

Court of Appeal File No.: M54109 (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)

RESPONDING MOTION RECORD

(Motion Under Rule 15.04 for Removal as Lawyer of
Record before a Single Judge of the Court of Appeal
returnable March 17, 2023)

March 15, 2023

GOODMANS LLP
Barristers & Solicitors
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Lawyers for KSV Restructuring Inc.
in its capacity as Court-appointed Receiver

INDEX

INDEX

TAB	DOCUMENT	PAGE NO.
1.	Affidavit of Brennan Caldwell sworn March 15, 2023	1
A.	Exhibit A – Chronology of Counsel of 30 Roe Investments Corp.	4
B.	Exhibit B – Chronology of Appeal Proceedings	8
C.	Exhibit C – Excerpt of the Affidavit of the Appellant, Raymond Zar sworn February 6, 2023 and Exhibit “G”	11
D.	Exhibit D – Amended Notice of Motion of the Receiver dated March 14, 2023	17

1

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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**

AFFIDAVIT OF BRENNAN CALDWELL
(Sworn March 15, 2023)

I, Brennan Caldwell, of the City of Toronto, in the Province of Ontario, MAKE OATH
AND SAY:

1. I am a lawyer with Goodmans LLP, which acts for the Receiver, KSV Restructuring Inc. (the “**Receiver**”) in the within proceedings. As such, I have knowledge of the matters hereinafter deposed to. Where I do not have personal knowledge of the matters set out herein, I have stated the source of my information and, in all cases, believe it to be true.
2. A chronology of events regarding the various law firms that have been retained by the Appellant over the course of these proceedings is attached as **Exhibit “A”**.
3. A chronology summarizing the progress of this appeal to date is attached as **Exhibit “B”**.

4. Attached as **Exhibit “C”** is an excerpt of the Affidavit of the principal of the Appellant, Raymond Zar, sworn February 6, 2023, and Exhibit “G” thereto.

5. Attached as **Exhibit “D”** is a copy of the Amended Notice of Motion of the Receiver, returnable before a single judge of the Court of Appeal March 27, 2023, by which the Receiver seeks, among other things, to quash the Appellant’s appeal.

SWORN remotely by Brennan Caldwell stated as being in the City of Vancouver, in the Province of British Columbia, before me at City of Toronto, in the Province of Ontario, on March 15, 2023, in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*




A Commissioner for taking affidavits



Brennan Caldwell

A

**THIS IS EXHIBIT "A"
TO THE AFFIDAVIT OF BRENNAN CALDWELL
SWORN BEFORE ME THIS 15TH DAY OF MARCH, 2023**



Commissioner for Taking Affidavits

**Chronology of Counsel of
30 Roe Investments Corp. (the “Company”)**

Date	Event	Reference
January 17, 2022	<p>The date of KingSett Mortgage Corporation’s (the “Applicant”) application before Justice Cavanagh to appoint KSV Restructuring Inc. (the “Receiver”) as receiver of certain property of the Company (the “Receivership Application”).</p> <p>The Company appeared without legal counsel and sought an adjournment to retain counsel.</p>	Endorsement of Justice Cavanagh dated May 9, 2022 (“ May 9 Endorsement ”) at para 4.
February 21, 2022	<p>The Company retained Paliare Roland Rosenberg Rothstein LLP (“Paliare”) as counsel.</p> <p>Paliare acted for the Company in regards to its motion to adjourn the Receivership Application.</p>	Affidavit of Raymond Zar sworn February 22, 2022 at para 5.
March 8, 2022	<p>Date of case conference before Justice Cavanagh whereby Paliare advised they were moving for an order removing them as lawyers of record for the Company.</p> <p>Justice Cavanagh was advised that the Company would be opposing this motion.</p>	May 9 Endorsement at para 6. ¹
April 11, 2022	Date of Paliare’s motion to be removed as counsel of record.	May 9 Endorsement at para 7.
April 20, 2022	Date of Justice Penny’s order removing Paliare as counsel of record.	May 9 Endorsement at para 7.
May 2, 2022	<p>The Company retained Symon Zucker (“Mr. Zucker”) as counsel.</p> <p>Mr. Zucker acted for the Company in regards to the Receivership Application.</p>	May 9 Endorsement at para 9.

¹ Note that the May 9 Endorsement does not specify the names of counsel.

On or around May 10, 2022	The Company retained Nancy Tourgis (“ Ms. Tourgis ”) of Solmon Rothbart Tourgis Slodovnick LLP (“ Solmon ”) as counsel, who served a Notice of Appeal of the Order of Justice Cavanagh dated May 9, 2022 appointing the Receiver.	Notice of Appeal dated May 10, 2022.
June 16, 2022	Counsel for the Receiver was advised that (i) Mr. Zucker was terminated on behalf of the Company by Mr. Zar; and (ii) Ms. Tourgis was never counsel of record but rather was retained only to handle the appeal.	Email correspondence from Richard Swan to Christopher Armstrong (“ Mr. Armstrong ”) dated June 16, 2022.
July 16, 2022	Michael Simaan (“ Mr. Simaan ”) notified counsel for the Receiver that he had been retained by the Company. Mr. Simaan acted for the Company in regards to the Applicant’s motion to approve the sale process (“ Sale Process Motion ”).	Email correspondence from Mr. Simaan to Mark Dunn dated July 16, 2022.
August 8, 2022	Mr. Simaan notified counsel for the Receiver that his initial retainer was limited to representing the Company at the Sale Process Motion and that he was not representing the Company further.	Email correspondence from Mr. Simaan to Mr. Armstrong dated August 8, 2022.
December 14, 2022	Mr. Zar appeared without counsel at the Receiver’s motion to amend the sale process. With permission of Justice McEwen, Mr. Zar made submissions despite not having sought leave to represent the Company pursuant to Rule 15 of the <i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194.	Endorsement of Justice McEwen dated December 20, 2022 at page 2.
January 19, 2023	Blaney McMurtry LLP (“ Blaney ”) served a Notice of Change of Lawyer confirming that the Company, “formerly represented by Mr. Zucker of Symon Zucker Professional Corporation”, had appointed Lou Brzezinski and Lucas Strezos of Blaney as lawyers of record. Blaney acted for the Company in regards to the Applicant’s motion to approve the sales of PH04 and PH09 and the Ancillary Matters Order.	Notice of Change of Lawyer dated January 19, 2023.

March 3, 2023	Blaney notified counsel for the Receiver that it was bringing a motion to be removed as lawyers of record.	Letter from Blaney to counsel for the Receiver dated March 3, 2023.
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B

**THIS IS EXHIBIT "B"
TO THE AFFIDAVIT OF BRENNAN CALDWELL
SWORN BEFORE ME THIS 15TH DAY OF MARCH, 2023**



Commissioner for Taking Affidavits

Chronology of Appeal Proceedings

Date	Event	Reference
February 7, 2023	<p>Date of motion (the “Sale Approval Motion”) brought by KSV Restructuring Inc. (the “Receiver”) in its capacity as court-appointed receiver of certain property of 30 Roe Investments Corp. (the “Company”) for orders approving two sale agreements of residential condominiums (the “Agreements”) and granting various ancillary relief, among other things (collectively, the “Orders”).</p> <p>The Honourable Justice Steele granted the Orders on February 13, 2023.</p>	<p>Approval and Vesting Order (PH04) dated February 7, 2023.</p> <p>Approval and Vesting Order (PH09) dated February 7, 2023.</p> <p>Ancillary Matters Order dated February 7, 2023.</p>
February 16, 2023	<p>Date of motion before Justice Steele regarding the Receiver’s request to include a provisional execution provision in the Orders.¹</p> <p>Justice Steele dismissed the Receiver’s request for the provisional execution provision.</p>	<p>Endorsement of Justice Steele dated February 16, 2023 at para 16.</p>
February 23, 2023	<p>Blaney McMurtry LLP (“Blaney”), as counsel for the Company, served a Notice of Appeal in respect of the Orders.</p>	<p>Notice of Appeal dated February 23, 2023</p>
February 28, 2023	<p>The original date that the transactions were set to close pursuant to the Agreements.</p> <p>The Receiver entered into amendments with the purchasers under the Agreements, extending each closing date to March 31, 2023.</p>	<p>First Amendment to Agreement of Purchase and Sale between the Receiver and Mingjun Hu dated February 28, 2023.</p> <p>First Amendment to Agreement of Purchase and Sale between the Receiver and Kevin Windsor, Carolyn Dunn-Windsor and Randall Windsor, dated February 28, 2023.</p>
March 1, 2023	<p>Goodmans LLP (“Goodmans”), as counsel for the Receiver, served and filed a Motion Record</p>	<p>Motion Record of the Receiver dated March 1, 2023</p>

¹ At the Sale Approval Motion, the hearing of this issue had been adjourned to February 13 and then again to February 16.

	regarding its motion to quash the appeal or, in the alternative, expedite or lift the stay.	
March 3, 2023	Goodmans received a letter from Blaney providing it with notice of motions before the Ontario Superior Court of Justice and the Ontario Court of Appeal to have Blaney removed as lawyers of record.	Correspondence from Blaney to Goodmans dated March 3, 2023.
March 8 and 15, 2023	Goodmans inquired with the Court of Appeal regarding motion dates, emphasizing the urgency of this matter.	Email correspondence from Mark Dunn to Ms. Rebecca Singh at the Ontario Court of Appeal dated March 8, 2023; email from Carlie Fox to Ms. Rebecca Singh dated March 15, 2023

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C

**THIS IS EXHIBIT "C"
TO THE AFFIDAVIT OF BRENNAN CALDWELL
SWORN BEFORE ME THIS 15TH DAY OF MARCH, 2023**



Commissioner for Taking Affidavits

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

30 ROE INVESTMENTS CORP.

Respondent

AFFIDAVIT OF RAYMOND ZAR

I, RAYMOND ZAR, of the City of Toronto, Province of Ontario, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am the president and CEO of the Respondent (hereinafter referred to as the (“**Company**”) and as such have knowledge of the matters to which I hereinafter depose.
2. Where the information in this affidavit is based upon information and belief, I have indicated the source of my information and belief, and do verily believe it to be true. To the extent that any of the information set out in this affidavit is based on my review of documents, I verily believe the information in such documents to be true.
3. I am the majority shareholder, Director, President and CEO of Roehampton Capital; the parent company of the Company. I previously, served as Chief Operating Officer of Skyline

LLP. This included all litigation matters. Blaney McMurtry LLP also acts for Kingsett on a number of real estate matters, and as a result, I was not able to use Blaney McMurtry in the receivership litigation.

17. We were unable to find counsel that we felt comfortable with, and so we sought the consent of Kingsett to waive conflicts so as to allow Blaney McMurtry LLP to represent us in this Receivership. Kingsett agreed to waive the conflict, but on terms and conditions set out in **Exhibit “G”** to this affidavit (emphasis my own).

“KingSett agrees to the below:

“As you are aware Mr. Raymond Zar has requested a waiver of conflict of interest from KingSett Mortgage Corporation (KingSett) so as to allow him to retain Blaney McMurtry LLP (Blaneys) to represent him and 30 Roe Investments Corp. (30 Roe) in the receivership proceedings with court file No. CV-22-00674810-00CL (the proceedings)

We understand that KingSett agrees to provide such a waiver provided that (i) Blaneys’ retainer is limited to representing Mr. Zar and 30 Roe in the proceedings (which may include taking positions adverse to KingSett in or relating to the proceedings, including making settlement proposals to KingSett, attending at court on any motions in the proceedings, and/or examining a representative or representatives of KingSett), and such retainer will not include representing Mr. Zar, 30 Roe or any other party to commence or pursue any claims against KingSett or any of its affiliates, directors, officers, employees, agents or advisors, whether in the proceedings or otherwise, (ii) Blaneys shall ensure (including by establishing appropriate ethical walls) that no confidential information of KingSett or any of its affiliates be disclosed or used for the benefit of any other client, including 30 Roe or Mr. Zar and (iii) individuals who have worked on a KingSett file in the last 5 years are excluded from acting on this matter.

For greater clarity, this waiver excludes assessing the accounts of KingSett’s agents, counsel, the receiver or/and its counsel.

This waiver is strictly limited to its terms. For clarity, KingSett does not hereby waive or consent to anything not explicitly waived or consented to herein.”

Please note this agreement is subject to there being no changes or amendments to the above waiver.”

**THIS IS EXHIBIT “G” REFERRED
TO IN THE AFFIDAVIT OF
RAYMOND ZAR SWORN BEFORE ME
THIS 6TH DAY OF FEBRUARY, 2023.**



Lou Brzezinski
A Commissioner of Oaths



From: Daniel Pollack <DPollack@Kingsettcapital.com>
Sent: Tuesday, January 17, 2023 3:28 PM
To: Lou Brzezinski <lbrzezinski@blaney.com>
Cc: Sean Zweig - Bennett Jones <zweigs@bennettjones.com>
Subject: RE: Raymond Zar

Lou,

KingSett agrees to the below:

“As you are aware Mr. Raymond Zar has requested a waiver of conflict of interest from KingSett Mortgage Corporation (KingSett) so as to allow him to retain Blaney McMurtry LLP (Blaneys) to represent him and 30 Roe Investments Corp. (30 Roe) in the receivership proceedings with court file No. CV-22-00674810-00CL (the proceedings)

We understand that KingSett agrees to provide such a waiver provided that (i) Blaneys’ retainer is limited to representing Mr. Zar and 30 Roe in the proceedings (which may include taking positions adverse to KingSett in or relating to the proceedings, including making settlement proposals to KingSett, attending at court on any motions in the proceedings, and/or examining a representative or representatives of KingSett), and such retainer will not include representing Mr. Zar, 30 Roe or any other party to commence or pursue any claims against KingSett or any of its affiliates, directors, officers, employees, agents or advisors, whether in the proceedings or otherwise, (ii) Blaneys shall ensure (including by establishing appropriate ethical walls) that no confidential information of KingSett or any of its affiliates be disclosed or used for the benefit of any other client, including 30 Roe or Mr. Zar and (iii) individuals who have worked on a KingSett file in the last 5 years are excluded from acting on this matter.

For greater clarity, this waiver excludes assessing the accounts of KingSett’s agents, counsel, the receiver or/and its counsel.

This waiver is strictly limited to its terms. For clarity, KingSett does not hereby waive or consent to anything not explicitly waived or consented to herein.”

Please note this agreement is subject to there being no changes or amendments to the above waiver.

Sincerely,

Daniel Pollack | Senior Director, Portfolio Management | KingSett Capital
T. 416 639 6587 | M. 416 420 3239

From: Lou Brzezinski <lbrzezinski@blaney.com>
Sent: Tuesday, January 17, 2023 10:26 AM
To: Daniel Pollack <DPollack@Kingsettcapital.com>
Cc: Sean Zweig - Bennett Jones <zweigs@bennettjones.com>
Subject: RE: Raymond Zar

Subject: Raymond Zar

Your suggested amendments to the waiver have been made.

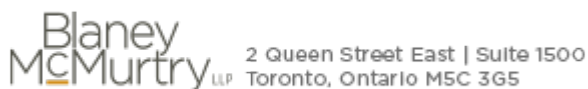
As you are aware Mr. Raymond Zar has requested a waiver of conflict of interest from KingSett Mortgage Corporation (KingSett) so as to allow him to retain Blaney McMurtry LLP (Blaneys) to represent him and 30 Roe Investments Corp. (30 Roe) in the receivership proceedings with court file No. CV-22-00674810-00CL (the proceedings)

We understand that KingSett agrees to provide such a waiver provided that (i) Blaneys' retainer is limited to representing Mr. Zar and 30 Roe in the proceedings (which may include taking positions adverse to KingSett in or relating to the proceedings, including making settlement proposals to KingSett, attending at court on any motions in the proceedings, and/or examining a representative or representatives of KingSett), and such retainer will not include representing Mr. Zar, 30 Roe or any other party to commence or pursue any claims against KingSett or any of its affiliates, directors, officers, employees, agents or advisors, whether in the proceedings or otherwise, (ii) Blaneys shall ensure (including by establishing appropriate ethical walls) that no confidential information of KingSett or any of its affiliates be disclosed or used for the benefit of any other client, including 30 Roe or Mr. Zar and (iii) individuals who have worked on a KingSett file in the last 5 years are excluded from acting on this matter.

For greater clarity, this waiver excludes assessing the accounts of KingSett's agents, counsel, the receiver or/and its counsel.

This waiver is strictly limited to its terms. For clarity, KingSett does not hereby waive or consent to anything not explicitly waived or consented to herein.

Please confirm KingSett agrees with the above. Thank you



Lou Brzezinski
Partner

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🌐 Blaney.com



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D

**THIS IS EXHIBIT "D"
TO THE AFFIDAVIT OF BRENNAN CALDWELL
SWORN BEFORE ME THIS 15TH DAY OF MARCH, 2023**



Commissioner for Taking Affidavits

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

KINGSETT MORTGAGE CORPORATION

Applicant

- 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**

**AMENDED NOTICE OF MOTION
(Motion to Quash, Expedite and Lift Stay)**

KSV Restructuring Inc., in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of certain property of 30 Roe Investments Corp. (the “**Company**”) pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act* (the “**BIA**”) and Section 101 of the *Courts of Justice Act* (Ontario) will make a motion to a judge panel of the Court of Appeal on March 27, 2023 ~~a date to be fixed by the registrar~~ at the courthouse, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

PROPOSED METHOD OF HEARING: The motion is to be heard:

[] In writing under subrule 37.12.1(1);

[] In writing as an opposed motion under subrule 37.12.1(4);

- 2 -

- In person;
- By telephone conference;
- By video conference (in the alternative).

THE MOTION IS FOR:

- (a) An order quashing the Company’s appeal (the “**Appeal**”) commenced by notice of appeal dated February 23, 2023 (the “**Notice of Appeal**”);
- (b) In the alternative, an order expediting the hearing of the Appeal so that it is heard on or before March 29, 2023;
- (c) In the further alternative, and if necessary, denying leave to appeal;
- (d) In the further alternative, an order lifting any automatic stay of proceedings arising as a result of the Appeal;
- (e) The costs of this motion; and
- (f) Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

Overview and urgency

1. The Receiver moves to quash the Appeal of the Orders of the Honourable Justice Steele of the Superior Court of Justice (Commercial List) (the “**Court**”) dated February 7, 2023 (collectively, the “**Orders**”). Two of the Orders approved sale agreements (the “**Sale Agreements**”) for residential condominium units entered into by the Receiver and

- 3 -

authorized it to complete the transactions contemplated by the Sale Agreements (the “**Transactions**”). The third Order (the “**Ancillary Order**”) granted various ancillary relief in connection with the Transactions, including the removal of camera monitoring equipment and approval of the Receiver’s conduct. The Company has not specified whether it is seeking any relief in respect of the Ancillary Order, or set out any basis for such relief.

2. The Transactions arise from a routine sale process approved by the Court (the “**Sale Process**”). The Receiver was appointed over nine condominium units and related parking and storage units owned by the Company (the “**Units**”). It sought and obtained Court approval for the Sale Process for the Units, carried out the Sale Process in accordance with its terms and entered into the Sale Agreements ultimately approved by the Orders. The Company’s two secured creditors supported (and continue to support) the Transactions, including the Company’s fulcrum creditor, who is expected to suffer a loss if the Transactions close.
3. The Company opposed the Transactions, but it did not serve any evidence until the evening before the motion for the Orders was heard (the “**Sale Approval Motion**”). The evidence that the Company late-filed was largely either irrelevant or inadmissible.
4. Although the Receiver believed (and believes) that the Company had no right to appeal the Orders without leave, based on the Company’s prior conduct, the Receiver was concerned that the Company would purport to appeal the Orders as of right and assert that the Orders were automatically stayed in an attempt to prevent the closing of the Transactions. The Receiver moved for provisional execution of the Orders to mitigate this risk. In response, the Company specifically *admitted* that it had “no right” to appeal without leave and there

- 4 -

would be “no automatic stay”, although it purported to resile from this position during oral argument. Justice Steele declined to grant provisional execution of the Orders.

5. The Company has now purported to appeal the Orders as of right, and asserts that the Orders are stayed pursuant to the *BIA*. It was not entitled to resile from its admissions and, in any event, it is not entitled to appeal without leave under Section 193(e) of the *BIA*.
6. This matter is urgent. The Transactions were originally scheduled to close on February 28, 2023. The Receiver and the Purchasers (as defined below) have agreed to extend the closings until March 31, 2023, but if the matter is not resolved by then, there is a risk that the Purchasers will seek to terminate the Sale Agreements and will not proceed with closing the Transactions.
7. The Appeal should be quashed. There is no right of appeal – a fact previously *admitted* by the Company. Leave should also not be granted. In the alternative, any automatic stay of proceedings should be lifted and/or the Appeal should be expedited.

The Orders under Appeal

8. The Company has appealed the following three Orders:
 - (a) the Approval and Vesting Order (PH04) (the “**PH04 Approval and Vesting Order**”) authorizing and approving the Receiver’s sale of PH04 and the related parking and storage units at the Minto 30 Roe (as defined below) (“**PH04**”) to Kevin Windsor, Carolyn Dunn-Windsor and Randall Windsor (collectively, the “**PH04 Purchaser**”) as contemplated by the Agreement of Purchase and Sale dated January 6, 2023 between the Receiver and the PH04 Purchaser;

- 5 -

- (b) the Approval and Vesting Order (PH09) (together with the PH04 Approval and Vesting Order, the “**Approval and Vesting Orders**”) authorizing and approving the Receiver’s sale of PH09 and the related parking and storage units at the Minto 30 Roe (“**PH09**” and with PH04, the “**Purchased Units**”) to Mingjun Hu (the “**PH09 Purchaser**” and with the PH04 Purchaser, the “**Purchasers**”) as contemplated by the Agreement of Purchase and Sale dated January 19, 2023 between the Receiver and the PH09 Purchaser; and
- (c) the Order (Ancillary Matters) (the “**Ancillary Matters Order**”) granting certain ancillary relief relating to the Transactions, including authorizing the Receiver to disconnect certain camera monitoring equipment on the penthouse floor of the Minto 30 Roe, sealing certain confidential appendices to the Receiver’s Third Report dated January 26, 2023, and approving the activities and conduct of the Receiver.

Background

- 9. The Units are located in a thirty-five storey, 397-unit condominium building at 30 Roehampton Avenue in Toronto, Ontario known as the “**Minto 30 Roe**”. The Company rented the Units to residential tenants on a short term and long term basis.
- 10. The Company borrowed funds from the Canadian Imperial Bank of Commerce (“**CIBC**”) in the total amount of approximately \$4.29 million as at January 25, 2023 (plus ongoing interest, fees and expenses). CIBC holds a first mortgage on each of the Units and other security.

- 6 -

11. The Company also borrowed funds (the “**KingSett Loan**”) from KingSett Mortgage Corporation (“**KingSett**”), secured by a second mortgage over the Units and other security. The KingSett Loan was due on December 21, 2021. The Company did not repay it on time, or at all. KingSett is owed approximately \$2.6 million as at January 26, 2023 (plus ongoing interest, fees and expenses).
12. KingSett commenced an application to appoint the Receiver on January 7, 2022. The Company sought, and obtained, multiple adjournments of the application so that it could appoint counsel and pursue a refinancing. The refinancing did not materialize, and the Receiver was appointed by Order dated May 9, 2022 (the “**Receivership Order**”).
13. Although the Company appointed counsel to resist the Receivership Order, it has repeatedly replaced its counsel. The Company’s current counsel is the fifth firm to represent it in these proceedings.
14. The Company appealed the Receivership Order. The Company took the same legally incorrect position then that it takes now – that it has an appeal as of right and benefits from an automatic stay of proceedings. On June 13, 2022, this Court granted KingSett’s motion to quash the Company’s appeal on the basis that the Company did not have an automatic right of appeal, dismissed the Company’s application for leave to appeal the Receivership Order and awarded costs to KingSett. The Company has not paid the cost award granted by this Court.

The Sale Process

15. The Receiver developed a sale process (the “**Sale Process**”) in order to realize and maximize value from the Units in a timely fashion for the benefit of stakeholders. The Sale

- 7 -

Process granted the Receiver discretion to determine when and how many of the Units would be marketed for sale. The Receiver planned to list the Units for sale in stages, to avoid flooding the market with all of the Units at once.

16. The Receiver brought a motion for approval of the Sale Process (the “**Sale Process Approval Motion**”), which was returnable July 20, 2022. The Company opposed the Sale Process Approval Motion on the basis that it should be given time to refinance the Units and that all of the Units should be sold together as a “hospitality enterprise” (the “**Enterprise Sale Theory**”).
17. The Receiver did not accept the Enterprise Sale Theory, in part because the Company did not provide any evidence to support it. There was no reliable evidence that the Company was operating a profitable hospitality enterprise or that a market existed for such an enterprise.
18. None of the evidence available to the Receiver supported the Enterprise Sale Theory: the Units are in a condominium building without hotel amenities; the appraisals relied on by the Company in the proceedings state that the highest and best use of the Units was their current use as residential rentals; and, the experienced real estate agents consulted by the Receiver in connection with the Sale Process recommended marketing the Units individually.
19. Justice McEwen rejected the Enterprise Sale Theory and approved the Sale Process by Order dated July 18, 2022 (the “**Sale Process Order**”).

- 8 -

The Receiver asked for, but did not receive, evidence to support the Enterprise Sale Theory

20. Despite the Company's failure to tender meaningful evidence prior to or in response to the Sale Process Approval Motion, and the approval of the Sale Process, the Receiver continued to consider whether there was any merit to the Enterprise Sale Theory. It repeatedly asked the Company for information that would assist with the evaluation of the Enterprise Sale Theory, including financial information to demonstrate that the Company had operated a profitable hospitality business.
21. The Company did not provide any of the information requested by the Receiver. Instead, it focused on a refinancing (which did not occur) and making allegations against virtually everyone involved in the receivership proceedings. It alleged, among other things, that someone involved in the case had used sophisticated electronic surveillance technology to listen to its principal's conversations and that an (unnamed) Justice on the Court of Appeal panel that quashed its appeal of the Receivership Order had an (unidentified) conflict of interest.

The Sale Process was implemented, and then amended

22. In August 2022, the Receiver, with the assistance of HomeLife Landmark Realty Inc. ("**HomeLife**"), prepared and listed PH04 and PH09 for sale on MLS and otherwise carried out the Sale Process in accordance with its terms; however the Sale Process failed to produce any offers to purchase PH04 or PH09 at the time. The Receiver's listing agreement with HomeLife expired on October 18, 2022, and PH04 and PH09 were delisted from MLS on or about that date.

- 9 -

23. Following discussions with KingSett and CIBC, the Receiver proposed certain amendments to the Sale Process (the “**Amended Sale Process**”), principally: (i) the engagement of RE/MAX Hallmark Realty Ltd., Brokerage (“**Remax**”) as the new listing agent, with Gloria Yeung as lead agent; and (ii) confirming the Receiver’s authority to, among other things, list any number of the Units for sale at any time as it, following consultation with Remax, determines is appropriate in its sole discretion. The Amended Sale Process was approved by Order of the Court dated December 14, 2022 (the “**Amended Sale Process Order**”).
24. The Company did not serve evidence or make meaningful argument to oppose the Amended Sale Process Order. Instead, it made unsubstantiated allegations against various participants in the proceedings. It even threatened to hold a press conference and illegally broadcast the hearing.

The Transactions

25. On or about January 3, 2023, the Receiver received an unsolicited offer for PH04 based on the Purchaser’s agent having reviewed the prior MLS listing.
26. The Receiver re-listed PH09 on MLS for a lower purchase price, and received an offer on or about January 19, 2023.
27. The Receiver and Remax entered into negotiations with each of the Purchasers, including making counter offers which ultimately resulted in the Sale Agreements. After consulting with Remax, the Receiver determined that the Transactions were in the best interests of stakeholders.
28. The Transactions were scheduled to close February 28, 2023.

The Sale Approval Motion

29. The Receiver moved for Approval and Vesting Orders in respect of each Transaction as well as the Ancillary Matters Order pursuant to the Sale Approval Motion.
30. KingSett supported the Sale Approval Motion, even though it is expected to suffer a loss. CIBC also supported the Transactions.
31. The Company opposed the Transactions, and recycled its Enterprise Sale Theory argument. The Company did not, however, provide admissible or reliable evidence to support its position. Indeed, the Company did not provide *any* evidence until the literal eve of the hearing. The Sale Approval Motion was heard on February 7, 2023. The Company served its evidence at 4:23 pm on February 6, 2023.
32. The Company's evidence consisted of an affidavit sworn by its principal, Raymond Zar. Mr. Zar opined that the Units would be worth approximately \$12.5 million if they were sold as an enterprise and that the Transactions would not maximize the value of the Units. In the Receiver's view, Mr. Zar's opinion evidence was not admissible, since none of the mandatory criteria for opinion evidence was satisfied. In any event, the Company still did not tender any reliable or up to date evidence that it had ever operated a profitable hospitality business. Putting aside admissibility, having reviewed the evidence put forward by Mr. Zar on behalf of the Company, the Receiver still believes that closing the Transactions is appropriate and will maximize recovery for the Company's creditors.
33. By Endorsement dated February 7, 2023, Justice Steele rejected the Company's arguments and granted the Orders.

The Company admits that it needs leave to appeal and is not entitled to an automatic stay

34. The Receiver was concerned that the Company would try to prevent the closing of the Transactions by, as it had done previously, commencing an appeal purportedly as of right and taking the position that it was entitled to an automatic stay pending the hearing of the appeal. The Receiver sought to address these concerns by moving for provisional execution of the Orders.
35. The Receiver did not believe that the Company had the right to appeal without leave, which would mean that it would not be entitled to an automatic stay and that it would need to seek a stay pending appeal if it wanted to prevent the closing of the Transactions.
36. In response to the motion, the Company specifically *admitted* in its factum that it had no right to appeal without leave and that it had no right to an automatic stay:

The Company agrees with the Receiver [...] that an appeal in this matter to the Court of Appeal will only proceed with leave.

...

It is submitted that this rigorous test for leave is more than sufficient to protect the interests of the Receiver and is a complete answer to its concerns that the Company will simply file a Notice of Appeal and stay these proceedings.

Accordingly, *there is no automatic stay* and accordingly, Section 195 provides no added protection to the Receiver. [emphasis added]

37. Justice Steele did not grant provisional execution of the Orders.

The Company purports to appeal as of right, despite its admission that it has no right to do so

38. On February 23, 2023, the Company served the Notice of Appeal, purporting to commence the Appeal as of right. The Company now says that it does not need to seek leave to commence the Appeal, purportedly based on Sections 193(a) to (c) of the *BIA*.

- 12 -

39. The Company said exactly the opposite in its factum filed in the hearing below. It admitted that it needed leave to appeal, and is bound by that admission.
40. Even leaving aside the Company's admission, it has no right to appeal the Orders without leave. Subsections 193(a) to (c) of the *BIA* are not applicable in these circumstances because:
- (a) 193(a) of the *BIA* has no application, because the Appeal does not involve future rights within the meaning of the *BIA*. The Sale Process for the Units has already been determined by final orders of the Court (*i.e.* the Sale Process Order and the Amended Sale Process Order). Those orders were not appealed, and the time to appeal has long passed. Further, the Approval and Vesting Orders apply only to the specific Purchased Units, and impact only the present rights of the Company in those Units.
 - (b) 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's real complaint is that the Receiver should have marketed and sold all of the Units together *en bloc*, as a hospitality business. This is an issue that, by definition, can only arise once. Once the Purchased Units are sold, the possibility of an *en bloc* sale cannot be raised in a future case. The argument made by the Company – that the Transactions are inferior to an *en bloc* sale – is entirely fact specific and unlikely to arise again;
 - (c) the property involved in the Appeal does not exceed \$10,000. As this Court has held, an appeal does not involve property with a value in excess of \$10,000 when

- 13 -

it is procedural in nature, does not bring into play the value of the debtor's property, or does not result in a loss. Each of these criteria is satisfied here:

- (i) the Approval and Vesting Orders were granted because Justice Steele was satisfied that the Receiver had followed an appropriate *process* when it pursued the Transactions. The Company seeks to call that *process* into question and say that the Receiver should have pursued the Enterprise Sale Theory. This Court has previously held that a person who calls into question the methods employed by a court officer does not fall within Section 193(c);
- (ii) as this Court has previously stated, approval and vesting 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;
- (iii) the Company has not shown that the Approval and Vesting Orders result in a gain or a loss. This Court has held that a bald assertion that a transaction will cause a loss is not sufficient to engage Section 193(c). The Company must "demonstrate some basis in the evidentiary record" to show that granting the Approval and Vesting 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.

41. In the 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

- 14 -

time as the Appeal; however, the Company has failed to serve an application for leave as required by subsection 31(2) of the *Bankruptcy and Insolvency Act General Rules*.

42. 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 proposed 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 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 onus. The Company's argument in favour of the Enterprise Sale Theory failed because the Company failed to tender any convincing or admissible evidence to support it; and,
- (c) the proposed Appeal will unduly hinder the progress of the proceeding. As noted, if the 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.

In the alternative, the Appeal should be expedited

43. In the alternative, if the Company does not require leave to appeal the Orders (or if leave is granted notwithstanding the Company's failure to file an application for leave), the hearing of the Appeal should be expedited so that it is heard on or before March 29, 2023.

- 15 -

44. The Transactions were originally scheduled to close on February 28, 2023. Following discussions between the Receiver and the Purchasers, the Purchasers have agreed to extend the closings to March 31, 2023. As a condition to the extension, the PH09 Purchaser has required an express right to terminate if the Transaction does not close by March 31, 2023.
45. If the Transactions fail to close, there is no certainty that the same or similar purchase prices can be obtained from other purchasers. Even if acceptable alternative sales can be achieved, efforts to remarket the Units would cause further delays to the progress of the receivership, further marketing and professional expenses, and greater stakeholder losses.
46. Expediting the Company's Appeal to be heard on or before March 29, 2023 will, should the Court decline to grant the Appeal, allow the Transactions to close by the extended closing date for the benefit of the Company's stakeholders and otherwise allow the Receiver to progress the conduct of the receivership in a timely manner.

Jurisdiction of a Panel

47. A panel of this Honourable Court has jurisdiction to hear this motion to quash and to grant the relief requested pursuant to:
 - (a) Rule 61.16(2.2) of the *Rules of Civil Procedure*;
 - (b) Subsection 7(1) – (3) and 134(3) of the *Courts of Justice Act*;

Jurisdiction and Legislative Provisions

48. *Practice Direction Concerning Civil Appeals in the Court of Appeal.*
49. Rules 37 and 61 of the *Rules of Civil Procedure*.

- 16 -

50. Sections 6, 7, and 134(3) of the *Courts of Justice Act*.
51. Sections 193 and 195 of the *BIA*.
52. Rule 31 of the *Bankruptcy and Insolvency General Rules*.
53. Such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The Orders;
- (b) The Notice of Appeal;
- (c) the Endorsement of Justice Steele dated February 7, 2023;
- (d) Affidavit of Susan Slaney sworn March 1, 2023;
- (e) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

March 14, 2023

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- 18 -

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

KINGSETT MORTGAGE CORPORATION

Moving Party
(Respondent)

- and -

30 ROE INVESTMENTS CORP.

Respondent
(Appellant)

**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**

CERTIFICATE

Counsel for KSV Restructuring Inc. in its capacity as the receiver and manager of certain property of 30 Roe Investments Corp. (the “**Receiver**”) certify that it is estimated that one (1) hour will be required for the Receiver’s oral argument of this motion, excluding reply.



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KINGSETT MORTGAGE CORPORATION

Moving Party (Respondent)

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

Respondent (Appellant)

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

COURT OF APPEAL FOR ONTARIO

Proceeding commenced in Toronto

**NOTICE OF MOTION
(Motion to Quash, Expedite and Lift Stay)**

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KINGSETT MORTGAGE CORPORATION
Applicant / Respondent in Appeal

- and - **30 ROE INVESTMENTS CORP.**
Respondent / Appellant in Appeal

Court of Appeal File No.: M54109 (COA-23-CV-0215)
Court File No.: CV-22-00674810-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced in Toronto

AFFIDAVIT OF BRENNAN CALDWELL
(Sworn March 15, 2023)

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**KINGSETT MORTGAGE
CORPORATION**

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

Applicant / Respondent in Appeal

Respondent / Appellant in Appeal

Court of Appeal File No.: M54109 (COA-23-CV-0215)
Court File No.: CV-22-00674810-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced in Toronto

RESPONDING MOTION RECORD

(Motion Under Rule 15.04 for Removal as Lawyer of
Record before a Single Judge of the Court of Appeal
returnable March 17, 2023)

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