coverage remaining under the D&O Insurance is approximately \$28 million. Counsel submits that, given Cash Store Financial’s involvement in multiple, significant litigation proceedings, there is considerable uncertainty about whether this coverage will be sufficient to cover defence costs for the directors and officers and make potential findings of liability.

[28] The D&O Insurance will expire in July 2014 and runoff coverage has been purchased.

[29] Cash Store Financial’s directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement unless the Initial Order contains a directors’ charge. In my view, the requested charge is appropriate in the circumstances and it is granted.

[30] I am also satisfied that it is appropriate to extend protection from liability to the Chief Restructuring Order of the nature proposed in the Initial Order.

[31] I also note that a number of concerns have been raised by the TPLs, specifically with respect to the obligations of the Applicants under their TPL Broker Agreement. If the Monitor becomes aware of any issues of non-compliance by the Applicants of material obligations under their TPL Broker Agreement, an immediate report is to be filed with the Court recognizing that the TPLs may seek to take steps to terminate the relevant TPL Broker Agreements. Any such motion would be scheduled on an urgent basis.

[32] I also recognize that the Initial Order was prepared with a view to providing certain protection for the TPLs, including a charge in favour of the TPLs (the “TPL Charge”) in the amount of the existing cash that will rank *pari passu* with the proposed DIP Lenders Charge.

[33] A court order reflecting the foregoing has been signed.

"MORAWETZ, RST"
Regional Senior Justice Morawetz

Date: April 23, 2014