



SUPERIOR COURT OF JUSTICE

**COUNSEL SLIP/ ENDORSEMENT**

COURT FILE NO.: CV-22-00674810-00CL DATE: **16-FEB-2023**

NO. ON LIST: 8

TITLE OF PROCEEDING: **KINGSETT MORTGAGE CORP V 30 ROE INVESTMENT**

BEFORE JUSTICE: **Madam Justice STEELE**

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

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

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**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info


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**ENDORSEMENT OF Justice STEELE:**

1. Further to my endorsement, dated February 13, 2023, the parties returned on February 16, 2023 to address the issue of whether the Orders ought to include the following provision requested by the Receiver:

**THIS COURT ORDERS** that this Order is subject to provisional execution notwithstanding any appeal brought in respect of this Order, pursuant to section 195 of the BIA.

2. The Receiver requests the inclusion of the provisional execution clause largely as a result of the history of this matter. There have been numerous delays and adjournments. Further, after the receivership order was granted 30 Roe Investment Corp. (the “Company”) filed a Notice of Appeal and took the position that it had an automatic right of appeal under section 193 of the *Bankruptcy and Insolvency Act* (the “BIA”) and accordingly was entitled to an automatic stay under section 195 of the BIA pending the disposition of the appeal. KingSett brought a motion successfully quashing the Company’s appeal.
3. The Receiver is concerned about further delays, as the sales of PH04 and PH09 are scheduled to close on February 28, 2023. It is a condition of closing that the relevant approval and vesting order be in full force and effect on the closing date.
4. Sections 193 and 195 of the BIA provide:

193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge or the court in the following cases:

- (a) If the point at issue involves future rights;
- (b) If the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) If the property involved in the appeal exceeds in value ten thousand dollars;
- (d) From the grant or a refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) In any other case by leave of a judge of the Court of Appeal.

195. Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefor, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal for a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

5. Although the Receiver does not believe that the Company would have an automatic right of appeal, and an automatic stay from the February 13, 2023 Orders, the Receiver is concerned that the Company will take the contrary position in light of the history of this matter.
6. The Court has the jurisdiction to make an order for provisional execution, however, such jurisdiction ought to be “exercised sparingly and with caution, given the normal operation of a notice of appeal:” *Century Services Inc. v. Brooklin Concrete Products Inc.*, [2005] O.J. No. 1246, 10 C.B.R. (5<sup>th</sup>) 169, at para. 5.
7. The Receiver points to the recent case, *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206 (“*YSL*”), where this Court ordered provisional execution in the context of approving a BIA order. In *YSL* the Court found that provisional execution was appropriate for two reasons. First, there were delays and the Court wanted to preclude any further delay by way of a “simple expedient of filing a Notice of Appeal”. In that case the receivership application had been adjourned for about nine months pending the negotiation and approval of the debtor’s proposal. Second, provisional execution brought a “degree of uniformity” between BIA and *Companies’ Creditors Arrangement Act* proceedings, as there is no automatic stay pending appeal in CCAA proceedings.
8. The *YSL* matter involved a large project for an 85-story complex planned in downtown Toronto. There had been pre-sales of numerous condo units and the demolition of the old structures and shoring up of the excavation had been largely completed. The project had ground to a halt and was on hold at a point where it was just a big hole in the ground. When the provisional execution order was sought it had been about nine months since the adjournment of receivership application. The Court was concerned about further delays. The *YSL* matter involved a huge project that had essentially been put on hold, impacting numerous stakeholders.
9. The Receiver also relied upon *Computershare Trust Company of Canada v. Beachfront Developments Inc. and Beachfront Realty Inc.*, 2010 ONSC 4833. In that case, the Court permitted the order to be subject to provisional execution. In finding that the order could include the provisional execution clause the Court noted the concern of the receiver that there was a substantial risk that Canada Post, a tenant in the premises at issue, would not renew its lease and would move elsewhere. If this were to occur, “the value of the property under receivership would likely deteriorate substantially without Canada Post being a tenant.”
10. *YSL* and *Computershare* both involved extraordinary circumstances. That is not the case here.
11. The Receiver acknowledges that the circumstances do not appear extraordinary. However, the Receiver argues that the lengths the debtor has gone to in order to thwart the receivership process have been extreme.
12. The Company argues that the unusual and rare relief of provisional execution is not appropriate in this case.
13. The Company submits that following the release of my judgment on February 13, 2023, it has 10 days to contemplate whether to appeal and whether to take the position that an automatic stay applies. The respondents are considering whether to appeal and require time to consider. It argues that the Court should not cut short the respondents’ appeal rights. The Receiver’s position is that the respondents would still have time to seek leave from the Court of Appeal if the provision is included.

14. The Company further submits that the parties who purchased the condo units were aware that they are subject to an approval and vesting process, which could delay their closing. Further, the Company argues that the respondents will be potentially prejudiced by the inclusion of this provision.
15. I agree with the Company. The sales of properties subject to approval and vesting orders are common occurrences in insolvency proceedings. The fact that there is an upcoming closing date for a sale of a property is not sufficient as to constitute the type of extraordinary circumstances necessary to alter a party's appeal rights. There is a statutory scheme regarding appeals in the BIA. Although section 195 of the BIA contemplates that an order may be subject to provisional execution, it is clear from the few cases cited that this is an extraordinary provision.
16. The Receiver's request to include the provisional execution provision in the Orders is dismissed.