

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

CENTURION MORTGAGE CAPITAL CORPORATION

Plaintiff

-and-

2545174 ONTARIO INC. and NAVEED AHMED QURESHI

Defendants

FACTUM OF THE PLAINTIFF

June 6, 2019

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Defendant

AND TO: Naveed Ahmed Qureshi
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Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF Section 101 of the
Courts of Justice Act and Section 243 of the *Bankruptcy and Insolvency Act*

B E T W E E N:

CENTURION MORTGAGE CAPITAL CORPORATION

Plaintiff

-and-

2545174 ONTARIO INC. and NAVEED AHMED QURESHI

Defendant

FACTUM OF THE PLAINTIFF
(Motion to Appoint a Receiver)

PART I - INTRODUCTION

1. Centurion Mortgage Capital Corporation (the "**Lender**"), seeks an Order appointing BDO Canada Limited as the receiver and manager ("**BDO**" or the "**Receiver**") in respect of all of 2545174 Ontario Inc.'s ("**254co**" or the "**Borrower**"), assets, undertakings and properties pursuant to section 101 of the *Courts of Justice Act*¹ (the "**CJA**") and section 243(1) of the *Bankruptcy and Insolvency Act* (the "**BIA**").²

2. The Lender is seeking a Court-appointed receiver pursuant to the terms of the Loan (defined herein) and related security described below, in order to maximize the realization from the sale of the Property and ensure that the interests of all creditors and other stakeholders are

¹ *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, s. 101 [**CJA**].

² *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended, s. 243(1) [**BIA**].

considered as part of a transparent Court-supervised sale process. It is just and convenient for this Court to appoint the Receiver over the Borrower's assets, undertakings and properties.

PART II – THE FACTS

The Parties

3. The Lender is an Ontario corporation carrying on business in Ontario as *inter alia*, a commercial mortgage lender.³

4. The Borrower is an Ontario corporation and the registered owner of those lands and premises located at 478-494 Kingston Road, Pickering, Ontario (the “**Property**”).⁴ The Borrower conducts its business on the Property. This business consists of a gas station with a Tim Horton's kiosk and a 3 storey office building (the “**Office Building**”). The Office Building is currently under construction and has no tenants.⁵

5. Naveed Ahmed Qureshi (the “**Guarantor**”) is the principal of the Borrower and the Guarantor under the Loan.

The Security

6. The Borrower is indebted to the Lender under a mortgage loan advanced further to a commitment letter dated June 1, 2017 (the “**Commitment**”) in the principal amount of \$6,357,000.00 (the “**Loan**”).⁶ The purpose of the Loan was to acquire the Property.⁷

³ Plaintiff's Motion Record (“**Motion Record**”), Tab 2, Affidavit of Ryan Buzzell sworn May 2, 2019 (the “**Buzzell Affidavit**”), page 11 at para 3.

⁴ Motion Record, Tab 2, Buzzell Affidavit, page 11 at para 6; Exhibit C.

⁵ Motion Record, Tab 2, Buzzell Affidavit, page 11 at para 6.

⁶ Motion Record, Tab 2, Buzzell Affidavit, page 11 at para 7; Exhibit D.

7. As security for the Loan, the Borrower delivered, *inter alia*, the following security without limitation to the Lender:

- (a) a Charge/Mortgage of Land between 254co, as Mortgagor, and Centurion, as Mortgagee, registered with the Durham Land Registration Office on July 14, 2017, as Instrument No.: DR1616311 (the “**Mortgage**”) including a Schedule of Additional Provisions, which formed part of the Mortgage;⁸
- (b) General Security Agreement between Centurion, as secured party, and 254co, as debtor, dated June 20, 2017 (the “**GSA**”);⁹ and
- (c) Guarantee Agreement between Centurion, as Lender, 254co, as borrower, and Naveed, as Guarantor, dated June 20, 2017 (the “**Guarantee**”).¹⁰

(collectively the “**Security**”).

8. As a condition of the Loan, the Guarantee stated that the Guarantor provided the Lender with an absolute and unconditional guarantee in respect of the full amount of the indebtedness under the Loan.

The Defaults and Demands Made by the Lender

9. The Borrower is in default of its obligations to the Lender. The Borrower breached the terms of the Commitment and the Security by, *inter alia*:

- (a) failing to repay the outstanding amount owing on the Loan on its maturity date of February 1, 2019; and¹¹
- (b) failing to pay the monthly interest payments for the months of March 2019, April 2019, May 2019, and June 2019.¹²

⁷ Motion Record, Tab 2, Buzzell Affidavit, page 11 at para 6.

⁸ Motion Record, Tab 2, Buzzell Affidavit, page 12 at para 8; Exhibit E.

⁹ Motion Record, Tab 2, Buzzell Affidavit, page 12 at para 8; Exhibit F.

¹⁰ Motion Record, Tab 2, Buzzell Affidavit, page 12 at para 8; Exhibit G.

¹¹ Motion Record, Tab 2, Buzzell Affidavit, pages 12-13 at para 13.

¹² Motion Record, Tab 2, Buzzell Affidavit, pages 12-13 at para 13.

(collectively, the "**Defaults**").

10. By letter dated April 8, 2019, the Lender demanded payment pursuant to the terms of the Loan and other related security, and delivered a Notice of Intent to Enforce Security (the "**BIA Notice**") under the *BIA*.¹³

11. The Borrower has not made any payments since the Affidavit of Ryan Buzzell, sworn on May 2, 2019.

12. In addition to the Borrower's Defaults, the Borrower failed to pay property taxes and has allowed significant property tax arrears to accrue in breach of the terms of the Loan.¹⁴

13. As a result of the Defaults, the Lender demanded repayment of the Loan on the Borrower and the Guarantor by letters dated April 8, 2019, and served the BIA Notice on the Borrower and Guarantor (the demand letter and the BIA Notice are collectively, the "**Demand**").¹⁵ The Lender is entitled to demand payment of the full amount owing on the Loan due immediately pursuant to section 35 of the Mortgage.¹⁶

14. Following receipt of the Demand, the Borrower made partial payment of \$30,000.00 that was applied towards its indebtedness to the Lender. The Lender advised the Borrower that acceptance of the partial payment was without prejudice to the Lender's right to full repayment of the Loan as set out in the Demand.¹⁷

¹³ Motion Record, Tab 2, Buzzell Affidavit, page 13 at para 16; Exhibit I.

¹⁴ Motion Record, Tab 2, Buzzell Affidavit, page 13 at para 15; Exhibit H.

¹⁵ Motion Record, Tab 2, Buzzell Affidavit, page 13 at para 16; Exhibit I.

¹⁶ Motion Record, Tab 2, Buzzell Affidavit, page 12 at para 11; Exhibit E, pages 74-75.

¹⁷ Motion Record, Tab 2, Buzzell Affidavit, page 13 at para 17; Exhibit J.

15. Despite the Borrower's partial payment, neither the Borrower nor the Guarantor made the full payment of the indebtedness owing to the Lender pursuant to the terms of the Loan.¹⁸

16. As at April 24, 2019, the Borrower owed the Lender \$6,448,503.18, plus per diem interest rate of \$1,427.75. The total indebtedness to the Lender does not include protective disbursements, including the legal fees, that have been incurred by the Lender to date.¹⁹

The Terms of the Security Permit the Appointment of the Receiver

17. The terms of the Mortgage (section 38 of the Additional Provisions)²⁰ and the GSA (section 6.02(2))²¹, permit the Lender to appoint a receiver, in the event that the Borrower is in default of the Loan.

Other Creditors

18. In addition to the Lender's Mortgage, the following is a summary of the charges against the Property, and the corresponding ranking priority:

Creditor	Instrument Number	Amount of Charge Against the Property
Centurion	DR1616311	\$8,000,000.00
1299400 Ontario Ltd. 2399574 Ontario Inc. ("239co")	DR1616314 (the "VTB Mortgage")	\$1,150,000.00

¹⁸ Motion Record, Tab 2, Buzzell Affidavit, page 13 at para 18.

¹⁹ Motion Record, Tab 2, Buzzell Affidavit, page 14 at para 19; Exhibit K.

²⁰ Motion Record, Tab 2, Buzzell Affidavit, page 12 at para 12; Exhibit E, pages 77-78.

²¹ Motion Record, Tab 2, Buzzell Affidavit, page 12 at para 12; Exhibit F, pages 92-94.

19. The Mortgage is in first priority because as a condition of the Loan, the Lender, the Borrower and 239co entered into a Subordination and Standstill Agreement dated July 14, 2017 (the "**Subordination and Standstill Agreement**").²² The Subordination and Standstill Agreement sets out, among other things, that:

- (a) the VTB Mortgage is subordinate and is postponed to the Mortgage; and
- (b) the owner of the VTB Mortgage shall not contest any enforcement action taken by Centurion in respect of the Mortgage.²³

20. Set out below is a summary of the PPSA registrations registered against the Borrower:

Creditor	PPSA Registration Number
Mark Lorne Cosman, Trustee	20170511 1449 6083 2186
Centurion Mortgage Capital Corporation	20170601 1445 1590 5039
2399574 Ontario Inc.	20170714 1629 1862 9702

21. As of April 25, 2019, the Borrower did not have any execution creditors. There are also no construction liens registered against the Property.²⁴

The TDL Lease

22. The TDL Group Corp. has registered a Notice of Lease as Instrument number DR1615509 against the Property. The Notice of Lease is in respect of the Tim Hortons kiosk in the gas station on the Property.²⁵

²² Motion Record, Tab 2, Buzzell Affidavit, page 14 at para 22.

²³ Motion Record, Tab 2, Buzzell Affidavit, page 14 at para 22; Exhibit N.

²⁴ Motion Record, Tab 2, Buzzell Affidavit, page 15 at para.24; Exhibit P.

BDO's Consent

23. BDO has consented to act as the Receiver in this matter.²⁶

PART III – THE ISSUE AND THE LAW

A. Issue

24. The issue on this Motion is whether it is just and convenient for this Honourable Court to appoint a receiver over the Borrower's assets, undertakings and properties pursuant to section 101 of the *CJA* and section 243(1) of the *BIA*.

B. The Law

25. The test to appoint a receiver under section 101 of the *CJA* and section 243(1) of the *BIA* is whether it would be just or convenient to do so.

26. Section 101 of the *CJA* states:

"In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so."²⁷

27. Section 243(1) of the *BIA* states:

"... on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

²⁵ Motion Record, Tab 2, Buzzell Affidavit, page 15 at para 25; Exhibit Q.

²⁶ Motion Record, Tab 2, Buzzell Affidavit, page 16 at para 27; Exhibit R.

²⁷ *CJA*, *supra* note 1.

- a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- c) take any other action that the court considers advisable."²⁸

28. In assessing whether it is just and convenient to appoint a receiver, the question is whether it is more in the interests of all concerned to have the receiver appointed or not.²⁹ When there is a contractual power of appointment, the Court assesses “the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the [Receiver]”.³⁰

29. When deciding to appoint a receiver, the Court must have regard to all of the circumstances but in particular, the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right to appoint a receiver is an important factor to be considered as is the question of whether or not an appointment by the Court is necessary to enable the receiver to carry out its work and duties more efficiently.³¹

30. The factors to be considered by the Court when determining whether to appoint a receiver include, *inter alia*:

²⁸ *BIA*, *supra* note 2.

²⁹ *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 CarswellOnt 12749 (S.C.J. [Commercial List]) at para 22 [*BDBC*].

³⁰ *Royal Bank of Canada v. CFNDRS Inc.*, 2017 ONSC 7661 (Ont. S.C.J. [Commercial List]) [*RBC*] at para 9, citing *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen Div. [Commercial List]) [*BNS*] at para 12.

³¹ *RBC ibid* at para 8, citing *BNS* at para 11; *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 CarswellOnt 896 (S.C.J.) at para 24 [*BMO*].

- (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;³²
- (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- (c) the nature of the property;
- (d) the rights of the parties thereto and the balance of convenience to the parties;
- (e) the preservation and protection of the property pending judicial resolution;
- (f) the fact that the creditor has the right to appoint a receiver under its security;
- (g) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
- (h) that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly, however this proposition does not apply or is less essential to a secured creditor with a right to enforce its security;³³
- (i) whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
- (j) the effect of the order on the parties;
- (k) the conduct of the parties;
- (l) the length of time that a receiver may be in place;
- (m) costs to the parties;
- (n) the likelihood of maximizing return to the parties;
- (o) facilitating the duties of the receiver; and
- (p) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity.³⁴

C. It is Just and Convenient to Appoint a Receiver Over the Borrower

31. The appointment of the Receiver is just and convenient in the circumstances because:

³² *RBC ibid* at para 8.

³³ *BMO supra* note 31 at para. 25; *BNS ibid* at para. 13

³⁴ *Bennett on Receivership, 3d ed.* (Toronto: Carswell, 2011), at pages 155-159; *BDBC, supra* note 30 at para. 22.

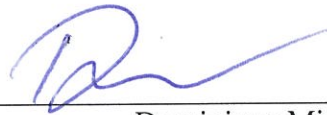
- (a) the Lender has a contractual right to appoint a receiver under the Security, including the Additional Provisions of the Mortgage and GSA, which expressly permit the appointment of a receiver;
- (b) it is possible that the sale of the Borrower's assets may result in a shortfall to the mortgagees. In these circumstances, a Court supervised process will ensure that the interests of all creditors and other stakeholders of the Borrower are considered with a view to minimizing the shortfall and achieving the maximum realization on the Borrower's assets;
- (c) the Borrower's construction of the Property is incomplete and, to the extent it is determined that any construction needs to be completed prior to selling the Property, the appointment of the Receiver will allow for a more effective means of managing the completion of such work;
- (d) the Receiver is best suited to take control and run the Borrower's business pending a sale of the Borrower's assets; and
- (e) the appointment of the Receiver will help to avoid any potential dispute regarding expenses incurred in and the value ultimately obtained for the sale of the Borrower's assets.³⁵

PART IV - ORDER REQUESTED

32. The Lender respectfully requests an Order appointing BDO as Receiver over the Borrower's assets, undertakings and properties pursuant to section 101 of the *CJA* and section 243(1) of the *BIA*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: June 6, 2019



Dominique Michaud

Lawyer for the Plaintiff

³⁵ Motion Record, Tab 2, Buzzell Affidavit, page 16 at para 26.

SCHEDULE 'A'
LIST OF AUTHORITIES

1. *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 CarswellOnt 12749 (S.C.J. [Commercial List])
2. *Royal Bank of Canada v. CFNDRS Inc.*, 2017 ONSC 7661 (Ont. S.C.J. [Commercial List])
3. *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen Div. [Commercial List])
4. *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 CarswellOnt 896 (S.C.J.)
5. *Bennett on Receivership*, 3d ed. (Toronto: Carswell, 2011)

SCHEDULE 'B'
STATUTES, REGULATIONS & BY – LAWS

1. *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended
2. *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended

**CENTURION MORTGAGE - and -
CAPITAL CORPORATION**

Plaintiff

2545174 ONTARIO INC. ET AL.

Defendants

Court File No.: CV-19-00618742-00CL

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