

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

2292912 ONTARIO INC.

Applicant

-and-

2380009 ONTARIO LIMITED

Respondent

APPLICATION UNDER Section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3  
as amended and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

**FACTUM OF THE RECEIVER**

(Re: Sales Process Approval Motion Returnable May 29, 2017)

May 24, 2017

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TO: **THE SERVICE LIST**

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**FACTUM OF THE RECEIVER**

**PART I - INTRODUCTION**

1. Pursuant to an Order of this Honourable Court dated February 7, 2017 (the “Appointment Order”), Collins Barrow Toronto Limited (“CBTL”) was appointed receiver (the “Receiver”), without security, of all of the assets, undertakings and properties of 2380009 Ontario Limited (“238” or the “Debtor”). On this Motion, the Receiver seeks Court approval to list for sale certain real property owned by 238 pursuant to a proposed sales process outlined in the Receiver’s First report to Court, as well as authorization to enter into an agreement of purchase and sale in respect of the property, conditional on Court approval.

**Reference** Appointment Order, First Report to Court of the Receiver dated May 11, 2017 (the “First Report”), Appendix “A”

2. 238 is a single-purpose Ontario corporation that holds title to the real property in question, known municipally as 2370 South Sheridan Way, Mississauga, Ontario (the “Property”). The

Property consists of 3.7 acres of land located in the City of Mississauga and includes a 78,964-square foot, free-standing industrial building (the “Building”). The Building comprises approximately 56,000 square feet of industrial area and 11,000 square feet of office space. The Receiver understands that the Property is the only significant asset of 238.

**Reference** First Report to Court of the Receiver dated  
May 11, 2017, para. 10

3. BuiltRite Technologies Inc. (“BuiltRite”) is the sole occupant of the Property pursuant to a lease dated January 15, 2014 (the “Lease”). BuiltRite carries on a manufacturing business from the premises. Elias Mancebo (“Mancebo”) is the sole officer and director of BuiltRite. Mancebo is also recorded as the sole officer and director of 238. In other words, BuiltRite and its landlord are related entities, controlled by the same director.

**Reference** First Report to Court of the Receiver dated  
May 11, 2017, paras. 9 and 10

4. The evidence establishes that the non-arms’-length Lease is heavily-weighted in favour of the tenant, has been in default for some time, and constitutes an impediment to the maximization of value for the creditors of 238. The value of the Property without the Lease significantly exceeds the Property’s value if it is sold subject to the Lease terms. The Receiver requests authorization to market the Property for sale on a vacant-possession basis, free from the tenancy of BuiltRite. The Receiver further requests:

- (a) an Order terminating the Lease and requiring BuiltRite to vacate the Property within 10 days of the date of such Order; or, in the alternative
- (b) an Order authorizing the Receiver to terminate the Lease on 60 days’ written notice to BuiltRite and 238.

5. The Receiver additionally seeks approval of its conduct as outlined in the First Report to Court and Supplemental Report to the First Report and approval of the Receiver's fees and disbursements, as well as those of its counsel, as are outlined in the fee affidavits filed in support of this Motion.

## **PART II - SUMMARY OF FACTS**

### **The Appointment Order**

6. The February, 2017 Appointment Order was issued on the application of 2292912 Ontario Inc. ("229"), the holder of the first-ranking mortgage registered against title to the Property. Four subsequent-ranking mortgages are registered against title to the Property. A number of parties have also registered security interests against 238 pursuant to the Ontario *Personal Property Security Act*.

**Reference** First Report to Court of the Receiver dated  
May 11, 2017, para. 12

7. At or about the time of the Receivership Application, the 229 Mortgage was in default, and significant arrears of realty taxes had accrued over a period of three years, in the total amount of \$332,889.87. Currently, \$301,601.28 is due and owing in respect of municipal taxes for the Property.

**Reference** First Report to Court of the Receiver dated  
May 11, 2017 paras. 13 and 31

### **Steps taken by the Receiver**

8. Upon its appointment, the Receiver took a number of steps to secure and preserve the Property, including,

- (a) arranging for insurance for the Property;

- (b) investigating whether the Receiver is required to take possession (which it has determined is not necessary in view of the BuiltRite tenancy);
- (c) attempting to obtain the books and records of the Debtor;
- (d) appointing a Property Manager;
- (e) meeting and discussing with the primary (to the best of the Receiver's knowledge) principals of 238/BuiltRite regarding various issues;
- (f) investigating the status of property taxes;
- (g) obtaining appraisals for the Property; and
- (h) inviting listing proposals from potential real estate agents.

**Reference** First Report to Court of the Receiver dated  
May 11, 2017 paras. 18 - 31

### **Real Estate Marketing Process**

9. In addition to the above steps, the Receiver has taken steps toward an eventual sale of the Property for the benefit of the creditors of 238. The Receiver has canvassed potential listing agents and, as part of that process, requested that three real estate brokers provide estimated selling values for the Property and marketing strategies to effect the sale of the Property. A summary of the three listing proposals is attached to the Receiver's First Report to Court as Confidential Appendix "M".

10. Taking into account the listing proposals received, the presentations of the respective realtors, the commission rates to be charged and the Receiver's subsequent discussions, the Receiver recommends to the Court that the Receiver be authorized to enter into a listing agreement with CBRE.

### **The Lease**

11. Two of the real estate brokerages canvassed by the Receiver each expressed their view that the Lease terms are unusual and financially unfavourable to the landlord. Both real estate brokerages expressed the view that the Property would be worth a significantly higher amount if

the Property could be sold on a vacant possession basis (i.e. without the financial burdens imposed on the landlord by the Lease).

12. Various aspects of the Lease lead to the conclusion that the Lease is heavily weighted in favour of the tenant. Those factors are summarized at paragraphs 34 and 35 of the Receiver's First Report to Court and include lower-than-market base rent, unfavourable renewal terms and unusual and uneconomic (from the landlord's perspective) terms regarding the tenant's fixed sum monthly contribution to the landlord for payment on account of municipal taxes payable by the landlord.

**Reference** First Report to Court of the Receiver dated  
May 11, 2017, paras. 34 and 35

13. One real estate brokerage stated<sup>1</sup> that "The property is currently encumbered by a non-arms-length lease that is assumed to be enforceable should the building ownership be transferred. The non-arms-length lease is currently at rates considered to be under prevailing market rates, and has provision whereby the landlord pays municipal taxes for the first 5 years of the term, **which is not considered typical of market lease agreements.**" [emphasis added]

**Reference** First Report to Court of the Receiver dated  
May 11, 2017, Confidential Appendix "J".

14. The second broker states that **BuiltRite's net rental rate is significantly below market and that there is an under recovery of property taxes.**

**Reference** First Report to Court of the Receiver dated  
May 11, 2017, Confidential Appendix "K"

15. As set out in Confidential Appendix "L", both appraisals obtained by the Receiver estimate that the current market value of the Property with the Lease in place would be substantially lower

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<sup>1</sup> The quotes included here from the confidential appendices do not include sensitive commercial information and are not intended as a general waiver of the confidentiality of the documents themselves.

than if a lease with market rent and usual net lease terms was in place. In the words of one appraiser: the market value appraisal of the Property with the Lease in place

has been adjusted to account for the **below market rent** [emphasis added], and the provisions that the tenant does not pay taxes for the first five years (after which it only pays a portion) and that the tenant does not pay insurance as a reimbursable expense.

**Reference** First Report to Court of the Receiver dated May 11, 2017, Confidential Appendix “L”

### **Receiver’s Investigations into the Lease**

16. The Receiver and its counsel have investigated the circumstances surrounding the execution of the lease. As stated above, 238 and BuiltRite are related parties and, therefore, the Lease dated January 15, 2014 is a non-arm’s length Lease. In addition, the Lease does not appear to represent a true reflection of the negotiation of commercial terms by truly arm’s-length parties. Specifically:

- (a) It does not appear that parties to the lease were separately represented by their own independent counsel.<sup>2</sup> The solicitor whose name appears as the notice recipient for 238 in the “Notice” section of the Lease has advised counsel to the Receiver that his office was not in fact involved in the preparation of the Lease and did not represent 238 in connection with the Lease, as the “Notice” section of the Lease would suggest. According to counsel named in the Lease, his name was added to the Lease without his knowledge. A representative of 238/BuiltRite advised the Receiver of the name of the lawyer who acted on behalf of BuiltRite in connection with the Lease. That lawyer passed away in or about September, 2014.

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<sup>2</sup> This observation is based on the hypothetical assumption that having separate counsel for each of the landlord and the tenant would have afforded some measure of quasi- independence for the parties, given that the same directing mind, Mr. Mancebo, would presumably have been providing instructions to counsel for both parties.



**Reference** First Report to Court of the Receiver dated May 11, 2017, paras. 34 – 48

- (b) Despite considerable history to this matter prior to the appointment of the Receiver, it does not appear that the existence and specific terms of the Lease were specifically brought to the attention of 229 despite several requests by 229 for same. Starting in 2015, a prior holder of the 229 mortgage, and later 229 itself, attempted to enforce the mortgage in question. A Notice of Sale and Notice of Attornment of Rents were served on 238/BuiltRite, in addition to the Application for the appointment of a receiver. That proceeding was adjourned numerous times, purportedly to permit 238 to re-finance the Property. Throughout that process, the terms of the Lease were not disclosed to 229 or its counsel. No rent was paid to 229 following the amount of rent being saved.

17. Based on the best information available, it appears that since the inception of the term of the Lease, the tenant has been paying rent at the flat rate of \$18,000 per month, without remitting HST. Alternatively, if the \$18,000 includes HST, then the rent paid is below the amount specified in the Lease. In other words, from its inception, the Lease has been in default and continues in default. The Receiver has seen no evidence of 229 taking any steps against 238 to enforce its rights for breach of covenant or to recover HST arrears, despite these arrears continuing for over 3 years.

**Reference** Supplemental Report to the First Report of the Receiver, para 10

18. In addition to the above noted default, BuiltRite has failed to pay rent due for the month of May, 2017 and continued in such default for a period exceeding 15 days which, pursuant to the terms of the Lease, is an event of default entitling the Landlord to terminate immediately.

**Reference** First Report to Court of the Receiver dated May 11, 2017, para. 48

**Attempts to Obtain Books and Records**

19. At a meeting on February 8, 2017, the Receiver discussed with representatives of 238 the receivership and information the Receiver required from the Debtor. While some of the information requested at that meeting or subsequently has been provided to the Receiver, certain records have not been provided as of the date of the First Report, including the following (Capitalized Terms as defined in the Receiver's Report to Court):

- (a) copies of the most recent notices of assessment and past two years of statutory remittances;
- (b) copies of the past two years' corporate tax returns;
- (c) copies of the 2014 and 2015 bank statements with cancelled cheques and bank reconciliations;
- (d) Certificate of Insurance confirming that BuiltRite has an insurance policy in place for the Property;
- (e) confirmation that the outstanding balance on 238's natural gas account for the Property has been paid and proof of payment;
- (f) copy of the most recent hydro bill/statement; and
- (g) information as to whether the monthly payments of \$18,000 paid to Timbercreek Mortgage Servicing Inc. by BuiltRite, on behalf of 238 prior to the receivership, and made pursuant to a Direction re Funds that is attached to the copy of the Lease provided to the Receiver, were inclusive, or exclusive, of HST.

**Reference** First Report to Court of the Receiver dated  
May 11, 2017, para. 26

20. Requests for this information were made in 5 separate e-mails to 238 sent between February 17 and March 29, 2017. On April 7, and again on April 25, 2017, the Receiver sent letters by e-mail requesting the above information. No information has been provided.

**Reference** First Report to Court of the Receiver dated  
May 11, 2017, para. 27

**Necessity to Terminate the Lease**

21. The Receiver is concerned that the Lease could represent an attempt by 238 to encumber the Property to the detriment of 238's creditors, and could constitute evidence of an intent on the part of 238, with the active assistance of BuiltRite, to hinder, defeat or delay the creditors of 238. The Lease could, on its face, constitute oppression pursuant to s. 248 of the Ontario *Business Corporations Act*, or an improper transaction pursuant to the *Bankruptcy and Insolvency Act*, or provincial fraudulent conveyance legislation.

22. If the Property is sold: (a) a purchaser could insist the Lease be terminated and vacant possession given or (b) subject to the Lease in which case a purchaser could be expected to pay a discounted price to reflect the under-market lease terms of the Lease. The purchaser could then be in a position to elect to terminate the Lease at the first opportunity and either re-let the premises on conventional net lease terms or sell the Property on a vacant basis or re-let the Property at market rates. In other words, a significant upside economic benefit could in short order be realized by a purchaser, at the expense of the creditors of 238.

### **Business Operations of BuiltRite**

23. The Receiver has met with representatives of 238/BuiltRite and has attended at the premises. The Receiver appreciates and understands that BuiltRite operates an active business from the premises and that the termination of the Lease could have an adverse effect on BuiltRite's business and employees.

**Reference** First Report to Court of the Receiver dated  
May 11, 2017, para. 68

24. The Receiver has considered the interests of all relevant parties in this matter and has come to the conclusion that the greatest overall benefit for 238's creditors will be achieved if the

Property is able to be marketed to potential purchasers on both an occupied, or on a vacant-tenancy basis, without the Lease.

**Reference** First Report to Court of the Receiver dated  
May 11, 2017, para. 68

25. The Receiver is therefore requesting:
- (a) an Order terminating the Lease and requiring BuiltRite to vacate the Property within 10 days of the date of such Order; or, in the alternative;
  - (b) an Order authorizing the Receiver to terminate the Lease on 60 days' written notice to BuiltRite and 238.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

26. It is respectfully submitted that the issues on this motion are as follows:
- (a) should the Receiver be authorized to list the Property for sale as proposed in the First Report and should the activities of the Receiver, and its fees and disbursements, as well as those of its counsel be approved?
  - (b) should the Receiver be granted the authorization to terminate the Lease along on the terms requested in its First Report?

#### **Sales Process and Conduct of the Receiver**

27. It is respectfully submitted that the activities of the Receiver, since its appointment as outlined in the First Report, are reasonable and ought to be approved by the Court. It is also submitted that the fees and disbursements of the Receiver and those of its counsel as shown in the Fee Affidavits, filed in support of this Motion, are reasonable and ought to be approved by the Court. As of the date of this Factum, no party has raised any issues with respect thereto.

**Issues Relating to the Lease**

28. It is further respectfully submitted that the Court should grant to the Receiver the requested authorization to terminate the Lease on 60 days' written notice, as required by the Receiver.

29. Paragraph 3(c) of the Appointment Order provides the Receiver with the power to manage and carry on the business of the Debtor, including the power to "cease to perform any contracts of the Debtor."

**Reference** Appointment Order, First Report to Court of the Receiver dated May 11, 2017, Appendix "A"

30. Both the Annotated *Bankruptcy and Insolvency Act* and Frank Bennett in *Bennett on Receiverships* make clear that in a Court-Appointed Receivership, the Receiver is not bound by existing contracts made by the Debtor. The Receiver may terminate such contracts without incurring liability.

**Reference** L.W. Houlden, G.B. Morawetz & J.P. Sarra, *The 2015 Annotated Bankruptcy and Insolvency Act*, at p. 1079

F. Bennett, *Bennett on Receiverships*, at p. 341

31. The Receiver must exercise proper discretion in terminating a contract entered into by the Debtor prior to the receivership. If the Receiver chooses to break a material contract, the Receiver should seek leave of the Court.

**Reference** Bennett, *supra*, at p. 341

32. In a number of cases, the Courts have held that the law is clear to the effect that in a Court-Appointed Receivership, the Receiver is not bound by existing contracts made by the Debtor.

**Reference** *Bank of Montreal v. Scaffold Connection Corp.* 202 CarswellAlta 932 (QB), para. 11

*New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 CarswellBC 578

33. In *Meridian Credit Union Limited v. 984 Bay Street Inc.*, the Court dealt with a request by a Receiver to terminate a leasehold interest in similar circumstances to the case at Bar. In that case, the Court authorized the termination of the lease as requested by the Receiver.

**Reference** *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.)

34. The *Meridian* decision was followed by this Honourable Court in *Romspen Investment Corp. v. Woods Property Development Inc.* [2011] O.J. No. 1163, at page 14. In that case, the Court held that the Court has the authority in a Court-Appointed Receivership to “vest out” a leasehold interest on the sale of real property by a Receiver, provided the Receiver takes into consideration the equities of the various parties involved.

**Reference** *Romspen Investment Corp. v. Woods Property Development Inc.* [2011] O.J. No. 1163, at page 14

35. In the *Meridian* case, in determining that the lease should be terminated, the Court considered the following factors:

- (a) the leases were entered into at a time when mortgages in respect of the property were in default and when the owner of the property was in serious financial difficulties;
- (b) the leases were entered into between related parties;
- (c) the leases contained generous rent-free periods;
- (d) the leases were in default;

- (e) there was evidence that the leases were at below-market terms in rent; and
- (f) the receiver had opined to the Court that the leases were an impediment to the Receiver's ability to market and sell the property.

**Reference** *Meridian, supra* at para. 20

36. It is respectfully submitted that almost all of the factors that influenced the Courts' discretion in the *Meridian* and *Romspen* cases are present in the case at Bar. Specifically,

- (a) the Lease is not an arms'-length lease and was entered into between related parties;
- (b) the terms of the lease are heavily weighted in favour of the tenant, including below-market rent and non-commercial terms regarding payment of municipal taxes by the tenant;
- (c) the Lease includes a generous municipal tax-free payment period for the tenant;
- (d) the Lease appears to be in default; and
- (e) the Receiver has opined that the Lease constitutes an impediment to its ability to effectively market and sell the Property at a value that would maximize value for the creditors of 238.

37. It is in the best interest of the creditors of 238 that the Property be marketed and sold without the burden of the Lease.

**PART IV - ORDER REQUESTED**

38. For the reasons set out above, the Receiver respectfully requests that this Honourable Court grant an Order on the terms requested in the Notice of Motion approving the sale process, approving its conduct, fees and disbursements and those of its counsel and permitting the Receiver to terminate the Lease on the terms outlined herein.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this            day of May, 2017.



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Jeffrey J. Simpson

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## SCHEDULE "A"

### LIST OF AUTHORITIES

1. L.W. Houlden, G.B. Morawetz & J.P. Sarra, *The 2015 Annotated Bankruptcy and Insolvency Act*
2. F. Bennett, *Bennett on Receiverships*
3. *Bank of Montreal v. Scafford Connection Corp.*, 2002 CarswellAlta 932 (QB)
4. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 CarswellBC 578 (CA)
5. *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.)
6. *Romspen Investment Corp. v. Woods Property Development Inc.* [2011] O.J. No. 1163

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RCP-E 4C (May 1, 2016)