Court File No.: BK-21-02734090-0031

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

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 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.**

APPLICATION UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

Responding Factum of the "YongeSL LPs"

(YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc.)

(CBRE Appeal: September 26, 2022)

September 20, 2022

THORNTON GROUT FINNIGAN LLP
100 Wellington St. West, Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

D. J. Miller (LSO #34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Alexander Soutter (LSO #72403T)
Tel: (416) 304-0595
Email: asoutter@tgf.ca

Lawyers for the YongeSL LPs

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PART I - OVERVIEW

1. A proof of claim filed in a proceeding under the *Bankruptcy and Insolvency Act*[1] must be supported by cogent evidence. CBRE Limited ("**CBRE**") has failed to prove its claim in this proceeding. Its procedural arguments on this appeal (eg. that the YongeSL LPs lack standing) have no merit, but do not change the fact that CBRE's claim is supported only by vague, unparticularized evidence. CBRE's appeal should be dismissed and the disallowance of its claim upheld.

2. This proceeding involves the "**YSL Project**", a condominium development originally controlled by the Cresford Group, a condominium developer. The Debtors YG Limited Partnership and YSL Residences Inc. are members of the Cresford Group. CBRE claims that it agreed to act as the YSL Project's broker in exchange for a commission that has not been paid. KSV Restructuring Inc., in its capacity as the Debtors' proposal trustee (the "**Proposal Trustee**"), disallowed CBRE's claim. CBRE appealed pursuant to s.135(4) of the *BIA*. It asks that the appeal be treated as a hearing *de novo* and has adduced fresh evidence in support of its claim.

3. This appeal should not be a hearing *de novo* and should be considered based on the record originally before the Proposal Trustee. Having a hearing *de novo* is not in keeping with the summary nature of *BIA* proceedings.

4. In any event, CBRE has not made out its claim. Its claim depends on proving that, between August 21 – November 18, 2020, there were negotiations between the Cresford Group and

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [***BIA***].

Concord Properties Developments Corp. ("**Concord**"), the proposal sponsor, regarding the sale of the YSL Project. CBRE has not adduced adequate evidence that there were any negotiations.

PART II - BACKGROUND FACTS

5. In summer 2021, the Debtors commenced this proceeding as a pre-packaged liquidation designed primarily to benefit the Cresford Group. The Debtors' original proposal would have seen the Cresford Group extract approximately $22 million from the YSL Project. Unsecured creditors would have recovered a maximum of 58% of their claims.[2]

6. The YongeSL LPs are among the Class A limited partners of the Debtor YG Limited Partnership. Collectively, these limited partners advanced $14.8 million to the Debtors and are entitled to a preferred return from the proceeds of the YSL Project after its creditors are paid.[3] Under the original proposal, the Class A limited partners would have recovered nothing.

7. The Proposal Trustee supported the Debtors' original proposal. The limited partners did not. Justice Dunphy agreed that the original proposal was not made in good faith or designed to benefit the general body of creditors.[4] His Honour refused to sanction it but gave the Debtors an opportunity to put forward a new proposal. The new proposal, which was ultimately Court-approved, did not cap unsecured creditor recovery. Indeed, unsecured creditors may yet recover 100% of their claims. The limited partners may yet recover their investment in the YSL Project.[5]

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[2] *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178 at paras 43-49 and 73-76 [*YSL*].

[3] Affidavit of Chris Wai at paras 5-6, Responding Motion Record, Tab 1.

[4] *YSL* at paras 73-76 and 84.

[5] Seventh Report of the Proposal Trustee dated September 12, 2022 ("**Seventh Report**"), pg 6, article 4.0(8).

8. By way of this proposal, the Debtors transferred the YSL Project lands to Concord, another condominium developer.

9. CBRE admitted during cross-examination that an unsigned, written document dated February 20, 2020 (the "**CBRE Agreement**") governs the legal relationship between the parties.[6] CBRE claims that the conveyance of the YSL Project to Concord entitles it to a commission of approximately $1.2 million.

10. The Proposal Trustee disallowed CBRE's claim for a number of reasons, including that (a) the transfer "does not meet the definition of an event giving rise to a Commission"; and (b) alternatively, "the Commission was not earned during the Term, or within the 90 calendar days following the expiration of the Term" (the "**Holdover Period**").[7]

11. CBRE appealed the Proposal Trustee's disallowance. In July 2022, after CBRE served its motion record on the appeal, CBRE settled the appeal with the Proposal Trustee. The settlement provides for the appeal being allowed without costs (the "**Settlement**").

PART III - ISSUES & ARGUMENT

12. There are four issues on this appeal, being whether:

(a) the YongeSL LPs have standing to object to the appeal – they do;

(b) the Settlement should be enforced – it should not;

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[6] Cross-examination of Casey Gallagher ("**Gallagher Cross**"), Q12-15, pg 7-8, Transcript Brief, Tab 2.

[7] Notice of Disallowance of Claim – Exhibit "A" to the Affidavit of Heyla Vettyvel sworn July 27, 2022 (the "**Second Vettyvel Affidavit**"), Supplementary Motion Record dated July 27, 2022 ("**Supp MR**"), Tab A.

(c) the appeal should be a hearing *de novo*, permitting CBRE to rely on its fresh evidence – it should not; and

(d) in any event, CBRE has made out its claim – it has not.

A. The YongeSL LPs Have Standing

13. The YongeSL LPs represent the ultimate economic interest in the YSL Project. Subject to the resolution of three disputed claims in this proceeding, including CBRE's claim, there may be millions for distribution to the YongeSL LPs.[8] As the interests of these stakeholders are so directly affected by this appeal, they should be heard.

i. Section 37 application not necessary to oppose appeal

14. There is no need for the YongeSL LPs to bring a motion under s.37 of the *BIA* in order to make submissions on the appeal. They plainly opposed it. In *Re Levy*,[9] Cullity J held that it does not matter whether a party objects by moving under s.37 of the *BIA* or by simply opposing the relief sought. It would promote an unnecessary multiplicity of proceedings to require a s.37 application in the circumstances.

ii. CBRE cites no authority that supports its no-standing argument

15. CBRE argues at paragraph 25 of its factum that "the only avenue for other parties to interfere" in a disallowance is pursuant to s.135(5) of the *BIA*. That is incorrect. That section applies where "the trustee declines to interfere in the matter".[10] That is, where a trustee declines to

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[8] Seventh Report, pg 5, article 4.

[9] *Re Levy*, 2002 CarswellOnt 4154, per Cullity J (SC) [*Re Levy*].

[10] *BIA*, s.135(5).

determine a claim. The Proposal Trustee has not declined to interfere – CBRE admits this at paragraph 30 of its factum. The Proposal Trustee "interfered" by disallowing CBRE's claim.

16. The YongeSL LPs have standing to make submissions on CBRE's appeal. CBRE cites no authority to the contrary.

B. The Settlement Should Not Be Enforced

i. The Proposal Trustee cannot withdraw the disallowance via the Settlement

17. The effect of the Settlement is that the Proposal Trustee withdraws its disallowance of CBRE's claim. Section 135(5) of the *BIA* provides that the disallowance of a claim is "final and conclusive" unless there is an appeal from the disallowance. Trustees cannot retract disallowances, and there is a good policy reason for that. Trustees are officers of the Court. The disallowance of a claim by a trustee represents a final determination which puts into play various provisions of the *BIA* and is not one undertaken lightly.

18. The Court confirmed this in *Re Drummie*.[11] In that case, a trustee initially allowed a claim before later disallowing it. On appeal, the Court held that this was permissible, as the *BIA* "does not make the determination of a provable claim by the Trustee final and conclusive **as it does for a disallowance**."[12]

ii. The Settlement should not be enforced

19. Alternatively, the Settlement should not be enforced. It is not commercially reasonable. There is no true element of compromise. The Proposal Trustee simply reversed its position. Based

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[11] *Re Drummie*, 2004 NBQB 35 [*Re Drummie*].

[12] *Re Drummie* at para 20 (emphasis added), cited with approval in *I. Waxman & Sons Limited*, 2010 ONSC 2369 at para 17.

on the new evidence included by CBRE in its appeal materials,[13] the Proposal Trustee no longer defends its initial and correct decision to disallow CBRE's claim, even though CBRE's fresh evidence fails to prove CBRE's entitlement to a commission.

20. When considering whether a settlement is commercially reasonable, Farley J's guidance is that the Court should "conduct an analysis of the strengths and weaknesses of the case, including the general vagaries of litigation plus the benefits of certainty and the avoidance of delay concerning possible appeals".[14]

21. All those factors suggest that the Settlement is not commercially reasonable. Settling after CBRE had delivered its appeal record did not avoid any meaningful litigation risk. Most importantly, as set out below, CBRE has failed to prove its claim.

22. This is not an instance where the dispute is rife with complicated factual or credibility issues. CBRE's entitlement to a commission depends on two straightforward questions:

(a) did the conveyance of the YSL Project to Concord trigger an entitlement to a commission (it did not); and

(b) were there negotiations between the Debtors and Concord in the Holdover Period (CBRE has failed to prove that there were).

23. If the answer to either question is no, then CBRE's claim fails. These questions involve applying simple facts to an interpretation of the CBRE Agreement. It is in the best interests of the Debtors' estates that they be determined.

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[13] Seventh Report, pg 8, article 5.0(13).

[14] *Ravelston Corp, Re*, 2005 CanLII 32207 (ON SC) at para 3.

iii. No need for the YongeSL LPs to bring a s.37 application

24. There is no need for the YongeSL LPs to bring a motion under s.37 of the *BIA* in order to oppose the Settlement. They plainly intended to oppose CBRE's claim.[15] It is appropriate for them to simply oppose the request by CBRE and the Proposal Trustee that the Settlement be enforced.[16]

25. If, however, the YongeSL LPs are limited to making their objection pursuant to s.37 of the *BIA*,[17] they are parties who are aggrieved by the Proposal Trustee's decision to settle. Section 37 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.

26. The jurisdiction under s.37 is a "wide residual power" that permits a bankruptcy judge to "do justice in special cases."[18] 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. While such a person cannot be a "mere busybody", they include a person who has a genuine grievance because a decision of a trustee has prejudicially affected their interests.[19]

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[15] Appendix "E" to the Seventh Report.

[16] *Re Levy* per Cullity J (SC).

[17] Without prejudice to their position that they do not need to bring a motion under s.37, the YongeSL LPs will deliver a Notice of Motion for such relief together with this Factum.

[18] *Transamerica Commercial Finance Corp of Canada v Computercorp Systems Inc*, 1993 ABCA 215 at para 7 [*Transamerica*].

[19] Houlden, Morawetz, Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th Edition, Release No. 2022-8, August 2022 § 2:132 para 3.

27. The YongeSL LPs are not mere busybodies. They have a real economic interest in the Debtors' estates. They were given standing by Dunphy J in this proceeding to oppose the Debtors' initial proposal and did so successfully to the benefit of all unsecured creditors. The Proposal Trustee has even acquiesced to the YongeSL LPs' participation in the claims process with respect to another disputed claim.[20]

28. Courts have accepted that shareholders can be aggrieved persons. There is no reason to treat limited partners differently:

(a) in *American Bullion*, the Court accepted that the phrase "aggrieved person" is "capable of describing a shareholder";[21] and

(b) in *Transamerica*, the Alberta Court of Appeal held that a Court could authorize shareholders to bring an action in the debtors' name.[22]

29. The Proposal Trustee's decision to settle affects the YongeSL LPs' interest in the residue of the Debtors' estates. The YongeSL LPs are aggrieved by that decision, which depletes that residue.

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[20] Endorsement of Justice Gilmore dated June 8, 2022.

[21] *American Bullion Minerals Ltd*, 2007 BCSC 1083 at para 22 (in this case, minority shareholders sought to annul a bankruptcy. Pitfield J allowed their application, reasoning that there were no words in s.181(1) of the *BIA* suggesting that a shareholder could not make the application, and supported his reasons with reference to s.37).

[22] *Transamerica* at para 7 (in this case, shareholders of a bankrupt alleged that Transamerica improperly called its loan to the bankrupt, precipitating the bankruptcy. The trustee lacked the funds to pursue the claim. The lower court authorized the shareholders to do so, in the bankrupt's name, pursuant to s.37. Transamerica's appeal succeeded because inadequate notice to creditors was given. The Alberta Court of Appeal did not accept Transamerica's argument that there was no authority to make the order).

C. Hearing *De Novo* Not Appropriate Here

30. The *BIA* provides for a summary procedure for the determination, by a trustee, of whether a claim is provable or not. It is in keeping with the summary nature of *BIA* proceedings that s.135(4) appeals should be true appeals (ie. on the record originally before the Proposal Trustee), not hearings *de novo*.[23] This was the conclusion of the British Columbia Court of Appeal in *Galaxy Sports*.[24] The standard of review is correctness.[25]

31. This approach was adopted in Ontario by Registrar Mills in *Charlestown*,[26] now the leading Ontario decision on s.135(4) appeals.[27] In that case, Registrar Mills confirmed the *Galaxy Sports* approach given that it: (a) recognizes the experience and expertise of trustees; (b) is reasonable to put the onus on a creditor to properly prove their claim at the first instance; and (c) promotes an efficient and cost-effective means for the administration of insolvent estates.[28]

32. It is only where "the trustee has committed an error or the interests of justice would only be served with an appeal *de novo*" that the Court should direct that the appeal proceed as a hearing *de novo*. Otherwise, the appeal of a trustee's disallowance of a claim ought to proceed based on the record before the trustee.[29]

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[23] *Eureka 93 Inc et al (Re)*, 2020 ONSC 6036 at paras 26-27, per MacLeod J [*Eureka 93*].

[24] *Galaxy Sports Inc (Re)*, 2004 BCCA 284 at para 40 [*Galaxy Sports*].

[25] *Eureka 93* at paras 26-27.

[26] *Charlestown Residential School, Re*, 2010 ONSC 4099, 2010 CarswellOnt 5343 (Registrar in Bankruptcy) [*Charlestown*].

[27] See, for example: *Eureka 93* at para 26; *Bambrick, Re*, 2015 ONSC 7488 at paras 16-18, per Mesbur J [*Bambrick, Re*]; *In re: John Trevor Eyton*, 2021 ONSC 1719 at para 5, per Registrar Mills, aff'd 2021 ONSC 3646, per Dunphy J.

[28] *Charlestown* at paras 14-16.

[29] *Bambrick, Re* at para 18.

33. The Ontario Court of Appeal has affirmed that the *Galaxy Sports* / *Charlestown* approach is appropriate because,[30]

> if evidence that was not before a Trustee were to be presented on an appeal as a matter of course, much of the efficiency in the operation of the bankruptcy scheme would be lost. Creditors who neglected to file a proof of claim in compliance with the requirements of the scheme would be at an advantage because they could expect to enhance their proof on appeal. This, it seems to me, would impact on the objective implicit in the BIA, which is to enable parties to have their rights and claims determined in an expeditious fashion, and add unwanted expense, delay and formality.

i. Information that the Proposal Trustee relied on does not justify a hearing de novo

34. CBRE relies heavily on the fact that the Proposal Trustee made its determination after receiving "information provided by Concord" without allowing CBRE an opportunity to respond to it.[31] Its argument is that this fact alone makes a hearing *de novo* appropriate.

35. The Proposal Trustee disallowed CBRE's claim for four reasons.[32] The impugned "information" is only relevant to one of those reasons. Two of the Proposal Trustee's other reasons (the conveyance to Concord did not trigger a commission, and the commission was not earned in the Holdover Period) are unrelated to the impugned information.

36. It is not appropriate to permit a hearing *de novo* on issues not tainted by any alleged misstep by the Proposal Trustee, such as its reliance on the impugned information used to arrive at only one of four reasons for the disallowance of CBRE's claim.

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[30] *Credifinance Securities Ltd, Re*, 2011 ONCA 160 at para 26.

[31] CBRE's Factum at paragraphs 36-37.

[32] Notice of Disallowance of Claim – Exhibit "A" to the Second Vettyvel Affidavit, Supp MR, Tab A.

37. The circumstances where an appeal *de novo* becomes appropriate do not arise here. The Proposal Trustee did not err in its treatment of CBRE's Proof of Claim, nor are there any interests of justice triggered.

D. CBRE Has Not Proven Its Claim

38. The Proposal Trustee was correct to disallow CBRE's claim. CBRE had a "positive obligation […] to prove its claim in the first instance".[33] It failed to do that.

39. In the summary process set out in s.135 of the *BIA*, CBRE should be expected to put its best foot forward, just as if it were seeking summary judgment. The creditor should be expected to adduce all evidence it has in support of its claim. That evidence must be detailed and particularized as opposed to vague, unparticularized pieces of evidence, which is really "no evidence" at all.[34]

40. Even if CBRE's fresh evidence were considered, it has failed to make out its claim. As the Proposal Trustee correctly determined,

(a) the conveyance of the YSL Project was not by agreement of purchase and sale and therefore was not an event that triggered entitlement to a commission as required by the CBRE Agreement; and

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[33] *Eureka 93* at para 26.

[34] *Sweda Farms v Egg Farmers of Ontario*, 2014 ONSC 1200 at paras 20 and 26, aff'd 2014 ONCA 878, leave to appeal ref'd [2015] SCCA No 97.

(b) the conveyance of the YSL Project did not trigger an entitlement to a commission in favour of CBRE, nor was the commission earned during the Holdover Period as stipulated in the CBRE Agreement.

i. Evidence before the Proposal Trustee

41. In support of CBRE's Proof of Claim, its counsel swore an affidavit, on information and belief, that they were advised by CBRE's in-house counsel that CBRE had entered into an agreement with the Debtor YSL Residences Inc. that entitled CBRE to a commission. The only exhibit to the affidavit was CBRE's invoice.[35]

42. In response to the Proposal Trustee's request for a copy of the agreement referred to, CBRE's counsel provided a copy of the CBRE Agreement.[36] CBRE's counsel also provided an earlier demand letter from CBRE's lawyers to Cresford. That demand letter enclosed (a) an even earlier demand letter from CBRE to Cresford; (ii) the CBRE Agreement; (iii) CBRE's invoice to Cresford Developments; (iv) a "mandate letter" from CBRE to Cresford dated February 21, 2020; and (v) a draft Statement of Claim.

43. CBRE submitted no further evidence to the Proposal Trustee.[37] There was no reference to an oral agreement as justification for CBRE's entitlement to a commission.

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[35] Affidavit of Elie Laskin sworn January 28, 2022 – Exhibit "D" to the Affidavit of Heyla Vettyvel sworn July 22, 2022 (the "**First Vettyvel Affidavit**"), Motion Record ("**MR**"), Tab 4D.

[36] Exhibit "D" to the First Vettyvel Affidavit, MR, Tab 4D.

[37] The First Vettyvel Affidavit at paras 8-12 MR, Tab 4.

ii. The CBRE Agreement governs the parties' legal relationship

44. The CBRE Agreement governs the legal relationship between CBRE and the Debtors, not the "Oral Agreement" referred to in CBRE's Factum.

45. During their January 2020 telephone call, Mr. Gallagher and Mr. Dowbiggin discussed the business terms of CBRE's involvement.[38] CBRE's witnesses do not even agree if they discussed the percentage of CBRE's commission at that time. Mr. Gallagher admitted during cross-examination that that the percentage was only included in the CBRE Agreement.[39]

46. They both agree, however, that the CBRE Agreement sets out the terms governing the parties' relationship.[40] They intended for it to be signed, but it inadvertently was not.[41] They acted in reliance on that agreement (not any oral agreement).[42] They are bound by their conduct to the terms of that agreement. The CBRE Agreement contains an entire agreement clause.[43]

iii. The CBRE Agreement

47. The CBRE Agreement provides that the term of the agreement was from February 20 – August 20, 2020 (the "**Term**").[44]

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[38] Cross-examination of Ted Dowbiggin ("**Dowbiggin Cross**"), pg 9, Q 17, Transcript Brief, Tab 1; Gallagher Cross, pg 7, Q 10, Transcript Brief, Tab 2.

[39] Gallagher Cross, pg 7, Q 10-11, Transcript Brief, Tab 2.

[40] Dowbiggin Cross, pg 9, Q 20-23, Transcript Brief, Tab 1; Gallagher Cross, pg 7, Q 12, Transcript Brief, Tab 2.

[41] Dowbiggin Cross, pg 10, Q 24-29, Transcript Brief, Tab 1; Gallagher Cross, pg 7-8, Q 13, Transcript Brief, Tab 2.

[42] Dowbiggin Cross, pg 11, Q 30, Transcript Brief, Tab 1; Gallagher Cross, pg 8, Q 14-15, Transcript Brief, Tab 2.

[43] The CBRE Agreement, clause 7.2 – Exhibit "J" to the Affidavit of Casey Gallagher sworn July 21, 2022 (the "**Gallagher Affidavit**"), MR, Tab 2J.

[44] The CBRE Agreement – Exhibit "J" to the Gallagher Affidavit, MR, Tab 2J.

48. The CBRE Agreement also provides,[45]

> **ARTICLE 3 THE BROKERAGE REMUNERATION**
>
> 3.1 The Owner agrees to pay the Brokerage a commission equivalent to 0.65% of the Gross Sale Price of the Property (the "**Commission**"). […]
>
> 3.2 The Commission shall be earned by the Brokerage in the event that during the Term: (a) the Owner enters into a binding agreement of purchase and sale for the Property […]; or (b) the Owner is a corporation, partnership or other business entity and an interest in such corporation, partnership or other business entity is transferred, whether by merger or outright purchase or otherwise in lieu of sale of the Property.
>
> **ARTICLE 4 HOLDOVER**
>
> The Owner further agrees to pay the Brokerage the Commission if, within 90 calendar days after the expiration of the Term, […] negotiations continue […] leading to the execution of a binding agreement of purchase and sale for the Property […] with any person […] to whom the Owner was introduced […]. The Brokerage agrees to submit a list of such persons or entities to the Owner within 10 business days following the expiration of the Term […].

49. The Holdover Period of 90 days after the expiration of the Term (August 20, 2020) ended on November 18, 2020.

iv. The Proposal Trustee's decision to disallow CBRE's claim was correct

50. It is undisputed that:

(a) CBRE introduced the YSL Project to Concord;

(b) the YSL Project was not conveyed to Concord within the Term; and

(c) pursuant to the Debtors' proposal, the YSL Project was ultimately conveyed to Concord on July 22, 2021 (246 days after the expiry of the Holdover Period).

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[45] The CBRE Agreement – Exhibit "J" to the Gallagher Affidavit, MR, Tab 2J.

51. That conveyance did not, however, trigger the payment of a commission. It was not a sale by agreement of purchase and sale, nor did it involve the transfer of an interest in the Debtors to Concord. Article 3.2 of the CBRE Agreement was therefore not met.

52. CBRE also did not tender evidence to the Proposal Trustee of any negotiations between the Debtors and Concord during the Holdover Period. Even if there had been negotiations, they did not lead to the execution of an agreement of purchase and sale. CBRE's entitlement to a commission was not triggered at any time.

53. For these reasons, the Proposal Trustee correctly disallowed CBRE's claim.

v. CBRE's fresh evidence does not support its claim

54. On this appeal, CBRE presents fresh evidence in support of its Proof of Claim. Even on this fresh evidence, CBRE has failed to prove its claim.

55. There are only two areas of CBRE's fresh evidence that are probative. Mr. Gallagher, a Vice-President with CBRE, states that "[a]round September 2020, I played golf with Mr. Dowbiggin and he again confirmed that the negotiations with Concord were ongoing for the purchase of the YSL Property".[46]

56. Mr. Gallagher has no other evidence of negotiations during the Holdover Period.

57. Mr. Gallagher's evidence is so vague that it amounts to no real evidence at all. It is also hearsay evidence on a central issue – whether there were negotiations between the Debtors and Concord during the Holdover Period.

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[46] The Gallagher Affidavit at para 42, MR, Tab 2.

58. CBRE also relies on the evidence of Mr. Dowbiggin, Cresford Capital Inc.'s former President. Mr. Dowbiggin is not a representative of the Debtors. The allegation in CBRE's Factum that the Debtors support CBRE's claim because Mr. Dowbiggin swore an affidavit is incorrect.[47]

59. Mr. Dowbiggin does not confirm or adopt the hearsay evidence that Mr. Gallagher attributes to him in the Gallagher Affidavit, though he could have. The only evidence that Mr. Dowbiggin proffers in respect of negotiations continuing during the Holdover Period is that:[48]

> Although the proposed structure and mechanism of the deal between Cresford and Concord went through many iterations, negotiations were ongoing from the point of Concord's introduction until Cresford and Concord agreed that the property would be sold through a proposal made pursuant to [the *BIA*].

60. Like Mr. Gallagher's evidence, Mr. Dowbiggin's evidence is so vague that it amounts to no real evidence at all. He does not even confirm that any negotiations took place during the Holdover Period.

61. In its factum, the Proposal Trustee suggests that the YongeSL LPs demand "perfect" or "exhaustive" evidence. That is not true. There is simply no persuasive evidence at all.

PART IV - CONCLUSION & ORDER SOUGHT

62. The YongeSL LPs have standing in this proceeding to object to CBRE's appeal and the Settlement, particularly given the nature of their interests at stake. The Settlement should not be enforced.

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[47] For example, see paragraphs 3(a), 15 and 28-29 of CBRE's Factum.

[48] Affidavit of Edward (Ted) Dowbiggin sworn July 25, 2022, at para 24, MR, Tab 3.

63. Allowing this appeal to proceed as a hearing *de novo* undermines the summary nature of *BIA* claims processes and runs counter to appellate guidance and settled practice in Ontario.

64. The Proposal Trustee rightly disallowed CBRE's claim based on the materials before it. CBRE offered no meaningful evidence that it was entitled to a commission under the CBRE Agreement. CBRE has not demonstrated on this appeal that the Proposal Trustee erred in its review of the evidence submitted with CBRE's Proof of Claim.

65. Rather, CBRE relies on fresh evidence that it says supports its entitlement to a commission. That evidence, if admissible, is incapable of making out CBRE's claim.

66. This Court should treat this appeal on the record originally before the Proposal Trustee but in any event should dismiss it. The YongeSL LPs seek their costs of this appeal from CBRE.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of September, 2022.

THORNTON GROUT FINNIGAN LLP
per Alexander Soutter, of counsel to the YongeSL LPs

SCHEDULE "A"
List of Authorities

No.	Case
1.	*YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178
2.	*Re Levy*, 2002 CarswellOnt 4154
3.	*Re Drummie*, 2004 NBQB 35
4.	*I. Waxman & Sons Limited*, 2010 ONSC 2369
5.	*Ravelston Corp, Re*, 2005 CanLII 32207 (ON SC)
6.	*Transamerica Commercial Finance Corp of Canada v Computercorp Systems Inc*, 1993 ABCA 215
7.	*Galaxy Sports Inc (Re)*, 2004 BCCA 284
8.	*Eureka 93 Inc et al (Re)*, 2020 ONSC 6036
9.	*Charlestown Residential School, Re*, 2010 ONSC 4099, 2010 CarswellOnt 5343
10.	*Bambrick, Re*, 2015 ONSC 7488
11.	*In re: John Trevor Eyton*, 2021 ONSC 1719, aff'd 2021 ONSC 3646
12.	*Credifinance Securities Ltd, Re*, 2011 ONCA 160
13.	*Sweda Farms v Egg Farmers of Ontario*, 2014 ONSC 1200, aff'd 2014 ONCA 878, leave to appeal ref'd [2015] SCCA No 97
	Secondary Sources
14.	Houlden, Morawetz, Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th Edition, Release No. 2022-8, August 2022 § 2:132

SCHEDULE "B"
Excerpts of Relevant Statutes

Bankruptcy and Insolvency Act, RSC 1985, c B-3

S.37

Appeal to court against trustee

37 Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

[...]

S.135

Admission and Disallowance of Proofs of Claim and Proofs of Security

Trustee shall examine proof

135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

(2) The trustee may disallow, in whole or in part,

(a) any claim;

(b) any right to a priority under the applicable order of priority set out in this Act; or

(c) any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed

under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Expunge or reduce a proof

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

APPLICATION UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 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.**

Court File No.: BK-21-02734090-0031

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

Proceedings commenced at Toronto

Responding Factum of the "YongeSL LPs"
(CBRE Appeal: September 26, 2022)

THORNTON GROUT FINNIGAN LLP
100 Wellington St. West, Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

D. J. Miller (LSO #34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Alexander Soutter (LSO #72403T)
Tel: (416) 304-0595
Email: asoutter@tgf.ca

Lawyers for the YongeSL LPs