CITATION: KingSett Mortgage Corporation v. 30 Roe Investments Corp., 2024 ONSC 919
COURT FILE NO.: CV-22-674810-00CL
DATE: 20240214

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: KingSett Mortgage Corporation, Applicant

AND: 30 Roe Investments Corp., Respondent

BEFORE: W.D. Black J.

COUNSEL: *Christopher Armstrong*, Lawyers for KSV Restructuring Inc., in its capacity as Court-appointed Receiver
*Richard Swan***,** *Sean Zweig*, for the Applicant
Sam A. Presvelos, for the Respondent

HEARD: February 7, 2024

ENDORSEMENT

OVERVIEW

[1] The primary motion featured in the proceedings before me today is that of the Receiver, KSV Restructuring Inc. ("KSV" or the "Receiver"), for an order discharging the Receiver, passing its accounts and those of its counsel, authorizing standard releases in favour of the Receiver and its counsel, and granting other related relief to bring this receivership to conclusion.

[2] The Receiver also seeks authorization to make HST Remittances.

[3] KSV fairly notes that these types of relief are routinely sought and most often granted by this Court at the conclusion of receivership proceedings. The relief is also supported by KingSett Mortgage Corporation ("KingSett"), the fulcrum creditor.

[4] It bears mention that, on its face, the receivership itself would also normally be characterized as straightforward and routine. The respondent 30 Roe Investments Corp. (the "Debtor"), the principal of which is Raymond Zar, owned and rented out nine luxury penthouse Condominium units and related parking spots and storage lockers in a condominium building located at 30 Roehampton Avenue in Toronto. There were two secured creditors at the time of the receivership, CIBC which provided first mortgage financing and KingSett, which provided second mortgage financing.

[5] However, the relief sought by the Receiver is partially opposed by the Debtor, which seeks to bring a claim – which it has already issued – against the Receiver and others.

[6] The Receiver initially scheduled this motion in October of 2023. In response, the Debtor served a motion seeking (i) leave to commence/continue an action against the Receiver; and, (ii) an Order referring the Receiver's fees and those of its counsel to an assessment officer (the Receiver noted that, for purposes of the hearing before me, the Debtor's materials appear now to seek an unquantified reduction of fees rather than an assessment per se, but counsel for the Debtor advised that its preferred outcome remains an assessment of the accounts).

[7] In addition to supporting the relief sought by the Receiver, KingSett asks that it too be given a release. The Debtor opposes that request; in the claim that it has already issued, the Debtor has named KingSett as a defendant.

ISSUES TO BE DETERMINED

[8] Accordingly, in addition to the Receiver's request for a discharge Order and related relief (including and/or alternatively an Order enforcing the stay provisions within the Receivership Order), I am asked to decide on the Debtor's motion for leave to sue the Receiver, and on KingSett's request to be included in the release under the Discharge Order.

[9] One of the primary issues raised by the Debtor as a basis for its opposition to the relief that the Receiver seeks is the allegation that the costs of this receivership have been significantly disproportionate to the amount at issue and to the relative simplicity of the Receiver's task here. In his evidence, Mr. Zar attributes this to a couple of aspects of the receivership, blaming the Receiver for what Mr. Zar describes as an ill-conceived approach to the sale of the condominium units comprising the primary assets in this receivership. Mr. Zar also blames the Receiver for a tax liability to CRA for outstanding HST.

[10] The Receiver, echoed by KingSett, argues that the disproportionate costs of the receivership - which it acknowledges - are virtually entirely a product of the Debtor/Zar's conduct throughout the receivership. It says:

> "Mr. Zar interfered with and opposed every step that the Receiver tried to take. This resulted in a total of 21 contested court hearings. By his own admission, Mr. Zar sent hundreds or thousands of e-mails in connection with this matter. Mr. Zar chose to do everything he could to make this Receivership more complicated, and more expensive. He cannot now complain that it should have been simpler and cheaper."

[11] The Receiver maintains that it did exactly what this court authorized it to do, at every stage, and that the Debtor and/or Mr. Zar's intended claim against it is based on the precise arguments that have been rejected repeatedly by this Court and once by the Court of Appeal for Ontario.

[12] A determination of this matter thus requires the court to review the steps taken during the receivership, to consider the determinations by this Court at various junctures (and where applicable by the Court of Appeal for Ontario), to assess the Debtor's allegations concerning missteps by the Receiver (and its counsel). I must also consider KingSett's request to be included in a release.

CONCLUSIONS

[13] Having done so, as discussed below, I am granting the Receiver's request for a discharge, and for the passing of its accounts and those of its counsel. I have read the reports that the Receiver has provided throughout the course of these proceedings, and the extensive related evidentiary record, and I find nothing to suggest that the Receiver's conduct and activities, and those of its counsel, have been anything other than entirely appropriate and professional.

[14] I am dismissing the motion by the Debtor for leave to commence or continue a claim against the Receiver, and the related relief that the Debtor seeks relative to the fees of the Receiver and its counsel (be it an assessment or simply a discount). I assess those accounts, for the final period of the receivership, at $251,180 for the Receiver, and $583,581 for its counsel, plus disbursements and applicable taxes. I am satisfied that those fees, although higher than what might ordinarily be required in a receivership of this nature, are fully supported and justified in the unique and challenging circumstances of this proceeding, as discussed below. I rely on and accept affidavits filed on October 4, 2023 in which these accounts are detailed.

[15] Finally, I am unable to grant the release that KingSett seeks. I am not persuaded that I have the jurisdiction to do so.

[16] In my view it is time for the sprawling and unduly expensive proceedings spawned by this receivership to be brought to an end. The receivership has exhausted enormous judicial and legal resources, and it cannot and should not continue.

RELEVANT PROCEDURAL HISTORY

[17] It is instructive, in understanding how the parties have arrived at the current heated impasse, to review aspects of the history of the receivership.

A. Appointment of Receiver and Cavanagh J.'s Comments

[18] The attendances and procedural wrangling involved in the appointment of KSV as the Receiver at the outset of this matter are representative of the way in which this case has unfolded since then.

[19] That is, following on the initial attendance before Cavanagh J. on January 17, 2022, there were four further attendances until His Honour ultimately appointed KSV as Receiver on May 6, 2022.

[20] In the meantime, the Debtor sought four adjournments, the last couple of which related to the Debtor parting company with its erstwhile counsel, Paliare Roland Rosenberg Rothstein LLP.

[21] On May 6, 2022, at the point at which he appointed KSV as Receiver, Cavanagh J. observed, in refusing a further (fifth) request by the Debtor for an adjournment, that "the Debtor has not acted reasonably and in accordance with my endorsements". The Court of Appeal for Ontario confirmed this conclusion in granting a motion by KingSett to quash the Debtor's appeal from Cavanagh J.'s Order.

[22] Justice Cavanagh's pointed comments, as it turned out, presaged observations subsequently made by other judges as the matter progressed.

B. Attendance Before McEwen J.

[23] By endorsement dated July 20, 2022, McEwen J. found that the record before him "does not support" Mr. Zar's contention that he had been "generally cooperative," and noted that the Receiver's motion for a second order to compel production of documents "should not [have been] necessary".

C. Justice Steele's Comments in May of 2023

[24] Some months later, commenting in part on a track record established by the time of a motion before her (on May 18, 2023), Steele J. observed that "Zar's conduct on this motion and throughout these proceedings has added complexity and costs...By not respecting the Court's procedures, requirements and timelines, time and expense have been unnecessarily added."

D. Court of Appeal for Ontario's Observations

[25] On March 27, 2023, in granting KSV's motion to quash the Debtor's proposed appeal from two approval and vesting orders made by Steele J. on February 7, 2023, Brown J. held that the "proposed appeal is not prima facia meritorious…it amounts to nothing more than a collateral attack on the July and December Sales Orders". Brown J. continued: "one therefore is left with the distinct impression that [the Debtor's] attempt to appeal…is nothing more than a delay tactic".

E. Findings by Osborne J.

[26] On May 30, 2023, Osborne J. found that Mr. Zar's conduct, including "the baseless allegations of misconduct advanced and the failure to provide to the Receiver relevant information and documents" had "contributed to the expense and delay."

SUMMARY OF PROBLEMATIC ASPECTS OF PROCEDURAL HISTORY

[27] In an appendix to its materials, KSV assembles a list of the 21 contested court attendances in this matter (including both motions and case conferences). KSV asserts that "Almost every motion in this matter became a procedural circus involving adjournment requests, judicial recusal requests, a rotating cast of counsel that ultimately included six law firms that acted for the Debtor (and two contested motions for counsel to be removed from the record) and last-minute filing of materials."

[28] KSV's description of the "procedural circus" characterizing this matter is apt, and amply supported by the record, from which the quotes from my colleagues excerpted above are but a handful of representative examples.

[29] The observation noting the relative revolving door of counsel for the Debtor is also fair. Mr. Zar has repeatedly fallen in and out with various counsel along the way, and has, during interludes between retainers, acted – or purported to act (there are significant questions about his ability to speak for the Debtor having regard to Rule 15) – for himself and notionally for the

Debtor. Both the frequent changes of counsel, and positions taken by Mr. Zar while purporting to act for the Debtor have tended to increase the costs and complexity of the proceedings.

DEBTOR AND MR. ZAR'S PARALLEL OUT-OF-COURT CONDUCT

[30] KSV notes that the Debtor and Mr. Zar's in-court strategy is coupled with equally problematic out-of-court conduct.

[31] That is, KSV excerpts in its materials an answer given by Mr. Zar on cross-examination in which he acknowledged that he has sent "hundreds, maybe thousands of e-mails" in this case, many or most of which have been directed to KSV and its counsel. KSV notes that "These e-mails included a number of outlandish allegations that were never substantiated, including an assertion that someone involved with the case has deployed electronic surveillance against him at a cost of more than $1 million, and that various judges of this Court and the Court of Appeal had ruled on the case despite unspecified conflicts of interest."

[32] I note that in a 151-page affidavit that he swore in connection with the motion(s) before me, Mr. Zar does not shy away from these sorts of vaguely conspiratorial claims. In the introduction section to his affidavit, for example, he defines and describes what he calls the "KingSett method", which method, he alleges, includes KingSett directing "KSV to engage legal counsel bound by a sworn duty of loyalty to KingSett." Again, both Mr. Zar's out-of-court conduct and his claims alleging conspiracies have added time and complexity to the Receiver's task.

[33] I should also observe in this context that in Mr. Zar's 151-page affidavit, he refers to many instances where he surreptitiously recorded telephone calls and other events, including a number of telephone calls with a representative of the Receiver.

[34] While such surreptitious unilateral recording is technically permissible, I have concerns about Mr. Zar's use of that strategy here.

[35] I find that the secretly obtained evidence on which the Debtor relies is selective, unreliable, and characterized by attempts by Mr. Zar to "bait" the Receiver's representative into saying things that Mr. Zar then purports to characterize as helpful to the Debtor's positions.

[36] Again, this conduct is counterproductive, and has likewise served to add unnecessary complexity and costs.

THE CONDUCT HAS DRIVEN COSTS

[37] In a separate appendix to its materials, KSV tallies the approximate costs incurred by the Receiver and its counsel as at various milestones in the litigation. KSV argues that the excessive costs incurred "correlate almost exactly with Mr. Zar's attempts to interfere with the receivership". While of course precise attribution of costs at each juncture is difficult to mete with precision, when one matches apparent spikes in fees with the judicial criticisms uttered at these junctures, the pattern of elevated costs arising in relation to the Debtor's problematic procedural conduct is inescapable.

DEBTOR'S PURPORTED EXPLANATION FOR CRITICISMS OF DEBTOR AND MR. ZAR

[38] During the course of their counsel's submissions on behalf of the Debtor and Mr. Zar, he alleged that the Receiver, aided by KingSett, had somehow created an inaccurate picture of Mr. Zar's behaviour, unfairly blaming Mr. Zar for all manner of problems in the progress of the Receivership.

[39] When I noted in response that it is not just the Receiver and KingSett, but also a significant number of judges, including in the Court of Appeal for Ontario, who have made observations about the Debtor and Mr. Zar's responsibility for delays, excessive procedural entanglement and elevated costs, Debtor's counsel maintained, in effect, that the judges who have made critical comments about Mr. Zar and his behaviour have been duped by the Receiver and fallen prey to the Receiver's false narrative.

[40] I reject this submission. I have no difficulty in finding, on the extensive record before me, that the Debtor and in particular its principal Mr. Zar, are all but entirely responsible for this receivership having in some ways spiraled out of control.

DISCUSSION OF THE DEBTOR'S SUBSTANTIVE POSITIONS

[41] Apart from these numerous and ongoing concerns about the questionable procedural conduct of the Debtor and Mr. Zar, it is also important for present purposes to focus on the substantive positions that they have taken at points during the proceeding, and to compare those positions to the arguments now advanced before me.

[42] There are two main arguments that the Debtor makes in this motion, both of which feature prominently in its allegations that the Receiver has been grossly negligent in the performance of its duties.

[43] First, the Debtor alleges that the tactical decision of the Receiver to sell the nine units at issue individually rather than collectively (en bloc) was ill-conceived. It argues before me that selling the units as a portfolio to another company would have been the better approach to maximizing value for stakeholders.

[44] It also says that this approach would have had the added benefit of avoiding significant HST liabilities, which liabilities are the subject of the Debtor's second main argument. That is, the Debtor allege that the Receiver ignored Mr. Zar's warnings about a pending potential liability for HST, and thereby caused that very liability to be incurred, at a cost to the estate of approximately a million dollars.

[45] There are problems with both arguments.

A. Evidentiary Problems with Debtor's Positions

[46] First, the underlying evidence for both arguments comprises, in each case, solely assertions made by Mr. Zar. There is no evidence of any expertise on Mr. Zar's part to allow him to opine persuasively on issues such as condominium marketing, tax issues, or the standard of care and

conduct for a Receiver. Nor does the Debtor offer any independent such evidence, and certainly no independent expert evidence. There is a significant threshold and evidentiary burden that a party making such allegations against a Receiver must surmount, and the Debtor's evidence falls well short of the mark.

[47] There is also considerable evidence in the record showing that the Debtor regularly ignored or refused requests from the Receiver for relevant information with respect to the two main issues about which the Debtor now complains. There is no evidence to suggest that the provision of all such information would have led the Receiver to make the decisions that the Debtor now says it should have, but regardless, it is not appropriate for the Debtor, having withheld relevant information that could assist the Receiver in its investigations and decision-making, to then complain that that decision-making was flawed.

B. The Same Arguments Have Been Made Repeatedly

[48] Another significant problem for purposes of the Debtor advancing these arguments in this motion is that both complaints, about the marketing strategy and about the failure to avoid HST liability, respectively, have previously been made by the Debtor in this proceeding, repeatedly and in more or less identical terms.

(i) McEwen J.'s Rejection of Debtor's Arguments

[49] It appears that, so far as the Court is concerned, these issues were first raised in hearings before McEwen J. on July 20, 2022 and December 14, 2022, respectively, at the point at which, (during the December attendance) by way of its second report, the Receiver was seeking approval of a proposed sales process and related relief.

[50] In his endorsement relative to the July attendance, apart from admonishing the Debtor/Mr. Zar for a lack of cooperation in producing material required and sought by the Receiver, His Honour specifically noted the Debtor's objection as to the methodology used by the Receiver to market the units. He reviewed the evidence, including advice the Receiver had received from parties with experience in the specific market, and approved the sales process recommended by the Receiver.

[51] Justice McEwen observed in his next endorsement in this matter, on December 14, 2022, that he allowed Mr. Zar to make submissions that day, notwithstanding that Mr. Zar had not sought leave to represent the Debtor pursuant to Rule 15. His Honour also noted that Mr. Zar, in those submissions, made a number of allegations against the Receiver, KingSett, and others.

[52] As events transpired, and in particular when McEwen J. refused to delay the hearing or to agree that the court itself should carry out an investigation (the proposed details of which are not clear in the endorsement), Mr. Zar asked McEwen J. to recuse himself. When His Honour also refused that request, Mr. Zar apparently threatened to conduct a press conference and to broadcast the Zoom hearing. Justice McEwen accordingly issued an urgent order prohibiting the broadcasting or publishing of the hearing.

[53] Amidst these distractions, McEwen J. also dealt with substantive items in the ongoing receivership, among other things confirming the benefits of the Receiver having

"greater flexibility" to deal with changing "market dynamics", and noting that "there may also be tax implications, which cannot yet be analyzed, as the Respondent has not yet provided the Receiver with necessary information." Justice McEwen refused to give effect to the Debtor's arguments, and approved the Receiver's ongoing approach to these issues.

(ii) The Same Requests Were Made to Steele J.

[54] These continuing concerns surfaced again at an attendance before Steele J. on February 7, 2023, convened to address the Receiver's motion for, "among other things, approval of the sale of two of the properties: PH04 and PH09". Her Honour recorded that the "proposed sale was opposed by 30 Roe Investments Corp."

[55] After referring to the sales process having been previously approved by McEwen J., Her Honour described the general approach, saying: "Among other things, the Receiver was empowered to determine, in its sole discretion, which and how many of the units are to be listed for sale and the listing prices for the units."

[56] She then observed that "The Receiver determined, with advice from the realtor, that the preferred course was not to flood the market with all of the condo units being listed at the same time. Accordingly, the Receiver implemented the sales process in respect of 2 of the condo units and now has firm sale agreements for PH04 and PH09. The Receiver seeks an approval and vesting order in respect of these sales."

[57] Significantly, Her Honour then described the Debtor's opposition to the proposed sale(s) as follows: "The Debtor has made the same argument on this motion with regard to the proposed sale as was made before Justice McEwen when the sales process was determined. Specifically, the Debtor is of the view that the 9 condo units at 30 Roehampton Avenue ought to be sold as a going concern hospitality business, not sold as individual units. This argument was rejected by Justice McEwen."

[58] After noting that "the Debtor reserved its right to object to future sales of the units on the basis that an en bloc sale would generate more value" Steele J. then observed that "The Receiver asked the Debtor for evidence supporting the Debtor's view that a going concern sale would be preferable" and that "This was not provided to the Receiver." More particularly, Her Honour said "There is correspondence from the Receiver following up on the request, including a list of what was required, but the Debtor did not provide the information."

[59] Finally, on this issue, Steele J. recorded that on the evening before the motion, the Debtor had filed some evidence, but that "the purported valuation was not prepared by a valuation expert, it was not supported by any of the underlying financial records of the Company, and it is more than two years stale."

[60] Turning to the second main argument advanced by the Debtor, Her Honour said: "The Debtor also raised the issue of HST on the condo sales. The Debtor argues that if the units are sold individually HST will be levied, whereas if they are sold as a going concern business, there should not be HST." However, while noting that the Receiver "acknowledged that HST may be an issue", Steele J. said that "the Receiver states that the Debtor has not provided the Receiver

with the information necessary to determine this issue. Further, the Receiver notes that there is no evidence that a going concern type of transaction would be available".

[61] Ultimately, after discussing relevant statutory provisions and the criteria for approving a sale as set out in *Royal Bank of Canada v. Soundair Corporation*, 1991 CanLII 2727 (Ont. C.A.), Her Honour approved the proposed sales.

[62] Justice Steele also dealt with other issues that day, but the exchanges concerning the two main concerns asserted by the Debtor underlines that the arguments that the Debtor submits in the motion before me are not new.

(iii) The Court of Appeal for Ontario Quashed the Debtor's Appeal

[63] The Debtor appealed Steele J.'s decision, and the endorsement of Brown J. for the Court of Appeal for Ontario for the Debtor's appeal on March 27, 2023, reflects many of the recurring themes of the receivership.

[64] After reviewing the procedural history of the matter to that point, Brown J.A. then addressed certain procedural matters. It is evident that Mr. Zar was in a significant dispute with his then counsel, Blaney McMurtry LLP, and that the firm was seeking at that juncture to remove itself as counsel of record for the Debtor.

[65] In the context of addressing that issue, Mr. Zar asked Lauwers J.A. to recuse himself from the panel, on the basis that Lauwers J.A. had heard and refused a motion the week prior in which Blaney McMurtry LLP had asked to be removed from the record.

[66] Lauwers J.A. agreed to Mr. Zar's request, and accordingly recused himself. As a result, Brown J.A. one of the scheduled duty judges, joined the panel.

[67] Somewhat remarkably, after some procedural matters were addressed, Mr. Zar then asked Brown J.A. to recuse himself, allegedly because of some familial relationship that created a conflict of interest. However, Mr. Zar was not prepared to identify the alleged family member whose relationship with Brown J.A. created the alleged conflict, and the matter proceeded with Brown J.A. in place.

[68] The panel dealt with issues of jurisdiction, and then turned to the substance of the appeal. In that regard, the Court observed that:

> "…30 Roe sought to oppose the sale transactions by repeating the 'en bloc sale' argument it had made at the time of the July Sales Order but which McEwen J. had rejected. On its face, the evidence 30 Roe filed before Steele J. carried virtually no weight, consisting as it did of a bald assertion by Mr. Zar about the possible value of an en bloc transaction that was not supported by an independent valuation and was advanced against a history of 30 Roe refusing requests by the Receiver for financial information about the "Enterprise."

[69] The Court went on to find that the Debtor's appeal did not fall within the ambit of BIA ss. 193(a)-(c), and quashed it. The Court also denied the Debtor's motion for leave to appeal the Approval Orders.

[70] There were two further attendances before Steele J. in May of 2023, following the latter one of which, on May 18, 2023, Her Honour wrote, after refusing the Debtor/Mr. Zar's motion seeking funding of the Debtor's expenses in the receivership proceedings, that "Zar's conduct on this motion and throughout these proceedings has added complexity and costs…by not respecting the Court's procedures, requirements and timelines, time and expense have been unnecessarily added."

(iv) Justice Osborne Addressed These Same Arguments

[71] Returning to the Debtor's substantive positions, on May 30, 2023, the parties were before Osborne J. His Honour was asked to make approval and vesting orders for the remaining condominium units at that time. He was also asked to adjudicate an unusual circumstance in which the Receiver sought vacant possession of a unit being occupied by someone who turned out to be Mr. Zar's mother.

[72] Justice Osborne reviewed much of the lengthy procedural history of the matter, noting undue expense and delays resulting from "the conduct of Mr. Zar, the baseless allegations of misconduct advanced and the failure to provide to the Receiver relevant information and documents." His Honour noted that Mr. Zar "submitted that the Court ought not to exercise its discretion to approve the sale of the Remaining Units in advance since the Receiver was not impartial, counsel for the Receiver was in a conflict of interest…and the conduct of KingSett has been 'poor'".

[73] Justice Osborne rejected those submissions, and, in reference to Mr. Zar's continued objections, noted that the "market has been extensively canvassed" and, in effect, that he accepted that the Receiver's approach to the unit sales was appropriate and based on proper information. He confirmed that the Receiver's approach was "informed by the recent sales and experience of the Receiver and listing agent in their respective areas of expertise."

[74] Mr. Zar also once again raised the HST issue before Osborne J. On this occasion, Mr. Zar apparently maintained that he had received a tax opinion form BDO that supported his contentions that the Receiver's approach to sales would create an overpayment of HST.

[75] His Honour actually agreed to give Mr. Zar a short time to provide to the Receiver the BDO tax opinion that he claimed to have obtained. In the result, however, no such tax opinion – or any tax opinion – was produced.

CONCLUSIONS ON THE DEBTOR'S TWO MAIN ARGUMENTS

[76] These various instances where the Debtor/Mr. Zar have raised the two concerns – the Receiver's approach to sales and the HST issue – that the Debtor now raises before me, may not exhaustively capture all occasions on which these complaints have been advanced. Suffice it to say, however, that it is beyond doubt that these two arguments have been repeatedly raised and thoroughly ventilated throughout the receivership proceedings.

[77] There is no new evidence before me, and certainly no expert evidence, from which I could conclude that the Debtor's criticism of the Receiver (and the Receiver's counsel) has merit. Accordingly, I reject those submissions.

APPROVAL OF RELIEF SOUGHT BY THE RECEIVER

[78] I therefore grant the primary relief sought by the Receiver, approve the Receiver's fifth report and its activities throughout the receivership, and discharge the Receiver from its capacity as the receiver and manager of certain property of 30 Roe Investments Corp. I also authorize the standard releases in favour of the Receiver and its counsel, and grant the other ancillary relief necessary to bring this matter to its conclusion, including authorizing the HST remittances that the Receiver seeks permission to make. There has been, and continues to be, no persuasive evidence in support of Mr. Zar's contentions about the Receiver's approach to the HST issues, and I find that the Receiver's recommendation, supported by the tax advice of its counsel, is reasonable and appropriate.

[79] As noted above, I also approve the Receiver's fees, and those of its counsel. While both acknowledge that their fees are higher than one might normally expect for a receivership of this type, this is explained entirely by the need to respond throughout the receivership to all manner of procedural ploys and arguments advanced by the Debtor and Mr. Zar. I have reviewed and accept as reasonable the affidavit evidence setting out the details of the fees incurred.

[80] I also find that the Receiver and its counsel in fact quite appropriately undertook various maneuvers with a view to keeping costs down, including for example bundling relief sought into omnibus motions, and seeking pre-approval of the sales of multiple units.

[81] I approve the release and related relief for the Receiver and its counsel, and other Released Parties. I find that those releases are necessary and appropriate to achieve certainty and finality for the Released Parties.

[82] I note that these protections echo protections already contained in the original receivership Order, including a stay of proceedings against the Receiver relative to its work in the receivership, and for greater certainty, for all of the reasons discussed in this endorsement I decline to lift that stay to allow any claims.

DISCUSSION OF KINGSETT'S REQUEST FOR A RELEASE

[83] I turn now to discuss the request of KingSett to have included, in the proposed Discharge and Relief Order, a release in favour of the KingSett Released Persons. The Receiver appropriately leaves it to KingSett to make submissions in support of this request, discussed below, but notes for its part that in order to bring finality to these proceedings, it believes that the release of KingSett is necessary. The Receiver emphasizes Mr. Zar's stated belief that KingSett is engaged in a conspiracy against him, and is concerned that without a KingSett release, it is virtually inevitable that Mr. Zar, in his personal capacity or otherwise, will bring a claim against KingSett which will in turn risk reviving various of the Debtor's complaints during and about the receivership.

[84] Indeed, in the materials before me there is a claim which appears to have been issued by the Debtor and/or Mr. Zar, claiming not only against KingSett, and many others, (including many

of the Debtor's previous counsel in this matter), but also, subject to obtaining leave, against the Receiver and its counsel.

[85] It is therefore evident that, absent an effective impediment to these steps, further proceedings will ensue, inevitably featuring the same or similar allegations to those that have beset this receivership, and leading to the continued outpouring of time, resources and funds for all those unfortunate enough to be caught up in the maelstrom.

[86] Whereas this Court's authority to discharge and release a Receiver is well-settled, the basis for extending a release to a third party creditor is not.

[87] In support of its request to be released, KingSett relies on the decision of this Court in *Kitchener Frame Ltd.*, 2012 ONSC 234, in which Morawetz J., as he then was, approved a broad release encompassing various third parties in the context of a proposal under Part III of the *Bankruptcy and Insolvency Act* ("BIA").

[88] In doing so, His Honour referenced the criteria established for granting third-party releases under the *Companies Creditors Arrangement Act* ("CCAA"), and emphasized the desirability of "harmony, coherence and consistency" between statutes, militating "in favour of adopting an interpretation of the BIA that is harmonious, to the greatest extent possible, with the interpretation that has been given to the CCAA". Justice Morawetz went on to add that the benefits of harmonious interpretation include "avoid[ing] the ills that can arise from 'statute-shopping'".

[89] In reaching this conclusion, Morawetz J. expressed the view that "the governing statutes should not be technically or stringently interpreted in the insolvency context but, rather, should be interpreted in a manner that is flexible rather than technical and literal, in order to deal with the numerous situations and variations which arise from time to time."

[90] Recognizing that His Honour's guidance was offered in the setting of a proposal under Part III of the BIA, and therefore not precisely apposite to the circumstances at hand, KingSett nonetheless argues that this court should equally strive for harmony between s. 243 of the BIA and the broad discretion inherent in s. 11 of the CCAA.

[91] KingSett says that the proposed release sought by it is not overly broad, and again, that the consequences if no release is given are not in doubt. It notes KingSett's funding and facilitation of these receivership proceedings, the shortfall that it has suffered under its security, and "the risk of protracted and meritless litigation – a risk which, as demonstrated by [the Debtor's Statement of Claim, included in the materials and poised to be served], is not merely hypothetical".

[92] While I have no doubt that, in the absence of a release in its favour, KingSett will remain in the Debtor and Mr. Zar's sights, I am unable to find clear jurisdiction to make the order KingSett seeks. I see no statutory basis for doing so, and, while acknowledging Mr. Swan's able argument relying on *Kitchener Frame*, Morawetz J.'s expansion of the basis for the releases in that case is clearly limited to the desirability of harmonizing Part III of the BIA with the CCAA in the context of restructuring proceedings. I am not persuaded that it extends beyond that to encompass releases of creditors in receiverships.

[93] KingSett also relies on this Court's "authority to control its own process and to supervise the commencement of proceedings arising out of insolvency proceedings. However, KingSett cites no authority for the latter proposition, and, while clearly the court has authority to control its own process, I can find no specific basis to grant the substantive relief of a release for which KingSett asks here.

ISSUE WITH RESPECT TO POSTING (OR NOT) OF MR. ZAR'S AFFIDAVIT ON THE RECEIVER'S WEBSITE

[94] Before concluding I should address a stray issue that has recently come up in these proceedings.

[95] In a recent attendance before Conway J., there was a dispute about whether or not Mr. Zar's 151-page affidavit, filed in the late fall of 2023 in connection with this motion, should be included in the Receiver's website (in keeping with the Commercial List protocol).

[96] The Receiver, again supported by KingSett, argued that the affidavit contained extensive allegations going beyond the bare evidence necessary for the Court to determine this motion, and that much of its contents was, or bordered on defamatory. The Receiver noted that the full affidavit is filed in the Court record, such that interested members of the public can access the affidavit whether or not it appears on the Receiver's website.

[97] The Debtor argued that there is no reasonable justification for treating Mr. Zar's affidavit any differently than the way evidence filed by parties in like circumstances is generally treated, i.e., by including such evidence within a Receiver's website.

[98] Justice Conway held that this question should be dealt with by the judge hearing the Receiver's motion for a discharge and related relief, and so I am addressing the issue.

[99] In my view, the issue in fact became academic in the way in which events unfolded. That is, despite filing an affidavit 151 pages in length, the Debtor did not refer to that affidavit, at all, in its factum.

[100] Moreover, having reached the decision that I have that the receivership is now at an end, I see no utility or benefit in having the affidavit featured, at this stage, on the receiver's website.

[101] It is true, as the Receiver asserts, that any interested member of the public can access the affidavit in the record for the matters before me, and again I see no additional imperative or benefit to forcing the Receiver also to feature the affidavit on its website.

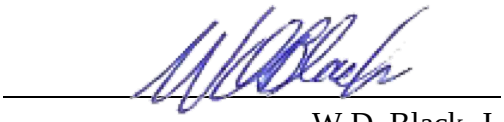
[102] For these reasons, I decline to do so.

FINAL CONCLUSIONS

[103] In conclusion, I am granting the relief sought by the Receiver, including approving its final report and approving the fees sought by both the Receiver and its counsel.

[104] I reject the Debtor's request for leave to pursue its claim against the Receiver, and grant the release sought by the Receiver within the Discharge Order.

[105] On the other hand, I am not persuaded that I have the jurisdiction to order the release sought by KingSett, and therefore decline to do so.



W.D. Black, J.

Date: February 14, 2024