

Court File No. BK-21-02734090-0031
Court of Appeal No. COA-22-CV-0451

COURT OF APPEAL FOR ONTARIO

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 the APPELLANTS

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

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Table of Contents

| | |
|---|-----|
| PART I - OVERVIEW | 1 |
| PART II - FACTS..... | 2 |
| A. Background..... | 2 |
| i. CBRE retained to broker the sale of the YSL Project | 2 |
| ii. The limited partners successfully opposed the original proposal | 3 |
| iii. The terms of the Proposal..... | 4 |
| iv. Three outstanding claims remain against the Debtors | 4 |
| B. The Proceeding Before the Motion Judge | 6 |
| i. CBRE’s claim | 6 |
| i. CBRE’s s.135(4) appeal to the Motion Judge | 7 |
| C. The Motion Judge’s Decision | 8 |
| PART III - ISSUES & ARGUMENT..... | 9 |
| A. The YongeSL LPs Had Standing on CBRE’s Appeal..... | 10 |
| i. Standard of review on questions of standing is correctness | 10 |
| ii. The YongeSL LPs were affected by the Motion Decision and had standing | 10 |
| iii. The Motion Judge failed to follow Justice Dunphy’s earlier decision..... | 11 |
| iv. Section 135(5) of the BIA had no application..... | 12 |
| v. The YongeSL LPs did not need to rely on s.37 of the BIA..... | 13 |
| vi. Alternatively, the YongeSL LPs were “persons aggrieved” | 14 |
| a. The Motion Judge’s definition of “person aggrieved” was unduly narrow | 14 |
| b. The Motion Judge’s hypothetical concern was unwarranted | 17 |
| B. The Motion Judge Erred in Allowing CBRE’s Appeal | 17 |
| i. Standard of review on questions regarding the applicable provision or test | 17 |
| ii. CBRE had the burden to prove its claim | 18 |
| iii. CBRE’s vague evidence is not proof on a balance of probabilities..... | 18 |
| PART IV - ADDITIONAL ISSUES..... | 19 |
| PART V - CONCLUSION & ORDER SOUGHT | 21 |
| SCHEDULE “A” List of Authorities..... | i |
| SCHEDULE “B” Excerpts of Relevant Statutes | iii |

PART I - OVERVIEW

1. This is an appeal by the YongeSL LPs from a decision of Justice Osborne (the “**Motion Judge**”) allowing CBRE Limited’s (“**CBRE**”) appeal pursuant to s.135(4) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-7 (“**BIA**”). The Motion Judge concluded that (a) the YongeSL LPs lacked standing in the proceeding and (b) CBRE had met its onus to prove its claim. Both conclusions were in error.

2. The proposal in this *BIA* proceeding provides that the YongeSL LPs and other Class A Preferred Unit holders of YG Limited Partnership (together, the “**limited partners**”) are entitled to the proceeds of the Debtors’ estates after all unsecured creditors are paid. The limited partners have the ultimate economic interest in this proceeding. Subject to the determination of three outstanding claims, including CBRE’s, the limited partners may yet recover their \$14.8 million investment in the Debtors.

3. CBRE filed a proof of claim alleging entitlement to a \$1.2 million commission for having introduced the Debtors to Concord Properties Developments Corp. (“**Concord**”), the Debtors’ proposal sponsor. The Debtors’ Proposal Trustee disallowed CBRE’s claim. CBRE appealed pursuant to s.135(4) of the *BIA*.

4. The YongeSL LPs opposed the appeal. Despite the fact that they are directly affected by the determination of CBRE’s claim, the Motion Judge held that they had no standing to make submissions. The Motion Judge allowed CBRE’s appeal based on vague and insufficient evidence incapable of supporting a provable claim.

5. The Motion Judge erred in concluding that the YongeSL LPs lacked standing to make submissions on CBRE’s appeal. That conclusion ignored that the YongeSL LPs were directly

affected by the outcome of the hearing and was inconsistent with a prior decision of Justice Dunphy in the proceeding, who had already determined that the limited partners had standing. The Motion Judge's analysis relied on s.135(5) of the *BIA*, which had no application, and misinterpreted s.37 of the *BIA* by holding that the YongeSL LPs were not "aggrieved".

6. The Motion Judge also erred in allowing CBRE's appeal from the disallowance of its claim. The onus was on CBRE to prove on a balance of probabilities that it had a provable claim against the Debtors. The Motion Judge erred in accepting CBRE's vague evidence as being capable of proving its claim on a balance of probabilities. The Motion Judge set the bar for proof of a claim impossibly and inappropriately low.

PART II - FACTS

A. Background

i. CBRE retained to broker the sale of the YSL Project

7. In January 2020, the debtors YG Limited Partnership and YSL Residences Inc. (the "**Debtors**") retained CBRE to broker the sale of the "**YSL Project**", a condominium development that was owned by the Debtors. The Debtors are members of the Cresford Group, a developer.

Revised Endorsement dated November 22, 2022 ("**Motion Decision**") at paras 6-8, Appeal Book and Compendium ("**ABCO**"), Tab 3, p 31.

8. CBRE introduced the Cresford Group to Concord in early 2020. Pursuant to its agreement with the Debtors, CBRE was entitled to a commission if (a) negotiations occurred between the Debtors and Concord during the period August 20 – November 18, 2020 (the "**Holdover Period**")

and (b) Concord ultimately acquired the YSL Project. There is no dispute that CBRE itself was not involved in the negotiations between the Cresford Group and Concord.

The CBRE Agreement – Exhibit “J” to the Affidavit of Casey Gallagher sworn July 21, 2022 (the “**Gallagher Affidavit**”), ABCO, Tab 5, p 55 and Exhibit Book (“EXHB”), p 65.

ii. The limited partners successfully opposed the original proposal

9. In summer 2021, the Debtors advanced a pre-packaged liquidation proposal under the *BIA* (the “**original proposal**”). The Debtors’ original proposal would have seen the Cresford Group extract approximately \$22 million from the YSL Project’s unsecured creditors. Under the original proposal, the YSL Project’s unsecured creditors would have recovered a maximum of 58% of their claims and the limited partners, who had collectively invested \$14.8 million in the YSL Project, would have recovered nothing.

YG Limited Partnership and YSL Residences (Re), 2021 ONSC 4178 at paras 11, 36 and 49 per Dunphy J [*YSL re Sanction Hearing*], Book of Authorities (“AOA”), Tab 1, pp 12, 18 and 21.

10. KSV Restructuring Inc., the Debtors’ proposal trustee (in that capacity, the “**Proposal Trustee**”), supported the original proposal. The limited partners did not.

11. On a preliminary hearing, over the objections of the Debtors and Concord, Justice Dunphy held that the limited partners had standing to make submissions on why the original proposal should not be sanctioned.

In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc (June 1, 2021), Toronto 31-2734090 (ONSC Commercial List), per Dunphy J [*YSL re Standing*], AOA, Tab 2, p 31.

12. The YongeSL LPs took the position that the Debtors' original proposal was made without good faith and did not benefit the general body of creditors. Justice Dunphy agreed and refused to sanction it. His Honour did, however, allow the Debtors to make another proposal (the "**Proposal**"), which was ultimately approved by the Court.

YSL re Sanction Hearing at [paras 73-76](#) and [84](#), AOA, Tab 1, pp 26-28.

iii. The terms of the Proposal

13. Pursuant to the Proposal, the YSL Project was transferred to Concord. In exchange, Concord paid \$30.9 million to the Proposal Trustee. From that pool of funds, unsecured creditors were to receive up to 100% of their claims (an increase from up to 58% under the original proposal).

14. Article 5.05 of the Proposal expressly provides that the limited partners are entitled to any residue of the Proposal after final distributions to creditors.

The Proposal, article 5.05 – Appendix C to the Seventh Report of the Proposal Trustee dated September 12, 2022 (the "**Seventh Report**"), [ABCO, Tab 10, p 116](#).

15. The improved terms of the Proposal meant that both the YSL Project's unsecured creditors and the limited partners might fully recover their investment in the YSL Project.

iv. Three outstanding claims remain against the Debtors

16. Three claims against the Debtors remain outstanding: (a) CBRE's claim of approximately \$1.2 million; (b) a claim by Harbour International Investment Group Inc. ("**Harbour**") for \$1 million plus HST, which the Proposal Trustee has allowed; and (c) an \$18 million claim by the

Cresford Group's former President of Marketing, Maria Athanasoulis, which the Proposal Trustee has advised that it intends to disallow, in part.

Seventh Report, p 6, ABCO, Tab 9, p 98.

17. The YongeSL LPs brought an application pursuant to s.37 of the *BIA* to challenge the Proposal Trustee's decision to allow Harbour's claim. That application has been held in abeyance pending a final determination of CBRE's claim.

Seventh Report, pp 5-6, ABCO, Tab 9, pp 97-98.

18. Ms. Athanasoulis' claim involves an allegation that she is entitled to share in the profits of the YSL Project. The Proposal Trustee and Ms. Athanasoulis agreed to a bifurcated arbitration of that claim, without the knowledge and involvement of the limited partners and Concord. The first phase of that arbitration resulted in a finding that Ms. Athanasoulis had an agreement with the Cresford Group whereby she would share in the profits of the YSL Project. The amount of that claim, if any, was not determined.

19. Once the limited partners and Concord learned the outcome, the limited partners took steps to challenge the Proposal Trustee's right to arbitrate Ms. Athanasoulis' claim. Justice Kimmel held that the arbitration contemplated a final adjudication of Ms. Athanasoulis' claim and went beyond a mere fact-finding exercise. Her Honour held that it was an improper delegation to the arbitrator by the Proposal Trustee of its ultimate responsibility to determine and value Ms. Athanasoulis' claim. The Proposal Trustee has since advised the Court that it intends to disallow Ms. Athanasoulis' claim to a share of the profits in the YSL Project.

YG Limited Partnership (Re), 2022 ONSC 6138 at [paras 10, 52](#) and [81](#), per Kimmel J [*YSL re Funding*], AOA, Tab 3, pp 38-39, 46 and 51-52.

20. Subject to the determination of the three outstanding claims against the Debtors, up to \$16.038 million may be available for distribution to the limited partners.

Seventh Report, p 6, ABCO, Tab 9, p 98.

B. The Proceeding Before the Motion Judge

i. CBRE's claim

21. CBRE is a real estate broker. It was retained to broker the sale of the YSL Project in January 2020, more than a year before the Debtors commenced this proceeding. Pursuant to CBRE's agreement with the Debtors, it earned a commission if there were negotiations between the Debtors and Concord during the Holdover Period, a 90-day period following the agreement's expiry:

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 [...]

Motion Decision at para 8, ABCO, Tab 3, p 31.

The CBRE Agreement – Exhibit “J” to the Gallagher Affidavit, ABCO, Tab 5, p 55 and EXHB, p 65.

22. CBRE sought a \$1.2 million commission in the Proof of Claim that it submitted to the Proposal Trustee. There was no evidence of any negotiation during the Holdover Period included with CBRE's Proof of Claim. The Proposal Trustee disallowed CBRE's claim.

CBRE's Proof of Claim – Exhibit “D” to the Affidavit of Heyla Vettyvel sworn July 22, 2022, ABCO, Tab 6, p 61 and EXHB, p 233.

Notice of Disallowance of Claim – Exhibit “A” to the Affidavit of Heyla Vettyvel sworn July 27, 2022, ABCO, Tab 7, p 77 and EXHB, p 266.

i. CBRE's s.135(4) appeal to the Motion Judge

23. CBRE appealed to the Motion Judge from the Proposal Trustee's disallowance of its claim. In support of its appeal, CBRE filed new evidence of negotiations between the Debtors and Concord. The new evidence was set out in and limited to two sentences:

(a) Mr. Gallagher, a Vice-President with CBRE, stated that,

[a]round 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”

The Gallagher Affidavit at para 42, ABCO, Tab 4, p 50 and EXHB, p 22.

(b) Mr. Dowbiggin, the former President of a company in the Cresford Group (not the Debtors), did not adopt this hearsay statement in his affidavit. Mr. Dowbiggin's evidence was that,

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 [the *BIA*].

Affidavit of Edward (Ted) Dowbiggin sworn July 25, 2022 (the “**Dowbiggin Affidavit**”) at para 24, ABCO, Tab 8, p 87 and EXHB, p 254.

24. The Proposal Trustee changed its position after CBRE delivered its materials in support of its appeal and consented to CBRE's appeal from the Proposal Trustee's disallowance of its claim. The Proposal Trustee agreed to seek the Court's approval of a settlement pursuant to which CBRE's claim and appeal would be allowed without costs.

Seventh Report, p 8, ABCO, Tab 9, p 100.

25. The YongeSL LPs opposed CBRE's appeal and the Proposal Trustee's request that the Motion Judge allow CBRE's appeal. The YongeSL LPs primary position was that they could simply oppose CBRE's appeal, but in the event that it was necessary to object to the Proposal Trustee's decision to consent to the appeal, the YongeSL LPs sought relief from that act of the Proposal Trustee under s.37 of the *BIA*.

26. On the merits of CBRE's appeal, the YongeSL LPs took the position that Mr. Dowbiggin's vague statement that "negotiations were ongoing" during the Holdover Period was a bald statement not cogent evidence capable of proving a claim. CBRE had not met its onus and the Proposal Trustee's disallowance of CBRE's claim ought to be upheld.

C. The Motion Judge's Decision

27. The Motion Judge held that the YongeSL LPs "lack the standing in this case to challenge the disallowance by the Proposal Trustee". This finding is based on a flawed premise. The YongeSL LPs were not challenging the disallowance by the Proposal Trustee, but rather sought to uphold it. The YongeSL LPs were opposing CBRE's motion to set aside that disallowance.

28. The Motion Judge accepted the Proposal Trustee's submission that, pursuant to s.135(5) of the *BIA*, "the court may grant relief only" where the debtor or a creditor applies in circumstances where the trustee will not interfere, and that the YongeSL LPs were neither creditors nor the Debtors. This finding is also based on a flawed premise. The YongeSL LPs were not seeking relief under s.135(5) of the *BIA*. Rather, they were opposing the relief sought by CBRE under s.135(4). Section 135(5) has no application.

Motion Decision at paras 21 and 23, ABCO, Tab 3, p 32.

29. The Motion Judge also held that the YongeSL LPs were not aggrieved by an act or decision of the Proposal Trustee and therefore lacked standing to oppose CBRE's motion under s.37 of the *BIA*.

Motion Decision at paras 28-32, ABCO, Tab 3, p 33.

30. Further, relying on the evidence of Mr. Gallagher and Mr. Dowbiggin, the Motion Judge held that CBRE's appeal should be allowed because,

negotiations between YSL and Concord commenced with their introduction and continued until the acquisition of the YSL Property by Concord through the proposal, and specifically during the holdover period. [...]

Motion Decision at para 51, ABCO, Tab 3, p 36.

PART III - ISSUES & ARGUMENT

31. The Motion Judge erred in determining that the YongeSL LPs lacked standing on CBRE's appeal because,

- (a) the YongeSL LPs have the right to be heard in circumstances where their interests are affected by the decision;
- (b) the Motion Judge relied on s.135(5) of the *BIA* in order to determine standing, which had no application to the relief sought on CBRE's motion;
- (c) the Motion Judge failed to follow the decision of Justice Dunphy that previously determined that the YongeSL LPs have standing in this proceeding; and
- (d) the Motion Judge interpreted s.37 of the *BIA* too narrowly in concluding that the YongeSL LPs were not "persons aggrieved".

32. The Motion Judge also erred in concluding that CBRE had proven its claim. The vague evidence before the Motion Judge was not capable of supporting CBRE's claim. CBRE failed to meet its onus under s.135(4) of the *BIA* of demonstrating that its claim should be allowed.

A. The YongeSL LPs Had Standing on CBRE's Appeal

i. Standard of review on questions of standing is correctness

33. Questions of law are reviewed on a correctness standard. The Motion Decision involved several questions of law: whether the YongeSL LPs have standing; whether ss.135(5) or 135(4) of the *BIA* applied; whether resort to s.37 of the *BIA* was necessary; and the interpretation of "persons aggrieved" within the meaning of s.37. The Motion Judge committed errors of law in respect of each of those issues.

Housen v Nikolaisen, 2002 SCC 33 at [para 8](#), *AOA*, Tab 4, p 69.

ii. The YongeSL LPs were affected by the Motion Decision and had standing

34. It is a basic principle of fundamental justice that if a party's proprietary or economic interests will be directly impacted by the outcome of a hearing, the party has standing to make submissions at the hearing.

Ivandaeva Total Image Salon Inc v Hlemgizky, 2003 CanLII 43168 at [para 27](#) (ONCA), *AOA*, Tab 5, pp 173-174.

35. The YongeSL LPs had standing before the Motion Judge. Their economic interests (their right to the proceeds of the Proposal) are directly affected by the determination of CBRE's claim. That fact has been recognized by both Justice Dunphy, who characterized the YongeSL LPs as among the "fulcrum stakeholders in this case", and Justice Kimmel, who confirmed that the YongeSL LPs have a "direct interest" in the determination of claims in this proceeding.

YSL re Sanction Hearing at [para 11](#), AOA, Tab 1, p 12; *YSL re Funding* at [para 59](#), AOA, Tab 3, p 48.

iii. The Motion Judge failed to follow Justice Dunphy's earlier decision

36. The Motion Judge erred in failing to follow an earlier ruling of Justice Dunphy. The question before Justice Dunphy was whether the limited partners could oppose the Debtors' motion for approval of the original proposal. Over the objections of the Debtors and Concord, Justice Dunphy held that the limited partners' arguments ought to be heard. Justice Dunphy recognized that the approval hearing was "effectively the only opportunity" that the limited partners would have to make their case.

YSL re Standing at [paras 3, 6, 10 and 12\(b\)](#), AOA, Tab 2, pp 32-34.

37. An analogous question was before the Motion Judge: whether the YongeSL LPs could oppose CBRE's appeal from the Proposal Trustee's disallowance of its claim. Both hearings affected the YongeSL LPs' rights and interests. On both occasions, the hearing was effectively the only opportunity for the YongeSL LPs to advance their position. Justice Dunphy correctly held that those circumstances support granting the YongeSL LPs standing. The Motion Judge erred in failing to make the same finding.

38. The Motion Judge's decision offends the principle of horizontal judicial comity. The Motion Judge ought to have followed Justice Dunphy's decision unless the Motion Judge "[was] convinced that the prior decision is wrong and can advance cogent reasons in support of this view." The Motion Judge did not refer to Justice Dunphy's decision. There were no reasons given for

departing from it, let alone cogent reasons. The Motion Judge's decision that the YongeSL LPs lacked standing was in error.

Stegenga v Jans, 2021 ONSC 7898 at [paras 50-51](#), AOA, Tab 6, pp 192-193. *Pfizer Ireland Pharmaceuticals*, 2021 ONSC 6345 at [paras 24-25](#), AOA, Tab 7, pp 203-204.

iv. Section 135(5) of the BIA had no application

39. The Motion Judge erred by conducting his analysis pursuant to s.135(5) of the *BIA*, despite correctly identifying that the appeal before the Court was pursuant to s.135(4) of the *BIA* earlier in the Motion Decision.

Motion Decision at paras 1, 23 and 41, [ABCO, Tab 3, pp 30, 32 and 34](#).

40. Section 135(5) of the *BIA* had no application to the relief sought by CBRE. That section provides that,

The court may expunge or reduce a proof of claim [...] on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

41. Section 135(5) of the *BIA* does not apply where a creditor appeals the disallowance of its proof of claim pursuant to s.135(4) of the *BIA*, which provides that,

A [...] disallowance [of a proof of claim] is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) [...], the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the *General Rules*.

42. CBRE's appeal was properly brought pursuant to s.135(4) of the *BIA*. Subsection 135(5) of the *BIA* did not apply because (a) no creditor or debtor made an application to expunge or reduce CBRE's proof of claim and (b) the Proposal Trustee had not declined to interfere – rather, it had disallowed CBRE's proof of claim.

43. The Motion Judge's analysis was based on a flawed premise. The issue before the Motion Judge concerned CBRE's appeal, pursuant to s.135(4) of the *BIA*, of the Proposal Trustee's disallowance of its claim. The question was whether the YongeSL LPs had standing to oppose CBRE's appeal because they were affected by the result. The YongeSL LPs' standing on the appeal was not affected when the Proposal Trustee consented to CBRE's appeal.

44. Instead of applying s. 135(4) of the *BIA*, the Motion Judge framed the issue as a motion by the YongeSL LPs to reduce CBRE's proof of claim under s.135(5) of the *BIA*, as though CBRE's proof of claim had been allowed. It was not. The error in applying s.135(5) led the Motion Judge to focus in error on whether the YongeSL LPs were the Debtors (a point that they did not argue) or whether they were a creditor of the Debtors (they conceded that they were not).

Motion Decision at paras 23-27, ABCO, Tab 3, pp 32-33.

45. The Motion Judge conducted his analysis under the wrong subsection. CBRE's appeal was brought pursuant to s.135(4) of the *BIA*, not s.135(5). On CBRE's appeal, the YongeSL LPs had standing to make submissions regarding why the appeal should be dismissed.

v. *The YongeSL LPs did not need to rely on s.37 of the BIA*

46. The YongeSL LPs' position before the Motion Judge was that they had standing to oppose CBRE's appeal from the disallowance of its claim and that the Proposal Trustee's consent to, and purported settlement of, the appeal was not determinative. In the alternative, however, they brought a motion under s.37 of the *BIA* to challenge the Proposal Trustee's decision to settle.

47. The Motion Judge erred by failing to decide, or even consider, whether the YongeSL LPs needed to rely on s.37 of the *BIA* at all.

vi. *Alternatively, the YongeSL LPs were “persons aggrieved”*

48. Even if the YongeSL LPs were required to make their objection pursuant to s.37, the Motion Judge erred in concluding that they were not “persons aggrieved” within the meaning of that section. Section 37 of the *BIA* 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.

49. The Motion Judge held that:

(a) because the YongeSL LPs’ complaint boiled down to the fact that their ultimate potential recovery may be reduced, they could not be “persons aggrieved”; and

(b) to conclude otherwise would mean that every creditor had standing to challenge the treatment of another creditor’s claim, a notion that the Motion Judge rejected.

50. Each of these conclusions are in error. A person who has rights to the proceeds of a debtor’s insolvent estate can properly be “persons aggrieved”. Further, a mechanism already exists for creditors to challenge the treatment of other creditors’ claims.

a. *The Motion Judge’s definition of “person aggrieved” was unduly narrow*

51. The definition of “person aggrieved” should be afforded a wide scope and not subjected to a restrictive interpretation. While such a person cannot be a “mere busybody”, a “person aggrieved” must include a person who has a genuine grievance because a decision of a trustee has prejudicially affected their economic interests.

Transamerica Commercial Finance Corp of Canada v Computercorp Systems Inc, 1993 ABCA 215 at [para 7](#) [*Transamerica*], AOA, Tab 8, pp

213-214.

Houlden, Morawetz, Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th Edition, Release No. 2022-8, August 2022 [§ 2:132 para 3](#), AOA, Tab 21, p 440.

52. The phrase “persons aggrieved” should be interpreted broadly in accordance with the remedial nature of the *BIA*. It encompasses all persons whose rights to a bankrupt’s estate are affected by a decision of a trustee.

David Brook (Re), [2016 ONSC 6277](#), per Wilton-Siegel J [*Brook*], aff’d [2016 ONCA 50](#), AOA, Tab 9, p 218.

53. Section 37 of the *BIA* applies where a trustee’s decision affects “the rights of those who have a claim with respect to the estate”. The YongeSL LPs have such claims to the proceeds of the Debtors’ estates.

New Home Warranty of British Columbia, Re, 2001 BCSC 1160 at [para 8](#), AOA, Tab 10, p 248-249.

54. Courts have accepted that shareholders can be aggrieved persons. For example, in *Liu v Sung*, the bankrupts’ shareholders were accepted as persons aggrieved by the trustee’s refusal to commence a derivative action. There is no reason to treat limited partners differently.

Liu v Sung, 1989 CarswellBC 327 at [paras 19, 21 and 27](#) (SC), AOA, Tab 11, p 253-254.

Transamerica at [para 7](#), AOA, Tab 8, p 213-214.

American Bullion Minerals Ltd, 2007 BCSC 1083 at [para 22](#), AOA, Tab 12, p 265.

55. The Proposal Trustee relied on *Brook* in support of its argument that the YongeSL LPs lacked standing under s.37 of the *BIA*. That case, however, supports the YongeSL LPs’ position. In *Brook*, Wilton-Siegel J considered whether two persons, Global Royalties and BCI, had standing under s.37. In that case, Global Royalties and BCI asserted claims against the bankrupt, who claimed set off against them.

56. Wilton-Siegel J in *Brook* held that Global Royalties and BCI were not aggrieved because:

- (a) insofar as they claimed to be creditors, they were not aggrieved because their claims “have no merit or are offset by” the bankrupt’s causes of action against them; and
- (b) they had no “current right to any distribution out of the Bankrupt’s estate” or any “realistic expectation of any distribution other than possibly a distribution of negligible value”.

Brook at [paras 19-24](#), AOA, Tab 9, pp 222-223.

57. The *ratio* in *Brook* is that to be “aggrieved” within the meaning of s.37 of the *BIA*, one cannot simply lose out on a tactical advantage, like suffering “the loss of the possibility of preventing Brook from asserting his defence to their claims and asserting [certain causes of action], with the attendant costs”. Rather, the real question is whether the claimant is deprived of a legal right, such as one’s interest in the proceeds of the debtor’s estate are negatively affected. That is exactly the position of the YongeSL LPs. Their interest in the proceeds of the Debtors’ estates are negatively affected.

Brook at [para 25](#), AOA, Tab 9, p 223.

58. The YongeSL LPs’ interest in the proceeds of the Debtors’ estate are affected by the final determination of CBRE’s claim. As Justice Dunphy put it, the YongeSL LPs are among the “fulcrum stakeholders” because the limited partners are entitled to the proceeds of the Proposal after unsecured creditors with provable claims are paid in full. They are properly “persons aggrieved” within the meaning of s.37 of the *BIA*.

YSL re Sanction Hearing at [para 11](#), AOA, Tab 1, p 12.

b. The Motion Judge's hypothetical concern was unwarranted

59. The Motion Judge's hypothetical concern that creditors might challenge the treatment of other creditors' claims did not account for the fact that such a mechanism already exists under s.135(5) of the *BIA*. If a trustee does not disallow one creditor's claim, other creditors can apply to reduce the claim under that section. Section 37 of the *BIA* is simply a broader, more flexible remedy for *any person*, including an equity claimant, who is aggrieved by a decision of a trustee to challenge that decision. It is an "alternative means" of seeking redress from a decision of a trustee. The fact that there is overlap between s.37 and other rights to challenge the trustee does not limit s.37's scope.

GMAC Commercial Credit Corp – Canada v TCT Logistics Inc, 2006 SCC 35 at [para 66](#), *AOA*, [Tab 13 p 296](#). See also *PR Engineering Ltd v Clarke, Henning & Hahn Ltd*, 1990 CanLII 8089 at [para 6](#) (ONSC), *AOA*, [Tab 14, p 336](#).

B. The Motion Judge Erred in Allowing CBRE's Appeal

60. The Motion Judge erred in allowing CBRE's appeal from the disallowance of its proof of claim. The Motion Judge failed to recognize that the onus was on CBRE to prove its claim on a s.135(4) appeal and erred in accepting CBRE's vague and insufficient evidence as being capable of proving its claim on a balance of probabilities.

i. Standard of review on questions regarding the applicable provision or test

61. The application of the correct statutory provision or legal test are questions of law. The standard of review relating to the Motion Judge's error in applying s.135(5) of the *BIA* instead of s.135(4) is correctness.

Sally Creek Environs Corp, Re, 2010 ONCA 312 at [para 68](#) [*Sally Creek*], AOA, Tab 15, p 361.

ii. *CBRE had the burden to prove its claim*

62. The onus on a s.135(4) appeal is on the creditor whose proof of claim was disallowed (here, CBRE).

Sally Creek, 2010 ONCA 312 at [para 16](#), AOA, Tab 15, pp 343-344.

63. The creditor must prove on a balance of probabilities that its claim was valid.

Canadian Imperial Bank of Commerce v 433616 Ontario Inc (1993), 17 CBR (3d) 160, 1993 CarswellOnt 193 at [para 17](#) (Gen Div), AOA, Tab 16, p 404.

64. The onus on a s.135(5) challenge is on the party challenging the claim.

Karataglidis (Re), 2003 CanLII 64281 at [paras 6-8](#) (Ont Registrar), AOA, Tab 17, p 407.

65. The Motion Judge's analysis proceeded on the basis that the appeal before the Court was pursuant to s.135(5) of the *BIA*. By proceeding under the wrong subsection, the Motion Judge implicitly proceeded on the basis that the YongeSL LPs were required to demonstrate that CBRE's claim was invalid, when really the onus was on CBRE to prove that the Proposal Trustee's disallowance should be set aside. Imposing such an onus on the YongeSL LPs was an error.

iii. *CBRE's vague evidence is not proof on a balance of probabilities*

66. CBRE's evidence was incapable of proving its claim on a balance of probabilities. Its evidence boiled down to a single sentence: that "negotiations were ongoing from the point of

Concord's introduction until Cresford and Concord agreed that [the YSL Project] would be sold through a proposal made pursuant to [the *BIA*].”

The Dowbiggin Affidavit at para 24, ABCO, Tab 8, p 87 and EXHB, p 254.

67. A bald statement does not amount to proof on a balance of probabilities. Claims unsupported by *any* particulars or supporting material, like CBRE's, should be disallowed. Such evidence is not “clear” or “cogent” as the Motion Judge described it. The Motion Judge committed a palpable and overriding error in allowing CBRE's claim based on the meagre evidence that CBRE tendered.

Motion Decision at paras 47-48 and 58, ABCO, Tab 3, pp 35-36.

PART IV - ADDITIONAL ISSUES

68. The YongeSL LPs do not need leave to appeal the Motion Judge's Order for two reasons. First, leave to appeal is not required where the order or decision appealed from “is likely to affect other cases of a similar nature” in this proceeding.

[BIA, s.193\(b\).](#)

69. The Motion Decision is likely to affect other cases of a similar nature in this proceeding because:

- (a) the YongeSL LPs have challenged the Proposal Trustee's treatment of Harbour's claim pursuant to s.37 of the *BIA*;
- (b) the YongeSL LPs may wish to challenge the Proposal Trustee's treatment of Ms. Athanasoulis' claim;

(c) Ms. Athanasoulis may appeal the determination of her claim, and the YongeSL LPs would want to participate on such an appeal; and

(d) The Proposal Trustee is relying on the Motion Judge's decision to support its position that the YongeSL LPs lack standing in the proceeding.

Proposal Trustee's Notice of Motion dated December 22, 2022, ABCO, Tab 11, p 127.

70. The Motion Judge's conclusions that the YongeSL LPs lack standing affect those similar cases in this proceeding. Further, the Motion Judge's decision to accept CBRE's vague and insufficient evidence as capable of proving its claim sets the standard too low for proving the Harbour and Athanasoulis claims.

71. Leave to appeal is also not required because the "property involved in the appeal exceeds in value ten thousand dollars". CBRE's claim is for approximately \$1.2 million.

BIA, s.193(c).

Friedland, Re, 2011 BCCA 540 at paras 7 and 8, AOA, Tab 18, pp 414-415.

Roman Catholic Episcopal Corporation of St. George's, Re, 2007 NLCA 17 at paras 25-27, AOA, Tab 19, p 426.

72. Alternatively, if leave to appeal is required, it should be granted. Leave to appeal may be granted where (a) the appeal raises issues of general importance to the practice in bankruptcy or insolvency matters, or to the administration of justice as a whole, (b) the appeal is *prima facie* meritorious, and (c) the appeal would not unduly hinder the progress of the proceeding.

BIA s.193(e).

Business Development Bank of Canada v Pine Tree Resorts Inc, 2013 ONCA 282 at para 29, AOA, Tab 20, pp 435-436.

73. This appeal involves matters of general importance to bankruptcy matters because it involves legal questions of (a) whether equity claimants have standing in bankruptcy matters generally, (b) whether they have standing as “persons aggrieved” by an act or decision of a trustee; and (c) what minimum quality of evidence is required to prove a claim. This appeal is *prima facie* meritorious given the errors identified above. This proceeding would not be unduly delayed by this appeal. The Debtors’ only asset has been liquidated – they will have no ongoing business. Determinations of the outstanding claims against the Debtors will not be unduly delayed by this appeal.

PART V - CONCLUSION & ORDER SOUGHT

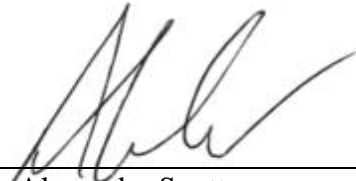
74. The Motion Judge erred in finding that the YongeSL LPs lack standing. They have the ultimate economic interest in this proceeding. They have a direct interest in the result of the determination of claims. The Motion Judge ought to have determined CBRE's appeal under s.135(4) of the *BIA* and followed the earlier decision of Justice Dunphy that confirmed the limited partners’ standing. In the alternative, the Motion Judge ought to have concluded that the YongeSL LPs had standing on CBRE’s appeal given that their rights were affected by its outcome, or alternatively, as “persons aggrieved” within the meaning of s. 37 of the *BIA*.

YSL re Funding at [para 59](#), AOA, Tab 3, p 48.

75. The Motion Judge also erred in allowing CBRE’s appeal from the disallowance of its claim. The Motion Judge impliedly put the onus on the YongeSL LPs to prove that CBRE’s claim was not provable, when the onus was properly on CBRE. The vague and insufficient evidence advanced by CBRE does not support a provable claim on a balance of probabilities.

76. The YongeSL LPs seek an order setting aside the order of the Motion Judge and granting an order in its place: (a) dismissing CBRE's motion; (b) declaring that CBRE's Proof of Claim is disallowed in full; (c) awarding the YongeSL LPs their costs of the motion below and of this appeal; and (d) declaring that the YongeSL LPs have standing in this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of January, 2023.



Alexander Soutter

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Court File No. BK-21-02734090-0031
Court of Appeal No. COA-22-CV-0451

COURT OF APPEAL FOR ONTARIO

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.**

CERTIFICATE

I estimate that one hour will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 23rd day of January, 2023.



Alexander Soutter

**SCHEDULE “A”
List of Authorities**

| No. | Case |
|-----|--|
| 1. | <u>YG Limited Partnership and YSL Residences (Re), 2021 ONSC 4178</u> |
| 2. | <u>Reasons for Decision of Justice S. F. Dunphy dated June 1, 2021</u> |
| 3. | <u>YG Limited Partnership (Re), 2022 ONSC 6138</u> |
| 4. | <u>Housen v Nikolaisen, 2002 SCC 33</u> |
| 5. | <u>Ivandaeva Total Image Salon Inc v Hlemgizky, 2003 CanLII 43168 (ON SC)</u> |
| 6. | <u>Stegenga v Jans, 2021 ONSC 7898</u> |
| 7. | <u>Pfizer Ireland Pharmaceuticals, 2021 ONSC 6345</u> |
| 8. | <u>Transamerica Commercial Finance Corp of Canada v Computercorp Systems Inc, 1993 ABCA 215</u> |
| 9. | <u>David Brook (Re), 2016 ONSC 6277</u> , per Wilton-Siegel J, aff'd <u>2016 ONCA 50</u> |
| 10. | <u>New Home Warranty of British Columbia, Re, 2001 BCSC 1160</u> |
| 11. | <u>Liu v Sung, 1989 CarswellBC 327</u> |
| 12. | <u>American Bullion Minerals Ltd, 2007 BCSC 1083</u> |
| 13. | <u>GMAC Commercial Credit Corp – Canada v TCT Logistics Inc, 2006 SCC 35</u> |
| 14. | <u>PR Engineering Ltd v Clarke, Henning & Hahn Ltd, 1990 CanLII 8089 (ON SC)</u> |
| 15. | <u>Sally Creek Environs Corp, Re, 2010 ONCA 312</u> |
| 16. | <u>Canadian Imperial Bank of Commerce v 433616 Ontario Inc (1993), 17 CBR (3d) 160, 1993 CarswellOnt 193</u> |
| 17. | <u>Karataglidis (Re), 2003 CanLII 64281</u> |
| 18. | <u>Friedland, Re, 2011 BCCA 540</u> |
| 19. | <u>Roman Catholic Episcopal Corporation of St. George’s, Re, 2007 NLCA 17</u> |
| 20. | <u>Business Development Bank of Canada v Pine Tree Resorts Inc, 2013 ONCA 282</u> |

| No. | Case |
|-----|--|
| | Secondary Sources |
| 21. | Houlden, Morawetz, Sarra, <i>Bankruptcy and Insolvency Law of Canada</i> , 4 th Edition, Release No. 2022-8, August 2022 § 2:132 para 3 . |

**SCHEDULE “B”
Excerpts of Relevant Statutes**

[Bankruptcy and Insolvency Act, RSC 1985, c B-3](#)

[S.37](#)

Appeal to court against trustee

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.

[...]

[S.135](#)

Admission and Disallowance of Proofs of Claim and Proofs of Security

Trustee shall examine proof

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.

Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

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.

Court File No.: BK-21-02734090-0031
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COURT OF APPEAL FOR ONTARIO

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