

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

30 ROE INVESTMENTS CORP.

Respondent

**SUPPLEMENTARY FACTUM
(PH04 AND PH09 SALE APPROVAL AND ANCILLARY RELIEF)
(RETURNABLE FEBRUARY 13, 2023)**

February 9, 2023

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TO: THE SERVICE LIST

When does the court have the jurisdiction to award Provisional Execution?

1. The award of a Provisional Execution has its roots in Quebec jurisprudence. Provisional Execution may be awarded pursuant to r. 661 of the Quebec *Rules of Civil Procedure*:

661.

If bringing an appeal is likely to cause serious or irreparable prejudice to one of the parties, the judge may, on an application, order provisional execution, even for part only of the judgment. The judge may also make provisional execution conditional on a surety being furnished.

If provisional execution is not ordered by the judgment itself, it cannot be ordered subsequently except on appeal, with or without a surety. A judge of the Court of Appeal may also stay or lift provisional execution if it has been ordered, or order that a suretyship be provided by a party that was exempted from doing so by the court of first instance.¹

2. Such an order may only be made where there is a risk of serious prejudice being experienced by one of the parties if the order is stayed pending appeal. This was explained in *McNicoll c. Jonquiere (Cité)* by the Quebec Court of Appeal:

This article has been replaced by Art. 547, para.(i) of which permits such execution to be ordered in "any case of exceptional urgency". Provisional execution may be ordered by the judgment itself or by a judge of this court upon motion (Arts. 549 and 550).²

3. Section 195 of the *Bankruptcy and Insolvency Act* brings orders for Provisional Execution into the Bankruptcy legal landscape. Generally, an appeal by right, with or without leave, stays all proceedings. This, however, is except to the extent that an order or judgment appealed from is subject to Provisional Execution notwithstanding any appeal therefrom, all proceedings under an

¹ *Civil Code*, [R. 661](#)

² *McNicoll c. Jonquiere (Cité)*,

order or judgment appealed from are 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.³

4. Orders for Provisional Execution have been granted in Ontario jurisprudence, but discussions of the order itself are sparse. Provisional Execution was discussed in *Century Services Inc. v. Brooklin Concrete Products Inc.* by the Ontario Superior Court of Justice.⁴ In considering a motion seeking to extend the closing date of a court-approved sale pending an application for review of a share ownership decision, the Ontario Superior Court of Justice held that Ontario cases have recognized the concept of Provisional Execution such that it is not only a concept applicable in Québec; and that it has the jurisdiction to make an order subject to Provisional Execution, which, pursuant to s. 195 of the *BIA*, operates as an exception to the automatic stay of an order appealed from unless varied by the Court of Appeal; but such discretion should only be exercised sparingly and with caution.⁵

5. It appears that an order for Provisional Execution may be made in similar circumstances to those under the *Quebec Civil Code*. There must some serious or irreparable prejudice brought on by the appeal. This was the case in *YG Limited Partnership and YSL Residences (Re)*.⁶ In ordering the approval of a debtor's proposal, the Court included, as requested, an order pursuant to s. 195

³ *BIA*, [s.195](#)

⁴ *Century Services Inc. v. Brooklin Concrete Products Inc.*, [2005 CarswellOnt 1248, \[2005\] O.J. No. 1246](#).

⁵ *Ibid.*, at para 5.

⁶ *YG Limited Partnership and YSL Residences (Re)*,

of the *BIA* permitting provisional execution of the approval order notwithstanding appeal. The Court granted the Provisional Execution on the following grounds:

- a. The secured creditors of YG LP have been deferred and stayed for a very, very long time at this point. Some of that deferral was purchased in the form of forbearance agreements with Timbercreek but the last negotiated extension... It would be unjust to Timbercreek to have its period of limbo indefinitely extended by the simple expedient of filing a Notice of Appeal and forcing Timbercreek to seek a lifting of an automatic stay to enforce its security.
- b. Our courts have generally sought to achieve a degree of uniformity of practice as between the CCAA and the *BIA*. Approval of a CCAA Plan Is not subject to an automatic stay. An automatic stay in this case would operate as a functional veto of the Proposal itself because the result would be an almost certain slide into receivership unless the stay were promptly lifted.⁷

Factual and Legal Theory of the Receiver

Serious and Irreparable Harm

6. The Receiver claims:

“The Company’s incorrect assertion that it had an automatic right to appeal the Receivership Order and was entitled to an automatic stay was just one of the many attempts it has made to delay, complicate and/or increase the cost of these proceedings. Other tactics have included multiple adjournment requests; the late filing of materials; numerous failures to provide the Receiver with information, Records and Property as required pursuant to Orders of this Court; and a litany of allegations against the Receiver and certain stakeholders. Third Report at pages 5 - 6; MR, Tab 2 [CL p. E600;E28 – E601;E29]”

7. The claims in the Receiver’s Factum that the present fact scenario is “directly analogous” to that of *YG Limited* are not overly accurate regarding the noted delays. The Factum, at paragraph 17, states that, as the Receivership Order was granted 9 months ago, and the endorsement of the

⁷ *Ibid* at para 33.

discussed sale of the units was provided 6 months ago, the Applicant is entitled to Provisional Execution on similar grounds to that in *YG Limited*. However, in *YG Limited*, the secured creditor's receivership application had been adjourned for approximately 5 years pending the negotiation and approval of the debtor's Proposal. This represents a significantly longer delay than that experienced in the present circumstances.

8. Attached to this Factum is a chronology of procedural steps taken by the parties.

9. Prior to the granting of the Receivership Order by Mr. Justice Cavanaugh on May 9, 2022 there were two adjournment requests that were granted. These adjournment requests were opposed by the Applicant. After having considered all the facts and evidence before him, Mr. Justice Cavanaugh proceeded to order the two adjournments.

10. One day after the May 9th Receivership Order, the Company delivered its Notice of Appeal. Five and one half weeks later on June 17, 2022, the appeal was quashed.

11. From June 17, 2022, to date, there was no activity on the part of the Receiver, and more particularly, the Receiver failed to obtain any offers on any of the units. This is the single longest delay in the process to date and is wholly attributable to the Receiver's failure to properly market the Units.

12. The claims in the Receiver's Factum that the present fact scenario is "directly analogous" to that of *YG Limited* are not overly accurate regarding the noted delays. The Receiver's Factum, at paragraph 17, states that, as the Receivership Order was granted 9 months ago, and the endorsement of the discussed sale of the units was provided 6 months ago. The Receiver is responsible for this lengthy delay.

13. The Applicant states it is entitled to Provisional Execution on similar grounds to that in *YG Limited*. However, in *YG Limited*, the secured creditor's receivership application had been adjourned for approximately 5 years pending the negotiation and approval of the debtor's Proposal. This represents a significantly longer delay than that experienced in the present circumstances.

14. The Company agrees with the Receiver and the jurisprudence cited thereunder that an appeal in this matter to the Court of Appeal will only proceed with leave. As stated in the *Kingsett* appeal:

“The test for leave to appeal under *BIA* Section 193(e) is well established:

(A) Does the proposed appeal raise an issue of general importance in the practice of bankruptcy insolvency matters or to the administration of justice as a whole and therefore is one that an appellate court should consider and address;

(B) Is the proposed appeal meritorious and does it involve a point that it is of significance to the proceed; and

(C) Does the proposed appeal unduly hinder the progress of the bankruptcy and insolvency proceedings?⁸

15. 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.

16. Accordingly, there is no automatic stay and accordingly, Section 195 provides no added protection to the Receiver.

17. It is submitted that in any proceeding in Ontario where there is a final order or judgment possible at the end of a hearing, the unsuccessful party will always have the right to file a Notice

⁸ *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, [2022 ONCA 479 \(CanLII\)](#)

of Appeal and obtain some kind of stay. This cannot be the basis for an assertion of serious and irreparable harm as every litigation matter is subject to the same uncertainties in respect of the filing of a Notice of Appeal.

18. It is submitted that there has been insignificant delays in these proceedings and the longest delay has been occasioned by the Receiver's failure to act properly. When one compares the delay occasioned by the Receiver's failure to sell the properties of 6 months, it is hardly a reason for intervention by this court to impose a restriction inherent in a Provisional Execution order on the company.

19. It is submitted that the receiver has failed to meet the serious and irreparable harm test and should not be granted the highly unusual and rare relief of Provisional Execution

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



Lou Brzezinski
Blaney McMurtry LLP

Counsel for the Respondent

SCHEDULE “A” – Table of Cases

1. *McNicol c. Jonquiere (Cité)*, [1970 CarswellQue 234, \[1970\] C.A. 263](#)
2. *Century Services Inc. v. Brooklin Concrete Products Inc.*, [2005 CarswellOnt 1248, \[2005\] O.J. No. 1246](#)
3. *YG Limited Partnership and YSL Residences (Re)*, [2021 ONSC 5206](#)
4. *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, [2022 ONCA 479 \(CanLII\)](#)

SCHEDULE “B” - Text of Statutes

661. If bringing an appeal is likely to cause serious or irreparable prejudice to one of the parties, the judge may, on an application, order provisional execution, even for part only of the judgment. The judge may also make provisional execution conditional on a surety being furnished.

If provisional execution is not ordered by the judgment itself, it cannot be ordered subsequently except on appeal, with or without a surety. A judge of the Court of Appeal may also stay or lift provisional execution if it has been ordered, or order that a suretyship be provided by a party that was exempted from doing so by the court of first instance.

2014, c. 1, a. 661.

Appeals

Marginal note: Court of Appeal

193 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.
- R.S., 1985, c. B-3, s. 193
 - 1992, c. 27, s. 68

Marginal note: Appeal to Supreme Court

194 The decision of the Court of Appeal on any appeal is final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is granted by that Court.

- R.S., c. B-3, s. 164
- R.S., c. 44(1st Supp.), s. 10

Marginal note: Stay of proceedings on filing of appeal

195 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.

- R.S., 1985, c. B-3, s. 195
- 1992, c. 27, s. 69

CHART OF PROCEDURAL STEPS

| Date | Event |
|-------------------|--|
| January 7, 2022 | The Notice of Application (the “ Application ”) was issued with only five business days notice until the hearing |
| January 17, 2022 | The Application came before Justice Cavanagh. 30 Roe Investment Corp. (the “ Company ”) requested an adjournment of the Application to allow the Company to retain counsel. The request for adjournment was supported by the first mortgagee, Canadian Imperial Bank of Commerce (“ CIBC ”). Justice Cavanagh granted the request for adjournment and the Application was adjourned to be heard on February 22, 2022 |
| February 22, 2022 | Counsel who had just been retained appeared on behalf of the Company. There was evidence that the Company had made other attempts to retain counsel but had been unable to do so because of conflicts. Counsel for the Company requested an adjournment to prepare responding materials and respond to the Application. This request was opposed by the KingSett Mortgage Corporation (“ KingSett ”) but not opposed by CIBC. Justice Cavanagh granted the Company’s request for an adjournment and the Application was adjourned to March 28, 2022. Justice Cavanagh directed counsel to agree on a timetable for the Application. |
| March 8, 2022 | A case conference was held before Justice Cavanagh on March 8, 2022. At that case conference, counsel for the Company advised that they were moving for an order removing them as lawyers of record for the Company. Justice Cavanagh was advised that the Company would be opposing this motion. A hearing date for this motion was set for April 11, 2022. As a result of the scheduling of this motion, Justice Cavanagh concluded that the hearing of the Applicant’s Application seeking the appointment of a receiver needed to be adjourned. A new hearing date for the application was set for May 6, 2022. |
| April 11, 2022 | The motion by counsel for the Company to be removed as counsel of record was heard on April 11, 2022. On that day, Justice Penny released an endorsement and made an order removing counsel for the Company as counsel of record. The Company was served with the formal Order on April 20, 2022. |
| April 20, 2022 | A case management conference was held before Justice Cavanagh on April 20, 2022. This was arranged at the request of the Applicant to set a timetable for the hearing of the application on May 6 even though the Company did not have counsel. Justice Cavanagh approved a timetable and directed the parties to comply with it even though the Company did not have a lawyer at the hearing to explain what a timetable was and no leave was granted for the Company to be represented by a nonlawyer so to comply with the timetable. |
| May 2, 2022 | The Company retained new legal counsel on May 2, 2022. A supplemental affidavit of Raymond Zar was sworn on May 5, 2022. The Company also produced a term sheet for refinancing from Firm Capital Corporation and a letter from CIBC’s counsel stating that CIBC supported adjournment of the Application so the Company could close on the refinancing with Firm Capital Corporation. |
| May 6, 2022 | The Application was heard. |

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|-----------------------------|---|
| May 9, 2022 | Justice Cavanagh granted the receivership order (the " Receivership Order ") appointing KSV Restructuring Inc. (" KSV ") as receiver and manager (the " Receiver "). |
| May 10, 2022 | The Company delivered a notice of appeal to appeal the Receivership Order. |
| June 17, 2022 | The Court of Appeal for Ontario granted KingSett's motion to quash the Company's appeal. |
| July 18, 2022 | The Court approved the sale process order (the " Sales Process ") despite the Company now providing a commitment letter from Firm Capital Corporation for refinancing. The Company had counsel only days before the hearing which is was given very short notice of. |
| From August to October 2022 | The Receiver prepared and listed PH04 and PH09 on MLS. Despite numerous showings and reductions to the listing prices, the Sale Process failed to produce any offers on PH04 and PH09. |
| October 18, 2022 | The listings for PH04 and PH09 expired. |
| December 14, 2022 | The Court approved the Amended Sale Process Order (the " Amended Sales Process ") |
| January 3, 2023 | The Receiver received an unsolicited offer for PH04 and accepted it without marketing it on MLS at the new court ordered commission rate of 2.5%. |
| January 19, 2023 | The Receiver received an offer for PH09. |
| February 7, 2023 | Motion for Sale and Approval Orders and Ancillary Relief heard. |

KINGSETT MORTGAGE CORPORATION

and

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

Applicant

Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

SUPPLEMENTARY FACTUM
(PH04 and PH09 Sale Approval and Ancillary Relief)
(Returnable February 13, 2023)

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