

Court of Appeal File No. COA-23-CV-0215
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)

**FACTUM OF THE RESPONDING PARTY / APPELLANT IN APPEAL
(Motion to Quash, Expedite and Cancel Stay)**

March 27, 2023

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PART I: OVERVIEW

1. The Appellant/Responding Party, 30 Roe Investments Corp. (the “**Company**” or “**30 Roe**”), opposes this motion to quash 30 Roe’s appeal (the “**Appeal**”) brought by the Respondent/Moving Party on this motion, KSV Restructuring Inc., in its capacity as Court-Appointed Receiver (the “**Receiver**”).
2. The Appeal arises out of two orders made by the Honourable Justice Steele (the “**Motion Judge**”), of the Superior Court of Justice (Commercial List), dated February 7, 2023 (the “**Orders**”), authorizing and approving the sale of certain real property (the “**Units**”) belonging to the Appellant, by the Receiver, and vesting title to the Units in certain purchasers (the “**Purchasers**”), pursuant to two agreements of purchase and sale.
3. On February 16, 2023, the Motion Judge dismissed the Receiver’s motion to include provisional execution clauses pursuant to s.195 of the *Bankruptcy and Insolvency Act* (“**BIA**”) in the Orders.
4. The Company served a notice of appeal on February 23, 2023 (the “**Notice of Appeal**”).¹ The Receiver served an Amended Motion Record returnable March 27, 2023 seeking, *inter alia*, an order to quash the Company’s Appeal, an order expediting the hearing of the Appeal and an order lifting any automatic stay of proceedings arising as a result of the Appeal.

¹ In the Notice of Appeal dated February 23, 2023, it incorrectly states that the Order to be appealed is dated February 16, 2023.

PART II: SUMMARY OF FACTS

Background

5. The Company owns the entire top floor of a building comprised of 9 penthouse condominium Units (the “Units”) and related parking spaces and storage lockers located in a 35 storey, 397-unit condominium building at 30 Roehampton Avenue, Toronto, Ontario (the “**Building**”). The Company operates a corporate housing business known as Roe Suites (the “**Enterprise**”), wherein it rents out the Units to various persons.

The Responding Record of the Appellant dated February 6, 2023 [Responding Record of the Appellant], page 92 at para 4, The Affidavit of Susan Slanely sworn March 1, 2023 [Slaney Affidavit] at Exhibit E, Motion Record of the Receiver dated March 1 2023 [MPMR] at Tab 2

6. 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. CIBC has never noted the Company in default or asked for its money back.

Responding Record of the Appellant, page 92 at para 5, Slaney Affidavit at Exhibit E, MPMR at Tab 2

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

Responding Record of the Appellant, page 92 at para 6, Slaney Affidavit at Exhibit E, MPMR at Tab 2

The History of the Relationship Between KingSett and the Company

8. In or about January of 2019, the Company made a presentation to KingSett 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 Enterprise and detailed the revenues generated from the Enterprise. All of the Units are furnished and contained amenities one would expect at a hotel. The Units were rented on a short-term basis. Sometimes, the short-term guests would convert to longer term stays, but the Units always remained part of the Enterprise, and were never used for residential tenancy purposes.

Responding Record of the Appellant, page 92 -93 at para 8, Slaney Affidavit at Exhibit E, MPMR at Tab 2

9. On or about March 18, 2019, there was an email exchange between Justin Walton of KingSett and Raymond Zar, the principal of 30 Roe, addressing the annual cash flow from the Units, demonstrating that they were operated as furnished rentals forming the Enterprise.

Responding Record of the Appellant at page 93 at para 10, Ex "D", Slaney Affidavit at Exhibit E, MPMR at Tab 2

10. On or about October 8, 2021, as part of its regular audit of the financial health of the Company, a valuation report was provided to KingSett with respect to the Units, showing a comparative analysis of value, based on the direct comparison approach and the income approach, using prevailing CAP rates. The CAP rates were based on those established by Colliers, who typically set the standard for the valuation industry. KingSett has since agreed to extend its loan three more times since the providing of the valuation report. The valuation of the Units today has been calculated to be as high as \$12,476,761.00.

Responding Record of the Appellant, page 93-94 at para 11-13, Slaney Affidavit at Exhibit E, MPMR at Tab 2

The Receiver and the Sales Process

11. The KingSett loan allegedly matured at the end of December 2021. Almost immediately thereafter, KingSett moved to appoint a Receiver. No opportunity was even provided to the Company to repay the debt before the motion record for the appointment of a Receiver was served.

Responding Record of the Appellant, page 96 at para 15, Slaney Affidavit at Exhibit E, MPMR at Tab 2

12. On May 9, 2022, by application of KingSett, the court below granted a receivership order appointing the Receiver as Receiver and Manager of the Company (the “**Receivership Order**”).

Responding Record of the Appellant, page 96 at para 18, Slaney Affidavit at Exhibit E, MPMR at Tab 2

13. On July 18, 2022, the court below approved the Sales Process Order (the “**Sales Process Order**”). Rather than appreciating the nature of the Enterprise, the Receiver’s plan was to simply sell off the Units individually. However, 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 Enterprise. The sale efforts were unsuccessful and in three months that the Units were listed on the Multiple Listing Service (“**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.

Responding Record of the Appellant, page 96 at para 19, Slaney Affidavit at Exhibit E, MPMR at Tab 2

14. In addition, the Receiver failed to investigate the impact of the HST when seeking approval of the Sale Process Order, and it has not been considered or examined at any point in the proceedings up until, for the first time, at the sales approval hearing for PH04 and PH09 before Justice Steele in February 2023.

Responding Record of the Appellant, page 100-101 at para 31, Slaney Affidavit at Exhibit E, MPMR at Tab 2

15. On December 14, 2022, the court below approved an amended sales process (the “**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. Again, the Receiver choose to market the Units individually, rather than as a going concern corporate housing business. The only change was the rate of commission to be paid which was increased from 2% to 2.5%.

Responding Record of the Appellant, page 96 at para 20, Slaney Affidavit at Exhibit E, MPMR at Tab 2

16. Further, the Receiver failed to calculate the Company’s equity position. Prior to the Receivership, the equity available to the Company was as follows:

Asset Value: \$12.5 million
CIBC Debt: \$4.3 million
KingSett Debt: \$1.875 million
Owner’s Equity: Positive \$6.33 million

Responding Record of the Appellant, page 100-101 at para 31, Slaney Affidavit at Exhibit E, MPMR at Tab 2

17. Following the discharge of the Receiver, the valuation of equity is as follows:

Proposed Sale Price: \$8 million (wrong sales path, wrong time)
CIBC Debt: \$4.5 million (higher due to unpaid interest since Receiver refuses to rent out the Units)
KingSett Debt: \$2 million (higher due to unpaid interest since Receiver refuses to rent out the Units)
Receivership Costs: \$1.5 million

Unrecoverable HST payable due to wrong sales path: \$1 million
Owner's Equity: Negative \$1 million

Responding Record of the Appellant, page 100-101 at para 31, Slaney Affidavit at Exhibit E, MPMR at Tab 2

The Transactions

18. On January 3, 2023, the Receiver received an unsolicited offer for one of the Units (PH04) and entered into an agreement of purchase of sale with a Purchaser without following its own amended sales process and listing the property for sale at the increased 2.5% commission rate.

Third Report at pages 49-51, Slaney Affidavit at Exhibit C, MPMR at Tab 2.

19. On January 19, 2023, the Receiver received an offer for the other Unit (PH09) and entered into an agreement of purchase of sale with a Purchaser.

Third Report at pages 49-51, Slaney Affidavit at Exhibit C, MPMR at Tab 2.

20. The closing dates for the sale of both Units was set for February 28, 2023 (the “**Transactions**”). However, as a result of the appeal herein, the Receiver elected to not close the Transactions and instead entered into new Transactions with new closing dates of March 31, 2023 without seeking or obtaining Superior Court approval of the new Transactions.

The First Amendment to the Agreement of Purchase and Sale between Mingjun Hu and the Receiver dated February 28, 2023 at pages 27-30 and The First Amendment to the Agreement of Purchase and Sale between Kevin Windsor, Randall Windsor and Carolyn Dunn-Windsor and the Receiver dated March 1, 2023 at pages 31-34, Slaney Affidavit at Exhibit “A” and “B”, MPMR at Tab 2

Blaney McMurtry LLP Motion to Remove

21. On March 17, 2023, Justice Lauwers dismissed Blaney McMurtry LLP's ("**Blaneys**") motion to be removed as lawyers of record for the proceeding herein (the "**Removal Motion**").

The Endorsement of Justice Lauwers dated March 17, 2023.

22. However, prior to doing so, Justice Lauwers effectively amended the Receiver's already amended motion and scheduled this specific motion. The Receiver's Amended Notice of Motion dated March 14, 2023 indicates that the motion is to be made to a single judge. Justice Lauwers decided to schedule it to a full panel without inviting submissions from the Company or considering that the Receiver had not served another amended Notice of Motion seeking a panel motion. .

Notice of Motion dated March 1, 2023, page 1, MPMR Tab 1

PART III: ISSUES

23. The issues to be determined on this motion are:
- (a) Whether Justice Lauwers had jurisdiction to schedule this motion and refer it to a panel without notice to 30 Roe;
 - (b) whether the Appeal is as of right pursuant to the *BIA*;
 - (c) in the alternative, if leave is required under the *BIA*, whether a leave application be heard at the same time as the Appeal; and

(d) in the further alternative, whether there is a need for the Appeal to be expedited so that it is heard on or before March 29, 2023.

PART IV: LAW AND ARGUMENT

Panel Appointment

24. The Receiver's Amended Motion Record indicates that the Receiver will make this motion to a single judge of the Court of Appeal on March 27, 2023.

Notice of Motion dated March 1, 2023, page 1, MPMR Tab 1

25. A single judge of the court of appeal has no power to quash an appeal.

Courts of Justice Act R.S.O. 1990, c. C.43, at [ss. 7\(3\)](#)

26. 30 Roe submits that Justice Lauwers had no jurisdiction to put this motion before a panel of this Court given that there was no Notice of Motion seeking such relief at the time, nor is there any such motion as of this day.

The Appeal is Moot and the Motion to Receiver's Motion must be Dismissed

27. In the alternative, an appeal is moot where the factual substratum of the appeal has disappeared. This can occur where the order under appeal has been performed or is otherwise spent.

Fontaine v. Canada (Attorney General), 2021 ONCA 931 (CanLII), [at para 14](#),

28. 30 Roe submits that the agreements of purchase and sale were void as the Orders were stayed by the filing of the Notice of Appeal. Accordingly, there is no underlying agreement of purchase and sale which requires a vesting order.

29. 30 Roe submits that the closing dates in the agreements of purchase and sale cannot be extended pursuant to the Orders as this extension is not a minor variation.
30. Moreover, the agreements of purchase and sale are void pursuant to their own terms at Clause 18 which state:

“18. The Purchaser agrees and acknowledges that the obligation of the Vendor to complete this Agreement of Purchase and Sale is subject in all respects to the granting of the Vesting Order by the Court and such Vesting Order being in full force and effect on the Closing Date [February 28, 2023].”

Approval and Vesting Order (PH04) at para 2, MPMR at Tab 9

Approval and Vesting Order (PH09) at para 2, MPMR at Tab 10

31. As the Vendor did not provide the Purchasers with a “Vesting Order... in full force and effect on February 28, 2023” the purchase agreements are void.

Appeal as of Right Pursuant to the BIA

32. The Orders appealed from are final orders as they are sale approval and vesting orders that authorizes the sale of the Units to two separate arms length purchasers.
33. A party seeking to appeal an order under the *BIA* must seek leave to appeal unless it falls within the categories set out in subsection 193. 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.

Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3) [*BIA*], [s. 193](#) and [s. 195](#)

34. Pursuant to ss. 193 (a), (b) and (c), 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;

BIA at [s.193\(a\) – \(c\)](#).

A. Future Rights

35. 30 Roe submits that it is entitled to appeal the Orders as of right pursuant to ss.193(a) of the *BIA* on the ground that the Appeal involves “future rights”.

36. There is considerable uncertainty in the case law as to the meaning of the term “future rights” as it appears in s.193(a) of the *BIA*. In *Elias v. Hutchinson*, McGillivray, C.J.A. wrote:

I find the authorities leave me in a state of uncertainty as to what a future right is at all, leave alone what there is about a future right that would require a treatment of cases involving future rights different from cases that do not involve future rights.

Elias v. Hutchinson, 1981 ABCA 31 (CanLII), [at para 15](#)

37. Blair J.A. in *Business Development Bank of Canada v. Pine Tree Resorts Inc.* (“**Pine Tree Resorts**”) stated:

“Future rights” are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future.

Business Development Bank of Canada v. Pine Tree Resorts Inc., 2013 ONCA 282 (CanLII) [*Pine Tree Resorts*] [at para. 15](#).

38. However, despite the language used in *Pine Tree Resorts*, the Court of Appeal of Alberta has addressed the unsettled status of the case law and has doubted the narrowly construed ‘as of right’ provisions in s. 193 of the *BIA* interpreted by several Ontario cases.

Manitok Energy Inc (Re) 2021 CarswellAlta 1777 [at para. 47](#)

1905393 Alberta Ltd v. Servus Credit Union Ltd., 2019 ABCA 269, 2019 CarswellAlta 1342 [at para. 26](#).

39. Extending beyond the narrow interpretation in *Pine Tree Resorts*, 30 Roe submits that matters raised in the within appeal involve future rights, including the manner in which the Units, as well as the other seven condominium Units on the same floor, and which are part of the Enterprise, are to be sold.

40. 30 Roe submits that the Orders involve the future legal rights of those with an economic interest in the Company. In this case, the Enterprise is greater than the sum of its individual parts, being the Units. By breaking up the unique full floor of penthouse suites that the Company has assembled, the Orders compromise the legal right of possession of the entire floor of Units and the benefits that come along with the right to control who has access to the Units on that floor. In turn, this affects not only the ability to carry on the Enterprise, but it also impacts the ability to realize the full synergized value of the Enterprise in the future, if and when, the remaining seven condominium Units are marketed and sold.

Responding Record of the Appellant, page 100 at para 34, Slaney Affidavit at Exhibit E, MPMR at Tab 2

B. The Order will Affect other Cases of a Similar Nature

41. Further, 30 Roe is entitled to appeal the Orders as of right pursuant to s.193(b) of the *BIA* on the ground that the Orders are likely to affect other cases of a similar nature in bankruptcy proceedings.

42. Section 193(b) of the *BIA* has been interpreted within the plain language of the section, which means that a right of appeal will lie where the decision in question will likely affect another case raising the same or similar issues in the same bankruptcy proceedings.

Certain Proceedings Taken in the High Court, 2013 BCCA 547 (CanLII), [at para 21](#)

43. Additionally, s.193(b) must concern real disputes that are likely to affect other cases raising the same or similar issues in the same bankruptcy proceedings.

Global Royalties Limited v. Brook, 2016 ONCA 50 (CanLII), [at para 19](#)

44. 30 Roe submits that the Units are part of the Enterprise, which includes seven other condominium Units in the same building. The Orders are arrived at through a process in which the Receiver has not adequately considered whether the Units should be marketed as the Enterprise.
45. The failure by the Receiver to market the Units and offer them for sale together led to a marked diminution in value of the Enterprise.
46. Ultimately, the Orders are likely to affect other cases of similar nature in this proceeding. The Orders in question relate to the Amended Sales Process that followed an initial Sales Process Order. In light of the history, there are likely to be other sale approval and vesting orders sought in this proceeding by the Receiver. In the absence of the existence of the full floor of Units owned by the Company, which gives it exclusive control of who may access or occupy the entire penthouse floor, future approval and vesting orders and/or future sale process orders will not consider the advantage of marketing the entire penthouse floor of Units as a going concern. As a result, the appeal herein and the rights to be determined will impact those sales, and other aspects of this proceeding.

C. Value over Ten Thousand Dollars

47. Further, 30 Roe is entitled to appeal the Orders as of right pursuant to s.193(c) of the *BIA* on the grounds that the property involved in the Appeal exceeds in value ten thousand dollars.
48. In *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, Brown J.A. held that s.193(c) does not apply to (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor's property, or (iii) orders that do not result in a loss.
2403177 Ontario Inc. v. Bending Lake Iron Group Limited, 2016 ONCA 225 (CanLII), [at para 53](#)
49. 30 Roe submits that the Orders are final and not procedural in nature. The grounds of appeal are substantive and concern the manner in which the sale of the Units and the remaining Units that are part of the receivership proceeding will proceed. By allowing the individual sale of the Units on a piecemeal basis, the Orders effectively bring an end to the Enterprise.
50. 30 Roe submits that the Orders bring the value of the Company's property into play as it would effectively set a market for the sale of the seven remaining condominium Units and disrupt the value of the Enterprise.
51. 30 Roe submits that it will lose millions of dollars if the appeal is not granted and the sale of the Units, and the other Units, goes ahead. The Orders are a result of the Receiver's failure to market the Units as an Enterprise and as such, they contain an element of final determination of economic interests of a claimant in the Company.

In the Event that the Appeal is Not of Right, Leave to Appeal Ought to be Granted

52. In the alternative, if leave is required under s. 193(e) of the *BIA*, 30 Roe seeks leave to appeal the Orders and asks that the leave application be heard at the same time as the Appeal.

53. In *IceGen Inc., Re*, after Justice Gillese determined leave to appeal was required, the appellant in that case was permitted to seek leave to appeal from the panel on the date scheduled for hearing the appeal, which was less than two months away. Justice Gillese ordered that if the panel granted leave, the appeal would be heard the same day.

IceGen Inc., Re, 2016 ONCA 902, at para. [10](#).

54. Section 193(e) of the *BIA* provides that an appeal lies to the Court from any order or decision of a judge of the court in any other case by leave of a judge of the Court of Appeal.

BIA at [s.193\(e\)](#)

55. The principles granting leave to appeal have been set out in *Pine Tree Resorts*. Blair J.A. indicated that the exercise of granting leave to appeal under s.193(e) is discretionary and must be exercised in a flexible and contextual way and the court will look to whether the proposed appeal:

- (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this court should therefore consider and address;
- (b) is *prima facie* meritorious; and
- (c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

Pine Tree Resorts at [paras. 28 – 29](#)

A. General Importance to the Practice

56. The Appeal raises an issue that is of general importance to the practice in bankruptcy/insolvency matters.

57. In her Endorsement dated February 13, 2023, the Motion Judge failed to appropriately apply the principles set out in *Royal Bank of Canada v. Soundair Corp* (“*Soundair*”), and failed to appreciate, in particular, that the process by which the Units were offered for sale was not a fair process, as the Units ought not to have been marketed or offered for sale in the first place.

The Endorsement of Justice Steele dated February 13, 2023 at pages 427- 432, MPMR at Tab 8.

Royal Bank of Canada v. Soundair Corp., 1991 CanLII 2727 (ON CA) [*Soundair*]

58. This Court should therefore consider and address whether the Motion Judge appropriately applied the *Soundair* test considering whether:

- (a) sufficient effort to get the best price was made and that the Receiver was not acting improvidently;
- (b) the interest of all parties was properly accounted for;
- (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.

Soundair [at para 16](#)

The Responding Record of the Appellant at pages 83-314, the Slaney Affidavit at Exhibit “E” at pages 93-94, Ex. “E” and “F” and pages 96-97, Ex. “I” and “J” of the MPMR at Tab 2.

59. 30 Roe submits that this Appeal raises issues that go beyond the parties themselves and are of general importance to the practice of insolvency law, namely the manner in which the Enterprise itself may and ought to be marketed and sold. In this regard, the court should

consider the value of the Enterprise being greater than the sum of its parts when determining an appropriate sale process.

B. Merits of the Appeal

60. The Appeal is *prima facie* meritorious.

61. The findings of fact and factual inferences made by the Motion Judge ought to be reversed on Appeal as it can be established that the Motion Judge made a “palpable and overriding error”.

Housen v. Nikolaisen, [2002] 2 S.C.R. 235, [at paras. 4, 10 and 19](#).

62. The Motion Judge’s decision to grant the Orders was an exercise in judicial discretion and is entitled to deference. Appellate courts will not interfere with such orders, unless there is an error of law, a serious misapprehension of the evidence, the discretion has been exercised on the basis of an erroneous principle or there was a failure to give any or sufficient weight to relevant considerations.

Regal Constellation Hotel, 2004 Carswell Ont. 2653 (Ont. C.A.) [Regal] [at para. 22 and 23](#)

63. 30 Roe submits that the Motion Judge:

- (a) incorrectly applied the principles in *Soundair* in accepting the Receiver’s recommendations and approving the Orders;

- (b) failed to appreciate the evidence on the motion concerning that the Units were part of the Enterprise, and ought not to have been sold off separately, which effectively destroys the value of the Enterprise;
- (c) failed to appreciate and find that the marketing and offering of the Units for sale here, on their own, would not be in the best interests of the creditors or the other stakeholders; and
- (d) failed to appreciate and find that it would be best to market and offer the entire Enterprise for sale, comprising all nine of the condominium Units together, as that would maximize value for the creditors and other stakeholders;
- (e) failed to appreciate and find that without a proper determination of the issue of HST, it would be prejudicial to all stakeholders, to have the HST cost go unmitigated. The Motion Judge failed to consider the issue of HST despite the evidence before her including the Receiver's waterfall analysis showing a loss for HST if the Units are sold individually and not as the Enterprise;

Third Report at pages 53-54, Slaney Affidavit at Exhibit "C" MPMR at Tab 2

- 64. Further, as upon the filing of the Notice of Appeal, the proceedings were stayed and the agreements of purchase and sale could not be amended. In particular, the closing date could not be changed, and thus the agreements of purchase and sale expired and became null and void.
- 65. Ultimately, the Appeal is *prima facie* meritorious as the Motion Judge made a number of factual and legal errors in reaching the conclusion to approve the sale of the Units.

C. The Appeal Would Not Unduly Hinder the Progress of the herein Proceedings

66. From August to October 2022, the Receiver prepared and listed the Units on MLS and did so with the wrong commission rate. There is finally demand in the residential market for the Units because the Receiver is finally offering the correct cooperating commission of 2.5%. Any delay in the proceedings is the Receiver's. There is no shortage of buyers for condominiums and the Receiver can simply relist the properties after the appeal is dealt with.

The Third Report at pages 48-49, Slaney Affidavit at Exhibit "C" MPMR at Tab 2.

67. As stated, on December 14, 2022, the court below approved an Amended Sale Process.

Third Report at pages 49, Slaney Affidavit at Exhibit "C" MPMR at Tab 2.

68. As stated, on January 3, 2023, the Receiver received an unsolicited offer for one of the Units (PH04) and on January 19, 2023, the Receiver received an offer for the other Unit (PH09).

Third Report at pages 49-51, Slaney Affidavit at Exhibit "C" MPMR at Tab 2.

69. The Units had an original closing date of February 28, 2023 and were not closed and so there is no longer any urgency as there is no approved or valid purchase agreement in place.

The First Amendment to the Agreement of Purchase and Sale between Mingjun Hu and the Receiver dated February 28, 2023 at pages 27-30 and The First Amendment to the Agreement of Purchase and Sale between Kevin Windsor, Randall Windsor and Carolyn Dunn-Windsor and the Receiver dated March 1, 2023 at pages 31-34, Slaney Affidavit at Exhibit "B" and "C", MPMR at Tab 2.

70. 30 Roe submits that the Purchasers recognized that they were purchasing the Units pursuant to the results of insolvency proceedings and understood that the Transactions were subject to court approval, which would effectively include the proceedings at the Appellate Court.

71. 30 Roe further submits that any hinderance, either in the proceedings below or the proceedings herein, are credited to the failure of the Receiver to market the Units in an appropriate fashion. It is the Receiver's job to get the best value for the assets under its control and the Court ought to prevent the sale of the Units on a piecemeal basis.
72. Furthermore, based on the on the principles set out above, this Court should grant leave to appeal the Orders.

There is no need for the Appeal to be Expedited

73. If the Appeal were found to be an automatic one or, in the alternative, if leave is granted, there is not a need for the Appeal to be expedited.
74. The Receiver is the author of its own misfortune as it failed to include, in its agreements of purchase of sale for the Units, any rights to extend the closing dates.
75. The Purchasers are aware that the Units are subject to an approval and vesting process, which includes the appeal proceedings herein.
76. 30 Roe ought to have the time it is entitled to and argue its appeal in the normal course of these proceedings.

PART V: RELIEF REQUESTED

77. The Company respectfully requests that the Receiver's motion to quash the Appeal should be dismissed with or without a determination that:
- (a) 30 Roe has an automatic right to appeal the Orders under the *BIA*; or

(b) in the event that the Appeal is not of right, leave to appeal ought to be granted; and

(c) that the Appeal is not to be expedited.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY OF MARCH 2023

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SCHEDULE “A” – LIST OF AUTHORITIES

1. [1905393 Alberta Ltd v. Servus Credit Union Ltd., 2019 ABCA 269, 2019 CarswellAlta 1342](#)
2. [2403177 Ontario Inc. v. Bending Lake Iron Group Limited, 2016 ONCA 225 \(CanLII\)](#)
3. [Business Development Bank of Canada v. Pine Tree Resorts Inc., 2013 ONCA 282 \(CanLII\)](#)
4. [Certain Proceedings Taken in the High Court, 2013 BCCA 547 \(CanLII\)](#)
5. [Elias v. Hutchinson, 1981 ABCA 31 \(CanLII\)](#)
6. [Global Royalties Limited v. Brook, 2016 ONCA 50 \(CanLII\)](#)
7. [Housen v. Nikolaisen, \[2002\] 2 S.C.R. 235](#)
8. [IceGen Inc., Re, 2016 ONCA 902](#)
9. [Manitok Energy Inc \(Re\) 2021 CarswellAlta 1777](#)
10. [Regal Constellation Hotel, 2004 Carswell Ont. 2653 \(Ont. C.A.\)](#)
11. [Royal Bank of Canada v. Soundair Corp., 1991 CanLII 2727 \(ON CA\)](#)

SCHEDULE "B" – STATUTES AND REGULATIONS

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.

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

Composition of court

Hearings

7 (1) A proceeding in the Court of Appeal shall be heard and determined by not fewer than three judges sitting together, and always by an uneven number of judges.

Motions

(2) A motion in the Court of Appeal and an appeal under clause 6 (1) (c) shall be heard and determined by one judge.

Same

(3) Subsection (2) does not apply to a motion for leave to appeal, a motion to quash an appeal or any other motion that is specified by the rules of court.

Same

(4) A judge assigned to hear and determine a motion may adjourn the motion to a panel of the Court of Appeal.

Same

(5) A panel of the Court of Appeal may, on motion, set aside or vary the decision of a judge who hears and determines a motion. R.S.O. 1990, c. C.43, s. 7.

Court of Appeal File No. COA-23-CV-0215
Court File No.: CV-22-00674810-00CL

KINGSETT MORTGAGE CORPORATION

and

30 ROE INVESTMENTS CORP.

Applicant
(Respondent in Appeal)

Respondent
(Appellant in Appeal)

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

FACTUM OF THE APPELLANT IN APPEAL

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