

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

KINGSETT MORTGAGE CORPORATION

Applicant

– and –

30 ROE INVESTMENTS CORP.

Respondent

**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**

AIDE MEMOIRE OF 30 ROE
(9:30 am Attendance before Justice Conway
December 1, 2023)

November 30, 2023

RAYMOND ZAR
Hudson's Bay Centre
3500-2 Bloor Street East
Toronto, Ontario, M4W 1A8

rz@roehamptoncapital.com
Tel: 416-322-8509

Agent for 30 Roe Investments Corp.

TO: THE SERVICE LIST

SCHEDULING OF THE RECEIVER'S MOTION AND 30 ROE'S CROSS-MOTION

1. The Receiver and 30 Roe Investments Corp. ("**30 Roe**") were jointly prepared to proceed with the hearing of the Receiver's Motion and 30 Roe's Cross-Motion as originally scheduled for November 17, 2023.
2. However, on November 13, 2023, and despite filing no responding materials or affidavit of its own, KingSett sought an adjournment to examine 30 Roe's affiant, Raymond Zar ("**Mr. Zar**") on the Zar Affidavit dated November 7, 2023, enclosed in 30 Roe's Responding and Cross-Motion Record.
3. While Mr. Zar preferred the motion not be adjourned, he made it clear to the Court that he stood firmly behind the Zar Affidavit and that, unlike KingSett, Mr. Zar welcomed the request to be cross-examined.
4. The Court set November 17 and 20, 2023, as the dates for cross-examinations and November 27, 2023, as the new return date of the hearing.
5. Richard Swan, on behalf of KingSett and Mark Dunn, on behalf of the Receiver, cross-examined Mr. Zar on the Zar Affidavit and beyond for almost eight hours on November 20, 2023.
6. On November 21, 2023, KingSett advised that its counsel, Richard Swan, was unavailable to attend the November 27, 2023, hearing and, as a result, sought a second adjournment.

FACTS CONCERNING NOTICE OF ACTION

7. At para 16-20 of its Aide Memoire, the Receiver has made misleading and inaccurate statements about the Notice of Action commenced November 17, 2023, which warrant the following response.

Notice of Cross-Motion Includes Leaves to Sue Receiver

8. First, 30 Roe's Notice of Cross-Motion, dated November 7, 2023, explicitly sought leave to commence and/or continue an action as against the Receiver.

9. Second, while 30 Roe does not believe it requires leave to sue any other party except for the Receiver, in an abundance of caution, 30 Roe's Amended Notice of Cross-Motion dated November 20, 2023, served prior to cross-examinations, explicitly seeks leave to commence and/or continue its claim against all the other parties listed as defendants in the Notice of Action.

Justice Steele Confirmed Residual Authority of 30 Roe's Board of Directors

10. Third, on May 18, 2023, The Honourable Madame Justice Steele made a judicial finding at para 9 of Her Honour's endorsement that "*[Raymond] Zar made submissions regarding the Board's residual power and ability to retain counsel. **There was no dispute that 30 Roe's Board would retain such powers**".*

11. Fourth, it is trite law that the Board of a Company in Receivership retains the power to retain counsel and/or litigate in the name of the Company, especially against parties such as the appointing creditor and despite the wishes of the Receiver.

12. In the analogous appellate decision of [Maple Leaf Foods Inc. v. Markland Seafoods Ltd.](#), [2007 NLCA 7 \(CanLII\)](#), which has been cited on numerous decisions of the Court of Appeal for Ontario, the NLCA found at paras:

[13] The sole issue for determination is whether the directors of Markland are entitled to control litigation against Maple Leaf following the appointment of the Receiver-Manager by Maple Leaf, and contrary to the instructions of the Receiver-Manager.

[34] Tysoe J. considered that Fortin at p. 765 correctly stated the basis for resolving whether the receiver-manager has exclusive control of litigation. He concluded:

[43] ... In other words, although a receiver-manager is generally given the power to prosecute and defend actions, it is in a conflict of interest position when the litigation is between the security holder and the company in respect of which the receiver-manager has been appointed. As a result of the conflict of interest, the receiver-manager does not have the ability to be involved in the litigation, and the power to either defend an action instituted by the security holder or to make a claim or counterclaim against the security holder on behalf of the company remains vested in the directors.

KingSett's Delays Necessitated Notice of Action to Preserve Limitation Period

13. By November 17, 2023, counsel advised the Board of Directors of 30 Roe (the “**Board**”) that the commencement of an action could no longer wait and certainly not until November 27, 2023 (the then scheduled return date of the motion) and that any further delay could prejudice 30 Roe’s ability to commence an action within the limitation period.

14. The Board has a fiduciary duty to act in the best interest of 30 Roe and determined that in the circumstances, it had an obligation to exercise its residual authority and include 30 Roe as a Plaintiff in the Notice of Action dated November 17, 2023.

15. The Board informed counsel to the Receiver about its decision to commence the Notice of Action in person on November 17, 2023, which was the earliest opportunity to do so.

16. In accordance with Rule 14.03(4) of the *Rules of Civil Procedure*, the Notice of Action will be served together with the Statement of Claim within the prescribed timelines.

DIRECTION TO PUBLISH 30 ROE’S RESPONDING AND CROSS-MOTION RECORD

17. The Receiver has not yet published 30 Roe’s Responding and Cross-Motion Record (the “**Responding Record**”) on the Case Website.

9:30 Is the Proper Forum for the Relief Sought

18. 30 Roe advised the Court in the 9:30 Request Form that this Direction would be sought. The Commercial List’s E-Service Protocol (the “**Protocol**”) specifically states:

If the WebHost is uncertain whether a document should be posted on the Case Website as a result of its content, the WebHost may seek directions from the Court at a 9:30 appointment.

No Publication Ban or Sealing Order has been Sought or Granted

19. The Receiver’s refusal to publish the Responding Record on the Case Website contravenes the open court principle, lacks juristic reason, and defies logic.

20. If the contents of the Responding Record were as the Receiver claims, then the Receiver or KingSett would have sought a publication ban or sealing order instead of an adjournment to spend eight hours cross-examining Mr. Zar on the Responding Record in question.

21. The Receiver has not sought a publication ban or sealing order because the Receiver knows it does not meet the test. Absent the requested Direction from this court, the Receiver will benefit from a de-facto sealing order it has not sought and is not entitled to.

The Relief Sought is Urgent and Required Prior to the Hearing

22. The Receiver has had the Responding Record for almost four weeks now, and despite publishing its own materials, which include a series of false and misleading statements and allegations against 30 Roe and Mr. Zar, including the false accusation that 30 Roe and Mr. Zar have failed to file any responding materials for this motion, the Receiver has refused to publish 30 Roe's response to the said false and misleading allegations.

23. The Responding Record must be published on the Case Website before the return date of the motion so that the public and any parties with a potential interest in this proceeding that rely on the Case Website to stay informed about this BIA proceeding can have a fair opportunity to participate or assert their rights.

DIRECTION SOUGHT

24. For all of the preceding reasons, 30 Roe respectfully requests that the Court:

- (a) Direct the Receiver to immediately publish 30 Roe's Responding and Cross-Motion Record on the Case Website or direct a hearing for determination of same.
- (b) And only after (a) above, set a date for the Receiver's motion and 30 Roe's cross-motion for a two (2) hour in-person hearing.

KINGSETT MORTGAGE CORPORATION
Applicant

and

Court File No. CV-22-00674810-00CL
30 ROE INVESTMENTS CORP.
Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

AIDE MEMOIRE OF 30 ROE
(9:30 Attendance before Justice Conway
December 1, 2023)

RAYMOND ZAR
Hudson's Bay Centre
3500-2 Bloor Street East
Toronto, Ontario, M4W 1A8

rz@roehamptoncapital.com
Tel: 416-322-8509

Agent for 30 Roe Investments Corp.