

Court/Estate File No.: 31-2675288

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
(COMMERCIAL LIST)**

**IN THE MATTER OF THE PROPOSAL OF
2505243 ONTARIO LIMITED, OF THE CITY OF
TORONTO, IN THE PROVINCE OF ONTARIO**

**FACTUM
(Motion returnable August 30, 2021)**

August 25, 2021

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PART I - INTRODUCTION

1. KSV Restructuring Inc. (“**KSV**”), in its capacity as proposal trustee (the “**Proposal Trustee**”) of 2505243 Ontario Limited (the “**Company**”), brings this motion seeking, among other things, approval of a proposal in respect of the Company (the “**Proposal**”) filed by the Proposal Trustee with the Official Receiver on July 26, 2021 pursuant to Section 62(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”).¹

PART II - THE FACTS

A. Background

2. On September 24, 2020, the Company filed a Notice of Intention to Make a Proposal (“**NOI**”) pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (“**BIA**”).²

3. The Company commenced these proceedings in response to a bankruptcy application (the “**Bankruptcy Application**”) filed against the Company by Princes Gates GP Inc., the general partner of Princes Gates Hotel Limited Partnership (collectively, “**PGH**”) and certain other creditors. The Bankruptcy Application was stayed pursuant to an order made on October 9, 2020.³

¹ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

² Proposal Trustee’s Report to Creditors dated August 5, 2021 (the “Report to Creditors”) at para. 1.0 – 1.

³ Report to Creditors at para. 1.0- 2.

4. On March 1, 2021, the Court issued an order extending the stay of proceedings to 15 business days after the day on which the Court releases its final decision (the “**Decision**”) with respect to the Company’s litigation against PGH (bearing Court File No. CV-20-644262).⁴

5. On July 5, 2021, the Court issued the Decision which, among other things, ordered⁵:

(a) PGH to pay to the Proposal Trustee “reliance damages” in the net amount of \$6,388,645.07 (the “**PGH Litigation Funds**”), being \$7,124,524.92 less \$735,879.85 by way of set-off for damages owed to PGH; and

(b) PGH to pay to the Proposal Trustee \$2.063 million in employee compensation damages (the “**PGH Litigation Employee Funds**”). The PGH Litigation Employee Funds do not form part of the Company’s estate and are not available for distribution to the Company’s other creditors.

6. On August 4, 2021, PGH filed a Notice of Appeal in which it appealed the Decision.⁶

7. On 10, 2021, the Court ordered costs in the amount of \$921,494.43 against PGH (the “**Cost Award**”).⁷

⁴ Report to Creditors at para. 1.0 – 4.

⁵ Report to Creditors at para. 1.0 – 5.

⁶ Proposal Trustee’s Seventh Report to Court dated August 20, 2021 (the “Seventh Report”) at para. 9.

⁷ Seventh Report at para. 10.

B. Approval of Proposal

8. On July 26, 2021, the Company filed the Proposal with the Official Receiver in accordance with Section 62(1) of the BIA. A Certificate of Filing a Proposal was issued by the Office of the Superintendent of Bankruptcy (Canada) (“OSB”) on July 27, 2021.⁸

9. On August 6, 2021, the Proposal Trustee sent by mail to the designated officer of the Company and to all known creditors of the Company, a Letter to Creditors, the Report to Creditors, a Proof of Claim Form and Voting Letter, and a Notice of Hearing of Application for Court Approval of the Proposal.⁹

10. In the Report to Creditors, the Proposal Trustee recommended that the creditors vote in favour of the Proposal.¹⁰

11. A meeting of creditors was held on August 16, 2021 (the “**Meeting**”) at which time the Proposal was unanimously accepted by the creditors who voted in person or by proxy at the Meeting or by Voting Letter prior to the meeting.¹¹

12. As set out in the Seventh Report to Court dated August 20, 2021, the Proposal Trustee recommends that the Court issue an Order approving the Proposal for the following reasons:¹²

⁸ Report to Creditors at para. 1.0 - 7.

⁹ Seventh Report at para. 4.1 – 1.

¹⁰ Report to Creditors at Section 7.0

¹¹ Seventh Report at Section 4.3.

¹² Seventh Report at section 5.2.

- (a) the Proposal was accepted by the requisite statutory majority of creditors voting in person or by proxy at the Meeting; and
- (b) it is estimated that approval and implementation of the Proposal will provide creditors with greater recovery than through a bankruptcy which, in the Proposal Trustee's estimation, may not result in any recovery for the creditors.

C. Summary of the Proposal¹³

13. The key terms of the Proposal are as follows¹⁴:

- (a) Purpose: The primary purpose of the Proposal is to effect distributions from the Unsecured Creditor Pool to holders of proven Unsecured Claims in accordance with their *pro rata* share, meaning the value that such proven Unsecured Claim bears to the total value of all proven Unsecured Claims.

The Unsecured Creditor Pool is to be funded in its entirety from the PGH Litigation Funds.

- (b) Classes of Creditors: There is only one class of creditors comprised of the Unsecured Creditors.

¹³ Unless otherwise defined herein, capitalized terms in this section have the meanings provided to them in the Proposal.

¹⁴ See Report to Creditors at section 3.1.

(c) Treatment of Claims: Pursuant to the terms of the Proposal, the scheme of distribution is set out as follows. Each tranche must be paid in full before the next tranche is entitled to distributions under the Proposal.

(i) First, all Administrative Fees and Expenses and Unaffected Claims.

Unaffected Claims include, inter alia, all amounts owing under a Court-approved debtor-in-possession facility (the “**DIP Facility**”) provided by Peter and Paul’s Gifts Limited (the “**DIP Lender**”), an entity related to the Company. As the Company has essentially no assets or liquidity, the DIP Facility was required to fund the fees and costs of these proceedings, including the litigation against PGH. As of June 30, 2021, approximately \$1.227 million was owing under the DIP Facility.

(ii) Second, any Preferred Claims, as set forth in Section 136(1) of the BIA.

(iii) Third, Crown Claims, as set out in Section 60(1.1) of the BIA, within six months after the Proposal Approval Order is granted, or as agreed to by Her Majesty.

(iv) Fourth, the Levy payable on dividends paid under the Proposal in respect of Preferred Claims and Unsecured Claims.

(v) Fifth, Unsecured Creditors from the Unsecured Creditor Pool.

(d) Employees: Former employees who are owed amounts for termination and severance under the *Employment Standards Act* are to be paid from the PGH Litigation Employee Funds. As such, these claims are not compromised under the Proposal unless the amount of the PGH Litigation Employee Funds is insufficient to fully repay the Unaffected Employee ESA Claims in which case the unpaid Unaffected Employee ESA Claims will be Unsecured Claims under the Proposal. Employee claims (such as unpaid vacation pay and wages) that are not Unaffected Employee ESA Claims are subject to the Proposal.

(e) Dividend Amount: subject to receipt of the PGH Litigation Funds and other factors, the Proposal Trustee estimates that Unsecured Creditors could receive approximately 44% of their claims under the Proposal. In the event that the Company recovers the Cost Award, the Unsecured Creditors could receive up to 53% of their claims.¹⁵

(f) Releases: At the Proposal Implementation Time¹⁶, the Company, the Proposal Trustee and each of their present and former employees and contractors and each of their respective financial advisors, legal counsel and agents (the “**Released Parties**”) shall be released and discharged from any and all rights and Claims of any Person against a Released Party, including without limitation any

¹⁵ Creditors Report at Section 5 and Seventh Report at para. 4.0 – 4.

¹⁶ As noted in Section 3.6, the implementation of the Proposal is contingent on, *inter alia*, receipt of the PGH Litigation Funds.

Unsecured Claim, provided, however, that nothing in the Proposal will release or discharge:

- (i) any Unaffected Claims against the Company;
- (ii) the Company or the Proposal Trustee of, or from, any obligation under the Proposal or under any Order; or
- (iii) a Released Party if the Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed fraud or wilful misconduct.

(g) Discharge of Claims: Effective on the Proposal Implementation Date, all Claims of Affected Creditors will be discharged, and the Company will be released from all Claims of Affected Creditors, other than the obligation to make the payments set out in the Proposal (subject to the conditions contained in the Proposal).

PART III - ISSUES

14. The issue addressed in this factum is whether the Court should approve the Proposal.

PART IV - LAW AND ANALYSIS

A. The Court Should Approve the Proposal

15. The statutory authority for the Court to approve or refuse a proposal is found in Section 59(2) of the BIA.

16. Courts have applied the following factors when considering the approval of a proposal under Section 59(2):¹⁷

- (h) whether the proposal is reasonable;
- (i) whether the proposal is calculated to benefit the general body of creditors;
- (j) whether the proposal meets the requirements of commercial morality and the integrity of the bankruptcy system; and
- (k) whether the proposal is made in good faith.

17. In addition, Section 59(2) requires consideration of whether any offences mentioned in Sections 198 to 200 of the BIA have been committed by the Company.

18. While a Court is not bound to approve a proposal even though it has been approved by creditors and recommended by the trustee, it has been held that substantial deference should be afforded to the votes of the creditors and the views of the trustee.¹⁸

19. In the current circumstances, the Proposal should be approved by the Court for the following reasons:

- (a) the Proposal provides an opportunity for recovery for the Company's Unsecured Creditors which would otherwise not be available. In a bankruptcy, the Proposal Trustee estimates that the Unsecured Creditors may not have any

¹⁷ *Kitchener Frame Ltd. (Re)*, [2012 ONSC 234](#) at paras. 19 and 22 ("**Kitchener Frame**").

¹⁸ *Kitchener Frame* at para. 21.

recovery as the litigation against PGH will be at risk and the Superintendent's Levy in a bankruptcy exceeds the Superintendent's Levy in a proposal [reference to report];

(b) 100% of the Unsecured Creditors voting at the Meeting (in person or by proxy) voted in favour of the Proposal;

(c) the release of claims against the Company and its directors and officers is conditional on implementation of the Proposal;;

(d) the Proposal is being made in good faith; and

(e) the statutory requirements provided for pursuant to Section 59(2) of the BIA have been met.

PART V - ORDER REQUESTED

20. The Proposal Trustee respectfully requests that the Court approve the Proposal and issue the Order substantially in the form filed with its motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of August, 2021.

Paliare Roland Rosenberg Rothstein LLP



SCHEDULE "A"
LIST OF AUTHORITIES

1. *Kitchener Frame Ltd. (Re)*, 2012 ONSC 234.

**SCHEDULE “B”
RELEVANT STATUTES**

Bankruptcy And Insolvency Act, R.S.C. 1985, c. B-3, as amended

Who may make a proposal

50 (1) Subject to subsection (1.1), a proposal may be made by

- (a)** an insolvent person;
- (b)** a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;
- (c)** a liquidator of an insolvent person’s property;
- (d)** a bankrupt; and
- (e)** a trustee of the estate of a bankrupt.

Calling of meeting of creditors

51 (1) The trustee shall call a meeting of the creditors, to be held within twenty-one days after the filing of the proposal with the official receiver under subsection 62(1), by sending in the prescribed manner to every known creditor and to the official receiver, at least ten days before the meeting,

- (a)** a notice of the date, time and place of the meeting;
- (b)** a condensed statement of the assets and liabilities;
- (c)** a list of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor’s books;
- (d)** a copy of the proposal;
- (e)** the prescribed forms, in blank, of
 - (i)** proof of claim,
 - (ii)** in the case of a secured creditor to whom the proposal was made, proof of secured claim, and
 - (iii)** proxy,if not already sent; and
- (f)** a voting letter as prescribed.

[...]

Court to hear report of trustee, etc.

59 (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

Court may refuse to approve the proposal

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

Reasonable security

(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

Court may order amendment

(4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

[...]

Filing of proposal

62 (1) If a proposal is made in respect of an insolvent person, the trustee shall file with the official receiver a copy of the proposal and the prescribed statement of affairs.

[...]

Bankruptcy offences

198 (1) Any bankrupt who

(a) makes any fraudulent disposition of the bankrupt's property before or after the date of the initial bankruptcy event,

(b) refuses or neglects to answer fully and truthfully all proper questions put to the bankrupt at any examination held pursuant to this Act,

(c) makes a false entry or knowingly makes a material omission in a statement or accounting,

(d) after or within one year immediately preceding the date of the initial bankruptcy event, conceals, destroys, mutilates, falsifies, makes an omission in or disposes of, or is privy to the concealment, destruction, mutilation, falsification, omission from or disposition of, a book or document affecting or relating to the bankrupt's property or affairs, unless the bankrupt had no intent to conceal the state of the bankrupt's affairs,

(e) after or within one year immediately preceding the date of the initial bankruptcy event, obtains any credit or any property by false representations made by the bankrupt or made by any other person to the bankrupt's knowledge,

(f) after or within one year immediately preceding the date of the initial bankruptcy event, fraudulently conceals or removes any property of a value of fifty dollars or more or any debt due to or from the bankrupt, or

(g) after or within one year immediately preceding the date of the initial bankruptcy event, hypothecates, pawns, pledges or disposes of any property that the bankrupt has obtained on credit and has not paid for, unless in the case of a trader the hypothecation, pawning, pledging or disposing is in the ordinary way of trade and unless the bankrupt had no intent to defraud,

is guilty of an offence and is liable, on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year or to both, or on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

Failure to comply with duties

(2) A bankrupt who, without reasonable cause, fails to comply with an order of the court made under section 68 or to do any of the things required of the bankrupt under section 158 is guilty of an offence and is liable

(a) on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both; or

(b) on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

Failure to disclose fact of being undischarged

199 An undischarged bankrupt who

(a) engages in any trade or business without disclosing to all persons with whom the undischarged bankrupt enters into any business transaction that the undischarged bankrupt is an undischarged bankrupt, or

(b) obtains credit to a total of \$1,000 or more from any person or persons without informing them that the undischarged bankrupt is an undischarged bankrupt,

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both.

Bankrupt failing to keep proper books of account

200 (1) Any person becoming bankrupt or making a proposal who has on any previous occasion been bankrupt or made a proposal to the person's creditors is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, if

(a) being engaged in any trade or business, at any time within the period beginning on the day that is two years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, that person has not kept and preserved proper books of account; or

(b) within the period mentioned in paragraph (a), that person conceals, destroys, mutilates, falsifies or disposes of, or is privy to the concealment, destruction, mutilation, falsification or disposition of, any book or document affecting or relating to the person's property or affairs, unless the person had no intent to conceal the state of the person's affairs.

Proper books of account defined

(2) For the purposes of this section, a debtor shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, also accounts of all goods sold and purchased, and statements of annual and other stock-takings.

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