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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

AFFIDAVIT OF DANIEL POLLACK
(Affirmed May 17, 2023)

I, **DANIEL POLLACK**, of the City of Toronto, in the Province of Ontario, **AFFIRM AND SAY**:

1. I am a Senior Director, Special Loans and Portfolio Management, of KingSett Mortgage Corporation ("**KingSett**"). I have responsibility for matters pertaining to the borrowings of 30 Roe Investments Corp. (the "**Debtor**") from KingSett and, as such, have personal knowledge of the matters to which I depose in this affidavit, unless otherwise indicated. Where I do not possess personal knowledge, I have stated the source of my information and, in all such cases, believe it to be true.

2. I make this affidavit in response to one or more motions purportedly to be brought by the Debtor, 30 Roe Investments Corp. (the "**Purported Motion**"), for which no Notices of Motion

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have been delivered, and in response to certain assertions contained within the affidavit of Raymond Zar ("**Mr. Zar**") sworn on May 15, 2023 (the "**Zar Affidavit**") in support of the Purported Motion.

3. KingSett does not waive or intend to waive any applicable privilege by any statement herein.

I. SCOPE OF RESPONSE & BACKGROUND

4. KingSett was served with the Zar Affidavit on the afternoon three days prior to the scheduled hearing of the Purported Motion. In part as a result, this affidavit is not intended to address every issue raised by the Zar Affidavit, although much of what is set out in the Zar Affidavit is irrelevant to any motion for legal fee funding. Moreover, much of what the Zar Affidavit purports to reference was previously raised by the Debtor on prior motions, on almost all of which the Courts decisively found against the positions advanced by the Debtor. To the extent that I do not respond to certain assertions made in the Zar Affidavit, that does not mean that I agree with or accept them (quite the opposite is generally true), nor does it mean that they are relevant to the Purported Motion (most are not).

5. The background to these receivership proceedings, including the numerous findings of this Court and the Court of Appeal for Ontario (the "**Court of Appeal**") contradicting many of the assertions made in the Zar Affidavit, is set out in greater detail in the following Court Decisions and Orders, and is therefore not repeated in this affidavit:

(a) the endorsement of Justice Penny dated April 11, 2022, issued in connection with Paliare Roland Rosenberg and Rothstein LLP's ("**Paliare Roland**") successful

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motion to be removed as lawyer of record for the Debtor, which is attached hereto as **Exhibit "A"**;

(b) the endorsement of Justice Cavanagh dated May 9, 2022 (the "**May 9 Endorsement**"), issued in connection with KingSett's application (the "**Application**") for an order (the "**Receivership Order**") appointing KSV Restructuring Inc. as receiver and manger (in such capacity, the "**Receiver**") of certain of the Debtor's real and personal property (collectively, the "**Property**"), which is attached hereto as **Exhibit "B"**;

(c) the decision of the Court of Appeal, released on June 17, 2022 (the "**ONCA's June 17 Reasons**") granting KingSett's motion to quash the Debtor's purported appeal of the Receivership Order, dismissing the Debtor's motion for leave to appeal and awarding KingSett its costs in the aggregate amount of $15,000 (which costs award remains unpaid), which is attached hereto as **Exhibit "C"**;

(d) the endorsement of Justice McEwen dated July 20, 2022, issued in connection with the Receiver's motion for orders (i) approving a process (the "**Sale Process**") for the sale of nine condominium units, nine parking spaces and nine storage units and/or lockers forming part of the Property located in a condominium development known as "Minto 30 Roe" at 30 Roehampton Avenue in Toronto, Ontario (collectively, the "**Units**"), and (ii) directing the Debtor and Mr. Zar to provide certain records and Property to the Receiver, which is attached hereto as **Exhibit "D"**;

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(e) the endorsement of Justice McEwen dated December 20, 2022, issued in connection with the Receiver's motion for an order amending the Sale Process, which is attached hereto as **Exhibit "E"**;

(f) the endorsement of this Court dated February 7, 2023, issued in connection with the Receiver's motion for two approval and vesting orders in respect of the sale of Units PH04 and PH09 (the "**Approval and Vesting Orders**") and an order granting certain ancillary relief, which is attached hereto as **Exhibit "F"**;

(g) the endorsement of this Court dated March 10, 2023 (the "**March 10 Endorsement**"), issued in connection with Blaney McMurtry LLP's ("**Blaneys**") motion to be removed as lawyer of record for the Debtor in respect of the receivership proceedings before this Court and certain other unrelated proceedings, which is attached hereto as **Exhibit "G"**;

(h) the endorsement of Justice Lauwers of the Court of Appeal dated March 20, 2023 (the "**March 23 Endorsement**"), issued in connection with Blaneys' unsuccessful motion to be removed as lawyer of record for the Debtor in respect of the Debtor's purported appeal of the Approval and Vesting Orders, which is attached hereto as **Exhibit "H"**; and

(i) the decision of the Court of Appeal released March 29, 2023 (the "**ONCA's March 29 Reasons**"), granting the Receiver's motion to quash the Debtor's purported appeal of the Approval and Vesting Orders and denying the Debtor leave to appeal, attached hereto as **Exhibit "I"**.

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II. KINGSETT'S LIMITED RESPONSE

A. The Receivership Application

6. KingSett and the Debtor are parties to a commitment letter dated March 29, 2019 (as amended, the "**Commitment Letter**"). Pursuant to the Commitment Letter, KingSett extended a $1,875,000 second mortgage, non-revolving demand loan (the "**Loan Facility**") to the Debtor.

7. The Debtor granted various security in respect of the Property to KingSett to secure amounts owing under the Commitment Letter. The security provided by the Debtor included a second charge/mortgage on the real property owned by the Debtor (the "**Mortgage**") and a General Security Agreement dated April 8, 2019.

8. Following several extensions, the Loan Facility matured on December 1, 2021. The Loan Facility was not repaid. In addition, the Debtor defaulted on its interest payment due on December 1, 2021 (as it had on prior occasions).

9. By letter dated December 6, 2021, KingSett advised the Debtor of its default and the Loan Facility's maturity. On December 13, 2021, KingSett provided a demand letter to the Debtor advising that the Mortgage was in default and demanding repayment of the Debtor's indebtedness to KingSett. The demand letter was delivered contemporaneously with a notice of intention to enforce security in accordance with section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**").

10. These receivership proceedings were commenced on January 7, 2022. Following three adjournments requested by the Debtor, the Application was heard on May 6, 2022 and the Receivership Order was granted on May 9, 2022.

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11. Contrary to the assertions in the Zar Affidavit, the Debtor had the benefit of approximately four months to respond to the Application. In that time, the Debtor delivered the affidavits of Mr. Zar sworn February 22, 2022 (the "**February 2022 Affidavit**") and May 5, 2022 (the "**May 2022 Affidavit**").

12. Mr. Zar's May 2022 Affidavit raised a number of assertions concerning the events preceding, and the merits of, the Application that are now repeated in the most recent Zar Affidavit. Paragraphs 6, 8 and 10 of the May 2022 Affidavit are noteworthy in this regard and appear, in relevant part, as follows:

> Indeed, on September 27, 2021, I had a conversation with Scott Coates, head of Mortgage Investments and Justin Walton, managing Director of Mortgage Investments. I recorded that call under Ontario's one-party consent law. KingSett supported our decision to incur higher interest costs with them to delay the refinancing to take advantage of the higher loan to value made possible by the increase in EBITDA as a result of our effective management of the asset. The extensions of the mortgage was part of a general consensus as to what was in the best interest of the Respondent. The September 2021 call makes clear that:
>
> a) they were satisfied with the security;
>
> b) the loan was open and had no firm repayment date;
>
> c) they were aware that based on income received the valuation could be as high as 13.5 million dollars; and
>
> d) that we should not be concerned about extensions.
>
> Attached to this my Affidavit and marked as **Exhibit "B"** is a copy of the voice recording referenced herein.
>
> […]
>
> KingSett implicitly agreed with my proposal to extend the loan until April 1, 2022 by debiting the extension fee from our account on January 4, 2022 and leaving the interest rate as 9% - at least that is what they led me to believe. […] Indeed, KingSett continued to debit the extension fee in January and again in February, as shown on the transaction search report for the Borrower's account […]. They only tried returning the extension fee after I brought it to their attention in settlement talks to demonstrate that they should do the right thing and honour the extension

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> agreement. It was therefore my view that the Borrower was not in default. I rectified the matter and they accepted that rectification by debiting our account for the extension fee after December 16, 2021 when the loan was extended until April 1, 2022 – at no point did KingSett refute that the loan was extended. It was therefore a shock and surprise to me when I heard about the current Application.

13. In addition to being attached as an Exhibit to the May 2022 Affidavit, the voice recording referred to in the May 2022 Affidavit and again in the current Zar Affidavit was played at Mr. Zar's request for Justice Cavanagh during the hearing of the Application. Evidently, it was not persuasive. As the principal evidence delivered by the Debtor on the Application, the May 2022 Affidavit and the assertions therein, including the recording – now being repeated in the current Zar Affidavit – were before and were rejected by Justice Cavanagh in granting the Receivership Order. Indeed, as the May 9 Endorsement makes clear, Justice Cavanagh:

(a) found that "there was ample time" for the Debtor to retain counsel and respond to the Application and "that it would not be just to the Applicant to grant a further adjournment";

(b) rejected the Debtor's submission that, "by debiting the extension fee in error, the Applicant should be taken to have implicitly agreed to extend the maturity date for the mortgage until April 1, 2022";

(c) accepted KingSett's evidence that "the extension fee was debited in error and, when the error was discovered, it was corrected";

(d) noted that the "information given by Mr. Zar in his affidavit (that he obtained from the Respondent's former counsel) of what was said in the telephone conversation in question is vague and accompanied by Mr. Zar's characterization of what was said"

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and, in any event, was "far from sufficient" to support an inference that KingSett lacked good faith in bringing the Application;

(e) held that the Receiver's appointment would "provide an effective and appropriate means to realize on the mortgage security by a court-appointed officer who owes duties to all stakeholders"; and

(f) concluded that the Receiver's appointment was "just and convenient in the circumstances".

14. Having been included in the Debtor's Appeal Book and Compendium delivered in connection with the Debtor's purported appeal of the Receivership Order, the February 2022 Affidavit and the May 2022 Affidavit were also before the Court of Appeal. Notwithstanding the assertions therein, the ONCA's June 17 Reasons for quashing the Debtor's purported appeal of the Receivership Order and denying leave to appeal indicate that, among other things:

(a) contrary to the Zar Affidavit's assertion that the Debtor's "bulletproof argument" was not referenced in the ONCA's June 17 Reasons, the Court of Appeal considered and plainly rejected the Debtor's argument that the authorization provided to the Receiver under the Receivership Order to sell certain of the Property absent Court-approval placed the Receivership order in the class of orders for which an automatic right of appeal exists under subsection 193(c) of the BIA;

(b) the Debtor's Notice of Appeal did not "disclose a *prima facie* meritorious appeal";

(c) contrary to the Zar Affidavit's contention that the Loan Facility was extended, the Court of Appeal rejected the Debtor's argument that the "application judge failed to

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have regard to the evidence that KingSett debited 30 Roe's mortgage account for extension fees in January and February, 2022", and held that the "application judge dealt squarely with that issue, accepting KingSett's explanation that the debits were simply administrative errors" – a conclusion that, according to the Court of Appeal, "was reasonable in light of the evidence";

(d) the Debtor's assertion that it had the right under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to appoint new counsel until May 20, 2022, with the consequence that the Application ought to have been adjourned on May 6, 2022 was "without any merit";

(e) contrary to the Zar Affidavit's suggestion that Justice Cavanagh inappropriately applied the test for the appointment of a receiver, the Court of Appeal found that "the application judge weighed the various factors relevant to whether a receiver should be appointed" and that the "decision to appoint a receiver was not unreasonable given 30 Roe's default and inability to cure its default"; and

(f) the Court of Appeal concluded that "there was nothing premature or disproportionate about the application judge's appointment of a receiver".

15. It was incumbent on the Debtor, which was represented by counsel, to advance arguments in support of its opposition to the Application and its purported appeal of the Receivership Order. All such arguments were rejected by this Court and the Court of Appeal. The Debtor did not seek leave to appeal the Court of Appeal's June 17 Decision and the Receiver's appointment was thus finally determined on the merits.

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B. The Debtor's History Retaining Counsel

16. The Zar Affidavit makes various references to the Debtor's prior attempts to retain counsel, which attempts were largely detailed in the February 2022 Affidavit and the May 2022 Affidavit, to the extent those efforts predated the May 2022 Affidavit. The Debtor's prior attempts to retain counsel, the efforts of such counsel to be removed as lawyer of record for the Debtor and related allegations of "defamatory statements" having been made to such counsel, have previously been addressed by this Court and the Court of Appeal. These decisions were not appealed.

17. The Zar Affidavit also provides an account of the Debtor's experience with certain of its prior counsel, including Solomon Rothbart Tourgis Slodovnick LLP and Symon Zucker. KingSett has no direct knowledge of the Debtor's particular dealings with its counsel, and this narrative does not appear relevant to the Purported Motion.

C. The Debtor's Unfounded Assertions of Conflict

18. The Zar Affidavit advances several assertions of alleged undisclosed conflicts as between the Receiver, KingSett and their respective counsel notwithstanding that, among other things:

(a) the Receiver is a Court-appointed officer and is bound by its duties as such;

(b) the retention and prior legal representation of the aforementioned parties on unrelated matters is (i) a matter of public record, (ii) common and (iii) entirely uncontroversial; and

(c) the Debtor paradoxically elected to retain Blaneys in these receivership proceedings, which as the Debtor was aware, had previously acted as counsel for

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KingSett and required a limited waiver of KingSett permitting Blaneys to act as lawyer of record for the Debtor – a waiver that was agreed to by KingSett.

19. The suggestions within the Zar Affidavit that KingSett (i) has exerted untoward pressure on Blaneys or other prospective legal counsel to prevent the Debtor from securing legal representation where conflicts did not exist and (ii) chastised Blaneys for doing a "good job" for the Debtor, are remarkable.

20. As in the case of the Zar Affidavit's references to the removal of Paliare Roland as lawyer of record for the Debtor, the removal of Blaneys as lawyer of record for the Debtor has already been addressed in these receivership proceedings. Namely, by this Court in its March 10 Endorsement and Justice Lauwers of the Court of Appeal in the March 23 Endorsement.

21. KingSett does not have any knowledge of the financial arrangements reached between the Debtor and Blaneys or how such arrangements informed Blaneys' determination to bring a motion to be removed as lawyer of record for the Debtor, if at all, nor does this appear relevant.

D. The Debtor's Extraordinary Request for the Payment of its Legal Fees

22. I expect that asking the estate to fund the Debtor in these circumstances would be highly unusual – a Court-appointed receiver in such circumstances would be asked to diminish the value of a debtor company's estate to enable the debtor company to retain counsel to challenge such Court-officer's efforts to maximize value for stakeholders. As the Debtor's fulcrum creditor, which is expected to suffer a significant shortfall on its recovery, in large part due to the Debtor's and Mr.

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Zar's extraordinary conduct in these receivership proceedings, KingSett will suffer from any diminution in value of the Debtor's estate.[1]

23. In any event, the Zar Affidavit offers no evidence in support of its bald assertion that "the Board has no alternative source of funding for its legal fees". Indeed, the Zar Affidavit is devoid of any evidence of the inability of the Debtor's shareholders, the Debtor's guarantor, Mr. Zar, or others to fund the Debtor's legal costs. This omission should be fatal to the Purported Motion.

24. The Zar Affidavit also provides no explanation for why the Debtor "requires independent counsel so it can fulfil its obligations and act in the Company's best interest" at this stage in these receivership proceedings – which are by now well advanced – including what positions must be advanced by the Debtor that cannot be advanced by the Receiver or how the proposed retention of counsel will serve the best interests of the Debtor and the orderly administration of these receivership proceedings. As described in the ONCA's March 29 Reasons, Mr. Zar personally made the submissions in the Court of Appeal on the Debtor's behalf and proposes to do so again on the Purported Motion.

25. I believe that the real objective of the Purported Motion is a further effort by the Debtor to (i) delay or adjourn the hearing the Receiver's motion, scheduled for May 25, 2023, for the approval of, among other things, two additional sale transactions and a writ of possession and (ii) deplete KingSett's potential recovery. Unfortunately, the Debtor's "litigation playbook" is becoming all too familiar.

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[1] In circumstances where senior creditors are expected to suffer a significant shortfall, a request for payment of the Debtor's counsel's fees, if granted, will result in the Debtor's legal costs and disbursements being borne by KingSett.

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26. I affirm this affidavit in response to the Purported Motion and the Zar Affidavit, and for no other or improper purpose.

AFFIRMED REMOTELY by Daniel Pollack stated as being located in the City of Vancouver, in the Province of British Columbia, before me at the City of Oakville, in the Province of Ontario, on May 17, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

DocuSigned by:
Joshua Foster
166433D07B49432...

JOSHUA FOSTER
Commissioner for Taking Affidavits
(or as may be)

DocuSigned by:
Daniel Pollack
CE1C7913B195449...

DANIEL POLLACK

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THIS IS **EXHIBIT "A"** REFERRED TO IN THE AFFIDAVIT OF DANIEL POLLACK, AFFIRMED BEFORE ME THIS 17TH DAY OF MAY, 2023.

DocuSigned by:
Joshua Foster
166433D07B49432...

JOSHUA FOSTER
A Commissioner for taking Affidavits
(or as may be)

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SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-22-00674810-00CL **DATE:** 11 April 2022

NO. ON LIST: 02

TITLE OF PROCEEDING: KINGSETT MORTGAGE CORPORATION. v. 30 ROE INVESTMENTS CORP.

BEFORE JUSTICE: PENNY

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Richard B. Swan	KingSett	swanr@bennettjones.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Raymond Zar	Director of 30 Roe Investments Corp.	rz@roehamptoncapital.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Darren Marr	CIBC	Ben@chaitons.com
Rob Stellick	Paliare Roland Rosenberg Rothstein LLP	rstellick@agbllp.com
Massimo Starnino	Paliare Roland	max.starnino@paliareroland.com

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ENDORSEMENT OF JUSTICE PENNY:

This is a receivership application by Kingsett Mortgage Corporation against 30 Roe Investments Corp. Paliare Roland brings this motion to be removed as solicitor of record for its client, 30 Roe.

Paliare Roland was retained by the Client on February 21, 2022 to respond to the receivership application scheduled for February 22 before Cavanagh J. It took instructions from Mr. Zar. Paliare Roland sought an adjournment on behalf of the Client, which was granted, to March 28, 2022.

By February 23, Paliare Roland advised Mr. Zar that the Client should seek other counsel. On February 26, Paliare Roland advised Mr. Zar that it would be bringing a motion to be removed as counsel of record. Mr. Zar disagreed in both instances.

This matter came back before Cavanagh J. on March 8, 2022. The removal motion was scheduled for today, April 11; the receivership application was further adjourned to May 6, 2022. Cavanagh J.'s endorsement states "the Respondent is responsible for obtaining counsel, if necessary, and following a timetable to meet this hearing date".

Mr. Zar requested an adjournment of the Paliare Roland motion to cross examine Mr. Rosenberg. I denied that request. First, it was not made clear what would be gained by cross examination, given a number of undisputed facts relating to Paliare Roland's ability to act in the circumstances. In any event, the request was not made on a timely basis. Mr. Zar has had since March 8 to arrange for this cross examination but only made the request last Thursday, April 7, when it was too late.

The basis for Paliare Roland's decision to withdraw as counsel for the Client involves highly confidential matters which are no one else's business but the firm and the Client. As a result, the motion was conducted *in camera* without the participation of other parties to the litigation. Further, I will not be outlining the details of any of the grounds presented or the disagreements discussed during the submissions of both sides.

Suffice it to say that, considering the evidence as a whole, I am satisfied that the relationship between the Client, Mr. Zar and Paliare Roland has been irreparably damaged, lacks the fundamental requirements of trust and confidence and cannot continue. Indeed, Mr. Zar went so far as to say that Paliare Roland (as well as possibly Bennett Jones) may need to testify at the receivership application. On this basis alone, Paliare Roland could not possibly continue to act and Mr. Zar recognized and accepted that.

The May 6 return date for the receivership application was set on March 8 knowing of today's pending motion. The Client has had since February 23 to seek out new counsel.

In all of the circumstances, the order removing Paliare Roland as counsel of record for the Client is granted.

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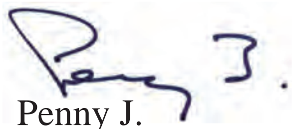
Paliare Roland agreed to return the retainer of $25,000 (on an entirely without prejudice basis). The Client has provided the banking details for that transfer.

Nothing in this endorsement affects Cavanagh J.'s ongoing management of this case or restricts the Client from responding to the receivership application on a timely basis as contemplated by the March 8 endorsement of Cavanagh J.

There is no order as to costs.



Penny J.

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THIS IS **EXHIBIT "B"** REFERRED TO IN THE AFFIDAVIT
OF DANIEL POLLACK, AFFIRMED BEFORE ME THIS
17TH DAY OF MAY, 2023.

DocuSigned by:
Joshua Foster
166433D07B49432...

JOSHUA FOSTER
A Commissioner for taking Affidavits
(or as may be)

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CITATION: KingSett Mortgage Corporation v. 30 Roe Investments Corp., 2022 ONSC 2777
COURT FILE NO.: CV-22-00674810-00CL
DATE: 20220509

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: KINGSETT MORTGAGE CORPORATION, Applicant

AND:

30 ROE INVESTMENTS CORP., Respondent

BEFORE: Cavanagh J.

COUNSEL: *Richard Swan*, *Sean Zweig*, and *Joshua Foster*, for the Applicant

Symon Zucker, for the Respondent

Ben Frydenberg and *Darren Marr* for Canadian Imperial Bank of Commerce

Chris Armstrong for proposed Receiver, KSV Restructuring Inc.

HEARD: May 6, 2022

ENDORSEMENT

Introduction

[1] The Applicant, Kingsett Mortgage Corporation, brings this application for an order appointing KSV Restructuring Inc. ("KSV") as receiver and manager, without security, of real property owned by the Respondent, 30 Roe Investments Corp., (the "Real Property") and other property as described in the Notice of Application (collectively, the "Property").

[2] For the following reasons, I grant the Applicant's application.

Procedural background

[3] The Real Property consists of nine residential condominium units within a thirty-five story, 397 unit, condominium known as "Minto 30 Roe" located at 30 Roehampton Avenue in Toronto. The Applicant is a second mortgagee in respect of the Real Property.

[4] This application was commenced by a Notice of Application issued on January 7, 2022. The application first came before me on January 17, 2022. At that appearance, the Respondent was not represented by legal counsel. Mr. Raymond Zar, a director and principal of the Respondent, requested an adjournment of the application to allow the Respondent to retain counsel and respond to the application. The request for an adjournment was supported by the first mortgagee, Canadian Imperial Bank of Commerce

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("CIBC"). I granted the request for an adjournment and the application was adjourned to be heard on February 22, 2022.

[5] On February 22, 2022, counsel who had just been retained appeared on behalf of the Respondent. There was evidence that the Respondent had made other attempts to retain counsel but had been unable to do so because of conflicts. Counsel for the Respondent requested an adjournment to prepare responding materials and respond to the application. This request was opposed by the Applicant. I granted the Respondent's request for an adjournment and the application was adjourned to March 28, 2022. I directed counsel to agree on a timetable for the application.

[6] A case conference was held before me on March 8, 2022. At that case conference, counsel for the Respondent advised that they were moving for an order removing them as lawyers of record for the Respondent. I was advised that the Respondent would be opposing this motion. A hearing date for this motion was set for April 11, 2022. As a result of the scheduling of this motion, I concluded that the hearing of the Applicant's application seeking the appointment of a receiver needed to be adjourned. The adjournment was opposed by the Applicant. A new hearing date for the application was set for May 6, 2022. In my endorsement, I wrote that "[t]he Respondent is responsible for retaining counsel, if necessary, and following a timetable to meet this hearing date".

[7] The motion by counsel for the Respondent to be removed as counsel of record was heard on April 11, 2022. On that day, Justice Penny released an endorsement and made an order removing counsel for the Respondent as counsel of record. The Respondent was served with the formal Order on April 20, 2022.

[8] A case management conference was held before me on April 20, 2022. This was arranged at the request of the Applicant to set a timetable for the hearing of the application on May 6. I approved a timetable and I directed the parties to comply with it.

[9] The Respondent retained new legal counsel on May 2, 2022. A supplemental affidavit of Mr. Zar was sworn on May 5, 2022. Some other documents relating to the Respondent's efforts to refinance were uploaded to CaseLines, including a letter of intent from Firm Capital Corporation dated May 4, 2022.

Analysis

[10] The issues raised at the hearing of the application were (i) whether the Respondent's request for an adjournment of the hearing should be granted, and, if not, (ii) whether the Applicant's application for the appointment of a receiver should be granted.

Request for adjournment

[11] The Respondent requested an adjournment of the hearing of the application for 30 days to allow time for the Respondent to complete the refinancing of the Real Property and pay out the second mortgage. The Applicant opposed this request. At the hearing, I denied the request for an adjournment. These are my reasons.

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[12] The Firm Capital letter of intent is not a binding commitment and is simply an expression of interest in providing refinancing. The Respondent has had many months to arrange to refinance. There is no assurance that if a further adjournment were to be granted for 30 days, as requested, the Respondent would be successful in paying out the indebtedness secured by the applicant's second mortgage.

[13] I granted adjournments to allow the Respondent to retain counsel and to accommodate the motion by former counsel to move to be removed as counsel of record. These adjournments were opposed by the Applicant. I set the hearing date for this application on February 22, 2022 that would having regard to the motion by former counsel for the Respondent to be removed as counsel of record.

[14] In his May 5, 2022 affidavit, Mr. Zar gives evidence of his attempts to retain counsel for the Respondent. According to his affidavit, Mr. Zar did not contact any prospective counsel between February 22, 2022 and April 11, 2022. After April 11, 2022, Mr. Zar contacted several counsel who had conflicts or were not available. Mr. Zucker was retained on May 2, 2022.

[15] In my view, the Respondent has not acted reasonably and in accordance with my February 22 and March 8, 2022 endorsements by not seeking to identify counsel who could represent the Respondent after February 22, 2022 and waiting until April 11, 2022 to contact new counsel who would be available to replace former counsel for the Respondent, if the motion by former counsel to be removed were to succeed. I made it clear in my March 8, 2022 endorsement that May 6, 2022 was a firm date, and that the Respondent was expected to act diligently to ensure that counsel was retained and able to meet this hearing date. In my view, there was ample time for the Respondent to do so if efforts to contact counsel who could act on this matter were made between February 22 and April 11, 2022.

[16] The Applicant's mortgage loan has been past due for many months. The Applicant is entitled to seek remedies to enforce payment of this loan. In the circumstances, I concluded that it would not be just to the Applicant to grant a further adjournment to accommodate the Respondent's continuing efforts to refinance. The request for an adjournment was denied.

Has the Applicant shown that it would be just or convenient for a receiver to be appointed?

Loan and security

[17] The Applicant is a party to a commitment letter dated March 29, 2019 with the Respondent pursuant to which the Applicant agreed to provide, among other things, a non-revolving demand loan secured by a second mortgage against the Real Property. This loan was originally advanced on April 8, 2019.

[18] The parties entered into four amendments to the original commitment letter which, among other things, increased the loan facility from $1,500,000 to $1,875,000 and provided three extensions to the maturity date to December 1, 2021. The Applicant's evidence is that as at December 13, 2021, the total indebtedness under the commitment letter, as amended, is $1,895,958.85.

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[19] As general and continuing security for the payment and performance of its obligations under the commitment letter, as amended, the Respondent granted the Applicant various security including (a) a second charge/mortgage in respect of the Real Property securing the principal amount of $1,875,000, (b) a General Assignment of Rents and Leases dated April 8, 2019 pursuant to which, among other things, the Respondent assigned to the Applicant all of its rights in and to the Leases and Rents (as defined in the Assignment of Rents) in respect of the Real Property, (c) an Assignment of Material Agreements dated April 8, 2019, (d) a General Security Agreement dated April 8, 2019 pursuant to which, among other things, the Applicant was granted a security interest in all of the present and future undertakings and property of the Respondent which is located at or related to or used or required in connection with or arising from or out of the Charged Property (as defined in the second mortgage).

Default by Respondent

[20] The original maturity date of the loan facility was in April 2021. The Applicant granted extensions to the maturity date to and until December 1, 2021. In the amendment letter dated October 25, 2021 in respect of the fourth amendment, the Respondent acknowledged that "there shall be no further extensions of the Term beyond December 1, 2021".

[21] On December 1, 2021, the Respondent failed to make its monthly interest payment. By letter dated December 6, 2021, the Applicant advised the Respondent that (a) as result of the defaulted payment of interest, the loan facility was in default and an event of default had occurred under the loan documents; (b) the December 1, 2021 interest default was particularly concerning because it was not the first interest-related default under the loan facility; (c) the loan facility matured on December 1, 2021; and (d) unless the Respondent paid the December interest payment by 4 o'clock p.m. on December 8, 2021, the Applicant would demand the immediate repayment of the loan facility and enforce the security it held.

[22] On December 13, 2021, the Applicant issued a demand letter to the Respondent advising that the mortgage was in default and demanding repayment of the indebtedness. The demand letter was delivered to the Respondent contemporaneously with a Notice of Intention to Enforce Security in accordance with s. 244 of the *Bankruptcy and Insolvency Act*. The Applicant demanded payment of $1,895,958.85.

[23] Mr. Zar submits that there is evidence that the Applicant implicitly agreed to extend the loan until April 1, 2022 by debiting the extension fee from the Respondent's account on January 4, 2022, and again in February 2022, and leaving the interest rate at 9%. Mr. Zar's evidence is that the Applicant only returned the extension fee after he brought it to the Applicant's attention in settlement talks. He states that it was a shock and surprise to him when he heard about the application seeking the appointment of a receiver.

[24] In the affidavit of the Applicant's Senior Director with responsibility for this loan, Daniel Pollack, he explains that the Applicant's finance department made an error in debiting the extension fee. A draft fifth amendment to the commitment letter (that, if agreed upon, would have extended the maturity date to January 1, 2022) had had been under

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consideration and would have provided for an extension fee. The draft fifth extension was not executed and did not become effective. When the error was discovered, the Applicant's finance department was instructed to correct the error (which was done when the Applicant debited the Respondent's account for the December interest payment, less the extension fee).

[25] I accept the evidence from Mr. Pollack that the extension fee was debited in error and, when the error was discovered, it was corrected. I do not accept the Respondent's submission that by debiting the extension fee in error, the Applicant should be taken to have implicitly agreed to extend the maturity date for the mortgage until April 1, 2022. I note that, in any event, April 1, 2022 has passed, and the mortgage debt remains unpaid.

[26] Section 243 (1) of the *BIA* and s. 101 of the *Courts of Justice Act* provide that the Court may appoint a receiver where it is just or convenient to do so.

[27] In determining whether it is just or convenient to appoint a receiver, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088, at para. 11.

[28] In *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866, Morawetz J., at para. 27, accepted the submission that while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. Morawetz J., at para. 28, accepted that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have a receiver appointed.

[29] In *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, Koehnen J., at paras. 43-44, held that when the court is dealing with a default under a mortgage, the relief becomes even less extraordinary, citing *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511, at para. 20. Koehnen J., at para. 45, referenced four additional factors set out by Farley J. in *Confederation Life*, at paras. 19-24, that the court may consider in determining whether it is just or convenient to appoint a receiver:

a. the lenders' security is at risk of deteriorating;

b. there is a need to stabilize and preserve the debtors' business;

c. loss of confidence in the debtors' management; and

d. positions and interests of other creditors.

[30] In the third and fourth amendments to the commitment letter, the Respondent consented to the Applicant's appointment of a receiver, either privately or court appointed, in the event of a default by the Respondent beyond the applicable cure period. In the General Security

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Agreement, the Respondent agreed that after the occurrence of an event of default, the Applicant will have the right to appoint a receiver.

[31] On this application, there is no evidence that the second mortgage against the Real Property is at risk of deteriorating. The evidence is that the condominium units are rented and rents are being paid. The Respondent is continuing to pay interest on the mortgage debt. The first mortgagee, CIBC, is willing to continue to defer and forbear from taking any enforcement steps in connection with its mortgages for a period of thirty days commencing May 6, 2022, in order to allow the Respondent an opportunity to complete its refinancing with Firm Capital Corporation. CIBC does not take a position in opposition to the application.

[32] Mr. Pollack has stated in his affidavit that the Applicant has lost confidence in the Respondent's management to continue to satisfy the Respondent's obligations, obtain refinancing and manage the Real Property. I do not regard this to be a statement in the air and without objective evidentiary support, as the Respondent submits. The Applicant's mortgage loan matured on December 1, 2021 and the Respondent has had five months to refinance but has not done so. The Respondent submits that the appointment of a receiver is an extreme remedy that is not needed when "less aggressive" remedies are available, but the only alternative course of action the Respondent submits should have been taken was for the Applicant to have commenced private power of sale proceedings. The Applicant was under no obligation to do so, and has brought this application to seek a remedy to which the Respondent has contractually agreed.

[33] The Respondent submits that there is evidence that the Applicant is not acting in good faith by seeking to appoint a receiver. In support of this submission, the Respondent relies on the evidence of Mr. Zar in his May 5, 2022 affidavit that in discussions between his former lawyer and a lawyer for the Applicant, the Applicant's lawyer advised "in highly defamatory terms what his clients thought of me and wanted to do to me". Mr. Zar states that it was clear to him and his former counsel that the Applicant is using the application to appoint a receiver to cause him significant harm, such that this application is excessive and unnecessary, and is brought in bad faith.

[34] The Applicant's application was brought after extensions of the maturity date for the loan had been given, the mortgage debt had matured, and demands for payment had been made. This, objectively, provides a good faith basis for this application. The information given by Mr. Zar in his affidavit (that he obtained from the Respondent's former counsel) of what was said in the telephone conversation in question is vague and accompanied by Mr. Zar's characterization of what was said. Mr. Zar does not recite any particular statements that were made by the Applicant's counsel to the Respondent's former counsel. If Mr. Zar's hearsay evidence is admitted into evidence notwithstanding rule 39.01(5) of the *Rules of Civil Procedure*, it is far from sufficient to allow me to draw the inference I am invited to make, that the Applicant lacks good faith in bringing this application. I do not draw this inference.

[35] The Applicant's loan has been overdue since December 1, 2021. The Applicant is entitled to take steps under its security to enforce payment of the indebtedness owing to it. The

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Applicant is not required to do so only through private power of sale proceedings. The appointment of a receiver will provide an effective and appropriate means to realize on the mortgage security by a court-appointed officer who owes duties to all stakeholders.

[36] I have considered the relevant circumstances and I am satisfied that the Applicant has shown that the appointment of receiver is just and convenient in the circumstances.

Disposition

[37] For these reasons, I grant the Applicant's application.

[38] Order to issue in form of Order signed by me today.

Digitally signed by Mr. Justice Cavanagh

Cavanagh J.

Date: May 9, 2022

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THIS IS **EXHIBIT "C"** REFERRED TO IN THE AFFIDAVIT
OF DANIEL POLLACK, AFFIRMED BEFORE ME THIS
17TH DAY OF MAY, 2023.

DocuSigned by:
Joshua Foster
166433D07B49432...

JOSHUA FOSTER
A Commissioner for taking Affidavits
(or as may be)

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COURT OF APPEAL FOR ONTARIO

CITATION: KingSett Mortgage Corporation v. 30 Roe Investments Corp.,
2022 ONCA 479
DATE: 20220617
DOCKET: M53449 & M53510 (C70638)

Brown, Roberts and Paciocco JJ.A.

BETWEEN

KingSett Mortgage Corporation

Applicant
(Moving Party/Responding Party)

and

30 Roe Investments Corp.

Respondent
(Responding Party/Moving Party)

Richard Swan and Sean Zweig, for the moving party (M53449)/responding party (M53510) KingSett Mortgage Corporation

Nancy J. Tourgis and Laney Paddock, for the responding party (M53449)/moving party (M53510) 30 Roe Investments Corp.

Mark Dunn, for KSV Restructuring Inc. in its capacity as court-appointed receiver

Darren Marr, for Canadian Imperial Bank of Commerce

Heard: June 13, 2022

On appeal from the order of Justice Peter J. Cavanagh of the Superior Court of Justice, dated May 9, 2022, with reasons reported at 2022 ONSC 2777.

Brown J.A.:

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I. OVERVIEW

[1] The respondent, KingSett Mortgage Corporation ("KingSett"), moves to quash the appeal brought by 30 Roe Investments Corp. ("30 Roe") from the order of Cavanagh J. dated May 9, 2022 (the "Receivership Order"). That order appointed KSV Restructuring Inc. as the receiver and manager of nine residential condominium units owned by 30 Roe in a 397-unit condominium building located at 30 Roehampton Avenue, Toronto (the nine units are hereafter referred to as the "Real Property").

[2] 30 Roe opposes the motion to quash, arguing that it enjoys an appeal as of right from the Receivership Order under s. 193(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").[1] As well, it moves for leave to appeal the Receivership Order pursuant to s. 193(e) of the *BIA*.

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[1] *BIA* s. 193 provides as follows:

> 193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of 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 of or 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.

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[3] At the conclusion of the hearing of the motions, the panel granted KingSett's motion to quash and dismissed 30 Roe's motion for leave to appeal with reasons to follow. These are those reasons.

II. BACKGROUND FACTS

[4] On April 8, 2019, KingSett advanced a non-revolving demand loan to 30 Roe, which originally was for the principal amount of $1.5 million, but later increased to $1.875 million. The advance was secured, in part, by a second mortgage on the Real Property. The advance is also secured by an April 8, 2019 General Security Agreement and other security.

[5] The Canadian Imperial Bank of Commerce ("CIBC") holds a first mortgage on the Real Property.

[6] The original loan maturity date was in April 2021. The loan facility was extended several times, with the final maturity date set for December 1, 2021.

[7] 30 Roe defaulted on the December 1, 2021 interest payment, as it had on some other interest payments, and it did not pay out the loan upon maturity. KingSett served a notice of default. On December 13, 2021, KingSett issued a demand letter and gave notice of intention to enforce security in accordance with s. 244 of the *BIA.*

[8] As of December 31, 2021, the amount due under the loan was $1,895,958.85.

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[9] KingSett applied on January 7, 2022 for the appointment of a receiver and manager of the Real Property pursuant to s. 243(1) of the *BIA* and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). 30 Roe sought and received three adjournments of the application, including one to enable the hearing of a motion brought by former counsel to get off the record. Cavanagh J. approved a timetable for all pre-hearing steps. Ultimately, KingSett's application was scheduled to be heard on May 6, 2022.

[10] On that date, 30 Roe sought a further adjournment. Cavanagh J. refused an adjournment for two reasons: (i) although 30 Roe had obtained an expression of interest to provide refinancing, the letter of intent was not a binding commitment letter and the application judge concluded there was no assurance 30 Roe would secure refinancing to pay out its debt to KingSett if a further adjournment was granted; and (ii) 30 Roe had not acted reasonably or in accordance with prior court endorsements to find new counsel.

[11] As of the hearing date, the state of affairs regarding the Real Property was as follows: (i) CIBC took no position in opposition to the application; (ii) all units were rented and rents were being paid; (iii) 30 Roe was paying interest on the second mortgage debt; and (iv) CIBC was willing to defer enforcement steps for 30 days commencing May 6, 2022 to allow 30 Roe an opportunity to put in place refinancing.

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[12] On May 9, 2022, Cavanagh J. made the Receivership Order.

[13] The next day, May 10, 2022, 30 Roe delivered a notice of appeal in which the grounds of appeal are essentially three-fold: (i) the motion judge erred in refusing its fourth adjournment request; (ii) he misapplied the factors applicable to whether it would be just and convenient to appoint a receiver; and (iii) he erred in failing to recognize that KingSett had impliedly extended the loan facility until April 1, 2022, by debiting the amount of an extension fee to 30 Roe's mortgage debt account in January and February 2022. (The application judge accepted KingSett's evidence that the debits were the result of an administrative error, which KingSett had reversed once advised of the mistake.)

[14] KingSett moves to quash the appeal on the basis that 30 Roe does not enjoy an appeal of right under *BIA* s. 193 but requires leave to appeal.

[15] 30 Roe takes the position that an appeal lies as of right under *BIA* s. 193(c), as the "the property involved in the appeal exceeds in value ten thousand dollars". 30 Roe has brought a separate motion for leave to appeal the Receivership Order pursuant to *BIA* s. 193(e).

III. KINGSETT'S MOTION TO QUASH

[16] In its jurisprudence regarding the appeals of orders appointing a receiver under *BIA* s. 243 and *CJA* s. 101, this court has consistently made two points:

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(i) Where a receivership order is made pursuant to both *BIA* s. 243 and *CJA* s. 101, the more restrictive appeal provisions of *BIA* s. 193 govern the rights of appeal and appeal routes: *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269, 69 C.B.R. (6th) 13, at paras. 66 and 67; *Buduchnist Credit Union Limited v. 2321197 Ontario Inc.*, 2019 ONCA 588, 72 C.B.R. (6th) 245, at paras. 10 and 11;

(ii) No appeal as of right exists under *BIA* ss. 193(a) or (c) from an order appointing a receiver: *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228, at para. 38; *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at paras. 15-17; and *Buduchnist*, at para. 12.

[17] In an effort to avoid the effect of that jurisprudence, 30 Roe fashions two arguments about the availability of a right of appeal under *BIA* s. 193(c). The first draws upon several decisions of judges of this court sitting in Chambers; the second is based on a sales approval “carve-out” provision in the Receivership Order.

[18] First, 30 Roe relies on several Chambers decisions of this court to contend that s. 193(c) authorizes an automatic right of appeal from a receivership order. The first decision is that of the Chambers judge in *Comfort Capital Inc. v. Yeretsian*, 2019 ONCA 1017, 75 C.B.R. (6th) 217. However, that case did not involve an

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appeal from an order appointing a receiver; the nature of the order in *Comfort Capital* was quite different. There, the order under appeal directed payment of part of the proceeds of the receiver's sale of property to one set of claimants that was otherwise payable to another claimant. The order resulted in a loss to the second claimant and, therefore, the nature of the order fell within *BIA* s. 193(c). *Comfort Capital* has no application to the order at issue in the present case.

[19] The other Chambers decisions are those in *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185, 78 C.B.R. (6th) 165[2] and *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 202, 88 C.B.R. (6th) 1. Neither case provides support for 30 Roe's submission that *BIA* s. 193(c) grants an automatic right of appeal from a receivership order, because neither case involved an attempt to appeal a receivership order. The order at issue in *Bodanis* was a bankruptcy order; that in *Shaver-Kudell* an order declaring that a bankrupt's debts and liabilities would survive his discharge from bankruptcy.

[20] Moreover, 30 Roe's submission based on those Chambers decisions ignores the more recent panel decision of this court in *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228. In the course of discussing the

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[2] While the court concluded that *BIA* s. 193(c) provided for the right to appeal a bankruptcy order, the Chambers judge cancelled the automatic stay on appeal under *BIA* s. 195.

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types of orders that fall outside of s. 193(c), the court in *Hillmount Capital* stated, at para. 38:

> By its nature the second type of order - one that does not bring into play the value of the debtor's property - would not result in a loss or put property value in jeopardy. For example, it is well-established in the *BIA* s. 193(c) jurisprudence that an order appointing a receiver or interim receiver usually does not bring into play the value of the debtor's property as it simply appoints an officer of the court to preserve and monetize those assets subject to court approval. [Emphasis added.]

[21] 30 Roe's second argument is based on para. 3(k) of the Receivership Order, which deals with the powers of the receiver and authorizes the receiver to sell any part of the Real Property out of the ordinary course of business "without the approval of this Court in respect of any transaction not exceeding $250,000, provided that the aggregate consideration for all such transactions does not exceed $500,000."

[22] Drawing on that provision, 30 Roe argues as follows: (i) in *Pine Tree Resorts* the Chambers judge described the nature of a receivership order as one that does not bring into play the value of the debtor's property but simply appoints an officer of the court to preserve and monetize those assets subject to court approval: at para. 17; (ii) in *Pine Tree Resorts* the court relied on that description of the nature of a receivership order to conclude that *BIA* s. 193(c) does not provide an automatic right of appeal from such an order; (iii) however, para. 3(k) of the Receivership Order identifies a sub-set of 30 Roe's property that the receiver may

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sell without applying for court approval; so, therefore, (iv) the nature of the Receivership Order containing para. 3(k) differs from that which led the court in *Pine Tree Resorts* to conclude that no appeal as of right existed. It follows, according to 30 Roe, that the presence of the para. 3(k) carve-out in the Receivership Order places that order in the class of orders for which an automatic right of appeal exists under *BIA* s. 193(c).

[23] This submission is not persuasive. First, 30 Roe does not cite any authority involving a receivership order to support its proposition. Second, as KingSett points out, the receivership order made in *Pine Tree Resorts* contained the same carve-out granting the receiver the power to sell assets without court approval in any transaction not exceeding $250,000. The presence of such a carve-out provision did not affect Blair J.A.'s characterization of the *Pine Tree Resorts* receivership order as one that did not bring into play the value of the debtor's property but simply appointed an officer of the court to preserve and monetize those assets subject to court approval: at para. 17. No doubt Blair J.A. reached that conclusion in part because the initial receivership order itself granted court approval for the monetization of assets of less than $250,000. As well, while a sale transaction of less than $250,000 would not require a further approval motion, the court ultimately reviews the receiver's conduct for such transactions as part of its periodic review and approval of receiver's reports. Accordingly, the presence of a "carve-out" provision such as para. 3(k) in the Receivership Order does not alter the essential

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nature of that order: namely, an order that does not bring into play the value of the debtor's assets for the purpose of a *BIA* s. 193(c) analysis.

[24] In its notice of appeal, 30 Roe also asserts that an appeal to the Court of Appeal is provided under *BIA* s. 195.[3] With respect, that assertion does not accurately describe the operation of s. 195, which deals with stays of orders pending appeal to an appellate court, not with when rights of appeal lie, or with appeal routes.

[25] To summarize, two recent panel decisions of this court, *Buduchnist* and *Hillmount Capital*, confirmed the court's jurisprudence that no appeal as of right exists under *BIA* s. 193(c) from an order appointing a receiver. The Receivership Order was made under *BIA* s. 243(1); *BIA* s. 193 therefore governs the availability of appeals; with the result that 30 Roe does not enjoy an automatic right to appeal the Receivership Order under *BIA* s. 193(c). Accordingly, 30 Roe must seek leave to appeal pursuant to *BIA* s. 193(e).

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[3] *BIA* s. 195 states:

> Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or 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.

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IV. 30 ROE'S MOTION FOR LEAVE TO APPEAL

[26] The test for leave to appeal under *BIA* s. 193(e) is well-established:

- Does the proposed appeal raise an issue of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole and therefore is one that an appellate court should consider and address?
- Is the proposed appeal *prima facie* meritorious and does it involve a point that is of significance to the proceeding?
- Would the proposed appeal unduly hinder the progress of the bankruptcy/insolvency proceedings?

See: *Pine Tree Resorts*, at para. 29; *Buduchnist*, at para. 17; *Essar Steel Algoma Inc. (Re)*, 2017 ONCA 478, 49 C.B.R. (6th) 259, at para. 19.

Issue of general importance

[27] The proposed appeal does not raise an issue of general importance to insolvency practice or to the administration of justice as a whole. The grounds of appeal are rooted in the specifics of the relationship between a mortgagor – 30 Roe – and a mortgagee – KingSett, including the effect on the maturity date of the loan facility by KingSett debiting an extension fee against 30 Roe's mortgage account in January and February 2022. It is also grounded in the fact-specific, discretionary decision of the application judge to refuse a fourth adjournment request by 30 Roe.

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Merits of the appeal

[28] Nor does the notice of appeal disclose a *prima facie* meritorious appeal. The application judge's reasons disclose that he fairly considered all relevant factors in refusing the fourth adjournment request, especially in circumstances where, by the May 6, 2022 hearing date, it was clear 30 Roe had no ability to make payments of principal, remained in default, and offered no tangible prospect of refinancing. There was nothing premature or disproportionate about the application judge's appointment of a receiver.

[29] 30 Roe argues that r. 15.04(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 gave it the right until May 20, 2022 to appoint new counsel, with the consequence that the scheduled May 6 hearing had to be adjourned until after that date. 30 Roe's submission is without any merit. During the course of case managing the matter, the application judge set a timetable that governed the date of the hearing. That timetable took precedence over any time specified in r. 15.04(6). As the application judges stated at para. 15 of his reasons, "I made it clear in my March 8, 2022 endorsement that May 6, 2022 was a firm date". In that circumstance, the language of r. 15.04(6) that a corporation must appoint counsel "within 30 days" after receiving the order removing former counsel from the record has no effect on the hearing date already set by a judge. It should go without saying that where a removal order is made in the face of a hearing date fixed by the judge

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managing an application, the corporation obviously must appoint new counsel before the hearing date or risk the hearing proceeding without representation.

[30] Finally, 30 Roe has not demonstrated any palpable and overriding error or unreasonableness in the application judge's conclusion, at para. 15, that 30 Roe "has not acted reasonably and in accordance with my [prior endorsements] by not seeking to identify counsel who could represent it …"

[31] As to the ground of appeal that the application judge failed to have regard to the evidence that KingSett debited 30 Roe's mortgage account for extension fees in January and February, 2022, the reasons disclose that the application judge dealt squarely with that issue, accepting KingSett's explanation that the debits were simply administrative errors: at paras. 23-25.

[32] That conclusion by the application judge was reasonable in light of the evidence that: (i) 30 Roe acknowledged in the October 25, 2021 fourth amendment letter that "there shall be no further extensions of the Term beyond December 1, 2021"; and, (ii) KingSett sent a December 13, 2021 demand letter and notice of intention to enforce to 30 Roe – acts inconsistent with granting an extension of the maturity date.

[33] According to the affidavit of a director of 30 Roe, Raymond Zar, the debtor also takes the position that the maturity date of the second mortgage was extended until April 1, 2022 as he had sent a December 16, 2021 email to KingSett

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requesting an extension of the maturity date to that time. However, KingSett did not respond to that email, and the record contains no evidence that KingSett granted such an extension. Instead, KingSett moved to enforce its security. In any event, the April 1, 2022 date has come and gone, and there is no evidence that 30 Roe has paid the mortgage debt. It remains in default.

[34] Finally, the reasons of the application judge do not disclose that his analysis was based on any error of law. While 30 Roe obviously does not agree with how the application judge weighed the various factors relevant to whether a receiver should be appointed, his decision to appoint a receiver was not unreasonable given 30 Roe's default and inability to cure its default.

[35] Accordingly, the proposed appeal is not *prima facie* meritorious.

Effect of an appeal on the progress of the receivership

[36] Finally, the proposed appeal would unduly hinder the progress of the administration of the receivership. Granting leave would trigger the automatic stay contained in *BIA* s. 195, thereby preventing the receiver from exercising its power under the Receivership Order to market and sell the Real Property. No purpose would be served by such a delay. It is apparent from the record that 30 Roe has been unable to secure third party financing to take out the KingSett second mortgage notwithstanding several extensions of the mortgage maturity date and the lapse of almost half a year since KingSett initiated its receivership application.

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[37] To delay the ability of KingSett to enforce its second mortgage – the validity and enforceability of which are not in dispute – would be unfair to KingSett, especially given 30 Roe's consent, in the third and fourth amendments to the commitment letter, to KingSett's appointment of a receiver, either privately or court-appointed, in the event of a default by 30 Roe going beyond the applicable cure period.

Summary

[38] For these reasons, the panel did not grant 30 Roe leave to appeal the Receivership Order.

V. DISPOSITION

[39] As stated at the end of the hearing, KingSett's motion to quash 30 Roe's appeal C70638 is granted and 30 Roe's motion for leave to appeal is dismissed.

[40] As agreed by the parties, KingSett is entitled to its costs of both motions fixed in the aggregate amount of $15,000, inclusive of disbursements and applicable taxes.

Released: June 17, 2022 JS

J.A.

I agree. L.B. Roberts J.A.

I agree - J.A.

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THIS IS **EXHIBIT "D"** REFERRED TO IN THE AFFIDAVIT
OF DANIEL POLLACK, AFFIRMED BEFORE ME THIS
17TH DAY OF MAY, 2023.

DocuSigned by:
Joshua Foster
166433D07B49432...

JOSHUA FOSTER
A Commissioner for taking Affidavits
(or as may be)

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Court File Number: CV-22-00674810-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Kingsett Mortgage Corporation
Plaintiff(s)

AND

30 Roe Investments Corp
Defendant(s)

Case Management ☐ Yes ☑ No by Judge: ____________

Counsel	Telephone No:	Facsimile No:
see counsel slip		

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: ____________
☐ Time Table approved (as follows):

The Receiver brings this motion seeking two orders:
(1) an order requiring the Respondent and its principal Raymond Zar ("Zar") to deliver various Records and Property to the Receiver by specified timelines all of which is set out in the draft order;
(2) a Sales Process Approval Order.

20 July 22
Date

[signature]
Judge's Signature

☑ Additional Pages 13 total

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Judges Endorsment Continued

The motions were heard by me on July 18/22. At the motion I granted the relief sought in both motions with reasons to follow. I am now providing those reasons.

I will now deal with each motion in turn.

① The Motion to Compel Production:

The Respondent did not meaningfully oppose this motion, but rather generally submitted that it had been generally co-operative.

The Record does not support this submission.

The Receivership Order provides that the Receiver shall take possession of and exercise control over the Property, and requires all persons (including the Respondent and Zar) to deliver all Property to the Receiver upon the

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Judges Endorsment Continued

Receiver's request.

Despite repeated requests, as set out in the Receiver's First Report, the Receiver has been unable to obtain a number of Records and Properties from the Respondent including, critically, a list of creditors and details of all Property.

A second order should not be necessary as the Respondent should have complied with the First Receivership Order.

I agree with the Receiver, however, that it is appropriate to grant this order to compel production of specific items, as set out in the order to ensure both the Respondent and Zar are full placed on notice of their duty to comply.

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Judges Endorsment Continued

I agreed to a tight timeline given the long outstanding failure of the Respondent Zar to comply with the provisions of the Receivership Order and the importance of the Records and Property sought.

All of the Records and Property sought are relevant and important to the Receivership.

(2) The Sales Process Approval Order.

The Respondent raises two primary objections to this order.

First, the Respondent submits that he has obtained refinancing to repay the Kingsett loan and discharge the Receiver.

I do not accept this is the case for a number of reasons:

- The purported refinancing surfaced the morning of the

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Judges Endorsment Continued

motion. This is the second time that the Respondent has delivered a commitment for purported financing on the eve of a hearing. Justice Cavanagh rejected similar type financing in his May 9/22 decision and his reasons resonate here (see para 12).

- The proposed financing does not satisfy the Kingsett obligation, CIBC arrears and amounts owing to CRA/RBC/prop taxes/Receiver fees and this assumes there are no other debts, which I will not do, given the Respondent's failure to provide a list of its creditors to the Receiver.
- Zar has advised the Receiver that he would fund any shortfall, but when the Receiver asked for

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Judges Endorsment Continued

evidence that he could do so, he did not reply.

- The purported financing is subject to numerous conditions precedent – in favour of the proposed lender. These include staying this proceeding, satisfactory appraisal reports off values of at least $9.956 million (which values would higher than previous assessments), need to provide info for a credit review and other conditions – none of which the Respondent has indicated it can do in a timely way. Nor is there any belief the lender would accept the responses provided.
- The COA, in dismissing the Respondent's appeal, of Justice Cavanagh's decision, noted (at para 36) that the Respondent has had a

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Judges Endorsment Continued

lengthy amount of time to obtain financing and has failed to do so. The same rings true again where the Respondent brings to this Court last minute, conditional and here, insufficient, speculative financing.

Last, it is worth noting that Respondent's counsel spent very little time responding to the above concerns, rather focussing on the Respondent's second objection to the Sales Process Order which I will now turn to.

The second objection again raised the day of the hearing when Zar filed a 2½ page affidavit, is that the methodology used by the Receiver to market the 4 Units is wrong-headed.

Zar deposes that the entire

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Judges Endorsment Continued

floor containing the 9 Units (which comprise the Penthouse Floor) should be sold en masse, essentially as an income producing hospitality-type of model akin to a hotel.

The Respondent relies mainly on the fact that there is security in the hall, housekeeping and internet services to support its view that its model for sale ought to be preferred.[1]

It also submits that it was short served with this motion and did not have a chance to adequately respond by obtaining a business valuation.

On the other hand, the Receiver (again supported by Kingsett) submits that the Respondent's submissions ought to be rejected. The Receiver points to the fact

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1. The Respondent submits that these services make the Units an attractive business opportunity.

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Judges Endorsment Continued

that the Respondent has not provided any evidence to support its claim that an en masse/going concern sale (which would presumably be rented out via Airbnb or Tides co.) is preferrable to the Receiver's preferred strategy. Instead it relies on Zar's brief, bare affidavit delivered the day of the hearing. Zar of course, says the Receiver lacks objectivity, and has delayed this matter and pursued an unsuccessful appeal.

The Receiver, insofar as the merits are concerned, also points to an earlier group of appraisal reports, the previously relied on by the Respondent that concluded the sale of individual units, instead of a going concern business, was

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Judges Endorsment Continued

preferrable.

It bears noting that the Units are located in a condominium building w/o hotel services or similar mixed use purposes.

The Receiver further submits that, pursuant to the Receivership Order, which grants it broad discretion, it has solicited proposals from four realtors with extensive experience with the building; engaged in discussions with three of them who submitted proposals; and, selected HomeLife to act as the listing agent.

HomeLife had the lowest commission rate and the lead agent, Erkan Sen, has extensive experience selling Units in this building. HomeLife is also a large, well-recognized

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Judges Endorsment Continued

brokerage.

HomeLife has proposed a process where two of the Units are listed for sale, so as not to depress the market.

Extensive marketing will take place and the Receiver will of course determine, subject to Court approval, whether to accept offers.[2]

HomeLife and the Receiver believe this Sales Process is commercially reasonable and provides broad exposure. This also potentially allows the company to refinance.

Primarily for the above reasons I approved the Sales Process.

I further do not accept that the Respondent dealt with the motion on short notice.

It has known of the date of the motion since June 22/22

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2. The entire Sales Process is set out in Section 4.0 of the Receiver's First Report which I have reviewed

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Judges Endorsment Continued

and was well aware before that, that the Receiver was pursuing a sale. The materials were served on Feb 7/22 and no adjournment was sought.

The submission of short notice is also somewhat ironic given the Respondents' history of delay and providing materials at the last moment.

I also reject another argument raised at that hearing and dealt with briefly in Zar's affidavit that the values of the Receiver are too low. Again, HomeLife is well qualified to set a sales price for the individual units when marketing begins.

In any event, any sale is subject to Court approval.

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Further, nothing in the aforementioned orders precludes the Respondent from attempting to secure financing and satisfy its obligations.

Last, I am concerned that the Respondent's last minute submissions if accepted (and I reject them on the merits) would lead to intolerable delay to the detriment of the creditors in circumstances where the Respondent has had every opportunity to remedy its defaults.

[signature]

Judges Initials [initials]

THIS IS **EXHIBIT "E"** REFERRED TO IN THE AFFIDAVIT
OF DANIEL POLLACK, AFFIRMED BEFORE ME THIS
17TH DAY OF MAY, 2023.

DocuSigned by:
Joshua Foster
166433D07B49432...

JOSHUA FOSTER
A Commissioner for taking Affidavits
(or as may be)

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Court File Number: CV-22-00674810-00CL

Superior Court of Justice
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FILE/DIRECTION/ORDER

Kingsett Mortgage Corporation
Plaintiff(s)

AND

30 Roe Investments Corp.
Defendant(s)

Case Management ☐ Yes ☑ No by Judge: ____________

Counsel	Telephone No:	Facsimile No:
see counsel slip - attached		

☑ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: ____________
☐ Time Table approved (as follows):

This matter appeared before me on December 14/22.
The Receiver brought a motion seeking amendments to the Sales Process and other related relief.
At the conclusion of the motion I granted the relief sought.[1] Counsel forwarded a draft Order which I have signed and attached to this

20 Dec 22
Date

[signature]
Judge's Signature

☑ Additional Pages seven total

1. Subject to one amendment discussed below.

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endorsement. The order shall go as of Dec 14/22, as amended.

Raymond Zar attended the motion. He is the principal of the Respondent. Notwithstanding that he has not sought leave to represent the Respondent, pursuant to Rule 15, I allowed him to make submissions.

Although the Respondent filed no materials, Mr Zar made a number of allegations against the Receiver, Applicant and others.

Mr Zar asked that I not proceed with the motion until investigations could be carried out and claimed that it was the duty of the Superior Court to carry out the investigations. I disagreed.

Mr Zar further asked me to recuse myself after I refused to

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Judges Endorsment Continued

grant him permission to record the proceeding and advised that he planned to conduct a press conference and broadcast the zoom hearing. As a result, I issued an endorsement on an urgent basis on Dec 14/22 prohibiting him from broadcasting or publishing the hearing and to destroy any recordings that he might have made.

Insofar as the motion itself is concerned, the motion to amend the Sales Process essentially involved two changes - both of which are fair and reasonable.

The first amendment involved changing the listing agent. The Receiver proposes to use Gloria Yeung of Remax. Ms Yeung is well qualified to act, as is Remax, based

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Judges Endorsment Continued

on the comments in the Receiver's Second Report, which I accept.

Mr Zar did not note any problems with Ms. Yeung or Remax. His comments were generally directed at the previous listing agent who is being replaced; thus, he should be pleased with a new agent being appointed.

I also note that Remax's Commission will be 0.5% higher than the previous agent's commission, but I agree with the Receiver that the change will assist in attracting buyers since it goes to the cooperating brokerage. Mr Zar did not raise any real opposition in this regard.

The second amendment involves the Receiver's request that it be allowed to sell all of the units, including those being occupied.

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Once again, based on the contents of the Second Report this is fair and reasonable. Market dynamics are changing and the market is becoming more challenging. The Receiver ought to be allowed greater flexibility to deal with these challenges.

There also may be tax implications which cannot yet be analyzed, as the Respondent has not yet provided the Receiver with the necessary information. Mr Zar also raised concerns about this issue. The tax implications may be relevent and this can be dealt with at a later date, if necessary, and particularly when approval for the sales is sought.

Both amendments are therefore, as noted, fair and reasonable. I

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Judges Endorsment Continued

pause here to note that a person, apparently Mr Zar's mother, recently occupied one of the condominium units. She was removed by police, but now may be occupying another unit. Such occupation is improper given the ongoing Sales Process and the sales ought to proceed despite any occupation. Details of this issue are set out in the Receiver's Supplement to the Second Report.

I am also prepared to approve the contents of the Second Report and the activities set out therein. As noted, Mr Zar has been critical of ~~the~~ some of the Receiver's activities, but the Respondent filed no materials and my review of the activities satisfies me that approval is appropriate.

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Judges Endorsment Continued

I am, however, deferring approval of the Receiver's activities in the Supplement to the Second Report to a further hearing. This report was delivered the evening before the hearing. The Respondent ought to have an opportunity to respond, if it wishes. I have therefore deferred this portion of the order.

The remainder of the ancillary relief sought is fair and reasonable.

Last, as I did at the hearing, I urge Mr Zar to retain counsel to deal with this matter on behalf of the Respondent.

McEwen J

Judges Initials TM

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THIS IS **EXHIBIT "F"** REFERRED TO IN THE AFFIDAVIT
OF DANIEL POLLACK, AFFIRMED BEFORE ME THIS
17TH DAY OF MAY, 2023.

DocuSigned by:
Joshua Foster
166433D07B49432...

JOSHUA FOSTER
A Commissioner for taking Affidavits
(or as may be)

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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
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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
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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

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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.

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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(l) 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.

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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

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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" withing 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.

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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

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THIS IS **EXHIBIT "G"** REFERRED TO IN THE AFFIDAVIT
OF DANIEL POLLACK, AFFIRMED BEFORE ME THIS
17TH DAY OF MAY, 2023.

DocuSigned by:
Joshua Foster
166433D07B49432...

JOSHUA FOSTER
A Commissioner for taking Affidavits
(or as may be)

DocuSign Envelope ID: FD251E10-F08D-450A-91E8-A87BFF6C4B9C

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

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

DATE: 10-MAR-2023

TITLE OF PROCEEDING

KINGSETT MORTGAGE CORPORATION
v.
30 ROE INVESTMENTS CORP.

BEFORE JUSTICE STEELE

NAMES OF COUNSEL AND PARTY:

☒ APPLICANT(S)
Richard Swan
(Counsel to KINGSETT MORTGAGE CORPORATION)
☐ PLAINTIFF(S)

PHONE

EMAIL swanr@bennettjones.com

NAMES OF COUNSEL AND PARTY:

RESPONDENT(S)
☒ **Lucas Strezos and Mervyn D. Abramowitz– Moving to get off the Record**
(Counsel to 30 ROE INVESTMENTS CORP.)
☐ RESPONDENT(S)
☐ DEFENDANT(S)
☐ DEFENDANT(S)

PHONE

EMAIL lstrezos@blaney.com; mabramowitz@blaney.com

PHONE

EMAIL

NAMES OF COUNSEL AND OTHER PARTIES:

Mark Dunn
(Counsel to The Receiver, KSV RESTRUCTURING)
Brian N. Radnoff and James M. McKeon
☒ (Counsel to 729171 ALBERTA INC.)
Wendy Ngai
(Counsel to ANGELA FONG AND JACK FONG in CV-22-00676835-0000)
☐

PHONE

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ENDORSEMENT OF JUSTICE STEELE:

[1] This is a motion by Blaney McMurtry LLP ("Blaneys") to be removed as lawyer of record for 30 Roe Investments Corp. ("30 Roe") pursuant to Rule 15.04 of the *Rules of Civil Procedure* in respect of this matter (Kingsett Mortgage Corporation v. 30 Roe Investments Corp.) (the "Kingsett Matter").

[2] Blaneys also seeks to be removed as lawyer of record for Raymond Zar and companies in respect of which Mr. Zar is the principal in four other matters currently before this Court: Epic Paving & Contracting Ltd. v. 170 Willowdale Investment Corp. c.o.b. as The Willowdale Hotel, Raymond Zar and 729171 Alberta Inc. (CV-21-00671802-0000) (the "Epic Paving Matter"), Jack Fong and Angela Fong v. 170 Willowdale Investments Corp. and Raymond Zar (CV-22-00676835-0000) (the "Jack and Angela Fong Matter"), Alexis Girgis v. Raymond Zar, Zar Advisory Corporation and Roehampton Capital (CV-22-00677148-0000) (the "Alexis Girgis Matter"), Esmaeil Mehrabi and Mehrabi Law Office v. Raymond Zar, Roehampton Capital Corporation, 30 Roe Investments Corporation, Mary-Am Hospitality Corporation, Maryam Travel Inc., Mary-Am Corporation, Maryam Maids Inc., 170 Willowdale Investments Corporation and Zar Advisory Corp. (CV-22-00685217-0000) (the "Mehrabi Law Matter").

[3] In his endorsement, dated March 3, 2023, Justice Osborne considered whether Blaneys had to appear on five separate occasions seeking removal as counsel of record, with the same evidence, or whether this could be addressed at one motion (including the notice of motion for each of the five matters). In determining that one appearance in respect of the 5 matters made practical sense, Justice Osborne stated:

> It makes practical sense to avoid requiring counsel to bring five identical motion records, with the identical evidence, in each of the five proceedings. Such duplicates the work for both the parties and for the Court. The motion materials will reflect the fact that the same relief (removal from the record) is being sought in each of the five proceedings, to be identified by title of proceeding and Court file number....
>
> If the judge hearing the motions on March 10 is so inclined to grant relief, and subject to whatever that judge may determine to do or not do, one endorsement or order can be made with effect in all five proceedings.

[4] I agree with Justice Osborne. Blaneys advised that all the parties the five matters were notified of the motion.

[5] Counsel appeared on the Kingsett Matter, the Epic Paving Matter, and the Jack and Angela Fong Matter.

[6] The motion was heard via Zoom. Raymond Zar, the principal of 30 Roe Investments and the defendants in the other actions (other than 729171 Alberta Inc.), did not attend, despite having been provided with the motion materials (including the unredacted motion record).

Kingsett Matter

[7] Counsel for the Receiver on the Kingsett Matter advised that Blaneys is the fifth firm the debtor has retained in the receivership proceedings.

[8] The Receiver states that Blaneys' withdrawal should not interfere with the progress of the receivership. The Receiver advised the Court that its efforts will continue in accordance with the existing orders of this Court.

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In the event that 30 Roe intends to take a position or act in these proceedings, it should act expeditiously to retain counsel.

[9] The Receiver further advised the Court that Blaneys filed a Notice of Appeal on behalf of the Company at the Ontario Court of Appel to prevent two sales approved by Court Orders dated February 7, 2023 from closing. The Receiver has brought a motion to quash this appeal so that the sales may proceed.

[10] Accordingly, the Receiver states that while it is not opposing Blaneys' removal in these proceedings, this is without prejudice to the Receiver's right to oppose Blaneys' removal as counsel of record at the Court of Appeal, as the matter before the Court of Appeal is urgent.

[11] Kingsett reiterated that my Order removing Blaneys as counsel of record for 30 Roe is restricted to the Superior Court of Justice proceedings and emphasized the urgency of the matter pending before the Court of Appeal. Although Kingsett does not oppose Blaneys removal as counsel of record for 30 Roe in this Court, Kingsett is concerned about further delays by Mr. Zar given the history of this matter.

The Jack and Angela Fong Matter

[12] Jack and Angela Fong do not oppose Blaneys' motion. However, counsel indicated that they wish to continue to move the matter forward and do not want to suffer a delay as a result of this.

Epic Paving Matter

[13] With regard to the Epic Paving Matter, Blaney informed the Court that the firm was retained by Mr. Zar in respect of all three defendants (including 729171 Alberta Inc., "729"). However, Blaney was very recently notified that 729 is not related to Mr. Zar. Accordingly, Blaney has agreed to remain as counsel of record until 729 can retain counsel.

[14] 729's regular counsel (not retained at this point in respect of the Epic Paving Matter) advised the Court that 729 did not know about the Epic Paving Matter litigation until last Friday. He asked that 729 be given 30 days to assess the claim to determine who will be retained as their counsel and reach out to the plaintiff.

[15] Further to Rule 1.05, no steps may be taken against 729 in the Epic Paving Matter for 30 days in order to provide 729 with the opportunity to assess the claim and retain counsel.

Blaneys' Motion

[16] Blaneys provided the Court with unredacted Motion materials. The reasons for Blaneys' decision to withdraw as counsel are confidential. That portion of the motion was conducted *in camera* without the participation of any of the parties. I am satisfied that there has been an irreparable breakdown in the relationship between Blaneys and Mr. Zar.

[17] Having read the motion materials, including the affidavit of Chad Kopach, and heard the submissions of Blaneys, the requested orders are granted (attached).

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THIS IS **EXHIBIT "H"** REFERRED TO IN THE AFFIDAVIT
OF DANIEL POLLACK, AFFIRMED BEFORE ME THIS
17TH DAY OF MAY, 2023.

DocuSigned by:
Joshua Foster
166433D07B49432...

JOSHUA FOSTER
A Commissioner for taking Affidavits
(or as may be)

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COURT OF APPEAL FOR ONTARIO

CITATION: KingSett Mortgage Corporation v. 30 Roe Investments Corp.,
2023 ONCA 196
DATE: 20230320
DOCKET: M54109 (COA-23-CV-0215)

Lauwers J.A. (Motion Judge)

BETWEEN

KingSett Mortgage Corporation

Plaintiff
(Responding Party/Respondent)

and

30 Roe Investments Corp.

Defendant (Appellant)

Mervyn D. Abramowitz and Lucas Strezos, for the moving party

Carlie Fox, for the Receiver of 30 Roe Investment Corp., KSV Restructuring Inc.

Richard Swan, for the responding party

Heard: March 17, 2023

ENDORSEMENT

[1] Blaney McMurtry LLP (“Blaneys”) moved for an order under r. 15.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, seeking to remove the firm as lawyer of record for the Appellant, 30 Roe Investment Corp. (“30 Roe”). I dismissed the motion with reasons to follow. These are the reasons.

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A. CONTEXT FOR THE MOTION

[2] Blaneys served a notice of appeal dated February 23, 2023 from the decision of Steele J. dated February 13, 2023 granting and approving a vesting order relating to the sale of two condominium units by KSV Restructuring Inc., the Receiver of 30 Roe, to close by the end of March 2023. The appeal jeopardizes the transaction.

[3] On March 1, 2023, the Receiver served a motion for an Order to quash 30 Roe's appeal, to expedite the hearing of the Appeal, and to lift any automatic stay of proceedings arising as a result of the appeal. The Receiver's motion is scheduled before a panel of three Judges of the Court of Appeal on March 27, 2023.

[4] The background to the motion is taken from the affidavit of Chad Kopach, a Blaneys partner.

[5] The lender, KingSett Mortgage Corporation, brought a receivership application against 30 Roe. On May 9, 2022, KSV Restructuring Inc. was appointed as receiver and manager over certain assets and undertakings of 30 Roe, including but not limited to certain real property. The principal of 30 Roe is Raymond Zar.

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[6] On February 7, 2023, the Receiver brought a motion for two approval and vesting orders from the Superior Court in respect of the sale of two condominium units.

[7] Arguments started before Steele J. of the Commercial List on February 7, 2023 and were adjourned to February 13, 2023, when the decision was expected. Due to the illness of one of 30 Roe's lawyers at Blaneys, the matter was again adjourned to February 16, 2023.

[8] In her endorsement dated February 13, 2023, Steele J. approved the transactions and granted the approval and vesting orders.

[9] Mr. Kopach states that: "On or about February 17, 2023, Zar advised Blaneys that he wished to appeal the AYO Orders, and instructed Blaneys to proceed with the appeal." On February 23, 2023, Blaneys served the notice of appeal but advised Zar that it would be bringing a motion to get off the record if he did not retain new counsel. Mr. Kopach also attests that Blaneys "advised Zar on multiple occasions… that it will no longer act for 30 Roe, the Remaining Zar Companies or Zar personally."

[10] By endorsement dated March 10, 2023, Steele J. removed Blaneys as lawyers of record for 30 Roe in the underlying matter before the Superior Court of Justice (Commercial List). Her endorsement provides additional context:

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Counsel for the Receiver on the Kingsett Matter advised that Blaneys is the fifth firm the debtor has retained in the receivership proceedings.

The Receiver states that Blaneys' withdrawal should not interfere with the progress of the receivership. The Receiver advised the Court that its efforts will continue in accordance with the existing orders of this Court. In the event that 30 Roe intends to take a position or act in these proceedings, it should act expeditiously to retain Counsel.

The Receiver further advised the Court that Blaneys filed a Notice of Appeal on behalf of the Company at the Ontario Court of Appel to prevent two sales approved by Court Orders dated February 7, 2023 from closing. The Receiver has brought a motion to quash this appeal so that the sales may proceed.

Accordingly, the Receiver states that while it is not opposing Blaneys' removal in these proceedings, this is without prejudice to the Receiver's right to oppose Blaneys' removal as counsel of record at the Court of Appeal, as the matter before the Court of Appeal is urgent.

Kingsett reiterated that my Order removing Blaneys as counsel of record for 30 Roe is restricted to the Superior Court of Justice proceedings and emphasized the urgency of the matter pending before the Court of Appeal. Although Kingsett does not oppose Blaneys removal as counsel of record for 30 Roe in this Court, Kingsett is concerned about further delays by Mr. Zar given the history of this matter.

…

Blaneys provided the court with unredacted motion materials. The reasons for Blaneys' decision to withdraw as counsel are confidential. That portion of the motion was conducted *in camera* without the participation of any of the parties. I am satisfied that there has been an

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> irreparable breakdown in the relationship between Blaneys and Mr. Zar.

[11] As noted, Steele J. granted an order taking Blaneys off the record.

B. ANALYSIS

[12] I too was provided with an unredacted record and in ordinary circumstances would not hesitate to give a similar order respecting Blaneys' involvement in the appeal. But these are not ordinary circumstances.

[13] There is relatively sparse law on when the court should exercise its discretion to refuse to take a law firm off the record. The cases focus on the interests of the client: see *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at paras. 49-50, and *Todd Family Holdings Inc. v. Gardiner*, 2015 ONSC 6590, 127 O.R. (3d) 714. The administration of justice must also be considered: *Cunningham*, at para. 45.

[14] I am satisfied that Blaneys gave 30 Roe and Mr. Zar adequate notice of the need to appoint new counsel expeditiously. That has not yet occurred and might not. However, the other parties fear that a lawyer will show up on the eve of the argument of the motion to quash and request an adjournment, which, if granted, would give Mr. Zar the result he wants, that the transactions do not close.

[15] In this case the court-appointed receiver has given its best advice to the court, which the court accepted. Priority should in this case be given to the

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administration of justice, not to the interests of Blaneys in avoiding the possibly unremunerated expense of further involvement.

[16] It is clear from the affidavit of Mr. Kopach that Blaneys had no intention of proceeding with the appeal. There is, in my view, an ethical obligation on an officer of the court to do no harm to court proceedings. Here, by launching a zombie appeal in which it intended to have no involvement, Blaneys knew that it was throwing a grenade into receivership proceedings in which it had participated. This action is disrespectful of the court. What Blaneys ought to have done was not to have filed a notice of appeal, leaving it to 30 Roe and Mr. Zar to take whatever steps they thought appropriate once Blaney exited, as the firm could have done under the order of Steele J. on March 10. Instead, Blaneys permitted its status as an officer of the court and the solicitor of record to be abused.

[17] Mr. Kopach's affidavit of March 1 states, at para. 18: "There are no other approaching deadlines in the Receivership, nor in the other four SCJ Matters for that matter." But, as Steele J. noted in her March 10 endorsement, this does not tell the whole story:

> The Receiver further advised the Court that Blaneys filed a Notice of Appeal on behalf of the Company at the Ontario Court of [Appeal] to prevent two sales approved by Court Orders dated February 7, 2023 from closing. The Receiver has brought a motion to quash this appeal so that the sales may proceed.

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[18] While it is rare for a court to exercise its discretion and refuse to permit a law firm to get off the record, this is one such instance. There is some ceremony around a lawyer getting on and off the record before the court, as is revealed in r. 15, for good reason. Lawyers are in many ways the privileged gatekeepers to the courts and should take their obligations seriously, both to clients, the other parties in lawsuits, and to the court.

C. DISPOSITION

[19] For these reasons, I dismissed Blaneys' motion for an order under r. 15.04 of the *Rules of Civil Procedure* removing the firm as lawyer of record for the appellant, 30 Roe Investment Corp. Unless the appellant appoints new counsel, Blaneys is to remain counsel of record until the final disposition of the motion to quash on March 27, 2023.

P Lauwers J.A.

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THIS IS **EXHIBIT "I"** REFERRED TO IN THE AFFIDAVIT
OF DANIEL POLLACK, AFFIRMED BEFORE ME THIS
17TH DAY OF MAY, 2023.

DocuSigned by:
Joshua Foster
166433D07B49432...

JOSHUA FOSTER
A Commissioner for taking Affidavits
(or as may be)

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COURT OF APPEAL FOR ONTARIO

CITATION: KingSett Mortgage Corporation v. 30 Roe Investments Corp., 2023 ONCA 219
DATE: 20230329
DOCKET: M54133 (COA-23-CV-0215)

Brown, Trotter and Paciocco JJ.A.

BETWEEN

KingSett Mortgage Corporation

Applicant
(Respondent/Responding Party)

and

30 Roe Investments Corp.

Respondent
(Appellant/Responding Party)

Mark Dunn, for the moving party Receiver, KSV Restructuring Inc.

Mervyn Abramovitz and Lou Brzezinski, for the responding party 30 Roe Investments Corp.

Richard Swan, for the respondent KingSett Mortgage Corporation

Darren Marr, for the Canadian Imperial Bank of Commerce

Raymond Zar, acting in person in his capacity as a guarantor of the responding party's debt

Heard: March 27, 2023

On appeal from the orders of Justice Jana Steele of the Superior Court of Justice, dated February 7, 2023.

REASONS FOR DECISION

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I. OVERVIEW

[1] The court-appointed receiver, KSV Restructuring Inc., moves for: (i) an order quashing the February 23, 2023 appeal initiated by the respondent debtor, 30 Roe Investments Corp. ("30 Roe"), from the two February 7, 2023 approval and vesting orders made by Steele J. (the "Approval Orders"); (ii) alternatively, an order expediting the appeal; (iii) in the further alternative, an order denying 30 Roe leave to appeal the Approval Orders under s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"); and (iv) in the further alternative, an order pursuant to *BIA* s. 195 lifting any automatic stay of the proceedings.

[2] The Approval Orders authorized the Receiver to complete sale transactions for two of the nine units owned by 30 Roe at the Minto 30 Roe condominium building, specifically units PH04 and PH09.

[3] Although the agreements for purchase and sale of those two units between the receiver and the purchasers contemplated an end of February closing, amending agreements filed in the motion record extended the closing dates for both transactions to the end of this week, Friday, March 31, 2023.

[4] A personal guarantor of the company's indebtedness, Raymond Zar, who is also the principal of 30 Roe, opposes the Receiver's motion.

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II. KEY EVENTS CONCERNING THE RECEIVERSHIP

[5] The events leading up to the appointment of a receiver over 30 Roe were described by this court in its decision quashing the company's appeal from the May 9, 2022 Receivership Order: 2022 ONCA 479.

[6] Since that time, the Receiver obtained from McEwen J. a July 18, 2022 Sale Process Approval Order, which authorized the Receiver to proceed with an individual-unit sales process described in s. 4.0 of its First Report (the "July Sales Order"). In approving that marketing and sales approach, McEwen J. rejected 30 Roe's submission that the nine units should "be sold en masse, essentially as an income producing hospitality-type of model akin to a hotel." No appeal was taken from the July Sales Order.

[7] McEwen J. subsequently authorized the Receiver to change listing agents for the sale of the units in his December 14, 2022 order (the "December Sales Order"). No appeal was taken from the December Sales Order.

[8] Earlier this year, the Receiver negotiated sale agreements for PH04 and PH09. The Receiver provided details of the events leading up to those agreements, including the listing history for the two units, in s. 4.0 of its Third Report dated January 26, 2023. In s. 4.5 of that report, the Receiver addressed the debtor's continued insistence that the nine units be sold as a block. In s. 4.5(6) the Receiver stated: "Based on its own review of the information

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available to it, the Receiver continues to believe there is no merit to the suggestion that the Units could be sold as a going concern hospitality business for a premium relative to the individual resale value of the Units".

[9] The Receiver moved before Steele J. for approval of the two sale transactions.

[10] The day before the return of that motion, 30 Roe filed an affidavit from Mr. Zar that repeated the company's criticism of the Receiver's plan to market the units individually. Mr. Zar contended that individual sales would not realize the units' optimum value. He deposed, at paras. 12 and 13 of his affidavit, that an income approach was more suitable for determining the aggregate value of the units (which he described as a business). Mr. Zar deposed that he valued the units on a "going concern" basis at approximately $12.476 million as of February 6, 2023.

[11] Steele J. was not persuaded by Mr. Zar's personal valuation and advocacy of an *en bloc* sale. She noted in her February 7, 2023 endorsement that:

- McEwen J. had rejected the "same argument" when he made the July Sales Approval Order;
- The Receiver had asked 30 Roe several times for evidence supporting the debtor's view that a going concern sale would be preferable but 30 Roe did not provide such information; and

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- The Receiver challenged the reliability of the valuation proffered by Mr. Zar, observing that 30 Roe had not provided up-to-date financial statements or information about the market for the type of business it contended was operated using the nine condominium units.

[12] Steele J. was satisfied that the criteria enumerated by this court in *Royal Bank of Canada v. Soundair Corporation* (1991), 83 D.L.R. (4th) 76 (Ont. C.A.) had been met. She approved the two sale transactions and granted the Approval Orders.

[13] On February 23, 2023, 30 Roe served a notice of appeal from the Approval Orders (the "Notice of Appeal").

III. PROCEDURAL ISSUES

[14] Before dealing with the relief sought by the Receiver in its notice of motion, we wish to recount several procedural issues raised by Mr. Zar during this appeal.

[15] On the initial return of the motion on Monday, March 27, 2023 before a slightly differently constituted panel, Mr. Zar asked Lauwers J.A. to recuse himself from the panel. The previous week, Lauwers J.A. had heard and denied a motion by 30 Roe's counsel of record, Blaney McMurtry LLP, to remove itself from the record: 2023 ONCA 196. Lauwers J.A. acceded to Mr. Zar's request and recused himself. As a result, one of the scheduled duty judges, Brown J.A., joined the panel.

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[16] Upon the resumption of the hearing before the reconstituted panel, Mr. Zar requested a 24-hour adjournment of the hearing to permit the filing of a responding factum. By way of background, on Friday, March 24, 2023, Blaneys had sent a letter to the court advising that "our client has instructed us to not to file any responding material" on the Receiver's motion to quash. As a result, no responding materials were before the panel.

[17] When this correspondence was brought to Mr. Zar's attention, he orally changed his instructions to Blaneys in open court. Mr. Zar wanted Blaneys to make submissions on behalf of 30 Roe as they were still on the record. Counsel from Blaneys was not prepared to do so.

[18] From the interaction between counsel from Blaneys and Mr. Zar, it was clear to the panel that a complete breakdown had occurred between the law firm and its client. In those circumstances, the panel had no confidence that if we were to compel Blaneys to make submissions, Mr. Zar as the principal of 30 Roe or on his own behalf would accept the adequacy or appropriateness of those submissions or their faithfulness to instructions he had given Blaneys. Consequently, we informed Mr. Zar that we would not call on Blaneys but would hear submissions from him on behalf of 30 Roe.

[19] We advised Mr. Zar that if he wished to file with our court registrar a draft respondent's factum that he was holding in his hands, we would have the registrar

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make copies for the panel so that we could review it before the continuation of the hearing. We granted Mr. Zar a 30-minute adjournment to decide whether he would file the factum and send electronic copies to the other parties. We thereupon recessed for 30 minutes.

[20] Upon resuming, the panel learned that Mr. Zar had not filed a factum for the panel's consideration or provided copies to the other parties.

[21] Instead, Mr. Zar requested that Brown J.A. recuse himself because, according to Mr. Zar, some familial relationship created a conflict of interest. When questioned, Mr. Zar was not prepared to name the person who allegedly had some familial relationship with Brown J.A. that might create a conflict. Consequently, the panel called on the moving party Receiver's counsel to make his submissions on the motion.

[22] When the panel called upon Mr. Zar to make responding submissions, he advised that a medical condition of his was making it difficult for him to formulate submissions. The panel offered, and Mr. Zar accepted, a 10-minute recess to allow him to collect his thoughts. Upon reconvening, argument of the motion proceeded to its conclusion, with the panel taking the matter under reserve.

[23] Throughout the hearing Mr. Zar took the position that the submissions he made were solely in his capacity as a guarantor of the corporate debt of 30 Roe

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and not on behalf of the company, although the substance of his submissions certainly conveyed a response by the debtor corporation to the Receiver's motion.

IV. ANALYSIS

The Receiver's motion to quash

[24] Although in a factum filed on a provisional execution motion below 30 Roe agreed that an appeal in the matter could only proceed with leave, apparently it "walked back" that admission during the course of argument. Consequently, we will examine whether in the specific circumstances of this case an appeal as of right lies under s. 193 from the Approval Orders.

[25] Consideration of the Receiver's motion to quash must begin with an examination of the order sought to be appealed and the grounds of appeal pleaded by 30 Roe in its Notice of Appeal.

[26] The Approval Orders follow the form of standard Commercial List approval and vesting orders: they approve the sale transactions; authorize the Receiver to execute the sale agreements "with such minor amendments as the Receiver may deem necessary" and to "execute such additional documents as may be necessary or desirable for the completion" of the transactions; and provide that upon the delivery of a Receiver's Certificate all of the debtor's right, title, and interest in the purchased units shall vest absolutely in the purchaser free and clear from all security interests. The Approval Orders make no provision for the distribution of

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the sale proceeds. Pursuant to para. 12 of the initial Receivership Order, the Receiver must deposit those funds into an account and hold the monies "to be paid in accordance with the terms of this Order or any further Order of this Court."

[27] The grounds of appeal advanced by 30 Roe in its Notice of Appeal reflect the debtor's repeatedly expressed view that the nine units should be sold *en bloc*, not individually. The Notice of Appeal alleges that:

- the Receiver ought not to have marketed the units as separate properties;
- the evidence on the motion was clear that the units were part of a larger commercial "Enterprise", a term 30 Roe and Mr. Zar use to describe a hospitality business they contend the nine units collectively supported;
- the failure to market the units for sale together led to a marked diminution in the value of the Enterprise;
- the motion judge "failed to appreciate the entire concept of the Enterprise and the loss in value of the Enterprise, if the Units were sold off separately";
- the motion judge failed to apply the *Soundair* test "as the Units ought not to have been marketed or offered for sale in the first place"; and
- the motion judge "failed to find that the marketing and offering of the Units for sale here, on their own, would not be in the best interests of the creditors or other stakeholders here."

[28] The Notice of Appeal states that 30 Roe has an appeal as of right pursuant to *BIA* ss. 193(a)-(c). We shall consider each provision.

[29] As to *BIA* s. 193(a), 30 Roe's Notice of Appeal from the Approval Orders does not raise any "point in issue [that] involves future rights". The narrow scope of the concept of future rights was described in *Business Development Bank of*

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Canada v. Pine Tree Resorts Inc., 2013 ONCA 282, 115 O.R. (3d) 617, at para. 15: "'Future rights' are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future".

[30] In the present case, the Notice of Appeal challenges the Approval Orders on the basis of the methodology, or procedure, followed by the Receiver for the unit sale process and alleged commercial disadvantages caused by that process. 30 Roe's appeal concerns rights that presently exist, not ones that may be exercised in the future. Consequently, the appeal of the Approval Orders does not engage *BIA* s. 193(a).

[31] Under *BIA* s. 193(c), an appeal as of right lies "if the property involved in the appeal exceeds in value ten thousand dollars." There is no dispute that the sale price for both units exceeds $10,000. However, the jurisprudence on *BIA* s. 193(c), as summarized by this court in *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228, at paras. 36-39, identifies three types of orders that do not fall within the ambit of that section:

- an order that does not result in a loss or does not "directly involve" property exceeding $10,000 in value;
- an order that does not bring into play the value of the debtor's property; or
- an order that is procedural in nature.

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[32] To determine whether an order sought to be appealed falls within *BIA* s. 193(c), a court must analyze the economic effect of the order: *Hillmount*, at para. 41. As stated in *Hillmount*, at para. 42:

> What is required in any consideration of whether the appeal of an order falls within *BIA* s. 193(c) is a critical examination of the effect of the order sought to be appealed. Such an examination requires scrutinizing the grounds of appeal that are advanced in respect of the order made below, the reasons the lower court gave for the order, and the record that was before it. The inquiry into the effect of the order under appeal therefore is a fact-specific one; it is also an evidence-based inquiry, which involves more than merely accepting any bald allegations asserted in a notice of appeal: *Bending Lake* [*infra*], at para. 64. [*MNP Ltd. v. Wilkes*, 2020 SKCA 66, 449 D.L.R. (4th) 439] concurs on this point, holding, at para. 64, that the loss claimed must be “sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal,” a point repeated in the subsequent chambers decision in *Re Harmon International Industries* [*Inc.*, 2020 SKCA 95, 81 C.B.R. (6th) 1], at para. 32.

[33] In the present case, the Approval Orders authorized the Receiver to proceed with sale transactions for two units. Section 4.0 of the Receiver’s Third Report detailed the listing history (including listing prices) for both units. Unredacted copies of the negotiated agreements of purchase and sale were provided to the debtor and were before the motion judge. No evidence was put before the motion judge that the sale prices for both transactions were unreasonable or not reflective of prevailing market conditions. Accordingly, there was no basis to suggest that

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approval of the two transactions would result in a “loss” of value for the properties when compared to available market prices.

[34] Instead, 30 Roe sought to oppose the sale transactions by repeating the “*en bloc* sale” argument it had made at the time of the July Sales Order but which McEwen J. had rejected. On its face, the evidence 30 Roe filed before Steele J. carried virtually no weight, consisting as it did of a bald assertion by Mr. Zar about the possible value of an *en bloc* transaction that was not supported by an independent valuation and was advanced against a history of 30 Roe refusing requests by the Receiver for financial information about the “Enterprise”.

[35] Moreover, the position taken by 30 Roe before Steele J. amounted to a collateral attack on the July and December Sales Orders, which it had not appealed. 30 Roe repeated its *en bloc* arguments before McEwen J. in December and then before Steele J., taking the position that it had “reserved” its right to object to future sales on the basis that an *en bloc* sale would generate more value. That unilateral reservation of rights did not alter the legal effect of the July and December Sales Orders under which the court authorized the Receiver to market and sell the units individually, which the Receiver did.

[36] By failing to appeal and set aside the July and December Sales Orders, 30 Roe lost the legal basis to advance an argument that the Approval Orders would create a loss of value by reason of the individual-unit marketing and sales

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methodology used by the Receiver as compared to an "*en bloc*" sales process. It was the July Sales Order, not the Approval Orders, that put in jeopardy any difference in value of the property that might arise from an "individual-unit" sales approach as compared to an "*en bloc*" sales approach. Given that 30 Roe's Notice of Appeal asserts no other basis on which to reverse the Approval Orders, in the circumstances of this case its appeal from the Approval Orders does not fall within the ambit of *BIA* s. 193(c).

[37] Finally, 30 Roe's appeal does not fall within the ambit of *BIA* s. 193(b), which provides an appeal as of right "if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings." The jurisprudence has consistently interpreted *BIA* s. 193(b) as meaning that a right of appeal will lie where "the decision in question will likely affect another case raising the same or similar issues in the same bankruptcy proceedings" as the provision concerns "real disputes" likely to affect other cases raising the same or similar issues in the same bankruptcy or receivership proceedings: see *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 32.

[38] As mentioned, by failing to appeal and set aside the July and December Sales Orders, 30 Roe lost the legal basis to advance an argument that the Approval Orders – or subsequent approval orders for other individual units – would create a loss of value by reason of the individual-unit marketing and sales methodology used by the Receiver. Further, subsequent motions by the Receiver

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for the approval of sale transactions for other units will be decided upon the evidence related to those sale transactions, not the transactions for PH04 and PH09 authorized by the Approval Orders.

[39] For these reasons, we conclude that 30 Roe's appeal does not fall within the ambit of *BIA* ss. 193(a)-(c). Accordingly, we quash its appeal.

Leave to appeal

[40] Although 30 Roe did not file a notice of motion seeking leave to appeal the Approval Orders pursuant to *BIA* s. 193(e), it did seek such alternative relief in its Notice of Appeal. As well, several of the submissions made by Mr. Zar during the hearing dealt with elements of the leave to appeal test. Accordingly, we will consider whether leave should be granted to 30 Roe to appeal the Approval Orders.

[41] In considering whether to grant leave to appeal an order under *BIA* s. 193(e) a court will look to whether the proposed appeal: (i) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this court should therefore consider and address; (ii) is *prima facie* meritorious; and (iii) would unduly hinder the progress of the bankruptcy/insolvency proceedings: *Pine Tree Resorts*, at para. 29; *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697, at para. 3.

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[42] 30 Roe's proposed appeal does not raise an issue of general importance, based as it is on the fact-specific sales process approved in its receivership. Its proposed appeal is not *prima facie* meritorious: as discussed, it amounts to nothing more than a collateral attack on the July and December Sales Orders. Finally, its appeal would unduly hinder the progress of the receivership. Granting leave to appeal probably would put in jeopardy the pending closings of the sales of PH04 and PH09. 30 Roe has not filed any evidence of equivalent or superior offers for those two units or of its present ability to satisfy the claims of its creditors. One therefore is left with the distinct impression that its attempt to appeal the Approval Orders is nothing more than a delay tactic.

[43] For these reasons, we deny 30 Roe leave to appeal the Approval Orders.

Lifting the automatic stay

[44] Since we have quashed 30 Roe's appeal and denied it leave to appeal, there is no need to consider the Receiver's alternative request for an order lifting the automatic stay under *BIA* s. 195.

V. DISPOSITION

[45] For the reasons set out above, we grant the Receiver's motion. The appeal of 30 Roe from the Approval Orders is quashed. We deny 30 Roe leave to appeal the Approval Orders.

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[46] The Receiver is entitled to seek its costs of this motion when it applies in the ordinary course for the approval of the supervising judge below of its activities and accounts.

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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

KINGSETT MORTGAGE CORPORATION	and	**30 ROE INVESTMENTS CORP.**	
Applicant		Respondent	Court File No.: CV-22-00674810-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceedings commenced in Toronto

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