

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

FORGESTONE MORTGAGE FUND LP

Applicant

- AND -

**72 JAMES INVESTMENTS INC., FORGE & FOSTER HOLDINGS INC. and CLIFTON
BLAKE PARTNERS LP**

Respondents

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

FACTUM OF THE RECEIVER

April 29, 2024

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TO: THE SERVICE LIST

PART I. NATURE OF THIS MOTION

1. On February 26, 2024, this Court made an Order (the “**Receivership Order**”) appointing KSV Restructuring Inc. (“**KSV**”) as receiver and manager (the “**Receiver**”), without security, of:
 - (a) all current and future property, assets and undertaking (collectively, the “**Property**”) of 72 James Investment Inc. (the “**Debtor**”), including but not limited to the real properties municipally known as 72-76 James Street North, Hamilton, Ontario (the “**Real Property**”); and
 - (b) the right, title and interest in the Real Property of the two beneficial owners of the Real Property (the “**Beneficial Owners**”), being Clifton Blake Partners LP (“**Clifton LP**”) and Forge & Foster Holdings Inc. (“**F&F Holdings**”).¹
2. The principal focus of the receivership proceeding has been to continue a sale process for the Real Property that was commenced by the Debtor prior to the date of the Receivership Order.
3. After marketing the Real Property for sale with the assistance of Colliers Macaulay Nicolls Inc. (“**Colliers**”), the Receiver selected an offer from 2793530 Ontario Inc. as the successful bidder.²

¹ Second Report of KSV dated April 24, 2024 (the “**Second Report**”).

² Second Report at section 4.2.

4. The Receiver and 2793530 Ontario Inc. entered into an Agreement of Purchase and Sale dated April 19, 2024 (the “**APS**”).³ On April 24, 2024, 2793530 Ontario Inc. assigned its interest in the APS to an affiliated company, 1000870452 Ontario Inc. (the “**Purchaser**”), in accordance with an express provision in the APS and with the Receiver’s consent.

5. The Receiver now seeks the following orders from this Court:
 - (a) an approval and vesting order (“**AVO**”):
 - (i) approving the transaction for the sale of the Purchased Assets (as defined in the APS) to the Purchaser (the “**Transaction**”); and
 - (ii) following the Receiver’s delivery of the Receiver’s Certificate substantially in the form attached as Schedule “A” to the proposed AVO, transferring and vesting all of the Respondents’ right, title and interest in and to the Purchased Assets in the Purchaser, free and clear of all liens, charges, security interests and encumbrances other than permitted encumbrances; and

 - (b) an ancillary relief and discharge order (the “**Ancillary Relief Order**”):
 - (i) authorizing the Receiver to make certain payments and distributions from the proceeds from the Transaction (the “**Purchase Proceeds**”);

 - (ii) approving the Second Report;

³ Second Report at Appendix F (redacted) and Confidential Appendix 3.

- (iii) approving the fees and disbursements of the Receiver and its counsel (the “**Professional Fees**”), as detailed in the Second Report and, respectively, the Affidavit of Robert Kofman and the Affidavit of Beatrice Loschiavo (the “**Fee Affidavits**”);
 - (iv) sealing the Confidential Appendices to the Second Report pending the completion of the Transaction;
 - (v) discharging the Receiver upon filing of a discharge certificate which certifies that all outstanding receivership matters have been completed; and
 - (vi) releasing the Receiver, upon its discharge, from any and all liabilities that it now has or may hereafter have by any reason of, or in any way arising out of, its acts or omissions, save and except for its gross negligence or wilful misconduct.
6. The relief sought is expected to be unopposed. In the Receiver’s view, the relief sought represents an orderly and appropriate completion of its mandate in this proceeding.

PART II. SUMMARY OF FACTS

A. The Real Property and the Sale Process

7. The Real Property is a 32-unit multi-residential property, with 29 residential units and three commercial units. As of the date of the Receiver’s Second Report, nine residential units and one commercial unit were vacant.⁴

⁴ Second Report at section 1.0(2).

8. Prior to the commencement of these proceedings, the Debtor retained Colliers, a national real estate brokerage, to list the Real Property for sale.⁵
9. At the hearing of the receivership application, the Receiver advised the Court of its intention to retain Colliers for the purpose of marketing the Real Property. Given that Colliers' pre-filing sale process was well advanced, and to avoid any interruption in that process, the Receiver advised the Court that it would summarize its proposed sale process in a report to the court (the "**First Report**"), which it would serve on the service list in these proceedings, and that it would only seek Court approval of that process if someone objected to it. The Receiver served the First Report on the service list on February 28, 2024. No objections were received and the Receiver proceeded to engage Colliers to continue the existing sale process.⁶
10. Colliers canvassed the market broadly for the Real Property, including by preparing an investment summary and making available a virtual data room, which included third-party consultant reports commissioned by the Receiver.⁷
11. In total, 69 parties executed a non-disclosure agreement to perform due diligence, including to gain access to the virtual data room containing information.⁸ The Receiver received two offers for the Real Property.
12. Further particulars of the sale process and its results are set out in the Second Report.⁹

⁵ Second Report at section 1.0(3).

⁶ Second Report at section 4.1(3).

⁷ Second Report at section 4.1.

⁸ Second Report at section 4.2.

⁹ Second Report at section 4.1.

13. The Receiver ultimately determined that the APS was the best offer received and provides the best recovery available for the stakeholders of the Debtor.¹⁰

B. Creditors

1. Forgestone Mortgage Fund LP

14. The applicant, Forgestone Mortgage Fund LP (“**Forgestone**”), has a senior ranking mortgage registered on title to the Real Property (the “**Forgestone Mortgage**”) and a general security agreement in respect of the Property. As at May 2, 2024, Forgestone is projected to be owed \$5,895,803 from the Debtor.¹¹

15. Receiver’s counsel provided an opinion that, subject to the standard assumptions and qualifications contained therein, Forgestone’s security creates valid, enforceable and priority charges on the Real Property and the Property.¹²

2. Other creditors

16. Based on information provided by the Debtor, as at the date of the Receivership Order, the Debtor’s unsecured obligations totalled approximately \$323,000, of which approximately \$207,000 is reflected as owing to Forge & Foster Partners Inc., a party related to the Debtor.¹³

17. Based on an HST audit recently performed by Canada Revenue Agency (the “**CRA**”), CRA has assessed that the Debtor has an HST obligation in the amount of \$35,491.00,

¹⁰ Second Report at section 5.2.

¹¹ Second Report at section 1.1.

¹² Second Report at section 3.1.

¹³ Second Report at section 3.2.

relating to the period from April 1 to September 30, 2023 (the "**CRA Claim**").¹⁴ This claim postdates the registration of Forgestone's mortgage.

C. *Proposed distribution*

18. The Receiver seeks authorization to distribute to Forgestone the amount of the Purchase Proceeds up to the maximum of Forgestone's outstanding indebtedness. The Receiver also seeks approval of the professional fees described in the Second Report and particularized in the Fee Affidavits.

D. *The Confidential Appendices*

19. On this motion, the Receiver seeks an order sealing the unredacted copies of Colliers' sale process summary, Colliers' summary of offers received, and an unredacted copy of the APS (Confidential Appendices 1, 2 and 3, respectively, to the Second Report) pending the closing of the Transaction or further order of the Court.
20. The Confidential Appendices contain sensitive information that could impact the marketability of the Purchased Assets if the Transaction does not close.

PART III. STATEMENT OF ISSUES, LAW & AUTHORITIES

21. The issues on this motion are:
- (a) whether this Court should grant the AVO; and
 - (b) whether this Court should grant the Ancillary Relief Order.

¹⁴ Second Report at section 3.2.

A. *The AVO should be granted*

1. The APS and the Transaction should be approved

22. It is well established that Courts in Ontario consider the following criteria set out in *Soundair* when assessing whether to approve a transaction in the context of a receivership:
- (a) whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;
 - (b) the interests of all parties;
 - (c) the efficacy and integrity of the process by which offers have been obtained; and
 - (d) whether there has been unfairness in the working out of the process.¹⁵
23. The *Soundair* test is met in this case. The Receiver has acted in a fair and reasonable manner and has appropriately conducted the Sale Process in accordance with its terms.¹⁶ The Receiver broadly canvassed the market and undertook significant efforts to obtain the highest and best offer for the Real Property.¹⁷ There is no reason to believe that any better price or result could have been obtained for the benefit of the stakeholders.¹⁸ In addition, the interests of all parties have been considered and furthered in the context of the Transaction, including the interests of Forgestone as the secured creditor.¹⁹

¹⁵ *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA) at [para 16](#) [*Soundair*].

¹⁶ Second Report at section 6.2(a).

¹⁷ Second Report at section 6.2(b).

¹⁸ Second Report at section 6.2(c)(d).

¹⁹ Second Report at section 6.2(d)(f).

24. The Court should accept the Receiver's recommendation and approve the APS and the proposed Transaction.

B. The Ancillary Relief Order should be granted

1. The proposed distribution is appropriate

25. The Receiver is seeking authorization and direction to make the proposed distribution to Forgestone as set out above.

26. The Court considers several factors in determining whether a distribution should be permitted including, among other things, (i) whether the payee's security was valid and enforceable; (ii) the efficiencies achieved by avoiding a separate motion for approval of a distribution, and (iii) whether the proposed payee is the only secured creditor.²⁰

27. In this case, it is appropriate and efficient for the Court to approve an immediate distribution to Forgestone, which is the only secured creditor and its entitlement to the proceeds is, to the Receiver's knowledge, undisputed.

2. The Court should approve the Second Report and the Receiver's activities described therein

28. The activities of the Receiver described in the Second Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Receivership Order and were, in each case, in the best interest of the Debtor's stakeholders generally.

²⁰ *Abitibowater* at [para 75](#); see also *GE Canada Real Estate* at [para 53](#).

29. The Receiver therefore respectfully submits that the Second Report and the activities described therein should be approved.

3. The Court should approve the fees and disbursements of the Receiver and its Counsel

30. The Receiver is seeking approval of the professional fees and disbursements incurred by it and its legal counsel from February 19, 2024 to and including April 19, 2024 as described in the Fee Affidavits attached to the Second Report.

31. The Receivership Order provides that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts.

32. In determining whether to approve the accounts of a Court-appointed receiver and its counsel, the Court will consider the overall value contributed, taking into account (a) the nature, extent and value of the assets, (b) the complications 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.²¹

33. The fees and disbursements are fair and reasonable and 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.²²

²¹ *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at [paras 33](#) and [44-45](#).

²² Second Report at section 8.0.

34. The Receiver respectfully submits that it is appropriate to approve the fees and disbursements of the Receiver and its counsel in the circumstances.

4. This Court should Seal the Confidential Appendices

35. As noted above, the Receiver seeks an Order sealing the Confidential Appendices pending the closing of the Transaction.

36. The limited circumstances in which this Court should seal part of a record before it were described by the Supreme Court of Canada in the case of *Sierra Club of Canada v. Canada (Minister of Finance)*.²³

37. In that case, that court observed that a confidentiality order should be granted in only two circumstances:

(a) when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(b) when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.²⁴

38. In the context of court-supervised sale proceedings, this Court has routinely applied *Sierra Club* and held that it is appropriate to seal information and documentation filed in support

²³ [2002 SCC 41](#) [*Sierra Club*].

²⁴ *Sierra Club* at [para. 45](#).

of a motion to approve a sale where the materials “disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought”.²⁵

39. Sealing these materials is necessary to ensure that the Receiver can maximize value for the Purchased Assets if the contemplated Transaction does not close and the Receiver (or someone else) has to market the Purchased Assets for sale again.²⁶

5. Receiver’s discharge

40. It is appropriate and efficient to grant an order, as part of the Ancillary Relief and Discharge Order, discharging the Receiver upon its filing of a certificate confirming that all outstanding receivership matters have been completed.
41. Given that the closing of the APS and subsequent distributions will represent substantial completion of the Receiver’s mandate, it is sensible to address discharge matters now so as to avoid the need for a further attendance before the Court.
42. The Ancillary Relief and Discharge Order contains standard provisions providing for the Receiver’s release from liability upon its discharge (subject to the usual exceptions for gross negligence and wilful misconduct) and permitting the Receiver to continue to perform any incidental and necessary duties.

²⁵ *GE Canada Real Estate* at [para. 32](#).

²⁶ *GE Canada Real Estate* at [paras. 32-34](#).

PART IV. ORDER REQUESTED

43. For the reasons stated herein, the Receiver respectfully requests that the Court grant: the
(i) AVO and (ii) Ancillary Relief Order, and approve the relief set out herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29TH DAY OF APRIL, 2024.



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
2. *Re Windsor Machine & Stamping Ltd.*, [2009 CanLII 39772 \(ONSC\)](#)
3. *AbitibiBowater inc. (Arrangement relatif à)*, [2009 QCCS 6461](#)
4. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#)
5. *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#)
6. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, R.S.C. 1985, c C-36

Court may appoint receiver

243 (1) Subject to subsection (1.1), 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:

- (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.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

...

Courts of Justice Act, R.S.O. 1990, c. C.43

Injunctions and receivers

101 (1) 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.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

FORGESTONE MORTGAGE FUND LP
Applicant

-and-

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Respondent

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