



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ ENDORSEMENT

COURT FILE NO.: CV-22-00674810-00CL DATE: **07-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:

Name of Person Appearing	Name of Party	Contact Info
Chris Armstrong	KSV Restructuring Inc.	carmstrong@goodmans.ca
Noah Goldstein	KSV Restructuring Inc.	ngoldstein@ksvadvisory.com
Mark Dunn	KSV Restructuring Inc.	mdunn@goodmans.ca
Murtaza Tallat	KSV Restructuring Inc.	mtallat@ksvadvisory.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Sean Zweig	Kingsett Mortgage	zweigs@bennettjones.com
Ben Frydenberg	CIBC	ben@chaitons.com
Lou Brzeninski	30 Roe Investment Corp	lbrzezinski@blaney.com
Lucas Strezos	30 Roe Investment Corp	LStrezos@blaney.com
Daniel Pollak	Kingsett Mortgage	DPollack@Kingsettcapital.com
Raymond Zar	30 Roe Investment Corp	rz@roehamptoncapital.com
Darren Marr	CIBC	dmarr@chaitons.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE STEELE:

1. Motion by the Receiver for, among other things, approval of the sale of two of the properties: PH04 and PH09. The proposed sale was opposed by 30 Roe Investments Corp. (the “Company” or the “Debtor”).
2. The facts of this case are well known to the parties and do not need to be repeated here.

The Proposed Sale

3. The sales process was approved by Justice McEwen in July 2022. The amended sales process was approved in December 2022. 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.
4. 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.
5. 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. That argument was rejected by Justice McEwen. I note 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.
6. The Receiver asked the Debtor for evidence supporting the Debtor’s view that a going concern sale would be preferable. This was not provided to the Receiver. 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. Accordingly, the Receiver made its own assessment based on the information it had available.
7. On the evening before this motion, the Debtor filed some evidence, which the Receiver asks the Court to disregard because the purported valuation that the Debtor provided 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. The Receiver states that there is no evidence that the Debtor obtained the gross rents the report is premised on. The Receiver submits that what is most noteworthy about the late-breaking information is what is not there – the Debtor has still not provided up to date financial statements for the Company or information about the market for this type of business, among other things.

8. 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. The Receiver acknowledged that HST may be an issue and has tried to analyze the issue. However, 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.
9. The Receiver states that the sales that have been secured will start to return money to the creditors whose interests are at stake. The proposed transactions will see CIBC, as first mortgagee, repaid its related mortgage loans in full. They are also supported by KingSett, the fulcrum secured creditor of the Company.
10. I also note that the Debtor previously asked for some time to permit refinancing, which was granted, and the sales process was paused. However, this did not come to fruition, and the sales process was restarted. It has been more than a year since the receivership application was first served.
11. The Debtor also argues that it tried to repay the debt to KingSett, but the Receiver asked for the insertion of a clause in the discharge order that prohibited the Company from taking any action against KingSett except with leave of the Court. The Debtor argues that the insertion of this clause effectively stopped the transaction, however it is not clear how. Further, the Receiver states that no money was tendered to either the Receiver or KingSett.
12. Under section 100 of the *Courts of Justice Act* (Ontario) the Court has the power to vest in any person an interest in real or personal property that the Court has the authority to order be disposed of, encumbered or conveyed.
13. Paragraph 3(1) of the receivership order expressly empowers and authorizes the Receiver “to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property.”
14. The Court of Appeal in *Royal Bank of Canada v. Soundair Corporation*, 1991 CanLII 2727 (Ont. C.A.) set out the criteria to be applied when considering the approval of a sale by a receiver:
 - a. Whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
 - b. Whether the interests of all parties have been considered;
 - c. The efficacy and integrity of the process by which offers are obtained; and
 - d. Whether there has been unfairness in the workout of the process.
15. Initially HomeLife was engaged as the listing agent. HomeLife took steps to market the two units, including staging them, as needed, arranging for painting and minor repairs, and arranging for professional photographing of the units and a 3D virtual tour available on a dedicated website.
16. The two units were listed on MLS from about August 11, 2022 to about October 18, 2022. There were approximately 24 viewings of PH04 during this period, but no offers were received. There were approximately 18 views of PH09 during this period, but no offers were received. Feedback was provided that buyer agents advised that the asking prices were too high. Following the expiry of the listing agreement with HomeLife, RE/MAX was engaged as the new listing brokerage.

17. The Receiver planned to re-list PH04 at a reduced price on January 9, 2023. However, prior to such listing, the Receiver received an unsolicited offer. The Receiver and its agent negotiated with the potential buyer (including making two counter-offers), which resulted in the PH04 APS.
18. PH09 was re-listed at a reduced price on January 11, 2023. An offer was received on January 19, 2023. The Receiver and its agent negotiated with the potential buyer (including making a counter-offer), which resulted in the PH09 APS.
19. The Receiver recommends the Court approve the Transactions for several reasons. The Receiver states that:
 - a. The market for PH04 and PH09 has been extensively canvassed by qualified real estate agents with considerable experience in the midtown Toronto condo market at multiple listing prices;
 - b. The purchase prices under the Transactions are not materially different from the most recent intended listing price (in the case of PH04) and most recent listing price (in the case of PH09);
 - c. Remax believes the Transactions are the best ones available in the present market and they are consistent with recent comparable transactions in the market;
 - d. The Transactions represent the best (and only) offers received for the units to date;
 - e. The Receiver does not believe that further time spent marketing the units will result in a superior transaction, including because the units are vacant and property taxes, condominium fees and other expenses continue to accrue; and
 - f. KingSett, the fulcrum creditor, supports the Transactions.
20. The Ontario Court of Appeal has emphasized that in assessing a sale by a court-appointed receiver, the Court must rely on the expertise and business judgment of the receiver and should only interfere in exceptional circumstances: *Soundair*, at paras. 16 and 58.
21. The Receiver sets out in detail at paragraph 44 of its factum how the *Soundair* criteria have been satisfied.
22. I am satisfied that the *Soundair* criteria have been met. The sale transactions are approved.

Interim Distributions

23. The Receiver proposes to make interim distributions, relying upon *AbitibiBowater Inc. (Arrangement relatif á)*, 2009 QCCS 6461 (CanLII), at para 87. The Debtor opposes the proposed interim distributions and states that the *AbitibiBowater* case is inapplicable to the facts. That case concerns a motion for the approval of DIP financing and the interim distribution of certain proceeds.
24. This is court monitored process. In my view, the Receiver ought to return to Court to seek approval for any distributions sought once the transactions have closed and the Receiver has additional information, in the usual way.

Removal of the Monitoring Equipment

25. The penthouse floor, where the 9 condominium units are located, contains security equipment, including camera and audio surveillance equipment (the “Monitoring Equipment”). The Company’s principal, Mr. Zar, has continued to access the Monitoring Equipment following the commencement of the

receivership. The Receiver proposes to disconnect and remove the Monitoring Equipment, which is opposed by the Debtor and Mr. Zar.

26. Mr. Zar takes the position that as a director of the condominium corporation he has the right to view the Monitoring Equipment and all cameras in the building as they are in the common elements.
27. The Receiver states that based on discussions with the property manager, the Receiver understands that the Monitoring Equipment is owned by the Company, not the condominium corporation. Accordingly, the Receiver is of the view that the Monitoring Equipment is “Property” within the meaning of the receivership order such that the Receiver may take possession and dispose of it.
28. The Receiver provided the Court with an email sent from the condominium corporation’s counsel, dated Feb. 6, 2023, which stated:

I can confirm that the Corporation will not be taking a position in the context of your upcoming motion.

The Corporation does not have, nor does it claim, any interest in the monitoring equipment referred to in your materials. This equipment does not belong to, and was not installed by or for the Corporation, despite said equipment having been installed on common elements. The Corporation has requested from Mr. Zar that the recording equipment be removed.

29. The receivership order empowers and authorizes the Receiver to, among other things, “...take possession of and exercise control over the Property [...] where the Receiver considers it necessary or desirable...”. “Property” is defined to include “...all of the assets, undertakings and properties of [the Company] acquired for, used in connection with, situate at, or arising from the ownership, development, use or disposition of, the Real Property...”
30. I am satisfied that the Monitoring Equipment is “Property” within the meaning of the receivership order such that the Receiver may take possession of it and dispose of it.

Request for a Sealing Order

31. The Receiver seeks an order sealing the confidential appendices to the Third Report, which are copies of the unredacted agreements for the sale of PH04 and PH09, Remax’s recommendations to the Receiver in respect of the transactions and the Receiver’s Waterfall Analysis. The Receiver’s request is that the sealing order be time limited pending closing of the transactions or further order of the court. There is no opposition to the Receiver’s request for a sealing order.
32. Subsection 137(2) of the *Courts of Justice Act* provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.
33. The Supreme Court of Canada, in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38, articulated the test applicable when determining whether a sealing order ought to be granted:
 1. Court openness poses a serious risk to an important public interest;
 2. The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
 3. As a matter of proportionality, the benefits of the order outweigh its negative effects.

34. Courts have acknowledged that there is public interest in maximizing recoveries in an insolvency that goes beyond the individual case: *Danier Leather Inc., Re*, 2016 ONSC 1044, at para. 84. In *Yukon (Government of) v. Yukon Zinc Corporation*, 2022 YKSC 2, the Yukon Supreme Court determined that generally where there is a sale process, all aspects of the bidding or sales process ought to be kept confidential:

Courts have found this appropriately meets the *Sierra Club* test as modified by *Sherman Estate*, as sealing this information ensures the integrity of the sales and marketing process and avoids misuse of information by bidders in a subsequent process to obtain an unfair advantage. The important public interest at stake is described as the commercial interests of the Receiver, bidders, creditors and stakeholders in ensuring a fair sales and marketing process is carried out, with all bidders on a level playing field.

35. With regard to the second principle from *Sherman Estate*, this Court has recognized that public disclosure of a purchase price may jeopardize dealings with future prospective purchasers, which would pose a serious risk to stakeholders and the sale process. The Receiver states that if the purchase price of the two units were made publicly available, this could negatively impact the selling price if one or both of the transactions failed to close. Further, as noted above, there are other condominium units to be marketed and sold.

36. I agree that the benefits of the sealing order outweigh the negative effects. Importantly, the sealing order will preserve the integrity of the sale process. This greatly outweighs any negative effect that may result from temporarily restricting public access to a limited amount of information.

37. The requested sealing order is granted.

Provisional Execution Provision

38. On February 3, 2023, the Receiver served an updated version of the form of Order requested, which contained a new provision:

“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.”

39. The respondents objected to the inclusion of this provision in the Order.

40. At the hearing of the motion on February 7, 2023, this issue was adjourned to February 13, 2023 to give the Company the opportunity to respond. The respondents gave an undertaking that they would not file a Notice of Appeal until this issue had been addressed by the Court.

41. On February 13, 2023, the hearing of this issue was further adjourned *sine die* on consent.

42. Orders to go in accordance with the attached.

Dated: February 13, 2023

