Court File No. BK-21-02734090-0031

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

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

REPLY FACTUM
OF THE PROPOSAL TRUSTEE

(Re: Motion Returnable September 26, 2022)

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PART I ~ OVERVIEW

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

2. This factum is in reply to the responding factum served and filed by the LPs on September 20, 2022 (the "**LP Factum**"). There a number of mischaracterizations and erroneous legal arguments in the LP Factum which warrant this reply.

The LPs' Factual Mischaracterizations

3. CBRE does not ask that its appeal be treated as a *de novo* hearing.[1] CBRE and the Proposal Trustee agreed that it would be a *de novo* hearing. For the reasons outlined in the Report and the Proposal Trustee's factum, the Proposal Trustee determined to deal with CBRE's claim by requesting CBRE to file a full evidentiary response to the Proposal Trustee's notice of disallowance as a means of dealing with its claim in a fully transparent, expeditious and efficient manner in the context of these proceedings.

4. No one filed any responding evidence contradicting any of CBRE's evidence. The LPs even cross-examined both of CBRE's affiants adducing no contradictory statements of any substance. No creditor opposes the Proposal Trustee's recommended resolution. Accordingly, there would have been no need for any briefing or a half day hearing on CBRE's appeal but for the opposition of the LPs who, on their own record, make it clear that they are opposing because eliminating CBRE's claim means potentially more money for them.

5. The LPs say that the Proposal Trustee "supported the Debtors' original proposal."[2] The Proposal Trustee's support for the original proposal was premised on the Proposal Trustee's view that recoveries under the original proposal provided a better result than the result in a bankruptcy.

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[1] LP Factum, para. 2.

[2] LP Factum, para. 7.

6. The LPs say that the proposal ultimately approved by the Court "did not cap unsecured creditor recovery."[3] The Final Proposal has a limited pool of $30.9 million to be distributed to YSL's creditors. As set out in the Report, this means creditor recoveries could be less than 100 cents on the dollar depending on the final total amount of proven claims, in which case there would be no recoveries for the LPs.

The de novo Hearing Red Herring

7. Whether or not an appeal of a trustee's disallowance ought to be a *de novo* hearing is a matter between the trustee and the creditor.

8. It does not lie in the mouth of a stranger to the claim to argue that a creditor must be limited to the record originally before the trustee. That is an overly formal and legalistic position, not a pragmatic and reasonable one.

9. Indeed, it would not have been proper and unlikely to be upheld by this Court had the Proposal Trustee simply disallowed CBRE's claim based only on the proof of claim it filed and then take the position that no further evidence could be filed on appeal. Such conduct by the Proposal Trustee would not be fair and reasonable because it forecloses any opportunity to respond to the Proposal Trustee's concerns.

10. The Proposal Trustee in this case could have exercised its rights under Section 135 of the BIA to request additional supporting evidence in an attempt to

[3] LP Factum, para. 7.

amass the same full evidentiary record as now exists privately. That process would not have been transparent to all interested parties and would have made obtaining any conflicting evidence considerably more cumbersome.

11. Accordingly, the Proposal Trustee chose a process which was premised on CBRE being able to file a full evidentiary response. To now deny CBRE the ability to fully respond would be prejudicial to CBRE, unfair and unreasonable in the circumstances.

12. The LPs presents the law on the appropriate standard of review of trustee decisions as fixed at paragraph 30 of the LP Factum. They cite the 2020 Ontario Superior Court decision in *Re Eureka* in support, when, in fact, it makes clear at paragraph 26 of the decision that "the court has the discretion to consider the matter de novo if it is necessary to prevent an injustice."

13. The LPs go on at paragraph 33 of the LP Factum to mischaracterize a quote from the Ontario Court of Appeal. The quote they insert is a comment by the Ontario Court of Appeal on the approach in British Columbia and the Ontario Court of Appeal specifically indicates that it was not reaching a decision on the Ontario standard of review, which they indicate is contextual. Indeed, paragraph 24 of the decision reads as follows:

> [24] At the very least, the practice seems to be that an appeal court, when considering a Notice of Disallowance, will first decide the issue of whether the matter proceeds as a true appeal or as a hearing *de novo*. The test that has evolved seems to be that a hearing *de novo* will occur if the court decides that to proceed otherwise

would result in an injustice to the creditor: *Charlestown Residential School (Re)* (2010), 70 C.B.R. (5th) 13 (Ont. S.C.) at paras. 1 and 18.

14. Lastly, at paragraph 39 of the LP Factum, the LPs cite a 2014 Ontario Superior Court decision in *Sweda Farms v Egg Farmers of Ontario*, concerning the purchase and sale of eggs, in order to support their characterization of the type of evidence required by a creditor on a proof of claim. *Sweda Farms v Egg Farmers of Ontario* is not an insolvency decision. There is no discussion in the decision of the type of evidence that a creditor should be expected to adduce in support of a proof of claim.

The Section 37 Red Herring

15. The LPs are a stranger to CBRE's claim. They are not a creditor in these proceedings with statutory rights under the BIA.

16. The reason that the LPs had standing on the motion to sanction the original proposal[4] was because they were applicants in a separate civil proceeding against Cresford and YSL which claimed, in part, that YSL had no authority under its limited partnership agreement to have initiated the proposal proceedings. Indeed, Mr. Justice Dunphy's reasons are styled in all three applications, not just the proposal proceeding.

[4] LP Factum, para. 27 states that the LPs "were given standing by Dunphy J in this proceeding to oppose the Debtors' initial proposal …"

17. The LPs statement that the Proposal Trustee has acquiesced to the LPs participation in the claims process with respect to another disputed claim[5] is also a mischaracterization. This is a reference to the claim of Ms. Athanasoulis which the Proposal Trustee is attempting to deal with more expediently by way of arbitration and mediation rather than via a series of court hearings which will be many months out given court time currently available. The LPs have evidence germane to the determination of that claim and wished at one point to advance their own claims against Ms. Athanasoulis in the process or otherwise insulate their claims from it. Accordingly, the Proposal Trustee invited the LPs to participate in this process which they've ultimately refused to do. Indeed, the LPs have brought another motion claiming, among other things, that the Proposal Trustee has no jurisdiction to deal with Ms. Athanasoulis' claim by way of arbitration or mediation.[6]

18. While it is not denied that the LPs would be entitled to distributions after all creditors are paid in full, to challenge decisions made by this Court's officer, the Proposal Trustee, the BIA requires the LPs to prove that the decision made deprived the LPs of a legal right. The LPs cannot and have not proven this. All the LPs say is that allowing the CBRE claim means there will be less money in the pot that may

[5] LP Factum, para. 27.

[6] *Re YG Limited Partnership and YSL Residences* (24 May 2022), Ontario BK-21-02734090-0031 (ONSC).

otherwise go to them. The case law is clear that this in and of itself does not make them an "aggrieved person".[7]

19. The LPs' opposition to the manner in which the Proposal Trustee has dealt with CBRE's claim, including (i) by means of a *de novo* appeal (ii) not opposing CBRE's appeal; and (iii) agreeing on appeal to allow CBRE's claim, amounts to challenging the decisions made by this Court's officer.

20. The LPs incorrectly cite *Re Levy* at paragraphs 14 and 24 of the LP Factum as standing for the proposition that a section 37 application is not necessary to oppose an appeal. *Re Levy* is a 2002 consumer bankruptcy decision related to section 38 of the BIA and it does not reference an appeal.

21. The LPs indicate at paragraph 26 of the LP Factum that "in their annotation of the BIA, Houlden J, Morawetz CJ, and Dr. Sarra adopt Lord Denning's view that the definition of "person aggrieved" should be afforded a wide scope and not be subjected to a restrictive interpretation." This is not accurate. The commentators do not adopt Lord Denning's view, they merely cite his view, which in the traditional Denning style actually adopts a narrow interpretation, and this follows the first substantive passage in the annotation, which states, "[t]hey do not mean a person who is disappointed in respect of a benefit that he or she might have received if some other order had been made."

[7] See para. 43 of the Proposal Trustee's Factum.

22. Lastly, the LPs claim at paragraph 28 of the LP Factum that courts have accepted that shareholders can be aggrieved persons under section 37 and accordingly limited partners should be treated in the same way. The case law they cite in support of this proposition does not stand for this proposition. *American Bullion* suggests, in obiter, as part of a consideration of section 181(1) of the BIA, that shareholders could in the right circumstances meet the test for aggrieved persons. Similarly, *Transamerica* makes clear that these are fact specific determinations and does not conclude that in every instance shareholders could bring such a claim.

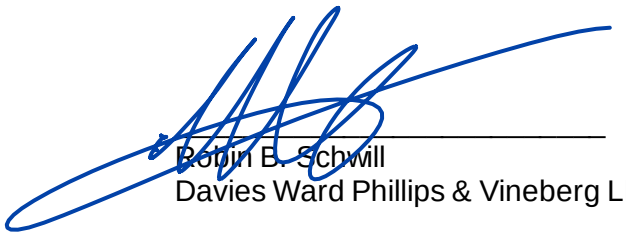
The Settlement Red Herring

23. The LPs themselves state that Section 135(5) of the BIA provides that a disallowance of a claim is final and conclusive unless there is an appeal from the disallowance.[8] Here we have an appeal. Therefore, the disallowance is not final. This is not a situation where the Proposal Trustee disallowed the claim and then unilaterally chose to reverse its position and allow it as the LPs suggest.

[8] LP Factum, para. 17.

24. Lastly, in the context of this case, the Court could simply allow the appeal without costs against the Proposal Trustee and this would achieve the same result without having to deal at all with the approval of any settlement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of September, 2022.



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