

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.**

NOTICE OF APPEAL

THE APPELLANTS, YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc. (collectively, the “**YongeSL LPs**”), **APPEAL** to this Court from the Order of the Honourable Justice Peter Osborne of the Superior Court of Justice (the “**Motion Judge**”) made on November 22, 2022 at Toronto, Ontario (the “**Order**”).¹

THE APPELLANTS ASK that the Order be set aside and that an order be granted in its place as follows:

1. Dismissing the motion brought by CBRE Limited (“**CBRE**”) for an order setting aside the disallowance of its Proof of Claim in this proceeding by KSV Restructuring Inc., in its capacity as the proposal trustee (the “**Proposal Trustee**”) of the debtors YG Limited Partnership and YSL Residences Inc. (together, the “**Debtors**”);

¹ The Motion Judge’s reasons for decision were dated November 16, 2022, but only released to the parties by email on November 22, 2022. The YongeSL LPs have asked the Court to correct the typographical error in the date but, in the event that it is necessary, seek leave to extend the time to appeal.

2. Declaring that CBRE's Proof of Claim in this proceeding is disallowed in full;
3. Awarding the YongeSL LPs the costs of the motion below and of this appeal; and
4. Such further and other relief as this Court may deem just.

THE GROUNDS OF APPEAL are:

5. The YongeSL LPs represent the ultimate economic interest in this proceeding and it was an error of law to deny the YongeSL LPs standing on CBRE's motion. In particular, the Motion Judge:
 - (a) erred in applying s.135(5) of the *Bankruptcy and Insolvency Act* ("**BIA**");
 - (b) erred by not following the earlier decision of Justice Dunphy which determined that the YongeSL LPs had standing in this proceeding as an affected group; and
 - (c) erred in determining that the Yonge SL LPs were not "persons aggrieved" under s.37 of the *BIA*.
6. The Motion Judge also committed a palpable and overriding error in allowing CBRE's claim. There was inadequate evidence before the Court such that CBRE's claim could succeed.

Background to the Proceeding

7. In summer 2021, the Debtors commenced this *BIA* proceeding as a pre-packaged liquidation designed primarily to benefit the Cresford Group, the developer that controlled the Debtors. The Debtors' original proposal would have seen the Cresford Group extract approximately \$22 million from the "**YSL Project**", the condominium development

owned by the Debtors. Unsecured creditors would have recovered a maximum of 58% of their claims. Under the original proposal, the Class A Unit holders of YG Limited Partnership (the “**limited partners**”), who had invested \$14.8 million in the YSL Project, would have recovered nothing.

8. The Proposal Trustee supported the Debtors’ original proposal. The limited partners did not. Justice Dunphy agreed that the original proposal was not made in good faith or designed to benefit the general body of creditors. His Honour refused to sanction it but gave the Debtors an opportunity to put forward a new proposal. The new proposal, which was ultimately Court-approved (the “**Proposal**”), did not cap unsecured creditor recovery. Indeed, unsecured creditors may yet recover 100% of their claims. The limited partners may yet recover their investment in the YSL Project.
9. By way of the Proposal, the Debtors transferred the YSL Project lands to Concord Properties Developments Corp. (“**Concord**”), another developer.
10. Article 5.05 of the Proposal expressly provides that the limited partners, including the YongeSL LPs, are entitled to any residue of the Proposal after final distributions to creditors.

Three Outstanding Claims Against the Debtors

11. Since the Proposal was sanctioned, the Proposal Trustee has been determining claims made against the Debtors. Three claims 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; and (c) an \$18 million claim by the Cresford Group's former President of Marketing, Maria Athanasoulis.

12. Subject to the resolution of those three claims, the limited partners may yet recover their \$14.8 million investment in the YSL Project, plus some return thereon.
13. 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 the Motion Judge's decision.
14. 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, pursuant to which the Proposal Trustee defended the claim. 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.
15. The limited partners and Concord were left out of this process. Once they learned of the outcome, the limited partners took steps to challenge the Proposal Trustee's right to arbitrate Ms. Athanasoulis' claim. Those steps are summarized in an October 17, 2022, decision of Justice Kimmel (*YG Limited Partnership (Re)*, 2022 ONSC 6138). 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 is now in the process of developing its protocol for the determination of that claim.

16. 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.

CBRE's Claim

17. CBRE is a real estate broker retained by the Debtors before the Debtors filed Notices of Intention to Make a Proposal under the *BIA*. CBRE was retained to broker the sale of the YSL Project. The YSL Project was ultimately conveyed to Concord, the proposal sponsor, in this proceeding.
18. CBRE's claim is for more than \$1.2 million as a commission arising after the conveyance of the YSL Project from the Debtors to Concord in this proceeding. CBRE's claim depends on there having been negotiations between the Debtors and Concord during a certain 90-day period (the "**Holdover Period**"). There was no evidence of such negotiations before the Proposal Trustee. The Proposal Trustee disallowed CBRE's claim.

CBRE's Appeal to the Motion Judge

19. CBRE appealed the Proposal Trustee's disallowance of its claim and 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". Mr. Dowbiggin, the former President of a company in the Cresford Group (not the Debtors), did not adopt this hearsay statement in his affidavit; and

(b) 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*].

20. The Proposal Trustee changed its position after CBRE appealed 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.
21. The YongeSL LPs opposed CBRE's appeal and the Proposal Trustee's request that the Motion Judge approve its settlement of it. The YongeSL LPs took the position that Mr. Dowbiggin's vague statement that "negotiations were ongoing" during the Holdover Period was not cogent evidence capable of proving a claim. CBRE had not met its onus and the Proposal Trustee ought to have maintained its disallowance of CBRE's claim.

The Motion Judge's Decision

22. The Motion Judge concluded that the YongeSL LPs had no standing before the Court and found that CBRE had proven its claim. Respectfully, the Motion Judge (a) erred in law by concluding that the YongeSL LPs lacked standing; and (b) committed a palpable and overriding error in concluding that CBRE had proven its claim.

The Motion Judge erred in law by concluding that the YongeSL LPs lack standing

23. The Motion Judge held that the YongeSL LPs "lack the standing in this case to challenge the disallowance [of CBRE's claim] by the Proposal Trustee.". The effect of the Motion

Judge's ruling is to deny the YongeSL LPs the right to be heard in circumstances where their interests are affected by the decision. That conclusion is in error.

24. The Motion Judge erred in applying s.135(5) of the *BIA*, which had no application to the relief sought on CBRE's motion. Section 135(5) 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." The section does not apply where a creditor appeals the disallowance of its proof of claim, as CBRE sought on its motion in this proceeding.
25. The YongeSL LPs were not challenging the Proposal Trustee's disallowance of CBRE's claim. To the contrary, they supported it. The YongeSL LPs opposed (a) CBRE's appeal and request that its proof of claim be allowed; and (b) the Proposal Trustee's consent to CBRE's appeal, which consent amounted to the Proposal Trustee agreeing to set aside its own disallowance. Even if s.135(5) did apply, which it did not, the YongeSL LPs would still have standing on CBRE's motion.
26. The Motion Judge also erred in law by failing to apply the earlier decision of Justice Dunphy whereby the YongeSL LPs have already been granted standing in this proceeding, over the objections of Concord and the Debtors. Justice Dunphy addressed that issue in the weeks leading up to the Debtors' unsuccessful motion for approval of their original proposal. Justice Dunphy determined that it was plain that the limited partners' arguments on the Debtors' proposal ought to be fleshed out and heard, and that the sanction hearing was effectively the only opportunity that the limited partners would have to make their case and be heard. They were affected by the outcome of the motion to sanction the original proposal and were entitled to be heard.

27. As a result of the limited partners making that case, the original proposal was rejected and the improved Proposal put forward, to the benefit of all unsecured creditors and the limited partners.
28. The YongeSL LPs represent the ultimate economic interest in this proceeding. The Debtors' proposal expressly provides that the limited partners are entitled to the entire proceeds of the YSL Project after unsecured creditors are paid. Their interests are affected by the determination of CBRE's claim. This alone should have afforded them standing to make submissions on CBRE's appeal. The Motion Judge erred in law by concluding that they lacked standing.

The Motion Judge erred in law by concluding that the YongeSL LPs were not "aggrieved"

29. The YongeSL LPs' primary position was that they had standing to oppose CBRE's appeal and that the Proposal Trustee's purported settlement of the appeal was not determinative of the appeal. In the event that it was necessary, however, they brought a motion under s.37 of the *BIA* for the purpose of challenging the Proposal Trustee's decision to settle the appeal.
30. Without deciding whether the s.37 application was necessary at all, the Motion Judge concluded that the YongeSL LPs were not "persons aggrieved" within the meaning of s.37. The Motion Judge erred in law in his interpretation of that section, which 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.

31. If it were necessary to bring a s.37 motion to challenge the Proposal Trustee's proposed settlement of the appeal, the YongeSL LPs were proper persons to make that challenge. The definition of "person aggrieved" should be afforded a wide scope and not be subjected to a restrictive interpretation. While such a person cannot be a "mere busybody", they include a person who has a genuine grievance because a decision of a trustee has prejudicially affected their interests. The YongeSL LPs are not mere busybodies. They have a real economic interest in the Debtors' estates. The Motion Judge's interpretation of s.37 was unduly narrow and constituted an error of law.
32. The Motion Judge held that the YongeSL LPs were not "persons aggrieved" because their complaint boiled down to the fact that their ultimate potential recovery would be reduced if CBRE's claim were allowed. The Motion Judge concluded that that was not sufficient to make them "persons aggrieved" because that would mean that every creditor would have standing to challenge the treatment of another creditor's claim in a bankruptcy, a notion which the Motion Judge rejected. This conclusion was an error of law.
33. A mechanism already exists for creditors to challenge the treatment of other creditors' claims. If a trustee does not disallow a claim, the creditors can apply for that relief under section 135(5). Section 37 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.
34. Courts have accepted that shareholders can be aggrieved persons. There is no reason to treat limited partners such as the YongeSL LPs differently.

35. Parties who have claims to the proceeds of an insolvent estate, as the YongeSL LPs do, have standing under s.37. It was an error of law for the Motion Judge to conclude otherwise.

The Motion Judge erred in allowing CBRE's appeal and claim

36. The Motion Judge committed a palpable and overriding error in allowing CBRE's appeal and claim. There was inadequate evidence before the Motion Judge such that CBRE's claim could succeed.
37. In the summary process set out in s.135 of the *BIA*, CBRE is expected to put its best foot forward, just as if it were seeking summary judgment. A creditor is expected to adduce all evidence it has in support of its claim. That evidence must be detailed and particularized as opposed to vague, unparticularized pieces of evidence, which is really no evidence at all. The fact that a summary process is to be used does not call for a lower standard of proof than used in a fuller process.
38. CBRE adduced only vague, unparticularized and hearsay pieces of evidence. The central issue on CBRE's appeal was whether negotiations between the Debtors and Concord took place during the Holdover Period. CBRE's evidence on this issue was limited to the two sentences reproduced above.
39. The Motion Judge's review of the merits of CBRE's claim was limited to mere reference to the affidavits of Mr. Gallagher and Mr. Dowbiggin.
40. It cannot be that such evidence is enough for a creditor to prove a claim in an insolvency proceeding. The Motion Judge committed a palpable and overriding error in accepting that such evidence could prove CBRE's claim.

Basis for the Court of Appeal's Jurisdiction

41. An appeal lies to the Court of Appeal from the Order pursuant to s.183(2) of the *BIA* and s.193(b) and (c), or alternatively (e), of the *BIA*.
42. Pursuant to s.193(b) of the *BIA*, the YongeSL LPs may appeal the Order without leave. The Order is likely to affect other cases of a similar nature in this proceeding:
 - (a) the YongeSL LPs have challenged the Proposal Trustee's decisions in respect of the Harbour claim. The limited partners might challenge the Proposal Trustee's ultimate decision in respect of the Athanasoulis claim or decide to participate in any appeal of such decision (eg if Ms. Athanasoulis appeals). The Motion Judge's conclusions that the YongeSL LPs lack standing affect those cases; and
 - (b) further, the Motion Judge's finding that the vague statements made by CBRE's deponents were sufficient to prove a claim sets too low a bar and affects the quality of evidence necessary for proof of the Harbour and Athanasoulis claims.
43. Pursuant to s. 193 (c) of the *BIA*, the YongeSL LPs may appeal the Order without leave. The property involved in the appeal exceeds ten thousand dollars in value. CBRE's claim is for approximately \$1.2 million. The property involved in the appeal meets the statutory minimum.
44. Alternatively, if leave to appeal is required, the YongeSL LPs seek leave to appeal pursuant to s.193(e) of the *BIA* and ask that the motion for leave be heard at the same time as the appeal. 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 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 described herein, particularly the Athanasoulis claim, will not be unduly delayed by this appeal.

December 2, 2022

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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
Court of Appeal No.

COURT OF APPEAL FOR ONTARIO

NOTICE OF APPEAL

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