

**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**

September 30, 2024

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Inc

**TO: THE SERVICE LIST**

## PART I. NATURE OF THIS MOTION

1. This is a motion to authorize and direct KSV Restructuring Inc. (the “**Receiver**”) to assign 72 James Investments Inc. (the “**Debtor**”) into bankruptcy, to authorize the Receiver to act as bankruptcy trustee (the “**Trustee**”) and for certain ancillary relief. The motion is expected to be unopposed.
2. Pursuant to an order of the Court granted on February 26, 2024 (the “**Receivership Order**”), KSV Restructuring Inc. was appointed Receiver of: (i) all of the assets, undertakings and properties of the Debtor, acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof; and (ii) the right, title and interest in the Real Property (as defined below) of Forge & Foster Holdings Inc. and Clifton Blake Partners LP including all proceeds thereof.
3. The Debtor’s principal asset was the real property municipally known as 72-76 James Street North, Hamilton, Ontario (the “**Real Property**”). The Real Property is a 32-unit multi-residential property, with 29 residential units and three commercial units.
4. The Receiver sold the Real Property to 1000870452 Ontario Inc. (the “**Transaction**”).
5. On May 2, 2024, the Court approved the Transaction and it closed on May 21, 2024.
6. 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**”).

7. As outlined in further detail in the Receiver's Third Report dated August 30, 2024 (the "**Third Report**"), the Receiver has not yet conducted a claims process given the uncertainty as to whether the selling price of the Real Property would be sufficient to fully repay the senior mortgagee.
8. The Receiver has also confirmed that the Debtor's books and records have not been kept current. As such, the Receiver cannot determine the population of creditors and the amounts owing to them without conducting a claims process.
9. An assignment into bankruptcy would provide an efficient and prescribed basis on which to notify creditors and claimants, determine their claims, and make distributions of the Surplus.

## **PART II. SUMMARY OF FACTS**

### ***A. Surplus and Identification of Potential Claims***

10. On closing of the Transaction, the senior mortgagee, Forgestone Mortgage Fund LP ("**Forgestone**") was fully repaid from the proceeds of the Transaction and there remains the Surplus, which is available for distribution to the Debtor's unsecured creditors, net of professional costs and other expenses.<sup>1</sup>
11. As outlined in further detail in the Third Report, the Receiver did not conduct a claims process given the uncertainty as to whether the selling price of the Real Property would be sufficient to fully repay Forgestone.<sup>2</sup>

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<sup>1</sup> Third Report at section 1.0, p. 14 of the Motion Record of the Receiver, August 30, 2024 ("**MR**").

<sup>2</sup> Third Report at section 2.0, p. 16 MR.

12. The Receiver now wishes to distribute the Surplus; however, the Receiver has confirmed that the Debtor's books and records have not been kept current and the Receiver cannot identify the claims against the Debtor without a claims process.<sup>3</sup>
  
13. Notwithstanding the state of the Debtor's records, the Receiver has identified the following claims:
  - (a) based on an HST audit recently performed by the Canada Revenue Agency (the "CRA"), the CRA has assessed that the Debtor has an HST obligation in the amount of \$35,491.00, relating to the period from April 1 to September 30, 2023 (the "CRA Claim").<sup>4</sup>
  
  - (b) 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 Holdings Inc., a party related to the Debtor.<sup>5</sup>
  
14. In the Receiver's opinion, assigning the Debtor into bankruptcy would provide an efficient and prescribed basis on which to notify creditors and claimants, determine their claims, and make distributions of the Surplus.

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<sup>3</sup> Third Report at section 2.0, p. 16 MR.

<sup>4</sup> Third Report at section 2.0, p. 16 MR.

<sup>5</sup> Third Report at section 2.0, p. 16 MR.

### PART III. STATEMENT OF ISSUES, LAW & AUTHORITIES

15. The issues on this motion are:
- (a) should the Receiver be authorized to assign the Debtor into bankruptcy;
  - (b) should the Receiver be entitled to act as the trustee in bankruptcy and to fund its and its counsel's fees and disbursements from the bankruptcy estate; and
  - (c) should the Court approve of the activities of the Receiver as well as the fees and disbursements of the Receiver and its counsel.

**A. *The Receiver should be authorized to assign the Debtor into bankruptcy***

16. The Receiver seeks the Court's authorization to assign the Debtors into bankruptcy and to act as the Trustee.
17. This relief is commonly granted by this Court. For example, in *RBC v Gustin*, this Court confirmed that it has the authority to empower a receiver to file an assignment in bankruptcy on behalf of a debtor company.<sup>6</sup>
18. In *Bank of Montreal v Owen Sound Golf and Country Club*, Justice Brown held:

It is well settled that a court possesses the power to authorize a receiver to file an assignment in bankruptcy or consent to a bankruptcy order.<sup>7</sup>

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<sup>6</sup> *RBC v Gustin*, 2019 ONSC 5370 at [para 15](#) [*Gustin*]; see also *CIBC v. 1340182 Ontario Limited et al.*, 2024 ONSC 3658, at [para 15](#).

<sup>7</sup> *Bank of Montreal v Owen Sound Golf and Country Club*, 2012 ONSC 557 at [para 7](#)

19. In granting such authority to receivers, the Court considers the specific facts of the case to ascertain whether bankruptcy might be preferable.<sup>8</sup> The Court has further held that 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.<sup>9</sup>
20. In this case, the Receiver's opinion is that bankruptcy is appropriate 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;

***B. The Receiver should be authorized to act as Trustee***

21. The *Bankruptcy and Insolvency Act (BIA)* permits receivers appointed in respect of a debtor to also act as trustees in bankruptcy of the debtor, if at the time of being appointed as trustee and at the first meeting of creditors, full disclosure of that fact and of the potential conflict of interest is disclosed.<sup>10</sup>

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<sup>8</sup> *Royal Bank v Sun Squeeze Juices Inc.*, 1994 CarswellOnt 266, [1994] O.J. No. 567 (Gen. Div. [Commercial List]), aff'd 1994 CarswellOnt 310, 28 C.B.R. (3d) 201 (CA) at para 11.

<sup>9</sup> *Gustin* at [para 17](#).

<sup>10</sup> *BIA*, s. [13.3\(2\)](#).

22. The practice of appointing a receiver previously appointed as the trustee in respect of a debtor is routinely approved in scenarios encompassing receiverships and bankruptcies.<sup>11</sup>
  23. When a bankruptcy order is being made, the court shall appoint a licensed trustee as the trustee in bankruptcy having regard, as far as the court considers just, to the wishes of the creditors.<sup>12</sup>
  24. No creditor of the Debtors has raised any perceived conflict of interest or other objection to the Receiver acting as Trustee.
  25. Authorizing the Receiver to act as Trustee will reduce the costs associated with the bankruptcy given the Receiver's familiarity with the Debtors' affairs and creditors. If another licensed trustee was required to be engaged, it would result in considerable duplication of efforts and increased cost, which would deplete the funds available for recovery to creditors.
  26. In all, the Receiver submits that it is appropriate for this Court to grant the Receiver the authority to assign the Debtor into bankruptcy, to act as the trustee in bankruptcy of the Debtor, and to fund the costs of administering the bankruptcy estate from the Surplus.
- C. *The Court should approve the Third Report and the Receiver's activities described therein***
27. The activities of the Receiver described in the Third Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the

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<sup>11</sup> *Pinnacle v. Kraus*, 2012 ONSC 6376 at paras [5-6](#); *HSBC Bank Canada v Kupritz*, 2011 BCSC 788 at para [4](#).

<sup>12</sup> *BIA*, s. [43\(9\)](#).

Receivership Order and were, in each case, in the best interest of the Debtor's stakeholders generally.

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

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

29. The Receiver is seeking approval of the professional fees and disbursements incurred by it and its legal counsel from April 19, 2024 to and including July 31, 2024 as described in the Affidavit of Robert Kofman and the Affidavit of Alexciya Blair (together, the "**Fee Affidavits**") attached to the Third Report.<sup>13</sup>

30. 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.

31. 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.<sup>14</sup>

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<sup>13</sup> Affidavit of Robert Kofman, sworn August 30, 2024, p. 36 MR and Affidavit of Alexciya Blair, sworn August 29, 2024, p. 53 MR.

<sup>14</sup> *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at [paras 33](#) and [44-45](#).

32. 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.<sup>15</sup>
33. The Receiver respectfully submits that it is appropriate to approve the fees and disbursements of the Receiver and its counsel in the circumstances.

**PART IV. ORDER REQUESTED**

34. For the reasons stated herein, the Receiver respectfully requests that the Court grant: (1) an order authorizing and directing the Debtor's bankruptcy; (2) authorizing the Receiver to act as Trustee; authorizing the Receiver/Trustee to fund the costs of administering the bankruptcy of the Debtor from the Surplus; (3) approving the Third Report and activities described therein; (4) approving the fees and disbursements of the Receiver and its counsel as detailed in the Fee Affidavits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2024



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Paliare Roland Rosenberg Rothstein LLP  
Lawyers for the Receiver and Manager, KSV  
Restructuring Inc.

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<sup>15</sup> Third Report at section 3.0, p. 16-17 MR.

## SCHEDULE “A”

### LIST OF AUTHORITIES

1. *RBC v Gustin*, [2019 ONSC 5370](#).
2. *CIBC v. 1340182 Ontario Limited et al.*, [2024 ONSC 3658](#).
3. *Bank of Montreal v Owen Sound Golf and Country Club*, [2012 ONSC 557](#).
4. *Royal Bank v Sun Squeeze Juices Inc.*, 1994 CarswellOnt 266, [1994] O.J. No. 567 (Gen. Div. [Commercial List]).
5. *Pinnacle v. Kraus*, [2012 ONSC 6376](#).
6. *HSBC Bank Canada v Kupritz*, [2011 BCSC 788](#).
7. *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#).

## 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.

##### **Where disclosure required**

13.3 (2) No trustee shall act as a trustee in relation to the estate of a debtor where the trustee is already

- (a) the trustee in the bankruptcy of, or in a proposal concerning, any person related to the debtor, or
- (b) the receiver, within the meaning of subsection 243(2), or the liquidator of the property of any person related to the debtor,

without making, at the time of being appointed as trustee in relation to the estate of the debtor and at the first meeting of creditors, full disclosure of that fact and of the potential conflict of interest.

##### **Appointment of trustee**

43 (9) On a bankruptcy order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court considers just, to the wishes of the creditors.

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#### 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-

**72 JAMES INVESTMENTS INC. et al**  
Respondent

Court File No.: CV-24-00714866-00CL

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

PROCEEDING COMMENCED AT  
**TORONTO**

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**FACTUM OF THE RECEIVER**

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