



SUPERIOR COURT OF JUSTICE

**COUNSEL SLIP**

COURT FILE NO.: CV-22-00674810-00CL

DATE: May 18<sup>th</sup>, 2023

REGISTRAR: JC

NO. ON LIST: 1

TITLE OF PROCEEDING: **KingSett Mortgage Corporation v. 30 Roe Investments Corp**

BEFORE JUSTICE: **May 18<sup>th</sup>, 2023**

**PARTICIPANT INFORMATION**

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

Name of Person Appearing	Name of Party	Contact Info
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**For Defendant, Respondent, Responding Party, Defence:**

Name of Person Appearing	Name of Party	Contact Info
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**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
Nargis Fazil	Counsel for the Receiver	<a href="mailto:nfazil@goodmans.ca">nfazil@goodmans.ca</a>
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Daniel Pollak	Kingsett Client representative	
Noah Goldstein	Receiver	

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### **ENDORSEMENT OF JUSTICE STEELE:**

1. This is a motion for funding of legal expenses for 30 Roe Investments Corp. (“30 Roe”) out of receivership assets. Raymond Zar (“Zar”) indicated that he was acting as agent for 30 Roe.

#### *Background*

2. Pursuant to an Order of the Court made on May 9, 2022, KSV Restructuring Inc. was appointed as receiver and manager of certain property of 30 Roe, including nine condominium units, nine parking spaces and nine storage units and/or lockers.
3. Thus far, the Receiver has closed two Court-approved sales of condo units and will seek approval of two more sales of condo units at a motion scheduled for May 25, 2023.
4. Kingsett is the fulcrum secured creditor.

#### *Preliminary Matters*

5. There was no Notice of Motion filed by 30 Roe, as required under Rule 37.01 of the *Rules of Civil Procedure* (the “RCP”). That section provides that a motion shall be made by a notice of motion unless the nature of the motion or its circumstances make a notice of motion unnecessary. The Receiver and Kingsett told Zar in advance that this was required, yet Zar did not file a notice of motion.
6. Further, there was no request for leave made by Zar to represent 30 Roe under Rule 15.01(2) of the RCP, which states that: “[a] party to a proceeding that is a corporation shall be represented by a lawyer, except with leave of the Court” (emphasis added).
7. Finally, Zar’s affidavit was late served and his factum was served just over a day prior to the hearing.
8. I decided to hear Zar’s motion despite the above procedural issues.

#### *Request for Funding*

9. Zar seeks an order (i) requesting the Receiver to reimburse the Board for 30 Roe’s legal expenses of \$50,740.01, and (ii) directing the Receiver to pay a \$50,000 monetary retainer as required by 30 Roe’s counsel, Heinen Hutchinson LLP.
10. Zar made submissions regarding the Board’s residual powers and ability to retain counsel. There was no dispute that 30 Roe’s Board would retain such residual powers.
11. What was in dispute, however, is whether the Receiver ought to provide funding to 30 Roe’s Board for the purpose of retaining counsel.

12. Zar states that the Board of 30 Roe has determined that the receivership is not in the company's best interest and that it requires counsel to prepare and argue that point on behalf of the company. He states that the Board is not seeking to delay the Receiver's motion, which is scheduled for May 25, 2023.
13. Zar argues that *Peterborough (City) v. Kawartha Native Housing Society Inc.*, [2009] 99 OR (3d) 573 (Ont. C.A.), 2009 CanLII 92134, is instructive. In *Kawartha*, there was a decision under appeal concerning the right of the board of directors to retain legal counsel in a receivership, and if they have the right, how the legal fees would be funded. The motion judge had determined that the boards of directors did not have the right to retain legal counsel in a receivership without approval of the court or the receiver. The corporations appealed the order. The Court of Appeal stated, at para. 2, that this issue "and other related issues regarding the ability of not-for-profit corporations that are raised on the appeal are important, in some respects difficult, and in some respects novel." The Court of Appeal noted, at para. 3, that as a result of the decision of the motion judge there was uncertainty regarding whether the boards could even retain counsel for the appeal. Relying on s. 134(2) of the *Courts of Justice Act*, which permits a court to which an appeal is taken to "make any interim order that is considered just to prevent prejudice to a party pending appeal," the Court of Appeal determined that the boards were entitled to retain counsel for the appeal. The Court of Appeal noted, at para. 8, that there were operating funds available in the companies. The Court of Appeal ordered that reasonable legal fees and expenses for the counsel retained for the purposes of the appeal by the companies were to be paid out of the companies' assets, after assessment. I further note that the evidence in *Kawartha*, as noted in para. 8, was that the directors did not have access to any other funds or assets other than the companies' assets.
14. Both Kingsett and the Receiver submit that it would be highly inappropriate in this case, at this stage, to provide funding for legal expenses for 30 Roe. The receivership is part way through. The Receiver states that it is unlikely that there will be sufficient assets of the estate to fully pay back the debt owed to Kingsett. Any funds directed to 30 Roe's legal expenses will further erode the estate.
15. There is no evidence before the Court that the guarantor of Kingsett's loan to 30 Roe, Zar, or the shareholders of 30 Roe, lack the financial resources to pay 30 Roe's legal expenses. Zar baldly deposes that the Board has no alternative sources of funding, but he has not provided any supporting evidence.
16. In this regard, *Kawartha* is distinguishable. First, that case dealt with funding for an appeal that the Court of Appeal noted was important and "in some respects novel." Second, there was no evidence in *Kawartha* that there would not be sufficient funds in the estate for the creditors, as the Receiver states is the case here. In *Kawartha* the court noted that there were operating funds available in the companies. Finally, unlike in *Kawartha*, there is no evidence before the Court that Zar, the guarantor of Kingsett's loan to 30 Roe, or the shareholders of 30 Roe lack the financial resources to pay 30 Roe's legal expenses.
17. The Receiver states that it is not aware of any instance in which a Court has ordered that a debtor company's legal expenses be funded from receivership assets in the commercial receivership context following the granting of a receivership order in circumstances where the secured creditor is expected to be impaired. The Receiver noted that there have been cases where the underlying right of the creditor to enforce its security against the assets in the manner proposed or the existence of the secured debt was in question, and the court ordered funding for the debtor at the receivership

application stage: *Royal Bank v. West-Can Resource Finance Corp.*, 77 Alta LR (2d) 43 (Alta. K.B.). As noted by the Receiver, these cases are distinguishable because the receivership order in the instant case is final, and the debtor has never disputed the existence of KingSett's secured debt or security.

18. The Receiver also noted that in *White Oak Commercial Finance, LLC v. Nygard Holdings (USA) Limited et al.*, 2022 MBQB 48, 97 C.B.R. (6<sup>th</sup>) 242, the court ordered funding of the debtor respondents' legal expenses from disputed non-receivership property held in trust and "net receivership proceeds" following confirmation from the receiver that the secured lenders had been repaid in full. *White Oak* is distinguishable from the instant case, as here the fulcrum secured creditor is expected to be impaired.
19. This is a commercial receivership. There are not expected to be sufficient funds to repay the debt owing to Kingsett, the fulcrum secured creditor. It would not be appropriate to further erode Kingsett's potential recovery by diverting funds to 30 Roe.
20. 30 Roe's motion is dismissed.

#### Costs

21. The Receiver seeks costs against Zar. The Receiver notes that although Zar purported to bring the motion on behalf of 30 Roe, he did not serve and file a motion seeking leave to represent the debtor (nor was a Notice of Motion filed in respect of this motion, as noted above). The Receiver argues that if costs are not awarded, or if costs are awarded against 30 Roe, then the debtor's fulcrum creditor will bear the costs.
22. Zar personally guaranteed Kingsett's loan to 30 Roe. Zar's conduct on this motion and throughout these proceedings has added complexity and costs. Although Zar did not have counsel on this motion, he has been before the Court with counsel for 30 Roe on prior occasions. By not respecting the Court's procedures, requirements and timelines, time and expense has been unnecessarily added.
23. Zar shall pay the Receiver's partial indemnity costs fixed in the amount of \$5,000 (inclusive of HST and disbursements).

