

Court File No. CV-20-00650239-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY
ACT*, R.S.C.1985, C.B-3 AS AMENDED;**

**IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 c.
C-43, AS AMENDED**

BETWEEN:

THE BANK OF NOVA SCOTIA

Applicant

- and -

1854313 ONTARIO LIMITED

Respondent

**FACTUM OF THE RECEIVER
(Motion returnable January 11, 2021)**

January 5, 2021

HARRISON PENSA LLP

Barristers & Solicitors
450 Talbot St.
London, ON N6A 4K3

**Timothy C. Hogan (LSO #36553S)
Robert Danter (LSO #69806O)**

Tel: (519) 679-9660

Fax: (519) 667-3362

Email: thogan@harrisonpensa.com
rdanter@harrisonpensa.com

Lawyers for the Receiver

TO: SERVICE LIST

PART I - NATURE OF MOTION

1. BDO Canada Limited ("**BDO**") in its capacity as Court-appointed receiver (the "**Receiver**") appointed pursuant to the Order of the Honourable Justice Cavanagh dated October 29, 2020 (the "**Appointment Order**") of the Property (as defined in the Appointment Order) of 1854313 Ontario Limited ("**DCC**" or the "**Debtor**"), Approving the Receiver's First Report to the Court dated December 22, 2020 (the "**First Report**") and the activities and conduct of the Receiver as detailed therein;
 - (a) That the Receiver's Interim Statement of Receipts and Disbursements, as detailed in the First Report, be approved;
 - (b) That the Receiver's Fees and Counsel Fees (all as defined and detailed in the First Report), and payment of same, be approved;
 - (c) Approving the Sale Process (as defined and detailed in the First Report);
 - (d) Directing Touchstone Group Inc. ("**Touchstone**"), Matthew Moyal ("**Moyal**"), DCC and Syed Bukahri ("**Bukahri**") to provide to the Receiver a full detailed accounting of receipts received and disbursements in relation to the Property, as well as any books and records of DCC in their possession;
 - (e) Seeking directions from this Court with respect to the payment to the Receiver of all monies collected or earned from the Property following October 29, 2020 (collectively, the "**Rents**") by Touchstone and Moyal and directing Touchstone and Moyal pay to the Receiver the sum of all monies collected or earned from the Property following October 29, 2020; and,
 - (f) Such further and other relief as to this Honourable Court may seem just.
2. It is the position of the Receiver that the above-noted relief should be granted, for the following reasons (with Terms used as defined below):
 - (a) The Receiver's activities, as set out in the First Report, were reasonable and conducted within the ambit of its powers granted by the Appointment Order, and should be approved accordingly;

- (b) The Sales Process, as set out in the First Report, is reasonable, and accords with the principals set out by the Court of Appeal in *Soundair*;
- (c) Despite the Receiver's numerous requests, it has not been provided with the Missing Records, which it requires in order to properly determine the state of the Debtor's estate, including dealing with tenants, former employees and any deemed trusts owing by the Debtor to the Canada Revenue Agency or to other parties;
- (d) Despite numerous requests, the Touchstone Moyal Receiver has failed to provide the Receiver with a full accounting of its activities and expenses during the period in which it was in possession of the Premises, as defined in the First Report;
- (e) Moyal/Touchstone have failed to comply with the provisions of the Appointment Order regarding the remittance of Rents to the Receiver, including the sum of \$57,855.09 paid to Moyal/Touchstone and representing six (6) tenant payments for November and one (1) tenant payment for December, 2020. The terms of the Appointment Order are clear and unambiguous regarding the obligation of these parties to remit the Rents forthwith to the Receiver, and there is no foundation on which Moyal/Touchstone may escape this obligation;
- (f) The Receiver did take possession of the Premises on the Date of Possession (October 30, 2020), and did, among other steps taken, change the locks, personally contact all tenants open for business at the Premises on that date and did issue a letter to each tenant, advising of the Appointment Order and directing that all Rents be paid to the Receiver;
- (g) The Appointment Order is clear that the Receiver's power and authorization to receive and collect the Rents due is separate and apart from its power and authority to take possession of the Premises. Neither the Receiver's power and authority to collect Rents nor Moyal/Touchstone's obligation to pay Rents collected are contingent or tied to the Receiver taking possession;

- (h) In no scenario do the Rents fall to Moyal/Touchstone, the Rents are payable to the Receiver under the terms of the Appointment Order and would be otherwise payable to the Bank as the senior secured creditor with priority to the Rents;
- (i) It is respectfully submitted that the Receiver's Fees and Counsel Fees (as defined below) are reasonable in the circumstances and should be approved.

PART II - THE FACTS

Previous Actions of the Receiver

- 3. The Receiver was appointed as Receiver of all of the Property of DCC on October 29, 2020, pursuant to the Appointment Order. DCC operated a shopping centre from the Premises, located in the downtown of Chatham, Ontario .

***First Report to the Court Submitted by the Receiver dated December 22, 2020
(the "First Report"), para 1 and Appendix "A" thereto***

- 4. Bukhari is the principal of DCC and of 2642614 Ontario Inc. ("**264**"), a holding company which purchased the shares of DCC from Touchstone. Moyal is the principal of Touchstone.

First Report, paras 7-10

- 5. The Applicant, The Bank of Nova Scotia (the "**Bank**") is a secured creditor of DCC, and holds a first registered charge (the "**BNS Mortgage**") and assignment of rents as against the Premises (the "**BNS Rent Assignment**"), as well as a general security agreement from DCC (collectively the "**BNS Security**"). As at the date of the Appointment order, DCC was indebted to the Bank in the approximate sum of \$14,000,000.

First Report, paras 62

- 6. Touchstone holds a second-priority charge and assignment of rents over the Premises.

First Report, para 64(a)

The Bank's Security

7. The Receiver is satisfied, based on the information available to it and subject to the payment of any unregistered interests, deemed trusts, statutory created priority claims and the prior ranking charges under the Appointing Order, that the Bank holds valid and enforceable security over DCC's property, including the Premises.

First Report, para 63

8. The Receiver is not aware of any unregistered interests, deemed trust claims, or other statutory created priority claims, with the exception of a small outstanding balance owing to the Canada Revenue Agency for unremitted HST; however, the Receiver is unable to fully verify any deemed trust amounts owing due to the fact that Bukhari, Moyal, and/or Touchstone have not turned over the Missing Records (as defined below) to the Receiver.

First Report, paras 68-74

Possession of the Property and Missing Records

9. On or about August 1, 2020, Touchstone took possession and control of the Premises, and control of DCC's operations, and the Bank was advised by Moyal that he was personally appointed as receiver of DCC on behalf of Touchstone (in such capacity the "**Touchstone Moyal Receiver**").

First Report, para 11

10. The Premises was in substandard condition and mostly vacant, and Moyal acknowledged that the Touchstone Moyal Receiver had been operating the Premises without insurance since taking possession.

First Report, paras 13-15

11. As the Touchstone Moyal Receiver did not have any general liability or property insurance policy in place relating to the Property, the Appointment Order provided that the Receiver was not to be deemed in possession of the Property until the Receiver took possession of same, in its absolute discretion, and provided notice of such possession to the service list.

First Report, paras 17-19

12. The Receiver did take possession of the Property on October 30, 2020 (the “**Date of Possession**”), and took certain steps, including the following:
- (a) Changed the locks at the Premises;
 - (b) Notified tenants (that were open for business at that time) of the Appointment Order and provided these tenants a copy of the Appointment Order; and,
 - (c) Issued a letter to each tenant advising of the Appointment Order, and directing all Rents to be paid to the Receiver.

First Report, para 20

13. On November 3, 2020, the Receiver did notify the service list in writing that it took possession of the Premises on the Date of Possession.

First Report, paras 20-23 and Appendices “B” and “C” thereto

14. As part of taking possession of the Property, the Receiver did take possession of the books and records of DCC which the Receiver located at the Premises. These records primarily relate to years 2017 or earlier.

First Report, para 25

15. The Receiver has requested the return of the missing DCC books and records from the Touchstone Moyal Receiver and Bukahri, and the former property manager (collectively, the “**Missing Records**”). Each of these parties have advised they are not in possession of any books and records of DCC.

First Report, paras 26-28

16. The provisions of the Appointing Order require that any Person with knowledge of the existence or location of any such Missing Records must forthwith advise the Receiver of same, and to provide copies of such records to the Receiver.

First Report, para 19 and Appendix “A” thereto, at paras 5-6

17. The Appointment Order required Touchstone and Moyal to provide a complete accounting of all Rents collected or earned from the tenants of the Premises subsequent to the Date of Appointment, and to remit same to the Receiver.

First Report at Appendix "A" thereto, at para 5

18. On taking possession of the Premises, the Receiver provided notice to the tenants of the Premises of their obligation to pay all future Rents to the Receiver, including Rents for November, 2020.

First Report, para 20(h) and Appendix "B" thereto

19. Despite this notice, several tenants of the Premises paid Rents to the Touchstone Moyal Receiver subsequent to the Date of Appointment. The amount of such Rents known to the Receiver totals the sum of \$57,855.09 (representing six (6) tenant payments for November and one (1) tenant payment for December, 2020). The Receiver is not aware whether the Touchstone Moyal Receiver received any additional Rents subsequent to the Date of Appointment.

First Report, paras 36-38

20. The Receiver has formally requested that Touchstone/Moyal pay these Rents over to the Receiver. Touchstone/Moyal has taken the position that it is not required to remit to the Receiver the Rents collected from the tenants of the Premises prior to November 3, 2020, as such Rents were collected prior to the Receiver notifying the service list that it took possession of the Property.

First Report, para 39, 49, and Appendices "D" to "J" thereto

Activities of the Touchstone Moyal Receiver

21. The provisions of the Appointing Order require that the Touchstone Moyal Receiver and Bukhari provide the Receiver with a complete accounting of all receipts and disbursements relating to its time in possession of the Property (the "**Accounting**").

First Report at Appendix "A" thereto, at para 5

22. The Accounting provided by the Touchstone Moyal Receiver is summary in nature and does not include related documentary evidence such as invoices. The Receiver has requested more detailed information from the Touchstone Moyal Receiver. As of the date of the First Report, this detailed Accounting had not been provided.

First Report at paras 49-52, and Appendices "D" to "J" thereto

Sales Process

23. The Receiver has prepared the Sale Process for the sale of the Property, for which it seeks approval of, as described in detail in the First Report. The Sales Process includes the following:
- (a) A marketing period of no less than six (6) weeks, with a Bid Deadline of March 15, 2021; and,
 - (b) The use of a confidential information memorandum, and a teaser, advertising in the Globe and Mail, notifying potential interested parties through BDO's Corporate Finance group and through a real estate broker yet to be determined, listing for sale under the "MLS" system in Ontario and on a real estate broker's website.

First Report, paras 54-61

Other Actions of the Receiver

24. Since the date of the Appointment Order, the Receiver has also performed a number of additional activities, as set out in the First Report, and which include dealing with the employees of DCC, dealing with creditors of DCC, and engaging a property manager to manage the day-to-day operations of the Premises.

First Report, paras 24, 29-35, 53, 62-64, and Appendix, "K" thereto

PART III - ISSUES, LAW AND ARGUMENT

A. Issues

25. The issues to be determined in this motion include:

- (a) Should the Receiver's activities, as set out in the First Report, be approved?
- (b) Is the Sales Process reasonable?
- (c) Is Touchstone obligated to provide a full detailed Accounting in relation to the Property as required by the Appointing Order?
- (d) Are Touchstone and/or Bukhari required to provide the Receiver with any books and records of DCC in their possession?
- (e) Is Touchstone/Moyal required to account for and remit all Rents collected from the Premises following October 29, 2020, being the Date of Appointment?
- (f) Should the Receiver's Fees and Counsel Fees be approved?

B. The Receiver's Activities

- 26. The Receiver's activities in these proceedings have been undertaken in furtherance of the Receiver's duties and are consistent with the Receiver's powers, as set out in the Appointment Order. The Receiver has acted reasonably and in the best interests of the Respondent's stakeholders. It is respectfully submitted that the Receiver's activities should therefore be approved by this Court.
- 27. This Court has the jurisdiction to approve such activities. The "court has the inherent jurisdiction to review and either approve or disapprove of the activities of a court appointed receiver" and "it would be unusual and illogical [if] the receiver could come to court for prior approval but not post approval."

Reference: [Bank of America Canada v. Willann Investments Ltd. \(1993\) 20 C.B.R. \(3d\) 223 \(ONSC\), at paras. 3 and 4.](#)

- 28. All of the Receiver's activities were conducted within the ambit of its powers granted by the Appointment Order and each of the activities were necessary to ensure that the proceedings were as orderly, effective and fair to all stakeholders as possible.
- 29. The Receiver therefore respectfully submits that its activities to date should be approved by this Court.

C. Approval of the Sales Process

30. Receivers are clothed with the powers set out in the order appointing them. Receivers are consistently granted the power to market and sell property belonging to a debtor.

Reference: *Appointment Order*, sub-paragraphs 3(j) and 3(k)

[*Integrated Building Corp. v. Bank of Nova Scotia \(1989\), 75 C.B.R. \(N.S.\) 158 \(Alta. C.A.\)*](#)

[*Battery Plus Inc. \(Re.\), \[2002\] O.J. No. 731, at paras 2-3, 19, 22-23, 34-5*](#)

31. Where a Court is asked to approve a transaction in a receivership context, the Court is to consider:

- i. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- ii. the interests of all parties;
- iii. the efficacy and integrity of the process by which the party obtained offers; and
- iv. whether the working out of the process was unfair.

Reference: [*Royal Bank of Canada v. Soundair Corp. \(1991\), 4 O.R. \(3d\) 1 \(ONCA\), at para 16*](#)

[*Skyepharm PLC v. Hyal Pharmaceutical Corp. \(1999\), 12 C.B.R. \(4th\) 87 \(ONSC., appeal quashed, \(2000\), 47 O.R. \(3d\) 234 \(C.A.\), at para 3*](#)

32. Based on the foregoing, it is respectfully submitted that this Honourable Court should approve the Sales Process. It is the Receiver's position that any sale resulting from the Sales Process would be in accordance with the *Soundair* principals, for the following reasons:

- (a) The Sales Process includes a reasonably lengthy marketing period to expose the Property to the open market, which shall include exposure in national news sources as well as e-marketing and listing on the Ontario MLS system;

- (b) The Receiver will obtain listing proposals from several licensed real estate brokers with experience in the sale of commercial properties such as the Premises;
- (c) The Sales Process contemplates a Bid Deadline which shall provided all interested parties with an equal opportunity to bid on the sale of the Property;
- (d) The Receiver has engaged the services of a professional appraiser to prepare a formal appraisal of the Property, and will be commissioning a second appraisal of same; and,
- (e) The Receiver will retain discretion to reject any or all bids if deemed commercially unreasonable.

Reference: First Report, paras 54-61

- 33. The Receiver has already received expressions of interest from potential purchasers, and expects the Sales Process to be a competitive one. The Bank, as senior secured creditor of DCC, supports the Sale Process.
- 34. The Receiver respectfully submits that the Sale Process should be approved.

D. Books, Records, and Accounting

- 35. The Receiver has requested the return of the Missing Records from Touchstone, Moyal, and/or Bukhari, including the Accounting from the Touchstone Moyal Receiver, without success.
- 36. Pursuant to paragraphs 5 and 6 of the Appointment Order, each of the above-named parties are required to deliver all such Records and Accounting to the Receiver, forthwith.
- 37. The Receiver respectfully submits that an Order should issued requiring each of Touchstone, Moyal, and/or Bukhari, as the case may be, to deliver such Missing Records, or to advise the Receiver of the existence and location of same, and to deliver the Accounting.

E. Rents

38. It is the position of the Receiver that all Rents collected or earned subsequent to the Date of Appointment and received by Touchstone and/or Moyal should be remitted forthwith to the Receiver.
39. Touchstone/Moyal have taken the position that it is only required to remit such Rents received subsequent to November 3, 2020, when the Receiver notified the service list that it had taken possession of the Property pursuant to the Appointment Order, and that prior to this time, Touchstone was a “mortgagee in possession” and is entitled to such income pursuant to its second-priority charge and assignment of rents.

Reference: First Report, Appendices “H” and “I” thereto

40. The Receiver respectfully submits that the points raised by Touchstone are irrelevant to its obligations to remit these monies to the Receiver.

Appointment Order

41. The Receiver states that the provisions of the Appointment Order provide a full answer to the position of Touchstone/Moyal, as follows:
- (a) Paragraph 3(f) thereof authorizes the Receiver to “*receive and collect all monies and accounts now owed or hereafter owing to the Debtor [DCC] and to exercise all remedies of the Debtor in collecting such monies*”; and,
 - (b) Paragraph 5 thereof requires Touchstone/Moyal to “*forthwith provide the Receiver with ... remittance of any rent collected from tenants of the Debtor in connection with the [Premises]*”;
42. The Receiver’s power to collect Rents under paragraph 3 (f) of the Appointment Order is separate and apart from the power to take possession as set out at paragraph 3(a) of the Appointment Order, and is not contingent on the Receiver actually taking possession of the Property.
43. It is respectfully submitted that the terms of Schedule “B” to the Appointment Order do not affect the operation of the provisions of paragraph 3 and 5 of the Appointment

Order, as Schedule B only refers to possession of the Property, and to the Receiver's obligations in relation to same, and does not purport to affect the obligations of Touchstone/Moyal to remit Rents to the Receiver "forthwith".

44. The Receiver submits that the Appointment Order is clear and unambiguous in its requirement for Touchstone/Moyal to remit all Rents to the Receiver collected or earned subsequent to the Date of Appointment.

Law

45. As an officer of the Court, a court-appointed Receiver "stands in the shoes" of a Debtor insofar as the Debtor's property is concerned, which, in the current matter, would include the collection and deposit of Rents otherwise due to DCC. The Receiver is not aware of any requirement in law that a Receiver must be in possession of a premises falling under its ambit in order to collect such monies, and in particular, in the context of the clear and unambiguous wording of the Appointment Order itself.

Reference: [GMAC Commercial Credit Corporation - Canada v. TCT Logistics Inc., \[2005\] OJ No 589 \(CA\) at para 36.](#)

46. Further, the Bank holds both a first-priority general security interest in the Debtor's personal property, and a first-priority assignment interest in all rents arising from the Premises pursuant to the BNS Security (the BNS Mortgage and the BNS Rent Assignment).
47. As such, the Rents fall to the Receiver under the Appointment Order and as well to the Bank as senior secured creditor, and not to Moyal/Touchstone.
48. The Receiver respectfully submits that Touchstone/Moyal are in violation of the Appointment Order, and that an Order should issue requiring Touchstone/Moyal immediately remit all Rents to the Receiver forthwith.

F. The Receiver's Fees and Counsel Fees Should Be Approved

49. The Receiver respectfully submits that the Receiver's Fees and Counsel Fees as detailed in the First Report should be approved.

Reference: *First Report, paras 75-79 and Appendices "L" and "M" thereto*

50. In determining whether to approve the fees of a receiver and its counsel, the Court should consider whether the remunerations and disbursements incurred in carrying out the receivership were fair and reasonable and take into consideration the following factors, which constitute a useful guideline, but are not exhaustive:
- (a) the nature, extent and value of the assets;
 - (b) the complications and difficulties encountered;
 - (c) the degree of assistance provided by the debtor;
 - (d) the time spent;
 - (e) the Receiver's knowledge, experience and skill;
 - (f) the diligence and thoroughness displayed;
 - (g) the responsibilities assumed;
 - (h) the results of the receiver's efforts; and,
 - (i) the cost of comparable services when performed in a prudent and economical manner.

Reference: [Bank of Nova Scotia v. Diemer, 2014 ONCA 851, Tab 14 at paras 33 and 45.](#)

51. It is the Receiver's view that it and its counsel's fees and disbursements were incurred at the respective party's standard rates and charges, and are fair, reasonable and justified in the circumstances. Further, the fees and disbursements sought accurately reflect the work done by the Receiver and by its counsel in connection with the receivership.

PART IV - ORDER REQUESTED

52. The Receiver requests that this Honourable Court grant the relief requested in the Notice of Motion and the First Report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of January, 2021.



HARRISON PENZA LLP

Barristers & Solicitors
450 Talbot St.
London, ON N6A 4K3

Timothy C. Hogan (LSO #36553S)

Robert Danter (LSO #69806O)

Tel: (519) 679-9660

Fax: (519) 667-3362

Email: thogan@harrisonpensa.com
rdanter@harrisonpensa.com

Lawyers for the Receiver

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Bank of America Canada v. Willann Investments Ltd.* (1993) 20 C.B.R. (3d) 223 (ONSC)
2. *Integrated Building Corp. v. Bank of Nova Scotia* (1989), 75 C.B.R. (N.S.) 158 (Alta. C.A.)
3. *Battery Plus Inc. (Re.)*, [2002] O.J. No. 731
4. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (ONCA)
5. *Skyepharm PLC v. Hyal Pharmaceutical Corporation*, 1999 CanLII 15007 (ONSC)
6. *GMAC Commercial Credit Corporation - Canada v. TCT Logistics Inc.*, [2005] OJ No 589 (CA)
7. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851

THE BANK OF NOVA SCOTIA

v.

1854313 ONTARIO LIMITED

Applicant

Respondent

Court File No. CV-20-00650239-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

FACTUM OF THE RECEIVER

Harrison Pensa^{LLP}

Barristers and Solicitors
450 Talbot Street, P.O. Box 3237
London, Ontario N6A 4K3

Timothy C. Hogan (LSO #36553S)

Robert Danter (LSO #69806O)

Tel: (519) 679-9660

Fax: (519) 667-3362

Email: thogan@harrisonpensa.com
rdanter@harrisonpensa.com

Lawyers for the Receiver,
BDO Canada Limited