

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

H.M POLYTHENE PRODUCTS LIMITED

Respondent

FACTUM OF THE RECEIVER
(Motion returnable June 15, 2023)

June 13, 2023

HARRISON PENSA LLP
Barristers & Solicitors
130 Dufferin Avenue, Suite 1101
London, ON N6A 5R2

Melinda Vine (LSO #53612R)

Tel: (519) 679-9660
Fax: (519) 667-3362
Email: mvine@harrisonpensa.com

Lawyers for the Receiver,
msi Spergel inc.

TO: SERVICE LIST

NATURE OF MOTION

1. This is a motion by msi Spergel inc. ("**Spergel**"), in its capacity as court-appointed Receiver (the "**Receiver**"), appointed pursuant to an order of the Ontario Superior Court of Justice – Commercial List (the "**Court**") dated May 26, 2023 (the "**Appointment Order**") of the Property (as defined in the Appointment Order) of the Respondent, H.M Polythene Limited (the "**Debtor**") for, *inter alia*, the following relief:
 - a) That the time for service, filing and confirmation of the Notice of Motion and the Motion Record be abridged so that this motion is properly returnable today, and dispensing with further service and confirmation hereof;
 - b) Approving the Receiver's First Report to the Court dated June 12, 2023 (the "**First Report**") and the activities and conduct of the Receiver as detailed therein;
 - c) An Approval and Vesting Order, approving the sale by Auction, contemplated by the Auction Agreement between the Receiver and the Platinum Asset Services Inc. (the "**Auctioneer**") for the sale of certain Property of the Debtor (as these terms are described and defined in the First Report); and,
 - d) Sealing the Confidential Appendix until the completion of the Auction, or until a further order of this Court.

2. It is the position of the Receiver that the Receiver's actions and the Auction Agreement should be approved and that the relief requested should be granted, for the following reasons:
 - a) The Auction Agreement is commercially reasonable and in accordance with industry standards;
 - b) The Auction Agreement has the support of the Debtor's first secured creditor, Royal Bank of Canada;
 - c) The Sealing Order ensures the integrity of the process and avoids any prejudice to stakeholders in the event that all assets do not sell at the Auction and a subsequent sale of certain of the Debtor's Property must be sought.

THE FACTS

3. The Debtor is a Canadian owned, private corporation incorporated pursuant to the laws of the Province of Ontario and was in the business of manufacturing and supplying plastic bags. The Debtor operated from leased premises located at 7650 Kimbel Street, Unit 18 & 19, Mississauga, ON (the "**Leased Premises**").

First Report to the Court Submitted by the Receiver dated June 12, 2023 (the "First Report"), para 2

4. Spergel was appointed as Receiver over the Property of the Debtor on May 26, 2023, pursuant to the Appointment Order following application of the Applicant, Royal Bank of Canada (the "**Bank**").

First Report, para 3 and Appendix "1" thereto

5. The Appointment Order was obtained on the consent of the Debtor and was held in escrow by Devry Smith Frank LLP ("**RBC's Counsel**") on certain terms.
6. On June 2, 2023, the Debtor did not comply with the terms and the Bank released the Appointment Order from escrow on that day (the "**Release Date**").

First Report, para 5

7. On the Release Date, the Receiver took possession of the Leased Premises and posted a notice on the door with respect to its appointment.

First Report, para 14

8. On June 6, 2023, the Receiver received correspondence from counsel for Desjardins Financial Security Life Assurance Company (the "**Landlord**"), the landlord of the Leased Premises, providing copies of the leases (collectively the "**Lease**") in relation to the Debtor's occupation of the Leased Premises and advising the Receiver of the following:
 - a) The Term of the Lease expired on April 30, 2023;

b) The Debtor has no further legal right to access or use the Leased Premises, however in order to assist the Debtor with moving out of the Leased Premises, the Landlord permitted the Debtor to occupy the Leased Premises until June 19, 2023 (the “**Move Out Date**”);

c) The Leased Premises have been leased to a third party, and the Landlord requires vacant possession not later than the Move Out Date, in accordance with its contractual obligations; and,

d) The Receiver must remove any of the Debtor’s property and vacate the Leased Premises, prior to the Move Out Date.

First Report, para 14, and Appendix “3” thereto

9. Prior to the correspondence from the Landlord, the Receiver was unaware of the expiration of the Lease and requirement to remove assets of the Debtor by the Move Out Date. The assets of the Debtor include three (3) Blow Film Extrusion Lines and two (2) Polybag Sheeting Lines. These assets are bolted to the ground and require heavy machinery removers to remove them from the Leased Premises. The Receiver is of the view that it will be cost prohibitive to remove these assets from the Leased Premises, store them and then attempt to auction them.

First Report, para 15

10. Following negotiations between the Landlord’s counsel and Receiver’s counsel, the Landlord, in principle, agreed to extend the Move Out Date to June 30, 2023, on the following terms (to be formalized in an occupancy agreement acceptable to the Landlord and the Receiver):

a) The Landlord to provide the Receiver with unfettered occupancy of the Leased Premises for the purpose of holding an onsite auction until June 30, 2023;

b) The Receiver will pay per diem rent from the date of occupation to June 30, 2023 at the most recent rent payable by the Debtor;

- c) The Receiver will leave the Leased Premises in a broom swept condition as it relates to the assets of the Debtor; and,
- d) The Landlord will be provided access to the Leased Premises to commence demolition of the office and mezzanine at the Leased Premises.

First Report, para 16

- 11. The Receiver has provided a draft occupation agreement to the Landlord and is awaiting comments regarding same.

First Report, para 17

The Auction

- 12. The Appointment Order, among other things, authorized the Receiver to market any or all of the Property, and section 3(k)(i) thereof authorized the Receiver to sell, convey, transfer, lease or assign the Property or parts of the Property out of the ordinary course of business.

First Report, Appendix "1" thereto, s. 3(k)(i)

- 13. The Property of the Debtor is located at the Leased Premises.

First Report, Appendix "1" thereto, s. 3(k)(i)

- 14. The Receiver sought and obtained an appraisal for the assets of the Debtor (the "**Platinum Appraisal**") which was conducted by Platinum Asset Services Inc. (the "**Auctioneer**"). The Platinum Appraisal indicates that the appraised values of the assets of the Debtor are in excess of the individual transaction limit and aggregate transaction limit as outlined in paragraph 3(k) of the Appointment Order

First Report, paras 18-20, Appendix "1" thereto, s. 3(k) and Confidential Appendix "1" thereto

- 15. The Receiver has obtained an auction proposal from the Auctioneer to auction the Property. The Auctioneer is familiar with the Property as a result of having provided the Platinum Appraisal to the Receiver. The proposed auction agreement (the "**Auction**")

Agreement") has not been finalized by the Receiver and the Auctioneer. The Auction Agreement remains subject to the approval of this Court.

First Report, para 21, Appendix "4" thereto

16. The Receiver recommends that the Auction Agreement and the Auction be approved as:
- a) The Auction Agreement is reasonable and is in line with industry standards;
 - b) The Receiver is satisfied that a public auction is the most commercially reasonable method of disposing of the assets of the Debtor, given the disadvantageous economies of scale that would result if the Receiver were to conduct its own sale process and that the Leased Premises is only available to the Receiver until June 30, 2023; and,
 - c) The Auction Agreement has the support of the Debtor's first secured creditor, the Bank.

First Report, paras 22 and 24

17. The auction is scheduled to take place on June 15, 2023 as the Auctioneer has advised that it will require two (2) weeks for removal of assets by the purchasers from the Leased Premises. The net proceeds of the sale from the auction would be held by the receiver pending further Order of this Court. In the event any of the assets are not sold, the Auction Agreement provides that such assets would either be moved out of the Leased Premises or disposed of by the Auctioneer.

Sealing Order

18. The Receiver is of the view that the information and documentation, including the Platinum Appraisal, contained in the Confidential Appendix contains commercially sensitive information and should be sealed in order to avoid the negative impact that the dissemination of the confidential information contained therein would have if the Auction is not completed. As a result, the Receiver is seeking a sealing order in respect of the Confidential Appendix until such time as the Auction is complete, or until further order of this Court.

First Report, para 18

ISSUES, LAW AND ARGUMENT

The Court's Procedural Powers

19. The Court may, by order, extend or abridge any time prescribed by the Rules on such terms as are just. Further, the Court may dispense with compliance with any Rule at any time where and as necessary in the interest of justice. Finally, the Court may dispense with service where it is impractical to effect prompt service and/or it may validate service where it is satisfied that the document came to the notice of the person to be served.

Rules [2.03](#), [3.02](#), [16.04](#) and [16.08](#), Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

The Receiver's Activities

20. 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 Debtor's stakeholders, and this Court has the inherent jurisdiction to approve such activities.

Bank of America Canada v. Willann Investments Ltd. (1993) 20 C.B.R. (3d) 223 (ONSC), at paras. 3 and 4, referenced in the Receiver's Book of Authorities at Tab 1.

21. 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.
22. The Receiver therefore respectfully submits that the First Report, and its activities to date as set out therein, should be approved by this Court.

Approval of the Auction and the Approval and Vesting Order

Auction Agreement

23. The Receiver submits that the sale of the Debtor's assets pursuant to the Auction Agreement will provide the best and highest return to the stakeholders of the Debtor, for the reasons set out herein.
24. 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. The Appointment Order also provides the Receiver with the power to market and sell or otherwise transfer the Property of the Debtor. Absent evidence that a sale is improvident or that there was an abuse of process, it is respectfully submitted that a Court is to grant deference to the recommendation of the Receiver to proceed with the Sale of the Debtor's assets via the Auction, and pursuant to the Auction Agreement.

First Report, Appendix A – Appointment Order, sub-paragraphs 3(j) and 3(k)

[Integrated Building Corp. v. Bank of Nova Scotia, 1989 ABCA 114](#)

[Battery Plus Inc., Re, 112 A.C.W.S. \(3d\) 208 \(ONSC \[Comm. List\]\) at paras. 2-3, 19, 22-23, 34-5 25](#)

25. Under Section 100 of the *Courts of Justice Act*, this Honourable Court has the jurisdiction to vest in any person an interest in real or personal property.

[Courts of Justice Act, RSO 1990, c. C-43, s.100 26.](#)

26. This Honourable Court has the jurisdiction to vest in any person an interest in real or personal property. Where a Court is asked to approve a transaction in a receivership context, the Court is to consider:

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

[Royal Bank of Canada v. Soundair Corp. \(1991\), 4 OR \(3d\) 1 \(ONCA\)](#)
[\("Soundair"\) at para. 16](#)

[Skyepharma PLC. V. Hyal Pharmaceutical Corp., 1999 CanLII 15007 \(ONSC\)](#)
[\("Skypepharma"\) at para. 3](#)

27. Only in exceptional circumstances where there is clear evidence that a sale is improvident or involved an abuse of process will a Court intervene and proceed contrary to the recommendation of its officer, the Receiver.

[Soundair, supra, at para. 21](#)

[Skyepharma, supra, at para. 3](#)

28. Based on the foregoing, it is respectfully submitted that this Honourable Court should approve the sale provided in the Auction Agreement and grant the Approval and Vesting Order, in accordance with the recommendation of the Receiver. It is the Receiver's position that the Sale be approved by the Court for the following reasons:

- a) The Appointment Order provides the Receiver with the authority to market and sell the Property of the Debtor;
- b) The sale of the Debtor's assets by the Auction pursuant to the Auction Agreement will result in the best and highest price for the Debtor's assets, and will result in greater net proceeds than if the Receiver were to market and sell the Debtor's assets on an individual basis;
- c) The proceeds of the Auction shall be held by the Receiver, and shall not be distributed absent an Order of this Honourable Court.

The Sealing Order Should be Granted

29. It is submitted that it is just, appropriate and necessary to the integrity of these receivership proceedings that the Confidential Appendix be sealed by this Court. The Confidential Appendix contains sensitive information, the release of which prior to the completion of the Auction could be prejudicial to the stakeholders of the Debtor.

Jurisdiction

30. The Court's jurisdiction to seal documents filed with it is found in s. 137(2) of the *Courts of Justice Act* (Ontario):

137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form a part of the public record.

[*Courts of Justice Act \(Ontario\), s. 137\(2\).*](#)

In addition to statutory jurisdiction, the Court also has inherent jurisdiction to issue sealing orders: "there is no doubt that the court has inherent jurisdiction, and jurisdiction under s. 137(2) of the Courts of Justice Act, to seal a portion of the court file."

[*Fairview Donut Inc. v. The TDL Group Corp. \(2010\), 100 O.R. \(3d\) 510 \(ONSC\), at para. 34.*](#)

Discretion

31. Sealing Orders are granted regularly in the context of Court-appointed receiverships where court openness may pose a risk to the public interest in enabling stakeholders in an insolvency to maximize the realization of a debtor's assets. In this context, such an order is necessary in order to prevent a serious risk to an important commercial interest; and the salutary effects of the sealing order outweigh its deleterious effects, which in this context includes the public interest in open and accessible court proceedings.

[*Sierra Club of Canada v. Canada \(Minister of Finance\), 2002 SCC 41 at para. 53-57*](#)

[*Sherman Estate v. Donovan, 2021 SCC 25 \("Sherman"\), at para. 38*](#)

The Receiver submits that there are no reasonable alternative measures to a sealing order which would fulfill the twin purposes of (i) allowing this Court to review the reasonableness of the Auction and (ii) ensuring that the commercially-sensitive information contained within the Confidential Appendix is not available to the public prior to the completion of the Auction.

[Sherman, supra, at para. 38](#)

32. Ontario Courts have recognized the customary practice of seeking a sealing order in the context of a sale approval motion. In *Ron Handelman Investments Ltd. v. Mass Properties Inc.*, Madam Justice Pepall stated:

[a]s is customary in sale approval motions, the Receiver seeks an order sealing the appraisal until the transaction is completed. This ensures the integrity of the process and avoids any prejudice to stakeholders in the event that the transaction does not close and a new purchaser must be sought.

[Ron Handelman Investments Ltd. v. Mass Properties Inc., 55 C.B.R. \(5th\) 271 at para. 26](#)

[Maxtech Manufacturing Inc. \(Re\), 2010 ONSC 1161 at paras. 29 and 30](#)

The Confidential Appendix contains the Platinum Appraisal. Should the Auction not proceed or certain of the assets not sell at the Auction, the information contained within this confidential appendix could cause a reduction in any future sale of the Property, and harm the creditors of the Debtor if made available to the public. Protecting the information contained within the Confidential Appendix is an important commercial interest that should be protected. There is no other reasonable alternative to sealing that will prevent Confidential Appendix from becoming public.

33. With regard to the Confidential Appendix, it is the Receiver's opinion that the Confidential Appendix should remain sealed until the completion of the Auction, sale of all Property or an Order by this Court.

ORDER REQUESTED

34. The Receiver requests the following Orders:

- a) That the Auction and the Auction Agreement be approved as recommended by the Receiver and that an Approval and Vesting Order be granted; and,
- b) That the additional relief sought in the Ancillary Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of June, 2023.



HARRISON PENSA LLP
Barristers & Solicitors
130 Dufferin Avenue, Suite 1101
London, ON N6A 5R2

Melinda Vine (LSO #53612R)

Tel: (519) 679-9660
Fax: (519) 667-3362
Email: mvine@harrisonpensa.com

Lawyers for the Receiver,
msi Spergel inc.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Bank of America Canada v. Willann Investments Ltd.* (1993) 20 C.B.R. (3d) 223 (ONSC)
2. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 OR (3d) 1 (ONCA)
3. *Integrated Building Corp. v. Bank of Nova Scotia*, 1989 ABCA 114
4. *Battery Plus Inc., Re*, 112 A.C.W.S. (3d) 208 (ONSC [Comm. List])
5. *Skyepharm PLC. V. Hyal Pharmaceutical Corp.*, 1999 CanLII 15007 (ONSC)
6. *Fairview Donut Inc. v. The TDL Group Corp.*, 2010 ONSC 789
7. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
8. *Sherman Estate v. Donovan*, 2021 SCC 25
9. *B&M Handelman Investments Ltd. v. Mass Properties Inc.* (2009), 55 CBR (5th) 271 (ONSC [Commercial List])
10. *Maxtech Manufacturing Inc. (Re)*, 2010 ONSC 1161

SCHEDULE "B"
RELEVANT STATUTES

Rules 2.03, 3.02, 16.04 and 16.08, Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

EXTENSIONS OR ABRIDGMENT

General Powers of Court

3.02(1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

Times in Appeals

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court.

Consent in Writing

(4) A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent.

SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

Where Order May be Made

16.04 (1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under these rules, the court may take an order for substituted service or, where necessary in the interest of justice, may dispense with service.

Effective Date of Service

(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective.

(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date of the order for the purpose of the computation of time under these rules.

VALIDATING SERVICE

16.08 Where a document has been served in a manner other than one authorized by these rules or an order, the court may make an order validating the service where the court is satisfied that,

(a) The document came to the notice of the person to be served; or

(b) The document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

Sections 100, 137(2) Courts of Justice Act, R.R.O. 1990, Reg. 194.

VESTING ORDERS

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

SEALING DOCUMENTS

137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record

ROYAL BANK OF CANADA

-and-

H.M. POLYTHENE PRODUCTS LIMITED

Applicant

Respondent

Court File No. CV-23-00697106-00CL

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HARRISON PENZA ^{LLP}
Barristers and Solicitors
130 Dufferin Avenue, Suite 1101
London, ON N6A 5R2

Melinda Vine (LSO #53612R)

Tel: (519) 679-9660
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Email: mvine@harrisonpensa.com

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