CITATION: *CIBC v. 1340182 Ontario Limited et al.*, 2024 ONSC 3658
COURT FILE NO.: CV-23-00698539-00CL
DATE: 20240626

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

APPLICATION UNDER section 243(1) 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, as amended

RE: Canadian Imperial Bank of Commerce, Applicant

AND:

1340182 Ontario Limited and Kazembe & Associates Professional Corporation, Respondents

BEFORE: Peter J. Osborne J.

COUNSEL: *Clifton P. Prophet*, Counsel for the Applicant, CIBC

Timothy R. Dunn, Counsel for the Receiver, Moving Party, MNP Ltd.

David A. Seed, Counsel for the Moving Party, Creditor, Arthur Bryan

Ian P. Katchin, Counsel for the 1st Mortgagee, 923944 Ontario Ltd.

Demetrios Yiokaris, Counsel for the Respondent, Kazembe & Associates Professional Corporation

HEARD: April 8, 2024

REASONS FOR DECISION

OSBORNE J.

The Two Motions before the Court, and the Positions of the Parties

1. MNP Ltd., in its capacity as the Court-appointed Receiver ("MNP" or the "Receiver") of the property of Kazembe & Associates Professional Corporation and 1340182 Ontario Limited ("182"), seeks an order:

a. approving the Second Report of the Receiver dated March 28, 2024 and the activities described therein;

b. approving the Receiver's Interim Statement of Receipts and Disbursements;

c. authorizing the Receiver to make a distribution to the secured creditors of 182 (defined below);

d. approving the fees and disbursements of the Receiver and its counsel;

e. authorizing the Receiver to assign 182 into bankruptcy; and

f. approving the discharge of the Receiver upon the filing of the Discharge Certificate.

2. Save for the relief sought in respect to the distribution to creditors, none of the relief sought by the Receiver is opposed, and it is strongly supported by the Applicant, the Canadian Imperial Bank of Commerce ("CIBC").

3. The distribution motion is opposed as a result of a priority dispute among the relevant mortgagees who have registered interests against title to a property located at 1888 Wilson Avenue, Toronto (the "Wilson Property"). Those mortgagees are Arthur Bryan ("Bryan"), 923944 Ontario Ltd. ("944") and CIBC. The sale transaction of the Wilson Property closed on January 15, 2024 and the Receiver is holding approximately $1.5 million of net sales proceeds.

4. At the time of the sale, the Parcel Register for the Wilson Property reflected 944 as the first mortgagee, CIBC as the second mortgagee, and Bryan as the third mortgagee. Bryan claims that his mortgage should rank in first position (with the result that 944 and CIBC would then rank second and third, respectively) on the basis that the Respondent, Kazembe, his former lawyer, fraudulently discharged his previously registered mortgage.

5. The Receiver relies upon its Second Report dated March 28, 2024, together with Appendices thereto, and the Supplement to the Second Report. 944 relies upon the Affidavit of Jasvir Dhillon sworn March 20, 2024, together with exhibits thereto. The Respondent Kazembe relies on his own Affidavit sworn March 21, 2024, together with Exhibits thereto. CIBC relies upon the Affidavits of its Senior Risk Manager, Jo-Ann Mitchell, sworn April 27, 2023 and March 25, 2024, respectively.

6. Bryan brings a cross-motion for an order:

a. declaring that his previous mortgage, registered on August 16, 2018, was fraudulently discharged;

b. declaring that the discharge registered on February 13, 2019 is fraudulent, void and of no force or effect; and

c. declaring that the discharged mortgage is in first position and ranks in priority to all other charges or mortgages registered as against title to the Wilson Property after August 16, 2018.

7. Bryan relies on his own Affidavit sworn March 7, 2024 together with exhibits thereto.

8. The Receiver takes no position on the priority of the respective mortgages, but needs direction from this Court as to which party should receive the funds in its possession, being the net proceeds of sale of the Wilson Property.

9. CIBC, 944 and Kazembe all oppose the position advanced and the relief sought by Bryan in respect of the priority of his mortgage and the corresponding distribution of proceeds.

10. As discussed further below, the issue of whether the Bryan mortgage was fraudulently discharged is the subject of a pending action in this Court brought by Bryan against Kazembe, his professional corporation and his real estate company, 182. Kazembe therefore takes the position that no finding of fact with respect to whether the mortgage discharge was fraudulent should be made in this proceeding.

11. Defined terms in this Endorsement have the meaning given to them in the motion materials, including the Second Report, unless otherwise stated.

The Motion of the Receiver for Relief other than Distribution of Proceeds

12. The basis for the Receiver's Motion for relief other than distribution of proceeds is fully set out in the Second Report and the Supplement thereto.

13. Courts have authorized Court-appointed receivers to file assignments in bankruptcy on behalf of insolvent entities in appropriate circumstances: *Royal Bank of Canada v. Gustin*, 2019 ONSC 5370, at paras. 12 and 15; and *Royal Bank of Canada v. Sun Squeeze Juices Inc. and Beit-Kirur Ltd*., 1994 CarswellOnt 266 at paras. 6 and 10.

14. The granting of such authority to file an assignment in bankruptcy may be appropriate even where one of the purposes in so doing is reversing the priorities in respect of a claim for HST advanced by the Canada Revenue Agency: *2403177 Ontario Inc. v. Bending Late Iron Group Limited*, 2016 ONSC 199 at paras. 113 – 123.

15. In the particular circumstances of this case, I am satisfied that the financial records of 182 are in such a state that it is impossible for the Receiver to determine the HST Claim. The Applicant, CIBC, has requested, and the Receiver believes it is prudent, to seek an order expanding its powers to include the ability to assign 182 into bankruptcy to clarify the priority in respect of the HST Claim.

16. As set out in the Second Report, since there were no recoveries from the assets of the operating company of Kazembe (the Respondent professional corporation), and neither that company nor 182 had any employees, the Receiver does not anticipate a CRA claim for unremitted employee source deductions.

17. However, the CRA did send a letter to the Receiver in July, 2023 identifying an obligation of the Respondent professional corporation in respect of filed HST returns totaling $171,334.24. In addition, the CRA filed a claim against 182 for $103,503.77 in respect of unremitted HST. The Receiver has not assessed the priority of the CRA HST Claim as against the security interests of the respective mortgagees and proposes to maintain the funds as part of the Holdback it seeks to maintain as set out in the Second Report.

18. The Receiver recommends that it distribute all available funds to whichever party this Court may direct, subject to maintaining the Holdback in respect of outstanding and estimated fees for the Receiver and its counsel, and for the HST Claim.

19. I am satisfied for the reasons set out in the Second Report that such expanded powers are appropriate in this case.

20. I am also satisfied that the combined Interim Statement of Receipts and Disbursements as attached to and described in the Second Report is appropriate and it is approved.

21. Further, I am satisfied that the professional fees and disbursements incurred by the Receiver and its counsel are appropriate, reasonable, and reflect the time spent to complete the activities of the Receiver as set out in the Second Report. Those activities themselves are reasonable, appropriate and are consistent with the mandate given to the Receiver in the order pursuant to which it was originally appointed. See: *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851. They are approved.

22. Finally, the Receiver seeks a discharge upon completion of the Remaining Activities (as set out in the Second Report at para. 34) and the filing of the Discharge Certificate. As the Receiver will then have completed its mandate, the discharge is appropriate and it is also approved.

The Motion of the Receiver for Distribution of Proceeds, and the Cross-Motion of Bryan for Declaratory Relief

23. The Respondent Kazembe operated a law practice in an office building owned by the Respondent 182 located at 1888 Wilson Ave., Toronto, Ontario (defined above as the "Wilson Property"). Both Respondent corporations were controlled by the same directing mind, the lawyer Mr. Courtney Kazembe ("Mr. Kazembe").[1] The professional corporation was the operating entity running the law practice, and 182 held title to the real estate.

24. The Receiver was appointed on June 23, 2023. The Receiver entered into an agreement of purchase and sale for the Wilson Property which was approved by the Court on November 22, 2023. The sale transaction closed on January 15, 2024 and the Receiver holds approximately $1.5 million in Net Proceeds. However, due to objections raised by Bryan, no distribution to the secured creditors of 182 has yet been made.

25. Bryan held a registered mortgage on title to the Wilson Property ranking in third position at the time of the sale. As described above, 944 and CIBC held mortgages ranking in first and second position, respectively. Bryan disputes the priority of 944 and CIBC.

26. The mortgage held by 944 at the time of closing in the principal amount of $1 million was registered on April 4, 2019 and ranked in first position. The mortgage held by CIBC was in the principal amount of $945,000. It was registered on August 1, 2019 and ranked in second position. The mortgage held by Bryan in the principal amount of $200,000 was registered on August 19, 2022 and ranked in third position at the time of the sale.

[1] Mr. Kazembe and the Respondent, Kazembe & Associates Professional Corporation, are referred to interchangeably as "Kazembe" unless a distinction between the two is relevant.

27. Bryan opposes the priority of the other mortgagees on the basis that Mr. Kazembe, his former lawyer, fraudulently discharged his previous mortgage registered on title to the Wilson Property on August 16, 2018, which registration date preceded the registration dates of each of the other two mortgages. Bryan alleges that this first mortgage was fraudulently discharged by Kazembe on February 13, 2019 without his permission or knowledge. His allegations against Kazembe are the subject of a pending civil action in this Court which action has not yet been determined.

28. Accordingly, the relative priority of the parties with respect to the distribution of the net proceeds from the sale of the Wilson Property depends upon whether the discharge of the Bryan mortgage is effective or not as against the other mortgagees. It is common ground that if the discharge is effective as against the other mortgagees, the relative priority of the parties would be as reflected on title to the Wilson Property at the time of the sale: 944, then CIBC, then Bryan. If the discharge is not effective as against the other mortgagees, and the original Bryan mortgage ought to be restored to title, the relative priority of the mortgages at the time of sale would be: Bryan, then 944, then CIBC.

Position of the Parties

29. Bryan submits that Kazembe is "the architect of the entire mess", and that he committed fraud. Accordingly, he seeks an order declaring that the discharge of his prior mortgage was fraudulent and of no force or effect, and that his prior first mortgage should therefore still be reflected on title, all with the result that he should rank first with respect to the distribution of net proceeds from the sale of the Wilson Property. I pause to observe that this is part of the relief he seeks in the pending action discussed below.

30. Bryan submits that the remedy he seeks on these motions, which amounts, in sum, to declaratory relief with the effect that his mortgage ranks in priority to the other two, should flow as a statutory remedy and not from the equitable exercise of discretion, all as a result of statutory amendments made in 2006 which operate so as to provide that fraudulent documents are not deemed to be registered on title to property.

31. Bryan submits that none of the other parties disputes that his original mortgage was registered first, and therefore, if still valid, it would rank in priority to the subsequent mortgages of 944 and CIBC. He further submits that no other party disputes his position that the discharge of that mortgage was the result of a fraudulent act by Kazembe.

32. It follows, he submits, that he lost his first-ranked position due to the fraud of his former lawyer, Kazembe, and that the 2006 amendments to the *Land Titles Act,* R.S.O. 1990, c. L.5 (the "*LTA*") operate so as to provide a complete foundation for the relief he seeks. 944 and CIBC submit that the statutory provisions, as amended, have the opposite effect.

33. Bryan argues that Kazembe is a "fraudulent person" within the meaning of the *LTA* and that the 2019 mortgage discharge (and the 2022 re-registration) were "fraudulent instruments" within the meaning of the *LTA*. He submits that the 2006 amendments to the *LTA* do not address all forms of fraud in real estate transactions, but rather were enacted to prevent fraudulent activity using title: *1168760 Ontario Inc. v. 6706037 Canada Inc.*, 7 R.P.R. (6th) 48, 2019 ONSC 4702 (Div. Ct.) ("*760*").

34. Bryan submits that as a result of the 2006 amendments, a fraudulent instrument is not deemed to be embodied in the land register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register, all of which operates to create a system of deferred indefeasibility.

35. 944 and CIBC submit that the whole point of the 2006 amendments, embodying the mirror principle, was to ensure that instruments registered on title, even subsequent to a fraudulent instrument, were valid and enforceable unless they themselves were fraudulent, such that they are not subject to defeasibility, whether immediate or deferred.

Analysis

36. The analysis must begin with the statutory framework found in the *LTA*, which was amended in relevant part in 2006.

37. That framework, including the relevant 2006 amendments and the rationale for the statute in the first place, was set out by the Court of Appeal in *Froom v. Lafontaine*, 2023 ONCA 519 at paras. 21 – 26 as follows:

> [21] The *LTA* was originally enacted in 1885 and was modelled on the English *Land Transfer Act*, 1875 (38 & 39 Vict. c. 87). The "essential purpose of land titles legislation" like the Act "is to provide the public with security of title and facility of transfer". The Act embodies three basic principles, namely:
>
> * The mirror principle – i.e., that the register of title reflects accurately and completely the state of title;
>
> * The curtain principle – i.e., that the register is the sole source of information regarding title such that a person need not search behind the title and investigate the property's history; and
>
> * The insurance principle – i.e., that that the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy.
>
> [22] The *LTA* has been amended many times, including in 2006. Before the 2006 amendments, s. 78(4) provided:
>
> (4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.
>
> [23] The bare text of s. 78(4) led to the argument that the *LTA* conferred "immediate indefeasibility" on registered instruments, meaning that instruments were effective and indefeasible as soon as they were registered, even if they were fraudulent. This argument was accepted in *CIBC Mortgages Inc. v Chan*, 2004 CanLII 66351

(Ont. S.C.), appeal dismissed by this court under the name of *Household Realty Corporation Ltd. v. Liu (2005), 2005* CanLII 43402 (ON CA), 261 D.L.R. (4th) 679 (Ont. C.A.), where the mortgage obtained through the use of a forged power of attorney was enforced. The result created a furor.

[24] Sections 78(4.1) and (4.2) were added to the *LTA* in 2006 and create an exception for "fraudulent instrument[s]" with the effect that such instruments are not deemed to be embodied in the register despite the words of s. 78(4). **The 2006 amendments provide:**

Exception

(4.1) Subsection (4) does not apply to a fraudulent instrument that is registered on or after October 19, 2006.

Non-fraudulent instruments

(4.2) Nothing in subsection (4.1) invalidates the effect of a registered instrument that is not a fraudulent instrument described in that subsection, including instruments registered subsequent to such a fraudulent instrument.

[25] The 2006 amendments added several definitions to s. 1 of the *LTA*. The term "fraudulent instrument" is defined in several ways in s. 1, some of which incorporate the concept of a "fraudulent person".

1 … "fraudulent instrument" means an instrument,

(a) under which a fraudulent person purports to receive or transfer an estate or interest in land, …

"fraudulent person" means a person who executes or purports to execute an instrument if,

(a) the person forged the instrument,

(b) the person is a fictitious person, or

(c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument;

[26] The 2006 amendments to the *LTA* were passed in the wake of this court's decision in *Household Realty* and before the court overruled that decision in *Lawrence*. The amendments were aimed at ensuring that fraudulent instruments would not be given effect in the title register. The legislative debates evidence a concern about

> real estate fraud and the attendant risk that a property owner might lose their property or become responsible for a fraudulent mortgage. It is noteworthy that there was no specific discussion in the legislative debates to the 2006 amendments about their impact on corporations owning land and securing financing through mortgages and charges.
>
> [Emphasis added].

38. Those "new" subsections were intended to protect innocent parties by denying the ordinary benefit of registration to fraudulent instruments. In *CIBC Mortgages Inc. v. Computershare Trust Co. of Canada*, 2016 ONSC 7094 ("*CIBC v. Computershare*") at para. 29, the Divisional Court quoted the following from the explanatory note for Bill 152, enacted as the *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*, the statute that included the 2006 amendments to the *LTA* excerpted above:

> The Bill amends section 78 of the [*LTA*] so that a fraudulent instrument will not have any effect on the title register. *Instruments registered subsequent to a fraudulent instrument are deemed to be effective.* A fraudulent instrument is defined to be one under which a fraudulent person purports to receive or transfer an estate or interest in land, one that is given under a forged power of attorney, a transfer of an instrument that is a charge given by a fraudulent person or a type of fraudulent instrument specified by the regulations made under the Act. If an instrument registered on or after October 19, 2006 is fraudulent, the Director of Titles can delete it from the title register. A person prescribed by the regulations made under the Act who thereby suffers a loss can recover compensation from The Land Titles Assurance Fund if the person has demonstrated due diligence and is not otherwise restricted from recovering compensation from the Fund.
>
> [Emphasis added.]

39. All parties agree that subsections 78(4.1) and (4.2), added in 2006, together with the statutory definitions, are centrally relevant to the disposition of this matter. Yet Bryan on the one hand and CIBC and 944 on the other hand, submit that they yield opposite results.

40. Bryan's position is that the discharge of his first mortgage is a "fraudulent instrument" within the meaning of s. 1 of the *LTA* such that, pursuant to ss.78(4.1), it is not effective to discharge his mortgage, notwithstanding the fact that it was registered on title. It follows, he submits, that even if the 944 mortgage in the CIBC mortgage are valid, they rank behind his first mortgage since the discharge was fraudulent.

41. I cannot accept the submission. Subsection 78(4.2) further requires that the mortgages registered subsequent in time to the discharge of Bryan's mortgage (i.e., the mortgages of 944 and CIBC respectively) also be "fraudulent instruments" within the meaning of s.1. They are not.

Those two mortgages are not "fraudulent instruments" and nor are the individuals who executed or purported to execute them "fraudulent persons".

42. It follows, in my view, that even if the discharge of the Bryan mortgage was a fraudulent instrument executed by a fraudulent person, that does not invalidate the effect of the subsequently registered mortgages of 944 and CIBC as valid and effective first and second ranking mortgages respectively, since neither of them are fraudulent instruments. This is the inevitable result of the application of the clear meaning of those defined terms to the facts of this case.

43. Further in my view, the facts of this case are, in relevant part, analogous to the facts in *CIBC v. Computershare,* where the Divisional Court held that two mortgages that had been registered subsequent in time to a mortgage that was fraudulently discharged were not "fraudulent instruments" within the meaning of the *LTA*.

44. I reach the same conclusion here for the same reasons, and in my view, CIBC and 944 are, just like the subsequent mortgagees in *CIBC v. Computershare,* "entitled to rely on both the mirror principle (the register is a perfect mirror of the state of title) and the curtain principle (a purchaser need not investigate the history of past dealings with the land, or search behind title)": *CIBC v. Computershare,* at para. 63.

45. I am reinforced in this conclusion by the fact that in this particular case, the evidence satisfies me that CIBC had no knowledge (actual or imputed) about the circumstances of the previously discharged Bryan mortgage.

46. Courts have held that notwithstanding the provisions of the *LTA* and the statutory analysis I have summarized above, s.78(4) applies only to *bona fide* registrants for value - those who do not have notice of an interest in land that differs from that of the register: see *Thomas Farrell et al. v. John Kavanagh et al.,* 2020 ONSC 8154 at para. 190, quoting from the Court of Appeal for Ontario in *Stanbarr Services Limited v. Metropolis Properties, Inc*., 2018 ONCA 244 ("*Stanbarr*").

47. I cannot accept the assertion of Bryan that CIBC did have actual or imputed knowledge of the fact that Kazembe fraudulently discharged Bryan's previously registered mortgage. First, this would require as a starting point, a finding of fact that the Bryan discharge was fraudulently registered, and I am not prepared to make that finding, for the reasons set out below.

48. Even if I were prepared to make that finding however, I find that CIBC and 944 were unaware of the circumstances of the discharge of that mortgage or indeed any of the relevant facts of the relationship between and among Kazembe, his legal professional corporation, his real estate holding company 182, and Bryan.

49. CIBC and 944 take no position on whether the discharge of the Bryan mortgage was in fact a fraudulent instrument. I pause to observe that the issue of whether that discharge was fraudulent is squarely the subject of the pending action by Bryan against Kazembe and his companies, which is yet to be determined. On this motion and apparently in that action, Kazembe vigourously denies such allegations.

50. I do not need to make a determination for the purposes of the disposition of this motion as to whether that discharge was fraudulent, and to be clear, I do not do so. Even if it was fraudulent, I am satisfied that neither CIBC nor 144 had any knowledge, actual or imputed, that it was.

51. CIBC led evidence in the form of a sworn affidavit from Ms. JoAnn Mitchell, Senior Risk Manager at CIBC. Ms. Mitchell stated clearly that the bank would not have advanced any funds as against its mortgage if there was any concern that it would not receive a clear and enforceable first mortgage or if it was aware that Bryan's mortgage had been improperly discharged (see para. 3). There is no evidence to the contrary.

52. As against that evidence of CIBC, I have significant concerns about the evidence of Bryan in this proceeding in relation to his fundamental position that the discharge of his mortgage was fraudulent and that he should be restored to first-ranking position. On his examination, he confirmed that he had filed no evidence in these proceedings that confirmed that the relevant solicitor acting for CIBC, Ms. Dana Campbell, was aware that Kazembe had fraudulently discharged his mortgage (see Q. 336-338).

53. Moreover, I am not persuaded by Bryan's submission, made in the alternative, that knowledge should be imputed to CIBC. As stated by the Court of Appeal in *Stanbarr* at para. 26:

> [26] Because notice has been considered to be one of a limited number of exceptions to the mirror principle, it has been strictly construed. Our courts insist on actual notice of a defect. Actual knowledge means just that; the party must actually know about the defect. It is not sufficient that it has become aware of facts that may suggest it should make inquiries: *Rose v. Peterkin* (1885), 13 S.C.R. 677, [1885] S.C.J. No. 45, at pp. 694-95 S.C.R. Constructive knowledge is insufficient. Thus, the factual analysis in considering a notice argument is limited to a consideration of what the party knew, not what it could have known had it made inquiries.

54. Bryan's argument is founded on the fact that since Kazembe's firm acted for the bank on the mortgage (as is often the practice in real estate transactions where lawyers for borrowers often act for lenders also), the knowledge of Kazembe himself should be imputed to CIBC. However, CIBC hired a different lawyer at that firm, Ms. Dana Campbell. There is no evidence from which I could conclude that Ms. Campbell had any knowledge of the fraudulent discharge (again, assuming that to be a fact) of the prior Bryan mortgage.

55. Even if Kazembe himself had been retained by CIBC (or alternatively, if, notwithstanding the lack of any evidence of actual knowledge on the part of Ms. Campbell, knowledge could be imputed from the law firm retained, regardless of which particular solicitor was involved), in my view, the exception to the proposition that knowledge of a solicitor will be imputed to his or her client would apply here.

56. That exception is applicable where the solicitor intentionally and fraudulently withholds the information from the client: *Royal Trust Corp. of Canada v. Giuggio,* 1993 CanLII 5575 (ONSC) at para. 77; and *Re Durbin et al. v. Monserat Investments Ltd., Re Monserat Investments Ltd. and Broderick,* [1978] 20 O.R. (2d) 181, 1978 CanLII 1730 (ONCA) at para. 8.

57. For all of these reasons, I find that neither 944 nor CIBC had knowledge, actual or imputed, that the previous Bryan mortgage had been fraudulently discharged, even assuming (as noted above) that such was a fact.

58. For completeness, I recognize that CIBC, in its Letter of Direction to Ms. Campbell, instructed her to ensure that the CIBC mortgage ranked in first position, and in fact this did not occur since the CIBC mortgage was registered in second position behind the 944 mortgage. However, nothing in that fact changes my conclusion above about the knowledge of CIBC with respect to the (allegedly) fraudulent discharge of the Bryan mortgage. The only relevance of that fact is that the CIBC mortgage ranks second behind 944. It still ranks ahead of the subsequently registered Bryan mortgage.

59. I pause to observe (here is as good a place as any) that I also reject Bryan's challenge to the validity of the 944 mortgage which he makes in support of his cross-motion. 944 has filed evidence confirming the loan is evidenced by a loan agreement, the valid mortgage, and a valid registered charge. Kazembe, for his part, does not dispute the validity of the 944 first mortgage and states that the principal amount of $1 million secured by the mortgage loan on the Wilson Property is still owing.

60. On cross-examination, Bryan himself conceded that he has no reason to dispute the terms of the 944 mortgage. The Receiver has obtained a security opinion from its counsel to the effect that the 944 mortgage is valid and enforceable.

61. I recognize that Bryan challenges the authenticity of the signature of Kazembe on a letter dated June 22, 2022 acknowledging the debt owing to 944. He does so (even though Kazembe himself admits the signature is his own) by filing a report from a forensic document examiner dated February 1, 2024 which opines that there is a "high probability" that the signature is not that of Kazembe. There is no evidence in the record filed by Bryan, however, in the form of an affidavit from that forensic document examiner. I have placed no weight on that report, but even if I had, my conclusion would be the same for the reasons set out above and below.

62. For all of these reasons, I would decline to grant Bryan any declaratory relief to the effect that his subsequently registered mortgage ought to rank ahead of the 944 mortgage.

63. Similarly, Bryan does not challenge the validity of the CIBC loan, the fact that the indebtedness remains outstanding, or the fact that CIBC was entitled to the mortgage to secure that loan. His only challenge, as I have addressed above, was to the position of CIBC asserted on this motion that its mortgage ought to rank in priority to his own. The Receiver has obtained a security opinion from its counsel to the effect that the CIBC mortgage is valid and enforceable.

64. Accordingly, I am satisfied that the mortgages of both 944 and CIBC are valid and enforceable.

65. It follows, given the defined terms in s. 1 of the *LTA* and the application of ss.78(4.2), that the mortgages of 944 and CIBC were validly registered and maintain their first and second priority positions, respectively. Whether the subsequently registered (or reregistered) mortgage in favour of Bryan is valid, I need not make any determination beyond concluding, as I have done, that if it is valid, it ranks in third position behind the mortgages of 944 and CIBC.

66. Finally, even if I were in error in my interpretation of the relevant provisions of the *LTA*, I would decline to grant the relief sought by Bryan on his cross-motion in the form of a declaration that he has a valid first-ranking mortgage security.

67. The evidence in respect of whether the first Bryan mortgage that is alleged to have been fraudulently discharged was valid in the first place, is at best problematic.

68. Bryan's evidence is that the mortgage was registered to secure a $200,000 loan made to Kazembe. That loan in turn arose out of the sale of another property Bryan states that he owned and on which Kazembe acted as his solicitor at 18 Wayne Ave., Cambridge, Ontario. Bryan's evidence is that upon completion of the sale, Kazembe failed to remit to him the full net proceeds of sale without any lawful right to do so. When Bryan subsequently discovered this, Kazembe told Bryan he needed the funds, and requested that Bryan treat the unauthorized shortfall as a loan, which Bryan apparently agreed to do.

69. However, the evidence on this motion is that the property at 18 Wayne Ave., Cambridge, Ontario, was in fact owned by Bryan's son, Austin Bryan. The loan which Bryan says the mortgage was intended to secure was, however, said to be owed to Bryan himself.

70. For his part, Kazembe denies that his firm represented Bryan at all with respect to the sale of 18 Wayne Ave., Cambridge, Ontario, and that he (Kazembe) acted only for Austin Bryan. Kazembe's evidence is that his own solicitor's file reflects that the registered owner of the property was Austin Bryan; that Austin Bryan swore the land transfer tax affidavit registered on title confirming that he was the actual transferee; and there is no mention of Bryan nor of any trust in favour of Bryan. Austin Bryan signed the agreement of purchase and sale as seller and owner and swore a contemporaneous declaration dated July 13, 2018 to the same effect.

71. Bryan asserts that there was supposed to have been a trust agreement (notwithstanding the declarations of Austin Bryan to the contrary), and yet there is no evidence before me from Austin Bryan at all, nor is there any evidence of any written trust agreement. Asked on cross-examination why his son Austin Bryan would swear a statutory declaration to the effect that he was the absolute owner of the property and no one else had an interest in it if indeed there was a trust agreement in favour of his father, Bryan refused to answer the question.

72. Kazembe denies that either he or 182 borrowed $200,000 from Bryan (or from Austin Bryan) around that time, and says he has no loan documents evidencing any such arrangement. Bryan has not produced any such documents either.

73. Finally, Kazembe takes the position that the Bryan mortgage was discharged with Bryan's consent and authorization, and not fraudulently. As stated above, I make no determination in that regard. Kazembe states that he cannot recall why the second Bryan mortgage was registered.

74. CIBC submits, and I accept, that in the circumstances, there is no evidence on which I can conclude that Bryan actually advanced any funds to Kazembe since the funds "advanced" via the shortfall in the remitting of net proceeds were funds that belonged to Mr. Austin Bryan and Mr. Austin Bryan is not a party to the Bryan mortgage at all.

75. Moreover, Kazembe's company, 182, did not provide any guarantee of the loan.

76. It would follow from all of this that there is no evidence before me on these motions upon which I can conclude that 182 or Kazembe are actually liable in law to Bryan for the loan in any event of whether the discharge of the Bryan mortgage was fraudulent or not.

77. CIBC submits that this conclusion is reinforced by the documentary evidence filed by Bryan in support of his motion, which includes a letter from 182 (Kazembe's company) to Bryan dated July 2, 2019, acknowledged with Bryan's signature, and which references a "second mortgage ***to be registered*** on the [Wilson Property]". [Emphasis added]. The date of this letter precedes the date of the registration of the CIBC mortgage.

78. CIBC submits that this supports an inference that a mortgage in favour of Bryan had in fact not yet been registered and would be registered in the future, particularly since Bryan made no inquiries about the issue at all for over three years until November, 2022 when he eventually obtained a parcel register search of the Wilson Property.

79. As stated above, in my view, the application of the relevant provisions of the *LTA* to the facts in the record are dispositive of both of these motions, and I need not make (and do not make) any determination about whether the first Bryan mortgage was fraudulently discharged by Kazembe.

80. I am satisfied, however, for all of the reasons set out above, that even if I were in error in my application of the *LTA*, in my view, I cannot conclude on the evidence before me that the equities favour Bryan.

Result and Disposition

81. The motion of the Receiver is granted. The Second Report and the activities described therein are approved, as are the Receiver's Interim Statement of Receipts and Disbursements, and the fees and disbursements of the Receiver and its counsel. The Receiver is authorized to assign 182 into bankruptcy, and the Receiver is discharged, effective upon the filing of the Discharge Certificate.

82. The Receiver is authorized to make a distribution to the secured creditors of 182 in a manner consistent with these Reasons, on the basis that, as against the Wilson Property, 944 holds a valid first-ranking mortgage and CIBC holds a valid second-ranking mortgage. I make no determination as to whether the previously registered Bryan mortgage was fraudulently discharged or whether the subsequently registered Bryan mortgage is valid.

83. Bryan's cross-motion is dismissed.

84. At the conclusion of the hearing of these motions, the parties made submissions with respect to costs.

85. Bryan submitted that this was a difficult case and the issues were novel, with the result that there ought to be no order as to costs, or in the alternative, an order should be made directing each party to bear its own costs.

86. Kazembe's professional corporation submitted that costs should be payable by Bryan to each of the three responding parties: CIBC, 944 and Kazembe's professional corporation, each in

the amount of $20,000 (in fact, in his case, for a total inclusive of disbursements and HST of $21,341.40) for an aggregate total of approximately $60,000.

87. 944 seeks its costs, inclusive of fees and disbursements, on a partial indemnity basis in the amount of $10,805.35.

88. CIBC submits that it, too, is entitled to its costs, and seeks the same amount as 944, or approximately $11,000, also on a partial indemnity basis.

89. Pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, costs are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

90. Rule 57.01 provides that in exercising its discretion under s. 131, the court may consider, in addition to the result in the proceeding (and any offer to settle or contribute), the factors set out in that Rule.

91. The overarching objective is to fix an amount that is fair, reasonable, proportionate and within the reasonable expectations of the parties in the circumstances: *Boucher v. Public Accountants Council for the Province of Ontario*, (2004) 71 O.R. (3d) 291 (C.A.), 2004 CanLII 14579 (Ont. C.A.).

92. Rule 57.03 provides that, on the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall fix the costs of the motion and order them to be paid within 30 days.

93. Having considered the Rule 57.01 factors as against the evidence on these motions, the success of 944 and CIBC as against Bryan on the motion and cross-motion, and considering the submissions of all of the parties with respect to costs including as to quantum, in my view an appropriate disposition with respect to costs in this matter is that Bryan should pay to each of 944 and CIBC the sum of $8,500 inclusive of fees, disbursements and taxes. Costs of the Receiver should be borne by the estate in the ordinary course. I make no order as to costs against or in favour of Kazembe, who supported CIBC and 944 with respect to the law, but urged that no finding be made with respect to the allegations that the discharge of the Bryan mortgage was fraudulent.

94. The costs payable to each of 944 and CIBC by Bryan shall be paid within 30 days.

Osborne J.