

District of: Ontario
Consolidated Court File No. 31-2734090
Division No. 09 - Toronto

**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

**IN THE MATTER OF THE NOTICES OF INTENTION
TO MAKE A PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.**

FACTUM OF CBRE LIMITED

September 15, 2022

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TABLE OF CONTENTS

	Page No.
INTRODUCTION.....	1
FACTS	2
I. CBRE'S ENTITLEMENT TO THE COMMISSION	2
II. DISALLOWANCE OF THE CLAIM.....	5
III. THE SETTLEMENT.....	6
STATEMENT OF ISSUES, LAW & AUTHORITIES	7
<i>ISSUE 1: LPS LACK STANDING TO INTERFERE WITH PROPOSAL TRUSTEE'S DECISIONS.....</i>	<i>7</i>
<i>ISSUE 2: CBRE'S MOTION SHOULD BE HEARD DE NOVO.....</i>	<i>9</i>
<i>ISSUE 3: CBRE'S CLAIM SHOULD BE ALLOWED.....</i>	<i>12</i>
ORDER REQUESTED.....	15

INTRODUCTION

1. The moving party, CBRE Limited (“**CBRE**”), appeals the decision of KSV Restructuring Inc., acting in its capacity as proposal trustee (the “**Proposal Trustee**”), to disallow its proof of claim (“**Claim**”) relating to a commission arising from the acquisition of the property located at 363-391 Yonge Street and 3 Gerrard Street East, Toronto, Ontario (the “**YSL Property**”) by Concord Properties Developments Corp. (“**Concord**”).
2. It is undisputed that (a) CBRE entered into a listing agreement with YSL Residences Inc. (“**YSL**”) in respect of the YSL Property, (b) CBRE introduced YSL to Concord for the purpose of acquiring the YSL Property, (c) Concord acquired the YSL Property, and (d) the commission earned by CBRE is equal to 0.65% of the total consideration paid for the YSL Property (the “**Commission**”).
3. Nobody with any direct involvement in the matter disputes CBRE’s entitlement:
 - (a) YG Limited Partnership (“**YGLP**”) and YSL (together, the “**Debtors**”) have filed an affidavit supporting CBRE’s entitlement to the commission;¹
 - (b) although they have no knowledge of an agreement between CBRE and the Debtors, Concord agrees that CBRE introduced them to the Debtors;²and

¹ Motion Record of CBRE Limited dated July 15, 2022, Tab 3, Affidavit of Edward (Ted) Dowbiggin, sworn July 25, 2022 at paras 12, 21, 29 [**Dowbiggin Affidavit**].

² Motion Record of CBRE dated July 15, 2022, Tab 2, Affidavit of Casey Gallagher, sworn July 21, 2022 at para 49 and Exhibit DD [**Gallagher Affidavit**] and Supplementary Affidavit of Heyla Vettyvel, sworn July 27, 2022 at para 4 and Exhibit B [**Supplementary Vettyvel Affidavit**].

- (c) despite initially disallowing the Claim, after reviewing CBRE's Motion Record, the Proposal Trustee and CBRE entered into a settlement to allow the Claim as filed in exchange for which CBRE would not seek and costs on this motion (the "**Settlement**"). Accordingly, the Proposal Trustee supports CBRE's Claim.³
4. The only parties objecting to CBRE's motion are the YongeSL LPs – a subset of five limited partners in the YGLP (the "**LPs**").⁴
5. The LPs are equity holders and have no standing to object to CBRE's motion. Further, the LPs have not adduced any evidence relating to the Claim. The Claim should be allowed.

FACTS

I. CBRE's Entitlement To The Commission

The Oral Agreement

6. In January 2020, CBRE entered into an oral agreement with YSL on the following terms (the "**Oral Agreement**"):
- (a) CBRE would introduce YSL to potential purchasers for the YSL Property;

³ Seventh Report of the Proposal Trustee to the Court dated September 12, 2022 at para 6.0-1 [**Seventh Report**].

⁴ Responding Motion Record of the YongeSL LPs, Tab 1, Affidavit of Chris Wai, sworn August 19, 2022 at para 14 [**Wai Affidavit**].

- (b) the Commission would be 0.65% of the purchase price of the YSL Property; and
 - (c) CBRE would earn the Commission if the purchaser of the YSL Property was one of the parties CBRE had introduced.⁵
7. Following the Oral Agreement in January 2020, CBRE began performing in accordance with the Oral Agreement and introduced YSL to various potential purchasers for the YSL Property.⁶

The Written Agreement

8. On February 21, 2020, after CBRE had already begun doing work under the Oral Agreement, it provided YSL with a copy of a written agreement (the “**Written Agreement**”) which contained more extensive terms.⁷
9. The Written Agreement provided that the term of the contract was until August 20, 2020 (the “**Term**”). The Written Agreement also included a clause (the “**Holdover Clause**”) which provided that:

[YSL] further agrees to pay [CBRE] the Commission if, within 90 calendar days after the expiration of the Term... 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 [CBRE] has negotiated (either directly or through another

⁵ Gallagher Affidavit paras 11-12; Dowbiggin Affidavit paras 9-12.

⁶ Gallagher Affidavit at paras 16-20, 26-40; Dowbiggin Affidavit at paras 16-26.

⁷ Gallagher Affidavit at para 21 and Exhibit J.

agent) or to whom the Property was introduced or submitted, from any source whatsoever, or to whom [YSL] was introduced, from any source whatsoever, prior to the expiration of the Term; with or without the involvement of [CBRE].⁸

10. Although the Written Agreement was not signed, this was due to inadvertence.⁹

Conduct of the Parties

11. At all times the parties acted as if CBRE was the exclusive listing brokerage for the YSL Property and believed that they had a binding agreement. CBRE introduced YSL to various potential purchasers for the YSL Property¹⁰ including Concord, the eventual purchaser of the YSL Property.¹¹
12. The uncontroverted evidence of Mr. Dowbiggin is that “negotiations were ongoing from the point of Concord’s introduction until Cresford and Concord agreed that the property would be sold through a proposal.”¹²
13. Although CBRE was not directly involved in these negotiations it continued to act in its capacity as listing brokerage by responding to questions from YSL during the negotiation period.¹³
14. The negotiations between YSL and Concord continued from their introduction until Concord acquired the YSL Property through the proposal for

⁸ Gallagher Affidavit at Exhibit J, s. 4.1.

⁹ Dowbiggin Affidavit at para 18.

¹⁰ Gallagher Affidavit of paras 16, 20, 26, 42; Dowbiggin Affidavit at paras 16, 26.

¹¹ Gallagher Affidavit at paras 26-31 and Exhibit DD; Dowbiggin Affidavit of paras 19-22; Supplementary Vettyvel Affidavit at para 4 and Exhibit B; Seventh Report at para 5.0-8.

¹² Dowbiggin Affidavit at para 24.

¹³ Gallagher Affidavit at para 38 and Exhibits Q & R; Dowbiggin Affidavit at para 25.

\$168,737,563.00 on July 22, 2021.¹⁴ The Commission (0.65% of the purchase price) is therefore \$1,239,377.40.

15. YSL agrees that CBRE is entitled to the Commission and the only reason it was not paid was because of YSL's insolvency.¹⁵

16. The only parties objecting to CBRE's motion are the LPs.¹⁶

II. Disallowance of the Claim

17. CBRE submitted its Claim on January 29, 2022.¹⁷

18. On February 10, 2022, the Proposal Trustee disallowed the Claim (the "**Disallowance**") on the bases that:¹⁸

- (a) the agreement is not signed and therefore is not binding;
- (b) Concord advised that at all times it dealt directly with the Debtors and that it did not have any dealings with CBRE;
- (c) the Conveyance does not meet the definition of an event giving rise to a Commission; and

¹⁴ Gallagher Affidavit at Exhibit Z and para 43.

¹⁵ Dowbiggin Affidavit at para 29.

¹⁶ Wai Affidavit at para 14.

¹⁷ Motion Record of CBRE dated July 15, 2022, Tab 4, Affidavit of Heyla Vettyvel sworn July 22, 2022 at Exhibit 2 [**Vettyvel Affidavit**].

¹⁸ Supplementary Vettyvel Affidavit at Exhibit A.

(d) 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.

19. CBRE was not given the opportunity to respond to the Proposal Trustee's investigation into its claim.¹⁹
20. At the outset of this appeal, CBRE and the Proposal Trustee agreed that a *de novo* hearing on a written record was appropriate.²⁰ This was clearly stated in CBRE's Notice of Motion which was served on March 10, 2022 and filed on March 11, 2022.²¹
21. On March 16, 2022 the parties appeared before Justice Cavanagh to schedule the return of this motion.²² At no time during the appearance or during the following four and a half months, during which time CBRE prepared and delivered its motion record and reached a settlement with the Proposal Trustee, did the LP's raise any objection to the matter being heard *de novo*.

III. The Settlement

22. During the four-month period between the scheduling appearance before Justice Cavanagh and the delivery of CBRE's motion record, counsel for CBRE and counsel for the Proposal Trustee engaged in settlement discussions. After

¹⁹ Vettyvel Affidavit at para 14.

²⁰ Seventh Report at para 5.0-7.

²¹ Motion Record of CBRE Limited dated July 25, 2022, Tab 1: Notice of Motion of CBRE Limited at para 11.

²² Seventh Report at para 5.0-10.

reviewing CBRE's Motion Record, the Proposal Trustee and CBRE agreed to seek an order admitting the Claim as filed and dispensing of the appeal on a without costs basis (the "**Settlement**").²³

STATEMENT OF ISSUES, LAW & AUTHORITIES

23. There are three issues before the Court on this motion:

Issue 1: Should the LPs be permitted to interfere with the Proposal Trustee's decisions in this case?

Issue 2: If so, should the appeal be heard *de novo*?

Issue 3: Should CBRE's Claim be allowed?

ISSUE 1: LPs lack standing to interfere with Proposal Trustee's decisions

24. In a proposal proceeding, parties rely on their ability to deal with the debtor company and/or proposal trustee to settle claims subject only to those limitations which are expressly set out in the *Bankruptcy and Insolvency Act*, RSC 1985, c B.5 ("**BIA**").²⁴ This provides the necessary certainty for the efficient and effective administration of insolvencies.

25. Section 135 the *BIA* sets out a complete scheme for the admission or disallowance of proofs of claim. It provides that the trustee will evaluate each proof of claim and may disallow a claim.²⁵ If the trustee disallows a claim it will

²³ Seventh Report at para 6.0-1.

²⁴ *Bankruptcy and Insolvency Act*, RSC 1985, c B.5 [**BIA**], s. 30(1)(i).

²⁵ *BIA* ss. 135(1) and (2).

provide notice of the disallowance and the party making the claim may appeal the decision.²⁶ The only avenue for other parties to interfere is set out in section 135(5) which provides:

135(5) The court may expunge or reduce a proof of claim or a proof of security **on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.**²⁷ [Emphasis added]

26. Pursuant to section 135(5) of the *BIA*, only creditors or the debtor have standing to seek relief from the court regarding a proof of claim, and only in circumstances where the trustee has declined to interfere in the matter. Neither fact applies in this case.

The LPs are not creditors or debtors

27. The LPs are not creditors. They have not filed a proof of claim, which would be assessed by the Proposal Trustee and could, in turn, be challenged by other creditors. Nor are they the Debtors. Rather, they are limited partners in YGLP – one of the Debtors.
28. The Debtors support CBRE's claim. The LPs rights to affect the decision making of YGLP are set out in their partnership agreement. The right to deal with the Claim belongs to YGLP's general partner, not the LPs. The LPs are not entitled to better rights than they bargained for through the proposal process.

²⁶ *BIA*, ss. 135(3) and (4).

²⁷ *BIA*, s. 135(5).

29. From CBRE's perspective, having obtained the support of the Debtors, it should not then have to concern itself with the positions of each of the Debtor's shareholders or limited partners, as applicable.

The Proposal Trustee is actively involved in the Claim

30. Far from declining to interfere, the Proposal Trustee has been involved throughout the proof of claim process. The Proposal Trustee reviewed and disallowed the Claim. At the outset of the appeal, the Proposal Trustee and CBRE agreed that the motion would proceed as a hearing *de novo* on a written record. Then, after numerous discussions with CBRE's counsel regarding the merits of the appeal and reviewing CBRE's Motion Record, the Proposal Trustee entered into the Settlement of the Claim with CBRE. Section 135(5) of the BIA is not an avenue to second guess the decisions of the Proposal Trustee and the LPs have not applied to the Court for relief under section 37 of the *BIA*.
31. For these reasons, the LPs submissions should be entirely disregarded and the Court should give effect to the Settlement by allowing the Claim and dispensing of the appeal without costs.

ISSUE 2: CBRE'S motion should be heard de novo

32. If this Court declines to give effect to the Settlement, this motion should be heard *de novo*.

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

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*.

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.

ISSUE 3: CBRE's Claim should be allowed

39. If this Court declines to give effect to the Settlement, CBRE's claim should be allowed.
40. The overriding purpose of contractual interpretation is to determine “the intent of the parties and the scope of their understanding.”³⁸ The interpretation of a contract should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the contract. It should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the agreement was entered into, and it should be consistent with the interpretations of similar contracts.³⁹
41. It is well established that the offer, acceptance, consideration and terms may be inferred from the parties’ conduct and from the surrounding circumstances.⁴⁰ As stated by Swan, *et al.*, in *Canadian Contract Law*, “[t]he rules for making contracts have to correspond broadly with what people actually do when they enter into transactions.”⁴¹
42. In this case, the intentions of YSL and CBRE are clearly demonstrated by both their evidence and their conduct. Both parties to the contract are in complete

³⁸ [Sattva Capital Corp v Creston Moly Corp, 2014 SCC 53](#) at paras 47-48.

³⁹ [Ledcor Construction Ltd v Northbridge Indemnity Insurance Co, 2016 SCC 37](#) at paras 49-50

⁴⁰ [Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp, 2020 SCC 29](#) at para 37.

⁴¹ Angela Swan, Jakub Adamski & Annie Y. Na, *Canadian Contract Law*, 4th ed (LexisNexis Canada Inc., 2018) at §1.12.

agreement with respect to the (a) existence of the agreement, (b) the essential terms of the agreement and (c) CBRE's entitlement to the Commission.

43. The essential terms of the Oral Agreement were that:
- (a) CBRE would introduce YSL to potential purchasers for the YSL Property;
 - (b) CBRE's Commission would be 0.65% of the purchase price of the YSL Property; and
 - (c) CBRE would earn the Commission if the purchaser of the YSL Property was one of the parties CBRE had introduced.⁴²
44. In addition to Messrs. Gallagher and Dowbiggin's express statements regarding the nature of the contract, the existence and terms of the contract are consistent with the parties' conduct. Immediately after the Oral Agreement was formed, CBRE commenced work meeting with Mr. Dowbiggin, preparing a list and introducing YSL to potential purchasers.⁴³ Both parties consistently treated CBRE as the listing brokerage for the YSL Property and CBRE continued acting in that capacity after introducing YSL to Concord by responding to inquiries made by Mr. Dowbiggin.⁴⁴

⁴² Gallagher Affidavit para 12; Dowbiggin Affidavit para 12.

⁴³ Gallagher Affidavit at paras 13-15; Dowbiggin Affidavit at para 16.

⁴⁴ Gallagher Affidavit at para 38-42; Dowbiggin Affidavit at para 25.

The Holdover Clause

45. If the contractual relationship between CBRE and YSL is governed by the Written Agreement rather than the Oral Agreement, CBRE is still entitled to the Commission pursuant to the Holdover Clause.
46. The Holdover Clause provides that the CBRE is entitled to the Commission if during the 90 days after the expiration of the Term “negotiations continue” resulting in the YSL Property being sold to “any person or entity (including his/her/its successors, assigns or affiliates) ... to whom the Owner [YSL] was introduced.”⁴⁵ In this case, the uncontroverted evidence is that (a) CBRE introduced Concord to YSL during the Term of the Written Agreement⁴⁶ and (b) Concord continued to negotiate with YSL until it acquired the YSL Property.⁴⁷
47. Messrs. Gallagher and Dowbiggin have each adduced evidence that their understanding of the terms of the agreement and CBRE's entitlement to the Commission is consistent with their considerable experience in the real estate industry.⁴⁸ Finally, Mr. Dowbiggin stated that:
- (a) “But for CBRE introducing Concord [to YSL], the sale would not have occurred”;⁴⁹ and

⁴⁵ Gallagher Affidavit at Exhibit J, s. 4.1.

⁴⁶ Gallagher Affidavit at para 31; Dowbiggin Affidavit at paras 19, 21, 29.

⁴⁷ Dowbiggin Affidavit at para 24.

⁴⁸ Gallagher Affidavit at para 23; Dowbiggin Affidavit at paras 12-14.

⁴⁹ Dowbiggin Affidavit at para 24.

- (b) “YSL did not pay CBRE the Commission because it was insolvent. CBRE performed all the duties that were asked of it as exclusive listing brokerage including introducing Cresford Group/YSL to Concord... CBRE is entitled to the Commission.”⁵⁰

48. No one disputes the calculation of the Commission.

49. In these circumstances, it would be commercially absurd to interpret the agreement in a manner that disentitled CBRE to the Commission.

ORDER REQUESTED

50. CBRE respectfully submits that this Court should:

- (a) set aside the Proposal Trustee's disallowance of the Claim;
- (b) allow the Claim;
- (c) declare that this motion for the appeal of the disallowance of the Claim be heard by way of hearing *de novo*;
- (d) order costs of this motion, as against the LPs; and
- (e) award such further and other relief as this Honourable Court may deem just.

⁵⁰ Dowbiggin Affidavit at para 29.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15 day of September, 2022.

A handwritten signature in black ink, appearing to be 'H. Murray', written above a horizontal line.

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SCHEDULE "A"
LIST OF AUTHORITIES

Tab	Title	Pinpoints
1	<u><i>Credifinance Securities Limited v DSLC Capital Corp, 2011 ONCA 160</i></u>	24
2	<u><i>Charlestown Residential School, Re, 2010 ONSC 4099</i></u>	1, 18-19
3	<u><i>Re: Poreba, 2014 ONSC 277</i></u>	32, 111
4	<u><i>Sattva Capital Corp v Creston Moly Corp, 2014 SCC 53</i></u>	47-48
5	<u><i>Ledcor Construction Ltd v Northbridge Indemnity Insurance Co, 2016 SCC 37</i></u>	49-50
6	<u><i>Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp, 2020 SCC 29</i></u>	37

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B.5

37 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.

[...]

135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

(2) The trustee may disallow, in whole or in part,

- **(a)** any claim;
- **(b)** any right to a priority under the applicable order of priority set out in this Act; or
- **(c)** any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice

was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Expunge or reduce a proof

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

IN THE MATTER OF THE NOTICES OF INTENTION
TO MAKE A PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

Consolidated Court File No.: 31-2734090
Division No. 09 – Toronto

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO

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