

**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**

MOVING PARTY'S FACTUM

(Respondent's Motion for an Order to fund its Legal Fees)

Motion returnable May 18, 2023

MOVING PARTY'S FACTUM

PART I - INTRODUCTION

1. The Respondent, 30 Roe Investments Corp., (the "**Company**"), is the largest owner of the condominium units and related parking spaces and storage lockers (collectively, the "**Units**") located at 30 Roehampton Avenue, Toronto, Ontario (the "**Building**"), which it operates as a corporate housing business known as Roe Suites (the "**Business**").
2. 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 the Company including the Units.
3. The Company's Board of Directors (the "**Board**") retains residual powers and is obligated to act in the Company's best interest and requires legal counsel to do so. The Receiver has been unwilling to reimburse the Board for legal expenses to date and to pay the monetary retainer required to retain counsel moving forward.
4. The Company brings this motion for an order requiring the Receiver to reimburse it for past legal fees and to pay the Board's future legal expenses from the funds of the Company so it can retain and be represented by counsel. For this motion, if leave is not granted to Board Director Raymond Zar to argue this motion as Agent for the Company, then in the alternative, an adjournment is sought so the Company can retain a lawyer to argue this motion.

PART II – SUMMARY OF FACTS

Background

5. The Company's senior lender is the Canadian Imperial Bank of Commerce (the "CIBC") for \$4.29 million as of January 25, 2023. CIBC has never noted the Company in default and instead has taken a neutral position. CIBC mortgages were funded in February 2017.

Affidavit of Raymond Zar sworn May 15, 2023 ("Zar Affidavit") at para 5.

6. The Company's junior lender is the Applicant, KingSett Mortgage Corporation ("KingSett"), for ~ \$1.9 million principal. KingSett loan was funded in April 2019.

Zar Affidavit at para 6.

KingSett Misled the Company then Ambushed it with a Receivership Application

7. In September 2021, the Company was refinancing the first and second mortgages due to increased property value to \$13,500,000, driven by higher rents. On September 27, 2021, KingSett assured the Company that they were content with the security and agreed to extend the loan, supporting the Company's refinancing strategy.

Zar Affidavit at para 7 and 8.

8. While KingSett subsequently claimed its loan matured on December 1, 2021, it did so after having misinformed the Company that the loan had been extended, even accepting the loan extension request on December 16, 2021. KingSett took no action to correct what it later referred to in court as an "administrative error" and continued to interact cordially with the Company until January 7, 2022. On this date, KingSett served a surprise 400-page application for the appointment of a Receiver, giving only five business days' notice of the

hearing. The Board believes this was a calculated move by KingSett, despite there being no outstanding interest, no risk to KingSett's security, and no allegations of misconduct against the Company or its management.

Zar Affidavit at para 8, 9, 10.

In response to the looming receivership, the Company tried to retain its usual counsel in January 2021, but KingSett asserted numerous conflicts, leaving the Company without its preferred representation. When the Board managed to hire Paliare Roland, KingSett made defamatory statements against the Board, causing Paliare Roland to resign. KingSett used this tactic to deter other firms from considering representing the Company.

Zar Affidavit at para 11, 12

Troubling Developments in the Receivership

9. The Board has recently uncovered troubling information regarding the Receivership. KingSett failed to disclose its relationship with the Receiver, KSV, and its principal, Noah Goldstein. They also failed to reveal that their chosen counsel, Chris Armstrong and Sean Zweig, have pre-existing loyalties to KingSett and KSV, respectively, which poses a conflict of interest.

10. The Board has also revealed that KingSett and KSV did not inform the court that the Company had tendered \$3 million to repay the KingSett loan and terminate the Receivership, which KingSett rejected, insisting on an improper clause in the discharge order. Further, the court was not informed of the Company's allegation that the Receiver had filed a false police report.

11. Moreover, the Board has learned that KingSett manipulated the Company's legal representation situation to its advantage. KingSett repeatedly obstructed the Company's attempts to retain counsel, leading to a high turnover of lawyers. Each firm or individual lawyer faced undue pressure or conflicts, such as Paliare Roland. KingSett and the Receiver also misrepresented the nature of some retainers to the court, such as the retainer of Ms. Tourgis and Mr. Simaan, to create negative optics and distract from the substance.
12. Furthermore, KingSett pressured Blaney McMurtry, the Company's primary law firm for many years, into resigning. This included exerting influence on individual lawyers within Blaney's, like Mr. Brzezinski, to control the Company's legal strategy. This manipulation culminated in the abrupt withdrawal of Blaney's from representing the Company, citing unpaid invoices as the reason.

Zar Affidavit at para 30

The Receiver is obstructing the Board from retaining counsel for the Company

13. The Board has been financing the Company's legal expenses for the past 16 months and is now seeking reimbursement from the Receiver, which has so far been denied. The Receiver has been seen to use the Company's funds for its own professional fees, amounting to \$300,000 last month, but refuses to pay the Company's legal expenses.

Zar Affidavit at para 43, 44

14. The Board believes that legal representation is in the Company's best interest. This is especially so given the evidence of a lack of independence of the Receiver due to its close

relationship with KingSett and the solicitor-client relationship between KingSett and the Receiver's counsel, Chris Armstrong of Goodmans.

Zar Affidavit at para 45, 46

15. As the Board plans to take positions contrary to those of the Receiver and its counsel, it sees the need for independent counsel to act in the best interest of the Company. However, the Company's funds are the only available source to pay for this legal representation.

Zar Affidavit at para 47, 48

16. Potential law firms have asked for large retainers and assurance that the Receiver will cover the Company's legal fees as a condition for their services. With Blaneys no longer on the record due to non-payment of fees, the Board needs a new firm to represent the Company and in need of funding to do so.

Zar Affidavit at para 49

PART III – STATEMENT OF ISSUES, LAW & AUTHORITY

Issue 1: Is the Board of the Company entitled to retain counsel on behalf of the Company, despite the Receivership?

Issue 2: If so, is the Board entitled to use the assets and/or funds of the Company held with the Receiver to pay for the services rendered by its counsel?

Issue 1: The Board holds all residual powers and is entitled to retain counsel.

17. It is trite law that the right to retain counsel is essential to our justice system and cannot be denied. In *British Columbia (Attorney General) v. Christie*, [2007 SCC 21 \(CanLII\)](#), [2007] 1 S.C.R. 873, [2007] S.C.J. No. 21, the Supreme Court said, at para. 22:

*[I]t is important to note that this Court has repeatedly emphasized the important role that lawyers play in ensuring access to justice and upholding the rule of law: *Andrews v. Law Society of British Columbia*, [1989 CanLII 2 \(SCC\)](#), [1989] 1 S.C.R. 143, at p. 187; *MacDonald Estate v. Martin*, [1990 CanLII 32 \(SCC\)](#), [1990] 3 S.C.R. 1235, at p. 1265; *Fortin v. Chretien*, [2001] 2 S.C.R. 500, [2001 SCC 45](#), at para. 49; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, [2001 SCC 67](#), at para. 43; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, [2002 SCC 61](#), at paras. 64-68, per LeBel J. (dissenting in part but not on this point). This is only fitting. Lawyers are a vital conduit through which citizens access the courts, and the law. They help maintain the rule of law by working to ensure that unlawful private and unlawful state action in particular do not go unaddressed. The role that lawyers play in this regard is so important that the right to counsel in some situations has been given constitutional status.*

18. The right to retain counsel is germane, especially in the case of a corporation in receivership. This was the ruling of a full panel of the Court of Appeal for Ontario in *Peterborough (City) v. Kawartha Native Housing Society Incorporated*, [2010 ONCA 705 \(CanLII\)](#), where the Court of Appeal was asked if a receivership order prevents the board from retaining counsel on behalf of the company. At para 29, the Court of Appeal stated that it does not:

[29] On my reading of the provisions of the operating agreements, relied upon by the motion judge, I do not find anything that prohibits the boards from retaining counsel without the consent of the receiver or approval of the court in respect of the receivership litigation. Similarly, I do not agree that the terms of the receivership order prevent the boards from retaining counsel on behalf of the corporations.

19. The Court of Appeal also thoroughly reviewed Canadian jurisprudence on the residual powers of boards of directors of companies placed in receivership, including share capital corporations such as the Company. At para 30, the Court of Appeal stated:

[30] There was considerable argument before us concerning the extent of the residual authority of a board of directors of a corporation in receivership. In a recent judgment of the Newfoundland and Labrador Court of Appeal, Maple Leaf Foods Inc. v. Markland Seafoods Ltd., [2007 NLCA 7 \(CanLII\)](#), [2007] N.J. No. 22, 264 Nfld. & P.E.I.R. 126 (C.A.), Mercer J.A. did a thorough review of the Canadian jurisprudence on the residual powers of boards of directors of companies placed in receivership. At paras. 37 and 38, Mercer J.A. said:

Upon a receivership the directors retain residual powers. [Though] they are displaced in respect of powers exercisable by the receiver-manager, they remain in office and can exercise limited functions.

The powers of the receiver-manager are stated in the court order of appointment or in the private appointment as authorized by the security instrument . . . Powers which the receiver-manager is not authorized to exercise remain vested in the directors. (Citations omitted)

Maple Leaf Foods involved the receivership of a share capital corporation. The motion judge concluded that cases concerning share capital corporations although "helpful for analogy purposes" do not "apply to the situations before the court". While these cases are certainly distinguishable, both on their facts and the legal structure of the corporations, I find that the general principles articulated by the Newfoundland and Labrador Court of Appeal to be relevant to the circumstances here.

Morawetz J., of the Ontario Superior Court, adopted the above principles in Inyx Canada Inc. (Re), [2007] O.J. No. 3846, 36 C.B.R. (5th) 154 (S.C.J.), at para. 5. See, also, Toronto Dominion Bank v. Fortin, [1978 CanLII 1934 \(BC SC\)](#), [1978] B.C.J. No. 1196, 26 C.B.R. (N.S.) 168 (S.C.), at pp. 171-72 C.B.R. The receiver's authority in this case is derived from the order of the [page47] court. Beyond the limits of that order, residual authority to act for the corporations rests with the boards of directors.

20. The Court of Appeal also emphasized that the board of directors' obligation to act in the best interest provides them with the right to retain counsel and oppose the receiver if they believe that steps taken by the receiver on behalf of the corporation are not in the corporation's best interest. At para 31, the Court of Appeal stated:

[31] Whatever their residual authority may be, the boards continue to have an obligation to act in the best interest of the corporations. If, in their opinion, the appointment of a receiver is not in the best interest of the corporations or if they believe that the steps being taken by the receiver on behalf of the corporations are not in the corporations' best interest, then they are entitled to retain counsel to bring the matter to the attention of the court. It will be for the court to decide if the boards have acted responsibly and reasonably in doing so. Clearly, if the boards were

to advance defences in the action then they have a right to retain counsel in order to do so. To the extent that the boards need to be paid out of the funds of the corporations, then they may decide to bring an application for an advance costs award. However, approval of the court is not a prerequisite to retain counsel.

21. The Court of Appeal for Ontario has stated, in no uncertain terms, that the board of directors of a company in receivership holds all residual powers and has the right to retain counsel for the corporation and have the right to retain counsel take positions in opposition to the receiver if, in their opinion, they believe the steps being taken by the receiver are not in the corporations best interest.

22. The Board has determined that the Receivership is not in the Company's best interest.

Zar Affidavit at para 11

23. The Board has determined that it cannot effectively prepare or argue on behalf of the Company without the benefit of counsel and that retaining counsel is in the Company's best interest.

Zar Affidavit at para 45

24. The Board has grave concerns about the Receiver's lack of independence, given its close ties with KingSett and the solicitor-client relationship between KingSett and the Receiver's counsel.

Zar Affidavit at para 46

25. The Board will be taking positions adverse to the positions advanced by the Receiver and its counsel and thus believes that it requires independent counsel so it can fulfil its obligations to protect the interests of the Company and act in the Company's best interest.

Zar Affidavit at para 47

26. Exercising its residual powers, the Board retained various counsel and paid them a combined \$50,740.01 inclusive of HST for their services to date. The Board seeks an order directing the Receiver to reimburse the Board for this amount using the funds of the Company and to pay for the future legal fees of the Board, including the payment of a monetary retainer to the Company's counsel.

Zar Affidavit at para 19, 28, 29, 49 and Exhibits A, B and C.

27. The Receiver agrees that Board and Company ought to be represented by counsel.

Issue 2: The Board is entitled to use the funds of the Company to pay for counsel.

28. While the Receiver agrees that the Board and Company ought to be represented by counsel, the Receiver refuses to allow the funds of the Company to be used to pay for that counsel.

Zar Affidavit at para 44

29. The Receiver's decision to withhold funds deprives the Company of legal representation and frustrates the Board's obligation to act in the Company's best interest.

Zar Affidavit at para 45

30. Other than using the funds of the Company, the Board has no alternative source of funding for its legal fees. All of the law firms the Board has sought to appoint since it last had

counsel have required a monetary retainer and assurance that the Receiver would pay the Company's legal fees.

Zar Affidavit at para 48, 49

31. In a separate ruling, the Court of Appeal for Ontario in *Peterborough (City) v. Kawartha Native Housing Society Inc.*, [2009 CanLII 92134 \(ON CA\)](#) made an order that the board of that corporation in receivership had the right to retain counsel on behalf of that corporation and that reasonable legal fees and expenses of counsel were to be paid out of the corporations' assets. In coming to this conclusion, Blair J.A. said, at paras 5 and 6 of his reasons:

[5] Here, the boards' ability to pursue the important issues that are raised on the appeal would be hollow in the extreme if they are not in a position to retain and properly pay legal counsel. The appeal cannot be effectively prepared, presented and argued on behalf of the corporations without the benefit of counsel.

[6] Accordingly, I have no hesitation in directing and ordering that the appellants may be represented by counsel on the appeal and that the boards are entitled on their behalf to retain counsel for purposes of the appeal.

[7] The respondent City and the receiver do not object to the above order, but argue that the legal fees should not be paid out of the receivership funds. They argue (1) that the appellants have not shown they do not have the means to retain counsel themselves; (2) that there is insufficient cash flow in the receivership to pay the fees; and (3) that the wording of the operating agreements that govern the social-housing scheme do not permit it. [page575]

[8] I am not persuaded by those arguments. The latter issue is one of the main issues raised on the appeal itself. The evidence of Mr. Dufresne, one of the directors, is clear that the directors have access to no other funds or assets other than the corporations' assets themselves. While it appears true that the corporations are operating in a deficit position,

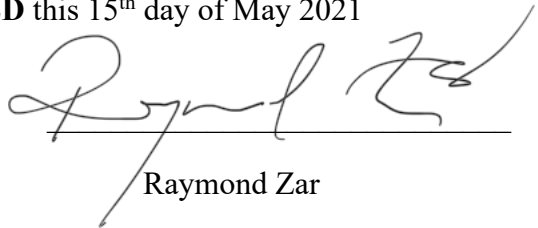
that deficit has been steadily decreasing. There are still operating funds available.

32. In two rulings concerning the funding of legal fees of a corporation in receivership, the Court of Appeal for Ontario has made itself abundantly clear: the right to retain counsel is fundamental, and without funding for counsel, that fundamental right is violated, and with it, the best interest of the corporation is placed in jeopardy, and the residual power of the board of directors is trampled upon.

PART IV – ORDER REQUESTED

33. For reasons set out herein, the Respondent respectfully requests that the Court:
- (a) make an order directing the Receiver to reimburse the Board for the Company's legal expenses of \$50,740.01, and
 - (b) make an order directing the Receiver to pay a \$50,000 monetary retainer required by the Company's counsel.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of May 2021



Raymond Zar

Agent for the Respondent

KINGSETT MORTGAGE CORPORATION
Applicant

and

Court File No. CV-22-00674810-00CL
30 ROE INVESTMENTS CORP.
Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

MOVING PARTY'S FACTUM
(Respondent's Motion for an Order to Fund its Legal Fees)