COURT OF APPEAL FOR ONTARIO

CITATION: YG Limited Partnership and YSL Residences Inc. (Re), 2023 ONCA 505
DATE: 20230720
DOCKET: COA-22-CV-0451

Huscroft, Miller and Paciocco JJ.A.

In the Matter of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

And in the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc.

Deborah Palter and Alexander Soutter, for the appellants, YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc.

Haddon Murray, for the respondent, CBRE Limited

Robin Schwill and Matthew Milne-Smith, for the respondent, KSV Restructuring Inc.

Heard: June 30, 2023

On appeal from the order of Justice Peter J. Osborne of the Superior Court of Justice, dated November 22, 2022, with reasons at 2022 ONSC 6548.

PACIOCCO J.A.:

OVERVIEW

[1] YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investments Ltd., E&B Investment Corporation, and TaiHe International Group Inc. are the limited partners of YG Limited Partnership (the “Limited Partners”). At the conclusion of the oral hearing, we dismissed the appeal by the Limited Partners

from the order of a motion judge denying them standing to appear at an appeal motion brought by a creditor of YG Limited Partnership pursuant to s. 135(4) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), relating to the denial by a Proposal Trustee of the creditor's proof of claim. The following reasons explain that decision.

THE MATERIAL FACTS

[2] YSL Residences Inc. ("YSL") was the registered owner of "the YSL project", a condominium development, acting as bare trustee for YG Limited Partnership. The general partner of YG Limited Partnership is 9615334 Canada Inc. ("the General Partner"). Both YSL and the YG Limited Partnership were members of the Cresford Group, a real estate development enterprise.

[3] On April 30, 2021, as a result of financial difficulties with the YSL project, YSL and YG Limited Partnership filed notices of intention to make a joint liquidation proposal pursuant to s. 50(1) of the *BIA*. Although KSV Restructuring Inc. ("the Proposal Trustee", and a respondent in this appeal) and the General Partner supported the initial proposal, the Limited Partners, who together had filed two applications challenging the proposal, were given standing by Dunphy J. to do so at the sanction hearing, pending on June 23, 2021 (the "Dunphy J. decision"). The Limited Partners succeeded in that challenge and the proposal was denied.

[4] A second proposal transferring the YSL project to Concord Properties Development Corp. (“Concord”) was subsequently approved. Under the terms of that proposal, Concord agreed to pay $30.9 million to the Proposal Trustee to fund creditors. Article 5.05 of the approved proposal provides that the Limited Partners are entitled to any residual funds held by the Proposal Trustee after final distribution to the creditors.

[5] As events transpired, the extent of recovery for the Limited Partners, if any, came to depend upon the claims of three creditors, including a real estate broker, CBRE Limited (“CBRE”), a respondent in this appeal. The Limited Partners would recover up to $16.038 million if all three claims were denied. CBRE’s proof of claim was for approximately $1.2 million. If allowed, it would reduce the Limited Partners potential recovery by that amount.

[6] The Proposal Trustee initially disallowed CBRE’s proof of claim because of insufficient proof, on the understanding that CBRE would appeal the disallowance and the appeal determination would resolve the claim on a more complete evidentiary record. CBRE brought an appeal motion under s. 135(4) of the *BIA*. Based on affidavits CBRE filed on the appeal, the Proposal Trustee changed its position, but concluded that the most expeditious way to approve the claim would be to permit CBRE’s appeal to proceed unopposed.

[7] The Limited Partners, whose interest lay in CBRE's proof of claim failing, sought to oppose CBRE's appeal at the appeal hearing, arguing that they had the right to appear and do so. In the alternative, they sought relief pursuant to s. 37 of the *BIA*. The motion judge denied the Limited Partners standing to appear at CBRE's motion, held that the Limited Partners were not "persons aggrieved" within the meaning of s. 37 of the *BIA*, and allowed CBRE's appeal.

THE ISSUES

[8] The Limited Partners appealed that decision, arguing:

1. The motion judge erred in denying the Limited Partners standing, and
2. The motion judge erred in concluding that CBRE had proven its claim.

[9] As indicated, at the end of the oral hearing, we dismissed the Limited Partners' appeal for reasons to follow. Since we are upholding the motion judge's decision that the Limited Partners lacked standing at CBRE's appeal hearing, it is unnecessary to consider ground of appeal 2, which addresses the merits of an appeal decision that the Limited Partners are not entitled to participate in.

ANALYSIS

[10] With respect to the standing issue raised in ground of appeal 1, we were not persuaded by the Limited Partners' primary submission that based on general common law principles of standing the motion judge erred by denying them the

right to standing, as their economic interests would be affected by the CBRE appeal decision.

[11] It is not clear that the claimed common law "right" of standing exists. The authorities relied upon by the Limited Partners do not say so. *Ivandaeva Total Image Salon Inc. v. Hlembizky* (2003), 63 O.R. (3d) 769 (C.A.), at para. 27, involved an interpretation of rule 37.14(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which permits a party who "is affected by" an *ex parte* or registrar's order to move to set the order aside. *Fontaine v. Canada (Attorney General)*, 2018 ONCA 1023, at para. 21, spoke of the standing that the Canadian judicial system "generally" gives to those "who will be subject to an order of the court". The Limited Partners were not subject to the order under appeal. Rule 13.01(1), which the Limited Partners did not invoke, empowers courts to grant leave to intervene to parties that claim to have "an interest in the subject matter of the proceedings", a judicial power that would arguably be unnecessary if persons whose interests are affected by an order already have a right to standing. In any event, we need not resolve the contours of the common law right to standing in this case because even if the claimed right exists, the Limited Partners cannot avail themselves of that right in the circumstances of this case.

[12] First, in *Ivandaeva*, at para. 27, in describing the basis for standing Borins J.A. stipulated that "the order must be one that directly affects the rights of the moving party in respect of the proprietary or economic interests of the party." The

Limited Partners do not have a direct economic interest in CBRE's claim. By virtue of its constating partnership agreement and the *Limited Partnership Act*, R.S.O. 1990, c. L. 16, ss. 8-12, the business of a limited partnership is managed by its general partner. This is the price limited partners pay for their limited liability: *Kucor Construction & Developments & Associates v. Canada Life Assurance Co.* (1999), 41 O.R. (3d) 577 (C.A.), at pp. 588-91. The limited partners therefore enjoy the economic benefits from the partnership through their contractual relationship with the general partner, and not through direct legal rights tenable against debtors or creditors of the partnership. As a result, the direct economic interest at stake during CBRE's appeal belonged to the partnership, an economic interest that is to be exercised by the General Partner even where the outcome of the appeal could ultimately inure to the financial benefit of the Limited Partners. Simply put, even if the general common law principles of standing relied upon by the Limited Partners do exist and are tenable in the appeal of a creditor's proof of claim arising out of the *BIA*, the Limited Partners lacked the direct economic interest in the outcome of the proceedings that would be required to support their standing claim.

[13] Second, and in any event, we are persuaded that the general standing principles that the Limited Partners invoke do not apply during proof of claim appeals under s. 135(4) of the *BIA*. Although the *BIA* does not speak explicitly to "standing" at proof of claim appeals, s. 135(4) is explicit in granting the authority to appeal the disallowance of a "claim" to "the person to whom the notice was

provided." Subsection 135(3) stipulates, in material part, that the notice of disallowance contemplated by s. 135(4) is provided to "the person whose claim …was disallowed" by the trustee. Under the terms of s. 135(4) it is therefore CBRE that has standing to address the disallowance of its claim, not the Limited Partners.

[14] We are not persuaded by the Limited Partners' argument that s. 135(4) is relevant only to who can bring an appeal. We are satisfied that the Legislature intended that equity owners of the debtor, such as limited partners, would not have a right of standing, for two reasons.

[15] First, as the Proposal Trustee argued before us, by design, the *BIA* processes, including the process for appealing proof of claim decisions, are "between the trustee, the creditor claimant and the debtor." This not only reflects the relevant direct interests at stake in the material claim it also safeguards the mission of "the *BIA* to provide summary and expeditious procedures to determine the questions that arise in bankruptcy with a minimum cost": *Re McEwen*, 2021 ONCA 566, at para. 1; *Romspen Investments Corporation v. Courtice Auto Wreckers Limited*, 2017 ONCA 301, 138 O.R. (3d) 373, at para. 70, leave to appeal refused, [2018] S.C.C.A. No. 37636; *Canada (A.G.) v. Rassell*, 1999 ABCA 232, 237 A.R. 137. If equity owners had automatic rights of standing in creditor claim appeals, it would impose notice requirements and have time implications that are contrary to the interest in the prompt and effective disposition of *BIA* claims.

[16] Second, when the *BIA* is read as a whole, it becomes clear that the right of standing the Limited Partners claim was not intended. Section 135(5), addressing the right of appeal where a proof of claim is allowed, limits the right of appeal to "the creditor or the debtor", in other words, the parties to the debt, which, as the motion judge found, would exclude the Limited Partners. If equity owners of a debtor nonetheless had a right of standing to participate in such appeals, it would be an irrationally fickle right. They could not appeal a trustee's decision approving a creditor's claim because of s. 135(5) but could, fortuitously, join in an appeal by another if that appeal happens to be launched.

[17] When considering the statute as a whole, s. 37 of the *BIA* is also important. To the extent that the *BIA* contemplates conferring standing on others to participate in the processes between the trustee, debtors and creditors, s. 37 provides the mechanism, limiting the right to apply to a person "aggrieved by any act or decision of the trustee". Section 37 is therefore the legislative provision available to fulfil the function of the common law standing principles the Limited Partners seek to invoke, by providing a statutory mechanism for interested persons to participate. Given that the statute sets out the parameters for such participation, the common law principles cannot be used in preference to the statutory regime that has been created. It bears repeating in this regard, that "as is often observed, the *BIA* is a complete code governing the bankruptcy process": *Re McEwen*, at para. 1.

[18] We also reject the Limited Partners' submission that the motion judge's assessment of standing was tainted by a mistaken belief that the CBRE appeal was brought under s. 135(5) instead of s. 135(4). We accept that the motion judge misspoke at one point by describing the appeal as having been brought under s. 135(5), but he recognized explicitly on more than one occasion that the appeal was brought under s. 135(4). We are satisfied from his reasons that he considered standing under s. 135(5) for completeness, and to consider the impact of the statute as a whole on the Limited Partners' submissions, as I have done. In any event, his ultimate decision did not rest on his analysis of s. 135(5).

[19] Therefore, the motion judge did not err in denying the Limited Partners their right of standing arising from their economic interest in the outcome. No such right exists.

[20] We also rejected the Limited Partners' submission that the motion judge erred in finding that the Limited Partners could not seek relief under s. 37 because they are not "aggrieved by any act or decision of the trustee". That determination is a decision of mixed fact and law, reviewable on a "palpable and overriding error" standard. The Limited Partners failed to persuade us that the motion judge erred in law in making this determination or committed a palpable and overriding error. Indeed, the outcome he arrived at is in keeping with recognition that any interest the Limited Partners can assert in the outcome of the appeal is indirect, and

tenable through the General Partner who they empowered to act on their behalf in managing claims made by creditors of the Limited Partnership.

[21] We also rejected the Limited Partners' submission that the motion judge erred by not observing the principles of judicial comity in not following the Dunphy J. decision. It is unnecessary to explore the reach and effect of the principles of judicial comity or to comment on whether Dunphy J. was correct in effectively granting the Limited Partners standing at the sanction hearing. The Dunphy J. decision does not address the same issue that was before the motion judge. Justice Dunphy was not conducting a creditor's proof of claim appeal but rather a sanction hearing that would determine the underlying validity of a proposal that would ground the entire bankruptcy proceeding, where issues paralleling those raised by the Limited Partners in related proceedings needed resolution. In any event, Dunphy J. permitted the Limited Partners to participate in the sanction hearing in part because he recognized that they would not have standing in later proceedings. In this material sense the Dunphy J. decision supports the motion judge's decision.

[22] Finally, none of what wI have said is affected by the fact that the potential recovery of the Limited Partners was specifically identified in the approved proposal. Even if express provision had not been made in the proposal for their recovery rights, the Limited Partners would have partnership rights in any equity remaining in the partnership assets after creditors have been paid. Put simply, the

Limited Partners would have had an indirect economic interest in the resolution of creditor claims, even if not mentioned in the proposal. The mention in the proposal cannot be taken to elevate their standing.

CONCLUSION

[23] We therefore denied ground 1 of the appeal, an outcome that prevents the Limited Partners from advancing ground 2 of the appeal, and we dismissed this appeal.

[24] Costs of the appeal of $20,000 are payable by the Limited Partners to CBRE Limited, inclusive of HST and disbursements. No costs were sought by the Proposal Trustee, and none will be awarded.

Released: July 20, 2023 "G.A."

"G.A."

"I agree. Grant Huscroft J.A."

"I agree. Gillese J.A."