

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

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

FACTUM OF THE PROPOSAL TRUSTEE
(Re: Motion Returnable September 26, 2022)

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PART I ~ OVERVIEW

1. Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the report dated September 12, 2022 (the "**Seventh Report**") prepared by KSV Restructuring Inc., in its capacity as the proposal trustee (the "**Proposal Trustee**") in connection with the Notices of Intention to Make a Proposal filed on April 30, 2021 by YG Limited Partnership and YSL Residences Inc. (collectively, "**YSL**") pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") dated September 12, 2022 (the "**Report**").

2. CBRE, a creditor of YSL, has brought a motion pursuant to Section 135 of the BIA appealing the Proposal Trustee's disallowance of its claim filed in the amount of approximately \$1.2 million. Given the evidence provided by CBRE, the Proposal Trustee has agreed to accept CBRE's claim as originally filed and CBRE

has agreed to seek no costs on the dispensation or withdrawal of its appeal. No creditor is opposed to this resolution.

3. Depending on the final resolution of the remaining three Disputed Claims in these proceedings there may be a residual *equity* amount distributable to the LPs. The LPs, however, are not creditors of YSL.

4. The LPs oppose the Proposal Trustee's resolution of CBRE's appeal. They argue that CBRE is not entitled to file any evidence which was not provided with its proof of claim and, therefore, the Proposal Trustee's disallowance should stand. The LPs also argue that even on such evidence the appeal should be dismissed and the Proposal Trustee should not have agreed to accept CBRE's claim as originally filed.

5. The LPs' opposition ought to be dismissed for the following reasons:

- (a) The LPs do not have standing to oppose;
- (b) The Proposal Trustee agreed with CBRE that CBRE was entitled to file its full evidentiary record on appeal given the Proposal Trustee's approach to determining CBRE's claim; and
- (c) Based on CBRE's evidence, which is uncontested by any party, it is reasonable to conclude that CBRE is entitled to its commission pursuant to the terms of its Listing Agreement.

6. Pursuant to Section 37 of the BIA, the LPs do not have standing to oppose the Proposal Trustee's resolution of CBRE's claim as the LPs are not a

creditor, the debtor or a “person aggrieved”. Decisions of a Proposal Trustee that merely have the affect of reducing distributions available to other stakeholders do not make one a “person aggrieved” by such decisions for the purposes of Section 37 of the BIA.

7. In addition, the LPs have no jurisdiction to apply to have CBRE’s claim expunged pursuant to Section 135(5) of the BIA as they are not a creditor or the debtor and the Proposal Trustee is actively engaged in the adjudication of the CBRE claim.

8. 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 on one complete record.

9. Accordingly, CBRE’s appeal is not an attempt at a *de novo* adjudication of its claim but rather the Proposal Trustee’s procedural means of dealing with CBRE’s claim in an open and transparent manner.

10. The BIA is a commercial statute and the scheme set out thereunder is summary in nature. The administration and determination of claims is clearly the

mandate of the trustee pursuant to Section 135 of the BIA. In carrying out this administrative duty, the role of the trustee is not to obtain absolute certainty that a claim should be allowed and otherwise disallow it. Rather, the trustee must be commercially pragmatic and need only satisfy itself that in good faith it is reasonable to conclude that a claim exists and, if so, allow it.

11. Having the trustee administer claims in such a manner is in accordance with the summary nature of the BIA and maintains its expediency and efficiency. This avoids time consuming and costly litigation for each and every claim.

12. For the reasons set out below, it is more than reasonable to conclude that CBRE is entitled to its commission pursuant to the terms of its Listing Agreement.

PART II ~ FACTS

13. The facts pertaining to the relief being sought in the Motion are set out in the Report. A summary of key facts follows.

14. On July 16, 2021, this Court sanctioned a final amended proposal made by YSL pursuant to the BIA. No inspectors were appointed in the Final Proposal.

15. YSL is part of the Cresford Group of Companies, a Toronto-based real estate developer. In addition to the NOI Proceedings, several of Cresford's other developments have been subject to restructuring proceedings.

16. Residences was the registered owner of the real properties municipally known as 363-391 Yonge Street and 3 Gerrard Street East, Toronto, Ontario, acting as a bare trustee and nominee of, for and on behalf of the Partnership.

17. The Partnership was the beneficial owner of the Real Property and was formed for the purpose of developing the Real Property into a mixed-use office, retail and residential condominium development comprised of approximately 1,100 residential units, 190,000 square feet of commercial/retail/institutional space and 242 parking spaces known as the YSL Project.

18. As a result of the successful implementation of the Final Proposal, title to the Real Property was transferred to an affiliate of the Sponsor.

19. The Final Proposal provided for an Affected Creditor Cash Pool in the amount of \$30.9 million. Sixty-five (65) claims have been filed against the

Companies, including claims from trade creditors, real estate brokerages, professional advisors and former employees. Concord, the Proposal Sponsor, is the largest creditor by way of assignment of claims totalling \$12 million.

20. Of these claims, the total amount of undisputed proven claims to date equals \$14.874 million and only 3 disputed claims remain. CBRE's claim is one of the Disputed Claims.

21. 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.

Estimated Distributions	Amount (\$000)	
	High	Low
Affected Creditor Cash Pool	30,900	30,900
<u>Claims</u>		
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	-

22. CBRE, a real estate brokerage, filed a proof of claim dated January 28, 2022 in the amount of approximately \$1.2 million. The claim relates to an invoice submitted by CBRE to "Cresford" dated October 13, 2021 and refers to services rendered by CBRE serving as the exclusive listing broker for the YSL Project pursuant to an unsigned listing agreement between CBRE and Residences.

23. The term of the Listing Agreement is six months from February 20, 2020 to August 20, 2020 (the "Term"). The Real Property was conveyed to the Sponsor on or about July 22, 2021 as a consequence of implementing the Final Proposal.

24. Therefore, one of the key issues in respect of CBRE's claim is the applicability of the "holdover clause" in the Listing Agreement, which reads as follows:

HOLDOVER

4.1

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 Brokerage is authorized to continue negotiations with such persons or entities. 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, provided, however, that if a written offer has been submitted, then it shall not be necessary to include the offeror's name on the list.

25. Accordingly, the holdover provision would only be applicable if "negotiations continue, resume or commence" with the Sponsor, within such 90-day period and the Sponsor was someone "to whom the Property was introduced or submitted, ..., or to whom the Owner was introduced ... prior to the expiration of the Term".

26. Given somewhat conflicting representations made to the Proposal Trustee by Cresford and the Sponsor and 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 in turn 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 on one complete record rather than all this evidence only being provided to the Proposal Trustee.

27. 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*".

28. 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.

29. 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.

30. 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.

31. 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 uncontroverted 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.

32. 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 to CBRE's motion. 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.

33. On August 18, 2022, counsel to the LPs sent a letter to counsel to the Proposal Trustee, among other things, informing the Proposal Trustee that they had instructions to challenge CBRE's appeal and requesting a copy of CBRE's proof of claim and the CBRE Notice. The Proposal Trustee subsequently provided these documents to the LPs' counsel on a without prejudice basis to the Proposal Trustee's and CBRE's rights to contest the LPs' standing on CBRE's motion.

34. As of the date of the Report, no other parties in these proceedings have contested the Proposal Trustee's allowance of CBRE's claim, including the Proposal Sponsor, which, as noted above, is the largest creditor in these proceedings by way of assignment of a number of claims.

35. The LPs served their responding motion record on August 19, 2022. Their motion record contains no evidence contesting or challenging any of the evidence submitted by CBRE.

36. The LPs then requested to cross-examine Mr. Dowbiggin and Mr. Gallagher, CBRE's other affiant and an Executive Vice President on the National Investment Team at CBRE. The Proposal Trustee understands that CBRE consented to the cross-examinations being conducted without prejudice to contesting the LPs rights to cross-examine CBRE's affiants.

37. The Proposal Trustee notes that the Final Proposal provides that all of the reasonable administrative fees and expenses of the Proposal Trustee must be funded by the Sponsor. Accordingly, all of the Proposal Trustee's costs and expenses, including those of its legal counsel, incurred in dealing with the LPs' opposition to this motion are ultimately payable by the Sponsor and, therefore, do not erode any of the potential recoveries of the LPs.

PART III ~ ISSUES AND THE LAW

38. The issues on this motion are as follows:

- (a) Do the LPs have standing?;
- (b) Is CBRE entitled to file the evidence provided in their motion record?;
- and
- (c) Should CBRE's claim be allowed?

The LPs Do Not Have Standing

39. As limited partners, their only economic interest is a *possible* return of capital depending on the final determination of the Disputed Claims.

40. The LPs are not creditors and therefore are not entitled to bring an application pursuant to Section 135(5) of the BIA to expunge or reduce a proof of claim.

41. The LPs are also not a person aggrieved by any act or decision of the Proposal Trustee pursuant to Section 37 of the BIA entitling them to apply to this Court to reverse or modify the act or decision complained of.

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

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

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

Global Royalties at [para 14](#).

44. The power to bring a section 37 application “must be judicially exercised... [t]o obtain relief under this section, the onus rests upon the applicant to show that it has been aggrieved by the decision of the trustee, or has suffered damage or prejudice as a result of the trustee's action: *Re Gareau (English & Scotch Woollen Co.)*, *Ex parte Joseph Bros.* (1922), 3 C.B.R. 76 (Que.).”

Global Royalties at [para 15](#).

45. Deciding to deal with CBRE's claim by way of a notice of disallowance with a full evidentiary appeal on notice to all is not a decision that has deprived the LPs of anything let alone any legal right.

46. Determining to settle CBRE's appeal by admitting CBRE's claim on the basis of such full evidentiary record is also not a decision that has deprived the LPs of anything.

47. The LPs have provided no other statutory basis under the BIA which entitles them to apply for any relief in respect of the determination of CBRE's claim.

CBRE is Entitled to Provide a Full Evidentiary Record

48. The Proposal Trustee consented to CBRE providing a full evidentiary record in response to its notice of disallowance as the procedure for dealing with CBRE's claim in the most transparent and efficient manner given the context of these proceedings and the information available to it at the time.

49. It would be unfair and prejudicial not to permit CBRE to respond with a full evidentiary record given that the Proposal Trustee did not request CBRE's response to the representations made to it by the Sponsor and CBRE was not provided any prior opportunity to know and answer the full case against it. This was by design given how the Proposal Trustee decided to deal with CBRE's claim as described above.

50. No creditor has objected to this process including the largest creditor, Concord.

51. No one has filed any evidence contesting the evidence provided by CBRE.

52. Again, there simply is no prejudice to anyone by permitting CBRE to provide a full evidentiary response.

53. The LPs' position that CBRE must be held to the evidence it provided in its proof of claim and is not entitled to a *de novo* hearing on its appeal is simply wrong and misplaced in the context of this case for the reasons outlined above.

CBRE's Claim Should Be Allowed

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](#).

55. "Solutions to BIA concerns require consideration of the realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard. What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis."

Re Residential Warranty Co. of Canada Inc., [2006 ABQB 236](#) at [para 27](#), aff'd 2006 ABCA 293.

56. “The Act puts day-to-day administration into the hands of trustees in bankruptcy and inspectors as business people and professionals; it is intended that the administration should be practical not legalistic, and the Act should be interpreted to give effect to this intent: *Re Russell* (1999), 1999 CarswellAlta 718, 12 C.B.R. (4th) 316, 177 D.L.R. (4th) 396, 71 Alta. L.R. (3d) 85, 237 A.R. 136, 197 W.A.C. 136 (C.A.).”

Houlden, Morawetz, Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th Edition, Release No. 2022-8, August 2022. § 1:8. Proposal Trustee’s Book of Authorities, Tab 1.

57. In deciding the validity of a claim, certainty is not the test. If the method used in calculating the amount of the claim is reasonable and the evidence in support of the claim is relevant and probative, the claim should be admitted. If a creditor adduces relevant and probative evidence from which a valid claim can be reasonably inferred, the test has been met and the claim is provable.

Mamczasz Electrical Ltd v South Beach Homes Ltd., [2010 SKQB 182](#) at paras [46-47](#).

Re Summit Glen Waterloo/2000 Developments Inc., [2016 ONCA 406](#) at paras [27-29](#).

58. As discussed above, 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.

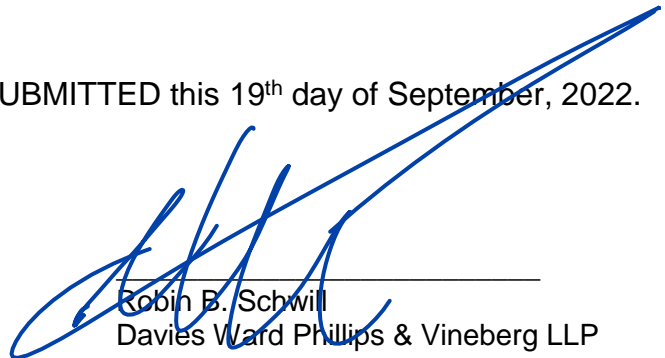
Dowbiggin that Cresford dealt with CBRE on the basis that the Listing Agreement was in force, notwithstanding that it was never signed. In the Proposal Trustee's view, the ongoing dialogue between Cresford and the Sponsor, as well as Cresford's and CBRE's conduct related to the Listing Agreement suggests that the holdover provisions apply and therefore entitle CBRE to its fee.

59. The LPs seem to complain that the evidence supporting CBRE's claim is not perfect nor exhaustive. But certainty is not the test. As long as the evidence in support of the claim is relevant and probative, which it is, the claim should be admitted.

PART IV ~ RELIEF SOUGHT

60. CBRE's claim should be allowed and its motion dispensed with without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of September, 2022.



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Lawyers for the Proposal Trustee

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Global Royalties Ltd. v. Brook*, [2016 ONSC 6277, 273 A.C.W.S.](#) (3d) 26 (Ont. S.C.J. [Commercial List])
2. *Oil Lift Technology Inc. v Deloitte & Touche Inc.*, [2012 ABQB 357](#)
3. *Re Residential Warranty Co. of Canada Inc.*, [2006 ABQB 236](#)
4. Houlden, Morawetz, Sarra, Bankruptcy and Insolvency Law of Canada, 4th Edition, Release No. 2022-8, August 2022. § 1:8
5. *Mamczasz Electrical Ltd v South Beach Homes Ltd.*, [2010 SKQB 182](#)
6. *Re Summit Glen Waterloo/2000 Developments Inc.*, [2016 ONCA 406](#)

SCHEDULE "B"
RELEVANT STATUTES

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, Section 37.

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.

2. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, Section 135.

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.

(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.

(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.

(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.

(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.

(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.

3. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, Section 66.

66 (1) All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.

**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 –
COMMERCIAL LIST**

Proceeding Commenced at Toronto

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(Motion Returnable September 26, 2022)

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