

**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**

FACTUM OF THE RESPONDENT

February 6, 2023

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OVERVIEW

1. Pursuant to an order of the Ontario Superior Court of Justice (the “**Court**”) made on May 9, 2022 (the “**Receivership Order**”) KSV Restructuring Inc. was appointed as receiver and manager (in such capacity, the “**Receiver**”) of certain property of 30 Roe Investments Corp. (the “**Company**”) including nine penthouse condominium units, nine parking spaces and nine storage units and/or lockers in a condominium development (collectively, the “**Units**”) known as Minto 30 Roe, located at 30 Roehampton Avenue in Toronto, Ontario (the “**Building**”).
2. This motion is brought by the Receiver for: (i) an order (the “**PH04 Approval and Vesting Order**”), *inter alia*, approving a sale of the PH04 condominium unit and related parking and storage units at the Minto (“**PH04**”); (ii) an order (the “**PH09 Approval and Vesting Order**”), *inter alia*, approving a sale of the PH09 condominium unit and related parking and storage units at Minto (“**PH09**”) ((i) and (ii), collectively, the “**Transactions**”); and (iii) an order (the “**Ancillary Matters Order**”), *inter alia*, (a) authorizing the Receiver to disconnect, remove and dispose of the monitoring equipment, (b) approving certain distributions in connection with the Transaction, (c) approving the activities of the receiver described in the Supplement to the Second Report of the Receiver dated December 13, 2022 (the “**Supplement to the Second Report**”) and the Third Report of the Receiver dated January 26, 2023 (the “**Third Report**”), and (d) sealing the confidential appendices to the Third Report on the terms specified. The Receiver has also included a provision that the Orders are subject to provisional execution notwithstanding any appeal brought in respect of this Order, pursuant to section 195 of the *Bankruptcy Insolvency Act*.

FACTS

Background

3. The Company owns all of the Units on the top floor of the Building out of which it operates a corporate housing business known as Roe Suites (the “**Business**”).

Motion Record of the Respondent, Tab 1, the Affidavit of Raymond Zar (“**Zar Affidavit**”) at para 4.

4. The Company is indebted to the Canadian Imperial Bank of Commerce (the “**CIBC**”) in the amount of \$4.29 million as of January 25, 2023 (the “**CIBC Mortgage**”). CIBC has not noted the Company in default nor has made demand for payment.

Zar Affidavit at para 5.

5. The Company is indebted to the Applicant, Kingsett Mortgage Corporation (“**Kingsett**”) in the amount of approximately \$1.9 million in principal as of January 26, 2023 (the “**KingSett Mortgage**”).

Zar Affidavit at para 6.

The History of the Relationship Between Kingsett and the Company

6. In or about January of 2019, the Company provided a corporate presentation in support of its application for a loan. That presentation detailed the business structure to be employed by the Company. In particular, it pointed out that the Units were used for the Business and detailed the revenues generated from the Business as opposed to residential tenancies. There is no landlord and tenant relationship so rent control does not apply. All of the Units are furnished and rented on short term basis. Sometimes, the short-term guests would convert to longer term stays but the Units always remained fully furnished and contained amenities one would expect at a hotel.

Zar Affidavit at para 8, Exhibit "B"

7. On or about March 18, 2019, there was an email exchange between Justin Walton of KingSett and Raymond Zar addressing the annual cash flow from the Units operated as furnished rentals.

Zar Affidavit at para 10, Exhibit "D"

8. On or about October 8, 2021, a valuation report of the Units with a comparative analysis of value based on the direct comparison approach and the income approach using prevailing CAP rates. This summary was provided to KingSett as part of its regular audit of the financial health of the Company and KingSett agreed to extend its loan three more times since this date. The CAP rates were based on those established by Colliers who typically set the standard for the valuation industry. Using CAP rates as of today, and presuming the EIBTDA would be the same as in October 2021 (even though the latest Colliers reports shows rents in Toronto have increased by 17% to 24% since last year), then the valuation as at today would be \$12,476,761.00 (EBITDA of \$393,018.00 divided by CAP rate 3.15%) which is significantly higher than the value derived from the direct comparison approach.

Zar Affidavit at para 11 - 12, Exhibit "E" and "F".

9. The income approach is more suitable for determining the value of a rental property than the direct comparison approach.

Zar Affidavit at para 13.

The Receiver and Sales Process

10. The KingSett loan allegedly matured at the end of December 2021, and almost immediately thereafter, KingSett moved to appoint a Receiver. No opportunity was provided to the Company to cure the default before the motion for a Receiver was served.

Zar Affidavit at para 15.

11. On application of KingSett on May 9, 2022, the court granted a Receivership Order appointing the Receiver as Receiver and Manager of the Company.

Zar Affidavit at para 18.

12. On July 18, 2022, this Honourable Court approved the Sales Process Order. The Receiver was unsuccessful in selling any of the Units from May 2022 until December 2022. The original listing agent, HomeLife, had no experience dealing with corporate housing businesses like the Business. The Receiver's plan was unsuccessful and in three months the Units were listed on the MLS, the Receiver was unable to sell a single Unit. The Receiver attributed this to its decision to offer cooperating brokers only 2% commission instead of the prevailing 2.5% almost all listings on MLS offer as commission.

Zar Affidavit at para 19.

13. On December 14, 2022, this Honourable Court approved an Amended Sales Process. The Amended Sales Process was intended to include, *inter alia*, the preparation of marketing materials, listing the units on MLS, circulating emails and newsletters to a database and staging the Units. Additionally, the Receiver choose to market the Units individually rather than as a going concern corporate housing business and altered the rate of commission.

Zar Affidavit at para 20, Exhibit "H"

14. The Receiver obtained agreements of purchase and sale for two units, being PH04 and PH09 but did not list them sufficiently on MLS. On or around January 19, 2023, counsel for the Company inquired into the deficiencies of the Amended Sales Process. Counsel for the Receiver addressed some of these deficiencies in a letter dated February 5, 2023.

Zar Affidavit at para 21, Exhibit "I".

15. The costs of the Receiver and its counsel that have been disclosed pertaining to this Receivership proceeding to date are disproportionate to the amounts sought to be recovered through the Transactions.

Zar Affidavit at para 22 -24, Exhibit "J"

16. The Receiver is now requesting authority from the court to make interim distributions from the proceeds of the Transactions:

- (a) to such parties as required in respect of: (i) property tax arrears and condominium common expense arrears in respect of the applicable Units; and (ii) such other disbursements as required to be paid by the Receiver in connection with the closing of such Transaction;
- (b) to Canada Revenue Agency in respect of harmonized sales tax ("HST") on the Transaction;
- (c) to the real estate listing brokerage in respect of the commissions payable (including, for the avoidance of doubt, commissions payable to the cooperating brokerage and applicable HST);

- (d) to CIBC in respect of the full amount of the indebtedness of the Debtor owing to CIBC and secured by the first mortgage in favour of CIBC on the applicable Unit; and
- (e) to KingSett in respect of the indebtedness of the Debtor owing to KingSett and secured by the second mortgage in favour of KingSett on the applicable Unit, subject to such holdback as the Receiver considers appropriate to fund the receivership, including the fees and expenses of the Receiver and its counsel (collectively, the “**Interim Distributions**”).

Motion Record of the Receiver, Tab 5, Draft Ancillary Matters Order at para 6

The \$3,000,000.00 Tender

17. Despite the costs above, the Company secured \$3 million in cash deposited in a lawyer’s trust account to payout KingSett and all its costs (pending assessment) and discharge the Receiver.

Zar Affidavit at para 25-26.

18. This bank draft was tendered to discharge the entirety of the indebtedness owed to KingSett and its Receiver and to then recover inflated costs through an assessment by the Court.

Zar Affidavit at para 27.

19. However, the Receiver’s counsel demanded on 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.

Zar Affidavit at para 28, Exhibit “K”

20. The insertion of the clause effectively stopped the transaction and prevented the Company from paying out KingSett and discharging the Receiver and minimizing the losses to the Company.

The clause demanded by the Receiver's counsel benefiting KingSett reads:

THIS COURT ORDERS that no action or other proceeding shall be commenced against KingSett or any of its partners, directors, employees, affiliates, shareholders, or lawyers in any way arising from or related to the KingSett Loan (as defined within the Second Report) or the within receivership proceedings, except with prior leave of this Court on a motion served on not less than twenty (20) days' prior notice to KingSett and any other applicable above referenced person.

Zar Affidavit at para 30

ISSUES

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

- (a) whether this Court should grant an adjournment based on the relief sought by the Receiver, particularly the relief of provisional execution;
- (b) whether the Transactions should be approved;
- (c) whether the Court has authority to approve the Interim Distributions;
- (d) whether the Receiver should disconnect, remove and dispose of the Monitoring Equipment.

LAW AND ARGUMENT

This Court should Grant an Adjournment

22. Pursuant to the draft Orders provided to the Respondent on February 3, 2023, the Receiver seeks the Orders are “subject to provisional execution notwithstanding any appeal brought in respect of this Order, pursuant to section 195 of the *Bankruptcy Insolvency Act*.”

Zar Affidavit at para 37, Exhibit “N”

23. In *Ariston Realty Corp. v Elcarim Inc.*, the court put forth a non-exhaustive list of factors to judicially exercise the discretion to grant or refuse an adjournment. Depending on the circumstances of each case, a judge or associate judge may need to weigh many relevant factors including, *inter aila*:

- (a) the principles of natural justice;
- (b) the practical effect or consequences of an adjournment on both substantive and procedural justice;
- (c) the competing interests of the parties in advancing or delaying the progress of the litigation
- (d) whether the ability of the party requesting the adjournment to fully and adequately prosecute or defend the proceeding would be significantly compromised if the adjournment were refused;

[*Ariston Realty Corp. v. Elcarim Inc.*](#), 2007 CanLII 13360 (ON SC) at para 34.

24. The Court should grant an adjournment based on the following principals outlined in *Ariston Realty Corp*:

(a) the Principals of Natural Justice: The Company ought to have the opportunity to be heard with respect to the issues raised. The Respondent submits that the Receiver only provided their position on the eve before this hearing. Additionally, adequate notice was not provided as the relief sought was not contained in the Notice of Motion dated January 26, 2023.

Zar Affidavit at para 38.

(b) the practical effect or consequences of an adjournment on both substantive and procedural justice: Granting an adjournment provides a positive and practical effect on both substantive and procedural justice. Both of these principals require that material be placed before the Court and the parties have an opportunity to address and respond accordingly. The relief sought is significant, consequential and requires a full hearing.

Zar Affidavit at para 39.

(c) the competing interests of the parties in advancing or delaying the progress of the litigation: There is no prejudice to the Receiver for an adjournment whereas there is substantial prejudice to the Company who cannot argue the matter on its merits and suffer the loss of a stay in respect to any appeal that it may file.

Zar Affidavit at para 37

(d) whether the ability of the party requesting the adjournment to fully and adequately prosecute or defend the proceeding would be significantly compromised if the adjournment were refused: As stated, the relief sought by the Receiver is significant, consequential and requires a full hearing. Refusing an

adjournment would significantly compromise the Company's ability to adequately defend against the relief sought.

Zar Affidavit at para 39, Exhibit "O"

The Transactions Should not be Approved

25. Court-appointed receivers have a fiduciary duty to act honestly, fairly and in a commercially reasonable manner, without any ulterior interest, on behalf of all individuals with an interest in the debtor's property, including the debtor.

[Bankruptcy and Insolvency Act](#), R.S.C., 1985, c. B-3, s. 247
[Ostrander v. Niagara Helicopters Ltd. et al.](#), 1973 CanLII 467 (ON SC), at para 6

26. The Receiver did not accept payment of the outstanding indebtedness owing to KingSett by effectively blocking any attempt to sue KingSett after payment had been made in full.

Zar Affidavit para 26 – 29, Exhibit "K"

27. A receivership is the best way to protect the interests of all stakeholders, with a view to maximizing value for all.

[Business Development Bank of Canada v. Pine Tree Resorts Inc.](#), 2013 ONSC 1911 (CanLII) at para 57

28. The criteria to be used by the Court to determine whether to approve a transaction in a receivership are set out in *Royal Bank v. Soundair Corp.*:

- (a) Whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) The interest of all parties;

- (c) The efficacy and integrity of the process by which offers were obtained; and
- (d) Whether there has been unfairness in the working out of the process.

[Royal Bank v. Soundair Corp.](#) (1991), 4 OR (3d) 1 [*Soundair*], para. 16

29. While the courts will carefully scrutinize the procedure followed by the receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. However, the Court may reject the recommendations and proceed contrary to the recommendations of the receiver.

[Regal Constellation Hotel Ltd., Re.](#) 2004 CanLII 206 (ON CA), at para 23.

[Soundair](#) at paras. 14 and 21.

30. The Court should not approve the Transactions based on the application of the *Soundair* test:

(a) Efforts to get the best price: The Receiver has not adequately considered whether the Units should be marketed *en bloc* as a going concern corporate housing business. The KingSett Mortgage was conceived as an umbrella charge over the Units. KingSett financed the Units with an understanding that it will be managed *en bloc*. The Receiver has not made sufficient efforts to consider the value of the corporate housing business and market the opportunity accordingly. The Receiver, by choosing to market the Units individually, will not realize their optimum value. The motion material contains a valuation report of the Units with a comparative analysis of value based on the direct comparison approach and the income approach using prevailing CAP rates. This summary was provided to KingSett on or about October 8, 2021 as part of its regular

audit of the financial health of the Company and KingSett agreed to extend its own three more times since this date and did not refute the valuation. The CAP rates were based on those established by Colliers who typically set the standard for the valuation industry. The income approach is more suitable for determining the value of the Company and its Units than the direct comparison approach.

Using the CAP rates as of today, and even assuming EIBTDA would be the same as in October 2021 (even though the latest Colliers reports shows rents in Toronto have increased by 17% to 24% since last year), then the valuation would be \$12,476,761 (EBITDA of \$393,018.00 divided by CAP rate of 3.15%, which is considerably higher than the individual Units will fetch, yet the Receiver has not even tried to have market in this fashion).

The sale of a rental condominium to an individual will be subject to HST where the individual is a non-registrant and is likely purchasing the condominium as a resident. For HST purposes, a seller must collect and remit. Pursuant to paragraph 266(2)(d) of the *Excise Tax Act*, a receiver is deemed an agent of an insolvent person and the receiver is jointly and severally liable with the insolvent person for all payment and remittance of HST/GST, including for HST/GST debt arising before the receivership. However, the insolvent person, pursuant to paragraph 266(2)(d)(ii), is not liable for any GST/HST collected or collectible by the receiver.

Zar Affidavit at para 11 - 12

Appendix "A" to the factum, A Letter of Opinion from tax lawyer, Sunita Doobay is found appended to this factum.

(b) Interests of the parties: The Receiver has not adequately considered the interest of the Respondent and its business interest, the unsecured creditors and shareholders. As stated above, the Receiver has not accounted for the potential value of a going concern corporate housing business.

(c) Lack of efficacy and integrity of the process: The Third Report did not initially disclose sufficient marketing materials, the second MLS listing for PH09, information related to the database of industry contacts and efforts regarding the staging of the units. The Respondent had inquired on January 19, 2023 for further particulars of the inadequate marketing efforts on behalf of the Receiver. The Receiver only provided its answer to this demand on February 5, 2023. Additionally, the concern relating the disproportionate amount of costs raises an issue with the efficiency of the process. The Respondent submits that the initial deficiency of disclosure in the Third Report, the delayed response and the disproportionate costs lacks efficacy and integrity in the sales process.

Zar Affidavit at para 21 - 22 Exhibits "I" and "J"

(d) Unfairness in the process: Despite five months going by, the Receiver and its counsel now say costs are less than the amount they demanded the Company pay in August 2022 when it sought to discharge the Receiver. Additionally, there has been a substantial amount of costs incurred outlined in the confidential schedule to the Receiver's Third Report. The Respondent submits that, assuming the remaining units are to be sold at or about the same price per square foot, it is unlikely that KingSett will recover even 50% of its outstanding indebtedness.

Pursuant to the draft Orders, the Receiver included relief indicating that the “Order is subject to provisional execution notwithstanding any appeal brought in respect of this Order, pursuant to section 195 of the *Bankruptcy Insolvency Act*.” In essence, section 195 of the *Bankruptcy Insolvency Act* places a stay of proceedings on filing of appeal. The Respondent submits that this relief sought is an unfair, unjust and an overreach within the context of this sale approval motion.

The Respondent submits that counsel for the Receiver has acted on behalf of KingSett on another unrelated matter before the Ontario Superior Court of Justice Commercial List. Court-appointed receivers are supposed to be independent from the appointing creditor and should retain independent counsel to avoid any issues of conflict of interest.

Zar Affidavit at para 22 and 37-39, Exhibits “J” and “O”

Karen Perron, [The ABCs of Appointing a Receiver](#), 2019 39th Annual Civil Litigation Conference 12A, 2019 CanLIIDocs 3839.

The Case of *AbitibiBowater Inc.*

31. In the event that this Court grants the sale of PH04 and PH09, the Receiver relies on the case of *AbitibiBowater Inc.* as authority for the Court to make the proposed Interim Distributions.

32. This case concerns a motion for the approval of DIP financing and the interim distribution of certain proceeds. In essence, the payee of the interim distribution was also the DIP lender who insisted as part of the conditions to grant the DIP, he would receive an interim distribution.

[AbitibiBowater inc. \(Arrangement relatif à\)](#), 2009 QCCS 6461 (CanLII), at para 87

33. The case is wholly inapplicable to the material facts.

Monitoring Equipment

34. Pursuant to the Receivership Order, the Receiver may "...take possession of and exercise control over the Property [...] where the Receiver considers it necessary or desirable...". "Property" is defined in the Receivership Order 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..."

35. With permission of the property manager, the Company did install a monitoring equipment in the common elements of the condominium corporation to provide security and safety to the inhabitants of the Units and the Building and Mr. Zar as Director of the condominium corporation has the right to view those cameras and all cameras in the Building as they are in the common elements. The Receiver's order does not give any jurisdiction or authority to remove cameras located in the condominium corporation common elements.

Zar Affidavit at para 34.

RELIEF SOUGHT

36. For reasons herein, the Respondent respectfully requests that the Court:

(a) grant an adjournment with request to the provisional execution;

(b) refuse the approval of the sale of PH04 and granting of the PH04 Approval and Vesting Order;

(c) refuse the approval of the sale of PH09 and granting of the PH09 Approval and Vesting Order;

(d) refuse the approval of the Interim Distributions; and

(e) refuse the disconnection, removal and disposal of the monitoring equipment.

APPENDIX "A"

A Letter of Opinion from tax lawyer, Sunita Doobay

-----Original Message-----

From: Sunita Doobay
Sent: Monday, February 6, 2023 12:38 PM
To: Lou Brzezinski <lbrzezinski@blaney.com>
Subject: RE: HST question

Lou,

The sale of a rental condo to an individual will be subject to HST where the individual is a non-registrant and is likely purchasing the condo as a resident. We don't have the facts and for this purpose lets assume that HST is payable on the purchase of the Condo and in other words the receiver must collect.

For HST purposes, a seller must collect and remit.

Pursuant to paragraph 266(2)(d), a receiver is deemed an agent of an insolvent person and the receiver is jointly and severally liable with the insolvent person for all payment and remittance of HST/GST, including for HST/GST debt arising BEFORE the receivership.

NOTE however that the insolvent person, pursuant to paragraph 266(2)(d)(ii) which I have attached to this email, IS NOT liable for any GST/HST collected or collectible by the receiver.

I hope this answers your question below.

Sunita

Sunita Doobay
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-----Original Message-----

From: Lou Brzezinski
Sent: Monday, February 6, 2023 11:38 AM
To: Sunita Doobay <SDoobay@blaney.com>
Subject: HST question

Hi Sunita.

Thank you for doing this.

My client is a developer that owns nine condo units and rents them out on a monthly basis.

When he purchased the units, no, HST was paid as my client self-assessed himself as running a business and going concern as a registrant.

Unfortunately, these units are now being sold by a receiver. The receiver has chosen to sell these units individually and not as a going concern. The purchasers are residential users.

What is the significance of this kind of individual sale to the HST liability

KINGSETT MORTGAGE CORPORATION
Applicant

and

Court File No. CV-22-00674810-00CL
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Proceeding commenced at Toronto

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