



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

**COUNSEL/ENDORSEMENT SLIP**

**COURT FILE NO.:** CV-24-00714866-00CL

**DATE:** 4

**NO. ON LIST:** 07 Oct 2024

**TITLE OF PROCEEDING:** FORGESTONE MORTGAGE FUND LP v. 72 JAMES INVESTMENTS INC.  
et al

**BEFORE:** JUSTICE KIMMEL

**PARTICIPANT INFORMATION**

**For Defendant, Respondent, Responding Party:**

Name of Person Appearing	Name of Party	Contact Info
Piper Mckerlie	Forge & Foster Holdings Inc.	pmckerlie@shlaw.ca

**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
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**ENDORSEMENT OF JUSTICE KIMMEL:**

- [1] KSV Restructuring Inc. (the "Receiver") seeks an order authorizing it to assign 72 James Investments Inc. (the "Debtor") into bankruptcy, and authorizing the Receiver to act as bankruptcy trustee (the "Trustee") and for certain ancillary relief. The motion was not opposed.
- [2] A transaction was completed on May 21, 2024 for the sale of the Debtor's principal asset, the real property municipally known as 72-76 James Street North, Hamilton, Ontario (the "Real Property"). The sale was approved by the court on May 2, 2024. The Transaction generated surplus proceeds of approximately \$250,000 after fully repaying the senior

mortgagee and before payment of additional receivership costs and professional fees (the "Surplus").

- [3] The main purpose of the intended bankruptcy is to invoke the statutory claims process that will provide an efficient and prescribed basis on which to notify creditors and claimants, determine their claims, and make distributions of the Surplus. This process is considered by the Receiver to be more efficient than a court ordered sale process in the receivership, and it is being undertaken with a view to maximizing the potential available residual funds for distribution to entitled claimants, which is in the interests of all stakeholders.
- [4] In *RBC v. Gustin*, 2019 ONSC 5370, at para 15 and in *CIBC v. 1340182 Ontario Limited et al.*, 2024 ONSC 3658, at para. 15 this court recognized its authority to empower a receiver to file an assignment in bankruptcy on behalf of a debtor company. It is not necessary for the receiver to exhaust its remedies under other legislation before resorting to a bankruptcy assignment, as such steps could prove to be needlessly inefficient and expensive. See *Gustin*, at para. 17.
- [5] The Receiver recommends that the Debtor make an assignment in bankruptcy because: (a) a claims process must be conducted to identify the whole creditor population, including any additional tax liabilities aside from the CRA Claim; (b) the incomplete state of the Debtor's books and records warrants an expansion of the Receiver's powers so that a claims process can be conducted in bankruptcy; (c) it does not appear that any party would be prejudiced by assigning the Debtor into bankruptcy. I agree that it is appropriate in the circumstances of this case that the Receiver be authorized to make that assignment into bankruptcy in respect of the Debtor.
- [6] The court asked that the proposed order be amended so as to remove the court's "direction" that the Receiver file the assignment in bankruptcy in respect of the Debtor. The order authorizes the Receiver to do so.
- [7] It is also appropriate in the circumstances of this case to grant the Receiver the authority to act as the trustee in bankruptcy of the Debtor (as s.13.3(2) of the BIA allows for as long as the potential conflict is disclosed at the first meeting of creditors) and to fund the costs of administering the bankruptcy estate from the Surplus as that is the only source available to fund the bankruptcy and those funds would have to be resorted to in order to fund a claims process in the receivership, which the Receiver believes would be less efficient, and therefore more expensive.
- [8] The requested approval of the activities of the Receiver described in its Third Report is consistent with the policy and practice that is followed by this court in insolvency matters. See *Target Canada Co (Re)*, 2015 ONSC 7574, at paras. 2 and 22.

- [9] The activities of the Receiver as described in the Third Report appear to have been carried out in good faith, in a manner consistent with the provisions of the BIA and in accordance with the provisions of the Orders issued in this proceeding.
- [10] With respect to the fees of the Receiver and its counsel for which approval is sought, the guiding principle is whether the fees are fair, reasonable and proportionate. The fees and disbursements of the Receiver and its counsel for which approval is sought are supported by fee affidavits and invoices for time and hourly rates that are well documented and they are fair, reasonable and appropriate, having regard, (a) the time spent; (b) their knowledge, experience and skill; (c) the responsibilities assumed; (d) the complications and difficulties encountered; (e) the results achieved; and (f) the cost of comparable services when performed in a prudent and economical manner. *See Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at paras. 33 and 44-45.
- [11] The fees and disbursements for which approval is sought appear to be fair and reasonable and to have been properly incurred. The hourly rates charged by the Receiver and its counsel are consistent with comparable firms practicing in the area of insolvency in the Toronto market.
- [12] The revised Order, which appears to be in a form consistent with other similar such orders that have been granted by this court, may issue in the form signed by me today.

A handwritten signature in black ink, appearing to read "Kimmel J.", written in a cursive style.

KIMMEL J.