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.

ORAL HEARING COMPENDIUM of the APPELLANTS

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June 23, 2023

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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

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TAB 1

Outline of the Appellants' Oral Argument

1. The lower Courts erred by denying the appellants' standing to participate in creditors' appeals pursuant to s.135(4) of the *Bankruptcy and Insolvency Act* ("***BIA***").

2. The appellants' economic interests are directly affected in this proceeding. The Debtors' *BIA* proposal (the "**Proposal**") expressly provides that the limited partners will receive all surplus proceeds of the Proposal after unsecured creditors are paid.

3. It is undisputed that the appellants stand to recover up to $16 million pursuant to the Proposal, subject to the determination of three outstanding claims against the Debtors. These appeals involve two such claims, one by Maria Athanasoulis and another by CBRE Limited ("**CBRE**"). The appellants' entitlement under the Proposal is directly affected by the determination of these claims.

Appeal in Court File COA-23-CV-0288 regarding the Athanasoulis Claim

4. Ms. Athanasoulis claims $18 million (allegedly 20% of the profits of the YSL Project). The lower Court erred in determining that, if Ms. Athanasoulis appeals from a disallowance of her claim, the appellants' standing should be restricted to matters where they have a "unique perspective".

5. Parties whose economic interests are affected by a Court's decision, like the appellants, have standing to appear and make submissions. (*Ivandaeva; Blake*)

6. This is not a case where there is "no possibility" that the appellants could benefit from a surplus after the determination of claims against the debtors. (*Ethier*)

7. Courts have already accepted that the appellants are among the "fulcrum stakeholders" and have a "direct interest" in the determination of claims against the Debtors. Justice Dunphy acknowledged the appellants' standing. It was an error to not follow Justice Dunphy's decision. (*Pfizer*)

8. The appellants' standing to make submissions is not a matter of discretion. It was an error to conflate the legal issue of a party's standing with the Court's discretionary power to control its own process.

Appeal in Court File COA-22-CV-0451 regarding the CBRE Claim

9. CBRE claims $1.2 million regarding a commission arising from the transfer of the YSL Project pursuant to the Proposal. The Proposal Trustee disallowed CBRE's claim. CBRE appealed pursuant to s.135(4) of the *BIA*, which permits a creditor to appeal from the disallowance of its claim.

10. The lower Court treated the appeal as if brought under s.135(5), which permits creditors or debtors to challenge claims allowed by a trustee. That subsection had no application to CBRE's appeal and is not determinative of the appellants' standing. The appellants have standing for the reasons set out in paragraphs 5-7 above.

11. Treating the appeal as if pursuant to s.135(5) also reversed the onus. Under s.135(4), the onus is on CBRE to prove its claim. Under s.135(5), the onus is on the person challenging the claim to prove it is not a provable claim. (*RBC v Insley; Sally Creek; Karataglidis*).

12. The vague evidence offered by CBRE was not capable of meeting its onus and ought not to have been accepted. (*CIBC v 433616*)

TAB 2

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**

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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.

TAB 3

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

[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:

TAB 4

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

> 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

which the principle of open and accessible court proceedings has been invoked. See, e.g., Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, 211 D.L.R. (4th) 193.

[28] In Stanley, the issue was whether a union and its members had standing under rule 37.14(1)(a) as persons "affected by an order obtained on motion made without notice", to move for an order setting aside an order obtained under rule 44.01(1) by the employer of the union members, Stanley, directing the sheriff to enter the defendant company's premises and to recover a quantity of steel owned by Stanley. At the time of the order, the union was on a legal strike against Stelco Inc., which had manufactured the steel for Stanley, that was stored for Stanley by the corporate defendant.

[29] The union contended that it had standing because the economic impact on Stelco of its picketing had been, and would be, diminished as a result of the rule 44.01(1) order. The union's picketing of the company precluded Stanley from removing its steel from the company's warehouse. The union contended that this represented an economic advantage to it in its strike against Stelco Inc.

[30] McKeown J., at p. 537 D.L.R., held "that the substantial economic advantage to the union members in keeping the steel in the warehouse makes them persons 'affected by an order' under rule 37.14". He also found at p. 539 D.L.R., that the "potential infringement" of its freedom of expression guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms "qualifies the union members as 'affected by' . . . the master's order".

[31] Stanley was applied in Weinstein v. Weinstein (Litigation Guardian of) (1997), 35 O.R. (3d) 229, 30 R.F.L. (4th) 116 (Gen. Div.). [page780] In that case a wife had settled a trust and provided that on her death the trust assets were to go to her estate, the residue of which had been bequeathed to her grandchildren under her will. Subsequently, her husband applied without notice to the grandchildren for a judgment equalizing the net family assets of himself and his

wife. The application was granted and a judgment was given transferring $2.5 million from the wife's trust to the husband. The grandchildren moved under rule 38.11(1) to set aside the judgment on the ground that they were persons "affected by a judgment on an application made without notice". In setting aside the judgment, Sheard J. held that the grandchildren were "manifestly" persons affected by the judgment and that they should have received notice of the application. Citing Stanley, he rejected the argument that an economic interest in the outcome of a proceeding does not confer standing under rule 38.11(1).

[32] The following cases which have considered whether a stranger to a proceeding was a person affected by an ex parte order, or an order made without notice to him or her, within the meaning of rule 37.14(1) or rule 38.11(1), all determine standing on the ground that the order sought to be set aside or varied affected the moving party's propriety or economic interests:

(1) The administrator of an estate of a deceased person had standing to move to set aside an order appointing an administrator ad litem to represent the estate of the deceased in an action against him commenced before his death: McLean v. Allen (1898), 18 P.R. 255 (Ont. H.C.J.).

(2) A person claiming to be entitled to moneys attached pursuant to a garnishee order obtained with notice to her, was a person affected by the order: Canada Lumber Co. v. Whatmough (1923), 23 O.W.N. 584 (C.A.).

(3) The defendant's motor vehicle insurer was affected by an order renewing a writ of summons because it could be liable to indemnify the plaintiff for any damages recovered from the defendant: Palmateer v. Back (1976), 9 O.R. (2d) 693, [1975] I.L.R. 1-677 (H.C.J.).

(4) A mortgagee's interests as a secured creditor were affected by an order expediting the sale of condominium units and requiring it to discharge its mortgage: Unical Properties v. 784688 Ontario Ltd., [1993] O.J. No. 2039 (Quicklaw)

TAB 5

1991 CarswellOnt 213
Ontario Court of Justice (General Division), In Bankruptcy

Ethier, Re

1991 CarswellOnt 213, [1991] O.J. No. 1886, 29 A.C.W.S. (3d) 919, 2 W.D.C.P. (2d) 615, 7 C.B.R. (3d) 268

RE MARY LOU PATRICIA ETHIER (Bankrupt); RE JOSEPH ARMAND BERNARD ETHIER (Bankrupt)

Desmarais J.

Heard: August 16, 1991
Judgment: October 21, 1991
Docket: Docs. 051041, 051044

Counsel: *Ronald S. Petersen*, for bankrupts.
Stephen S. Appotive, for trustee.

Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.2 Trustees
XIV.2.c Removal

Headnote
Bankruptcy --- Administration of estate — Trustees — Removal
Trustees — Removal for cause — Application by bankrupt — Bankrupt not "interested person" under s. 14(4) of Bankruptcy Act and not having status to proceed — Trustee acting as receiver — Not necessarily cause for removal — Application dismissed — Bankruptcy Act, R.S.C. 1985, c. B-3, s. 14(4).
B. & B. Ethier Company Ltd. ("B & B") was a residential and commercial plumbing contractor. BE was the sole shareholder of B & B. BE incorporated another company, which carried on business as B.E. Mechanical. Due to financial difficulties, B & B placed itself into voluntary receivership and the bank appointed Thorne Ernst & Whinney Inc. ("TEWI"), now Peat Marwick Thorne Inc. ("PMTI"), as the receiver. TEWI sued BE, PE, his wife, and B.E. Mechanical concerning the payment of suppliers through B & B when the payables were that of B.E. Mechanical.
Following BE's and PE's assignment into bankruptcy, the official receiver appointed PMTI as the trustee. As a result of the bankruptcy of BE, his non-voting share in BE Mechanical vested in the trustee. The civil action against BE and PE was stayed by reason of the bankruptcies but it proceeded against B.E. Mechanical. BE and PE requested that the receiver dismiss or discontinue the civil action against them. The receiver refused.
BE and PE argued that PMTI was in a conflict of interest by reason of the refusal of the receiver to dismiss or discontinue the civil action. They also alleged that the bank and PMTI had taken actions that were malicious. The bankrupts applied to have the trustee removed for cause.
Held:
The application was dismissed.
In order to have the trustee removed, the applicant must first establish that he is an "interested person" within the meaning of s. 14(4). Although the expression has been construed liberally enough to include the trustee himself, it does not encompass the bankrupt unless there is a surplus in the trustee's hands after satisfying in full all the claims of the creditors.
In this case there was no possibility of a surplus in the hands of the trustee and it appeared that there was a substantial deficit.
Even if the bankrupts had status to proceed, they must still establish cause for the removal of the trustee. The fact that the trustee was also acting as a receiver did not disqualify him from acting as trustee, particularly in view of the fact that the inspectors approved of the trustee's performance, suggesting not only that the trustee was acting without interest or bias but also was

spending money to conduct s. 163 examinations of family members and other friends. More particularly, Bernard Ethier alleges that the nature of the questioning in the s.163 examination suggested he had absconded with funds and made him out to be an idiot. In addition, he says that creditors have directed correspondence to himself rather than the receiver and this constitutes malicious action.

Decision

18 In my view, the application for an order to remove Peat Marwick Thorne as trustees should be dismissed.

19 Section 14(4) of the *Bankruptcy Act*, R.S.C. 1985, c. B-3, reads as follows:

> The court on application of any interested person may for cause remove a trustee and appoint another licensed trustee in his place.

20 In order to have the trustee removed, the applicants must first establish that they are "interested persons" within the meaning of s.14(4). Although the expression has been construed liberally enough to include the trustee himself, it does not always encompass the bankrupt.

21 *Re Commonwealth Investors Syndicate Ltd.* (1986), 61 C.B.R. (N.S.) 147, 69 B.C.L.R. 346 (S.C.), was the only case cited whereby the bankrupt succeeded in having the trustee removed on the ground that the latter was in an intolerable conflict position. Gibbs J. of the British Columbia Supreme Court noted the trustee could be held accountable to the bankrupt as cestui que trust as there was a surplus remaining after the payment of the creditors. Such reasoning is in keeping with the principle enunciated in the much earlier decision of *Re A Debtor; Ex parte Debtor v. Dodwell (Trustee)*, [1949] 1 All E.R. 510, [1949] Ch. 236. In *Re Debtor*, the issue was whether the bankrupt could force the trustee in his bankruptcy to account for the management and disposition of the estate. The terms of the then *Bankruptcy Act* allowed any "aggrieved person" to bring forth a motion. The court stated the following [p. 511 All E.R.]:

> The point, of course, can only arise where the bankrupt can show that there is or will or might (but for the trustee's action or inaction) be a surplus in the trustee's hands after satisfying in full all the claims of the creditors. Where, as in the vast majority of cases, the estate is insolvent, the bankrupt has clearly no interest in it, and it matters not to him how it is administered, ...

22 The evidence in this case clearly indicates there is no possibility of a surplus. In fact, it is advanced by the bankrupts that there is a deficit in the vicinity of $400,000. In my view, therefore, the threshold requirements set out in s. 14(4) of the Act has not been met by the applicants.

23 Even had I decided that the bankrupts had locus standi to proceed, they must still establish cause for the removal of the trustee.

24 The applicants argue that there are several grounds that justify the removal of the trustee.

25 Firstly, they contend that the dual appointment of Peat Marwick Thorne as receiver and then as trustee is in itself problematic. They rely on *Prince Edward Island v. Bank of Nova Scotia* (1988), 70 C.B.R. (N.S.) 209, 72 Nfld. & P.E.I.R. 191, 223 A.P.R. 191, 2 T.C.T. 4090 (P.E.I. T.D.), to assert that point. Although McQuaid J. in the P.E.I. case clearly set out the distinctions to be drawn between the duty of the receiver and that of the trustee, he noted that it is not incompatible with the scheme of the Act for the same party to receive both appointments. In my view, the fact the inspectors themselves have approved of the trustee's performance thus far suggests not only that the trustee is acting without interest or bias, but is also perceived to be acting in the proper manner. Although the test to be applied is an objective one, it is usual for the courts to defer to the creditors' and inspectors' views on that point as was seen in *Re Terrace Sporting Goods Ltd.* (1979), 31 C.B.R. (N.S.) 68 (Ont. S.C.) and *Re Bryant Isard & Co.* (1923), 4 C.B.R. 317, 25 O.W.N. 382, [1924] 1 D.L.R. 217 (S.C.). In this case there is no indication of bias or prejudice and I would not in the circumstances allow the motion on that basis.

TAB 6

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: YG Limited Partnership (Re), 2022 ONSC 6138
COURT FILE NO.: BK-21-02734090-0031
DATE: 20221101

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

RE: 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.

BEFORE: Kimmel J.

COUNSEL: *Robin Schwill and Chenyang Li*, for the Proposal Trustee, KSV Restructuring Inc.

Jason Berall, for the Proposal Sponsor, Concord Properties Developments Corp.

Alexander Soutter, for Yonge SL LPs

Shaun Laubman, for Chi Long LPs

Mark Dunn and Sarah Stothart, for Maria Athanasoulis

HEARD: October 17, 2022

ENDORSEMENT
(FUNDING MOTION)

Overview

[1] YG Limited Partnership and YSL Residences Inc. (together, "YSL" or the "Debtor") filed Notices of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), which were procedurally consolidated pursuant to an Order dated May 14, 2021. The Debtor companies are special purpose entities established to hold the assets for a large real estate development in downtown Toronto known as the "YSL Project".

[2] This court approved an Amended Third Proposal dated July 15, 2021 (the "Proposal") on July 16, 2021. Under the Proposal, the moving party, KSV Restructuring Inc. (the "Proposal Trustee"), was authorized to deal with various claims against the Debtor, some of which were disputed.

[3] In the Proposal, Concord Properties Developments Corp. (the "Sponsor") covenanted in sections 10.2 and 11.1 to indemnify the Proposal Trustee for "all Administrative Fees and

iv) Would the Cost of this Arbitration be a Reasonably Incurred Expense?

[55] One of the other grounds upon which the Sponsor argued that the anticipated Administrative Fees and Expenses for phase 2 of the Arbitration would not be reasonably incurred was because they would be the product of a complex, lengthy and expensive process that is not in keeping with the summary and efficient adjudication of claims envisioned by the *BIA*, especially one that might not have resulted in a final resolution of the Athanasoulis Claim without the willing participation of the LPs,[4] leaving the LPs' priorities and other enforceability issues to be determined through some other process.

[56] Section 135 of the *BIA* is intended to be a summary procedure for the determination of claims, animated by the objectives of speed, economy and informality: see *Conforti*, at para. 43 and *Asian Concepts*, at para. 53.

[57] The decision on the Jurisdiction Question renders it unnecessary to decide whether the anticipated budgeted cost of phase 2 of the Arbitration represents anticipated reasonably incurred Administrative Fees and Expenses that the Sponsor should be required to fund. The court will not order the Sponsor to fund this aspect of the Arbitration that involves the ultimate determination of this claim by someone other than the Proposal Trustee as that would not be a determination of the Athanasoulis Claim in accordance with s. 135 of the *BIA*.

v) Section 135 *BIA* Determination of the Athanasoulis Claim

[58] The Proposal Trustee has identified various aspects of what had been expected to be resolved through the anticipated phase 2 Arbitration that will still require factual inputs and findings for the Proposal Trustee to make its determination of the Athanasoulis Claim. For example, to determine the meaning of "profits" under the oral profit sharing agreement, and when and how they should be calculated, expert valuation evidence may be required. This was part of the justification for the Arbitration process envisioned, and has not been resolved by the court's finding that the process agreed to went too far by improperly delegating the ultimate issue to be decided by the Proposal Trustee to the Arbitrator.

[59] Further, whether the Athanasoulis Claim is a provable claim under s. 135 of the *BIA* depends on whether the claim is in debt or equity, which in turn may require further evidence and inputs from other stakeholders, like the LPs. Not only would the LPs potentially have relevant information, but they also have a direct interest in these determinations.

[60] The Proposal Trustee has the power under s. 135 of the *BIA* to seek additional information and documents from the claimant: see *Urbancorp Cumberland 2 GP Inc.*, 2022 ONSC 2430, at

[4] As previously indicated, there is a dispute about whether the LPs agreed to arbitrate their priority and enforceability challenges to the Athanasoulis Claim. The court was not asked to determine whether the LPs had in fact agreed to arbitrate their issues in the expanded phase 2 of the Arbitration. I do not need to decide this question to decide the funding motion.

TAB 7

CITATION: Apotex Inc. v. Pfizer Ireland Pharmaceuticals, 2021 ONSC 6345
COURT FILE NO.: CV-14-514915
DATE: 20210927

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
APOTEX INC. Plaintiff	*Harry. B. Radomski, Nando De Luca and Jerry Topolski*, lawyers for the Plaintiff
- and -	
PFIZER IRELAND PHARMACEUTICALS, PFIZER INC., PFIZER EXPORT COMPANY, PFIZER GLOBAL SUPPLY, PFIZER OVERSEAS LLC, PFIZER PGM AND PFIZER CANADA ULC Defendants	*Orestes Pasparakis, Daniel Daniele, and David Yi*, lawyers for the Defendants
AND BETWEEN:	
PFIZER CANADA ULC AND PFIZER PRODUCTS INC. Plaintiffs by Counterclaim	*Orestes Pasparakis, Daniel Daniele, and David Yi*, lawyers for the Plaintiffs by Counterclaim
- and -	
APOTEX INC. Defendant by Counterclaim	*Harry. B. Radomski, Nando De Luca and Jerry Topolski*, lawyers for the Defendant by Counterclaim
	HEARD: September 10, 2021

REASONS FOR DECISION

DIAMOND J.:

> I also conclude that Lilly has committed no wrongdoing that would give rise to liability under the *Trademarks Ac*t or at common law. Apotex led no evidence to support such claims other than the facts that Lilly sought and obtained a patent for Olanzapine, and then invoked the *PM(NOC) Regulations* as it was entitled to do when it held that patent. Lilly did not engage in any unlawful conspiracy or make any false or misleading statements."

[20] In essence, Justice Schabas found that the scope of each the alleged wrongful acts on the part of Eli Lilly was authorized by the Patent Regime (ie. the *Patent Act* and the *PM(NOC) Regulations*), which operated as a complete code and excluded any additional claims under other statutes and/or at common law.

[21] In addition to dismissing Apotex's action against Eli Lilly by operation of the Patent Regime being a complete code, for completeness of the exercise Justice Schabas also found each of the individual causes of action to be legally untenable.

Is the *Zyprexa* decision binding on this Court?

[22] There is no current appellate authority "on all fours" with the facts of this proceeding (or any of the similar proceedings commenced by Apotex against other drug innovator companies). Apotex has launched an appeal of the *Zyprexa* decision, and this Court understands that the appeal is currently scheduled to be argued in February 2022.

[23] Do the doctrines of *stare decisis* and/or judicial comity require this Court to follow its own prior (albeit recent) decisions? In *Duggan v Durham Region Non-Profit Housing Corporation* 2020 ONCA 788 (CanLII), the Court of Appeal for Ontario held as follows:

> "I would also reject any applicability of the *Carter* decision on *stare decisis* to this case. In *Carter*, at para. 44, the Supreme Court discussed two circumstances where a court would not be bound by *stare decisis*: where a new legal issue is raised or 'where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate.' In this case, the *Bondy-Rafael* decision interpreting the same rule was decided after the *Hryniak* case in the Supreme Court. There was no basis for the courts below to ignore the doctrine of *stare decisis*.
>
> The doctrine of *stare decisis* makes an important contribution to the cost-effective and efficient management of litigation by ensuring that a legal issue, including the interpretation of a legislative provision, regulation or rule, once decided, is not relitigated in the next case. In my view, the courts below erred in law by failing to treat the *Bondy-Rafael* case as binding."

[24] As held in *Allergan Inc. v. Canada (Minister of Health)* 2021 FCA 308 (CanLII), the principle of judicial comity dictates that a decision by a court of the same jurisdiction is persuasive and should be given considerable weight. A court of the same jurisdiction should

only depart from a prior decision "where a judge is convinced that the prior decision is wrong and can advance cogent reasons in support of this view."

[25] In *R. v. Scarlett* 2013 ONSC 562 (CanLII), Justice Strathy (as he then was) held as follows:

> "The decisions of judges of coordinate jurisdiction, while not absolutely binding, should be followed in the absence of cogent reasons to depart from them: see *Re Hansard Spruce Mills Ltd.*, 1954 CanLII 253 (BC SC), [1954] 4 D.L.R. 590 (S.C.); *R. v. Northern Electric Co. Ltd.*, 1955 CanLII 392 (ON SC), [1955] O.R. 431, [1955] 3 D.L.R. 449 (H.C.) at para. 31. Reasons to depart from a decision, referred to in *Hansard Spruce Mills*, include (a) that the validity of the judgment has been affected by subsequent decisions; (b) that the judge overlooked some binding case law or a relevant statute; or (c) that the decision was otherwise made without full consideration. These circumstances could be summed up by saying that the judgment should be followed unless the subsequent judge is satisfied that it was plainly wrong."

[26] Apotex takes the position in resisting Pfizer's motion for summary judgment that the *Zyprexa* decision, including Justice Schabas' analysis of the Patent Regime being a complete code, is "manifestly wrong", and thus the *Zyprexa* decision should not be followed as a matter of judicial comity.

[27] In assessing Justice Schabas' finding that the Patent Regime operates as a complete code, I do not find the presence of any "change in circumstances" or "evidence that fundamentally shifts the parameters of the debate" in the case before me. The issue, squarely argued by Apotex, is whether this Court can arrive at the conclusion that the *Zyprexa* decision is clearly wrong. It is not enough to find that this Court would have come to a different, or slightly different, conclusion. The application of judicial comity requires that this Court be convinced that the *Zyprexa* decision is clearly wrong.

Is the *Zyprexa* decision clearly wrong?

[28] I have read Justice Schabas' legal and factual analysis in detail. I cannot conclude that the *Zyprexa* decision is clearly wrong, and on the contrary I agree with it.

[29] Patent rights are entirely a creature of statute. The Patent Regime does not confer rights to consumers, and in my view these supposedly missing rights do not imply that common law causes of action can "fill in" any such gap.

[30] The Patent Regime explicitly authorizes all of the actions undertaken by Pfizer in applying for and ultimately obtaining the 446 Patent. It is the provisions of the Patent Regime itself that precluded Apotex from competing with Pfizer through the development and sale of generic drugs, and not by reason of any alleged wrongful act or omission on the part of Pfizer.

TAB 8

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

loan debts were disclosed in the trustee's reports. The Claims Register is not static; it can and often does change as the estate moves along such as where creditors amend their claim or where they are subsequently withdrawn. In any event, the trustee points out that the date for admittance of claims is the date of distribution, not the date of the bankrupt's discharge. In response to RBC's secondary argument, they submit that the scheme of distribution in s. 136 applies regardless of the rights of s. 178 creditors.

Issues:

[21] The issues raised in this application are the following:

(a) What is the test to be applied by a party seeking relief under s. 135(5)?

(b) Are creditors with a s. 178 'surviving' debt entitled to participate and share in distribution of estate dividends?

(c) Did this Court's decision exclude government student loan creditors from sharing in estate dividends?

(a) the test applied to expunge a claim under s. 135(5) of the BIA

[22] Section 135 of the *BIA* sets out the provisions for admitting and disallowing claims with ss. 135(4) and (5) governing the procedures on appeal of disallowance and for expunging or reducing any proven claim. It provides:

> 135.(1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.
>
> (2) The trustee may disallow, in whole or in part,
>
> (a) any claim;
>
> (b) any right to a priority under the applicable order of priority set out in this Act; or
>
> (c) any security.

> (3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.
>
> (4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.
>
> (5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

[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]

[28] No further elaboration was offered in *Marsuba* as to what constitutes a "legitimate" claim nor did the Court expand upon whether an appeal under this subsection proceeds on the record or is *de novo* in nature.

[29] Regardless of the nature of a s. 135(5) appeal, the standard of review also remains an open issue unexplored in the referenced cases. This Court summarized the standard of review in the context of appeals from disallowance under s. 135(4) in the following manner: "Where the trustee's decision involves a question of law or the interpretation of a statute, the standard of review is correctness. On the other hand, where the matter under consideration is factual in nature or involves a discretionary element, the standard of review is reasonableness." (*Business Development Bank v. Pinder Bueckert*, 2009 SKQB 458 at para. 24; see also *Eskasoni Fisheries Ltd., Re* (2000), 16 C.B.R. (4th) 173; *Lloyd's Non-Marine Underwriters v. J.J. Lacey Insurance Ltd.*, 2008 NLTD 9; 41 C.B.R. (5th) 137.)

[30] The application before me is one to expunge two claims filed and admitted by the trustee. The onus rests with RBC to establish error on the part of the trustee, or in keeping with the approach taken in *Marsuba*, to establish these were not "legitimate" claims. In my view there is no need to explore the contours of what is or is not a legitimate claim, or other collateral issues arising on appeal (issues not argued by the parties) for the simple reason that RBC abandoned its initial argument that the impugned claims were not filed prior to Insley's discharge or disclosed by the trustee. In any event, no argument was advanced nor evidence presented concerning the underlying validity of the claims or their allowance. There is no suggestion whatsoever that the trustee improperly interpreted the law, ignored crucial facts, exercised its discretion improperly or acted outside of its authority in the course of exercising its function under s. 135. For all of these reasons, RBC's initial argument fails.

TAB 9

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*.

[4] For the reasons that follow, the motion is granted.

Background and Context

[5] On April 30, 2021, YG Limited Partnership and YSL Residences Inc. [collectively, "YSL"] filed Notices of Intention to Make a Proposal pursuant to section 50.4(1) of the BIA. On May 14, 2021, this Court granted a consolidation order consolidating the NOI Proceedings for the purpose of simplifying the administration of the estates and facilitating the filing of a joint proposal and single meeting of creditors, among other things.

[6] YSL is part of the Cresford Group of Companies, a developer of real estate in the Toronto area. YSL Residences Inc. was a registered owner of the YSL Property defined below. It acted as bare trustee for, and nominee of, the limited partnership.

[7] This motion arises out of a dispute over a commission related to the acquisition of property at 363-391 Yonge St., Toronto and 3 Gerrard Street East, Toronto, [together, the "YSL Property"] by Concord Properties Developments Corp. ["Concord"].

[8] More than a year prior to the filing of the NOIs, in January 2020, CBRE had entered into an oral agreement with YSL for the listing of the YSL Property. For the purposes of this motion, the agreement was a relatively typical arrangement pursuant to which CBRE was to be paid a commission equal to 0.65% of the purchase price in the event that the property was sold and the purchaser was one of the parties introduced by CBRE.

[9] On February 21, 2020, as CBRE was already performing the oral agreement, it provided YSL with a proposed written agreement which further clarified and defined the terms of the bargain. In particular, it provided that the term of the contract expired on August 20, 2020 but also included a holdover clause pursuant to which the commission was payable if a binding agreement of purchase and sale was executed within 90 days after the expiry of the term and the transaction subsequently closed.

[10] The evidence on this motion is that the written agreement was never executed through inadvertence, although both parties performed the agreement and acted in all respects as if it had been formally executed.

[11] As noted above, YSL subsequently encountered financial difficulties and filed the NOIs. CBRE filed a claim with the Proposal Trustee in respect of the commission owing on the sale of the YSL Property.

[12] The Proposal Trustee initially disallowed the claim of CBRE as it was not satisfied, on the information initially filed in support of the claim, that it ought to be allowed. However, upon further review and particularly upon reviewing the Motion Record filed by CBRE, the Proposal Trustee and CBRE entered into a settlement agreement pursuant to which the claim would be allowed in exchange for the agreement of CBRE not to seek its costs on this motion.

[13] As a result of that settlement agreement, the Proposal Trustee supports CBRE and the relief sought on this motion.

[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.

[60] CBRE, the Proposal Trustee and the limited partners have all submitted costs outlines. CBRE seeks partial indemnity costs, inclusive of fees, disbursements and HST, of $64,896.07. The Proposal Trustee seeks costs on the same basis of $58,948.48. The costs outline of the limited partners supports a claim for costs on the same basis of $21,725.48.

[61] Exercising my discretion pursuant to section 131 of the *Courts of Justice Act*, and considering the factors in Rule 57.01, I have determined that costs should follow the event, and that CBRE and the Proposal Trustee have succeeded on the merits and should be entitled to costs.

[62] However, I am conscious of the fact that the Proposal Trustee supported the motion of CBRE and I am conscious of avoiding any duplication in work and fees. I am also cognizant of the somewhat unique nature of the circumstances and chronology in this case.

[63] The validity of the claim flows from the entitlement to the commission under the listing agreement, and the facts that support the fact of that agreement, as they do, are not readily apparent at first blush from a review of the facts given the initial oral agreement and the terms of the holdover clause in the written agreement [i.e., the 90-day period]. The fact that it is not immediately straightforward is illustrated perhaps by the original concerns of the Proposal Trustee.

[64] I also observe, as submitted by the limited partners, that given the manner in which the events unfolded, this appeal would have been necessary even if it had been unopposed. However, it would have been a much more straightforward and less expensive proceeding.

[65] Accordingly, in considering the facts and Rule 57 factors, in my view CBRE is entitled to partial indemnity costs from the limited partners in the amount of $25,000 and the Proposal Trustee is entitled to costs on the same basis in the amount of $18,000. All amounts are inclusive of fees, disbursements and HST. Costs payable within 60 days.

Osborne, J.

Date: November 22, 2022, revised January 10, 2023

TAB 10

1993 CarswellOnt 193
Ontario Court of Justice (General Division)

Canadian Imperial Bank of Commerce v. 433616 Ontario Inc.

1993 CarswellOnt 193, 17 C.B.R. (3d) 160, 38 A.C.W.S. (3d) 1086

CANADIAN IMPERIAL BANK OF COMMERCE v. 433616 ONTARIO INC., KIMINCO ACCEPTANCE CO. LTD. and COULTER FINANCIAL CORPORATION

McWilliam J.

Judgment: February 23, 1993
Docket: Doc. 13737/89

Counsel: *William J. Simpson, Q.C.*, for plaintiff.
James L. MacGillivray, for defendant.

Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.2 Disallowance of claim
IX.2.b Trustee's discretion to disallow

Headnote
Bankruptcy --- Proving claim — Disallowance of claim — Trustee's discretion to disallow
Proof of claim — Disallowance — Setting aside notice of disallowance — Trustee justified in disallowing claims where no evidence given to support claims — Motion to set aside notice of disallowance dismissed.
The applicants were a corporation and its director. They alleged that they had provided the sole shareholder of a bankrupt company with money to invest in mortgages with the bankrupt company. They maintained that the sole shareholder, acting for the bankrupt company, accepted the money and gave back promissory notes.
The applicants' proofs of claim were disallowed by the trustee in bankruptcy, who found that there was no evidence to support the allegations that the money was to be put into mortgages. They brought a motion pursuant to s. 135(4) of the *Bankruptcy Act* for an order setting aside the notices of disallowance.
The motion was dismissed.
Under s. 135(1) of the *Bankruptcy Act*, the trustee is under a duty to examine every proof of claim and the grounds for it. In doing so, the trustee may require further evidence in support of the proof of claim and may go behind the forms provided to evaluate the truth of the claim. In this case, the trustee did not act inequitably in dismissing the applicants' claim that they were investors in the bankrupt company; no investor's claim was adopted.

Table of Authorities
Cases considered:
Cohen, Re (1956), 36 C.B.R. 21, 19 W.W.R. 14, 3 D.L.R. (2d) 528 (Alta. C.A.) — *referred to*
Van Laun, Re; Ex parte Chatterton, [1907] 2 K.B. 23, [1904-07] All E.R. Rep. 157 (C.A.) — *referred to*
Statutes considered:
Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 135(1)

s. 135(2)

s. 135(4)

> • Question: Now the thing that I'm a little concerned or a little confused about is that you seem to — it seemed to be significant to you that at all times the personal bank account of Mr. Coulter was in an overdraft position. Is that correct?
>
> • Answer: Yes.
>
> • Question: And why is that significant to you?
>
> • Answer: Well I understand that the special meaning of the word "trace" is that you can't trace trust funds past an overdrawn bank account.

11 Mr. Caton did agree, however, that it would be possible to "see what cheques were written following the infusion of money into ... Coulter's personal bank account?"

12 Mr. Simpson objects to evidence from the cross-examination of Mr. Coulter in another action being considered in these proceedings. The pleadings in that action filed herein convince me that the issues are so closely intertwined that I ought to allow the trustee of use this evidence. In any event, the only point I take from it is that Mr. Coulter says that the funds were not advanced to him for mortgage investments.

13 By December 2, 1991 Mr. MacGillivray wrote to Mr. Simpson and said:

> We will not maintain our position taken on Mr. Caton's examination that once the proposal in the Glen Coulter bankruptcy was accepted it extinguished the claim of Ron Miller and his numbered company insofar as it related to any claim against Kiminco Acceptance.

14 Nevertheless earlier in his letter Mr. MacGillivray said at paragraph 6:

> It is the trustee's position that investors of Kiminco do not have claims provable in the proposal of Kiminco on account of their investment. The acceptance of the proposals of Kiminco, C.F.C., Glen Coulter, G.I.C. Investments and of the Compromise Distribution Scheme formed a court approved contract binding on the Kiminco investors.

15 It seems there were three other persons left holding promissory notes like Mr. Miller, and they were all categorized as coming within the personal bankruptcy of Glen Coulter.

Law

16 Under s. 135(1) of the *Bankruptcy Act* the trustee is under a duty to examined every proof of claim and the grounds for it. The trustee may require further evidence in support of the proof of claim. Such evidence must be satisfactory that the debt is a valid debt since not even a judgment recovered against the bankrupt, or covenant given or account stated by him deprives the trustee of his right to make such enquiries. He is entitled to go behind such forms to get at the truth; it is unnecessary for him to show fraud or collusion: *Re Van Laun; Ex Parte Chatterton*, [1907] 2 K.B. 23 (C.A.). The trustee must take into account the effect upon other creditors in exercising his discretion: *Re Cohen* (1956), 36 C.B.R. 21 (Alta. C.A.).

17 In *Bankruptcy and Insolvency Law of Canada*, Houlden and Morawetz, 3rd ed., G§69, 5-92 and 5-93, the authors say:

> It would seem that the onus should be on the claimant to prove his claim, and if he fails to do so on the balance of probabilities, the court should dismiss the appeal ... In disallowing a claim, a trustee should not act inequitably: *Re Waltson Properties Ltd. (No. 2)* (1977), 24 C.B.R. (N.S.) 212, affirmed 28 C.B.R. (N.S.) 269 which was affirmed (1979), 30 C.B.R. (N.S.) 112 (Ont. C.A.).
>
> A creditor is not restricted to filing only one proof of claim. He may file a second proof of claim if it does not deal with matters contained in the first proof which were dealt with on their merits: *Atlas Accept. Corp. v. Franklin* (1978), 27 C.B.R. (N.S.) 220 (Man. C.A.).

Ontario Superior Court of Justice
Karataglidis (Re)
Date: 2003-07-24
Docket: 31-268286

Durval Martins for Zissis Dragatsikis / Moving Party

Christos Papadopoulos for Bankrupt / Moving Party

Atoosa Mahdavian for George Sdrakas / Respondent

Deputy Registrar Nettie:

[1] This matter was heard before me on the eleven days set out above. It was a motion by Zissis Dragatsikis ("Zissis") to expunge the two proofs of claim submitted by the respondent, George Sdrakas ("George"), which had been allowed by the Trustee. These were the January 25, 1996, claim for $75,000.00, and the November 6, 1997, claim. I will refer to these as the S1 and S2 claims, respectively.

[2] There was also a motion by Konstantinos Karataglidis (the "Bankrupt") to expunge not only S1 and S2, but also for relief with respect to two claims submitted by Zissis which had been allowed by the Trustee. These were the December 21, 1992, claim in the amount of $85,000.00 and the November 6, 1997, claim. I will refer to these as the D1 and D2 claims, respectively. The relief sought with respect to Dl was to reduce its quantum to $80,000.00. The relief sought with respect to D2 was to expunge it.

[3] The present Trustee did not appear on the motion. The present Trustee is not the trustee which allowed S1, S2, Dl, and D2. The former trustee also did not appear on the motion.

[4] Part way through September 6, 2002, being the second day of what was then thought to be a three day motion, the parties settled the issues relating to S2, Dl, and D2. I made a consent Order that day expunging S2 and D2, without leave to re-file, I also made an Order dismissing the balance of the Bankrupt's motion, as against Zissis, in effect permitting Dl to stand unreduced at $85,000.00. The Order was on consent. This left only the motions by Zissis and the Bankrupt to expunge S1.

Issues

[5] Before turning to a consideration of the evidence and the facts, it is appropriate to consider the issues.

[6] The first issue is that of burden. Who has the burden on the motion, and what standard must be met in discharging that burden? All three counsel agreed, as do I, that the moving parties have the burden of proving that George does not have a provable claim in the bankruptcy. There was not, however, agreement as to the standard of discharging that burden.

[7] Counsel for George argues that the standard is one of beyond a reasonable doubt. Messrs. Martins and Papadopoulos argue that the standard is one of a balance of probabilities. Counsel directed me to three cases in support of their positions: *Browne, Re,* [1960] 2 All E.R. 625 (Eng. Ch. Div.); *Purdy, Re,* 1997 CarswellBC 2623 (B.C. S.C. [In Chambers]); and *Marsuba Holdings Ltd., Re,* 1998 CarswellBC 2792 (B.C. Master).

[8] *Browne* holds that the correct standard of proof is one of beyond a reasonable doubt. With respect, I do not agree, but find that *Marsuba Holdings Ltd.* correctly sets out the burden and standard of proof. *Marsuba Holdings Ltd.* recognizes, as do I, that while the higher standard of proof might exist in some cases, it is limited to the unusual circumstances such as in *Browne.* Although in the case at bar, there is an alleged similarity to *Browne,* that the passage of time allowed by the moving parties has caused the unavailability of documents, I do not find that allegation to have been proved. The allegation is that George could have obtained a copy of the missing cheque if the motion had been brought sooner. However, George's own evidence was that he asked his bank for a copy of the $60,000.00 cheque by which his loan was advanced, throughout the relevant time period, both before and after the motion was brought. The evidence suggested, and I find, that George could have done nothing different, even if the motion to expunge had been brought earlier. Accordingly, I find that, based on *Marsuba Holdings Ltd.,* the correct standard of proof to apply to the burden in the case at bar is that of a balance of probabilities.

[9] The other issue raised related to estoppel. George submits that in allowing him to join in the s. 38 proceedings, and waiting until after the litigation relating to the Greek property was concluded to move to expunge his proofs of claim, estoppel must serve to protect him. However, this argument would only apply to the motion by Zissis, as the Bankrupt was no part of the permitting of George to prove his claim, and join Zissis in the s. 38 proceeding. Additionally, it should be noted that s. 135(5) of the BIA does not impose a time limitation on a motion to expunge. In any event, for reasons which will become clear, I need not deal with this issue.

TAB 11

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.

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**

TAB 12

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 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**").

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:

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

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

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

COURT OF APPEAL FOR ONTARIO

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