Court File No. BK-21-02734090-0031

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

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

AIDE MEMOIRE OF THE PROPOSAL TRUSTEE, KSV RESTRUCTURING INC.

(September 21, 2022 Case Conference)

September 16, 2022

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A. Overview

1. KSV Restructuring Inc. ("**KSV**"), in its capacity as the proposal trustee (the "**Proposal Trustee**") of YG Limited Partnership and YSL Residences Inc. (collectively, "**YSL**") delivers this aide memoire in respect of the case conference to be held on September 21, 2022.

2. The case conference is to address scheduling matters in respect of a Notice of Motion being brought by YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc. (collectively, the "**LPs**") for an order, among other things, permitting examinations of Henry (Yulei) Zhang (the sole shareholder of Harbour International whose claim is being challenged) and Daniel Casey (the principal of the Cresford group of companies that controlled YSL), setting aside the Proposal Trustee's allowance of the claim of Harbour International (defined below) and disallowing Harbour International's claim.

3. The LPs' motion raises three distinct issues:

   (a) Do the LPs have standing to bring such a motion?

   (b) If so, do the LPs have the right to examine parties other than the Proposal Trustee?

   (c) Should the Proposal Trustee's allowance of the claim of Harbour International be set aside and the claim disallowed?

4. The question in (a) above needs to be answered before it makes sense to answer questions (b) and (c).

5. The LPs are not creditors of YSL. They are equity.

6. Depending on the final aggregate amount of proven creditor claims in these proceedings there may be a residual amount distributable to the LPs. Therefore, the LPs have an economic interest in reducing the quantum of proven creditor claims.

7. Pursuant to Section 37 of the *Bankruptcy and Insolvency Act* (the "**BIA**"), the LPs do not have standing to bring their motion as they are not a creditor, the debtor or a "person aggrieved". Decisions of the Proposal Trustee that merely have the affect of reducing distributions available to other stakeholders do not make one a "person aggrieved" by such decisions for the purposes of Section 37 of the BIA.

8. Accordingly, a ruling on standing should be made prior to any further time and costs being incurred on procedural matters in respect of the LPs' motion, including whether the LPs have any right to examine any party other than the Proposal Trustee, which examination would be by way of written questions.

9. This issue of standing will also be addressed by this Court on another effectively identical motion being brought by the LPs challenging the Proposal Trustee's allowance of a claim filed by CBRE Limited ("**CBRE**"), subject to Court approval. That motion is scheduled to be heard on September 26, 2022 (the "**CBRE Motion**").

B. Background to this Case Conference

10. Mr. Zhang, a real estate broker, filed a proof of claim dated September 19, 2021 in the amount of approximately $1.5 million. For reasons set out summarily in the Proposal Trustee's notice of disallowance in respect of this claim, the Proposal Trustee

partially accepted an amended claim for $1 million (plus HST) that was filed by Harbour International Investment Group ("**Harbour International**"), a company owned by Mr. Zhang.

11. The LPs requested that the Proposal Trustee provide them with copies of the original proof of claim and the Proposal Trustee's notice of disallowance, which the Proposal Trustee did, as a courtesy to them. As the LPs are not creditors and, therefore cannot and have not filed their own proof of claim, they are not legally entitled under the BIA to review the proof of claims of other creditors.

12. Upon being served with the Proposal Trustee's motion seeking approval of an interim distribution to creditors with proven claims, the LPs informed the Proposal Trustee that they would be objecting to the allowance of Harbour International's claim and bringing a motion pursuant to Section 37 of the BIA in that regard. In light of this, no distribution has been made to Harbour International.

13. On March 21, 2022 the LPs served their notice of motion but have not yet completed and served their motion record.

14. Both Harbour International and the Proposal Trustee object to the LPs' standing to bring such a motion and to their right to examine Mr. Zhang and Mr. Casey.

C. The Law

15. Section 126(1) of the BIA reads as follows:

> Every creditor who has filed a proof of claim is entitled to see and examine the proofs of other creditors.

16. Section 37 of the BIA reads as follows:

> Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

17. Section 37 of the BIA does not define the word “aggrieved”. The case law has made clear that it does not mean a person who is disappointed in respect of a benefit that he or she might have received if some other order had been made.

> Houlden, Morawetz, Sarra, Bankruptcy and Insolvency Law of Canada, 4th Edition, Release No. 2022-8, August 2022 § 2:132 para 2.

18. For a party to have standing as an “aggrieved” person under section 37 of the BIA, the trustee’s decision must have affected or deprived them of something. “The cases regarding the definition of an "aggrieved person" establish that it is necessary for a claimant to demonstrate that it was deprived of a legal right or was otherwise wrongfully deprived of something.”

> *Global Royalties Ltd. v. Brook*, 2016 ONSC 6277, 273 A.C.W.S. (3d) 26 (Ont. S.C.J. [Commercial List]) (”*Global Royalties*”) at para 13.

19. This Court upheld the reasoning that “the words 'person aggrieved' do not mean a person who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.”

Global Royalties at para 14.

D. Position of the Proposal Trustee

20. This same issue will be addressed in the CBRE Motion scheduled to be heard on September 26, 2022. Accordingly, the Proposal Trustee recommends that a case conference be scheduled after there has been a decision in the CBRE Motion as this motion may be moot depending on the outcome of the CBRE Motion.

21. If this Court finds in the CBRE Motion that the LPs have standing, it may be necessary to determine whether the LPs have the right to examine parties in addition to the Proposal Trustee and that issue should be briefed and argued depending on the outcome of the CBRE Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of September, 2022.

Davies Ward Phillips & Vineberg LLP
Counsel for the Proposal Trustee,
KSV Restructuring Inc.

Bankruptcy and Insolvency Law of Canada, 4th Edition § 2:132

Bankruptcy and Insolvency Law of Canada, 4th Edition
The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra

Part I. The Bankruptcy and Insolvency Act

Chapter 2. Part I Administrative Officials

XIV. Section 37

§ 2:132. Actions Against the Trustee—Who May Bring the Application

An application under s. 37 can be brought by: (a) the bankrupt; (b) a creditor; or (c) any other person aggrieved.

The words "any other person is aggrieved" must be broadly interpreted. They do not mean a person who is disappointed in respect of a benefit that he or she might have received if some other order had been made. A "person aggrieved" is a person who has suffered a legal grievance, a person against whom a decision has been pronounced by the trustee that has wrongfully deprived him or her of something, or wrongfully affected his or her title to something: Re Sidebotham (1880), 14 Ch.D. 458 at 465; Liu v. Sung (1989), 72 C.B.R. (N.S.) 224 (B.C. S.C.). To come within s. 37, a person must have been prejudicially affected in some way by actions of the trustee: Calford v. Royal Bank (1998), 7 C.B.R. (4th) 94, 1998 CarswellOnt 5114 (Ont. Gen. Div.).

In A.G. of The Gambia v. Jie, [1961] A.C. 617 (P.C.), Lord Denning said at p. 634: "The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because [an act or decision] has been made which prejudicially affects his interests."

In order to bring an application under s. 37, the applicant must put material before the court, which shows that he or she has been aggrieved by actions of the trustee, and if no such material is put before the court, the application will be dismissed: Cirillo v. Royal Bank (1996), 39 C.B.R. (3d) 22, 1996 CarswellOnt 1332 (Ont. Gen. Div.).

Where a trustee agrees to sell assets to a purchaser and then reneges on the agreement, the purchaser comes within the words "any other person aggrieved" in s. 37: PR Engineering Ltd. v. Clarke, Henning & Hahn Ltd. (1990), 79 C.B.R. (N.S.) 172, 1990 CarswellOnt 183 (Ont. H.C.).

A shareholder of a bankrupt company who wishes the trustee to bring an action with respect to a claim that, if valid, would be property of the bankrupt estate, and the trustee refuses because there are insufficient funds in the estate, is a person aggrieved: Transamerica Commercial Finance Corp., Canada v. Computercorp Systems Inc., 20 C.B.R. (3d) 96, 10 Alta. L.R. (3d) 337, [1993] 7 W.W.R. 495 (*sub nom. Computercorp Systems Inc. (Bankrupt), Re*) 141 A.R. 237, 46 W.A.C. 237, 1993 CarswellAlta 418.

Where the aggrieved party is content that all the fruits of a proposed action should be paid to the trustee in bankruptcy, there is no need to give notice to creditors of the s. 37 application: Re Redipac Recycling Corp. (1998), 9 C.B.R. (4th) 291, 1998 CarswellOnt 4402 (Ont. Gen. Div.).

A secured creditor can bring an application under s. 37: Re Sechart Fisheries Ltd., 10 C.B.R. 565, [1929] 2 W.W.R. 413, [1929] 4 D.L.R. 536 (B.C. S.C.).

Although the bankrupt can bring an application under s. 37, he or she has no right under this power to interfere in the day-to-day administration of the estate. Canadian courts do not appear to have placed any restriction on the right of the bankrupt to

bring an application under s. 37. In Re Van Damme (1924), 5 C.B.R. 225, 37 Que. K.B. 242 (C.A.), the bankrupt was allowed to bring an application under s. 37 to attack a fraudulent sale of the assets by the trustee to an inspector. See also Re Stefaniuk (2001), 27 C.B.R. (4th) 162, 2001 SKQB 308, 210 Sask. R. 157, 2001 CarswellSask 505 (Sask. Q.B.).

Where a cause of action has vested in a trustee in bankruptcy and the trustee, with the consent of the creditors has sold the cause of action, the court will not, provided there is no fraud and the trustee and creditors are acting *bona fide*, permit the bankrupt to bring an application under s. 37 to challenge the sale: Caskey (Trustee of) v. Guardian Insurance Co. of Canada (1999), 180 D.L.R. (4th) 727, 14 C.B.R. (4th) 45, 1999 CarswellAlta 926 (Alta. Q.B.).

Where a trustee agreed to accept government funding to investigate possible claims against directors of a bankrupt corporation, a director is not a person aggrieved, since the director was not deprived of anything by the decision of the trustee: Re New Home Warranty of British Columbia Inc. (2001), 27 C.B.R. (4th) 308, 2001 BCSC 1160, 91 B.C.L.R. (3d) 384, 2001 CarswellBC 1713 (B.C.S.C. [In Chambers]).

A trustee assigned certain causes of action to a bankrupt. Moving parties brought a motion pursuant to s. 37 of the *BIA* to set aside the assignment and direct an auction process for the sale of the causes of action. The Ontario Superior Court of Justice dismissed the motion on the basis that none of the moving parties was an "aggrieved person" for purposes of s. 37. Justice Wilton-Siegel held that the trustee's decision to enter into the assignment was reasonable on the basis of the absence of a superior financial offer and not procedurally unfair, and thus even if the moving parties could come within the definition of s. 37, the court would not exercise its discretion to grant the relief sought. The Court held that the trustee was entitled to costs of the motion on a substantial indemnity basis as none of the moving parties were entitled to bring the motion and their submissions engaged the integrity of the trustee. The bankrupt's motion for costs was dismissed; while the bankrupt was entitled to participate if he chose, the issue before the court was the validity of the trustee's action, and the bankrupt's involvement was not necessary and did not add anything to the argument of the trustee: Re David Brook, 2017 CarswellOnt 14279, 52 C.B.R. (6th) 110, 2017 ONSC 4918 (Ont. S.C.J. [Commercial List]).

2016 ONSC 6277
Ontario Superior Court of Justice

Global Royalties Ltd. v. Brook

2016 CarswellOnt 18618, 2016 ONSC 6277, 273 A.C.W.S. (3d) 26, 41 C.B.R. (6th) 228

IN THE MATTER OF THE BANKRUPTCY OF DAVID BROOK, OF THE CITY OF MISSISSAUGA, IN THE REGIONAL MUNICIPALITY OF PEEL, IN THE PROVINCE OF ONTARIO

GLOBAL ROYALTIES LIMITED AND BENCHMARK CONVERSION INTERNATIONAL LIMITED O/A BCI (Plaintiff) and DAVID BROOK, ANNA BROOK, 2323593 ONTARIO INC., GEOFFREY BLACK aka GEOFF BLACK, GRIFFIN & HIGHBURY INC., DARIO BERIC aka DARIO BERIC - MASKAREL, DIKRAN KHATCHERIAN aka DIKO KHATCHERIAN aka DANNY MATAR, LESLIE FROHLINGER aka LES FROHLINGER, DIVERSITY WEALTH MANAGEMENT INC. and DIVERSITY WEALTH MANAGEMENT HOLDINGS INC. and BDO CANADA LIMITED IN ITS CAPACITY AS TRUSTEE OF THE ESTATE OF THE BANKRUPT DAVID BROOK (Defendants)

DAVID BROOK (Plaintiff by Counterclaim) and GLOBAL ROYALTIES LIMITED AND BENCHMARK CONVERSION INTERNATIONAL LIMITED O/A BCI, BRANDON HALL, CHRISTINE HALL and CASH INTERNATIONL INC.

H.J. Wilton-Siegel J.

Heard: October 7, 2016
Judgment: November 23, 2016
Docket: CV-15-11006-00CL, 32-1774278

Counsel: Harvey Stone, for Moving Parties, Global Royalties Limited and Benchmark Conversion International Limited
Jules Berman, for Respondent, BDO Canada Limited
Frank Bennett, for Bankrupt, David Brook

***H.J. Wilton-Siegel J.*:**

1 The moving parties, Global Royalties Limited ("Global"), Benchmark Conversion International o/a BCI ("BCI"), Brandon Hall ("Brandon"), Christine Hall ("Christine") and Cash International Inc. ("Cash") (collectively, the "Moving Parties"), seek an order under section 37 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") setting aside the assignments dated May 6, 2016 of certain causes of action to the bankrupt David Brook ("Brook") by BDO Canada Limited, the trustee in bankruptcy of Brook (the "Trustee"), and directing a tender or auction process for the sale of such causes of action.

Factual Background

2 David Brook was an independent contractor with Global from 2002 to 2008, then an employee for one year, and then an independent contractor again until January 16, 2015. After that date, Brook was an employee of BCI until it terminated his employment on March 23, 2015.

3 Brook filed a proposal under the BIA on July 31, 2013. The proposal was rejected by his creditors and he was assigned into bankruptcy on February 27, 2015 under the BIA. In his statement of affairs, Brook declared liabilities totaling $1,722,321.59 and assets of $20,392.10. He did not declare any liability to either Global or BCI. As of June 27, 2016, the Trustee had received and admitted eleven unsecured claims totaling $2,010,214. The Canada Revenue Agency (the "CRA") is the largest creditor, having claims totaling $1,906,534, which is 94.8% of the proven unsecured claims. None of the Moving Parties has filed a proof of claim in Brook's bankruptcy. The creditors declined to appoint an inspector in the bankruptcy.

4 On June 23, 2015, Global and BCI issued a statement of claim (the "Statement of Claim") against Brook and others alleging that Brook misappropriated clients and sales belonging to Global and/or BCI. They claim damages of $1 million. Brook served a defence, counterclaim and third party claim in the action on May 25, 2016 (the "Defence, Counterclaim and Third Party Claim").

5 In Brook's Defence, he denies the allegations in the Statement of Claim. In his Counterclaim and Third Party Claim, among other things, Brook alleges that Brandon, the principal of both Global and BCI, made profits from 2001 to 2009 which Global or Brandon were obligated to share with Brook pursuant to an oral agreement between Brandon and Brook. Brook alleges that these profits were made pursuant to a scheme under which invoices of a particular supplier to Global were increased by 25% and the increased amount was paid by the supplier to Christine or Cash. These claims in the Counterclaim and Third Party Claim are herein referred to as the "Causes of Action".

6 In connection with the preparation of the Defence, Counterclaim, and Third Party Claim, Brook negotiated a purchase of the Causes of Action from the Trustee. The Trustee and Brook reached an arrangement under which Brook would pay $15,000 in two equal installments over one year and the parties would share any net proceeds after legal expenses on the basis of 2/3 to the Trustee and 1/3 to Brook.

7 The documentation giving effect to this agreement was executed on May 6, 2016. Subsequently, further documentation was executed, back-dated to May 6, 2016, to correct the omission in the original assignment documentation of an assignment of the Causes of Action asserted against Christine and Cash, and to confirm the 2/3:1/3 sharing of the proceeds of such Causes of Action. The documentation giving effect to the foregoing is herein referred to collectively as the "Assignments".

8 In the absence of an inspector, the Trustee communicated with, and obtained the written approval of the CRA, as the largest creditor of the bankrupt's estate, to the agreement with Brook. The Trustee did not, however, contact any other potential purchasers of the Causes of Action, including the Moving Parties. It also did not conduct a public tender or auction process.

9 In an affidavit sworn on July 10, 2016 in this proceeding, Christine says that, if the Trustee had contacted her or Cash to discuss the Causes of Action and any potential settlement of the claims against them, she would have been prepared to enter into negotiations to settle "any and all claims that the Trustee had in the within action." She also says that, if the Assignments were set aside by the Court on this motion, she or Cash are prepared to pay $50,000 to acquire the Causes of Action. In a further affidavit sworn the same day, Brandon makes essentially the same statements.

Analysis and Conclusions

The Issue

10 Section 37 of the BIA reads as follows:

> Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

11 The Moving Parties say that they are aggrieved parties. The Moving Parties submit that the Court should set aside the Assignments principally for the following reasons:

> (1) The Trustee did not attempt to market the Causes of Action to anyone other than Brook;
>
> (2) The transaction was improvident as the Moving Parties are prepared to pay $50,000 for an assignment of the Causes of Action;
>
> (3) The private sale process unfairly disregarded the rights of the seven creditors of Brook's estate who had no knowledge of the sale; and

(4) A tender or bidding process is a fair process that will maximize the value for the benefit of all creditors.

Analysis and Conclusions

12 In order to succeed on this motion, the Moving Parties must demonstrate that they are "aggrieved parties" for the purposes of section 37 of the BIA and that the Court should exercise its discretion under that provision. I will address each issue separately.

Are the Moving Parties Aggrieved Persons?

13 The BIA does not define the word "aggrieved". The cases regarding the definition of an "aggrieved person" establish that it is necessary for a claimant to demonstrate that it was deprived of a legal right or was otherwise wrongfully deprived of something.

14 In a decision involving section 37 of the BIA, *Liu v. Sung* (1989), 72 C.B.R. (N.S.) 224 (B.C. S.C. [In Chambers]), 1989 CanLII 2822, the court held, at para. 12, as follows:

> In order to have status, the applicants must be found to be persons who are aggrieved by the decision of the Trustee in refusing to take action under s. 225 of the Company Act. The word "aggrieved" is not defined in the *Bankruptcy Act*. In the *Oxford Universal Dictionary*, 3rd ed., it is defined as "injuriously affected". Counsel for the Trustee has cited the definition made by James L.J. in *RE Sidebotham; Ex Parte Sidebotham* (1880) 14 Ch. B. 458 at 465:
>
> > But the words 'person aggrieved' do not mean a person who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

15 A similar statement is found in *Pachal's Beverages Ltd., Re* (1969), 7 D.L.R. (3d) 113 (Sask. C.A.), at para. 14 as follows:

> While s. 15 [currently section 37] gives to the court a wide discretionary power: *Imperial Bank of Canada v. Barber* (1921), 50 O.L.R. 380, 1 C.B.R. 485, and *Re Hancock, Ex parte Spraggett*, [1952] O.R. 121, 32 C.B.R. 96 (C.A.), that power must be judicially exercised. To obtain relief under this section, the onus rests upon the applicant to show that it has been aggrieved by the decision of the trustee, or has suffered damage or prejudice as a result of the trustee's action: *Re Gareau (English & Scotch Woollen Co.), Ex parte Joseph Bros.* (1922), 3 C.B.R. 76 (Que.).

16 I will first address the position of Brandon, Christine, and Cash (collectively, the "Third Parties") and then address the position of Global and BCI.

The Third Parties

17 In this case, the execution of the Assignments did not wrongfully deprive the Third Parties of anything to which they are legally entitled, or prejudice them in respect of any legal rights they may otherwise have been entitled to assert. As strangers to the bankruptcy, they have no legitimate right to require that the Trustee dispose of the assets of the estate in any particular manner. Further, as parties to the litigation, the decision of the Trustee does not affect their ability to defend themselves against the allegations constituted by the Causes of Action.

18 Accordingly, I do not see any basis upon which the Third Parties have standing to bring this motion under section 37 of the BIA. If, however, I have erred in reaching this conclusion, the further conclusions reached below in respect of Global and BCI would also apply to the Third Parties.

Global and BCI

19 In this proceeding, Global and BCI wear two hats. They are contingent creditors of the estate in respect of the claims asserted in their Statement of Claim and they are defendants to the Defence, Counterclaim, and Third Party Claim. It is not entirely clear in which capacity they say they are aggrieved.

20 Insofar as they say that they aggrieved in their capacities as creditors of the estate, I am not persuaded that they are aggrieved parties for two reasons.

21 First, given the state of the litigation commenced by Global and BCI, and the assertion of the Causes of Action by way of offset, it is not possible to make any assessment of the likelihood that these parties have a viable claim against the estate. To the extent the Global and BCI claims against Brook have no merit or are offset by the Causes of Action, Global and BCI would have no contingent claims against the estate. In such circumstances, the Moving Parties would have no standing in this proceeding.

22 Second, even if they are to be treated as creditors of the estate, I do not think that Global and BCI have established that they have suffered a material loss or prejudice in such capacity.

23 Global and BCI have chosen not to file any proof of claim in the bankruptcy. This is understandable given the negligible assets in the estate. The Moving Parties have pursued the action with a view to obtaining a judgment that survives bankruptcy, rather than with any expectation of receiving a distribution from the estate. Given the absence of any claim of Global or BCI in the bankruptcy, however, neither party has any current right to any distribution out of the Bankrupt's estate. On this basis, I do not think that either party can assert that it is an aggrieved party.

24 More significantly, even if they had an entitlement to participate in any distribution from the estate, and even if their proposal of $50,000 for the Causes of Action were accepted, neither Global nor BCI has any realistic expectation of any distribution other than possibly a distribution of negligible value.

25 The real prejudice that Global and BCI have suffered is the loss of the possibility of preventing Brook from asserting his defence to their claims and asserting the Causes of Action, with the attendant costs. However, for the reasons set out above in respect of the Third Parties, insofar as they say that they are aggrieved as parties to the litigation, they have no standing on this motion. If the Moving Parties wish to protect themselves against legal costs which they regard as improper, they must avail themselves of the protections afforded under the *Rules of Civil Procedure* or deal directly with Brook.

Conclusion

26 Based on the foregoing, none of the Moving Parties is an "aggrieved" person for the purposes of section 37 of the BIA. On this basis, the motion must be dismissed. It is therefore unnecessary to consider whether the Trustee's decision was unreasonable for the purposes of that provision. I have, however, set out in my views on this issue in case I have erred in reaching the conclusions above.

Was the Decision of the Trustee Unreasonable?

27 The Trustee argues that, even if the Moving Parties are aggrieved persons for the purposes of section 37 of the BIA, the Court should not exercise its discretion under that provision to grant the relief sought on this motion. The Trustee argues that its decision to execute the Assignments was reasonable in the circumstances.

28 The principles governing an action under section 37 have been set out in *Re Pachal's Beverages Ltd*., at para. 14, as quoted earlier in this decision.

29 In the absence of any inspector for the estate, s. 30(3) of the BIA grants the Trustee the authority to sell the Causes of Action in any manner it thinks advisable. There is no statutory requirement obliging the Trustee to engage in any particular sales process and, in particular, no obligation to engage in an auction, public or otherwise. On the other hand, section 30(3) does not remove the obligations of the Trustee under the BIA in respect of the sale or other disposition of the assets of Brook, as Brook as appears to argue.

30 Accordingly, as creditors of the estate of Brook, the Moving Parties had a legitimate expectation that, in exercising its powers under section 30(3) of the BIA to dispose of any assets of the estate, the Trustee would act reasonably, honestly, in good faith and for the benefit of Brook's estate generally.

31 In this case, there is no basis for concluding that the Trustee's actions constituted an abuse of power. As mentioned, the Trustee had the authority to dispose of the Causes of Action pursuant to section 30(3) of the BIA. There is also no suggestion of fraudulent activity on the part of the Trustee.

32 Further, while the Moving Parties complain of the lack or delay of disclosure of the Assignments, these complaints do not establish bad faith on the part of the Trustee. In this regard, it is relevant that the first communication of the Moving Parties with respect to the Causes of Action did not occur until after Brook served his Defence, Counterclaim and Third Party Claim on them. As the Assignments had already been executed by that time, the Trustee did not withhold any information that it was requested to provide to the Moving Parties. Any delay in providing the amended Assignments is not significant given that the amendments were made solely for the purpose of giving effect to the original intention of the parties to assign to Brook all of his Causes of Action.

33 The issue on this motion is therefore whether the Moving Parties have demonstrated that the actions of the Trustee were unreasonable from the perspective of the good of the estate generally. This involves a consideration of both the process that was followed by the Trustee and the substantive reasonableness of the Trustee's decision to assign the Causes of Action to Brook, which I will address in turn.

Did the Process Adopted by the Trustee Comply with its Obligations?

34 The Causes of Action had not been asserted prior to the bankruptcy. Accordingly, they were assets of the estate which the Trustee was entitled to assert by commencing a new action against the Moving Parties. However, the Trustee had neither the money to commence any such action nor the ability to assess the relative merits of Brook's assertions. Accordingly, it was necessary to sell or assign the Causes of Action to Brook or a third party.

35 The Trustee believed that a public sale of the Causes of Action was impracticable. The Moving Parties suggest that it was at least theoretically possible that third parties might be interested in purchasing the Causes of Action if a public auction or tender process were conducted. I do not think that is reasonable in the particular circumstances.

36 The Causes of Action were not reduced to writing at the time of the Assignment, at which time the Moving Parties say that a public sales process should have been conducted. In addition, any party pursuing the Causes of Action would have needed the active involvement of Brook. Therefore, Brook had an effective veto over any third party purchase of the Causes of Action. In order to bid for the Causes of Action, Brook had to find a third party to finance the purchase as he was unable to do so himself. Whether or not that party is his wife is not relevant for present purposes. It is, however, relevant that he can be assumed to have canvassed the possible options available to him and made his choice. On this basis, I do not think that there is any realistic possibility of a third party bidder for the Causes of Action.

37 Accordingly, the procedural issue on this motion is whether the Trustee was required to give the Moving Parties an opportunity to bid on the Causes of Action.

38 The Causes of Action assert that Brandon and Global acted fraudulently in respect of their dealings with Brook and perhaps in respect of their dealings with the supplier to Global. The Trustee says that it considered that it would be unseemly for the Trustee to offer the Causes of Action to the Moving Parties, given that it would, in effect, be offering the Moving Parties the right to prevent the assertion of potentially valid fraud claims of a bankrupt. I will return to this consideration at the end of this Endorsement.

39 The Trustee says that it proceeded instead on the basis that it should remain neutral between the parties regarding their respective assertions of fraud against each other. To this end, the Trustee believed it was reasonable to allow Brook to pursue

the Causes of Action, subject to negotiation of an agreement it considered to be reasonable for the sale price of the Causes of Action. It considered this action to be the counterpart of its earlier decision not to object to a motion of Global and Bell to lift the stay under the BIA to prosecute the action. Brook vigorously opposed that motion in a number of proceedings without any success, with the result that he has significant unpaid costs awards against him arising out of those proceedings.

40 On this motion, both parties, in effect, rely on *Hoque, Re* (1996), 38 C.B.R. (3d) 133 (N.S. C.A.). The circumstances in that decision were, however, different from the present circumstances in a number of respects. In that decision, a creditor brought an action under section 37 seeking to set aside an agreement that had been entered into with a bankrupt in connection with his discharge.

41 Among other things, it was clear in *Hoque* that the creditor had been aware of the possible claim against it for some time before the agreement was entered into and had taken no action to indicate its interest in purchasing the claims. The court of appeal upheld the motion court decision finding the actions of the trustee to be reasonable on two grounds, at para 51:

> In summary, on the principal issue, I would dismiss the appeal on two grounds. The trial judge did not err in concluding on the facts that the trustee acted reasonably, and in the interests of the creditors generally, notwithstanding the failure to ask Montreal Trust if it would like to bid to acquire the lawsuit; and, secondly, it would be unjust in the circumstances to grant the relief sought by Montreal Trust as Dr. Hoque was entitled to have the agreement he made with the trustee finalized; in short, it would not be a judicial exercise of the power given the court by s. 37 of the *Act*. To grant the relief sought, even if it were concluded that the trustee acted unreasonably, would also offend the integrity of the bankruptcy process.

42 In reaching its decision on the first ground, the court stated the following, at para. 50:

> The decision in *Pachal's Beverages* (*supra*) is relevant as it makes clear that the burden of proof is on the applicant to show that the trustee's decision was unreasonable and not on the trustee to show that it was right. In the absence of evidence to prove that, as a general practice, trustees in bankruptcy offer to sell causes of action which the bankrupt may have to the potential defendants in those lawsuits who also happen to be creditors of the bankrupt, it is difficult to conclude that the trustee's conduct in this instance was a failure to meet the acceptable standards for a trustee in realizing on assets of the bankrupt.

43 The Moving Parties say that all the reported cases on the sale of causes of action, at least in Ontario, indicate that a trustee in bankruptcy is required to conduct a public tender or auction process or, at a minimum, offer the causes of action to the other party to the litigation. They say in effect that, if a trustee fails to do so, its actions are *per se* unreasonable. The Moving Parties argue that the Trustee's failure to conduct such a process should therefore invalidate the Assignments. I do not agree for the following reasons.

44 First, while the Moving Parties have presented a number of cases in which a trustee in bankruptcy conducted a public sales process for causes of action, the case law does not establish an absolute requirement for such a process. Each case must be examined on its own terms.

45 In this case, for the reasons set out above, it was not realistic to contemplate a public sales process to attract third party bidders. The only issue is whether the Trustee was required to offer the Causes of Action to the Moving Parties as the other parties to the litigation. The case law also does not establish an absolute requirement that a trustee offer causes of action to the other party to litigation or proposed litigation.

46 More generally, a public auction or tender process is not an end in itself. It is one means, but not the only means, by which a trustee in bankruptcy satisfies itself that it has obtained fair market value for the assets of the bankrupt. What constitutes a sales process that results in a maximization of value for creditors will depend upon the nature of the assets being sold. Apart from the Trustee's failure to conduct a public sales process, the Moving Parties have no evidence to support a finding that the sales process adopted by the Trustee was unreasonable.

47 Accordingly, I do not accept the Moving Parties' argument that the Trustee's decision was unreasonable solely on the basis of the process followed by the Trustee. The real issue for the Court on this motion is whether the Trustee's decision was unreasonable as a substantive matter.

Was the Trustee's Decision Substantively Reasonable?

48 The Moving Parties also argue that the Trustee's execution of the Assignment was unreasonable as a substantive matter. In particular, they argue that, in the absence of an auction or other tender process in which they are able to participate, the Trustee cannot demonstrate that it has maximized the sales proceeds for the assets.

49 In this regard, I accept that, to the extent that a trustee does not include a possible purchaser in a sales process, it runs the risk that the sales process may subsequently be challenged if the third party who was not provided with an opportunity to bid is prepared to commit to a materially better offer. In such circumstances, the willingness of the third party to make a superior offer may be evidence that the trustee has failed to obtain fair market value for the assets.

50 However, for the following reasons, I do not agree that, in the present circumstances, the Court must find that the trustee's actions were unreasonable because of its decision not to conduct an auction or other tender process

51 The Moving Parties have the onus of proving that the Trustee's action was unreasonable. In this case, as discussed above, the only other possible bidder for the Causes of Action would be one or more of the Moving Parties. Moreover, they have made their offer of $50,000 known to the Court in their motion materials. It is therefore possible to assess the reasonableness of the Trustee's action based on a comparison of the respective offers of Brook and the Moving Parties. Put another way, it is possible to make a determination regarding the fair market value of the Causes of Action given that the only likely offers in the market are before the Court.

52 In this case, the offer of Brook, which the Trustee accepted, and the offer of the Moving Parties are not directly comparable. As mentioned, the Moving Parties are prepared to offer a fixed sum of $50,000 while Brook offered $15,000, representing $35,000 less than the Moving Parties, and a 2/3 sharing of any successful result in the litigation. The issue for the Court is whether the Moving Parties' offer demonstrates that the Trustee failed to maximize the value received for the Causes of Action and that the Trustee's actions were therefore unreasonable.

53 The Court cannot, and more importantly, the Trustee could not, assess the merits of the Causes of Action. However, it is possible to make the following observations regarding the offers.

54 First, while there is no obligation under the arrangements with Brook that he pursue the Causes of Action, Brook would have a very real incentive to assert the Causes of Action by way of offset to the extent that the claims of Global and BVI have merit and are being pursued. In such circumstances, Brook will have an incentive to assert the Causes of Action to prevent a judgment against him that will survive bankruptcy. There is, therefore, an inherent dynamic that is likely to ensure that the Causes of Action are asserted to the extent they are meaningful.

55 Second, if the Causes of Action are not pursued or are determined to have no merit, the recovery to the estate will be modest under each of the offers. In such circumstances, under the agreement with Brook, the recovery will be limited to $15,000. Under the offer of the Moving Parties, the estate would have recovered $35,000 more. However, given the extent of the proven claims of the estate, even before inclusion of the claims of the Moving Parties, such additional recovery would permit, at best, a negligible distribution to the creditors of the estate.

56 Third, if on the other hand, the Causes of Action are determined to have merit, there is considerable upside to the creditors. The sharing arrangement would be expected to recover substantially more than the additional $35,000 offered by the Moving Parties. More importantly, the sharing arrangement has the potential to recover a sufficient amount to permit a meaningful distribution to the creditors of the estate.

57 It is not possible to assign a probability to the latter scenario given the inability of the Trustee to assess the merits of the Causes of Action. However, unless the Causes of Action are clearly without merit, it is not unreasonable to conclude that the potential upside of the arrangement with Brook by virtue of the sharing arrangements is of greater value to the creditors than the fixed payment offered by the Moving Parties. In more formal terms, it is reasonable to conclude, as a matter of traditional financial analysis, that the "option" value of the arrangement with Brooks was superior from a financial point of view to the offer that the Moving Parties are prepared to make.

58 On this analysis, the Moving Parties' offer is not a superior offer from a financial perspective to the arrangement with Brook. There is, therefore, no evidence before the Court that the Trustee failed to obtain fair market value for the Causes of Action.

59 I would note that there is also some independent confirmation of the analysis set out above in the form of the approval of the CRA to the arrangement with Brook, even though the CRA did not have the offer of the Moving Parties before it at the time that it approved that arrangement. As the creditor holding approximately 95% of the proven claims against the estate, the CRA had the preponderant interest in maximizing the value received by the Trustee for the Causes of Action. It would have been aware of the possibility of offering the claims to the Moving Parties. The fact that the CRA was prepared to approve the agreement with Brook is confirmation that any offer that provided solely for a fixed amount of cash that would permit at best a negligible distribution to creditors would be perceived by the creditors as inferior to an offer that included a 2/3 sharing arrangement.

60 As mentioned above, the Trustee has provided a further justification for its decision based on the nature of the Causes of Action. It says that, in cases such as the present where causes of action to be assigned are based on alleged fraudulent conduct of a party and the trustee is not in a position to assess the merits of the causes of action, it is inappropriate or "unseemly" for a trustee in bankruptcy to conduct an auction between the alleged perpetrator of the fraud and the alleged victim who is bankrupt.

61 While the Moving Parties suggest that Strathy J. (as he then was) suggested otherwise in *Cal Jet Performance Inc., Re*, 2010 ONSC 3394 (Ont. S.C.J.), in that case, the defendant made an offer to settle in respect of an action that was outstanding at the date of the assignment in bankruptcy. The issue was therefore raised in the very different context of another bidder attempting to exclude the offer of settlement made by a defendant in order to acquire the cause of action at the lowest possible price. For these reasons, I do not think that *Cal-Jet* is a helpful precedent in the present context.

62 I am inclined to agree with the Trustee that, at least in the circumstances where causes of action are first asserted only after the commencement of bankruptcy proceedings and are not capable of assessment, it is at least open to a trustee in bankruptcy to say that it does not think it proper to market fraud claims to an alleged fraudster. However, I have found that the decision of the Trustee was reasonable on the basis of the absence of a superior financial offer. It is therefore unnecessary to determine this issue and, accordingly, I decline to do so. I also note that the Moving Parties deny the alleged fraudulent conduct on their part and the Court is not making any determination on this issue in reaching its conclusions herein nor is it taking any such allegations into consideration in reaching such conclusions.

Conclusion

63 Based on the foregoing, the motion of the Moving Parties is dismissed.

Motion dismissed.

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Court File No. BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT
TORONTO

AIDE MEMOIRE OF THE PROPOSAL TRUSTEE, KSV RESTRUCTURING INC.
(September 21, 2022 Case Conference)

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