Court File No. BK-21-02734090-0031
Court of Appeal File Nos. COA-22-CV-0451
& COA-23-CV-0288

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.
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

ORAL ARGUMENT COMPENDIUM OF THE PROPOSAL TRUSTEE KSV RESTRUCTURING INC.

June 28, 2023

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Lawyers for the Respondents,
the Proposal Trustee, KSV Restructuring Inc.

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I N D E X

Outline of Oral Argument of the Proposal Trustee,
KSV Restructuring Inc.

1. The lower courts acted reasonably in imposing reasonable limits on the standing of the appellant limited partners (the "**LPs**") to participate in creditors' appeals under s. 135 of the *Bankruptcy and Insolvency Act* ("**BIA**").

2. In any event, both decisions on appeal were correct, and the LPs' appeals are either moot or premature:

   (a) In the CBRE matter (Court File No. COA-22-CV-0451), Justice Osborne correctly found that the CBRE appeal should be allowed. Notwithstanding his finding that the LPs did not have standing, Justice Osborne considered the LPs' arguments on the merits and correctly found them wanting. The issue of standing is moot.

   (b) In the Athanasoulis matter (Court File No. COA-23-CV-0288), Justice Kimmel did not make a final determination denying the LPs the ability to make any argument. She deferred to the judge hearing any appeal the ultimate determination of what arguments the LPs may advance. The LPs' appeal is premature.

The CBRE Appeal

3. The "Holdover Clause" provides that CBRE is entitled to its commission if negotiations continued between August 21 and November 18, 2020 with a party introduced to YSL by CBRE, and eventually resulted in a transaction. [Brokerage Agreement, Tab 2]

4. CBRE introduced YSL to Concord, and negotiations continued during the Holdover Period. [Gallagher Affidavit, Tab 3; Dowbiggen Affidavit, Tab 4; KSV Seventh Report, Tab 5]

5. The LPs did not cross-examine on this issue or introduce any evidence to the contrary. [KSV Seventh Report, Tab 5; Endorsement of Osborne J., Tab 6]

6. Section 135(4) of the BIA only permits a creditor whose claim was disallowed to appeal that disallowance. [Relevant BIA Excerpts, Tab 7] The LPs are not creditors and have no standing under s. 135(4). [*Royal Bank v. Insley*, Tab 8; *Re Enernorth*, Tab 9]

7. Justice Dunphy granted the LPs standing on the sanction motion because they had an outstanding proceeding against the debtors claiming that YSL had no authority to initiate proposal proceedings. [Endorsement of Dunphy J., Tab 10]

8. The LPs are not "persons aggrieved" under s. 37 of the BIA. [*Re Brook*, Tab 11; *Re OSFC Holdings*, Tab 12; *Re Drummie*, Tab 13]

The Athanasoulis Claim

9. The Proposal Trustee has expressed an intention to disallow the Athanasoulis Claim on the grounds that: (i) her claim is in the nature of equity not debt; (ii) Cresford did not in fact earn a profit on the YSL project; and (iii) her claim was subordinated to the interests of the LPs. [Draft Disallowance, Tab. 14]

10. Justice Kimmel set out a process for the final determination of that claim, and any appeal. That process is now largely complete. She also proposed limits on the LPs' standing to participate in any appeal of that determination, <u>subject explicitly to the discretion of the judge hearing any appeal</u>. [Endorsement of Kimmel J., Tab 15]

11. The claims process under the BIA is between the trustee, the creditor claimant and the debtor. Allowing third party stakeholders with an economic interest in the outcome to intervene would undermine the need for efficient and expedient claims resolution.

12. None of the cases relied on by the LPs involve appeals under s. 135 of the BIA, and therefore they are of no assistance on this appeal. [*Ivandaeva v. Hlembizky*, Tab 16; *Blake v. Blake*, Tab 17]

THIS EXCLUSIVE SALES LISTING AGREEMENT dated February 20, 2020 (the "Agreement")

BETWEEN

YSL RESIDENCES INC. (the "**Owner**")

-and-

CBRE Limited (the "**Brokerage**")

WHEREAS the Owner is the legal owner of 363-391 Yonge Street & 3 Gerrard Street East Toronto, Ontario (the "**Property**");

AND WHEREAS the Owner wants to retain the Brokerage to serve as the exclusive listing brokerage for the sale of the Property;

AND WHEREAS the Brokerage listing team representing the Owner in the sale of the Property shall consist of Peter D. Senst and Casey Gallagher (the "**Listing Team**");

NOW THEREFORE in consideration of the listing for sale of the Property by the Brokerage, and the Brokerage's efforts to effect a sale of the Property, the Owner and the Brokerage hereby agree as follows:

ARTICLE 1 RECITALS

1.1 The above recitals are true and accurate in all respects.

ARTICLE 2 TERM

2.1 The Owner grants to the Brokerage the exclusive right to sell the Property for a period commencing February 20, 2020 and expiring at midnight on August 20, 2020 (the "**Term**").

2.2 Notwithstanding the foregoing, if at any time after the receipt of best-and-final bids, the Owner is not satisfied with pricing, the Owner may terminate this Agreement upon the provision of 10 days' notice to the Brokerage and all obligations hereunder shall be at an end.

ARTICLE 3 THE BROKERAGE RENUMERATION

3.1 The Owner agrees to pay the Brokerage a commission equivalent to 0.65% of the Gross Sale Price of the Property (the "**Commission**"). Gross sales price shall include any and all consideration received or receivable, in whatever form, including but not limited to assumption or release of existing liabilities, without any downward adjustments for any capital, environmental issues, mark-to-market adjustment or yield maintenance fees with respect to existing mortgages as adjusted on the closing of the transaction pursuant to an agreement of purchase and sale executed and delivered by Owner. Commission shall be paid and deemed earned if and only if a closing occurs pursuant to a contract of sale executed and delivered by Owner.

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

partnership or other business entity is transferred, whether by merger or outright purchase or otherwise in lieu of sale of the Property.

3.3 The Commission shall be payable immediately upon closing of the agreement of purchase and sale referred to in section 3.2(a) above; or upon the completion of the transfer referred to in section 3.2(b) above; notwithstanding that the sale may close, or the transfer may be completed, following the expiry of the Term.

3.4 The Commission payable herein shall be subject to the payment of Harmonized Sales Tax (HST) thereon by the Owner.

ARTICLE 4 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.

ARTICLE 5 THE OWNER SHALL NOT ENGAGE ANOTHER BROKERAGE DURING THE TERM

5.1 The Owner warrants to the Brokerage that, as at the date of execution of this Agreement, the Owner is not a party to a valid listing agreement with any other real estate brokerage with respect to the sale of the Property. The Owner shall not engage the services of another real estate brokerage during the Term with respect to the sale of the Property.

5.2 The Owner agrees to cooperate with the Brokerage in bringing about the sale of the Property and to refer immediately to the Brokerage all inquiries of anyone interested in the Property. All negotiations are to be through the Brokerage.

5.3 The Owner and the Brokerage hereby acknowledge that this is an exclusive listing and that the Brokerage shall not be required to cooperate with any other brokerage in connection with this exclusive listing. At the sole discretion of the Brokerage, a third-party real estate agent (the "**Cooperating Agent**") may be permitted to cooperate in the sale of the Property and any Cooperating Agent shall comply with the terms of this Agreement.

ARTICLE 6 DUAL AGENCY

6.1 The Owner acknowledges and agrees that the Brokerage may represent the Owner and a purchaser in a dual agency relationship. In the event that such dual agency relationship arises, the Listing

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

ONTARIO
SUPERIOR COURT OF JUSTICE

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.

AFFIDAVIT OF CASEY GALLAGHER

I, Casey Gallagher, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a real estate sales representative at CBRE Limited ("**CBRE**") and, as such, have knowledge of the matters contained in this affidavit. Where I have received and relied on information provided to me by others, I verily believe that information to be true.

Background

2. The applicant, CBRE, is a commercial real estate services firm.

3. I have been a real estate sales representative with CBRE since 2003. I am an Executive Vice President on the National Investment Team at CBRE.

a. **Exhibit I** – CBRE's mandate letter for the YSL Property dated February 21, 2020 ("**Mandate Letter**"); and

b. **Exhibit J** – the exclusive listing agreement dated February 20, 2020 (the "**Written Agreement**")

22. The Written Agreement provides that YSL would pay CBRE the Commission if CBRE found a purchaser for the YSL Property. Article 4 of the Written Agreement is a "holdover provision" (the "**Holdover Provision**") which provides, among other things, that CBRE is entitled to the Commission if, during the 90 days after the expiration of the Term, negotiations continued which led to the execution of a binding agreement of purchase and sale of the YSL Property with any person or entity introduced by CBRE.

23. The intent of the Holdover Provision is to ensure that CBRE does not lose the Commission simply because negotiations between YSL and a purchaser continued for longer after the term set out in the Written Agreement. Based on my experience with large commercial sales, negotiations between vendors and purchasers can often take months to complete. The Holdover Provision is meant to account for those circumstances.

24. The Mandate Letter identified the potential purchasers that Mr. Senst and I had already discussed with Mr. Dowbiggin: Concord, Menkes, Lanterra, and Westbank. Consistent with Mr. Dowbiggin's instructions to CBRE at the February Meetings, the Mandate Letter explained that CBRE had already begun work and was in contact with these potential purchasers about purchasing the YSL Property.

25. Although Mr. Dowbiggin did not execute the Written Agreement, he has at all times continued to act in accordance with our Oral Agreement that Cresford/YSL act as CBRE's exclusive listing brokerage for the YSL Property and has, since then, confirmed that CBRE is entitled to the Commission.

CBRE continued to market the YSL

26. Following the February 21 Email, CBRE continued to market the YSL Property and introduce Cresford/YSL to potential purchasers, including Concord, the ultimate purchaser.

27. Around mid-February 2020, I reached out to Concord about the YSL Property sale.

28. Around February 23, 2020, I spoke to Gabriel Leung, Vice President of Development at Concord, about the sale of the YSL Property. On the call, I explained CBRE's role as the exclusive listing brokerage for YSL.

29. Following my initial discussion with Mr. Leung, on February 24, 2020, Terry Hui, Chief Executive Officer of Concord, asked if it was possible to meet with a representative of Cresford about purchasing the YSL Property. I emailed Mr. Dowbiggin to relay this information and helped him arrange the meeting. My email to Mr. Dowbiggin on February 24, 2020 is attached as **Exhibit K** to my affidavit.

30. I knew through Mr. Dowbiggin that he was in Mexico at this time so we decided that a conference call would be a good first meeting between Cresford/YSL and Concord.

Dowbiggin asked me to send him information about Mr. Hui following their meeting. On February 27, 2020, I emailed Mr. Dowbiggin with two links to information about Mr. Hui. Attached as **Exhibit Q** to my affidavit is my email.

37. Following the meeting in Vancouver, I understand from Mr. Dowbiggin that he continued negotiations directly with Concord. I am advised by Mr. Dowbiggin that he began speaking to Cliff McCracken, Senior Vice President at Cresford. I did not expect CBRE to be involved in the negotiations between Cresford/YSL and the potential purchaser, however, Mr. Senst and I remained open to assist negotiations between Cresford and Concord.

38. Despite CBRE not being involved in negotiations between Cresford/YSL and Concord, Mr. Dowbiggin continued to reach out to CBRE about the status of the YSL Property sale as well as introducing Cresford/YSL to other potential purchasers.

39. In early March 2020, Mr. Dowbiggin reached out to me about the current real estate market, which was being affected by the COVID-19 pandemic. I emailed him on March 9, 2020 that there were major shifts in the market. We spoke by phone the next day, on March 10, 2020, to discuss the status of negotiations with Concord and I provided advice on how I thought the market would be affected by the pandemic. Attached as **Exhibit R** to my affidavit is an email I sent to Mr. Dowbiggin confirming the call.

40. In addition, it became clear around late February / early March 2020, that (a) word was getting out in the industry that Cresford was having financial difficulties and

information to Mr. Dowbiggin and connected him with Mr. Hiscox. The emails showing that exchange are attached as **Exhibit V** and **W**.

e. CBRE also continued to communicate with Lanterra. Attached as **Exhibit X** to my affidavit is an email from Mr. Wein of Lanterra to Richard Casey, Ted Dowbiggin, Peter Senst, Tai Kai Li, and myself dated March 4, 2020 requesting details or documentation on the existing and proposed financing for YSL.

41. On May 15, 2020, I had a conference call with Mr. Senst and Mr. Dowbiggin. On this call, Mr. Dowbiggin explained that negotiations with Concord remained underway for the purchase of the YSL Property. He also confirmed on this call that CBRE would be entitled to its Commission. Attached as **Exhibit Y** to my affidavit is the calendar invitation for that conference call.

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

Sale of the YSL Property

43. Around August 2021, I heard that the sale of the YSL Property closed on July 22, 2021 and Concord was the purchaser. I confirmed this information by searching on RealNet, which is a website used in the real estate industry to publicize and provide analytics on property sales. The RealNet search result indicates that the YSL Property was sold for a purchase price of $168,737,563.00 (the "**Purchase**

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ONTARIO
SUPERIOR COURT OF JUSTICE

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

AFFIDAVIT OF EDWARD DOWBIGGIN

I, Edward (Ted) Dowbiggin, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the President of Cresford Capital Inc., which is related to Cresford (Rosedale) Developments Inc. ("**Cresford**"). I was the President of Cresford Capital Inc. from 2011 until March 2022. Cresford is related to the corporations that are the parents (collectively, the "**Cresford Group**") of YG Limited Partnership and YSL Residences Inc. ("**YSL**"), and therefore, I have knowledge of the matters contained in this affidavit. Where I have received and relied on information provided to me by others, I verily believe that information to be true.

2. Cresford is a real estate developer operating primarily in Ontario. The Cresford Group incorporated companies for the purposes of developing properties. YSL was incorporated for the purposes of developing the property located at 363-391 Yonge Street and 3 Gerrard Street East (the "**YSL Property**").

numerous properties for Canada Deposit and I worked largely with Peter Senst, a real estate sales representative at CBRE.

8. When I joined Cresford, Mr. Senst introduced me to Casey Gallagher, another CBRE sales representative. CBRE, through its real estate representatives Mr. Senst and Mr. Gallagher, sold the Cresford Group the YSL Property, Halo, and Yorkville. A Cresford Group corporation bought the Clover property directly from the vendor.

CBRE's Involvement in the Sale of the YSL Property

9. In January of 2020, I called Mr. Gallagher to ask if CBRE would be the exclusive listing brokerage for the sale of the YSL Property. I explained that Cresford was experiencing financial difficulties and wanted to free up the equity it had in the YSL Property. I asked CBRE to prepare a list of potential purchasers that they could introduce Cresford/YSL to who would be good candidates to purchase the YSL Property.

10. I contacted Mr. Gallagher both because CBRE had prior experience with the YSL Property, having sold it to Cresford/YSL, and because I believe they were the two best real estate sales representatives in Toronto to find a buyer for a development property in the price range of the YSL Property.

YSL's Agreement with CBRE

11. Mr. Gallagher agreed that CBRE would be the exclusive listing brokerage for the YSL Property during my initial call with him in January 2020. I directed CBRE to begin reaching out to potential purchasers on behalf of Cresford/YSL.

12. There was no written agreement between YSL and Cresford at that time. However, based on our discussions and my experience in the real estate industry (including my understanding of with the standard terms on which real estate brokers like CBRE are engaged), I understood that we had an agreement (the "**Oral Agreement**") that CBRE would introduce Cresford/YSL to potential purchasers for the YSL Property and, should one of those purchasers ultimately acquire the property, CBRE would be entitled to a commission of 0.65% of whatever consideration was given for the property (the "**Commission**"). The Commission would be owed to CBRE if the purchase was related to their introduction.

13. I understood that CBRE's entitlement to Commission was not dependent on whether the YSL Property sold in a certain time frame. The value provided by CBRE was the introduction of Cresford/YSL to a purchaser, not selling within a set period of time.

14. Based on my experience in the industry, the Commission was typical for a deal of similar nature to the YSL Property. In particular, with respect to the entitlement to the Commission, it was common for negotiations to take place over months for deals of this size. This was the case with the YSL Property.

15. I considered the Oral Agreement to be binding and it was clear in my mind that CBRE was engaged as YSL's exclusive listing brokerage.

16. In February 2020, after I had an initial call with Mr. Gallagher, I went to the CBRE office to further discuss the sale of the YSL Property and in particular, CBRE's marketing approach. I met with Mr. Gallagher and Mr. Senst and who suggested that CBRE introduce YSL to Concord Adex ("**Concord**"), Menkes Developments Ltd. ("**Menkes**"), Lanterra Developments Ltd. ("**Lanterra**"), and Westbank Corp. ("**Westbank**").

17. On February 21, 2020, CBRE sent me an email attaching a contract (the "**Written Agreement**") and mandate letter ("**Mandate Letter**") for the engagement of CBRE as YSL's exclusive listing brokerage. The email and attachments are Exhibits H-J of the Affidavit of Casey Gallagher (the "**Gallagher Affidavit**").

18. Although I reviewed the Written Agreement and Mandate Letter when I received them, I did not sign the Written Agreement. My failure to execute the Written Agreement was inadvertent. I was very busy at the time dealing with Cresford's operations and financial difficulties and the Written Agreement was not a high priority as it merely confirmed and expanded on the terms of the Oral Agreement.

CBRE Introduced YSL to Concord

19. On February 24, 2020, Mr. Gallagher emailed me to say that Terry Hui, Concord's Chief Executive Officer, wanted to meet with a principle at Cresford. Mr. Gallagher's email is attached as Exhibit K to the Gallagher Affidavit.

20. Because I was in Mexico at this time, CBRE proposed an initial conference call introduction between Concord and YSL.

21. CBRE arranged the call that took place on February 25, 2020 between myself, Gabriel Leung (Concord's Vice President, Development), and Mr. Gallagher. The purpose of the call was to discuss Concord's potential purchase of the YSL Property. A copy of the email where CBRE arranged the introduction call is attached as Exhibit L to the Gallagher Affidavit.

22. After this introduction call, I flew from Mexico to Vancouver in order to meet with Mr. Hui in order to discuss the potential deal between YSL and Concord. CBRE organized the meeting.

23. Following the meeting, I began working directly with Concord (largely, with Gabriel Leung and Cliff McCracken, Concord's Senior Vice President). I did not expect CBRE to be involved in this stage of Cresford/YSL's relationship with Concord.

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

25. Despite Cresford/YSL working directly with Concord after CBRE's introduction, I continued to reach out to Mr. Gallagher and Mr. Senst to get advice about the sale to Concord and the market conditions generally:

a. Around March 10, 2020, I had a call with Mr. Gallagher and Mr. Senst and they provided information about the market generally in order to inform YSL's negotiations with Concord. A copy of an email prior to that meeting is attached as Exhibit R to the Gallagher Affidavit; and

b. I had another call with Mr. Gallagher and Mr. Senst on May 15, 2020 about the status of the deal with Concord. The calendar invitation for that meeting is attached as Exhibit Y to the Gallagher Affidavit.

26. In accordance with our agreement, CBRE also introduced YSL (by way of either arranging meetings or connecting via email) to at least seven[1] other potential purchasers for the YSL Property.

CBRE is Entitled to the Commission

27. On April 30, 2021, YSL and YG Limited Partnership filed notices of intention to make a proposal pursuant to section 50(1) of the BIA (the "**Proposal Proceedings**"). I understand that CBRE filed a claim in the Proposal Proceedings in respect of the Commission.

28. On February 1, 2022, Dave Mann, of Cresford, responded to an email from Mitch Vininsky of KSV Restructuring Inc., the proposal trustee ("**Proposal Trustee**"), requesting information regarding CBRE's Claim. Mr. Mann informed the Proposal Trustee that YSL did have an agreement with CBRE on the fees to be paid to CBRE, CBRE introduced Concord, and CBRE performed services throughout the

[1] Menkes, Lanterra, Westbank, Diamante Development, OneProperties, Tricon Residential and Robert Hiscox (on behalf of Constantine Enterprises Inc.).

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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

SEVENTH REPORT TO COURT OF KSV RESTRUCTURING INC. AS PROPOSAL TRUSTEE

SEPTEMBER 12, 2022

1.0 Introduction

1. This report ("Report")[1] is filed by KSV Restructuring Inc. ("KSV") in its capacity as Proposal Trustee (the "Proposal Trustee") in connection with Notices of Intention to Make a Proposal (the "NOIs") filed on April 30, 2021 (the "Filing Date") by YG Limited Partnership (the "Partnership") and YSL Residences Inc. ("Residences", and together with the Partnership, the "Companies"), pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA").

2. On May 14, 2021, the Ontario Superior Court of Justice (Commercial List) (the "Court") issued an order (the "Consolidation Order") procedurally and substantively consolidating the NOIs (the "NOI Proceedings") for the purpose of simplifying the administration of the NOI Proceedings, including filing a joint proposal and convening a single meeting of creditors.

3. The principal purpose of the NOI proceedings was to create a stabilized environment to allow the Companies to present a proposal to their creditors that provides them with a recovery greater than they would have received in a bankruptcy or alternative insolvency process.

4. On May 27, 2021, the Companies filed a proposal with the Official Receiver in accordance with Section 62(1) of the BIA (the "Proposal"). On June 3, 2021, the Companies filed an amended proposal (the "First Amended Proposal") and on June 15, 2021, the Companies filed a further amended proposal (the "Second Amended Proposal").

[1] Capitalized terms have the meaning provided to them in the Final Proposal (as defined herein), unless otherwise defined in this Report.

5.0 Status of the CBRE Claim

1. 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 as the exclusive listing broker for the YSL Project pursuant to an unsigned listing agreement between CBRE and Residences (the "Listing Agreement").

2. The Proposal Trustee disallowed CBRE's claim in full for the reasons set out in its Notice of Disallowance of Claim dated February 10, 2022 (the "CBRE Notice"). A copy of the CBRE Notice is provided as Appendix "D".

3. 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.*

4. The Term expired on August 20, 2020, and the Final Proposal was approved on July 16, 2021, well outside the 90-day period. 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*".

5. The CBRE Notice was issued based on, among other things, representations the Proposal Trustee received from the Sponsor that the Sponsor dealt directly with Cresford and that it did not have any dealings with CBRE in respect of the YSL Project.

6. Requiring CBRE to respond to the Sponsor's representations would have involved the Proposal Trustee receiving affidavit evidence from CBRE and, in light of that, possibly responding to affidavit evidence from the Sponsor.

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

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

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

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

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

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

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

14. 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. A copy of the August 18, 2022 letter is attached as Appendix "E".

15. As of the date of this Report, no parties in these proceedings other than the LPs have contested the Proposal Trustee's allowance of CBRE's claim, including the Proposal Sponsor, which is the largest creditor in these proceedings by way of assignment of the claims discussed in paragraph 4.7 above.

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

17. 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.

18. 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.

6.0 Conclusion

1. It is the Proposal Trustee's view that CBRE's claim in the amount of $1,239,377.40 should be allowed and the appeal dispensed, without costs.

* * *

All of which is respectfully submitted,

KSV Restructuring Inc.

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

CITATION: YG Limited Partnership and YSL Residences Inc., 2022 ONSC 6548
COURT FILE NO.: BK-21-02734090-0031
DATE: 20221122

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER of the *Bankruptcy and Insolvency Act*, R.SC. 1985, c.B-3 as amended

AND:

IN THE MATTER of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc.

BEFORE: Osborne J.

COUNSEL: *C. Haddon Murray and Elie Laskin*, CBRE Limited
A. Soutter, Yonge SL LPs
Robin Schwill, KSV, Proposal Trustee
Jesse Mighton, Concord Properties
Sarah Stothart, Maria Athanasoulis
A. Sipa, Harbour International Investment Group and Yulei Zhang

HEARD: September 26, 2022

REVISED ENDORSEMENT

[1] This motion raises three questions that can arise where a Proposal Trustee has disallowed a Proof of Claim pursuant to section 135 of the *Bankruptcy and Insolvency Act* ["BIA"], and the claimant has appealed from that disallowance pursuant to section 135(4):

a. should the appeal proceed before this Court as a hearing *de novo*, or should the record be limited to those materials considered by the Proposal Trustee at the time [i.e., the materials filed in support of the claim];

b. do limited partners of a limited partnership that has filed an NOI have standing on such an appeal; and

c. should the appeal be allowed in this case?

[2] CBRE Limited ["CBRE"] moves for an order setting aside the disallowance of its claim by the Proposal Trustee in the Proposal of YSL Limited Partnership and YSL Residences Inc. [together, the "Debtors"], and allowing the claim.

[3] CBRE also seeks an order that this motion, which is effectively the appeal of the disallowance of its claim, be heard by way of hearing *de novo*.

[14] Indeed, the only parties opposing the relief sought are certain limited partners in the YG Limited Partnership.

[15] CBRE, supported by the Proposal Trustee, submits that the disallowance should be set aside and its claim should be allowed pursuant to the settlement agreement. It argues that, for the purposes of this motion, the Court should in any event consider the matter *de novo.*

[16] The limited partners submit that CBRE has failed to prove its claim with the requisite cogent evidence originally before the Proposal Trustee [i.e., the material originally filed in support of the CBRE claim], or at all.

ANALYSIS

Do the Limited Partners Have Standing?

[17] Section 135 of the BIA sets out the regime pursuant to which proofs of claim are admitted or disallowed.

[18] Pursuant to subsection (2), a trustee may disallow, in whole or in part, any claim.

[19] That disallowance is final and conclusive unless, pursuant to subsection (4), the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the *General Rules*.

[20] Pursuant to subsection (5), 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.

[21] Here, the limited partners are limited partners in one of the Debtors, YG Limited Partnership. In my view, they lack the standing in this case to challenge the disallowance by the Proposal Trustee.

[22] For the purposes of this motion, the creditor is CBRE and the Debtor [or one of them] is YG Limited Partnership. As submitted by the Proposal Trustee, the whole bankruptcy regime is based upon all parties dealing with the debtor entity and/or the proposal trustee to address, determine and/or resolve claims.

[23] I agree with the submission of the Proposal Trustee that pursuant to subsection 135(5), the court may grant relief only where either one of two parties requests it: the creditor applies, or the debtor applies in circumstances where the trustee will not interfere.

[24] The limited partners are not creditors, but rather are exactly that - limited partners - in one of the Debtors. They hold limited partnership units in that entity. That is insufficient to make them debtors [within the meaning of this subsection or generally within the structure of the BIA], any more than shareholders of a debtor corporation would themselves automatically be debtors.

[25] Moreover, the particular contractual entitlements of the limited partners applicable to their units do not assist them here. The partnership agreement sets out the rights and obligations of the general partner to act on behalf of the limited partnership, and of the limited partners themselves.

[26] The contractual right in the partnership agreement to bind the partnership with respect to things such as claims is granted to the general partner. The general partner, on behalf of the limited partnership, consents to the relief sought on this motion.

[27] Finally, the Proposal Trustee has in fact "interfered" here, as contemplated in section 135(5). This is not a case where a trustee simply refuses to take a position or will not engage on the issue.

[28] I also observe that 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.

[29] I have already concluded that the limited partners are not creditors. Are they "persons aggrieved"? In my view they are not. Their grievance, or complaint, boils down to the fact that their ultimate potential recovery will presumably be reduced if the claim is allowed. That is not sufficient to make them aggrieved within the meaning of section 37. To conclude otherwise would mean that every creditor would have standing pursuant to section 37 to challenge the claim of every other creditor in a bankruptcy proceeding and I reject this notion.

[30] As observed in Holden & Morawetz, *The 2022 Annotated Bankruptcy and Insolvency Act*, Thomson Reuters, Toronto, 2022 at p. 102-103,

> "the words "any other person is aggrieved" must be broadly interpreted. They do not mean a person who is disappointed of a benefit that he or she might have received if some other order had been made. A "person aggrieved" is a person who has suffered a legal grievance, a person against whom a decision has been pronounced by the trustee that has wrongfully deprived him or her of something, or wrongfully refused him or her something, or wrongfully affected his or her title to something: *Re Sidebotham*, (1880), 14 Ch.D. 458 at 465; *Liu v. Sung*, (1989), 72. C.B.R. (N.S.) 224 (BCSC)."

[31] This Court reached the same conclusion in *Global Royalties Ltd. v. Brook*, 2016 ONSC 6277 at para. 13.

[32] I conclude that in this case, the limited partners lack the requisite standing to oppose the motion.

Should the Appeal Proceed *de Novo*?

[33] As stated above, the authority of the court to expunge or reduce a proof of claim is found in section 135(5) of the BIA.

[34] I am satisfied that this Court may direct that an appeal from a disallowance of a claim by a trustee proceed by way of hearing *de novo* where it determines that to proceed otherwise would result in an injustice to the creditor. (see *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, and *Re: Poreba*, 2014 ONSC 277 at para. 32).

[35] I recognize, as did the Court of Appeal in *Credifinance*, that this practice is not uniform across the country. I also recognize that a major legislative objective of the bankruptcy regime is to maximize efficiency and the expeditious determination of claims between and among the stakeholders, and that this, in turn, could support the exercise of deference in the review of a decision of a trustee. In my view, that is why appeals of this nature should generally proceed as true appeals, based on a record consisting of the materials relied upon by the trustee in its decision to disallow the claim.

[36] However, it seems to me that the present case is an example of precisely the type of case where to proceed otherwise than *de novo*, and limit the record to that material originally filed in support of the claim, would result in an injustice to the creditor. That is exactly what section 135(5) is designed to correct or avoid, and in circumstances such as this, the appeal can and should proceed *de novo* in the sense that materials not originally before the trustee can and should be considered by the court.

[37] The *Poreba* case is such an example, where the Master [now Associate Judge] concluded that a hearing *de novo* was appropriate because there were significant issues of credibility such that fairness required that the claimant be given an opportunity to provide *viva voce* evidence and to explain certain issues.

[38] The evidence that, in my view, is relevant both to a determination of the claim and to my conclusion that to exclude it would work an injustice on the creditor, is described below. The creditor and the Proposal Trustee acted openly and transparently and entering into the settlement agreement, in the context of the appeal by the creditor. They did not act in an underhanded or unfair manner.

Should the Appeal be Allowed?

[39] Notwithstanding my conclusion above that the limited partners lacked the requisite standing to oppose this motion, I have considered their evidence and arguments with respect to the merits of the appeal, in case I am wrong. Moreover, CBRE seeks an order allowing the appeal, in any event of opposition.

[40] In this case, what occurred was rather straightforward. Based on the information and material originally available to it, the Proposal Trustee disallowed the claim. This seems reasonable when one considers the summary nature of claims evaluation by a trustee, in the somewhat unique circumstances of this case where the listing agreement giving rise to the claim for the commission on the sale of the property was first oral and then reduced to writing but through inadvertence the written agreement was never executed.

[41] However, and as stated above, when additional material was filed with the Proposal Trustee, it was of the view that the claim ought properly to be allowed. The Proposal Trustee did not, however, purport to allow an appeal from its own decision. Rather, it agreed, pursuant to the provisions of the settlement agreement, to support and not oppose the appeal by the creditor, properly brought pursuant to section 135(5), in exchange for the agreement of the creditor not to seek costs against the Proposal Trustee.

[42] I point this out in part due to the argument advanced by the limited partners to the effect that the disallowance of a claim by the Proposal Trustee is final and conclusive with the result that the Proposal Trustee has no residual power to reconsider its own decision or reverse itself. Again, that is not what has occurred here. Rather, the settlement agreement was entered into in the context of the appeal properly brought by the creditor.

[43] There is no dispute on this motion as to several relevant facts:

a. CBRE entered into a listing agreement with YSL for the YSL Property;

b. CBRE introduced YSL to Concord for the purposes of acquiring the YSL Property;

c. Concord in fact did acquire the YSL Property; and

d. the commission claimed by CBRE is equal to 0.65% of the total consideration paid for the YSL Property.

[44] For its part, Concord agrees and acknowledges that CBRE introduced it to YSL, although it has no knowledge of the agreement with CBRE. The evidence on this motion is that the Proposal Trustee in making its decision relied on information provided by Concord to the effect that it dealt with the Debtors at all times and did not have dealings with CBRE.

[45] However, that information was not provided to the creditor that had advanced the claim, CBRE. CBRE accordingly did not have any opportunity to make submissions with respect to, or file evidence to challenge, that statement from Concord.

[46] The evidence of Concord as subsequently provided to the Proposal Trustee and filed on this motion is to the effect that CBRE in fact introduced it to YSL for the purposes of acquiring the YSL Property.

[47] Indeed, the clear and unequivocal evidence of both counterparties to the agreement [CBRE and YSL] is consistent and clear: there was an agreement, CBRE performed the agreement and indeed was involved in negotiations right up until the conveyance of the YSL Property pursuant to the amended Proposal, and the commission is payable according to its terms.

[48] I am satisfied that this is clear from the evidence, and in particular the affidavit of Mr. Ted Dowbiggin, the former president of Cresford, and the affidavit of Mr. Casey Gallagher, VP of CBRE, relied upon by CBRE.

[49] I referred above in these reasons to the oral agreement of January, 2020 and the subsequent written agreement of February 21, 2020 and the fact that the latter had never been formally signed. As noted, the written agreement provided that the term of the contract ended on August 20, 2020, and the holdover clause [section 4.1] essentially extended the entitlement to a commission for an additional 90 days.

[50] The limited partners submit that even if the YSL Property was conveyed pursuant to the [amended] Proposal, that occurred outside the 90-day period with the result that the commission ought not to be payable.

[51] I am satisfied based on the evidence described above and particularly the evidence of Messrs. Dowbiggin and Gallagher, and in the absence of any contrary evidence put forward by any party, that the 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. The limited partners did not cross-examine either of those witnesses on their evidence with respect to these points. CBRE continued to act as listing broker and responded to questions from YSL during the negotiations.

[52] In addition, the Debtors themselves support the claim and have confirmed such to the Proposal Trustee. This is consistent also with the conduct of both the Debtors on the one hand and CBRE on the other, prior to the claim being advanced, as the parties to the agreement performed it according to its terms and acted in all respects as if the written agreement had been executed.

[53] Finally, I observe that Concord itself supports the claim being allowed and it, very arguably, has the most to gain if the claim were denied.

[54] The limited partners oppose the relief sought but were not parties to the impugned agreement nor, obviously, were they present for any of the discussions leading to the oral agreement.

[55] The limited partners argue that the terms of the agreement did not entitle CBRE to the payment of the commission since the sale of the YSL Property was not a sale by agreement of purchase and sale within the meaning the commission agreement.

[56] CBRE, one of the parties to that agreement, supported by both the Debtors [the counterparty to the agreement] and the Proposal Trustee, submits that this includes an agreement pursuant to which consideration is given for the conveyance of title to the YSL Property. I agree. I also agree that a proposal is a form of contract [between the debtor and its creditors].[See *Jones v. Ontario*, (2003), 66 O.R.(3d) 674 (ONCA)].

[57] In the result, I am therefore satisfied that to exclude this clear and cogent evidence would result in the disallowance of the claim and that would be an unjust result in the circumstances of this case.

[58] For all of the above reasons,

a. the limited partners do not have standing to oppose or the relief sought on this motion by the creditor [CBRE] supported by the Proposal Trustee and the Debtors;

b. in this case, the appeal from the decision of the Proposal Trustee should be considered, and has been considered by me, as a hearing *de novo*, since to do otherwise would result in an injustice to the creditor [CBRE]; and

c. the appeal should be allowed and the motion granted.

[59] Accordingly, the disallowance of CBRE's claim by the Proposal Trustee is set aside and the claim is allowed.

SCHEDULE B
STATUTES AND REGULATIONS

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

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.

[…]

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.

[…]

No action against Superintendent, etc., without leave of court

215 Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

Court No. 14313 **2010 SKQB 17**
Estate No. 23-883167 J.C.R.

IN THE COURT OF QUEEN'S BENCH
PROVINCE OF SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF

KRISTYN JOELLE INSLEY

BETWEEN:

ROYAL BANK OF CANADA

APPLICANT

AND:

KRISTYN JOELLE INSLEY

RESPONDENT

Jim Kroczynski, for the Royal Bank of Canada
Jeff Lee, for Dr. Insley
Mary Lou Senko, for Canada Student Loans
Marla Adams, for Deloitte & Touche Inc, trustee

JUDGMENT LIAN M. SCHWANN, Q.C.
January 19, 2010 Registrar in Bankruptcy

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[1] The Royal Bank of Canada ("RBC"), the major creditor in Kristyn Insley's bankruptcy, applies to expunge or reduce the proofs of claim of 'CRA – Govt Programs (Non Tax) Acct Maint' and of 'Trustees of Saskatchewan Student Aid Fund' (the

> (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.

[23] I find it helpful to begin by placing the whole of s. 135 in its proper context. This section imposes a statutory obligation on trustees to examine every proof of claim and every security for the purpose of determining if the claim or security, as the case may be, is valid. (Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, vol. 2, p. 5-180; *Canadian Imperial Bank of Commerce v. 433616 Ontario Inc.* (1993), 17 C.B.R. (3d) 160). If unsatisfied with the proof of claim or its supporting material, the trustee has not only a right but a corresponding duty to demand sufficient evidence to establish the validity of the claim. The trustee is given many tools under the *BIA* to fulfil this function including, where necessary, examination of parties and requiring production of documents. (Houlden and Morawetz, vol. 2, p. 5-181)

[24] Following examination, the trustee either allows the claim or disallows it in whole or in part. A disallowance is final and conclusive unless appealed by the aggrieved creditor within the time permitted for doing so under s. 135(4). Section 135(5) is the flip side of a disallowance. Where a claim is admitted, s. 135(5) permits creditors or the bankrupt to apply to expunge or reduce the claim *if the trustee declines to interfere in the*

matter.

[25] An application to expunge pursuant to s. 135(5) has been characterized by the courts as an *appeal* against allowance. "In effect, the motion under section 135(5) is an appeal by a creditor or the debtor against an allowance by the trustee of a proof of claim or proof of security" (Houlden and Morawetz, vol. 2, p 5-205 (cites omitted); see also s. 192(1)(n) *BIA*).

[26] In *Lamont Hi-Way Service Ltd. v. Bunning*, 2003 ABQB 297, 44 C.B.R. (4th) 91, para. 20 and 21, an application to expunge was described in this fashion:

> Section 135 creates a two sided token. If a trustee disallows a creditor's claim the creditor's only remedy is given by s.-s. (4)……If a trustee allows a claim other creditors and the bankrupt are adversely affected, so s.-s. (5) gives then a right to challenge the trustee's decision. There is little case law on s.-s. (5). Houlden & Morawetz, Bankruptcy & Insolvency Act (The 2002 Annotated) say that 'in effect' a motion under the s.-s. is an appeal by a creditor or the bankrupt of the trustee's disallowance of a claim, p. 551.

[27] *Marsuba Holdings Ltd., Re* (1998), 8 C.B.R. (4th) 268 is another case where a s. 135(5) application was explored. At paragraphs 14 and 15 the learned Master examined the scope of the provision, commenting as follows on the applicable test.

> Counsel for the trustee says the applicant must show that the trustee acted unreasonably or improperly in accepting the proof of loss. Counsel would have it that so long as the trustee acted reasonably, the actual legitimacy of the claim is irrelevant. I respectfully disagree.
>
> Quite apart from questions of natural justice raised by this position….this construction of s. 135(5) is contrary to the tenor of s. 135 as a whole. The first four sub-sections deal with the procedure to be followed where a creditor appeals the *disallowance* of a claim by a trustee, and in such cases the appeal is decided simply on the basis of the legitimacy of the claim. There is no reason at all why different considerations should apply to appeals of a decision by the trustee to allow a claim. The only question should be whether the claim is indeed legitimate.
> [emphasis added]

(b) ***are section 178 'survivable debts' excluded from sharing in dividends?***

[31] RBC advances this line of argument through the vehicle of a s. 135(5) appeal, accordingly it must be considered within that context. As noted, the RBC does not challenge the validity of the claim but instead attempts to use s. 135(5) to disrupt the trustee's intended scheme of distribution of estate dividends. This argument is premised on the proposition that once the pre-condition to s. 135(5) exists, i.e. the trustee 'declines to interfere in the matter', a creditor possess an unqualified and unconstrained right to challenge the proposed distribution scheme in the face of an otherwise valid and allowed claim.

[32] In *EnerNorth Industries Inc., Re*, 2009 ONCA 536, 55 C.B.R. (5th) 1the Ontario Court of Appeal examined the scope of an application to expunge under s. 135(5) in the context of a debt arising from a valid and enforceable judgment. That court's observations concerning the purpose of s. 135(5) applications is summarized at para. 38:

> The appellants' argument that they have an 'unqualified right' to challenge Oakwell's proof of claim under section 135(5) is based on the unsupported theory that the *only* precondition to a creditor being entitled to a hearing under s. 135(5) is that the trustee must have declined to interfere in the matter. I do not read the provision in such a restricted manner. [emphasis in original]

[33] Although *EnerNorth* dealt with an attack in bankruptcy proceedings of an otherwise valid and enforceable judgment, the decision, in my view, stands for the broad principle that s. 135(5) does not confer on creditors an unqualified right of challenge to proven claims. Something more is required apart from the trustee merely declining to interfere in the matter.

[34] Neither, in my judgment, should s. 135(5) be used as an entry point to overturn or disrupt other processes or decisions made by the trustee in the course of estate

administration. Section 135(5) constitutes a right of challenge limited to allowed or disallowed claims and should not be viewed more broadly than that. The right to challenge other decisions made by the trustee in the course of estate administration is available through s. 37 of the Act where an aggrieved person seeks court oversight over those decisions.

[35] Even if I am wrong, there is nothing in the Act or in decided cases which supports RBC's position. Section 178(1) carves out a list of eight distinct types of debts which survive bankruptcy and which are not extinguished on the bankrupt's discharge. Debts or obligations in respect of a loan made under the *Canada Student Loans Act*, R.S.C. 1985, c. S-23, the *Canadian Student Financial Assistance Act*, S.S. 1994, c. 28, or an enactment of the province which provides student loans or guarantees of loans is a "survivable debt" if assignment is made within the prescribed time frames. (s. 178(1)(g))

[36] Section 141 makes clear that *subject to any provision of the Act*, all claims proved in a bankruptcy are to be paid rateably. There is nothing in this section, s. 178 or s. 136 (which addresses priorities on distribution) precluding s. 178 surviving creditors from sharing in dividends or in any manner adjusts the concept of rateable distribution prescribed by s. 141. In fact, case law supports the opposite position. Houlden and Morawetz make the following observation at vol. 3, p. 6-230:

> The claims listed in s. 178(1) are properly provable in bankruptcy. Proofs of claim may be filed for them and the creditor can receive a dividend on them: *Trusts & Guarantee Co. v. Brenner* (1932), 13 C.B.R. 518; affirmed in part 15 C.B.R. 112 (S.C.C.); *B. (S.M.A.) v. H. (J.N.)* (1993), 23 C.B.R. (3d) 81, 87 B.C.L.R. (2d) 241, [1994] 4 W.W.R. 281, affirmed (1994) 31 C.B.R. (3d) 302.
> [emphasis added]

[37] The decisions in *Weihs, Re* (para. 7) and *Stoski Estate* (para. 25) confirm this approach.

In the Matter of EnerNorth Industries Inc.

[Indexed as: EnerNorth Industries Inc., Re]

96 O.R. (3d) 1

Court of Appeal for Ontario,
Simmons, Blair and Juriansz JJ.A.
July 3, 2009

Bankruptcy and insolvency -- Proof of claim -- Creditor not having unqualified right on application pursuant to s. 135(5) of Bankruptcy and Insolvency Act to challenge validity of judgment debt based on decision of court of competent jurisdiction if court considered merits of claim in granting judgment -- Creditors of bankrupt moving for order under s. 135(5) challenging proof of claim filed by judgment debtor based on Singapore judgment -- Issues of mitigation and set-off raised by creditors having been finally determined in Singapore proceedings -- Creditors being privies of bankrupt -- Doctrine of res judicata applying -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 135(5).

EnerNorth and Oakwell were parties to a joint venture agreement concerning the construction and operation of two power plants in India. They incorporated the Project Company to finance, construct and operate the Project. Disputes arose between EnerNorth and Oakwell which were ultimately resolved by way of a Settlement Agreement in which EnerNorth agreed to buy out Oakwell's interest in the Project Company. They agreed that any disputes would be governed by Singapore law and subject to the non-exclusive jurisdiction of the Singapore courts. EnerNorth did not make the required payments under the Settlement Agreement. It sold its interest in the Project Company to VBC. Oakwell entered into negotiations with VBC

sought but denied on January 18, 2007, [2006] S.C.C.A. No. 343.

[25] On March 20, 2007, EnerNorth filed an assignment in bankruptcy. RSM Richter Inc. ("Richter") was appointed trustee in bankruptcy the following day. [page9]

The bankruptcy proceedings

[26] Oakwell's claim in the bankruptcy is for CDN$6,807,130.43. It is based entirely upon the Singapore judgment, plus interest and costs.

[27] The appellants, Ms. Hall and Mr. Cassina, are minor creditors of EnerNorth. They are its former president and chairman, respectively. Ms. Hall has filed a proof of claim in the amount of $20,142.38, for outstanding salary, vacation pay and directors' fees. Mr. Cassina's claim is for $73,222.06, for outstanding consulting and directors' fees.

[28] At the first meeting of creditors, Ms. Hall raised the issue of whether Oakwell's claim should be reduced by a further US$1,650,000, allegedly received from VBC under the Licence Agreement following the date of the Singapore judgment. The other unsecured creditors -- whom I shall call the appellant group of creditors -- took up the cause along with her. While Oakwell does not specifically concede that it has received the additional funds, it accepts that these proceedings should be decided on the basis that it has.

[29] Richter made enquiries about these allegations and concluded that it had not been provided with any confirmable information that would warrant reducing Oakwell's proof of claim. Accordingly, it proposed to admit Oakwell's proof of claim in full.

[30] Ms. Hall and Mr. Cassina moved before the Bankruptcy Court for an order pursuant to s. 135(5) of the BIA challenging the proof of claim filed by Oakwell. They were supported by a companion motion filed on behalf of the appellant group of creditors. Oakwell brought a cross-motion to dismiss these motions on the ground that the issue of whether the Licence

Expunge or reduce a proof

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.

[38] The appellants' argument that they have "an unqualified right" to challenge Oakwell's proof of claim under s. 135(5) is based on the unsupported theory that the only precondition to a creditor being entitled to a hearing under s. 135(5) is that the trustee must have declined to interfere in the matter. I do not read the provision in such a restricted manner. Their premise that the Singapore judgment cannot "displace" their "unqualified" right is founded on quite old English authority which -- if it ever stood for the proposition advanced -- should no longer be followed, in my view.

[39] In the first of these decisions, Fraser (Re); Ex parte Central Bank of London, [1892] 2 Q.B. 633 (C.A.), at pp. 635-37 Q.B., Lord Esher M.R. said:

As a matter of law the judgment, therefore, stands as a good judgment against John Fraser, and it cannot be questioned by him in any Court, except the Court of Bankruptcy. . . . The mere fact that there is a judgment for the debt does not prevent the registrar from saying that there is no good petitioning creditor's debt. The Court of Bankruptcy can go behind the judgment, and can inquire whether, notwithstanding the judgment, there was a good debt. In so doing, the Court of Bankruptcy does not set aside the judgment. If I may use the expression, the Court goes round the judgment, and inquires into the subject-matter. . . . The existence of the judgment is no doubt prima facie evidence of a debt; but still the Court of Bankruptcy is entitled to inquire whether there really is a debt due to the petitioning creditor.

[40] Lord Justice Kay concurred, at pp. 637-38 Q.B., saying:

It is old law in bankruptcy that, neither upon an attempt to

B.C.J. No. 34, 39 C.B.R. (4th) 35 (S.C.), at para. 26, Burnyeat J. drew the same distinction, noting that the comments of Cozens-Hardy M.R. in Van Laun (Re) were obiter. Lord Justice Fry made the point in Flateau (Re), at p. 86, as well:

> It is true that in some cases the Court of Bankruptcy has gone behind a judgment, when it has been obtained by fraud, collusion, or mistake. But this power has never, so far as I am aware, been extended to cases in which a judgment has been obtained after issues have been tried out before a Court.

[48] I see no basis for holding that an applicant pursuant to s. 135(5) of the BIA should have "an unqualified" right to challenge the validity of a judgment debt that is based on a decision of a court of competent jurisdiction on the merits of the claim or that res judicata should not apply, where appropriate, in such circumstances. Take, for example, the case of a debtor with $10 million in assets and judgment debts spread amongst five creditors of $5 million each. Suppose that each $5 million judgment debt resulted from lengthy and costly litigation from trial, through intermediate appeal to the Supreme Court of Canada and that the debtor has failed at each stage. As EnerNorth did here, the debtor makes an assignment in bankruptcy following its last loss in the highest court. It surely contravenes every imaginable principle of judicial economy, finality and fairness to say that the Bankruptcy Court can now, indiscriminately, re-open each hotly contested dispute in order to satisfy itself, in its own mind, that "there really is a debt due to the . . . creditor" (Fraser (Re)) or that "the debt on which the proof is founded is a real debt" (Van Laun (Re)). I do not accept such a proposition.

[49] I agree that the trustee's power to allow or disallow a proof of claim, and the court's power to expunge or reduce it on an application under s. 135(5) of the BIA, is wide. However, to say that the attacking creditor or debtor has an "unqualified" right to challenge the proof of claim where the claim is based upon a valid and enforceable judgment that is no longer subject to appeal is going too far. The appellant's submission goes beyond the proposition that a judgment creditor is precluded from making a [page14]"double

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

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

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

BEFORE: S.F. Dunphy J.

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

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

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

David Gruber Lawyers for Plan Sponsor Concord Properties Development Corp.

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

Robin Schwill for KSV Restructuring Inc.

James W. MacLellan for Sureties Aviva et al and Westmount

Jane Dietrich for Timbercreek Mortgage Servicing Inc. et al.

HEARD at Toronto: June 1, 2021

REASONS FOR DECISION

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

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

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

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

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

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

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

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

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

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

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

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

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

[12] In conclusion I am directing:

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

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

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

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

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

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

June 11 - Cross examinations

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

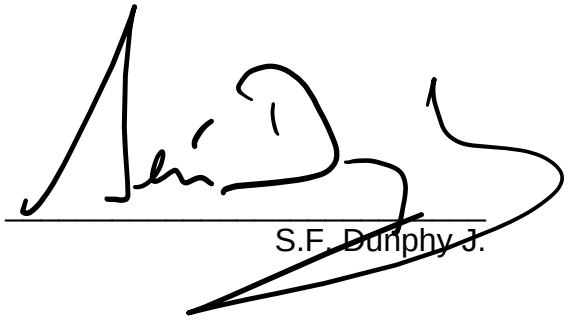
June 18 - Cresford's Factum re the LPs' Applications and Factum re BIA Proposal

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

June 23 – Hearing

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

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



S.F. Dunphy J.

Date: June 1, 2021

CITATION: David Brook (Re), 2016 ONSC 6277
COMMERCIAL LIST COURT FILE NO.: CV-15-11006-00CL
BANKRUPTCY COURT FILE NO. 32-1774278
DATE: 20161123

SUPERIOR COURT OF JUSTICE – ONTARIO
IN BANKRUPTCY

IN THE MATTER OF THE BANKRUPTCY OF DAVID BROOK, OF THE CITY OF MISSISSAUGA, IN THE REGIONAL MUNICIPALITY OF PEEL, IN THE PROVINCE OF ONTARIO

RE: GLOBAL ROYALTIES LIMITED AND BENCHMARK CONVERSION INTERNATIONAL LIMITED O/A BCI, Plaintiff

AND:

DAVID BROOK, ANNA BROOK, 2323593 ONTARIO INC., GEOFFREY BLACK aka GEOFF BLACK, GRIFFIN & HIGHBURY INC., DARIO BERIC aka DARIO BERIC – MASKAREL, DIKRAN KHATCHERIAN aka DIKO KHATCHERIAN aka DANNY MATAR, LESLIE FROHLINGER aka LES FROHLINGER, DIVERSITY WEALTH MANAGEMENT INC. and DIVERSITY WEALTH MANAGEMENT HOLDINGS INC. and BDO CANADA LIMITED IN ITS CAPACITY AS TRUSTEE OF THE ESTATE OF THE BANKRUPT DAVID BROOK, Defendants

AND BETWEEN:

DAVID BROOK, Plaintiff by Counterclaim

AND:

GLOBAL ROYALTIES LIMITED AND BENCHMARK CONVERSION INTERNATIONAL LIMITED O/A BCI, BRANDON HALL, CHRISTINE HALL and CASH INTERNATIONL INC.

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *Harvey Stone*, for the Moving Parties, Global Royalties Limited and Benchmark Conversion International Limited,

Jules Berman, for the Respondent, BDO Canada Limited.

Frank Bennett, for the Bankrupt, David Brook

HEARD: October 7, 2016

ENDORSEMENT

[1] The moving parties, Global Royalties Limited ("Global"), Benchmark Conversion International o/a BCI ("BCI"), Brandon Hall ("Brandon"), Christine Hall ("Christine") and Cash International Inc. ("Cash") (collectively, the "Moving Parties"), seek an order under section 37 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") setting aside the assignments dated May 6, 2016 of certain causes of action to the bankrupt David Brook ("Brook") by BDO Canada Limited, the trustee in bankruptcy of Brook (the "Trustee"), and directing a tender or auction process for the sale of such causes of action.

Factual Background

[2] David Brook was an independent contractor with Global from 2002 to 2008, then an employee for one year, and then an independent contractor again until January 16, 2015. After that date, Brook was an employee of BCI until it terminated his employment on March 23, 2015.

[3] Brook filed a proposal under the BIA on July 31, 2013. The proposal was rejected by his creditors and he was assigned into bankruptcy on February 27, 2015 under the BIA. In his statement of affairs, Brook declared liabilities totaling $1,722,321.59 and assets of $20,392.10. He did not declare any liability to either Global or BCI. As of June 27, 2016, the Trustee had received and admitted eleven unsecured claims totaling $2,010,214. The Canada Revenue Agency (the "CRA") is the largest creditor, having claims totaling $1,906,534, which is 94.8% of the proven unsecured claims. None of the Moving Parties has filed a proof of claim in Brook's bankruptcy. The creditors declined to appoint an inspector in the bankruptcy.

[4] On June 23, 2015, Global and BCI issued a statement of claim (the "Statement of Claim") against Brook and others alleging that Brook misappropriated clients and sales belonging to Global and/or BCI. They claim damages of $1 million. Brook served a defence, counterclaim and third party claim in the action on May 25, 2016 (the "Defence, Counterclaim and Third Party Claim").

[5] In Brook's Defence, he denies the allegations in the Statement of Claim. In his Counterclaim and Third Party Claim, among other things, Brook alleges that Brandon, the principal of both Global and BCI, made profits from 2001 to 2009 which Global or Brandon were obligated to share with Brook pursuant to an oral agreement between Brandon and Brook. Brook alleges that these profits were made pursuant to a scheme under which invoices of a particular supplier to Global were increased by 25% and the increased amount was paid by the supplier to Christine or Cash. These claims in the Counterclaim and Third Party Claim are herein referred to as the "Causes of Action".

[6] In connection with the preparation of the Defence, Counterclaim, and Third Party Claim, Brook negotiated a purchase of the Causes of Action from the Trustee. The Trustee and Brook reached an arrangement under which Brook would pay $15,000 in two equal installments over

one year and the parties would share any net proceeds after legal expenses on the basis of 2/3 to the Trustee and 1/3 to Brook.

[7] The documentation giving effect to this agreement was executed on May 6, 2016. Subsequently, further documentation was executed, back-dated to May 6, 2016, to correct the omission in the original assignment documentation of an assignment of the Causes of Action asserted against Christine and Cash, and to confirm the 2/3:1/3 sharing of the proceeds of such Causes of Action. The documentation giving effect to the foregoing is herein referred to collectively as the "Assignments".

[8] In the absence of an inspector, the Trustee communicated with, and obtained the written approval of the CRA, as the largest creditor of the bankrupt's estate, to the agreement with Brook. The Trustee did not, however, contact any other potential purchasers of the Causes of Action, including the Moving Parties. It also did not conduct a public tender or auction process.

[9] In an affidavit sworn on July 10, 2016 in this proceeding, Christine says that, if the Trustee had contacted her or Cash to discuss the Causes of Action and any potential settlement of the claims against them, she would have been prepared to enter into negotiations to settle "any and all claims that the Trustee had in the within action." She also says that, if the Assignments were set aside by the Court on this motion, she or Cash are prepared to pay $50,000 to acquire the Causes of Action. In a further affidavit sworn the same day, Brandon makes essentially the same statements.

Analysis and Conclusions

The Issue

[10] Section 37 of the BIA reads as follows:

> 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.

[11] The Moving Parties say that they are aggrieved parties. The Moving Parties submit that the Court should set aside the Assignments principally for the following reasons:

(1) The Trustee did not attempt to market the Causes of Action to anyone other than Brook;

(2) The transaction was improvident as the Moving Parties are prepared to pay $50,000 for an assignment of the Causes of Action;

(3) The private sale process unfairly disregarded the rights of the seven creditors of Brook's estate who had no knowledge of the sale; and

[16] I will first address the position of Brandon, Christine, and Cash (collectively, the "Third Parties") and then address the position of Global and BCI.

The Third Parties

[17] In this case, the execution of the Assignments did not wrongfully deprive the Third Parties of anything to which they are legally entitled, or prejudice them in respect of any legal rights they may otherwise have been entitled to assert. As strangers to the bankruptcy, they have no legitimate right to require that the Trustee dispose of the assets of the estate in any particular manner. Further, as parties to the litigation, the decision of the Trustee does not affect their ability to defend themselves against the allegations constituted by the Causes of Action.

[18] Accordingly, I do not see any basis upon which the Third Parties have standing to bring this motion under section 37 of the BIA. If, however, I have erred in reaching this conclusion, the further conclusions reached below in respect of Global and BCI would also apply to the Third Parties.

Global and BCI

[19] In this proceeding, Global and BCI wear two hats. They are contingent creditors of the estate in respect of the claims asserted in their Statement of Claim and they are defendants to the Defence, Counterclaim, and Third Party Claim. It is not entirely clear in which capacity they say they are aggrieved.

[20] Insofar as they say that they aggrieved in their capacities as creditors of the estate, I am not persuaded that they are aggrieved parties for two reasons.

[21] First, given the state of the litigation commenced by Global and BCI, and the assertion of the Causes of Action by way of offset, it is not possible to make any assessment of the likelihood that these parties have a viable claim against the estate. To the extent the Global and BCI claims against Brook have no merit or are offset by the Causes of Action, Global and BCI would have no contingent claims against the estate. In such circumstances, the Moving Parties would have no standing in this proceeding.

[22] Second, even if they are to be treated as creditors of the estate, I do not think that Global and BCI have established that they have suffered a material loss or prejudice in such capacity.

[23] Global and BCI have chosen not to file any proof of claim in the bankruptcy. This is understandable given the negligible assets in the estate. The Moving Parties have pursued the action with a view to obtaining a judgment that survives bankruptcy, rather than with any expectation of receiving a distribution from the estate. Given the absence of any claim of Global or BCI in the bankruptcy, however, neither party has any current right to any distribution out of the Bankrupt's estate. On this basis, I do not think that either party can assert that it is an aggrieved party.

[24] More significantly, even if they had an entitlement to participate in any distribution from the estate, and even if their proposal of $50,000 for the Causes of Action were accepted, neither Global nor BCI has any realistic expectation of any distribution other than possibly a distribution of negligible value.

[25] The real prejudice that Global and BCI have suffered is the loss of the possibility of preventing Brook from asserting his defence to their claims and asserting the Causes of Action, with the attendant costs. However, for the reasons set out above in respect of the Third Parties, insofar as they say that they are aggrieved as parties to the litigation, they have no standing on this motion. If the Moving Parties wish to protect themselves against legal costs which they regard as improper, they must avail themselves of the protections afforded under the *Rules of Civil Procedure* or deal directly with Brook.

Conclusion

[26] Based on the foregoing, none of the Moving Parties is an "aggrieved" person for the purposes of section 37 of the BIA. On this basis, the motion must be dismissed. It is therefore unnecessary to consider whether the Trustee's decision was unreasonable for the purposes of that provision. I have, however, set out in my views on this issue in case I have erred in reaching the conclusions above.

Was the Decision of the Trustee Unreasonable?

[27] The Trustee argues that, even if the Moving Parties are aggrieved persons for the purposes of section 37 of the BIA, the Court should not exercise its discretion under that provision to grant the relief sought on this motion. The Trustee argues that its decision to execute the Assignments was reasonable in the circumstances.

[28] The principles governing an action under section 37 have been set out in *Re Pachal's Beverages Ltd*., at para. 14, as quoted earlier in this decision.

[29] In the absence of any inspector for the estate, s. 30(3) of the BIA grants the Trustee the authority to sell the Causes of Action in any manner it thinks advisable. There is no statutory requirement obliging the Trustee to engage in any particular sales process and, in particular, no obligation to engage in an auction, public or otherwise. On the other hand, section 30(3) does not remove the obligations of the Trustee under the BIA in respect of the sale or other disposition of the assets of Brook, as Brook as appears to argue.

[30] Accordingly, as creditors of the estate of Brook, the Moving Parties had a legitimate expectation that, in exercising its powers under section 30(3) of the BIA to dispose of any assets of the estate, the Trustee would act reasonably, honestly, in good faith and for the benefit of Brook's estate generally.

[31] In this case, there is no basis for concluding that the Trustee's actions constituted an abuse of power. As mentioned, the Trustee had the authority to dispose of the Causes of Action

COURT FILE NO.: 31-395548
DATE: 2004-11-02

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)
	)
In the Matter of the Bankruptcy of OSFC Holding Limited, a Company Duly Incorporated under the Laws of the Province of Nova Scotia with its Principal Place of Business in the City of Toronto in the Province of Ontario	)
	) Murray B. Page, Q.C., for the Trustee, BDO Dunwoody Limited
	) Geoffrey B. Morawetz for Thorsteinssons
	) Surksha Nayar, for the Minister of National Revenue
	) Kevin O'Hara, for the Ministry of Finance for the Province of Ontario

REASONS FOR DECISION

Pepall, J.

Request

[1] BDO Dunwoody Limited, the Trustee in Bankruptcy of OSFC Holding Limited, seeks an order pursuant to section 34 of the *Bankruptcy and Insolvency Act* for advice and directions.

Facts

[2] There are no material facts in dispute. The debtor, OSFC, has two creditors of substance: Canada Customs and Revenue Agency ("CCRA") and the Ontario Ministry of Finance (the

"Ministry"). The claims of these entities are $4,594,464.63 and $1,670.367.94 respectively. There is also another claim of $3,745 in favour of Steel Investments Ltd. The indebtedness of OSFC to the two major creditors arises from adverse tax assessments made in reliance on the General Anti-Avoidance Rule ("GAAR") provisions found in the *Income Tax Act* and the *Corporations Tax Act (Ontario)* respectively. OSFC had been entitled to a tax refund of $3,500,000 but CCRA applied the refund to OSFC's outstanding tax liability. The reassessments were unsuccessfully appealed to the Tax Court and then to the Federal Court of Appeal. OSFC then sought leave to appeal the Federal Court of Appeal decision to the Supreme Court of Canada. The Supreme Court of Canada denied OSFC leave on June 20, 2002.

[3] On February 14, 2002, OSFC filed a proposal in bankruptcy and was subsequently deemed to have made an assignment in bankruptcy. On March 4, 2002, the Trustee disallowed the claims of CCRA and the Ministry on the grounds that, as the Supreme Court of Canada had not rendered its decision, the indebtedness was contingent. The disallowances were appealed to the Registrar in Bankruptcy. After the Supreme Court refused leave to appeal, the Registrar allowed the appeals on consent of the Trustee. Those orders are dated July 4, 2002 (the "Registrar's orders"). CCRA and the Ministry appointed themselves as the two inspectors of the bankrupt's estate.

[4] OSFC had had partners who engaged in a tax scheme similar to that of OSFC. They too were reassessed and were unsuccessful in both the Tax Court and the Federal Court of Appeal. Unlike OSFC, however, their leave to appeal application to the Supreme Court of Canada was granted on June 24, 2004. The appeal is scheduled to be heard on March 7, 2005. According to the affidavit of Mr. M. G. Williams of Thorsteinssons, this appeal and another will be the first GAAR cases heard by the Supreme Court of Canada.

[5] Not surprisingly, the shareholders of OSFC wish a motion to be brought before the Supreme Court for reconsideration of OSFC's original application for leave to appeal and for an extension of time. The essence of the motion is that it would be manifestly unjust if OSFC's partners were able to dispute the reassessments while OSFC could not. The threshold test for reconsideration of an application for leave to appeal is set out in Rule 73 of the Supreme Court of

Discussion

[10] This is a most unusual situation. If any one of the motions or appeal to the Supreme Court of Canada is unsuccessful, the issue becomes moot. On the other hand, if the appeal is successful, subject to setting aside the Registrar's orders, the indebtedness of the two major creditors would be negated and the tax refund would be payable to the estate.

[11] Firstly, there is the issue of the Registrar's orders. Although the Registrar upheld the claims of CCRA and the Ministry, section 187 (5) of the *BIA* provides that every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction. If the Trustee were successful in the Supreme Court of Canada, it would then have to move for relief pursuant to this section. While the decision of *Re Taylor*[1] may be interpreted as possibly favouring the position taken by the two main creditors, relief pursuant to section 187 (5) is discretionary and that issue should not be determined as part of the motion before me.

[12] Secondly, I agree with the Trustee's conclusion that consideration of the proposal would put the inspectors in a conflict of interest and that it was appropriate to request advice and direction from the court.

[13] Thirdly, one must examine the duties of a trustee. As noted by the Trustee in its factum, a trustee is an officer of the court and must act equitably but essentially he represents the interests of the creditors: *Re Roy*.[2] A trustee is under a continuing duty to effect recovery of the assets of the bankrupt: *Re Salloum*[3]. In the normal course, this would extend to recovery of any tax refund. Here recovery would benefit Steel Investments Ltd. but would be to the detriment of CCRA who offset the refund against OSFC's indebtedness. A successful appeal to the Supreme Court would also be to the detriment of the two major creditors as it would leave them exposed to having their claims in OSFC's bankruptcy set aside. A successful appeal would benefit the

[1] [1998] B.C.J No. 837.
[2] [1963] 4 C.B.R. (N.S.) 275.
[3] (1988) 69 C.B.R. (N.S.) 255.

shareholders in that, assuming that the claims of the two major creditors were subsequently set aside, they would be entitled to participate in a distribution of assets after any remaining creditors were paid in full: *Re Thompson Cadillac Mining Corp.*[4]

[14] The role of a shareholder in bankruptcy proceedings is not clearly defined. There are situations where a shareholder of the bankrupt may be permitted to bring a section 37 application for permission to bring an action that a trustee has declined to bring: *Churchill Pulp Mill Ltd. v. Manitoba*.[5] Similarly, a shareholder of a bankrupt company is an "interested person" within the context of a section 119 (2) application to review and revoke decisions and actions of inspectors of the estate: *NSC Corp v. ABN Amro Bank Canada.*[6] The case before me, however, does not engage either of those sections of the *BIA.*

[15] That said, it does seem most inequitable in the circumstances outlined to preclude OSFC from pursuing the requisite motions, and if successful, the appeal. In addition, although the claim is modest, there is at least one creditor, namely Steel Investments Ltd., who might benefit from this course of action. I have concluded that in these circumstances the Trustee should be advised and directed to pursue the proposal presented on the following basis:

> (i) there is to be no charge to the estate of OSFC if any of the motions or the appeal is unsuccessful, and
>
> (ii) before any further proceedings are taken, an indemnity for any adverse costs awards in terms satisfactory to the Trustee is to be provided to the Trustee.

Pepall, J.

Released: November 2, 2004

[4] (1943), 24 C.B.R. 274 (S.C.C.).
[5] 24 C.B.R. (N.S.) 116.
[6] (1992) 15 C.B.R. (3d) 301.

Re: Drummie 2004 NBQB 035

Court File No.: NB 8881
Estate No.: 092558

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

IN BANKRUPTCY & INSOLVENCY

IN THE MATTER OF the *Bankruptcy and Insolvency Act*;

AND IN THE MATTER OF the Bankruptcy of Thomas Blair Drummie;

BETWEEN **ROYAL BANK OF CANADA** (aka Royal Bank Financial Group)

APPLICANT

AND: **GRANT THORNTON LIMITED** in its capacity as Trustee in Bankruptcy of the Estate of Thomas Blair Drummie

RESPONDENT

AND: **THE SOCIETY OF LLOYDS**

INTERVENOR

DECISION ON MOTION

Before: Michael J. Bray, Q.C. Registrar
Heard: October 6, 2003
Decision: January 23, 2004
Appearances: Walter D. Vail, Q. C. – Solicitor for the Applicant, Royal Bank of Canada
R. Gary Faloon, Q. C. – Solicitor for the Respondent, Grant Thornton Limited
Bruce S. Russell – Solicitor for the Respondent, The Society of Lloyds

I FACTS

1. Thomas Blair Drummie, Q. C. (hereinafter "the Bankrupt") made an Assignment in bankruptcy on March 29, 2000 in which he listed the applicant as a creditor.
2. The Bankrupt had executed an Agreement on March 23, 1994 by which he hypothecated to the applicant 2,501 shares in Ground Floor Holdings Ltd.
3. In May of 2001 the applicant filed a proof of claim with the respondent claiming a debt of $310,801.90 and listing the hypothecation agreement as security.
4. On July 25, 2001, Vincent L. Duff, acting for the Respondent stated in writing, "…we wish to advise that the documentation in support of your recent claim to security has been reviewed and appears to be in order".
5. By Form 77 dated January 31, 2002, and pursuant to subsection 135(2) of the *Bankruptcy & Insolvency Act* (hereinafter "the Act") the Respondent disallowed the security claim of the applicant because "the security given related to a specific loan in the amount of $150,000.00 and that loan was repaid in full prior to the date of bankruptcy."
6. By Notice of Motion returnable before the Registrar on the 13th day of May 2002, the applicant sought an Order holding that the disallowance by the Trustee of the security that the applicant had alleged on its claim of $310,801.90 was a nullity. The Notice of Motion indicated that reliance would be made upon sections 135, 187 and 192 of the Act.
7. Three oral decisions resulted from the hearing on May 13, 2002. The first allowed the Society of Lloyds to intervene with the status of friend of the court.

limitation period in Section 135 by a Section 37 application would be using the latter section to obtain a remedy that is contrary to the Act.

15. Unless the text reveals an inherent contradiction or inconsistency that cannot be avoided without employing a strained and unrealistic construction, a statute should be interpreted in a manner that respects its integrity. In a statute as comprehensive as the *Bankruptcy and Insolvency Act*, a specific provision concerning the procedure to be followed in a particular aspect of the administration of the estate, such as appeals disallowances, must prevail over a general remedy for review of Trustee's decisions. Section 37 cannot be used in place of Section 135 to appeal a disallowance by the Trustee.

16. Although the court has a discretion in granting remedies by way of an application pursuant to a Section 37 application to avoid injustice to any party to the administration of the estate, normally its first inquiry will be whether the Trustee has acted in accordance with his or her obligations under the Act. There is no evidence before the court that the Trustee in this instance conducted himself improperly. Having initially decided that the security claim had appeared to be in order, he later disallowed it based on further information. The Act refers only to the Trustee's disallowance as being final and conclusive. It does so in terms so clear and with such distinct procedures for giving notice of the disallowance and for appeal thereof, that one must imply an exclusion for other decisions by the Trustee.

17. Consideration must be given, nevertheless, to the applicant's submission that, notwithstanding the silence of the Act about any impediment to a change of

135(5) Expunge or reduce a proof – 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.

23. There are distinguishing factors between the facts of Ostrander and those of the present instance. The lapse of time between the filing of the applicant's proof of claim and the Trustee's disallowance was six months as opposed to five years in Ostrander. Assuming the court to be correct in the latter case in interpreting "interfere" widely enough to permit the Trustee to prevail himself of s. 135(5) in case of necessity, I read the decision as suggesting that the use of this provision is facultative to and not mandatory upon any Trustee who wishes to modify his decision to allow a proof. The circumstances in the cited case were exceptional. There was nothing in the present instance to prevent the filing of an appeal pursuant to s. 135(4) if the applicant believed the Trustee to be in error.

CONCLUSION

24. The *Bankruptcy and Insolvency Act* is a comprehensive code developed over an extended period of time and its provisions should be observed unless the court is faced with a situation for which no remedy has been provided or factual circumstances so unique that recourse must be sought from the court's inherent jurisdiction to avoid substantial injustice.

25. The Trustee in the present instance modified his initial decision concerning the applicant's claim based on new information. Nothing in the Act precludes his doing this. The applicant had a remedy pursuant to s. 135(4) if it believed the Trustee's decision to be in error.

26. Having not availed itself of the remedy in accordance with the statutory conditions imposed, the applicant cannot now have recourse to the more general appeal provisions of s. 37 in order to dispense with the said prerequisite conditions.

27. The motion stands dismissed.

28. The question of costs deserves mention, particularly as it relates to the intervenor.

29. Normally there are two types of intervention. There is that in which a corporation or individual applies to intervene as a party in a lawsuit which may affect their economic well-being and in which their interests may not be otherwise protected. A second form of intervention is that of amicus curiae wherein a disinterested party either applies or is requested upon the court's initiative to assist it in considering a point of law that has been overlooked or to avoid a procedural error.

30. It is neither desirable nor appropriate that a creditor have an unfettered right to intervene as a party in a bankruptcy matter unless it has an individual interest which would be in particular jeopardy and the issue involved otherwise might not be raised before the court. This would lead to an unwieldy procedure wherein any creditor could allege that a court review of proof of security would open a right to intervene because some impact might result in the ultimate dividends realized from the estate. As well as unnecessary delay, the legal costs there associated could deplete the estate to no benefit.

31. The intervenor in the present instance framed its motion requesting to be authorized to intervene as an added party or, in the alternative, as a friend of the court for the purpose of addressing the propriety of proceeding under s. 135(4). It

FORM 77

Notice of Disallowance of Claim, Right to Priority or Security *or* Notice of Valuation of Claim
(Subsection 135(3) of the *Bankruptcy and Insolvency Act*)

TAKE NOTICE THAT:

As Licensed Insolvency Trustee acting IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. (collectively, "**YSL**"), KSV Restructuring Inc. (the "**Trustee**") has disallowed the unsecured claim of Maria Athanasoulis, in part, pursuant to subsection 135(2) of the *Bankruptcy and Insolvency Act* (the "**BIA**"), for the reasons set out below.

Your Proof of Claim, as filed with the Trustee, claims:

1. $1 million in respect of damages for wrongful dismissal (the "**Wrongful Dismissal Claim**"); and

2. $18 million in respect of damages for breach of an oral agreement that YSL would pay Ms. Athanasoulis 20% of the profits earned on the YSL project (the "**Profit Share Claim**").

In determining your claims, the Trustee has reviewed and is relying on the following, which represents the support and record for your claim:

1. the Proof of Clam, as filed;

2. all material on the record in these proposal proceedings to date, together with all material on the record in the proceedings by the limited partners of YG Limited Partnership (the "**LPs**") against YSL Residences Inc. et al. in Court file numbers CV-21-00661386-00CL and CV-21-00661530-00CL;

3. the partial arbitration award of Mr. William G. Horton (the "**Arbitrator**") dated March 28, 2022 (the "**Partial Award**");

4. all material filed and produced, and all testimony given, in the "Phase 1" arbitration (the "**Arbitration**") before the Arbitrator; and

5. all responses received by the Trustee from counsel to the LPs and counsel to Ms. Athanasoulis in respect of any information requests of the Trustee.

Wrongful Dismissal Claim

Pursuant to the Partial Award, the Arbitrator held that: (i) YSL was a common employer of Ms. Athanasoulis; and (ii) Ms. Athanasoulis was constructively dismissed from her employment in December 2019. The Trustee accepts the findings of fact of the Arbitrator.

The records of the relevant Cresford entity reflect that Ms. Athanasoulis' employment income was $889,400 in each of 2017 and 2018.

The Trustee has confirmed that Ms. Athanasoulis received $120,000 as a combined, aggregate settlement in respect of both her similar wrongful dismissal and profit share claims in: (a) the 480 Yonge Street Inc. and 480 Yonge Street Limited Partnership proceedings; and (b) The Clover on Yonge Inc. and The Clover on Yonge Limited Partnership proceedings. The Trustee has confirmed with PricewaterhouseCoopers Inc., the court officer in those other proceedings, that such settlement did not incorporate any value in respect of the profit share claim. The Trustee has also determined that Ms. Athanasoulis has not received any other payments in respect of her claims in any other Cresford entity insolvency proceedings.

The Trustee has also taken into account Ms. Athanasoulis' mitigation efforts subsequent to the wrongful termination of her employment and the advice of its counsel on the amount of damages generally awarded by Ontario courts given similar facts and circumstances.

Given the foregoing, the Trustee has determined to allow the Wrongful Dismissal Claim in the amount of $880,000 as an unsecured claim.

The Trustee received objections from certain of the LPs to any allowance of the Wrongful Dismissal Claim and it has considered these objections in making its determination. The Trustee is of the view that the LPs have no standing to object to the Trustee's determination of the Wrongful Dismissal Claim for the reasons set out in the decision of Mr. Justice Osborne in respect of another claim in the proceedings in *YG Limited Partnership and YSL Residences Inc.*, 2022 ONSC 6548. The Trustee is aware that certain of the LPs have appealed this decision.

Profit Share Claim

The Trustee has determined to disallow the Profit Share Claim in full for several, independent reasons that follow.

Equity Not Debt

Pursuant to the Partial Award, the Arbitrator found that Ms. Athanasoulis had a profit share agreement (the "**PSA**") that entitled her to 20% of the profits earned on any of Cresford's current and future projects. The Arbitrator also found that: (a) profits were to be calculated, on a good faith basis, based on the *pro forma* budgets prepared by Cresford in respect of each project; (b) Ms. Athanasoulis' share of the profits was to be paid by the relevant owner that earned the profit; and (c) profits were to be shared when earned, usually at the completion of a project. The Trustee accepts the findings of fact of the Arbitrator.

Section 121 of the BIA provides as follows:

> 121 (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

An entitlement to a share of the profits earned by YSL (*i.e.*, the relevant owner) is not a "provable claim" pursuant to the BIA. It is not a debt obligation of YSL but rather, in substance, an equity entitlement. Profits are, by definition, the difference between the amount earned and the amount spent in buying, operating, or producing something. It is the amount remaining for distribution to

the owners of the enterprise. This is also reflected on YSL's *pro forma* budgets. As such, the Trustee has determined that the PSA, which is an agreement to share in the profits earned by the owner of the YSL project is, in substance, not a debt or liability to which YSL was subject on the day on which these proposal proceedings were commenced.

A claim based on a breach of the PSA that has not been reduced to a judgment debt is also not a "provable claim". The Partial Award also makes no finding as to whether or not the PSA has in fact been breached or the damages associated with such breach assuming one exists.

No Profits Earned by YSL

The Arbitrator held that Ms. Athanasoulis' share of profits resulting from the YSL project was to be paid by the relevant owner that earned the profit, meaning a profit must be earned by the owner of the YSL project for there to be any profit in which to share.

As of the date that these proposal proceedings were initiated, YSL had not completed the YSL project. Indeed, the initial excavation phase of the YSL project was not complete at that time and the construction schedule for the YSL project as of October 2019 contemplated that the YSL project would not be completed until 2025 at the earliest. Accordingly, as of the date of the proceedings, no profit had been earned by the YSL project and, therefore, there was no profit in which to share.

Without prejudice to the Trustee's determination that any claim based on the PSA is not a provable claim, to the extent that Ms. Athanasoulis relies upon the projected profitability of the YSL project as a contingent claim for a lost profit share, the Trustee values such a contingent and unliquidated claim at zero. The assumptions required to determine such a possible amount over such a long time horizon are far too speculative and the alleged damages far too remote to be capable of being considered a provable claim or the subject of any meaningful and reasonable computation.

In addition to the foregoing, the Trustee notes that an affiliate of Concord Properties Developments Corp. ("**Concord**"), the sponsor of the proposal filed and sanctioned by the Court in these proposal proceedings (the "**Proposal**"), became the owner of the YSL project upon implementation of the Proposal. Accordingly, even if the YSL project is successfully brought to completion, despite all of the intervening events challenging such an outcome, any profits earned on the YSL project will not accrue to the relevant owner, *i.e.*, YSL. Ms. Athanasoulis is not entitled to claim a profit-share under the PSA for amounts earned by Concord's affiliate who is not a party to the PSA.

Moreover, the LPs made a total capital contribution of $14.8 million to the YG Limited Partnership in exchange for Class A Preferred Units. Pursuant to the limited partnership agreement in respect of the YG Limited Partnership, the LPs are entitled to a preferred return from the proceeds of the YSL project. Once the LPs are repaid their capital contribution plus their preferred return, any remaining proceeds from the YSL project would be paid to the Class B unit holder, being Cresford (Yonge) Limited Partnership, a Cresford entity. Depending on the resolution of the remaining disputed claims in these proposal proceedings, the most that would be available for distribution to the LPs is approximately $16 million[1] which is less than the amount of their capital contribution

[1] Assuming that the CBRE, Zhang and Athanasoulis claims are all disallowed.

plus their preferred return. Accordingly, the disposition of the YSL project in these proceedings also has not resulted in any profit earned by Cresford (Yonge) Limited Partnership.

Ms. Athanasoulis provided evidence in the Arbitration that "profit" pursuant to her PSA is determined by taking revenue, minus costs, minus the amount returned to the LPs, "and the balance is your net profit".[2] Again, on this basis, there is no profit earned by YSL.

Lastly, to the extent that Ms. Athanasoulis claims that she is entitled to a share of unrealized hypothetical gains on the YSL project as of the date of her dismissal, the Trustee notes that this is contrary to an essential term of the PSA established by the Arbitrator. The Arbitrator found that profits were to calculated based on *pro formas*, but only payable when earned at the completion of the YSL project. There is no dispute that the *pro formas* would be revised continuously throughout the life of the YSL project in order to take into account actual events that transpired. Ms. Athanasoulis cannot claim a share in profits based on an unrealized vision of the YSL project that, as we now know, will never materialize. Such profits are not "earned" until the project is completed. Profits are not "earned" during the life of project because the paper value of the project may increase at a particular point in time. The earning of a profit and asset appreciation are two very different concepts. Furthermore, given that an essential term of the PSA requires profits to be calculated at project completion, any claim for damages for a breach of the PSA must take into account the actual profits earned by YSL upon completion of the project, which as noted above is zero.

Profit Share Claim is Subordinated

In connection with the Arbitration, Ms. Athanasoulis admitted three times under oath – in discovery, in direct examination, and on cross-examination – that any entitlement to a profit-share she may have would arise only after the LPs are repaid their original investment.

On examination for discovery on January 13, 2022, Ms. Athanasoulis stated:

> Q. Did you discuss anything about how profit would be calculated?
>
> A. It was going to be calculated -- you know, in my conversations with Dan, it would be calculated after paying the costs and any... and after paying the equity to... and specific to YSL and 33 Yorkville, it would be paid after the equity was repaid to the LP investors.
>
> Q. You said specific to YSL and 33 Yorkville that you discussed with Dan that profit would be after equity paid to limited partners. So is it right if I understand that Clover and Halo, that was not the definition of profit that you discussed?
>
> A. Clover and Halo didn't have limited partners. So it was after the equity was... like, the equity of -- Dan's equity was repaid.[3]

[2] Transcript of Direct Examination of Ms. Athanasoulis on February 22, 2022, page 153, lines 13-23.

[3] Transcript of Discovery of Ms. Athanasoulis on January 13, 2022, qq. 211-212.

Ms. Athanasoulis confirmed the same understanding in her evidence in-chief during Phase 1 of the Arbitration:

> Q. Okay. And turning down to the profit listed here on the, on the pro forma, in general terms, how was this calculated on the pro forma?
>
> A. How is the profit calculated? So, basically, it takes your revenue, minuses your costs, minuses the amount returned on equity, and the balance is your net profit.
>
> Q. And was Cresford consistent in how it assessed and how it calculated profits?
>
> A. Yes.[4]

She also confirmed the same evidence on cross-examination at Phase 1 of the Arbitration:

> Q. Once construction of a condominium is complete, you register the condominium with the Condominium Authority of Ontario. Do I have that right?
>
> A. Correct. I mean, you register it with -- yes. You register it with the authorities that -- the city.
>
> Q. Right. And we talked about registration before. I'm just trying to make sure we have it clear what that means. And then, once it's registered, you turn the building over to the condominium corporation for that particular property, right?
>
> A. Yes.
>
> Q. And you collect the balances due from purchasers, and you sell any remaining units that might be in the building?
>
> A. Yes.
>
> Q. And then you pay the trades and any fees that might be owing to the kind of management companies that you've described?
>
> A. Sure. You would, you would be paying them along the way, yeah.
>
> Q. And you repay the loans and return equity to investors?
>
> A. Yes.
>
> Q. And it's at this point that you can calculate the actual profits earned by the project, correct?
>
> A. Okay, yes.[5]

[4] Transcript of Direct Examination of Ms. Athanasoulis on February 22, 2022, page 153, lines 13-23.

[5] Transcript of Cross-Examination of Ms. Athanasoulis on February 23, 2022, page 232, line 24 to page 234, line 3.

As the LPs will not be receiving a full return of their equity investment in the YSL project, it is unclear to the Trustee how Ms. Athanasoulis can make a successful claim for a share in profits amount when she has admitted repeatedly that her Profit Share Claim would be calculated after a full return of equity to the LPs.

AND FURTHER TAKE NOTICE that if you are dissatisfied with our decision in disallowing your claim in whole or in part (or a right to rank or your security or valuation of your claim), you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30-day period, allow.

Dated at Toronto, this ___ day of December, 2022.

KSV RESTRUCTURING INC.,
in its capacity as the proposal trustee
for YG LIMITED PARTNERSHIP AND
YSL RESIDENCES INC.

by _____
Name: Robert Kofman
Title: President

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: **BK-21-2734090-0031** **HEARING DATE:** **Monday January 16, 2023**

NO. ON LIST: **2**

TITLE OF PROCEEDING: **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**

BEFORE JUSTICE: **KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Matthew Milne-Smith	Counsel for KSV Restructuring Inc. (Proposal Trustee)	mmilne-smith@dwpv.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info

For Other, Counsels:

Name of Person Appearing	Name of Party	Contact Info
Alexander Soutter	Counsel for Yonge SL Investment Limited Partnership	asoutter@tgf.ca
Mark Dunn	Counsel for Maria Athanasoulis	mdunn@goodmans.ca
Sarah Stothart	Counsel for Maria Athanasoulis	sstothart@goodmans.ca

a. The Proposal Trustee shall reasonably determine and value the Athanasoulis Claim in a timely and principled manner. It will be afforded significant deference. All parties agree that it can use the Arbitration Award from phase 1 of the Arbitration and build on it so that time and effort is not wasted.
b. The Proposal Trustee shall, in its discretion, determine an appropriate procedure to receive the further evidence and submissions of Ms. Athanasoulis and other interested stakeholders. The Proposal Trustee may choose to share its proposed procedure with the other participating stakeholders and seek their input.
c. If expert inputs are deemed necessary to determine the Athanasoulis Claim, the Proposal Trustee may choose to invite expert evidence and input from Ms. Athanasoulis and then determine if it needs its own expert to review and comment upon what is provided.
d. The process by which the Proposal Trustee will determine the Athanasoulis Claim may need to account for the fact that the LPs are expected to advance claims that may require determinations from the Proposal Trustee and/or the court regarding the subordination and/or priority of their claims in relation to the Athanasoulis Claim, the enforceability of any proven Athanasoulis Claim as against them and the damages that they claim to be entitled to for alleged breaches of fiduciary and other duties and contractual obligations that they seek to set-off against the Athanasoulis Claim, if the Athanasoulis Claim is allowed.

8. In the Funding Decision, the court indicated that if the Proposal Trustee chose to share its proposed procedure for the determination of the Athanasoulis Claim with the Sponsor and/or other stakeholders, and if the parties require some further direction and assistance from the court, they may arrange a case conference before me.
9. The Proposal Trustee engaged in a consultative process with Ms. Athanasoulis, the Sponsor and the LPs about the procedure for determining the Athanasoulis Claim. There were fundamental points of disagreement, largely between Ms. Athanasoulis on one side and the Sponsor and the LPs on the other.
10. Based on the input received, the Proposal Trustee suggested the following compromise procedure for resolving the Athanasoulis Claim:
    a. The Proposal Trustee will issue a notice pursuant to ss. 135(2) and (3) of the BIA, substantially in the form of the draft attached as an appendix to its report (the "Notice of Determination"). Under the draft Notice of Determination, the Proposal Trustee would allow the Wrongful Dismissal Claim in part (in the amount of $880,000) as an unsecured claim but would disallow the Profit Share Claim in its entirety. The Proposal Trustee bases its Notice of Determination upon:
        i. the proof of claim, as filed;
        ii. all material on the record in these proposal proceedings to date, together with all material on the record in the proceedings by the LPs against YSL Residences Inc. et al in court file numbers CV-21-00661386-00CL and CV-21-00661530-00CL and some additional submissions provided by the LPs to the Proposal Trustee (that were initially not shared with Ms. Athanasoulis but eventually were shared with her counsel prior to the January 16, 2023 hearing);
        iii. the partial arbitration award of Mr. William G. Horton (the "Arbitrator") dated March 28, 2022 (the "Partial Award");
        iv. all material filed and produced, and all testimony given, in phase 1 of the Arbitration; and
        v. all responses received by the Proposal Trustee from counsel to the LPs and counsel to Ms. Athanasoulis in respect of any information requests made by the Proposal Trustee.
    b. Consistent with the Funding Decision, the Partial Award and factual findings and determinations therein form part of the "factual predicate upon which the determination of [Ms. Athanasoulis'] claim will proceed".
    c. Ms. Athanasoulis may file any appeal pursuant to s. 135 of the BIA.

actual valuation) can be deferred, along with all evidence and submissions about the calculation of these Future Oriented Damages, until after the appeal of the Proposal Trustee's determination to disallow it.

45. As mentioned earlier, during oral argument, counsel for Ms. Athanasoulis agreed that it might be more efficient and economical to defer the valuation of her Future Oriented Damages claims (based on the repudiation date or the date of the Proposal), given that those valuations will be dependent upon expert input, until the appeal of the determination of whether the Profit Share Claim is provable on the principled/legal grounds (equity vs. profit, earned vs. realized profits and subordinated to the LPs' Claims) has been decided (with a reservation of her right to pursue those Future Oriented Damages if the appeal succeeds).
46. In addition to evidence that Ms. Athanasoulis may already have and that could be compiled for submission to the Proposal Trustee, she has identified further evidence that she may need to obtain from the Debtor (and/or Cresford). For example, evidence to counter the Proposal Trustee's determination that the Profit Share Claim is to be valued at zero predicated on the assumption that there were no profits in the YSL Project at, or at any time prior to, the date of the Proposal (because it was not built). Ms. Athanasoulis is entitled to test that determination. To do so she may need additional production from the Debtor and/or Cresford of historic financial documents, beyond those that she has already received. Insofar as the Proposal Trustee is in control of any of the Debtor's records that Ms. Athanasoulis may ask for, it too may be required to produce documents to Ms. Athanasoulis.
47. I agree with Ms. Athanasoulis that if the goal is to create a record now that can be used for a true appeal, the issues identified in the Proposal Trustee's draft Notice of Determination warrant an opportunity for a further exchange of materials and some (circumscribed and limited) cross-examinations so that there is a complete record for the appeal.
48. While the claims process is intended to a summary process and not a full adjudicative process with a trial, this is a complex claim with a multitude of competing interests. Fairness requires that Ms. Athanasoulis be given access to documentary records (and a witness from the Debtor or Cresford who can explain/prove them, if necessary) that she needs to prove her claim and counter the grounds upon which it is expected to be ruled by the Proposal Trustee not to be provable.
49. The court has the jurisdiction to order this under its general discretionary powers in s. 183(1)(a) of the BIA. See also *Toronto-Dominion Bank v. Brad Duby Professional Corporation*, 2022 ONSC 6066, at para. 33. In this instance, the use of those powers in the unique circumstances of this case is appropriate to ensure procedural fairness in the determination of the Athanasoulis Claim and any appeals that may arise from the Proposal Trustee's determination.

c) Standing of the LPs on the Appeal of the Profit Share Claim Disallowance

50. The LP's Claims are not part of this proceeding, except to the extent that they are relevant to the identified grounds for the Proposal Trustee's intended disallowance of the Profit Share Claim. I cannot accede to the request from Ms. Athanasoulis to order the LP's Claims to be adjudicated on their merits in this proceeding, absent the consent of the LPs, which is not forthcoming.
51. The Proposal Trustee suggests that the LPs be entitled only to raise issues in the appeal that pertain directly to: (a) whether the LPs must be repaid in full prior to any payments being made on the Athanasoulis Claim (the enforceability of the Profit Share Claim as against the LPs, which in turn is tied into preliminary questions of subordination and priority); and (b) the enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement."
52. The LPs argue that because they would be the ones most immediately and directly impacted by any aspect of the Athanasoulis Claim that is allowed, and by the value ascribed to any allowed claim, they should have full participation rights on all issues. At some level, every creditor has an interest in minimizing or eliminating the claims of other creditors on equal footing. That is not a reason to grant the LPs advance standing on an appeal, or even to give them full standing in the determination of the Athanasoulis Claim.

53. The Proposal Trustee's suggestion is reasonable and strikes the appropriate balance. Subject, always, to the discretion of the judge hearing the appeal, I see no reason to grant the LPs *carte blanche* to double down on all the arguments already being made by the Proposal Trustee. The LPs have a legitimate interest in bringing forward any unique evidence, claims and arguments that they can offer, but not to duplicate or pile onto arguments already being made by the Proposal Trustee.
54. I consider this situation to be distinguishable from another situation that arose in this case, in relation to a different proof of claim: see *YG Limited Partnership and YSL Residences Inc.*, 2022 ONSC 6548 (now under appeal). In that circumstance, the LPs were held not to have any standing to participate in the adjudication of a creditor's claim at the *de novo* appeal of a claim filed by CBRE involving a contract that the LPs had no involvement in or evidence to offer in respect thereof. The justification for not granting the LPs standing in that situation was fact specific (as it often is). Notably, as well, no one in the circumstances of this case is suggesting that the LPs should have no standing to address any issues on appeal.
55. Here, the LPs have been afforded standing to provide evidence and make submissions to the Proposal Trustee in connection with the Notice of Determination regarding the "provability" of the Profit Share Claim. They have a unique perspective to offer with respect to their argument that the Profit Share Agreement should be found to be unenforceable because it is contrary to the Limited Partnership Agreement (a ground not relied upon by the Proposal Trustee but raised and therefore forms part of the record for appeal purposes that Ms. Athanasoulis must respond to).
56. The LPs may also have a unique perspective on the preliminary question of whether the Profit Share Agreement can be enforced in the face of Ms. Athanasoulis' admissions that she agreed with the LPs that they would be paid out before her. These unique perspectives have been placed before the Proposal Trustee; Ms. Athanasoulis will be permitted to respond to and challenge them, and they will be "in play" on any appeal.
57. Subject to the discretion and views of the judge hearing the appeal, I would anticipate that the LPs will have at least some status at the appeal to address at least these points, but perhaps not beyond them.
58. Finally, the certainty and finality that the determination of these issues will bring is important because of the LP's Claims outside of this proceeding. The LPs need to be given standing to participate in order for an issue estoppel to arise so as to prevent the re-litigation of the same points in the context of the LP's Claims.
59. For all these reasons, it is anticipated that the LPs will be afforded an opportunity to participate on the appeal to the extent of any unique or added perspective or submissions that they have that are not advanced by the Proposal Trustee, or that the Proposal Trustee defers to the LPs on. In contrast, the LPs should not expect to be permitted to make submissions on points already being addressed by the Proposal Trustee, such as, the argument that the Profit Share Claim is a claim in equity, not a debt owing by the Debtor.
60. The LPs asked to be afforded the opportunity to make further submissions in response to Ms. Athanasoulis' further evidence and submissions. I do not consider that to be necessary or appropriate. However, if the Proposal Trustee asks them for further information or documents after receiving the further evidence and submissions from Ms. Athanasoulis, whatever the LPs provide must be given to Ms. Athanasoulis as well.

d) Directions Regarding the Procedure for the Determination of the Profit Share Claim

61. Having considered all the written and oral submissions received, and in the exercise of my discretion, the following directions are provided in respect of the suggested procedure by the Proposal Trustee for the determination and appeal of the Profit Share Claim:
    a. Within one week of the release of this endorsement, Ms. Athanasoulis will be provided with a complete record of all evidence and submissions received from other stakeholders in connection with the Proposal Trustee's draft Notice of Determination with respect to her Profit Share Claim.

This may have already occurred by the delivery of materials previously provided by the LPs to the Proposal Trustee just prior to the hearing of this motion; however, in the interests of completeness a further week is being afforded to ensure that she has now been provided with all materials.

b. Within two weeks of the release of this endorsement, Ms. Athanasoulis may make reasonable and targeted document requests from the Proposal Trustee, the Debtor and/or Cresford, or any other participating party for documents that she does not have and claims she needs to support the proof of the Athanasoulis Claim and to establish that it should be valued at more than "zero" (for example, in support of any grounds upon which she challenges the Proposal Trustee's determination that there were no profits in the YSL Project as at the date of the Proposal or at any time prior to that date).

c. Ms. Athanasoulis' requests shall be responded to, and any documents that are in the possession, control or power of the Proposal Trustee or the Debtor and/or Cresford shall be provided, within three weeks of any such request.

d. Within two months of the release of this endorsement, Ms. Athanasoulis shall deliver her submissions and a supplementary record containing any further evidence that she relies upon in support of the Athanasoulis Claim or that she relies upon to challenge any determination that may be made to disallow her Profit Share Claim on the grounds that:

   i. it is equity, not debt;
   ii. the YSL Project did not generate any profits at, or at any time prior to, the date of the Proposal;
   iii. it is to be subordinated to the LPs return of equity (that will inevitably be subject to a shortfall) because of representations to that effect made to the LPs by Ms. Athanasoulis; and/or
   iv. it is not enforceable as against the LPs because it was entered into in breach of the Limited Partnership Agreement, breach of fiduciary duties owed to the LPs by the general partner and/or misrepresentations made to the LPs by Ms. Athanasoulis.

e. The Proposal Trustee may request further submissions, evidence or documents in respect of its consideration and assessment of the supplementary material provided by Ms. Athanasoulis, the Debtor, the LPs or elsewhere as it deems appropriate. Any such evidence or documents shall be requested by the Proposal Trustee and provided to Ms. Athanasoulis within four weeks of the delivery of her supplementary record.

f. Within two weeks after the provision of any further evidence or documents received by the Proposal Trustee (or the deadline for so doing),

   v. the Proposal Trustee may question (by way of an examination under oath) Ms. Athanasoulis about any evidence or submissions she provides in support of the proof of the Athanasoulis Claim;
   vi. Ms. Athanasoulis may examine a representative of the Debtor and/or Cresford under oath on the question of whether there were any profits in the YSL Project as at the date of the Proposal or at any time prior to that date.

g. The Proposal Trustee shall deliver to all interested parties its final Notice of Determination in accordance with s. 135(3) of the BIA (which may, in the Proposal Trustee's discretion, be revised from the draft Notice of Determination previously delivered, taking into account the additional evidence and submissions it receives) within two weeks of the completion of any questioning/cross-examinations (or the date for their completion having lapsed).

h. Ms. Athanasoulis may thereafter appeal the Proposal Trustee's Notice of Determination and its anticipated disallowance of any aspect of the Athanasoulis Claim in the normal course in accordance with s. 135(3) of the BIA.

i. Subject to the discretion of the appeal judge, the LPs standing on the appeal shall be limited to submissions in respect of the impact of the prohibition contained in the Limited Partnership Agreement on non-arm's length agreements (such as the Profit Sharing Agreement), on the

question of enforceability of the Profit Share Claim and in respect of the priority/subordination of the Profit Share Claim to the LPs recovery of their initial investment based on alleged breaches of contractual and fiduciary duties and alleged misrepresentations.

j. If the parties require further directions or clarifications from the court as they progress through these steps, a case conference may be requested before me through the Commercial List scheduling office.

62. I realize that this will result in a number of months delay in the ultimate determination of the Athanasoulis Claim before any appeal; however, it is still a far less cumbersome process than what was contemplated by the Arbitration, and it is a process that places the determination of the provability of the Athanasoulis Claim, and its valuation, in the hands of the Proposal Trustee.
63. To be clear, it is not expected that there will be any material or submissions at this time regarding the Future Oriented Damages (whether calculated at the repudiation date or the Proposal date). If Ms. Athanasoulis is successful on appeal of any disallowance of the Profit Share Claim, the parties shall make an appointment for a case conference before me (if my schedule permits within the time frame requested) to seek directions about the process for the determination of the more complex valuation question that will likely require expert input.

Analysis and Directions – Wrongful Dismissal Claim

64. The Proposal Trustee allowed the Wrongful Dismissal Claim in part and valued it at $880,000. $120,000 was discounted because the Proposal Trustee determined that this amount had already been paid to Ms. Athanasoulis in the context of another proceeding. It has not been suggested that there is a need for further evidence or submissions in respect of the Proposal Trustee's determination of this claim reflected in the draft Notice of Determination. If Ms. Athanasoulis has further evidence or submissions on the narrow question of whether she has already received $120,000 on account of this claim, those may be provided to the Proposal Trustee when she delivers her supplementary record in connection with the Profit Share Claim (as indicated in the previous section, to be provided within two months of this endorsement).
65. The issues raised for the court's consideration in respect of this aspect of the Athanasoulis Claim are:
    a. Whether the LPs have standing in respect of the determination of the Wrongful Dismissal Claim.
    b. Should the allowed portion of this claim be paid out in a manner consistent with other employee claims, or deferred until the appeal and other steps in the determination of the entire Athanasoulis Claim have been resolved?
66. The Proposal Trustee is of the view that the LPs have no standing with respect to the Proposal Trustee's determination of the Wrongful Dismissal Claim for the reasons set out in the decision of Osborne J. in respect of the CBRE claim (discussed earlier in this endorsement at paragraph 54, *YG Limited Partnership and YSL Residences Inc.*). The Proposal Trustee is aware that certain of the LPs have appealed this decision.
67. There has been no indication that the LPs have any unique perspective or evidence to offer in respect of this issue (unlike the Profit Share Claim, where they do, and have accordingly been afforded rights of participation commensurate with their unique perspective and evidence). I do not see any basis on which they should be involving themselves in the determination or valuation of the Wrongful Dismissal Claim.
68. It will be a matter for the Proposal Trustee to decide, but it was indicated at the hearing that the "allowed" portion of the Wrongful Dismissal Claim will be treated in same way as "like" employee claims which, if not appealed, have been paid out at 70 cents on the dollar.

Costs and Final Disposition

69. The Proposal Trustee does not seek costs from any party in respect of this motion.

Ivandaeva Total Image Salon Inc. et al. v. Hlembizky
c.o.b. as Dermocare; Ivandaeva, Third Party

Ivandaev v. Ivandaeva

[Indexed as: Ivandaeva Total Image Salon Inc. v. Hlembizky]

63 O.R. (3d) 769
[2003] O.J. No. 949
Docket No. C38289

Court of Appeal for Ontario
O'Connor A.C.J.O., Laskin and Borins JJ.A.
March 18, 2003

Civil procedure -- Orders -- Motion to set aside -- Sealing order made in matrimonial litigation -- Petitioner in that litigation was plaintiff in commercial litigation -- Defendants in commercial litigation not "persons affected" by sealing order -- Defendants not having right to notice of motion for sealing order under rule 37.07(1) of Rules of Civil Procedure as no proprietary or economic interest of theirs was affected by sealing order -- Defendants not having standing to bring motion under rule 37.14(1) to set aside or vary sealing order -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 37.07(1), 37.14(1).

The defendants entered into three commercial agreements with the plaintiff and his wife for the purchase of the defendants' business. Before the closing of the agreements, the marriage of the plaintiff and his wife failed. The plaintiff and his company brought three proceedings against the defendants claiming that they were entitled to terminate the agreements and asking for the return of all deposits paid under the agreements. Around the same time, the plaintiff commenced a

Hlembizky.
M. Michael Title, for respondent Denis Ivandaev.
Michael Krylov, for third party Elena Ivandaeva.

The judgment of the court was delivered by

[1] BORINS J.A.: -- Walter and Audrey Hlembizky ("the Hlembizkys") moved under rule 37.14(1)(a) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 to set aside an order of Caswell J. issued under s. 137(2) of the Courts of Justice Act, R.S.O. 1990, c. C.43 sealing the "court file" in Ivandaev v. Ivandaeva, which is a family law proceeding in the Family Law Division of the Superior Court of Justice. In response to the Hlembizkys' motion, Denis Ivandaev moved for an order, inter alia, that the Hlembizkys and their solicitor, Mark Arnold, comply with the order of Caswell J. The motion judge dismissed the Hlembizkys' motion and granted Mr. Ivandaev's motion. The Hlembizkys appeal both of these orders. For the reasons that follow, I would dismiss both appeals.

Background

[2] There is no serious dispute surrounding the events that led up to the motions under appeal. However, they are quite complicated. For the purpose of my reasons, I will limit my review of the background events to those that are required to decide the appeal.

[3] Denis Ivandaev and Elena Ivandaeva ("the Ivandaevs") entered into three commercial agreements with the Hlembizkys. One agreement was for the purchase of the Hlembizkys' spa and [page772] beauty salon business. Another required Mr. Hlembizky to provide consulting services to Mr. Ivandaev. The third required Mrs. Hlembizky to train the Ivandaevs in conducting the businesses. Before the closing of the agreements, the Ivandaevs' marriage failed. As a result, on September 26, 1999, Mr. Ivandaev and his company commenced three separate proceedings against [the] Hlembizkys (the "commercial litigation") claiming that they were entitled to terminate the agreements and asking for the return of all

> motion, and the question is not alone whether the order should have been made, but whether, having been made, it should, in view of any change in the state of affairs, or positions of the parties, be rescinded: Howland v. Dominion Bank (1892), 15 P.R. 56, at p. 63; Cairns v. Airth (1894), 16 P.R. 100, and Cousins v. Cronk (1897), 17 P.R. 348; Allison v. Breen (1900), 19 P.R. 119, 143.

See, also, W.B. Williston and R.J. Rolls, The Law of Civil Procedure, Vol. 1 (Toronto: Butterworths, 1970), at pp. 470-71.

A person affected by an order

[26] Since the inception of the rule in 1881, access to it has been available to one "affected by" the order which it is sought to rescind, set aside or vary. From 1881 to the introduction of the Rules of Civil Procedure in 1985, the rule provided that it was available to a "party affected by an ex parte order". However, in 1985 "person" replaced "party" in rule 37.14(1). In this regard, I note that in the complementary rule, rule 37.07(1), a notice of motion must be served "on any person or party who will be affected by the order sought" (emphasis added). This raises the [page779] question of whether a party may bring a motion under rule 37.14(1), or whether it is available only to a "person", or whether a person includes a party.

[27] Other than Stanley Canada Inc. v. 683481 Ontario Ltd. (1990), 74 D.L.R. (4th) 528 (Ont. Gen. Div.), the cases that have considered the rule in its different forms do not discuss the meaning of "affected by". However, a review of the cases in which a successful motion has been brought under rule 37.14(1) and rule 38.11(1), which applies to applications, or their predecessors, to set aside or vary an order suggests that the order must be one that directly affects the rights of the moving party in respect to the proprietary or economic interests of the party. In addition, there is another broad group of cases, usually arising from the sealing of a court file, in which the media has complained that its right to freedom of expression as guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms has been compromised and in

CITATION: Blake v. Blake, 2021 ONSC 7189
COURT FILE NO.: DC-21-009
DATE: 20211101

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

M.L. EDWARDS R.S.J., S.T. BALE. and FAVREAU JJ.

B E T W E E N:	)	
	)	
BRUCE HOWARD BLAKE, KATHRYN JOAN HOMES and PATRICIA RUTH GEDDES	)	*Edwin G. Upenieks*, for the Applicant Patricia Ruth Geddes
	)	
	)	*Fred Leitch*, for the Applicants
Applicants (Respondents on Appeal)	)	Bruce Howard Blake and Kathryn Joan Homes
	)	
- and –	)	
	)	
KENNETH GEORGE BLAKE and KENNETH GEORGE BLAKE in his capacity as the Estate Trustee of the Estate of AINSLEE ELIZABETH BLAKE	)	*Jeffrey Haylock,* for the Respondent (Appellant)
	)	
	)	*Angela Casey and Laura Cardiff,* Amicus Curiae
Respondent (Appellant)	)	
	)	*Sean Dewart and Mathieu Bélanger*, for the Intervenor Gregory Sidlofsky
	)	
	)	*Sarit Batner, Moya Graham and Adriana Forest*, for The Advocates' Society
	)	
	)	**Heard at Brampton via Zoom on June 18, 2021**

REASONS FOR DECISION

Overview

[1] It is rare that leave to appeal is granted where the only issue in dispute relates to costs. It is even more rare that this court would hear an appeal which has been rendered moot by the parties' settlement of the action as a whole, including the costs issue for which leave was originally granted.

[2] The appeal as it was originally formulated relates to the Costs Decision of the motion judge who heard a motion for summary judgment. Leave to appeal the decision of the motion judge was

granted by the Divisional Court in December 2019. In January 2020, the parties to the litigation reached a global settlement of their dispute. The global settlement dealt with the award of costs on a substantial indemnity scale against Mr. Blake. The parties agreed that this appeal need not proceed as no money was being paid with respect to the costs order that forms the subject matter of the appeal. It is quite clear as a result of the settlement that the appeal is moot.

[3] In September 2020, the parties appeared before Fowler Byrne J. on a motion for an order permitting Mr. Sidlofsky to intervene in this appeal and to pursue the appeal despite the fact the appeal was moot. The motion was granted. Intervenor status was granted to Mr. Sidlofsky. Fowler Byrne J. framed the issues to be argued on appeal by Mr. Sidlofsky as follows:

> a) are the findings of the motion judge about Mr. Sidlofsky's professional conduct proper and supported by the evidence;
>
> b) what is the extent of a lawyer's duty to the court including when a matter has been argued and remains under reserve; and
>
> c) should there be cost consequences for a client if his or her lawyer has breached his or her duty to the court.

[4] In addition to granting Mr. Sidlofsky intervenor status, Fowler Byrne J. also appointed *amicus curiae* to argue the appeal from the adverse position to Mr. Sidlofsky and ordered that Mr. Sidlofsky's errors and omissions insurer would be responsible for paying amicus' fees and disbursements.

[5] Adding to the cast of characters with standing to argue this moot appeal is The Advocates Society which was granted leave to intervene as a friend of the court on consent by order of this court dated April 28 2021.

The Facts

[6] The background facts are not in dispute and are accurately reflected in the reasons for judgment of Fowler Byrne J. dated October 19, 2020. Those background facts are set out below.

[7] On September 19, 2018, Mr. Blake, in his personal capacity and as estate trustee, brought a motion for summary judgment seeking to dismiss the claims of the Applicants. In his decision of March 18, 2019, the motion judge dismissed the motion and invited written submissions on costs.

[8] At all relevant times, Mr. Sidlofsky was counsel of record for Mr. Blake, personally, and in his capacity as estate trustee. Mr. Sidlofsky made written submissions on costs on behalf of his client and delivered them to the motion judge as directed.

[9] On July 8, 2019, the motion judge released his costs endorsement ("Costs Decision"). In the Costs Decision, the motion judge expressly considered Mr. Sidlofsky's conduct as counsel and the resulting costs implications. In particular, the motion judge found that Mr. Sidlofsky breached

his duty to the court, and because of this breach, found that it was a proper case for an award of substantial indemnity costs in the sum of $91,695.13 payable by Mr. Sidlofsky's client, Mr. Blake.

[10] Mr. Blake sought leave to appeal the Costs Decision, which was granted on December 13, 2019. Mr. Blake then filed his appeal on December 23, 2019.

[11] In or around January 2020, the parties in the main action settled their dispute in its entirety. Accordingly, Mr. Blake has no interest in pursuing his appeal of the Costs Decision. After the affidavits in support of the motion before Fowler Byrne J. were sworn, Mr. Sidlofsky commenced an action against Mr. Blake for his legal fees. Mr. Blake has defended this claim and made his own counterclaim for damages for negligence and breach of contract, relying specifically on the Costs Decision. We will refer to this ongoing litigation between Mr. Blake and Mr. Sidlofsky as the Fees Action.

The Argument of the Summary Judgment Motion

[12] The facts as they relate to the argument of the summary judgement motion, the resulting reasons of the motion judge and his Costs Decision bring context to our reasons. A summary of those facts largely drawn from the factum of amicus is reproduced as follows.

[13] The moving party on the motion before the motion judge, Mr. Blake, is the estate trustee of his mother's estate. The respondents are the other beneficiaries of that estate.

[14] In the underlying litigation, Mr. Blake sought to pass his second set of estate accounts. The main issue on the passing of the estate accounts related to an allegation that Mr. Blake had transferred some of the Deceased's properties (the "Arizona properties") to himself during the Deceased's lifetime, using his authority under the Deceased's power of attorney

[15] The applicants filed objections to the accounts on the basis that Mr. Blake had failed to provide proper disclosure with respect to the transfer of the Arizona properties. They also commenced two separate applications disputing the treatment of the Arizona properties. Those three proceedings were consolidated in an order by the motion judge dated August 2, 2012 ("2012 Consolidation Order"). All three proceedings were ordered to proceed as a trial of the passing of accounts.

[16] At the time the Consolidation Order was made, Mr. Blake had already identified the basis of a possible defence to the objections and applications. The 2012 Consolidation Order therefore preserved Mr. Blake's right to move for a declaration that the beneficiaries were "precluded by the Limitations Act and the doctrine of res judicata from raising issues respecting the deceased's affairs prior to October 31, 2010".

[17] In February of 2018, Mr. Blake brought the summary judgment motion contemplated by paragraph 3 of the 2012 Consolidation Order, specifically seeking the following relief:

> a) Summary judgment dismissing the within proceedings to the extent of any and all objections or other relief sought by any one or all of the applicants in respect of any alleged acts or omissions of

[41] Counsel for Mr. Sidlofsky points out that the motion judge found as a fact that Mr. Sidlofsky knew of the decisions at first instance (*Wall Estate*) and on appeal (*Wall v Shaw*) and that he purposefully did not bring the decisions to the court's attention.

[42] The motion judge made those findings of his own volition. He did not seek submissions from the parties and did not even advise Mr. Sidlofsky that he intended to consider facts that, if found to be true, would necessarily harm Mr. Sidlofsky, personally and professionally. The motion judge then relied on this finding to justify a punitive costs order against Mr. Sidlofsky's client.

[43] Counsel for Mr. Sidlofsky argues that the motion judge breached the rules of natural justice at the most rudimentary level. Specifically, he argues that Mr. Sidlofsky and his client were not afforded the opportunity to be heard. Natural justice requires that a party whose rights will be affected by a court's decision be provided with notice and afforded the opportunity to adduce evidence and make submissions.

[44] Mr. Sidlofsky argues that he learned that he was both accused and found guilty of purposefully misleading the court at the same time, when he received the motion judge's Costs Decision. He argues that he was affected by the Costs Decision in several ways. The findings and result drove a wedge between Mr. Sidlofsky and his client, resulted in inquiries by Mr. Sidlofsky's regulator and attracted significant adverse publicity which called Mr. Sidlofsky's integrity into question. During the course of argument in this court, we were advised that there is ongoing publicity on the internet as a result of the findings.

[45] Mr. Sidlofsky argues that if the motion judge had requested submissions on why the decisions in *Wall* were not referred to in court, he could have explained that he was not aware of the decisions and that he had not seen his law partner's blog regarding the decision at first instance. He could also have provided submissions about why the decision in *Wall* was not determinative, or even relevant, to the limitations argument he had advanced on his client's behalf.

[46] Mr. Sidlofsky also argues that the motion judge's conclusion about his supposed misconduct is not supported by the record that was before the court. The motion judge researched the law without seeking submissions from any counsel and found by himself the case he relied on to dispose of the summary judgment motion. He later found that Mr. Sidlofsky's law firm is a "small specialized firm practicing in the area of estate litigation", presumably after visiting the firm's website of his own volition.

[47] It is also emphasized by counsel for Mr. Sidlofsky that the motion judge also found the blog commentary of his law partner by himself, and drew inferences based on the dates the decisions and the blog commentary were published. As it happens, the motion judge erred in the basic facts, from which he concluded that Mr. Sidlofsky had misconducted himself. He wrote twice in the Costs Decision that the Court of Appeal's decision in *Wall v Shaw* was released in March 2018, when in fact this was the date of the decision at first instance. The decision of the Court of Appeal only came out on November 21, 2018, two months after the motion was argued.

[48] Counsel for Mr. Sidlofsky also notes that the motion judge conducted a review of documents regarding a lawyer's duty as an officer of the court. In doing so, the motion judge did

[54] In coming to the decision that the motion judge should, as a matter of fairness, have invited submissions from counsel, we want to make clear that we understand the crushing workload the judiciary has to address on a daily basis. Judges are human and can fall into error. The error in this case unfortunately had a very negative impact on Mr. Sidlofsky's professional reputation.

[55] It is clear from a review of the motion judge's Costs Decision that he was of the view that he had not been provided the necessary tools to determine the issue before him. This is made self-evident by paragraph 20 of his Costs Decision where he states:

> In the course of considering my decision, while under reserve, given the lack of helpful authorities on the application of a limitation period to the Notice of Objection, I reviewed the law by considering the jurisprudence and the applicable statutory language.

[56] It is made further evident from his Costs Decision that the motion judge undertook his own review of the law and as a result of that review discovered the *Wall* decision. Having discovered *Wall*, the motion judge concluded that it was determinative of the summary judgment motion. It is clear from paragraph 21 of his Costs Decision that the motion judge was frustrated by counsel not having brought to his attention a decision that was directly on point and determinative of the motion:

> During my review of the law, and without any ingenious or in-depth research on my part, the first instance and appeal decisions in *Wall v. Shaw* 2019 ONSC 4062 (CanLII) came to my attention. These decisions were directly on point with the limitation issue as raised by the respondents and immediately disposed of their submissions on the limitation period.

[57] Lawyers are professionals whose conduct is governed by the *Rules of Professional Conduct.* While the Law Society regulates the legal profession, our courts may in appropriate circumstances sanction the conduct of a lawyer. One of the better-known examples of such a sanction can be found in Rule 57.07(1) of the *Rules of Civil Procedure*. Another example can be found in the court's inherent jurisdiction to find a lawyer in contempt of court. On the facts of this case, another way the court can sanction a lawyer is through the reasons of the court that become part of the public record.

[58] Regardless of how the court imposes a sanction, it is fundamental that the court provides notice to the lawyer of the court's intention to sanction the lawyer. It is also fundamental that the court provide the lawyer an opportunity to be heard prior to sanctioning the lawyer's conduct. To sanction the conduct of a lawyer without notice and without an opportunity to make submissions puts the court in the position of making findings that could have a significant impact on a lawyer's reputation.

[59] In a situation where a judge's decision will have a direct impact on someone who is not a party to the dispute there is an obligation to allow that person to be heard. The Court of Appeal

makes this clear in *Fontaine v Canada (Attorney General)* 2018 ONCA 1023, at para 21, as follows:

> Contrary to what the respondent argues, it is precisely because the Eastern Administrative Judge was exercising his judicial functions that he owed the appellant an elevated duty of procedural fairness and natural justice. Of the many principles underlying the Canadian judicial system, generally those who will be subject to an order of the court are to be given notice of the legal proceeding and afforded the opportunity to adduce evidence and make submissions: A.(L.L.) v. B.(A.), [1995] 4 S.C.R. 536, at para. 27.

[60] Along the same vein, Lamer C.J. and Sopinka J. provide similar guidance in *A. (L.L.) v B.(A)* [1995] 4 S.C.R. 536 at para 27:

> The one question that remains is whether both a complainant, a third party to the proceedings (whether or not an appellant, but here one of the appellants), and the Crown, a party to the proceedings, have standing in third party appeals. There is no doubt in my mind that they do. The *audi alteram partem* principle, which is a rule of natural justice and one of the tenets of our legal system, requires that courts provide an opportunity to be heard to those who will be affected by the decisions.

[61] The motion judge did not award costs against Mr. Sidlofsky personally. He did however award the Applicants their costs on an elevated scale. Substantial indemnity costs were awarded precisely because of the motion judge's finding of Mr. Sidlofsky's "clear breach of duty" (para 37 Costs Decision). While Rule 57.07 is not engaged by the facts of this case, the requirement imbedded in Rule 57.07 to provide a lawyer with notice of the court's intention to award costs against a lawyer should help inform the obligation to similarly provide a lawyer with notice where a finding of professional misconduct may have negative consequences for that lawyer's client.

[62] The following extract from paragraph 13 of the motions judge's Costs Decision makes it abundantly clear that the motion judge was concerned with Mr. Sidlofsky's conduct as it relates to his perceived non-disclosure of the *Wall* decision:

> The conduct of counsel for the respondents gives rise to some very serious concerns regarding counsel's understanding and recognition of his duty as an officer of the court and his duty of candour with counsel opposite.

[63] The concerns about Mr. Sidlofsky's conduct were based on the motion judge's perception of the facts and the law, without giving Mr. Sidlofsky any opportunity to address those concerns. The motion judge reached the following conclusion found at paragraph 26 of his Costs Decision:

> Furthermore, I have also reached the very troubling conclusion that counsel for the respondents **purposely** did not bring the decision in *Wall v Shaw* to the attention of the court during the submissions on the motion or while my decision was under reserve. The decision was directly on point with the issue at stake on the summary judgement motion and the decision was adverse to the interests of the respondents. [Emphasis added.]

[64] The motion judge completed his analysis of the facts and the law with his conclusion that Mr. Sidlofsky breached his duty to the court by his failure to bring the *Wall* decision to the court's attention. A public finding by the court that a lawyer has breached his or her duty to the court is a finding that can have a long-lasting impact on that lawyer's reputation -- hence the requirement that a lawyer facing such a sanction must be given notice and an opportunity to be heard prior to the court making such a public finding.

[65] Where a motion judge or trial judge intends to call into question the integrity of a lawyer with a finding that the lawyer has breached his or her duty to the court, there is a corresponding obligation on the court to provide that lawyer with notice and an opportunity to be heard. This is a rule of fairness. A lawyer's reputation is something built on years of hard work. A lawyer's reputation can be lost in mere seconds when someone reads a judge's reasons that call into question that lawyer's integrity. We therefore allow the appeal on the basis of a breach of procedural fairness.

[66] As it relates to the various other issues argued on this appeal, we are of the view that those other issues should be left for another day when the court is asked to deal with an appeal where the issues are not moot. Perhaps of equal importance is our concern that if we weigh into those other issues (some of which are framed in the Order of Fowler Byrne J.), we could make factual and legal determinations that might unfairly impact on the Fees Action that continues between Mr. Blake and Mr. Sidlofsky.

[67] In the normal course, where there is a breach of procedural fairness, the appropriate remedy is to send the decision back to the original decision maker or to decide the matter afresh. However, given that the estate litigation has been resolved and some of these issues arise in the Fees Action, there is no purpose in remitting the issue back nor would it be helpful for the panel to decide the issues.

[68] The appeal is allowed. As agreed among the participants on the appeal, there will be no order as to costs.

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Edwards R.S.J.

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Bale J.

.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

Court File No. BK-21-02734090-0031
Court of Appeal File Nos. COA-22-CV-0451
& COA-23-CV-0288

COURT OF APPEAL FOR ONTARIO

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

ORAL ARGUMENT COMPENDIUM OF THE PROPOSAL TRUSTEE KSV RESTRUCTURING INC.

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