Court File No.: BK-21-02734090-0031

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

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.**

APPLICATION UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

Compendium of the YongeSL LPs

(YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc.)

(CBRE Appeal: September 26, 2022)

September 23, 2022

THORNTON GROUT FINNIGAN LLP
100 Wellington St. West, Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

D. J. Miller (LSO #34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Alexander Soutter (LSO #72403T)
Tel: (416) 304-0595
Email: asoutter@tgf.ca

Lawyers for the YongeSL LPs

COMPENDIUM INDEX

TAB 1

(b) the conveyance of the YSL Project did not trigger an entitlement to a commission in favour of CBRE, nor was the commission earned during the Holdover Period as stipulated in the CBRE Agreement.

i. Evidence before the Proposal Trustee

41. In support of CBRE's Proof of Claim, its counsel swore an affidavit, on information and belief, that they were advised by CBRE's in-house counsel that CBRE had entered into an agreement with the Debtor YSL Residences Inc. that entitled CBRE to a commission. The only exhibit to the affidavit was CBRE's invoice.[35]

42. In response to the Proposal Trustee's request for a copy of the agreement referred to, CBRE's counsel provided a copy of the CBRE Agreement.[36] CBRE's counsel also provided an earlier demand letter from CBRE's lawyers to Cresford. That demand letter enclosed (a) an even earlier demand letter from CBRE to Cresford; (ii) the CBRE Agreement; (iii) CBRE's invoice to Cresford Developments; (iv) a "mandate letter" from CBRE to Cresford dated February 21, 2020; and (v) a draft Statement of Claim.

43. CBRE submitted no further evidence to the Proposal Trustee.[37] There was no reference to an oral agreement as justification for CBRE's entitlement to a commission.

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[35] Affidavit of Elie Laskin sworn January 28, 2022 – Exhibit "D" to the Affidavit of Heyla Vettyvel sworn July 22, 2022 (the "**First Vettyvel Affidavit**"), Motion Record ("**MR**"), Tab 4D.

[36] Exhibit "D" to the First Vettyvel Affidavit, MR, Tab 4D.

[37] The First Vettyvel Affidavit at paras 8-12 MR, Tab 4.

TAB 2

48. The CBRE Agreement also provides,[45]

> **ARTICLE 3 THE BROKERAGE REMUNERATION**
>
> 3.1 The Owner agrees to pay the Brokerage a commission equivalent to 0.65% of the Gross Sale Price of the Property (the "**Commission**"). […]
>
> 3.2 The Commission shall be earned by the Brokerage in the event that during the Term: (a) the Owner enters into a binding agreement of purchase and sale for the Property […]; or (b) the Owner is a corporation, partnership or other business entity and an interest in such corporation, partnership or other business entity is transferred, whether by merger or outright purchase or otherwise in lieu of sale of the Property.
>
> **ARTICLE 4 HOLDOVER**
>
> The Owner further agrees to pay the Brokerage the Commission if, within 90 calendar days after the expiration of the Term, […] negotiations continue […] leading to the execution of a binding agreement of purchase and sale for the Property […] with any person […] to whom the Owner was introduced […]. The Brokerage agrees to submit a list of such persons or entities to the Owner within 10 business days following the expiration of the Term […].

49. The Holdover Period of 90 days after the expiration of the Term (August 20, 2020) ended on November 18, 2020.

iv. The Proposal Trustee's decision to disallow CBRE's claim was correct

50. It is undisputed that:

(a) CBRE introduced the YSL Project to Concord;

(b) the YSL Project was not conveyed to Concord within the Term; and

(c) pursuant to the Debtors' proposal, the YSL Project was ultimately conveyed to Concord on July 22, 2021 (246 days after the expiry of the Holdover Period).

---

[45] The CBRE Agreement – Exhibit "J" to the Gallagher Affidavit, MR, Tab 2J.

TAB 3

Mitch Vininsky
ksv advisory inc.
150 King Street West, Suite 2308
Toronto, Ontario, M5H 1J9
T +1 416 932 6013
F +1 416 932 6266
mvininsky@ksvadvisory.com
ksvadvisory.com

February 10, 2022

DELIVERED BY EMAIL AND REGISTERED MAIL

Elie Laskin
Gowling WLG (Canada) LLP
1 First Canadian Place
100 King Street West, Suite 1600
Toronto, ON M5X 1G5

Dear Ms. Laskin:

Re: The Proposal of YSL Residences Inc. and YG Limited Partnership (together, the "Company")

KSV Restructuring Inc., in its capacity as proposal trustee of the Company, acknowledges receipt of the proof of claim filed in your capacity as counsel to CBRE Limited in the amount of $1,239,377.40.

We have disallowed the claim for the reasons outlined in the attached notice.

Should you have any questions regarding this matter, do not hesitate to contact the undersigned.

Yours very truly,

KSV RESTRUCTURING INC.
IN ITS CAPACITY AS PROPOSAL TRUSTEE OF
YSL RESIDENCES INC. AND YG LIMITED PARTNERSHIP
AND NOT IN ITS PERSONAL CAPACITY

Per: Mitch Vininsky

MV:rk
Encl.

ksv advisory inc.
150 King Street West, Suite 2308
Toronto, Ontario, M5H 1J9
T +1 416 932 6262
F +1 416 932 6266

ksvadvisory.com

Estate File No.: 31-2734090

**IN THE MATTER OF THE PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.,
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

**NOTICE OF DISALLOWANCE OF CLAIM
(Subsection 135(3) of the *Bankruptcy and Insolvency Act* ("Act"))**

TAKE NOTICE THAT, as Proposal Trustee acting in the matter of the Proposal of YSL Residences Inc. ("Residences") and YG Limited Partnership Inc. (the "Partnership" and together with Residences, the "Companies"), we have this day disallowed your claim. The reason for the disallowance is as follows:

- The claim is in respect of an invoice submitted by CBRE Limited ("CBRE") to "Cresford" dated October 13, 2021 in the amount of $1,096,794.16 plus HST (the "Invoice"). The Invoice refers to services rendered by CBRE in connection with serving as the exclusive listing brokerage for the land located at 363-391 Yonge Street and 3 Gerrard Street East, Toronto, Ontario, (the "Property"). The Property was to be developed by the Companies into a significant condominium project.

- A demand letter dated November 26, 2021 from CBRE to the Companies (the "CBRE Letter") references that the Invoice was issued in respect of an Exclusive Sales Listing Agreement dated February 20, 2020 (the "Agreement") between CBRE and the Companies, pursuant to which the Companies "agreed to pay commission equivalent to 0.65% of the Gross Sale Price of the Property" (the "Commission"). The CBRE Letter further states that "CBRE has complied with and performed its obligations under the Agreement." The term of the Agreement is six months from February 20, 2020 to August 20, 2020 (the "Term"). The Agreement is appended to the CBRE Letter and it is unsigned.

- The Property was conveyed on or about July 22, 2021 (the "Conveyance") to Concord Adex Inc., an entity related to Concord Properties Developments Corp., the eventual sponsor ("Sponsor") of the Companies' Proposal proceedings which were commenced on April 30, 2021.

- Dave Mann, CFO of the Cresford Group of Companies ("Cresford") advised the Proposal Trustee that CBRE introduced Cresford to the Sponsor. The Sponsor advised the Proposal Trustee that "Cresford, through its representative Ted Dowbiggin, first approached Concord in early 2020 to discuss four of Cresford's distressed projects, however Concord did not have any interest in the YSL project at this time." and that "In September/October 2020, Cresford re-engaged Concord to discuss the YSL project, after it had canvassed a number of other developers. After this outreach in fall 2020 until the time of the proposal proceedings, Cresford and Concord were consistently engaged to explore potential alternatives for the YSL project".

- The Agreement states the following with regards to the Commission:

  - "*The Commission shall be earned by the Brokerage in the event that **during the Term:** (a) the Owner enters into a binding agreement of purchase and sale for the Property with a purchaser procured by the Brokerage, the Owner or from any other source whatsoever, and such sale closes; or (b) the Owner is a corporation, partnership or other business entity and an interest in such corporation, partnership or other business entity is transferred, whether by merger or outright purchase or otherwise in lieu of sale of the Property*."

- Furthermore, the Agreement has a holdover clause which states that:

  - *"The Owner further agrees to pay the Brokerage the Commission **if, within 90 calendar days after the expiration of the Term**, the Property is sold to, or the Owner enters into an agreement of purchase and sale for the Property with, or negotiations continue, resume or commence and thereafter continue leading to the execution of a binding agreement of purchase and sale for the Property, provided the transaction subsequently closes, with any person or entity (including his/her/its successors, assigns or affiliates) with whom the Brokerage has negotiated (either directly or through another agent) or to whom the Property was introduced or submitted, from any source whatsoever, or to whom the Owner was introduced, from any source whatsoever, prior to the expiration of the Term; with or without the involvement of the Brokerage."*

- The Proposal Trustee has disallowed the claim in full as:

  - The Agreement is not signed and therefore is not binding;

  - The Sponsor advised that at all times it dealt directly with the Companies and that it did not have any dealings with CBRE;

  - The Conveyance does not meet the definition of an event giving rise to a Commission; and

  - To the extent any Commission could apply, which is denied, the Commission was not earned during the Term, or within the 90 calendar days following the expiration of the Term.

AND FURTHER TAKE NOTICE, that if you are dissatisfied with our decision in disallowing your claim as set out above, you may appeal to the Ontario Superior Court of Justice ("Court") within the 30-day period after the day on which this notice is served, or within such other period as the Court may, on application made within the same 30-day period, allow.

DATED at Toronto, Ontario, this 10th day of February, 2022.

KSV Restructuring Inc.

KSV RESTRUCTURING INC.
IN ITS CAPACITY AS PROPOSAL TRUSTEE OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.
AND NOT IN ITS PERSONAL CAPACITY

TAB 4

Extract from the Affidavit of Casey Gallagher, sworn July 21, 2022, CBRE Limited's Motion Record dated July 25, 2022, Tab 2, pg 25, CaseLines Master A2378:

42. Around September 2020, I played golf with Mr. Dowbiggin and he again confirmed that the negotiations with Concord were ongoing for the purchase of the YSL Property.

Extract from the Affidavit of Ted Dowbiggin, sworn July 25, 2022, CBRE Limited's Motion Record dated July 25, 2022, Tab 3, pg 179, CaseLines Master A2532:

24. Although the proposed structure and mechanism of the deal between Cresford and Concord went through many iterations, negotiations were ongoing from the point of Concord's introduction until Cresford and Concord agreed that the property would be sold through a proposal made pursuant to section 50(2) of the *Bankruptcy and Insolvency Act* ("***BIA***"). But for CBRE introducing Concord, the sale would not have occurred.

TAB 5

7. Given the nature of these proceedings with the history of other stakeholders claiming to have information relevant to the Proposal Trustee's assessments, the Proposal Trustee determined that the best and most transparent way of determining CBRE's claim, based on the information available to it at the time, was to disallow the claim on the basis set out in the CBRE Notice and to permit CBRE to file a full evidentiary response by way of an appeal on notice to all. In this way, all parties would be able to review and respond to the evidence as they saw fit once on one complete record.

8. On February 11, 2022, following the issuance of the CBRE Notice, counsel for the Sponsor copied the Proposal Trustee on email correspondence with counsel for CBRE. In that correspondence, the Sponsor stated that while CBRE had introduced the Sponsor to Cresford, the Sponsor had no "*knowledge of a brokerage agreement or similar arrangement between Cresford and CBRE relating to the project formerly known as Yonge Street Living (YSL) residences*".

9. On March 10, 2022, CBRE served its notice of motion to appeal the CBRE Notice on the service list in these proceedings with scheduling to be dealt with at a case conference on March 16, 2022. Parties intending on taking a position on CBRE's motion were invited to attend at the case conference.

10. The case conference was held before Mr. Justice Cavanagh, at which the LPs' counsel attended. Mr. Justice Cavanagh scheduled the appeal to be heard on September 26, 2022.

11. The Proposal Trustee then canvassed with CBRE's counsel whether the dispute could be dealt with earlier by means of an arbitration, but no agreement could be reached on the terms for doing so.

12. On July 25, 2022, CBRE served its complete motion record containing its affidavit evidence regarding CBRE's role related to the YSL Project and its introduction to the Sponsor. CBRE's position is supported by an affidavit of Ted Dowbiggin, the President of Cresford Capital Inc. CBRE's evidence illustrates an ongoing dialogue between Concord and Cresford, after such introduction, that resulted in the transaction implemented through the Final Proposal. CBRE also provided evidence from Mr. Dowbiggin that Cresford dealt with CBRE on the basis that the listing agreement was in force, notwithstanding that it was never signed. In the Proposal Trustee's view, the ongoing dialogue between Cresford and the Sponsor, as well as Cresford's and CBRE's conduct related to the listing agreement, suggests that the holdover provisions apply and therefore entitle CBRE to its fee.

13. Based on the evidence provided by CBRE, the Proposal Trustee advised the service list that the Proposal Trustee would not be filing any responding material. Rather, at the hearing scheduled for September 26, 2022, the Proposal Trustee will seek the Court's approval of a settlement of the appeal with CBRE by admitting CBRE's claim, as filed, and the withdrawal of the appeal on a without costs basis. The Proposal Trustee informed the service list that, should any party wish to file their own responding material, the current schedule proposed this be done on or before August 18, 2022, and that the Proposal Trustee reserves the right to file reply materials to any responding materials.

TAB 6

Extract from the Factum of the Proposal Trustee dated September 19, 2022, page 15, paragraph 54, CaseLines E1829:

54. "The Bankruptcy and Insolvency Act is sometimes said to be a 'businessman's statute'. All that means is that the Act should be administered in a practical and accessible way. Rigid formalism should be rejected and a pragmatic approach should be preferred."

Oil Lift Technology Inc. v Deloitte & Touche Inc., 2012 ABQB 357 at para 34.

Oil Lift Technology Inc v Deloitte & Touche Inc, 2012 ABQB 357, para 34 (in full):

[34] The *Bankruptcy and Insolvency Act* is sometimes said to be a "businessman's statute". All that means is that the Act should be administered in a practical and accessible way. Rigid formalism should be rejected and a pragmatic approach should be preferred. However, a claimant should be encouraged to put their best foot forward with their proof of claim. Automatically accepting fresh evidence on appeal would encourage a careless approach to initial proofs. It would also have the effect of transferring the obligations imposed upon the Trustee under section 135 of the Act, to the Court. Accordingly, some explanation ought to be given about why the material now before a Registrar was not initially before the Trustee.

TAB 7

33. A court can direct an appeal of a Notice of Disallowance to proceed on a hearing *de novo* where it determines that proceeding otherwise would result in an injustice to the creditor.[28]

34. In *Charlestown Residential School, Re*,[29] Justice Mills found that the Trustee reviewed materials not otherwise available to the creditor to assist in formulating her decision to disallow the claim. His Honour found that this alone amounted to an injustice if the appeal was to proceed based solely on the record of the documents submitted by the creditor.[30]

35. In *Re: Poreba*,[31] Master Short determined that a *de novo* hearing was appropriate because:

    (a) there were significant issues of credibility which meant that it was only fair to permit the claimant an opportunity to give *viva voce* evidence in addition to affidavits and cross examinations filed prior to the hearing, and to permit an opportunity to the appellant to explain certain issues which arose with respect to various agreements and other documents;[32]

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[28] *Credifinance Securities Limited v DSLC Capital Corp*, 2011 ONCA 160 at para 24, citing *Charlestown Residential School, Re*, 2010 ONSC 4099 at paras 1, 18.
[29] *Charlestown Residential School, Re*, 2010 ONSC 4099.
[30] *Charlestown Residential School, Re*, 2010 ONSC 4099 at para 19.
[31] *Re: Poreba*, 2014 ONSC 277.
[32] *Re: Poreba*, 2014 ONSC 277 at para 32.

(b) the bankrupt was never consulted by the trustee with respect to the truth of the information and evidence filed in support of the claims and contained in the affidavits of the appellant;[33] and

(c) the trustee did not ask the bankrupt to review the disallowances for accuracy or ask the bankrupt for his concurrence with the trustee's position.[34]

36. In this case, the Proposal Trustee relied on information provided by Concord that "at all times it dealt directly with the [Debtors] and that it did not have any dealings with CBRE."[35] This information was not provided to CBRE and CBRE was not given any opportunity to comment or respond to this statement.[36]

37. The injustice that would be caused by refusing to permit new evidence on this motion is not theoretical. Once CBRE became aware of the basis for the Disallowance it reached out to Concord who then confirmed that CBRE did, in fact, introduce them to YSL.[37]

38. Accordingly, it would be unjust to limit the record to CBRE's proof of claim and CBRE's motion should proceed by way of a hearing *de novo.*

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[33] *Re: Poreba*, 2014 ONSC 277 at para 111.
[34] *Re: Poreba*, 2014 ONSC 277 at para 111.
[35] Supplementary Vettyvel Affidavit at Exhibit A.
[36] Vettyvel Affidavit at para 14.
[37] Supplementary Vettyvel Affidavit at Exhibit B.

TAB 8

2. Of the claims in the table, the following claims remain unresolved, as more fully discussed below (the "Disputed Claims"):

   a) Ms. Athanasoulis;

   b) CBRE; and

   c) Mr. Zhang.

3. On March 24, 2022, the Proposal Trustee paid an interim distribution of 70¢ on the dollar to the creditors with Proven Claims.

4. Since the interim distribution, the Proposal Trustee has resolved various claims, including complex claims filed by four former employees of Cresford (the "Former Employees"), including common employer claims that each Former Employee filed against the Companies. The Proposal Trustee negotiated settlements of these claims, which were approved by the Court on May 24, 2022.

5. The Proposal Trustee paid a catch-up distribution to the Former Employees and other creditors with Proven Claims, except those who continue to have Disputed Claims and four creditors whose claims were recently resolved.

6. The Proposal Trustee has reserved the balance of the Affected Creditor Cash Pool until the Disputed Claims can be determined. The Affected Creditor Cash Pool is approximately $20.5 million.

7. The Sponsor took an assignment of 28 of 65 Affected Creditor claims, totalling approximately $12 million. As assignee, the Sponsor participated in the interim distribution and has received approximately $8.4 million of the total amounts distributed.

8. The table below shows the range of outcomes to stakeholders depending on the resolution of the Disputed Claims. The table illustrates that resolution of the Disputed Claims will determine whether there will be any distributions to the LPs.

	Amount ($000)	
Estimated Distributions	High	Low
Affected Creditor Cash Pool	30,900	30,900
Claims		
Proven Claims	14,874	14,874
Ms. Athanasoulis	-	19,000
CBRE	1,239	1,239
Mr. Zhang	-	1,130
Total Claims	16,113	36,243
Dividend rate	100%	85.3%
Residual for LPs	14,787	-

TAB 9

Consolidated Court File No.: 31-2734090
DATE: 20210601

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. APPLICATION UNDER THE BANKRUPTY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED

BEFORE: S.F. Dunphy J.

COUNSEL: *Shaun Laubman and Sapna Thakker* Lawyers for the Moving Parties, 2504670 Canada Inc ., 8451761 Canada Inc ., and Chi Long Inc.

Alexander Soutter Lawyers for the Moving Parties Yonge SL et al.

Harry Fogul, Lawyers for YG Limited Partnership and YSL Residences Inc.

David Gruber Lawyers for Plan Sponsor Concord Properties Development Corp.

Bobby Kaufman and Mitch Vininsky for Proposal Trustee KSV Restructuring Inc.

Robin Schwill for KSV Restructuring Inc.

James W. MacLellan for Sureties Aviva et al and Westmount

Jane Dietrich for Timbercreek Mortgage Servicing Inc. et al.

HEARD at Toronto: June 1, 2021

REASONS FOR DECISION

[1] These two similar motions were brought by two applicants who between them represent all or substantially all of the limited partners of YG Limited Partnership. The LP is in turn the object of a *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended proposal which is scheduled to be voted upon at a June 15, 2021 meeting of creditors and, if approved by them, submitted to the court for approval on June 23, 2021 at a scheduled sanction hearing.

[2] The motions before me seek to declare the *BIA* stay of proceedings to be inapplicable to the two applications discussed below or, in the alternative, to lift the BIA stay of proceedings to enable the two applications to proceed on a parallel track for a full hearing on June 23, 2021.

[3] While I was invited to make a ruling on the applicability of the *BIA* stay of proceedings to the two applications, I declined to do so. I shall leave for another day the question of whether the addition of s. 140.1 and s. 54.1 to the *BIA* in 2005 and 2007 had the result of including holders of equity claims in the definition of "creditor" or merely clarified the status of debt claims such as class action misrepresentation claims or contractual rescission claims whose origin lies in an equity interest. Whether the stay of proceedings is found to be inapplicable as a matter of law or whether I conclude that it should be lifted as a matter of equity and judicial discretion is a matter of legal but not practical interest. In either event, it is plain to me that the two applicants' arguments ought to be permitted a reasonable opportunity to be fleshed out and to be heard at the time the proposal is brought before the court for approval.

[4] The judge at a sanction hearing for a *BIA* proposal is always required to satisfy him or herself (i) that the application is procedurally sound in the sense that the statute and any relevant court orders relating to the approval process have been complied with; and (ii) that the proposal itself is fair and reasonable in all of the circumstances.

[5] The applicants raise grounds that – if established – would lead to the conclusion that either or both of the *BIA* Notice of Intention filed by the LP or the plan sponsorship agreement that forms the backbone of the proposed plan submitted to creditors for a vote were void. If true, there would be no proposal to approve. Further, they raise grounds that could lead to the conclusion that the plan itself is fundamentally unfair and unsound. Once again, if established, such grounds would be relevant to whether the judge at the sanction hearing can be satisfied that the proposed plan is fair and reasonable in all of the circumstances.

[6] The sanction hearing on June 23, 2021 is effectively the only opportunity the applicants will have to make their case. Deferring the hearing of their applications until after a potentially flawed or void proposal has been approved or implemented would be to deny them a hearing altogether. The arguments raised by them are neither spurious nor frivolous. I cannot purport to judge the merits of the claims at this early stage beyond concluding that they ought to be heard in the context of the sanction hearing on June 23, 2021.

[7] There is a difference between concluding that the two applicants need to be heard on June 23, 2021 and concluding that their applications ought to be heard in their entirety at the same time. A pragmatic approach is required to balance the competing interests, including those of creditors who may have a preference for even a flawed proposal over depending solely upon the tender mercies of a secured creditor initiating

its own realization process. There is only so much that can be accomplished in the time that is actually available. We must do the best we can do to be fair to all of the interests engaged in this process.

[8] The two applicants have initiated separate but largely identical proceedings against 9615334 Canada Inc. as general partner of the LP. At the risk of over-simplification, those two applications seek (i) an order that the general partner of the LP be removed from that role or a declaration that it has ceased to be general partner and can exercise none of the powers of a general partner over the LP; (ii) an order declaring that any agreements entered into by the general partner with the plan sponsor Concord are void; (iii) an order declaring the general partner to be in breach of the LP agreement; (iv) an order declaring the general partner to have breached its fiduciary obligations or its duty of good faith owed to the applicant limited partners; and (v) an order setting aside the NOI and the proposal as filed by the LP. One of the two applications (that of YongeSL et al) also has joined to it a request to appoint a Receiver on the grounds that it is just and convenient to do so.

[9] The primary relief sought on the two applications is (v) above. The applicants' position is that the NOI and the plan sponsorship agreement that underlies the proposal were filed or entered into by a general partner who had no authority to do so. The grounds for taking that position are the grounds for the relief sought in (i), (ii), (iii) and (iv). Those grounds are in turn based upon various provisions of the LP agreement that the applicants view as stripping the general partner of its authority to take certain steps (or to act as general partner) upon the happening of certain events including consenting to the appointment of a receiver or entering into the sponsorship agreement in relation to the plan.

[10] I am directing that the applicants should be entitled to seek to establish that the NOI is void or invalid by reason of the grounds alleged in support of the relief sought in (i) to (iv) above. In other words, the whole of both applications is not being heard on June 23, 2021 but so much of the grounds and evidence as are relevant to establish that the NOI and or plan sponsorship agreement are void shall be heard. Similarly, the alternative position of the applicants – that the grounds raised in support of invalidity are also grounds that justify exercising the discretion to reject the plan as unfair or unreasonable even if those grounds do not rise to the level of supporting a finding that the plan or the NOI itself are void – shall also be heard.

[11] I have passed over the claim of one of the applicants for a receiver purposefully. If the applicants are unable to establish that the NOI or the proposed plan are void and they are also unable to persuade the judge presiding over the sanction hearing to reject the proposed plan, the receivership application of YongeSL will be quite moot. If on the other hand the plan is not approved for any reason, then something of a vacuum would exist. The secured creditor Timbercreek has a pending application to enforce its security and to seek the appointment of a receiver that is currently scheduled for July

12, 2021. Timbercreek's counsel intends to file a short update affidavit for the June 23, 2021 sanction hearing and will be at the hearing for the purpose of alerting the court to its position should the plan not be approved for any reason. In that event, Timbercreek intends to ask the court to appoint a receiver either the same day or as soon after that date as is practicable. That position of course comes as a surprise to none of the parties nor should it. It is at least theoretically possible that the application by the LP unitholders for a receiver could have an object. In reality – given the volume of secured claims ahead of them – it is unlikely. That being said, I give them any necessary leave to proceed with that limited aspect of their application as well.

[12] In conclusion I am directing:

a. that the prayer for relief in paragraph 1(d) of the 2504670 Canada Notice of Application shall be heard in connection with the scheduled Sanction Hearing of the BIA proposal and that in connection with that hearing, the grounds cited in support of the relief sought in paragraph 1(a), (b), (e) and (f) thereof may be referred to (the same direction applying to the analogous prayers for relief in the YongeSL application);

b. both applicants shall also be heard on the question of whether the proposed plan is fair and reasonable having regard to their interests and to the grounds mentioned in the two Notices of Application; and

c. the YongeSL application to appoint a receiver will only be considered in the event that the plan is not approved for any reason but the hearing judge may decide to defer the hearing of that application in favour of hearing the application of Timbercreek to be heard prior to July 12, 2021.

[13] The parties have conferred on a case timetable needed to have all of these arguments placed in a coherent and developed way in front of the judge on June 23, 2021. That timetable is as follows:

June 7 - Cresford's Record with respect to the LPs' Applications

June 10 - LPs' Reply Records with respect to the LPs' Applications

June 11 - Cross examinations

June 16 - LPs' Factums with respect to the LPs' Applications

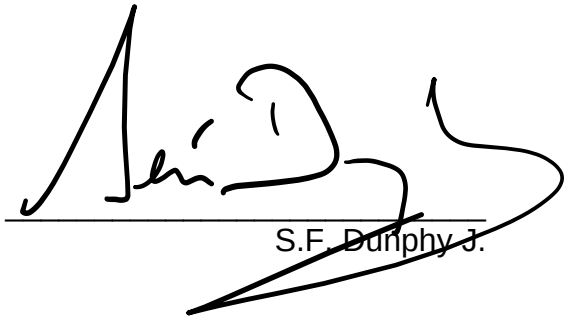
June 18 - Cresford's Factum re the LPs' Applications and Factum re BIA Proposal

June 21 - LPs' Reply Factums with respect to the LPs' Applications/Responding Factums with respect to the BIA Proposal

June 23 – Hearing

[14] I have given the parties directions regarding the conduct of the cross-examinations. Absent agreement to the contrary, the two applicants shall have a total of ½ day between them and the respondents to the applications (the GP) shall have ½ day.

[15] The parties are directed to adhere to the above timetable. Costs of these motions are reserved to be dealt with by the judge hearing these submissions on the merits at the sanction hearing.



S.F. Dunphy J.

Date: June 1, 2021

TAB 10

iii. No need for the YongeSL LPs to bring a s.37 application

24. There is no need for the YongeSL LPs to bring a motion under s.37 of the *BIA* in order to oppose the Settlement. They plainly intended to oppose CBRE's claim.[15] It is appropriate for them to simply oppose the request by CBRE and the Proposal Trustee that the Settlement be enforced.[16]

25. If, however, the YongeSL LPs are limited to making their objection pursuant to s.37 of the *BIA*,[17] they are parties who are aggrieved by the Proposal Trustee's decision to settle. Section 37 provides that,

> 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.

26. The jurisdiction under s.37 is a "wide residual power" that permits a bankruptcy judge to "do justice in special cases."[18] In their annotation of the *BIA*, Houlden J, Morawetz CJ, and Dr. Sarra adopt Lord Denning's view that the definition of "person aggrieved" should be afforded a wide scope and not be subjected to a restrictive interpretation. While such a person cannot be a "mere busybody", they include a person who has a genuine grievance because a decision of a trustee has prejudicially affected their interests.[19]

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[15] Appendix "E" to the Seventh Report.

[16] *Re Levy* per Cullity J (SC).

[17] Without prejudice to their position that they do not need to bring a motion under s.37, the YongeSL LPs will deliver a Notice of Motion for such relief together with this Factum.

[18] *Transamerica Commercial Finance Corp of Canada v Computercorp Systems Inc*, 1993 ABCA 215 at para 7 [*Transamerica*].

[19] Houlden, Morawetz, Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th Edition, Release No. 2022-8, August 2022 § 2:132 para 3.

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]).

End of Document

TAB 11

COURT FILE NO.: 05-CL-5863
DATE: 20050826

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE RAVELSTON CORPORATION LIMITED AND RAVELSTON MANAGEMENT INC.

AND IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

BEFORE: FARLEY J.

COUNSEL: *Alex MacFarlane*, for RSM Richter Inc. in its capacity as Receiver, Interim Receiver, and Monitor of The Ravelston Corporation Limited, Ravelston Management Inc., Argus Corporation Limited, 509643 N.B. Inc., 509644 N.B. Inc., 509645 N.B. Inc., 509646 N.B. Inc., 509647 N.B. Inc.

Matthew Gottlieb, for Hollinger Inc.

Robert W. Staley and *Derek J. Bell*, for Hollinger International Inc.

Lyndon Barnes and *Nancy Roberts*, for CanWest Global Communications Corporation

HEARD: August 25, 2005

E N D O R S E M E N T

[1] These are the short reasons promised yesterday where I approved the settlement between the Receiver of Ravelston and CanWest concerning the dispute between them as to the termination fee owing under the Management Services Agreement dated November 15, 2000 between Ravelston, CanWest and National Post. As I pointed out, the business efficacy of the Management Services Agreement may well be questioned; however what was to be decided by me was not that, but rather the issue of the termination arrangements.

[2] The Receiver and CanWest – the day before the hearing of this dispute reached a settlement, subject to court approval, whereby the parties would exchange mutual releases and CanWest would pay the Receiver $12.75 million. This amounted to 50% of the amount the Receiver was claiming pursuant to the notice of termination which Ravelston gave CanWest the day before Ravelston filed for protection pursuant to the CCAA (with the Receiver being the monitor under the CCAA proceedings) and for the appointment of the Receiver as the court appointed receiver of Ravelston. The two Hollinger companies, Inc. and International, were not happy with the amount of the settlement, although it appears that both were content with a settlement at a higher amount being paid the Receiver. Inc. did not support the approval of the settlement but did not oppose it. International actively opposed the settlement; its position was that the Receiver ought to have obtained a settlement in the 75% range. Both Inc. and International assert that they ought to have been more involved with the settlement process as they assert a special relationship owing to claimed security interests in the claim and its proceeds. One could well posit a situation where the process of settlement could have been improved by more involvement of Inc. and International. However, what we are concerned with is not perfection, but rather has there been material and relevant prejudice so as to taint the process to the degree that the court ought not to entertain the settlement. However, in this situation, Mr. Gottlieb for Inc. volunteered that Inc. had been alerted to the settlement prior to its being entered into, albeit just immediately prior (where in my view it would have been better to have alerted Inc. that settlement discussions were to be actively engaged in and then given progress reports at meaningful times along the way). International was kept more abreast of the situation; the Receiver and its Canadian counsel dialogued with International's counsel, Mr. Staley, including a meeting on June 7, 2005 which, *inter alia*, dealt with International's view concerning the dispute with CanWest. The Receiver of course had the benefit of the active participation of International leading up to the hearing scheduled for August 17th including a detailed factum by International opposing the CanWest position that it owed nothing. On August 15th, Mr. Staley was advised that the Receiver would be meeting with CanWest's counsel the next day to see if a settlement could be reached. While Mr. Staley was otherwise engaged on the 16th, he did indicate that a settlement would be preferable to having the matter litigated. International did not ask that another lawyer be allowed to participate in or observe the settlement discussions, nor did it indicate that a floor amount should be achieved in order that International would be supportive of a settlement.

[3] The Receiver submitted that a motion to approve a settlement entered into by a court-appointed receiver is analogous to a motion to approve a sale of assets by a court-appointed receiver so that the 4 part set of principles/considerations of *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) at para. 16 would come into play. See *Re Bakemates International Inc.*, [2003] O.J. No. 3191 (S.C.J.), affirmed 2004, CarswellOnt. 2339 (C.A.). However, it seems to me that there is a subtle distinction to make between reliance on a receiver's commercial expertise concerning a recommended sale and the receiver's expertise in regards to a settlement of a legal dispute (while of course taking into account that such a receiver will have had appropriate legal advice from its own counsel). That distinction is based on the fact that the court is the "expert" in respect of the law and will generally be in a better position to assess the law involved in a situation than it would be as to the commercial aspects of a sale of property. In

this regard, one may wish to consider the analogous situation of expert opinions as discussed in *R. v. Mohan*, [1994] 2 S.C.R. 9. Thus it seems to me that the court, with the assistance of counsel (both counsel supporting the approval of a settlement and counsel opposing), should conduct an analysis of the strengths and weaknesses of the case, including the general vagaries of litigation plus the benefits of certainty and the avoidance of delay concerning possible appeals, sufficient for the court to conclude that the proposed settlement fell within the range of what was fair and commercially reasonable. The case here involved an all or nothing result if the case went on to a court decision.

[4] I have had the benefit of reviewing in detail the material for the August 17th hearing immediately prior to being advised that the Receiver and CanWest had reached a settlement, subject to court approval. In my view there was much to be said for the merits of each side's position. There was much to be said about the pros and cons -- and it was carefully detailed in that material and so was said. I have now had as well the benefit of the material filed and argued concerning the approval of the settlement as concerns the merits of the dispute which was to have been heard on August 17th. If the case had not settled, then I would have had to make a decision, a decision on an all or nothing basis. I would have made that decision – but I cannot predict now what it would have been, nor could I predict how the Court of Appeal would have decided, given the fact that inevitably my decision would have been appealed. It would have been an interesting decision to write. There certainly was no slam-dunk either way, nor nothing approaching that certainty of result. In my view, the settlement on a 50% basis falls within the general range of acceptability on a fair and commercially reasonable basis. I therefore have approved the settlement.

[5] Allow me to observe that in the fact circumstances of this case and the law as eventually argued in the respective factums, I agree that it is highly likely that attempts to negotiate a settlement before almost reaching the court house steps would have been premature. It was indeed necessary and appropriate that each side reflect on its own strengths and weaknesses once it had the benefit of refined argument on the strengths of the other side.

[6] Mr. Gottlieb makes a fair request in my view where he asks on behalf of Inc. for advance notice of any intention to deal with the proceeds of this settlement. I leave it to the Receiver in consultation with International and Inc. to deal with the issue of proceeds disposition and notice generally.

[7] Order approving settlement to issue as per my fiat.

J.M. Farley

DATE: August 26, 2005

APPLICATION UNDER 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.**

Court File No.: BK-21-02734090-0031

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

Proceedings commenced at Toronto, Ontario

Compendium of the YongeSL LPs

(CBRE Appeal: September 26, 2022)

THORNTON GROUT FINNIGAN LLP
100 Wellington St. West
Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

D. J. Miller (LSO #34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Alexander Soutter (LSO #72403T)
Tel: (416) 304-0595
Email: asoutter@tgf.ca

Lawyers for the YongeSL LPs