Court File No. CV-22-006748100-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

30 ROE INVESTMENTS CORP.

Respondent

FACTUM OF THE RESPONDENT, 30 ROE INVESTMENTS CORP.

January 31, 2024

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TO: SERVICE LIST

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PART I: OVERVIEW AND KEY FACTS

Overview

1. This Receivership was not complex. Principally, it involved the Receiver hiring Re/Max agent to sell nine (9) residential condominiums on the same floor and within the same condominium building located at 30 Roehampton Avenue, Toronto, Ontario (collectively, the "**30 Roe Units**"), which were collectively owned by 30 Roe Investments Corp. (hereinafter, the "**Company**" or the "**Debtor**").
2. When the Receivership Order became active in June 2022, seven of the nine units were on short-term rental through Airbnb, with many of these rentals set to expire in July or August that year, while two units had long-term leases ending in 2022.[1]
3. The Company had two secured creditors: CIBC, which had a first mortgage and KingSett, which had a second mortgage over the 30 Roe Units. Other than modest amounts owing to the CRA and RBC[2], no other creditors existed, and shareholder equity stood at over $6 million.
4. The Receiver's negligence created a $956,000 HST liability for the Company, which, combined with the professional fees sought, has resulted in a significant shortfall of funds to repay even the principal of the KingSett loan, which was the catalyst for this Receivership. The Receiver managed to wipe out all $6 million of the equity held by the Company's shareholders.
5. Despite the simplicity of the mandate and the unfavourable result achieved, the Receiver and its counsel, Goodmans, now seek to collect over $1 million in combined fees while leaving the creditors partially paid and the Company's shareholders with nothing.

[1] First Report of KSV Restructuring Inc as Receiver dated July 7, 2022 (the "**Receivers' First Report**").
[2] Receiver's First Report at Sections 2.2.1, 2.2.2 and 2.2.3.

A Planning Failure: The Receiver's Sales Process Ignored the Benefits of Selling 30 Roe Units as a Portfolio and Business – which would have Avoided the HST Liabilities Incurred

6. At the outset of this proceeding, the Receiver was fixated on selling the 30 Roe Units individually rather than *en bloc* as a business or a real estate portfolio.
7. The Debtor always maintained that selling the 30 Roe Units as a portfolio to another company was the best approach to maximize value for all stakeholders. Unlike selling condominiums to individual purchasers, selling a portfolio to a corporate HST registrant would have the added benefit of avoiding the significant HST liabilities that would otherwise accrue through a regular sales process.
8. The Receiver made no attempt to sell the 30 Roe Units as a rental property business – or to even explore this avenue – despite the tax advantages associated with this approach. Although these benefits were identified to the Receiver, the Receiver maintained the fiction that it had insufficient financial information from Mr. Zar to consider this option and failed to prepare any supporting analysis for this opinion.
9. The Receiver, without any financial reasoning, decided that selling the 30 Roe Units individually would maximize value for all stakeholders. The shortfall realized demonstrates that it was severely and avoidably misguided.

The Receiver Neglected to Investigate, Understand and Assess the HST Implications of its Preferred Sales Process

10. After the Receiver assumed management over the 30 Roe Units, the Debtor repeatedly proposed to sell the 30 Roe Units as a going concern to another corporate entity (and HST registrant) in order to avoid the HST liabilities that would otherwise be triggered upon the disposition of each individual condominium unit to non-HST registrant individual buyers.

11. Since at least June 2022, the Receiver had been in contact with the CRA regarding the Company. On June 14, 2022, the CRA informed the Receiver of the Company's outstanding HST arrears and directed the Receiver to file the Company's HST returns, which the Receiver never did.[3] It appears that, as of June 2022, the Receiver had not asked the CRA for any information that may have helped it understand the HST liability.

12. To be clear, in 2022, before it sold any of the 30 Roe Units, the Receiver knew HST liabilities would result from its proposed sales. According to the Receiver's Second Report:

> …A primary reason for the shortfall is that the Receiver believes that HST will likely need to be charged and remitted on the sale of the Units…[4]

13. On August 5, 2022, the Receiver wrote to the Respondent's counsel inquiring about whether the Company had claimed Input Tax Credits ("**ITCs**") when it had purchased the 30 Roe Units. In this correspondence, the Receiver stated:

> We note that if no response is received to this request, the Receiver will have no choice but to assume that ITCs were claimed on the last acquisition of each of the Units, **with the result that HST will need to be charged and remitted on the sale of the Units**…[5]

14. For reasons still unknown, the Receiver did not request this same information from the CRA until after the assets were sold.

15. In <u>January 2023, Mr. Zar unequivocally confirmed the information the Receiver needed</u> to appreciate the HST liability that was about to be incurred through its sales process:

> …In a letter from the Company's new counsel received January 23, 2023, the Company advised that "Finally regarding HST. **The Company did not remit HST upon purchase of these units from the developer in 2017. Instead the HST was self assessed by both the purchaser and developer.**[6] [Emphasis Added]

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[3] Receiver's First Report, Appendix "B", Letter from CRA to the Receiver dated June 14, 2022.
[4] Receiver's Second Report, Section 4.2 at para. 2.
[5] Receiver's Second Report, Appendix "I", Letter from Christopher Armstrong to Michael Simnaan dated August 5, 2022.
[6] Receiver's Third Report at Section 5.2, para. 2.

16. The Receiver did not lack the information required to (a) consider the sale of the 30 Roe Units as a business and (b) consider the tax consequences of selling the 30 Roe Units to individual buyers. KSV Advisory is a sophisticated firm with all the expertise necessary to properly evaluate the 30 Roe Units and solicit interests from real estate and property management businesses that own similar rental portfolios. Its strategic blame-shifting to Mr. Zar is no justification for its inaction as a commercially prudent custodian of the Company's assets.

Synopsis of Activities between May – July 2022

17. Following the Receivership Order of May 9, 2022, the Receiver undertook simple procedures which involved: identifying creditors, seeking information from the debtor; assessing the nature of the real estate portfolio and retaining a residential real estate broker to sell the 30 Roe Units (which were the only asset in Receivership).
18. In May 2022, the Receiver informed all the tenants at the 30 Roe Units that it had been appointed as a receiver and manager of the properties.[7] The following month, it obtained copies of their lease agreements.
19. The Receiver was singularly focused on selling the 30 Roe Units as individual entities, despite to the Respondent's repeated opposition to this sales approach.
20. Initially, the Receiver engaged a real estate brokerage, HomeLife Landmark Realty Inc., to list and sell the 30 Roe Units,[8] which were sold on an "as is, where is" basis.

[7] Receiver's First Report, Appendix "G", Letter to Tenant of Unit (30 Roehampton Avenue) from KSV restructuring Inc.
[8] Receiver's First Report at Section 4.0.

Synopsis of Activities between July – December 2022

21. By July 2022, the Receiver had exclusive access to the 30 Roe Units.[9] Despite repeatedly alleging within this proceeding that it was unable to obtain information, the Receiver was in direct contact with all the 30 Roe Unit tenants and had immediate access to any relevant information it wished to request.[10]

22. At all material times, the Receiver had insight as to the occupancy status of each unit. Most units were vacant and, therefore, available for sale. [11]

23. In August 2022, two of the units were listed for sale. It seems that, due poor pricing strategy and the odd selection of 2% cooperating commission offered to buyer agents instead of the standard 2.5% expected in the Toronto market, the Receiver and HomeLife struggled to sell a single unit and wasted valuable time and money.

24. When HomeLife's listing agreement expired on October 18, 2022, the Receiver waited nearly two months before engaging Re/Max Hallmark Realty Ltd. to sell the 30 Roe Units.

25. Again, the Receiver maintained the same approach – namely to sell each of the condominiums to individual buyers rather than the entire portfolio to a company. This time, however, the Receiver offered 2.5% commission to buyer's agents. The Receiver returned to Court for an Amended Sales Process Order in which it could list *all* units for sale and determine the listing prices for each of the units.[12]

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[9] Second Report of KSV Restructuring Inc. dated December 5, 2022 (the "**Receiver's Second Report**") at Section 3.0 para. 5.
[10] Second Report, Section 3.0 at para. 6.
[11] Receiver's Second Report at Section 3.2
[12] Receiver's Second Report, Section 4.2 at para. 5. See also: Appendix "J".

Synopsis of Activities between December 2022 – May 2023

26. In January 2023, two units, PH04 and PH09, were sold.[13] Around this time, the Receiver informed the Court that it anticipated a shortfall between the sale proceeds and the amounts owing to KingSett.

27. According to the Receiver, "a primary reason for the projected shortfall to KingSett, as presented in the Waterfall Analysis, is that HST may be payable on the sale of the Units".[14] Put differently – the very liability which Mr. Zar had warned the Receiver about, in fact, materialized.

28. In March and April 2023, another two units, PH02[15] and PH03[16] were sold. The Receiver subsequently sought an "Approval and Vesting Order" to sell the remaining five units.[17] The remaining units were sold by late summer/early fall of 2023.[18]

The Receiver Finally Requests the Company's HST Filings from the CRA which Confirmed Mr. Zar's Warnings about the HST Liabilities

29. Inexplicably, in October 2023, and after all the 30 Roe Units were sold, the Receiver finally requested the Company's HST filings from the CRA:

> Given that Zar did not provide the HST return to the Receiver, the receiver has requested a copy of the HST return from the CRA. The Receiver intends to continue to attempt to access records relevant to the Potential HST Obligation[19] including by liaising with CRA, in an effort to determine the Potential HST Obligation owing.[20]

30. On October 10, 2023, the CRA provided the Company's HST filings and elections.[21]

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[13] Third Report of KSV Restructuring dated January 26, 2023 (the "**Receiver's Third Report**") at Section 4.3 and 4.4.
[14] Receiver's Third Report at Section 5.2.
[15] Receiver's Fourth Report, Section 4.2
[16] Receiver's Fourth Report, Section 4.3.
[17] Receiver's Fourth Report, Section 6.0 at paras. 5 and 6.
[18] Fifth Report of KSV Restructuring Inc. dated October 4, 2023 ("**Receiver's Fifth Report**") at Section 3.2, para. 3.
[19] The term, itself a misnomer.
[20] Fifth Report, Section 3.3 at para. 3.
[21] Supplement to the Fifth Report of KSV Restructuring Inc. dated November 6, 2023, Appendix "D".

31. Based on this information, the Receiver confirmed what was already assumed since early August 2022 and what Mr. Zar had repeatedly warned about; namely, that the Company self-assessed HST when it acquired the 30 Roe Units.

32. The above is specifically why the Receiver was advised repeatedly that it was not desirable to sell the 30 Roe Units to individual buyers, who, unlike a corporate buyer, were not HST registrants. Put differently, a sale of 30 Roe Units to another company would have avoided the HST liability.

33. In disregarding the HST concern – which not only was brought to its attention expressly, but which it knew or ought to have known inherently by virtue of its training and experience as a Certified Professional Accountant and Licensed Insolvency Trustee – the Receiver failed to act as a reasonable and prudent professional operating in its field in selling the Debtor's assets without triggering substantial HST liabilities.

34. The Receiver did not even attempt to sell the 30 Roe Units as a package deal when it knew or ought to have known that not doing so, while also charging over $1 million in professional fees, effectively negated the entire cost-benefit analysis underlying the Receivership itself.

PART II: ISSUES

35. The issues on this motion and cross-motion are whether:

    a. The Respondent should be granted leave to pursue a claim against the Receiver;

    b. The professional fees incurred by the Receiver and its counsel are unfair, unreasonable and disproportionate;

    c. KingSett's request for a release should be denied.

PART III: LAW & ANALYSIS

(A) LEAVE TO SUE THE RECEIVER SHOULD BE GRANTED

The Receiver's Standard of Care

36. A Receiver is required to "act honestly and in good faith" and must deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.[22] Receivers also have a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor and any of its shareholders.[23]

37. Acting in a commercially reasonable manner involves obtaining the best price for assets, having regard to the competing interests of the parties involved.[24] Receivers are expected to "exercise the care comparable to the reasonable care, supervision and control that an ordinary man would give to the business if it were his own".[25]

38. In *Toronto-Dominion Bank v. Usarco Ltd.,*[26] the Ontario Court of Appeal held a "receiver has a duty to make candid and full disclosure to the court including disclosing not only facts favourable to pending applications but also facts that are unfavourable" and that it must "act with meticulous correctness".[27] The Court also noted that tax advice obtained should be disclosed.[28]

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[22] Section 247 of the *Bankruptcy and Insolvency Act* (the "**BIA**")
[23] *Ostrander v. Niagara Helicopters Ltd.* (1993), 1973 CanLII 467 (ON SC), 1 O.R. (2nd) 281 at para. 6.
[24] *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) at para 4, [1999] O.J. No. 4300 (Ont. S.C.J. [Commercial List]), aff'd on appeal (2000), 15 C.B.R. (4th) 298 (Ont. C.A.).
[25] *Royal Bank of Canada v. Penex Metropolis Ltd.*, at para. 25, citing *Bayhold Financial Corp. v. Clarkson Co.* (1991), 10 C.B.R. (3d) 159, [1991] N.S.J. No. 488 (C.A.) at para. 15; *Textron Financial Canada Limited v. Beta Ltee/Beta Brands Ltd.* (2007), 31 C.B.R. (5th) 296 (Ont. S.C.J.) at para. 21.
[26] *Toronto-Dominion Bank v. Usarco Ltd.*, 2001 CanLII 24004 (ON CA)
[27] *Toronto-Dominion Bank v. Usarco Ltd.* 2001 CanLII 24004 (ON CA) *at para. 30.*
[28] *Toronto-Dominion Bank v. Usarco Ltd.* 2001 CanLII 24004 (ON CA) at para. 31.

The Test for Leave to Sue a Receiver is met

39. Pursuant to Section 215 of the *BIA*, leave is required to commence an action against the Receiver. For its part, the Receivership Order indicates that "gross negligence" and "willful misconduct" constitute limits on the Receiver's liability.[29]

The Frivolous or Vexatious Test should apply and is met

40. The Supreme Court of Canada in *GMAC Commercial Credit Corporation – Canada v. TCT Logistics Inc.* held that only frivolous, vexatious, or manifestly unmeritorious claims should not proceed against receivers.[30]

In The Alternative, the Strong Prima Facie Test is met

41. In *Bank of America Canada v. Willann Investments Ltd.*[31], the Court held that where the activities of the receiver have already been approved by the Court, the test should be one of a "reasonable cause of action" or a "strong *prima facie* case".[32][33]

42. More recently, the "strong *prima facie*" test was articulated differently by the Ontario Court of Appeal in *Holmes v. Schonfeld Inc.*:[34]

> In relation to this latter submission, I note that the Discharge Order contains a release of any and all liability relating to matters raised or which could have been raised within the proceedings; any liability not amounting to gross negligence or wilful misconduct falls within the scope of this release, even if the nature of the claim was not known at the time of discharge. The motions judge correctly noted that a more stringent standard for the granting of leave – a *strong prima facie* case – may be appropriate **in cases where the issues raised in the action could have been raised in the discharge proceedings:** see *Bank of America Canada v. Willann Investments Ltd.* (1993), 23 C.B.R. (3d) 98 (Ont. Gen. Div.), at para 9; *Gallo v. Beber* (1998), 1998 CanLII 907 (ON CA), 116 O.A.C. 340 (C.A.), at para. 7.[35]

[29] Receivership Order at para. 16 "Limitation on the Receiver's Liability".
[30] *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35 (CanLII), [2006] 2 SCR 123 at para. 7 and 58.
[31] *Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249, [1993] O.J. No. 3039
[32] *Bank of America Canada v. Willann Investments Ltd.*, at para. 9.
[33] *Bank of America Canada v. Willann Investments Ltd.*, at para. 8.
[34] *00* (CanLII).
[35] *Holmes v. Schonfeld Inc.*, 2016 ONCA 148 (CanLII). at para. 35.

Negligence, Gross Negligence and Wilful Misconduct

43. Negligence is failing to do something which a reasonably prudent person, in similar circumstance, would do; or doing something which a reasonably prudent person in similar circumstances would not do.[36]

44. In *Levy v. Brampton (City),*[37] the Superior Court aptly described gross negligence as follows: "what is ordinarily considered a neglect of duty is negligence; and what is ordinarily considered a great neglect of duty is gross negligence".[38] This determination requires a consideration of the subject matter and the related circumstances.[39] In *Crinson v. Toronto (City)*, the Ontario Court of Appeal indicated that gross negligence required the application of common sense.[40]

45. In *Royal Bank of Canada v. 6382330 Manitoba et al Ltd.,*[41] the Court held that:

> gross negligence or willful misconduct requires some evidence that the acts or omissions of the receiver amount to a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that the Receiver knew what it was doing was wrong or was recklessly indifferent in its conduct.

The Receiver was Negligent and Grossly Negligent in Failing to Investigate the Tax Liabilities Created by Selling the 30 Roe Units to Individual Buyers - Despite its Subject Matter Expertise and Available Resources

46. The Receiver was negligent and grossly negligent in failing to analyze the tax implications of its proposed sales process. The Receiver was made aware of the HST liability as early as July 2022, before a single unit was sold. Its failure to take this seriously is inexcusable, especially considering Mr. Goldstein is a CPA.

47. The Receiver's negligence materially harmed the appointing creditor, KingSett, and the shareholders of the Company. As it has now reported to this Court, its sales process

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[36] *Seyom v. TTC*, 2018 ONSC 6848 (CanLII) at para. 6. See: *Levac v. James*, 2023 ONCA 73 (CanLII) for elements of negligence.
[37] *Levy v. Brampton (City),* 2005 CanLII 21547 (ON SC)
[38] *Levy v. Brampton (City),* 2005 CanLII 21547 (ON SC) at para. 41.
[39] *Levy v. Brampton (City),* 2005 CanLII 21547 (ON SC) at para. 42.
[40] *Zaravellas v Armstrong*, 2016 ONSC 3616 (CanLII), at para. 160 citing *Crinson v. Toronto (City),* 2010 ONCA 44.
[41] *Royal Bank of Canada v. 6382330 Manitoba et al Ltd.* 2021 MBQB 72.

resulted in an unnecessary HST liability of almost $1 million, which liability was foreseeable given the Receiver's sales strategy.[42]

48. From the outset of its mandate, the Receiver was aware of two key issues: first, that selling the 30 Roe Units for its parts would likely be less profitable than selling the Company as a short-term rental portfolio to another company (and HST registrant) and, second, that its proposed sale process (i.e. selling condominiums to individual purchasers rather than to a company that would self-assess HST) would create a material liability undesirable for all stakeholders.

49. The idea that this Receiver could have taken no steps to properly consider and plan for the potential tax liability in selling the 30 Roe Units – despite the sweeping powers conferred through the Receivership Order – is an inadequate excuse to justify its gross inaction.

50. KSV Advisory promotes itself as "Canada's leading boutique advisory, restructuring and valuations firm". It routinely provides financial advisory services including: (a) assessing financial and operational performance (b) developing restructuring plans that address operational underperformance (c) performing investigations, valuations, and financial modelling and (d) conducting M&A processes. None of these services were provided in this Receivership.

The Receiver Knew its Sales Process would Create an HST Liability and Withheld Relevant Communications from the Debtor

51. Although the 30 Roe Units have been under Receivership since May 2022, the Receiver seems to only have contacted the CRA to obtain the Company's tax filings in the fall of 2023 – after all assets were sold. Meanwhile, the Receiver had been in contact with the CRA since July, 2022 and had several opportunities to request same.[43]

[42] Receiver's Fifth Report, Section 3.3.
[43] Receiver's First Report, Section 2.2.2.

52. The Receiver's failure to obtain the Company's HST filings from the CRA, until after all assets were sold, is particularly concerning given that, by the time it prepared its Second Report (December 5, 2022), it acknowledged the HST liability that would result through its Amended Sales Process:

> … A primary reason for the shortfall is that the Receiver believes that HST will likely need to be charged and remitted on the sale of the Units…[44]

53. On August 5, 2022, Receiver informed the debtor that it assumed HST liability would accrue as a result of its Amended Sales Process:

> We note that is no response is received to this request, **the Receiver will have no choice but to assume that ITCs [input tax credits] were claimed on the last acquisition of each of the Units, with the result that HST will need to be charged and remitted** on the sale of the Units (which, in turn, will decrease the sale proceeds available for distribution to stakeholders)…[45][Emphasis Added.]

54. These statements stand in strong contrast to the Receiver's claim that it lacked the information to understand whether HST would result from the sale of 30 Roe Units to individual buyers and whether it would be desirable to sell 30 Roe Units as a going concern.[46]

55. In an email dated August 7, 2022, from Mr. Zar to Mr. Goldstein – not disclosed to this Court – Mr. Zar stated that 30 Roe Units should be sold to an HST qualified buyer:

> You cannot sell anything unless and until the Court approves a new sales process, which given the information you now have, **will be limited to a going concern sale to an HST qualified buyer**.[47] [Emphasis Added.]

56. On January 19, 2023, before any condominium was sold, Mr. Zar provided the Receiver with the information it needed to understand the HST liability:

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[44] Receiver's Second Report, Section 4.2 at para. 2.
[45] Receiver's Second Report, Appendix "I".
[46] Receiver's Third Report, Section 4.5.
[47] Respondent's Supplementary Motion Record dated January 30, 2024, Tab 2 – A, Email from Mr. Raymond Zar to Mr. Noah Goldstein dated August 7, 2022.

> Finally regarding HST, the Company did not remit HST upon purchase of these units from the developer in 2017. **Instead the HST was self assessed by both the purchaser and the developer.**[48] [Emphasis Added.]

57. Furthermore, Mr. Zar's affidavit sworn February 6, 2023, predicted the HST liability that inevitably resulted from the Receiver's sales process:

> The Receiver, by choosing to market the Units individually, will clearly not realize their optimum value. In addition, because these units are not being sold as a going concern, HST is payable in the amount of 13% of the value of the sales of the unit. **This will add an additional $1 million in costs to the Receiver with no benefit for any stakeholder.** [49][Emphasis Added.]

58. Mr. Zar's repeated emphasis on the HST liability came as no surprise to the Receiver. Mr. Zar expressly raised this this issue early on during a phone call that took place on July 6, 2022. Mr. Goldstein promised to investigate the HST issue – but never did.[50]

> **Raymond**: So there are a few issues. One is I don't think you considered HST at all, in any of this, that, that would be a major issue in the way youre planning on doing it, hich is why I don't, I don't see it happening like that. That -, we -, a sale would be Roe Suites because its EBITDA is phenomenal and you know, cap rates for this property are just …
>
> **Noah**: Sorry, sorry, sorry, what do you mean the HST? What do you mean, the HST?
>
> **Raymond**: Well, if youre -, Im, Im not entirely, uh, Im not gonna pretend like I know, like im a tax guy, but I, but I recall is that if we sell these things as residential units there would be some form of HST as far as I know, um, so that's why it has to be sold as a business.
>
> **Noah**: I gotta, I gotta – I don't know the answer, okay.
>
> **Raymond**: Yeah, cause I don't -, cause theres no HST on residential resell, so then wed have to pay HST, something like that, um, but…
>
> **Noah**: I, I, I – we will look into it.

59. On a motion returnable in May 2023, the Receiver seems to have advised Justice Osborne about a tax opinion it received. On May 29, 2023, Mr. Zar specifically asked about this:

> **On the subject of HST, you had mentioned to Justice Osborne about a tax opinion received from the groups at Goodmans and Bennett Jones**. I kindly request a copy of this for our records. If such an opinion does not exist, please confirm so at the earliest.[51] [Emphasis Added.]

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[48] Responding Motion Record dated February 6, 2023 (PH04 and PH09 Sale Approval and Ancillary Relief), Tab 1, Exhibit "I".
[49] Responding Motion Record dated February 6, 2023 (PH04 and PH09 Sale Approval and Ancillary Relief), Tab 1, Affidavit of Raymond Zar at para. 14.
[50] Respondent's Supplementary Motion Record dated January 30, 2024, Tab 2 – C.
[51] Respondent's Supplementary Motion Record dated January 30, 2024, Tab 2 – B, Email from Raymond Zar to Christopher Armstrong dated May 29, 2023.

60. There remains no indication the Receiver obtained tax advice on its proposed sales process.

61. Meanwhile, Goodmans' dockets reveal it repeatedly considered the HST matter. Included are several dockets from **Glen Ernst** who serves as counsel in the firm's Tax Group.[52] Substantial time was spent "researching" the HST issue and apparently a memo was produced, which has never been disclosed to the Company or the Court.

- **08/05/22**: Telephone call with client and Bennett Jones/KingSett re: HST analysis; draft letter to 30 Roe counsel re: HST input tax credit issue"
- **08/22/22**: Consider HST issues, telephone call with Receiver re: same and email to J. Warren re: same…
- **01/24/23**: Review emails; research; discussion with C. Armstrong re: HST, instruction to student re: research
- **01/27/23:** Research; discussion with student; email to C. Armstrong re: HST matters.
- **01/29/23:** Review memorandum from G. Ernst/student re: HST research and email re: same.
- **01/30/23:** Research re: HST matters; email to C. Armstrong.
- **02/03/23:** …interoffice conference with G. Ernst re: HST issues
- **02/03/23**: Consider tax issues; discussion with C. Armstrong
- **02/07/23**: Telephone call with G. Ernst re: HST matters
- **03/28/23**: Consider issues re: HST on sale of units
- **03/29/23**: Discussions with C. Armstrong re: HST on sale of units
- **04/11/23**: Discussion with C. Armstrong re: HST matters
- **06/01/23**: Review debtor's HST proposal; discussion with C. Armstrong.
- **06/14/23**: Consider status of HST matters and email with client re: same
- **06/23/23**: Telephone call with G. Ernst re: HST matters; telephone call with N. Goldstein re: HST matters.
- **06/23/23**: Telephone call with C. Armstrong re: HST issues
- **7/17/23**: Emails with S. Zweig re: HST matters

What the Receiver Should and Could have Done to Maximize Value for Stakeholders

62. A Receivership does not justify a fire sale of assets. Rather than choose a path of least resistance, the Receiver could have:

(i) Conducted a comparative market analysis on short-term and long-term rental that could be generated by the 30 Roe Units (the Receiver arranged for a similar analysis to determine the sales price per square foot for each unit);

(ii) Obtained transactional history from Airbnb and the Company's bank statements to better understand the short-term rental demand for the 30 Roe Units;

[52] Goodmans website: https://www.goodmans.ca/people/bio/Glenn_Ernst.

(iii) Prepared a pro forma on projected rental revenue for 30 Roe Units based on the aforementioned analysis; and,

(iv) Used all this information to develop a presentation for interested corporate buyers and solicited interest to purchase the 30 Roe Units as a short term rental portfolio. By selling 30 Roe Units in this manner – as Mr. Zar repeatedly suggested – the transacting corporate parties could self-assess HST and, thereby, 30 Roe would avoid the $1 million HST liability now caused by the Receiver's inaction and gross negligence.

63. In these circumstances, the obvious thing for the Receiver to have done, before proceeding with any sales process, was to obtain the Company's HST filings from the CRA. This would have confirmed whether ITCs were claimed by the Company. Rather than obtain this information at the outset, the Receiver only turned its mind to this after it sold the 30 Roe Units. This was confirmed by the "CRA Update", contained within the Receiver's Supplement to the Fifth Report.[53]

(B) THE RECEIVER AND COUNSEL FEES SHOULD BE REDUCED

64. The Receivership Order, at Section 18, directs all accounts to be passed and "referred to a judge of the Commercial List of the Ontario Superior Court of Justice". Accordingly, this Court has jurisdiction to assess the professional fees incurred by this Receiver.

65. The Ontario Court of Appeal's decision in *Bank of Nova Scotia v. Diemer* is authoritative on this matter.[54] The onus is on the Receiver to prove that the compensation is fair and reasonable.[55] In coming to this determination, the following non-exhaustive factors are considered:[56](i) *The nature, extent, and value of the assets;* (ii) the complications and difficulties encountered; (iii) the degree of assistance provided by the debtor; (iv) the time

[53] Supplement to the Fifth Report, Section 3.0 at para. 3.
[54] *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII)
[55] *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII) at para. 32.
[56] *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII) at para. 33.

spent; (v) the receiver's knowledge, experience, and skill; (vi) the diligence and thoroughness displayed; (vii) the responsibilities assumed; (viii) the results of the receiver's efforts; and (ix) the cost of comparable services when performed in a prudent and economical manner.

66. Ultimately, the "focus of the fair and reasonable assessment should be on what was accomplished, not how much time it took".[57]

67. The Receiver has "the duty to monitor legal fees and services in the first instance" and that, in selecting counsel, it should consider the "expertise, complexity, location and anticipated costs".[58]

68. In *Confectionately Yours Inc. (Re),* the Court of Appeal clarified that passing accounts is a different exercise than that of approving the way assets were administered.[59] Courts "employ careful scrutiny" to determine whether the Receiver's remuneration is fair and reasonable "in the context of the duties which the court has ordered the receiver to perform".[60]

(i) <u>The Nature and Value of the Assets</u>

69. The nature of assets under Receivership was simple. The Receiver oversaw the sale of residential condos. While it could have run a more sophisticated sales process, it decided not to. Instead, it applied an unsophisticated approach, individually listing nine condominium units on an "as is" basis, to the general public.

70. Not only was the sales process rudimentary, but the Receiver did little to manage the 30 Roe Units in the interim. For example, it did not seek new tenants to generate cash flow which could then be used to support the sale of the 30 Roe Units as a rental portfolio to

[57] *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII) at para. 45.
[58] *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII) at para. 44.
[59] *Confectionately Yours Inc. (Re),* 2002 CanLII 45059 (ON CA) at para. 30.
[60] *Confectionately Yours Inc. (Re),* 2002 CanLII 45059 (ON CA) at para. 41.

another company. The extent of its "management" was ensuring that the 30 Roe Units could be immediately listed for sale. This is not the work of a receiver-manager.

71. The Receiver spent two years, and almost a million dollars in professional fees to: (a) oversee the vacancy of all 9 units; (b) ensure property–related expenses continued to be paid from the Company's bank account; (c) retain a brokerage to list and sell the 30 Roe Units on an "as is" basis and (d) report to the Court and obtain its approval for these steps.

72. Based on publicly available information through the Receiver's website, this Receivership may be the smallest mandate KSV and Goodmans have ever acted on.

(ii) <u>Results of the Receiver's Efforts</u>

73. The Receiver failed to maximize value for the Company's stakeholders, despite the million dollars it now seeks in fees.

74. While the sale of the 30 Roe Units generated approximately $8 million as against roughly $6 million in mortgages, the Receiver achieved a shortfall because of the $956,000 HST liability – a direct result of the Receiver's failure to tax plan. The net result is that the appointing creditor, KingSett, has not recovered its entire principal from its mortgage to the Company.

75. Beyond simply listing the assets for sale through a real estate broker, the Receiver did nothing to maximize the value of the Company's assets. It did not bother to solicit real estate investment companies that might have been interested in acquiring the 30 Roe Units as an attractive rental portfolio.

76. Importantly, the Receiver failed to file the Company's HST returns, despite the CRA's demand that it do so. In these circumstances, and considering its relief for discharge, this Court ought to direct the Receiver to file the HST returns for, at a minimum, 2022 and 2023, the years in which it managed and sold all of the Company's assets. Only after all HST

returns have been filed and notices of assessment issued should any HST be remitted to the CRA.

(iii) Receiver's Knowledge, Experience and Skill

77. The Receiver, and its counsel, are high-profile firms. They should be held to a high standard. The Receiver's website boasts they are trusted with the most "complex mandates" and have an "unrivalled depth and breadth of knowledge to every situation".

78. KSV's Case Studies are noteworthy. In *2301132 Ontario Inc. and 2309840 Ontario Inc.*[61], it managed 5 development properties in Ontario. To maximize value, it conducted an *en bloc* sale, which is exactly what Mr. Zar suggested:

> **An en bloc sale of the Assembly was the only way to unlock full value for stakeholders**. The SISP was a stalking horse sale process. Such a process secures a transaction, as a baseline, and provides an opportunity to generate recoveries greater than the value of the stalking horse. As a result of the SISP, all first mortgagees were repaid in full. [Emphasis Added.]

79. As with the Receiver, Goodman similarly holds itself as being a firm experienced in complex insolvency matters. According to its website, "we have played a significant role in substantially all of the leading insolvency cases in Canada and have acted on more restructuring than any other Canadian law firm".[62]

80. Considering the combined experience and sophistication of the Receiver and its counsel, it was unreasonable, and contrary to the standard expected of either insolvency or legal professional involved, incurring $1 million in fees for an $8 million residential asset sale, conducted through a Re/Max agent.

81. Furthermore, given counsel's experience and expertise, it was grossly unnecessary to staff this file with 16 people: 5 partners, 1 counsel, 3 associates, an articling student and 6 law clerks. A national firm like Goodmans was also unnecessary given the size and nature of the Receivership.

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[61] KSV Advisory's Website: <https://www.ksvadvisory.com/experience/case-study/2301132-ontario-inc.-and-2309840-ontario-inc>.
[62] Goodmans' Website: < https://www.goodmans.ca/expertise-detail/restructuring-and-insolvency>.

82. There were several questionable time entries considering the firm's admitted sophistication and experience with "complex" insolvencies. Below is a snapshot of such time entries:

- Researching right to appeal under s.193(c) of the BIA;[63]
- Preparing letter to tenants of 30 Roe regarding receivership;[64]
- Researching receivership appeal/stay matters;[65]
- Multiple hours spent to research and draft factum on routine "sales process approval"[66]
- Multiple hours spent "revising [standard] OREA listing agreement; preparing form of Agreement of Purchase and Sale for units"[67]
- Multiple hours spent on a factum for its amended sales process;[68]
- Multiple hours preparing a single notice of Motion
- Multiple time entries for "researching" HST liabilities

83. Goodmans also acted on each of the 9 residential real estate closings, when such work could have clearly been outsourced to a more cost-effective firm.

84. The pace at which the Receiver and its counsel incurred fees is also suspect. For instance, the Interim Statement of Receipts and Disbursements from **May 9, 2022 – April 30, 2023,** it claimed to have incurred $180,625 in fees while the Receiver, who wrote its own reports, incurred less than half that amount, $88,021.[69]

However, the subsequent Interim Statement of Receipts and Disbursements, between **May 9, 2022 to October 4, 2023** (i.e. six months following the first statement) Goodmans had now incurred $587,459 in legal fees – **an increase of $406,834** - while the Receiver had incurred $251,180 – **an increase of $163,159**.[70]

(iv) <u>Receiver's Diligence and Thoroughness</u>

85. The Receiver's lack of diligence and thoroughness is evidenced by the material shortfall occasioned by failing to tax plan. Even though Mr. Goldstein is a CPA, no efforts were made to plan around anticipated tax consequences of selling 9 residential condominium units to

[63] Receiver's Motion Record dated October 4, 2023, Tab 2-M, August 17, 2022 Invoice
[64] Receiver's Motion Record dated October 4, 2023, Tab 2-M, August 17, 2022 Invoice
[65] Receiver's Motion Record dated October 4, 2023, Tab 2-M, August 17, 2022 Invoice
[66] Receiver's Motion Record dated October 4, 2023, Tab 2-M, August 17, 2022 Invoice
[67] Receiver's Motion Record dated October 4, 2023, Tab 2-M, September 8, 2022 invoice
[68] Receiver's Motion Record dated October 4, 2023, Tab 2-M, December 19, 2022 invoice
[69] Motion Record for Discharge, Tab 6, Appendix "AA".
[70] Motion Record, Appendix K.

individual buyers. Further examples of things the Receiver failed to do, and which it could have done to maximize value for all stakeholders include:

a. Prepare promotional materials for the 30 Roe Units;
b. Solicit and gauge interest from larger retail estate investment groups who might have acquired the 30 Roe Units, *en bloc*;
c. Prepare a formal memo on HST liabilities and tax planning for the benefit of the Court;
d. Prepare comparative market analysis and pro forma for both short-term and long-term rental rates on the 30 Roe Units;
e. Use the Company's bank statements to prepare a pro forma for anticipated revenues that the 30 Roe Units might generate.

86. Rather than take some or all these commercially reasonable steps, the Receiver wrote several reports which regurgitated facts and events already described through previous reports. It proposed a sales process only to then amend that sales process and, subsequently, seek a pre-approval of another sales process for those units which had not been sold under its amended sales process. All of this for nine residential condominiums.

(v) <u>Debtor's Cooperation</u>

87. The Receiver, an Officer of this Court, has taken every liberty to shift the burden and blame for its oversized professional fees and the HST liability on Mr. Zar's conduct during the Receivership. In doing so, it believes that it had no independent obligation to assess and gather information that Mr. Zar purportedly refused to share.
88. A debtor's purported lack of cooperation is not an invitation for the Receiver to be derelict in its duty to manage assets prudently and in a commercially reasonable manner.
89. At its highest, a debtor's lack of cooperation is only one of the factors to be considered when passing accounts. In *Tandia Financial Credit Union v. 1322295 Ontario Ltd.,* which

also dealt with real property, the Court reduced the Receiver's fees despite an acknowledged lack of cooperation between the debtor and the receiver in that case.[71]

90. Mr. Zar cannot be endlessly blamed and pejoratively labelled for exercising his legal rights during the Receivership. His decision to challenge several aspects of the Receivership was neither frivolous nor vexatious. Mr. Zar's concerns were clearly justified considering the $1 million HST liability that resulted from the Receiver's sales process.

91. The Receiver's assertions that it expended significant time and money responding to Mr. Zar's allegations and motions is not substantiated. A review of the motions reveals the following: (a) almost every motion relied upon the Receiver's reports (which Goodmans did not draft); (b) no cross-examinations were conducted, except for this motion; (c) the Receiver bundled ancillary relief relating to Mr. Zar with standard relief relating to the sales process; and (d) all motions, except the motion to quash, was efficiently dealt with, virtually, before the Commercial List.

92. The Receiver had the necessary powers to obtain whatever it needed to ensure it could maximize value for the Company's stakeholders. It was also able to obtain the information it claims Mr. Zar did not provide. To illustrate, it wrote a letter to the tenants occupying the 30 Roe Units to obtain a copy of their lease; it wrote a letter to Airbnb to obtain information about the bookings at 30 Roe Units; it coordinated with property management to change the keys to the 30 Roe Units; it corresponded with the tenants at to vacate their units ahead of sale; it wrote to RBC to obtain information regarding the Company's bank account; and, perhaps most significantly – albeit inexplicably delayed – it obtained the Company's HST and tax information from the CRA. Even if Mr. Zar had provided all this information, it would be prudent for the Receiver to have done exactly what it did, anyway.

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[71] *Tandia Financial Credit Union v. 1322295 Ontario Ltd.,* 2019 ONSC 3243 at paras. 3 and 22.

(C) KINGSETT'S BASELESS REQUEST FOR A RELEASE SHOULD BE DENIED

No Basis to Grant KingSett Blanket Immunity as Part of this Receivership

93. There is no basis to release KingSett from any liability because of this Receivership. Relatedly, this Receiver cannot and should not act as an agent for KingSett. If KingSett is concerned about claims made against it, it may bring a motion to strike or seek other relief in the context of *that* proceeding.

94. The Receiver has not produced any statutory or jurisprudential authority to support a third-party release in KingSett's favour within a receivership. In fact, the Receiver sent mixed messages about this release. In its *aide memoire* dated January 11, 2024, before Justice Conway it stated:

> The receiver also included KingSett's request for a release in its Notice of Motion, although it does not take any position on whether that relief should be granted.

95. Meanwhile, this position is contradicted by the Receiver's factum which appears to support this relief "as a matter of convenience to avoid the need for a separation motion".[72]

96. Also confusing is the fact that KingSett has not sworn any affidavit evidence, even though the Receiver stated that "KingSett will make submissions with respect to this relief".[73]

97. The Receiver's assertion that Mr. Zar has not adduced evidence concerning conspiracy[74] is contradicted by Mr. Zar's substantive affidavit sworn November 7, 2023, which is replete with examples as to KingSett's conspiracies and intention to inflict economic harm including by interfering with Mr. Zar's counsel through this proceeding.

98. The Respondent submits that the Court's discretion to grant a third-party release to KingSett in this context is, at best, extremely limited and is more narrow than it would be even in a CCAA proceeding (which this is not).

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[72] Factum of the Receiver (Discharge and Ancillary Relief) dated November 6, 2023, at para. 60.
[73] Factum of the Receiver (Discharge and Ancillary Relief) dated November 6, 2023, at para. 60.
[74] Factum of the Receiver (Discharge and Ancillary Relief) dated November 6, 2023, at para. 61.

99. The Respondent submits that the following overview[75] regarding the granting of third-party releases to non-debtor parties within CCAA matters, which characterizes them as being "extraordinary and exceptional", is relevant to the consideration of whether a third-party release is merited here:

> *Releasing third-party claims*
>
> **The release of claims against non-debtor parties has been described as "[o]ne of the most exceptional forms of relief available under the *CCAA*".**[149] **Third-party releases generally involve a release of claims against the third party in exchange for the third party providing some financial investment or other contribution to support the restructuring**.[150] No provisions under the *CCAA* explicitly deal with allowing for the release of liabilities owed by third parties other than for directors under section 5.1(1). However, courts have sanctioned releases extending beyond directors under the authority of section 11 of the *CCAA*, holding that the skeletal nature and broad discretion of the *CCAA* provide ample room for legal ingenuity to accommodate unique factual scenarios.[151]
>
> …
>
> However, courts have cautioned against too readily authorizing third-party releases, holding **that granting such relief should be reserved for "extraordinary and exceptional" circumstances**.[158] [**Emphasis added**.]

100. In this case, the third-party, an arms-length creditor, provided no financial investment or contribution toward restructuring. It is also not a director, employee, plan sponsor, or professional in this proceeding, and it otherwise has no identifiable entitlement to a release.

101. The Respondent therefore submits that the request for a third-party release in favour of KingSett must be dismissed.

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[75] Anything You Can Do, I Can Do Better: Does the CCAA Provide Broader Discretionary Relief than the BIA?, Eamonn Watson, Gray Monczka and Jordan Schultz, 2022 CanLiiDocs 4309, pp. 22-24

PART IV: CONCLUSION

102. The Receiver severely failed to "maximize value for the Company's stakeholders".[76] The undesirable yet avoidable outcome of this Receivership aptly reflects the well-known maxim *if you fail to plan, you plan to fail.*

103. The Receiver is an Officer of the Court and a sophisticated professional entity. It knew, or ought to have known, that at a minimum, alternative sales options, with corresponding tax analysis, should have been presented to the stakeholders and to this Court.

104. The Receiver failed to conduct basic due diligence – especially considering it was repeatedly warned about the very problem that ultimately materialized.

105. Throughout this Receivership, the Receiver took steps to independently obtain and verify information, regardless of the debtors' purported lack of cooperation. Nothing prevented it from obtaining the necessary tax documents from the CRA; preparing basic rental income analysis; and reaching out to commercial parties that may be interested in acquiring a rental portfolio. These steps are a matter of common sense for a Bay Street advisory firm which prides itself on identifying "the most significant issues and strategies to address them".[77]

106. The Receiver's inactions and wilful blindness to the repeated warnings and information provided by Mr. Zar has and will have material consequences to the creditor and debtor.

107. While the Receiver, and its counsel, represent themselves as experienced and sophisticated parties, more should be expected and demanded from them. This Court should have confidence that a receiver has explored all commercially reasonable options and sought all advice necessary to maximize asset value and minimize foreseeable liabilities. Anything less undermines both public confidence and the integrity of this process.

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[76] Fifth Report of KSV Restructuring Inc. as Receiver dated October 4, 2023 (the "**Receiver's Fifth Report**"), Section 1.03 at para. 3.
[77] KSV Advisory's Website: https://www.ksvadvisory.com/service/restructuring.

PART V: ORDER SOUGHT

108. In light of the foregoing, the Respondent respectfully requests:

a. An Order granting it leave to pursue its claim against the Receiver;

b. An Order discounting the Receiver and Receiver counsel fees by such an amount or percentage as this Honourable Court finds reasonable;

c. An Order dismissing the request for a release in favour of KingSett;

d. An Order directing the Receiver to file the Company's HST returns and only pay any HST owing to the CRA after all outstanding HST returns have been filed and all HST notices of assessment have been received from the CRA stating the exact quantum of HST owed by 30 Roe;

e. Costs of this motion on a partial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31 day of January 2024.

Sam Presvelos

Sam A. Presvelos

Lawyers for the Respondent, 30 Roe Investments Corp.

SCHEDULE "A" – STATUTES CITED

***Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3**

No action against Superintendent, etc., without leave of court

215 Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

Good faith, etc.

247 A receiver shall

- **(a)** act honestly and in good faith; and
- **(b)** deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

SCHEDULE "B" – CASES REFERENCED

1. *Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249, [1993] O.J. No. 3039.

2. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII).

3. *Confectionately Yours Inc. (Re),* 2002 CanLII 45059 (ON CA).

4. *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35 (CanLII), [2006] 2 SCR 123.

5. *Holmes v. Schonfeld Inc.*, 2016 ONCA 148 (CanLII).

6. Levac v. James, 2023 ONCA 73 (CanLII).

7. *Levy v. Brampton (City),* 2005 CanLII 21547 (ON SC).

8. *Ostrander v. Niagara Helicopters Ltd*. (1993), 1973 CanLII 467 (ON SC), 1 O.R. (2nd) 281.

9. *Royal Bank of Canada v. 6382330 Manitoba et al Ltd.* 2021 MBQB 72.

10. *Royal Bank of Canada v. Penex Metropolis Ltd*., 2009 CanLII 45848 (ON SC); 2010 ONSC 636 (CanLII).

11. *Seyom v. TTC,* 2018 ONSC 6848 (CanLII).

12. *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]).

13. *Tandia Financial Credit Union v. 1322295 Ontario Ltd.,* 2019 ONSC 3243.

14. *Toronto-Dominion Bank v. Usarco Ltd*., 2001 CanLII 24004 (ON CA).

15. *Zaravellas v Armstrong*, 2016 ONSC 3616 (CanLII).

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.

KINGSETT MORTGAGE CORPORATION **and** **30 ROE INVESTMENTS CORP.**
Applicant Respondent

Court File No CV-22-00674810-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

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