

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

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

**KINGSETT MORTGAGE CORPORATION**

Applicant / Respondent in Appeal

- and -

**30 ROE INVESTMENTS CORP.**

Respondent / Appellant in Appeal

**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**

**FACTUM OF THE RECEIVER  
(Motion to Quash, Expedite and Cancel Stay)**

March 10, 2023

**GOODMANS LLP**  
Bay Adelaide Centre – West Tower  
333 Bay Street, Suite 3400  
Toronto, ON M5H 2S7

Chris Armstrong  
Tel: (416) 849-6013  
Email: [carmstrong@goodmans.ca](mailto:carmstrong@goodmans.ca)

Mark Dunn  
Tel: (416) 849-6895  
Email: [mdunn@goodmans.ca](mailto:mdunn@goodmans.ca)

Lawyers for KSV Restructuring Inc. in its  
capacity as Court-appointed Receiver

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

Richard Swan (LSO# 32076A)  
Email: [swanr@bennettjones.com](mailto:swanr@bennettjones.com)  
Sean Zweig (LSO# 57307I)  
Email: [zweigs@bennettjones.com](mailto:zweigs@bennettjones.com)  
Joshua Foster (LSO# 79447K)  
Email: [fosterj@bennettjones.com](mailto:fosterj@bennettjones.com)

Tel: 416-863-1200  
Fax: 416-863-1716

Lawyers for KingSett Mortgage Corporation, the Moving Party/Respondent

AND TO: **BLANEY MCMURTRY**  
2 Queen Street East  
Suite 1500  
Toronto, ON M5C 3G5

Lou Brzezinski  
Tel: (416) 593-2952  
Email: [lbrzezinski@blaney.com](mailto:lbrzezinski@blaney.com)

Lucas Strezos  
Tel: (416) 593-3906  
Email: [lstrezos@blaney.com](mailto:lstrezos@blaney.com)

Lawyers for 30 Roe Investments Corp.,  
the Appellant in Appeal

AND TO: **KSV RESTRUCTURING INC.**  
150 King Street West, Suite 2308  
Toronto, ON M5H 1J9

Noah Goldstein  
Tel: (416) 932-6207  
Email: [ngoldstein@ksvadvisory.com](mailto:ngoldstein@ksvadvisory.com)

Murtaza Tallat  
Tel: (416) 932-6031  
Email: [mtallat@ksvadvisory.com](mailto:mtallat@ksvadvisory.com)

The Receiver

AND TO: **30 ROE INVESTMENTS CORP.**  
2 Bloor Street East, Suite 3500  
Toronto, ON M4W 1A8

Raymond Zar  
Email: [rz@roehamptoncapital.com](mailto:rz@roehamptoncapital.com)

AND TO: **RAYMOND ZAR**  
2 Bloor Street East, Suite 3500  
Toronto, ON M4W 1A8

Raymond Zar  
Email: [rz@roehamptoncapital.com](mailto:rz@roehamptoncapital.com)

AND TO: **CANADIAN IMPERIAL BANK OF COMMERCE**  
CIBC – Commerce Court Operations  
Commerce Court West  
199 Bay Street, B-2, Securities Level  
Toronto, ON M5L 1A2

Secured Creditor

AND TO: **CHAITONS LLP**  
5000 Yonge Street  
North York, ON M2N 7E9

Ben Frydenberg  
Tel: (416) 218-1146  
Email: [ben@chaitons.com](mailto:ben@chaitons.com)

Darren Marr  
Tel: (416) 218-1136  
Email: [dmarr@chaitons.com](mailto:dmarr@chaitons.com)

Lawyers for Canadian Imperial Bank of Commerce

AND TO: **LOOP FUNDING INC.**  
410 Adelaide Street West, Suite 500  
Toronto, ON M5V 1S8

Chris Budwal  
Email: [chris.budwal@lendingloop.ca](mailto:chris.budwal@lendingloop.ca)

Secured Creditor

AND TO: **RBC ROYAL BANK**  
Royal Bank Plaza  
200 Bay Street  
Toronto, Ontario M5J 2W7

Natalia Naraine  
Email: [natalia.naraine@rbc.com](mailto:natalia.naraine@rbc.com)

AND TO: **DEPARTMENT OF JUSTICE**  
Ontario Regional Office  
120 Adelaide Street West, Suite 400  
Toronto, ON M5H 1T1

Diane Winters  
Email: [diane.winters@justice.gc.ca](mailto:diane.winters@justice.gc.ca)

AND TO: **MINISTRY OF FINANCE (ONTARIO)**  
Legal Services Branch  
777 Bay Street, 11th Floor  
Toronto, ON M5G 2C8

Steven Groeneveld  
Tel: (905) 431-8380

Email: [steven.groeneveld@ontario.ca](mailto:steven.groeneveld@ontario.ca)

AND TO: **MAZIAR FARHOOD**  
1396 Don Mills Road #B121  
Toronto, ON M3B 0A7

Maziar Farhood  
Tel: (647) 997-1236  
Email: [farhoodhomes@gmail.com](mailto:farhoodhomes@gmail.com)

AND TO: **SHAHIN BAHRAMI**

Shahin Bahrami  
Email: [shahinbahrami@icloud.com](mailto:shahinbahrami@icloud.com)

## TABLE OF CONTENTS

<b>PART I:</b>	<b>OVERVIEW .....</b>	<b>1</b>
<b>PART II:</b>	<b>SUMMARY OF FACTS.....</b>	<b>2</b>
A.	Background.....	2
B.	The Sale Process .....	3
C.	The Transactions.....	4
<b>PART III:</b>	<b>ISSUES.....</b>	<b>6</b>
<b>PART IV:</b>	<b>LAW AND ARGUMENT.....</b>	<b>7</b>
A.	The Company’s Purported Appeal is governed by the <i>Bankruptcy and Insolvency Act</i> .....	7
B.	The Company has no right to appeal without leave.....	7
C.	In the alternative, the automatic stay should be cancelled.....	10
D.	In the further alternative, the Company should not be granted leave to appeal .....	11
E.	In the further alternative, the Purported Appeal should be expedited .....	12
<b>PART V:</b>	<b>RELIEF REQUESTED .....</b>	<b>12</b>

## PART I: OVERVIEW

1. KSV Restructuring Inc. (the “**Receiver**”), in its capacity as receiver of certain property of 30 Roe Investments Corp. (the “**Company**”) brings this motion to quash the Company’s purported appeal (the “**Purported Appeal**”) of three Orders of the presiding Commercial List Judge, Justice Steele, dated February 7, 2023 (the “**Orders**”) so that the two condominium sale transactions (the “**Transactions**”) approved by the Orders can be completed.
2. The Purported Appeal should be quashed. This Court has held, consistently and repeatedly, that there is no automatic right to appeal sale approval orders granted pursuant to the *Bankruptcy and Insolvency Act* (the “**BIA**”). This approach is consistent with the plain language of the *BIA*, which grants limited automatic appeal rights and requires leave for all other appeals. It is also essential to the efficient operation of the bankruptcy system. Automatic appeals under the *BIA* trigger an automatic stay of the order under appeal. The bankruptcy system could not function efficiently if any dissatisfied stakeholder had the right to delay court-approved sales for months simply by filing a notice of appeal, however frivolous or unmeritorious. Notably, the Company expressly stated in its factum on the motion below that it would have no automatic right of appeal and would require leave to appeal the challenged Orders. Also notably, the Company purported to appeal as of right from the order appointing the Receiver – which appeal was quashed (and leave to appeal was dismissed) by a panel of this Court in June 2022.
3. The Receiver moves, in the alternative, for an order cancelling any stay of proceedings that applies to the Orders. The Purported Appeal rests entirely on the Company’s baseless assertion that all nine of the condominium units should be sold together as a hospitality business and that the motion judge erred by finding otherwise. The motion judge made no such error, let alone a palpable and overriding error that would warrant appellate interference. The Company tendered almost no relevant or admissible evidence to support its position. Indeed, it served no evidence at all until the evening before the motion. The Purported Appeal is doomed to fail and will cause significant prejudice. In similar circumstances, this Court has cancelled the stay of proceedings and allowed transactions to close.

4. In the further alternative, if the Purported Appeal is not quashed and leave is required under Section 193(e) of the *BIA*, the Company's request for leave should be dismissed as the Company has failed to serve an application for leave as required by subsection 31(2) of the *Bankruptcy and Insolvency Act General Rules* (the "***BIA Rules***"), or in the further alternative because leave is not warranted.

5. Finally, and in the further alternative, if the Purported Appeal is not quashed and the stay is not cancelled, the Purported Appeal should be expedited so that it is heard on the merits before March 29, 2023. That approach (which would only apply if the Court determined that there was an automatic right of appeal, which is denied, and the stay is not cancelled) would not put the Transactions at risk.

## **PART II: SUMMARY OF FACTS**

### **A. Background**

#### *(i) The Company and the Units*

6. The Company owns nine penthouse condominium units, nine parking spaces and nine storage units in a residential condominium development known as "Minto 30 Roe", located at 30 Roehampton Avenue in Toronto, Ontario (collectively, the "**Units**"). The Company rented the Units to residential tenants on a short term and long term basis. Raymond Zar ("**Mr. Zar**") is the Company's sole officer and director.<sup>1</sup>

7. This has been a difficult receivership, and especially so relative to the size of the Company's debts and the nature of its assets. The Company has been represented by *five separate law firms* in this proceeding, and its current counsel has now scheduled motions to withdraw as counsel of record, the second law firm to do so in this proceeding. Mr. Zar has been uncooperative throughout (*e.g.*, by renting out at least one Unit *after* the Receivership Order was granted, failing to provide the Receiver with readily available information in his possession despite multiple requests, and allowing his mother to stay in a Unit and then denying any knowledge of it). He has also made a number of allegations against the Company's

---

<sup>1</sup> The Receiver understands that there has been litigation between Mr. Zar and his mother, Maryam Rezaee, relating to the control of the Company.

fulcrum secured creditor, KingSett Mortgage Corporation (“**KingSett**”), the Receiver and the Receiver’s counsel and even Judges involved in this case. He even alleged that someone involved in the case used sophisticated technology to listen to his conversations and then threatened a Justice of the Commercial List that he would illegally broadcast a court hearing.

Email Correspondence between Mr. Zar and Christopher Armstrong dated September 19 to 24, 2022, December 13, 2022 and December 16, 2022, Affidavit of Susan Slaney sworn March 1, 2023 [Slaney Affidavit] at Exhibits F, G and I, Motion Record of the Receiver dated March 1, 2023 [MPMR] at Tab 2.

Endorsement of Justice McEwen dated December 14, 2022 at page 2, Slaney Affidavit at Exhibit J, MPMR at Tab J.

Third Report of the Receiver at pages 5-6 and 7-9 [Third Report], Slaney Affidavit at Exhibit C, MPMR at Tab 2.

(ii) ***The appointment of the Receiver and the Company’s unsuccessful attempt to appeal that appointment***

8. KingSett commenced an application to appoint the Receiver on January 7, 2022, after a loan that it advanced to the Company (the “**KingSett Loan**”) was not repaid when it was due. After a series of adjournments granted so that the Company could (among other things) retain counsel, the Receiver was appointed pursuant to an order of the Court made on May 9, 2022 (the “**Receivership Order**”).

Reasons for Judgment of the Court of Appeal dated June 17, 2022, MPMR, Tab 4, paras. 9-11.

9. Using the same tactics the Company is again trying to employ now, the Company improperly purported to appeal the Receivership Order. On June 13, 2022, this Court held that the Company did not have the right to appeal without leave and denied leave to appeal. The Company was ordered to pay the costs of the motion. It has not paid any of these costs.

[KingSett Mortgage Corporation v 30 Roe Investments Corp., 2022 ONCA 479](#) at paras [9-10](#), [15](#), and [39-40](#), MPMR at Tab 4 and Book of Authorities of the Moving Party at Tab 1 [BOA].

Third Report at pages 4-5, Slaney Affidavit at Exhibit C, MPMR at Tab 2.

**B. The Sale Process**



10. The Receiver developed a sale process (the “**Sale Process**”) in order to maximize the value of the Units. The Receiver proposed retaining an experienced agent and marketing the Units in stages to avoid flooding the market with all of the Units at once.

Third Report at page 11, Slaney Affidavit at Exhibit C, MPMR at Tab 2.

11. The Receiver brought a motion for approval of the Sale Process (the “**Sale Process Approval Motion**”). The Company opposed the Sale Process Approval Motion. It argued, among other things, that all of the Units should be sold together as a “hospitality enterprise” (the “**Enterprise Sale Theory**”).

12. The Receiver repeatedly requested evidence from the Company to support the Enterprise Sale Theory. The Company did not provide the evidence requested by the Receiver, or any other evidence to support its position. It provided no evidence that there was a market of potential purchasers who might pay a premium for the Company’s alleged hospitality business in a residential condominium. Based on the evidence available to it, the Receiver concluded that there was no merit to the Enterprise Sale Theory. Justice McEwen rejected the Enterprise Sale Theory, and approved the Sale Process over the Company’s objection by Order dated July 18, 2022 (the “**Sale Process Order**”). The Company did not appeal the Sale Process Order.

Endorsement of Justice McEwan dated July 20, 2022 [July 20 Endorsement] at pages 8 to 9, MPMR, Tab 6.

Third Report at pages 14-15 and Appendices O, M and N, MPMR at Tab 2.

(ii) ***The Sales Process***

13. The Receiver began marketing the first two Units, PH04 and PH09 (the “**Purchased Units**”), in August 2022. These Units were listed on MLS until October 2022. The initial marketing efforts were not successful, so the Receiver sought and obtained approval for certain amendments to the Sale Process by Order dated December 14, 2022 (the “**Amended Sale Process Order**”), including engaging a new listing brokerage. The Amended Sale Process Order was not appealed.

Endorsement of Justice Steele dated February 7, 2023 at para 10 [February 7 Endorsement], MPMR at Tab 8.

**C. The Transactions**

14. On January 3, 2023, the Receiver received an unsolicited expression of interest in PH04. The Receiver also received an offer for PH09 on January 19, 2023. The Receiver negotiated with each purchaser, obtained prices that are satisfactory to it and the Company's secured creditors and recommended to it by the listing brokerage as consistent with comparable sales. The Receiver entered into Agreements of Purchase and Sale (*i.e.* the Agreements) in respect of each of the Purchased Units.

Third Report at pages 12-13, Slaney Affidavit at Exhibit C, MPMR at Tab 2.

15. The Receiver moved for Approval and Vesting Orders in respect of each Transaction as well as an Ancillary Matters Order (the "**Sale Approval Motion**"). KingSett and CIBC (the Company's first position secured creditor) both supported the Transactions, notwithstanding that KingSett may realize a loss in respect of the KingSett Loan.

16. The Receiver advised the Company of the proposed Transactions shortly after they were entered into, and on January 26, 2023, served the Sale Approval Motion returnable February 7, 2023. The Company did not file any responding materials until after 4:00 p.m. on the day prior to the hearing. The evidence that it finally filed consisted largely of Mr. Zar's unsubstantiated opinion that the Units would be worth more if they were all sold together.

17. By Endorsement dated February 7, 2023, the Commercial List Judge, Justice Steele, rejected the Company's arguments and granted the Orders.

July 20 Endorsement at page 12, MPMR at Tab 6.

February 7 Endorsement at para 21, MPMR at Tab 8.

(i) ***The Company admits it has no right to appeal, but then purports to appeal as of right***

18. The Receiver sought provisional execution of the Orders, because it was concerned that the Company would try to stop the Transactions by purporting to commence an appeal as of right, as it had done with the Receivership Order. The ***Company explicitly stated in its responding factum below that it had no right to appeal without leave***: "an appeal in this matter to the Court of Appeal will only proceed with leave," although it sought to resile from this in oral argument. It also accepted that and there would

be “no automatic stay,” with a view to avoiding a provisional execution order. Justice Steele declined to grant provisional execution of the Orders pursuant to an Endorsement dated February 16, 2023 (the “**February 16 Endorsement**”).

Supplementary Factum of the Appellant dated February 9, 2023 at paras 14-16, Slaney Affidavit, Exhibit D, MPMR, Tab 2.

February 16 Endorsement at para 16, MPMR, Tab 12.

(ii) ***The Purported Appeal***

19. On February 23, 2023, despite what it said in its factum below, the Company served the Notice of Appeal, purporting to commence the Purported Appeal as of right. The Company now says that it does not need to seek leave to commence the Purported Appeal, allegedly based on subsections 193(a) to (c) of the BIA.

20. Under the Agreements, as amended, the closing date for the Transactions is March 31, 2023. The Transactions are terminable by the Purchasers if they do not close on or before the closing date of March 31, 2023.

First Amendment to Agreement of Purchase and Sale of PH04 dated February 28, 2023, Slaney Affidavit, Exhibit B, MPMR, Tab 2.

First Amendment to Agreement of Purchase and Sale of PH09 dated February 28, 2023, Slaney Affidavit, Exhibit A, MPMR, Tab 2.

**PART III: ISSUES**

21. The issues to be determined on this motion are:

- (a) whether the Company’s Purported Appeal should be quashed because it has no right to appeal;
- (b) if the Purported Appeal is not quashed, whether any automatic stay of proceedings should be cancelled;
- (c) if the Purported Appeal is not quashed and leave to appeal is required, whether the Company should be denied leave to appeal; and

(d) if the Purported Appeal is not quashed and the stay is not cancelled, whether the Purported Appeal should be expedited so that it is heard on or before March 29, 2023.

22. The Receiver respectfully submits that the answer to each of these questions is yes.

#### **PART IV: LAW AND ARGUMENT**

##### **A. The Company's Purported Appeal is governed by the *Bankruptcy and Insolvency Act***

23. Subsection 134(3) of the *Courts of Justice Act* (“*CJA*”) vests this Court with jurisdiction to hear this motion and quash the Purported Appeal. Because the Receiver was appointed pursuant to the *BIA* (in addition to the *CJA*), the Company's appeal rights are governed by the *BIA*.

[Buduchnist Credit Union Limited v 2321197 Ontario Inc., 2019 ONCA 588](#) at para 10 [*Buduchnist*], BOA at Tab 2.

Receivership Order, MPMR at Tab 2.

##### **B. The Company has no right to appeal without leave**

24. The Company has purported to commence the Purported Appeal as of right. But this Court has repeatedly held that sale-approval orders *cannot* be appealed as of right. Leave is required.

25. A party seeking to appeal an order under the *BIA* must seek leave to appeal unless it falls within certain narrow categories set out in subsections 193(a)-(d) of the *BIA*. If an order is properly appealed as of right, then pursuant to s. 195 of the *BIA* it is stayed until the appeal is disposed of.

[BIA s. 193 and 195](#)

26. Expedient resolution is a “principal object” of the *BIA*. That object cannot be achieved if any disaffected stakeholder can prevent the implementation of any order simply by filing a notice of appeal. This Court has recognized this reality, and it has repeatedly held that the “awkward and anachronistic” appeal rights in the *BIA* are to be construed narrowly.

[2403177 Ontario Inc. v Bending Lake Iron Group Limited 2016 ONCA 225, 347 O.A.C. 226](#) at paras 1 and 33 [*Bending Lake*], BOA at Tab 3.

27. This Court has also held, repeatedly, that sale approval orders do not trigger an automatic appeal right. This principle was established in 2016 by *2403177 Ontario Inc. v. Bending Lake Iron Group Limited* and it has been consistently applied since then.

[\*Bending Lake\*](#), BOA at Tab 3.

See also: [\*Hillmount Capital Inc. v Pizale\*, 2021 ONCA 364](#), BOA at Tab 4; [\*Cosa Nova Fashions Ltd. v The Midas Investment Corporation\*, 2021 ONCA 581](#) [*Cosa Nova*], BOA at Tab 5; [\*B&M Handelman Investments Limited v Drotos\*, 2018 ONCA 581](#), BOA at Tab 6; [\*First National Financial GP Corporation v Golden Dragon HO 10 Inc.\*, 2019 ONCA 873](#) [*First National*], BOA at Tab 7; [\*Downing Street Financial Inc. v Harmony Village Sheppard Inc.\*, 2017 ONCA 611](#), BOA at Tab 8.

28. In this case, Company claims that it has the right to appeal pursuant to section 193 of the *BIA* because: (a) the point at issue involves future rights; (b) the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; and (c) the property involved in the appeal exceeds in value ten thousand dollars. The Company's position runs squarely contrary to the established jurisprudence of this Court.

29. **193(a) of the *BIA* has no application, because the Purported Appeal does not involve future rights within the meaning of the *BIA*.** The Company asserts in its Notice of Appeal that the matters in the within Purported Appeal "involve future rights" including "the manner in which the Units...are to be sold." This is, with respect, simply wrong. The Orders *do not* direct how any of the other Units will be sold. That issue was already determined by the Sale Process Order and the Amended Sale Process Order, neither of which were appealed. Justice Brown considered, and rejected, a substantially identical argument in *Bending Lake* and concluded that the purported appeal of the approval and vesting order in that case *did not* involve future rights or engage 193(a) of the *BIA*.

[\*Bending Lake\*](#), paras [25-27](#), BOA at Tab 3.

30. **193(b) of the *BIA* has no application, because the Orders will not affect other cases of a similar nature in the proceedings.** The Company asserts that the Orders will affect other cases of a similar nature, because it involves the process for selling Units and Units remain to be sold. This is, essentially, the same argument made in respect of future rights and 193(a), and it must fail for the same

reason. The process for selling Units has already been determined. The Orders apply only to the Purchased Units. Moreover, the Company's core complaint is that the Transactions are inferior to an *en bloc* sale (*i.e.* the Enterprise Sale Theory). This issue is entirely fact specific and, by definition, the allegation that all Units should be sold together can only arise once. The Company's speculation about future sale approval motions is not sufficient to engage subsection 193(b).

31. **Subsection 193(c) is not engaged because the Appeal does not engage property worth \$10,000.**

As this Court has held in *Bending Lake*, an appeal does not involve property with a value in excess of \$10,000 when it is procedural in nature, does not bring into play the value of the debtor's property, or does not result in a loss.

[\*Bending Lake\*](#), at para [53](#), BOA at Tab 3.

32. Each of these criteria is satisfied here:

- (a) the Orders were granted because Justice Steele was satisfied that the Receiver had followed an appropriate *process* when it pursued the Transactions. The Appellant seeks to call that *process* into question and say that the Receiver should have pursued the Enterprise Sale Theory;

[\*Cosa Nova\*](#) at para [28](#), BOA at Tab 5.

[\*IceGen\*](#) at para [3](#), BOA at Tab 9.

- (b) the Orders do not bring the value of the Company's property into play. The Receiver simply seeks to carry out its mandate by converting certain Units into cash;

[\*First National\*](#) at para [17](#), BOA at Tab 7.

- (c) the Company has not shown that the Orders result in a gain or a loss. A bald assertion that a transaction will cause a loss is not sufficient to engage subsection 193(c). The Company must "demonstrate some basis in the evidentiary record" to show that granting the Orders will result in a loss. The Company has not met this threshold. The only evidence it has tendered on this point is the inadmissible opinion of its own principal, Mr. Zar.

[\*Bending Lake\*](#), at para. [64](#), BOA at Tab 3.

33. As a result, based on this Court’s unambiguous jurisprudence interpreting subsections 193(a)-(c) of the *BIA*, it is plain that the Company has no appeal from the Orders as of right. It necessarily follows that the Purported Appeal is a nullity.

**C. In the alternative, the automatic stay should be cancelled**

34. In the alternative, if the Company has a right to appeal then the resulting automatic stay should be cancelled under *BIA* s. 195. This Court has held that it is appropriate to cancel the stay if the appeal lacks merit and the stay will cause prejudice. A history of delay will also weigh against the appellant.

[\*Royal Bank of Canada v Bodanis\*, 2020 ONCA 185](#) at paras [11-13](#), BOA at Tab 10.

[\*First National\*](#) at paras [40-42](#), BOA at Tab 7.

35. In *Royal Bank of Canada v. Bodanis*, this Court cancelled a stay even where the appeal was not “entirely meritless” but challenged the factual findings of the court below. In this case, the Purported Appeal *is* entirely meritless. The entire Purported Appeal turns on the assertion that 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.”

36. The evidence before the Commercial List Judge did not come remotely close to establishing the value of the “Enterprise” or that the Transactions would decrease that value. The Company had from at least July 2022, when the Sale Process was approved, to substantiate the Enterprise Sale Theory with evidence. After all of that time, it proffered only Mr. Zar’s unsubstantiated opinion that the Units were collectively worth \$12.5 million. Mr. Zar’s opinion is not relevant or admissible.<sup>2</sup> It was not supported by any current or verifiable financial information.<sup>3</sup> It was delivered so late that cross-examination was not

---

<sup>2</sup> By way of example, Mr. Zar opines at paragraph 13 of his affidavit that the “income approach” to valuing the Units is more suitable for determining the value of the Business and its Units than the direct comparison approach. This is classic opinion evidence, which can only be tendered by duly qualified experts in accordance with the *Rules*.

<sup>3</sup> The Company only offered an Operating Statement for 2018 to support Mr. Zar’s opinion. It did not explain why current financial information was not available.

possible. Nothing in the Notice of Appeal engages with these frailties, and there is no reason at all to believe the Company will be able to overcome them.

37. The balance of prejudice also favours cancelling the stay. If the stay remains in place (and the Purported Appeal proceeds) then the Transactions will likely be lost. This will prejudice all stakeholders. In contrast, any prejudice suffered by the Company is the result of its own decision to withhold any relevant and admissible evidence it has to support the Enterprise Sale Theory.

**D. In the further alternative, the Company should not be granted leave to appeal**

38. In the further alternative, if leave is required under Section 193(e) of the BIA, the Company seeks leave to appeal the Orders and has asked that the leave application be heard at the same time as the Purported Appeal; however, the Company has failed to serve an application for leave as required by subsection 31(2) of the *BIA Rules*.

[BIA Rules, s. 31\(2\)](#).

39. In any event, leave to appeal should not be granted in the circumstances. The leave application is not properly before the Court. If leave is raised properly, it ought to be rejected since:

- (a) the Purported Appeal does not raise an issue of general importance. Justice Steele applied the well-established *Soundair* test to the evidence. The result below is only important to the parties;
- (b) the Purported Appeal is not *prima facie* meritorious. In order to succeed on appeal, the Company must show that Justice Steele committed a palpable and overriding error by rejecting the Enterprise Sale Theory. The evidence falls well short of carrying this heavy burden. The Company did not tender any convincing or admissible evidence to support its position, and Justice Steele was right to reject it; and,



- (c) the Purported Appeal will unduly hinder the progress of the proceeding. As noted, if the Purported Appeal proceeds and the Orders are stayed, then it is likely that the Transactions will be lost. This will delay, and almost certainly decrease, recovery for all stakeholders.

[Buduchmist](#) at para [17](#) and [30](#).

**E. In the further alternative, the Purported Appeal should be expedited**

40. In the further alternative, the Purported Appeal should be expedited. If the Purported Appeal were found to be an automatic one, and if the stay is not cancelled, then the Purported Appeal would be rendered moot because the Transactions are expected to be terminated by the Purchasers if they do not close by March 31, 2023. The Company will achieve its goal without the need to prove its case. This is a perverse result that should not be allowed.

**PART V: RELIEF REQUESTED**

41. The Receiver respectfully requests: (a) an order quashing the Purported Appeal; (b) in the alternative, an order cancelling the stay of proceedings; (c) in the further alternative, an order dismissing the Company's request for leave to appeal; (d) in the further alternative, an order expediting the hearing of the Purported Appeal so that it is heard on or before March 29, 2023; and (e) its costs of this motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10<sup>th</sup> DAY OF MARCH 2023.**



---

**Goodmans LLP**

Barristers & Solicitors

Bay Adelaide Centre

333 Bay Street, Suite 3400

Toronto, ON M5H 2S7

**Christopher G. Armstrong** LSO# 55148B

**Mark Dunn** LSO# 55510L

Tel: 416.979.2211

Fax: 416.979.1234

Lawyers for the Receiver

## SCHEDULE A – LIST OF AUTHORITIES

### *Cases Cited*

1. [\*KingSett Mortgage Corporation v 30 Roe Investments Corp.\*, 2022 ONCA 479](#)
2. [\*Buduchnist Credit Union Limited v 2321197 Ontario Inc.\*, 2019 ONCA 588](#)
3. [\*2403177 Ontario Inc. v Bending Lake Iron Group Limited\*, 2016 ONCA 225](#)
4. [\*Hillmount Capital Inc. v Pizale\*, 2021 ONCA 364](#)
5. [\*Cosa Nova Fashions Ltd. v The Midas Investment Corporation\*, 2021 ONCA 581](#)
6. [\*B&M Handelman Investments Limited v Drotos\*, 2018 ONCA 581](#)
7. [\*First National Financial GP Corporation v Golden Dragon HO 10 Inc.\*, 2019 ONCA 873](#)
8. [\*Downing Street Financial Inc. v Harmony Village Sheppard Inc.\*, 2017 ONCA 611](#)
9. [\*IceGen Inc., Re\*, 2016 ONCA 902](#)
10. [\*Royal Bank of Canada v Bodanis\*, 2020 ONCA 185](#)

## **SCHEDULE B – STATUTES AND REGULATIONS RELIED ON**

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

#### **Section 193**

##### **Court of Appeal**

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.

#### **Section 195**

##### **Stay of proceedings on filing of appeal**

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.

### **Bankruptcy and Insolvency General Rules, C.R.C. c. 368**

#### **Section 31**

##### **Appeal to Court of Appeal**

- (1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.
- (2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

**Courts of Justice Act, R.S.O. 1990, c. C. 43**

**Section 134**

**Powers on appeal**

(1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).

**Interim orders**

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. 1999, c. 12, Sched. B, s. 4 (3).

**Power to quash**

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

**Determination of fact**

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;

(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and

(c) direct a reference or the trial of an issue, to enable the court to determine the appeal.

**Scope of decisions**

(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal. R.S.O. 1990, c. C.43, s. 134 (3-5).

**New trial**

(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred. R.S.O. 1990, c. C.43, s. 134 (6); 1994, c. 12, s. 46 (1).

**Same**

(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties. R.S.O. 1990, c. C.43, s. 134 (7); 1994, c. 12, s. 46 (2).

**KINGSETT MORTGAGE  
CORPORATION**

Applicant / Respondent in Appeal

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

Respondent / Appellant in Appeal

Court of Appeal File No.:

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

---

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced in Toronto

---

**FACTUM OF THE RECEIVER  
(Motion to Quash, Expedite and Cancel Stay)**

---

**Goodmans LLP**

Barristers & Solicitors

Bay Adelaide Centre

333 Bay Street, Suite 3400

Toronto, ON M5H 2S7

**Christopher G. Armstrong LSO# 55148B**

**Mark Dunn LSO# 55510L**

Tel: 416.979.2211

Fax: 416.979.1234

Lawyers for KSV Restructuring Inc. in its capacity as  
Court-appointed Receiver