

Court File No. CV-22-00674810-00CL
Court of Appeal File No.: C70638

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

Applicant
(Respondent)

and

30 ROE INVESTMENTS CORP.

Respondent
(Appellant)

**APPELLANT'S MOTION RECORD
(MOTION TO QUASH)**

May 26, 2022

**SOLMON ROTHBART TOURGIS
SLODOVNICK LLP**

Barristers
375 University Avenue
Suite 701
Toronto, Ontario M5G 2J5

Nancy J. Tourgis (LSO# 37340I)
ntourgis@strslegal.com
Tel: 416-947-1093 (Ext. 342)

Lawyers for the appellant

TO: BENNETT JONES LLP
One First Canadian Place, Suite 3400
P.O. Box 130
Toronto, ON M5X 1A4

Richard Swan (LSO# 32076A) Tel: (416) 777-7479

Email: swanr@bennettjones.com

Sean Zweig (LSO# 57307I) Tel: (416) 777-6254

Email: zweigs@bennettjones.com

Joshua Foster (LSO# 79447K) Tel: (416) 777-7906

Email: fosterj@bennettjones.com

Lawyers for the Applicant (respondent)

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

Applicant
(Respondent)

and

30 ROE INVESTMENTS CORP.

Respondent
(Appellant)

**APPELLANT'S MOTION RECORD
(MOTION TO QUASH)**

TABLE OF CONTENTS

1	Notice of Motion for Leave to Appeal
----------	---

Court File No.

**COURT OF APPEAL FOR
ONTARIO**

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

**Applicant
(Responding Party)**

- and -

30 ROE INVESTMENTS CORP.

**Respondent
(Moving Party)**

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 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**

**NOTICE OF MOTION
FOR LEAVE TO APPEAL**

The Respondent/Moving Party, 30 Roe Investments Corp., will make a motion for leave to appeal, if leave is necessary, the Order of Justice Cavanagh dated May 9, 2022, on the same date as a motion to quash brought by the Applicant/Responding Party in Court File No. C70638 or in writing as set out in Rule 61.03(1) of the *Rules of Civil Procedure* or directed by this Honourable Court, the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

PROPOSED METHOD OF HEARING: The Motion is to be heard

[X] if necessary, at the Motion to Quash in Court File No. C70638; or,

[X] in writing under rule 61.03(1) of the *Rules of Civil Procedure*.

THE MOTION IS FOR:

- (a) An Order, if necessary, granting leave to appeal the Order of Justice Cavanagh dated May 9, 2022 appointing a Receiver of the Appellant pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 as amended (the “Order”);
- (b) Costs reserved to the panel hearing the appeal; and,
- (c) Such further and other Relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

1. The appeal is meritorious in that:
 - a. The Learned Motions Court Judge erred in law and made palpable and overriding errors in fact in granting the motion by Kingsett Mortgage Corporation (the “Respondent”) for an Order pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3 (the “BIA”) and section 101 of the *Courts of Justice Act* R.S.O. 1990, c. C. 43 (the “CJA”) appointing KSV Restructuring Inc. (the “Receiver”) without security of, *inter alia*, the real property of the Appellant, being a 9 unit residential building located at 30 Roehampton Avenue, Toronto (the “Property”), together with all other undertakings and assets;

- b. The Learned Motions Court Judge erred in law and made palpable and overriding errors in fact in failing to grant the adjournment of the hearing requested by the Appellant for thirty days to allow the time for the Respondent to complete the refinancing of the Property and to pay out the second mortgage held by the Respondent in that;
- c. The First Mortgagee of the Property, the Canadian Imperial Bank of Canada, did not oppose the request for the adjournment;
- d. The Firm Capital letter, filed, is evidence of more than an expression of interest in providing refinancing and was evidence that the Appellant was taking every step to refinance the Property and that 30 additional days was reasonable;
- e. There was no prejudice to the Respondent in granting the adjournment;
- f. The Learned Motions Court Judge erred in law and made palpable and overriding errors in fact in finding that the Appellant had not acted reasonably and in accordance with the February 22nd and March 8th, 2022 Endorsements and in finding that the Appellant had not taken steps to replace former counsel;
- g. The Learned Motions Court Judge erred in law in failing to follow or reference Rule 15.04(6) of the *Rules of Civil Procedure* which state that the Appellant had the absolute right to thirty days to find new counsel from the date the Order was made removing Paliare Roland Rosenberg Rothstein LLP as counsel of record for the Appellant, being April 20, 2022;

- h. The Learned Motions Court Judge erred in law and made palpable and overriding errors in fact and exercised His discretion on wrong principles by finding that it was just and convenient for a Receiver to be appointed;
- i. The Learned Motions Court Judge erred in law and made a palpable and overriding error in fact in failing to have regard to the evidence that the Respondent had agreed to extend the loan until April 1st, 2022 by debiting the extension fee from the Appellant's account on January 4th, 2022 and again on February 22nd, 2022 and accepting that an error was made with respect to the debiting of the extension fee when, in fact, it was evidence of the agreement to extend to April 1, 2022.
- j. Further, or in the alternative, the Learned Motions Court Judge erred in law and made palpable and overriding errors of fact in failing to consider that:
 - i. This Application was commenced prematurely before there was any default; and
 - ii. The Respondent's actions interfered with the Appellant's ability to re-finance the Property.
- k. The Learned Motions Court Judge erred in law and in fact in finding that any of the factors that apply when considering whether it is just and convenient to appoint a Receiver apply in these circumstances, and specifically:
 - i. There was absolutely no evidence that the Respondent's security was a risk of deteriorating and, in fact, the appraisals before the

Court showed a robust value for the Property over and above the debt load, such that there was equity;

- ii. There was no need to stabilize and preserve the Appellant's business as the Property continued to perform, rents were being received and there was no prejudice or risk to the Respondent;
- iii. The loss of confidence in the Appellant's management, relied upon by the Learned Motions Court Judge was subjective only and objectively does not weigh in favour of the appointment of a Receiver; and,
- iv. The position and interest of other creditors when taken into account was that there was no support for a Receiver, particularly the CIBC. No other creditors were impacted.

- l. The Learned Motions Court Judge erred in law in finding that the bald statement in an affidavit that the Respondent had lost confidence in the Appellant's management to continue to satisfy the Respondent's obligations was enough to objectively find a loss of confidence, especially in the face of the fact that there were less aggressive remedies available, in the face of other factors that affected the Appellant to refinance and on a paper record without the benefit of *viva voce* evidence, was an error in law; and
- m. The Learned Motions Court Judge erred in law in finding that a Receiver was necessary and specifically, a Court Appointed Officer, to protect the interests of

other stake holders, as there are none other than the Respondent, the CIBC and a small contingent liability;

2. This is a matter of public importance and of importance to the profession;
3. The proposed appeal will not hinder the progress;
4. Sections 193 (e) and 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3;
5. Section 101 of the *Courts of Justice Act*, R.R.O. 1990, c.C. 43;
6. Rule 15 of the *Rules of Civil Procedure*; and
7. Such further and other grounds as the lawyers may advise from review of the record.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The Application Record before the Divisional Court Panel; and,
- (b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

May 19, 2022

**SOLMON ROTHBART TOURGIS
SLODOVNICK LLP**
375 University Avenue
Suite 701
Toronto, Ontario M5G 2J5

Nancy J. Tourgis (LSO# 37340I)
ntourgis@strslegal.com
Tel: 416-947-1093 (Ext. 342)

Lawyers for the Respondent(Moving
Party)

TO: **BENNETT JONES LLP**
One First Canadian Place, Suite 3400
P.O. Box 130
Toronto, ON M5X 1A4

Richard Swan (LSO# 32076A) Tel: (416) 777-7479
Email: swanr@bennettjones.com

Sean Zweig (LSO# 57307I) Tel: (416) 777-6254
Email: zweigs@bennettjones.com

Joshua Foster (LSO# 79447K) Tel: (416) 777-7906
Email: fosterj@bennettjones.com

Lawyers for the Applicant (Responding Party)

KINGSETT MORTGAGE CORPORATION
Applicant
(Responding Party)

-and- 30 ROE INVESTMENTS CORP,
Respondent
(Moving Party)

Court File No.

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

**NOTICE OF MOTION
FOR LEAVE TO APPEAL**

SOLMON ROTHBART GOODMAN LLP
Barristers
375 University Avenue
Suite 701
Toronto, Ontario
M5G 2J5

Nancy J. Tourgis (LSO# 37340I)
ntourgis@strslegal.com
Tel: 416-947-1093 (Ext. 342)

Lawyers for the Respondent(Moving Party)

File Number: 18801

RCP-E4C (May 1, 2016)

KINGSETT MORTGAGE CORPORATION

-and- **30 ROE INVESTMENTS CORP.**

Applicant
(Respondent)

Respondent
(Appellant)

Court File No. CV-22-00674810-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

**RESPONDING MOTION RECORD
(MOTION TO QUASH)**

SOLMON ROTHBART TOURGIS SLODOVNICK LLP

Barristers

375 University Avenue,

Suite 701

Toronto, Ontario M5G 2J5

Nancy J. Tourgis (LSO# 37340I)

ntourgis@strslegal.com

Tel: 416-947-1093 (Ext. 342)

Lawyers for the Appellant