COURT OF APPEAL FOR ONTARIO

CITATION: YG Limited Partnership and YSL Residences Inc. (Re), 2025 ONCA 591
DATE: 20250814
DOCKET: COA-24-CV-0468 & COA-24-CV-0550

George, Favreau and Gomery JJ.A.

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. of the City of Toronto, in the Province of Ontario

Matthew Milne-Smith, Robin B. Schwill and Chenyang Li, for the appellant, KSV Restructuring Inc.

Shaun Laubman, for the appellants, 2504670 Canada Inc., 8451761 Canada Inc. and Chi Long Inc.

Alexander Soutter, for the appellants, Yonge SL Investment Limited Partnership, 2124093 Ontario Inc., E&B Investment Corporation, SixOne Investment Ltd. and Taihe International Group Inc.

Mark Dunn, Sarah Stothart and Brittni Tee, for the respondent, Maria Athanasoulis

Heard: December 17, 2024

On appeal from the order of Justice Jessica Kimmel of the Superior Court of Justice, dated March 19, 2024, with reasons reported at 2024 ONSC 1617.

Favreau J.A.:

A. INTRODUCTION

[1] YSL Residences Inc. ("YSL") and YG Limited Partnership ("YG") owned a property on which they intended to develop an 85-storey building (the "YSL project"). YSL and YG filed a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") before the project was built. The appellant, KSV Restructuring Inc., was appointed as proposal trustee (the "Trustee"). The other appellants are limited partners of YG.

[2] The appeal arises from a claim made by the respondent, Maria Athanasoulis, a former employee of YSL. She claims $1 million in damages for wrongful dismissal, and $18 million in damages for breach of a profit-sharing agreement pursuant to which she was to receive 20% of the profits from the YSL project. The Trustee disallowed the profit-sharing claim on the basis that (1) it was an equity claim, and (2) it was too contingent and remote.

[3] The appeal judge allowed Ms. Athanasoulis' appeal, finding that the profit-sharing claim is not a claim in equity, but is, instead, a claim for unliquidated damages for breach of contract that arose from her wrongful dismissal. The appeal judge also found that, while Ms. Athanasoulis' profit-sharing claim may be difficult to calculate, it is not a contingent claim nor is it too remote. The appeal judge directed that the next step in the proceedings was to hold a hearing for the purpose of quantifying Ms. Athanasoulis' profit-sharing claim.

[4] The Trustee submits that the appeal judge erred in finding that the profit-sharing claim is not "in substance" a claim in equity. It argues that the appeal judge misinterpreted and misapplied the relevant provisions of the *BIA*. The Trustee also argues that the appeal judge erred in finding that the profit-sharing claim is not too contingent and remote. The limited partners raise additional issues, including whether the appeal judge complied with her own procedural order by limiting the issues she was prepared to decide.

[5] I would dismiss the appeal. I see no error in the appeal judge's determination that the profit-sharing claim is not a claim in equity under the *BIA*, or in her conclusion that the claim is not too contingent or remote. I also see no merit to the additional grounds of appeal raised by the limited partners.

B. BACKGROUND

[6] The proceedings leading to the order under appeal are complex. I summarize them to give context to the issues on appeal.

(1) YSL and Ms. Athanasoulis

[7] YSL owned a development property. The intention was to develop the property as an 85-storey retail and condominium complex in downtown Toronto. The YSL project was to be completed by 2025.

[8] YSL was one of several companies ultimately owned and controlled by Daniel Casey, which used Cresford as the companies' trade name (the "Cresford

Group”). Besides the YSL project, in 2019, the Cresford Group was developing three other building projects.

[9] YSL was the general partner of YG, and held the project as a bare trustee for the limited partnership. Besides YSL as the general partner, YG is comprised of several Class A limited partners (otherwise known as unitholders).[1] The limited partners collectively advanced $14.8 million to YSL and YG in exchange for their Class A units in the YG limited partnership. The Cresford Group holds the Class B units of the partnership. The limited partnership agreement provides that the limited partners, as the holders of Class A units, are entitled to repayment of their investment and a 100% return on their investment for a total of $29.6 million, before the Cresford Group, as holder of Class B units, is entitled to any profit from the YSL project.

[10] Ms. Athanasoulis began working for the Cresford Group in 2004 as a Manager, Special Projects. At that time, she had limited education or prior experience. By 2013, she had worked her way up to one of two senior officer positions, reporting directly to Mr. Casey, who was the founder, president and sole director of the Cresford Group. In 2019, Ms. Athanasoulis had a falling out with Mr. Casey, which led to her being dismissed. At the time of her dismissal in

[1] The Class A limited partners include the appellants 2504670 Canada Inc., 8451761 Canada Inc., Yonge SL Investment Limited Partnership, 2124093 Ontario Inc., E&B Investment Corporation, SixOne Investment Ltd., Chi Long Inc., and TaiHe International Group Inc.

December 2019, Ms. Athanasoulis was the Chief Operating Officer and President of the Cresford Group, and an employee and officer of YSL.

(2) The proposal proceedings

[11] At some point after Ms. Athanasoulis' dismissal, the Cresford Group ran into financial difficulties. In the spring of 2021, YG and YSL filed Notices of Intention to Make a Proposal under the *BIA*. The deemed date of the bankruptcy was April 30, 2021. (The three other Cresford Group projects were also subject to earlier unrelated insolvency proceedings.)

[12] YSL and YG made a number of proposals. Ultimately, the court approved an Amended Third Proposal on July 16, 2021 (the "Proposal"): *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206, 93 C.B.R. (6th) 139.

[13] The Proposal provided that Concord Properties Developments Corp. (the "Sponsor") would acquire the project on the following terms: (i) the Sponsor would assume liability for all secured creditor claims and construction lien claims; (ii) the Sponsor would pay $30.9 million to the Trustee to be distributed to unsecured creditors with proven claims; and (iii) any amounts left over after the distribution to unsecured creditors were to be distributed to equity stakeholders, including the limited partners.

[14] At the time of the approval, the secured debt was approximately $260 million. The motion judge who approved the Proposal estimated that the

unsecured debt was between $20 and $25 million. He did not include Ms. Athanasoulis' profit-sharing claim as part of the unsecured debt for voting purposes because he decided that it was too speculative.

(3) Ms. Athanasoulis' claim

[15] Ms. Athanasoulis filed a proof of claim against YSL for two unsecured claims:

1. $1 million in damages for wrongful dismissal based on a claim of constructive dismissal; and
2. $18 million in damages for breach of an oral agreement that Ms. Athanasoulis would be paid 20% of the profits earned from the project.

[16] There is no dispute that if Ms. Athanasoulis is able to prove her claims, they are to be paid out of the $30.9 million the Sponsor has provided to the Trustee to pay unsecured claims. Ms. Athanasoulis' profit-sharing claim is by far the largest unsecured claim made against YSL. If the full $18 million is paid out, recovery for unsecured creditors would be reduced from an anticipated 100% to 70%. Further, absent the profit-sharing claim, the limited partners stand to recover $13.8 million of their $14.8 million investment. However, if the full $18 million is paid out, the limited partners will receive nothing.

[17] The Trustee and Ms. Athanasoulis agreed to submit her claims to arbitration.

(4) The arbitration

[18] William Horton was appointed as arbitrator. The arbitration was to proceed in two phases. As discussed below, ultimately only the first phase of the arbitration proceeded.

[19] The first phase addressed two issues: (a) whether Ms. Athanasoulis was employed by YSL and, if so, whether she was wrongfully terminated, and (b) whether Ms. Athanasoulis had a profit-sharing agreement with YSL that would entitle her to 20% of the profits from the YSL project and, if so, the terms of that agreement.

[20] The arbitrator released his award from the first phase on March 28, 2022. He found that Ms. Athanasoulis was constructively dismissed from her employment in December 2019. He also found that Ms. Athanasoulis and the Cresford Group had entered into an oral profit-sharing agreement pursuant to which she was entitled to 20% of the profits earned on all current and future Cresford projects, including the YSL project. Profits were to be calculated based on the pro forma budgets prepared by the Cresford Group, which used revenues less expenses and were updated on an ongoing basis. As a practical matter, profits were to be calculated after all costs on the project were paid out, including after the limited partners were repaid the equity they had invested in the project. The arbitrator further found that the profit-sharing agreement was not a standalone

agreement, but that it was part of Ms. Athanasoulis' contract of employment. Finally, the arbitrator found that YSL was to pay Ms. Athanasoulis her share of the profits when the profits were earned, which would usually be after the project was completed. Accordingly, there was no requirement that Ms. Athanasoulis remain employed for her to be entitled to payment of her share of the profits.

[21] The second phase of the arbitration was meant to determine the damages Ms. Athanasoulis was entitled to receive for constructive dismissal and from the profit-sharing agreement.

[22] However, after the first arbitration award was released, the Sponsor and the limited partners opposed the arbitration process because they had not had a chance to participate.

(5) The funding decision and procedural directions

[23] As a result of the opposition from the Sponsor and limited partners, the appeal judge heard a motion in connection with the Sponsor's obligation to fund the fees and expenses the Trustee had incurred up to that point in resolving Ms. Athanasoulis' claim. This resulted in a funding decision released on November 1, 2022: *YG Limited Partnership (Re)*, 2022 ONSC 6138, 5 C.B.R. (7th) 389.

[24] In the funding decision, the appeal judge required the Sponsor to reimburse the Trustee for its reasonable expenses in the first phase of the arbitration.

However, she determined that the Sponsor was not obligated to fund the second phase because this second phase would improperly delegate the determination of Ms. Athanasoulis' claim to the arbitrator. The appeal judge further directed the Trustee to determine how it would proceed next for the purpose of valuing Ms. Athanasoulis' claim.

[25] Following the issuance of the funding decision, on March 30, 2023, the Trustee allowed Ms. Athanasoulis' claim for wrongful dismissal in the amount of $880,000 based on a 24-month notice period.

[26] In a further decision, the appeal judge provided directions regarding the process the Trustee was to follow in determining the value of Ms. Athanasoulis' profit-sharing claim: *YG Limited Partnership (Re)*, 2023 ONSC 4638, 17 C.B.R. (7th) 388. In her directions, the appeal judge set a schedule and process for the Trustee to determine this claim. She also granted the limited partners a right to participate in the process, including in any appeal from the Trustee's decision. The limited partners' appeal raises issues regarding that direction, and I address the scope of their right to participate more fully in the analysis below.

(6) The Trustee's decision

[27] As part of the process before the Trustee, the parties first made submissions on threshold issues that the parties agreed may dispose of the matter. Therefore, at that stage, the parties did not provide any evidence or submissions for the

purpose of determining the amount, if any, of Ms. Athanasoulis' profit-sharing claim.

[28] On August 10, 2023, the Trustee released a Notice of Disallowance, denying Ms. Athanasoulis' profit-sharing claim. The appeal judge characterized the basis on which the Trustee disallowed the claim as follows:

> a. It is not a debt obligation or liability of YSL but rather, in substance, an equity claim, that is not a provable claim under the *BIA*.
>
> b. There was no profit to be shared, because none had been earned by YSL as of the date of either the termination of Ms. Athanasoulis' employment (December 2019) or the date of bankruptcy (April 2021). Ms. Athanasoulis cannot claim a share of a non-existent profit.
>
> c. Further, to the extent it is based upon projected future profitability, it is a contingent claim for a lost profit share that is far too remote to be capable of being considered a provable claim. Nor can it be the subject of any meaningful and reasonable computation, and it is thus valued at zero.
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> d. It is subordinated to the [limited partners'] entitlements because [Ms. Athanasoulis] was only to receive her share of the profits when Cresford did, which would occur only after the [limited partners] had been repaid their capital and earned their entire preferred return. The [limited partners] have not, and due to lack of available funds will not, receive all such amounts.

(7) The appeal judge's decision

[29] Ms. Athanasoulis appealed the Trustee's decision disallowing her profit-sharing claim to the appeal judge. The appeal judge allowed the appeal.

[30] In her decision, citing the decision of the Court of Appeal for British Columbia in *8640025 Canada Inc. (Re)*, 2018 BCCA 93, 8 B.C.L.R. (6th) 225, at para. 65, the appeal judge determined that she was to apply the appellate standard of review.

[31] The appeal judge concluded that the Trustee made a legal error in characterizing the profit-sharing claim as an equity claim. She found that, based on the definitions of "equity claim" and "equity interest" in the *BIA*, the profit-sharing agreement was not in respect of an equity interest in YSL or YG because it did not give Ms. Athanasoulis "a share in the corporation, or warrant or option or another right to acquire a share in the corporation".

[32] The appeal judge rejected the Trustee's characterization of the claim as a claim for lost profit that was too contingent, remote and speculative to be quantified. Instead, she held that Ms. Athanasoulis' profit-sharing claim is a claim for unliquidated damages for breach of contract. In the normal course, damages were to be determined from the date of the breach.

[33] The appeal judge also found that the Trustee erred in valuing the claim at $0 on the basis that no profit was earned during the notice period. The arbitrator had found that the profit-sharing agreement did not depend on Ms. Athanasoulis' continued employment. Therefore, the claim could only be valued at $0 if it was inevitable that no profits would have been earned on the project; however, there

was some evidence that the project's failure and the bankruptcy were not inevitable.

[34] The appeal judge rejected the Trustee's conclusion that Ms. Athanasoulis' claim was subordinate to the limited partners' claim. She acknowledged that, under the profit-sharing agreement, profits were to be calculated as revenues minus expenses, and the repayment of funds invested by the limited partners was to be an expense. However, this calculation method did not reverse the priority of claims in the bankruptcy context or affect the characterization of Ms. Athanasoulis' claim. Since Ms. Athanasoulis' claim was for damages for breach of contract and did not derive from an equity interest, it took priority over the limited partners' claims, which are equity claims.

[35] The appeal judge further rejected the limited partners' argument that the profit-sharing agreement was unenforceable because it breached the agreements they had entered with YG, namely the Amended Limited Partnership Agreement and the Sales Management Agreement, which included terms that prohibited payments to related parties or affiliates. The motion judge noted that there was no evidence that Ms. Athanasoulis was a related party or affiliate under the agreements at issue.

[36] Finally, the appeal judge dismissed the limited partners' arguments that Ms. Athanasoulis made misrepresentations or breached a fiduciary duty or other

duties she owed them. The appeal judge held that this argument went beyond the scope of the issues on which the limited partners had been granted standing. She further noted that there was insufficient evidence that would allow her to find that Ms. Athanasoulis owed or breached a fiduciary duty to the limited partners. She stated that these issues would be better decided in the separate action the limited partners had commenced against Ms. Athanasoulis.

[37] Having found that Ms. Athanasoulis' claim under the profit-sharing agreement is valid, the appeal judge indicated that the next step in the proceedings was to value the claim. She stated that, "while it may be difficult, efforts should be made to value" the profit-sharing claim. She directed the parties to attend a case conference to address the process for valuing the claim.

C. ISSUES RAISED BY THE TRUSTEE

[38] The Trustee and the limited partners both appeal the appeal judge's order. They raise separate issues on appeal. In this section, I address the issues raised by the Trustee. I will address the issues raised by the limited partners in the next section.

[39] The Trustee raises three main issues:

a. Did the appeal judge err in finding that the profit-sharing claim is not an equity claim under the *BIA*?

b. Did the appeal judge err in finding that the profit-sharing claim is not a contingent unliquidated claim that is too speculative or remote?

c. Did the appeal judge err in failing to find that the common law notice period applies to the profit-sharing claim?

[40] I would dismiss these three grounds of appeal. I address each in turn.

Issue 1: The appeal judge did not err in finding that the profit-sharing claim is not an equity claim under the *BIA*

(a) Introduction

[41] The Trustee submits that the appeal judge erred in finding that Ms. Athanasoulis' profit-sharing claim is not an equity claim. In making this argument, the Trustee submits that the appeal judge misinterpreted the definitions of "equity claim" and "equity interest" in s. 2 of the *BIA*, and specifically erred in applying an overly narrow interpretation of these terms; rather, she should have applied a contextual approach to find that Ms. Athanasoulis' profit-sharing claim is "in substance" an equity claim. The Trustee argues that its proposed approach is consistent with the common law, which was not meant to be altered by the definition of "equity claim" introduced in the *BIA* in 2009.

[42] I see no error in the appeal judge's interpretation of the definitions of "equity claim" and "equity interest" in s. 2 of the *BIA*. Her interpretation is consistent with the wording and intent of the provision.

(b) Relevant provisions of the *BIA*

[43] Section 121(1) of the *BIA* deems that provable claims in the context of a bankruptcy consist of:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt…. [Emphasis added.]

[44] Section 121(2) of the *BIA* directs that the determination of whether a contingent or unliquidated claim is a provable claim is to be decided in accordance with s. 135. Section 135(1.1) of the *BIA* requires a trustee to determine whether a contingent claim or an unliquidated claim is a provable claim and, if it is a provable claim, to value it.

[45] An equity claim is not a debt or liability under the *BIA*, and is therefore not a provable claim: *Central Capital Corp. (Re)* (1996), 27 O.R. (3d) 494 (C.A.), at p. 532, *per* Weiler J.A. This principle developed at common law. One rationale for the difference in treatment of debts and equity investments is that "shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential": *Re Sino-Forest Corporation*, 2012 ONCA 816, 114 O.R. (3d) 304, at para. 30.

[46] In 2009, both the *BIA* and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") were amended to add definitions of "equity claim" and "equity interest".

[47] Section 2 of the *BIA* defines an equity claim as follows:

> ***equity claim*** means a claim that is in respect of an equity interest, including a claim for, among others,
>
> **(a)** a dividend or similar payment,
>
> **(b)** a return of capital,
>
> **(c)** a redemption or retraction obligation,
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> **(d)** a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
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> **(e)** contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)

[48] Section 2 of the *BIA* defines an "equity interest" as "in the case of a corporation other than an income trust, a share in the corporation – or a warrant or option or another right to acquire a share in the corporation – other than one that is derived from a convertible debt" (emphasis added).

(c) Analysis

[49] There is no dispute that the proper interpretation of s. 2 of the *BIA* is a question of law. The standard of review is correctness. I see no error in the appeal judge's analysis and conclusion that Ms. Athanasoulis' profit-sharing claim is not an equity claim.

[50] Before us, the Trustee renews the argument it made to the appeal judge that Ms. Athanasoulis' profit-sharing claim is "in substance" an equity claim, and therefore not a provable claim under the *BIA.* The Trustee submits that Ms. Athanasoulis' profit-sharing claim is "in substance" an equity claim because it is dependent on the Cresford Group's ownership interest in YSL and YG; Ms. Athanasoulis was to receive 20% of the profits that the Cresford Group was to earn on the YSL project, and only after the limited partners received their return on their investments.

[51] The Trustee submits that the scope of equity claims that do not qualify as debts or liabilities is not constrained by the definition of "equity claim" or "equity interest" in the *BIA*. Rather, equity claims not eligible to be provable claims under the *BIA* include those defined under the common law, which include equity claims "in substance", such as Ms. Athanasoulis' profit-sharing claim. In other words, while the Trustee appears to accept that the definition of "equity claim" in the *BIA* does not include a profit-sharing claim that is not based on an ownership interest, such claims could nevertheless fall within the scope of an equity claim not provable under the *BIA* because of the common law. This argument depends on the following two premises: (1) the definition of equity claim in the *BIA* is not exhaustive; and (2) at common law, the meaning of "equity claim" would include a claim in the nature of Ms. Athanasoulis' profit-sharing claim.

[52] I would reject the Trustee's argument.

[53] I agree with the appeal judge that the definition of “equity claim” in the *BIA* is meant to be exhaustive. As she explained:

> When a word or phrase is defined with reference to what it “means” that has been held to signal that this definition is intended to be exhaustive, in accordance with well-accepted principles of statutory interpretation.
>
> The definition of “equity claim” in s. 2 goes on to provide, by way of example, a non-exhaustive list of types of equity claims, including a claim for a dividend, return of capital, redemption or retraction, monetary loss resulting from ownership, purchase or sale of an equity interest, or a claim for contribution or indemnity in respect of these types of claims. However, all of these examples are tied to the originally essential component of the definition that it be “a claim that is in effect of an equity interest”, meaning a share (or warrant or option to acquire a share). [Citations omitted.]

[54] This interpretation of “equity claim” is consistent with the principles of statutory interpretation. In *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, at para. 42, the Supreme Court explained that where a definition uses the term “means”, the scope of a definition is ordinarily exhaustive: see also *R. v. McColman*, 2023 SCC 8, 167 O.R. (3d) 559, at para. 38. Even where “means” is followed by “includes”, the enumerated terms can be illustrative rather than expansive.

[55] In this case, s. 2 of the *BIA* defines an “equity claim” to “mean” a claim “in respect of an equity interest”. “Equity interest” is specifically defined, with respect

to a corporation, as “share in the corporation – or a warrant or option or another right to acquire a share in the corporation”. This is an exhaustive list of ownership interests. The use of the word “in respect of” and “including” in the definition of “equity claim” does not expand or modify the meaning of “equity interest”; it simply lists the types of claims that might arise from an equity interest, which are a claim for (a) a dividend or similar payment, (b) a return of capital, (c) a redemption or retraction obligation, (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest, or (e) contribution or indemnity relating to any of (a) to (d). A careful reading of the definitions of “equity claim” and “equity interest” signals that an equity claim is meant to arise from nothing other than an ownership interest in a corporation. This definition may give rise to a wide variety of claims, but the origin of the claim is meant to be limited to an ownership interest.[2]

[56] Contrary to the Trustee’s submissions, the amendments made to the *BIA* in 2009 leave no room to read in an intention to include what it describes as equity claims “in substance”. The wording of the definitions of “equity claim” and “equity interest” demonstrate an intention to broaden the scope of claims that can be

[2] Following the hearing of the appeal, the Trustee submitted two additional cases which it said were relevant: *Re Atlantic Sea Cucumber Ltd.*, 2025 NSSC 234 and *Re Organic Garage*, 2025 ONSC 2476. Neither of these cases assists the Trustee. Both cases review in detail the jurisprudence on the definition of “equity claim”. Neither supports the Trustee’s position that the *BIA* envisions an equity claim “in substance” unconnected from an equity interest.

characterized as equity claims but to nevertheless require that such claims originate from an ownership interest.

[57] Prior to 2009, the classification of investments was left to the discretion of the courts. In *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, at pp. 587-590, the Supreme Court stated that the court should characterize hybrid investments based on their "substance" by performing a contextual analysis akin to a contractual interpretation; the courts were to determine the nature of the claim based on the intention of the parties and the surrounding circumstances. In *Re Central Capital Corp.*, at pp. 524-530, *per* Weiler J.A., and pp. 536-540, *per* Laskin J.A., this court expanded on the contextual approach, and considered such things as share purchase agreements, conditions attached to the shares, articles of incorporation, and the treatment of shares in financial statements for the purpose of determining whether the claim at issue was an equity claim.

[58] The 2009 amendments were introduced to remove the uncertainty in this type of analysis: Office of the Superintendent of Bankruptcy, "Bill C-12: Clause-by-Clause Analysis—Clauses 1-10", online: Office of the Superintendent of Bankruptcy <ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/legislation/bill-c-12-clause-clause-analysis>. The 2009 amendments sought to increase creditor protection by broadening and clarifying the types of shareholder claims

that would, pursuant to ss. 60(1.7) and 140.1 of the *BIA*[3], be subordinated to the interests of creditors: see *Sino-Forest*, at para. 56 (discussing a similar provision, s. 6(8), in the *CCAA*). This explains why the statutory language in s. 2 of the *BIA* includes both breadth and specificity. In *Sino-Forest*, at paras. 39-41, this court noted that the definition of "equity claim" incorporates "two expansive terms", namely "in respect of" and "including", which serve to create a broad range of claims that can be characterized as equity claims. At the same time, the restrictive definition of "equity interest", through the use of the word "means", signals that the type of interest that can give rise to an equity claim is limited to an ownership interest. This broad meaning of "equity claim" and restrictive meaning of "equity interest" are consistent with the 2009 amendments; they offer wide protection to creditors from the types of claims that can be made by shareholders, while clarifying the type of interest that can give rise to an equity claim.

[59] Contrary to the Trustee's submissions, this interpretation of "equity claim" and "equity interest" is consistent with this court's decision in *Sino-Forest*. That case was decided under the *CCAA*, which includes the same definitions of "equity claim" and "equity interest" as the *BIA.* The issue in *Sino-Forest* was whether the definition of "equity claim" was broad enough to include cross-claims for

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[3] Section 60(1.7) of the *BIA* provides that: "No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid." Section 140.1 provides that: "A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied."

contribution and indemnity made by auditors and underwriters arising from proposed class actions by shareholders. In that context, this court stated that it was necessary to focus on the substance of the claim rather than the identity of the claimant. However, in deciding that these were equity claims, the court focused on the expansive definition of "equity claim", which includes claims for "contribution and indemnity" in relation to the types of claims specifically listed in the definition of "equity claim". The court's focus in that case was not on the definition of "equity interest". As the appeal judge explained:

> The Proposal Trustee relies on the Ontario Court of Appeal's decision in *Sino-Forest*, at para. 44, which states that the term equity should be give an expansive meaning. In that case, the claim by the auditors for contribution and indemnity was derivative of a claim against them by corporate shareholders (equity holders). A claim for contribution and indemnity in respect of a claim for a monetary loss resulting from the ownership, purchase or sale of shares fall squarely within the examples of equity claims expressly provided for in the definition of equity claims under s. 2 of the BIA. In *Sino-Forest*, the Court's expanded view was in its recognition that the auditors' claim grounded in a cause of action for breach of contract did not change its essential character as a claim for contribution and indemnity in respect of shareholder (equity) claims. [Citation omitted.]

[60] The Trustee suggests that Ms. Athanasoulis' claim is akin to the claims of the auditors and underwriters in *Sino-Forest* because her entitlement to share in the profits of the YSL project is dependent on the ownership interests of the Cresford Group. I do not see the analogy. Ms. Athanasoulis' claim is not derivative

of a claim asserted by the Cresford Group. Rather, it is a claim asserted against her former employer. As the appeal judge stated:

> The fact that the parties chose to tie the quantification of the amounts payable under the Profit Sharing Agreement to YSL's (and the Cresford Group's) performance (profits, after deducting, or net of, amounts payable to the [limited partners]) does not transform a contractual obligation or debt to Ms. Athanasoulis into an equity claim within the meaning of the BIA, even if the practical effect of this would have been that payments under the Profit Sharing Agreement in the normal course would be made after payments to the [limited partners].

[61] The Trustee also relies on a number of decisions that it says support its position that equity claims "in substance", such as Ms. Athanasoulis' profit-sharing claim, fall within the scope of equity claims under the *BIA*. However, the cases that post-date the 2009 introduction of the definitions of "equity claim" and "equity interest" in the *BIA* do not support this position. While it is true that these decisions consider the "substance" of the claim at issue, each of the cases on which the Trustee relies deals with an "equity interest" as that term is specifically defined in the *BIA*.

a) *Re Nelson Financial Group Ltd.*, 2010 ONSC 6229, 75 B.L.R. (4th) 302: The claims of preferred shareholders in the capital stock of Nelson Financial were equity claims because they were in respect of equity interests, including declared but unpaid dividends and unperformed requests for redemption.

b) *Re U.S. Steel Canada Inc.*, 2016 ONSC 569, 34 C.B.R. (6th) 226, aff'd 2016 ONCA 662, leave to appeal granted but appeal discontinued, [2016] S.C.C.A. No. 480: A capital contribution by a sole shareholder of a company, unaccompanied by a further issue of shares, constituted a payment in respect of a share of the company. The shareholder's claim for repayment was therefore an equity claim.

c) *Re Bul River Mineral Corp.*, 2014 BCSC 1732, 16 C.B.R. (6th) 173: Shareholder claimants had received a judgment with respect to their claim before the bankruptcy filing. The judgment did not transform the original equity claim into a debt.

d) *Re All Canadian Investment Corporation*, 2019 BCSC 1488: Redemption notices delivered by preferred shareholders did not transform the shareholders' equity claim into a debt.

e) *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd.*, 2021 BCSC 607, aff'd 2023 BCCA 376: The plaintiffs' material contributions to the acquisition of property resulted in a beneficial ownership interest, *not* an equity interest.

f) *Avis d'intention de Cryogénique inc.*, 2021 QCCS 4100, aff'd 2022 QCCA 1387: An amalgamated company became the debtor for the balance of the share sale price for shares sold on the same day as the amalgamation occurred. The amalgamation did not change the nature of the claim, which was an equity claim for the sale of an equity interest.

g) *Syndic de Société de vélo en libre service*, 2023 QCCA 368, leave to appeal refused, [2023] S.C.C.A. No. 204: Loans from a sole shareholder were, in substance, contributions to capital. The shareholder's claim for repayment was an equity claim.

[62] In this case, Ms. Athanasoulis' profit-sharing claim is not based on an equity interest. She did not own shares in any of the Cresford Group companies, nor did she own any units in the limited partnership. Her claim is not based on an ownership interest, but rather, on a term of her employment, under which she was entitled to a share of the profits. This is not an equity interest as defined under the *BIA*, and accordingly the appeal judge made no error in finding that her profit-sharing claim is not an equity claim.

[63] Finally, the Trustee's proposed interpretation is result-driven. The circumstances of this case are unusual. Given the terms of the profit-sharing agreement, if Ms. Athanasoulis had not been terminated, she would not have received payments under the profit-sharing agreement until after the limited partners' investments were repaid. However, the apparent unfairness of Ms. Athanasoulis being paid ahead of the limited partners in the context of the bankruptcy proceedings cannot drive the determination of whether the profit-sharing claim is an equity claim. Bad facts should not make bad law. The court must base its decision on a correct interpretation of the *BIA* and not on what seems fair in the unique circumstances of this case. In any event, as noted by the appeal

judge, the only issue at this stage of the proceedings is whether the profit-sharing claim is a provable claim; the quantification of the claim, which will depend on multiple factors, may nevertheless lead to a conclusion that the claim is worth far less than Ms. Athanasoulis submits, and possibly even $0.

[64] Accordingly, I find that the appeal judge did not err in finding that the profit-sharing claim is not an equity claim under the *BIA*.

Issue 2: The appeal judge did not err in finding that the profit-share claim is not a contingent claim and that it is not too remote and speculative

(a) Introduction

[65] The Trustee submits that the appeal judge erred in finding that Ms. Athanasoulis' profit-sharing claim is not a contingent claim and that it is not too remote and speculative. The Trustee points out that, given that the Cresford Group did not ultimately build the YSL project, there were no profits earned on it. Moreover, had any profits been earned, they would have first gone to the limited partners.

[66] I disagree with the Trustee's position. The appeal judge correctly explained that, once Ms. Athanasoulis' claim is characterized as a claim for breach of her employment contract, damages are to be assessed from the date of the breach. Her claim is therefore not a contingent claim, but rather a claim for unliquidated damages. Calculating damages may be difficult and may even lead to the

conclusion that Ms. Athanasoulis is entitled to no damages, but this does not make her claim for breach of the profit-sharing agreement too remote and speculative as understood in the context of bankruptcy law and contract law.

(b) Relevant legal principles

[67] As noted above, s. 135(1.1) of the *BIA* requires a trustee to determine whether a contingent claim or unliquidated claim is provable and, if so, to value it.

[68] A contingent claim is a claim that may or may not ripen into a debt, depending on whether future events occur: *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 36. If a contingent claim is too remote or speculative, it is not a provable claim and a trustee can disallow it: *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443, at para. 36.

[69] A contingent claim must be distinguished from an unliquidated claim. An unliquidated claim is a claim whose value cannot be ascertained by mere arithmetic: L.W. Houlden, G.B. Morawetz, and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (2025-Rel 7), 4th ed (Toronto: Thomson Reuters, 2009) at §6:127.

[70] An unliquidated claim that is non-contingent is still subject to considerations of remoteness or speculation. In valuing an unliquidated claim, the trustee must

apply the law of damages relevant to that claim. I address the principles applicable to this calculation further below.

(c) Analysis

(i) Ms. Athanasoulis' claim is not a contingent claim

[71] On appeal, the Trustee renews the arguments made to the appeal judge that Ms. Athanasoulis' claim is a contingent claim because it depended on the completion of the YSL project and distribution of profits to the limited partners and then to the Cresford Group.

[72] In making the argument that the profit-sharing claim is a contingent claim, the Trustee ignores the appeal judge's determination that the profit-sharing claim is a claim for damages based on the breach of Ms. Athanasoulis' employment contract. The claim is therefore not contingent on a future event, namely the construction of the YSL project and earning of profits; rather, the breach occurred in January 2020 when Ms. Athanasoulis accepted the repudiation of her employment agreement. As the appeal judge stated, as in any employment context, damages are generally to be calculated from the date of the breach:

> Until there was a breach, the Profit Sharing Agreement would remain in place and any claim for payment under that agreement might reasonably be considered to be contingent upon profits actually being earned (to be calculated based on revenues less expenses, where expenses would include any amounts payable to the LPs). It might have been open to Ms. Athanasoulis not to accept the repudiation of the Profit Sharing Agreement

> and let it continue even though she was no longer employed by YSL and wait to be paid in the normal course; but she clearly did the opposite, as evidenced by her civil claim for damages for breach of that agreement commenced in 2020.
>
> As a matter of law, the accepted repudiation of the Profit Sharing Agreement converted a future right to receive actual profits if and when earned into a current right to receive damages for breach of contract. Once converted to a damages claim, the "normal course" that Ms. Athanasoulis would be paid once the profits had been earned, usually at the end of the project, no longer applied. Rather, the Profit Share Claim became an unliquidated claim for damages for breach of contract that would presumptively be assessed at the time of repudiation. [Emphasis added.]

[73] I see no error in the appeal judge's finding that Ms. Athanasoulis' profit-sharing claim is not a contingent claim. It is consistent with the treatment of other wrongful dismissal claims in the context of a bankruptcy, including claims based on future events, such as the payment of a bonus or a share of profits: *Noble v. Principal Consultants Ltd. (Bankrupt)*, 2000 ABCA 133, 187 D.L.R. (4th) 80, at para. 41; see also *Bankruptcy and Insolvency Law of Canada*, at §6:319. The fact that an employer became a bankrupt after the breach does not turn a valid wrongful dismissal claim into a contingent claim.

[74] The Trustee argues that this case is different from other employment cases because Ms. Athanasoulis' entitlement to share in the profits of the YSL project depended on the project going ahead and being profitable, which did not occur. I disagree. Again, this argument misses the point that the claim arose on the date

of the breach. At that point, as found by the arbitrator, Ms. Athanasoulis had an interest in the profit-sharing agreement. The breach of her employment contract means that she lost the opportunity to earn profits under the profit-sharing agreement. Although it may be difficult to quantify this lost opportunity, arguments about quantification do not transform this claim into a contingent claim.

[75] The Trustee relies on this court's decision in *Schnier v. Canada (Attorney General),* 2016 ONCA 5, 128 O.R. (3d) 537, to support its argument that the profit-sharing claim is a contingent claim. I agree with the appeal judge that *Schnier* has no application to the circumstances of this case. In *Schnier*, this court accepted that an amount claimed by the federal government for outstanding income tax which was under appeal by the bankrupt constituted a non-provable contingent claim because it depended on a determination to be made by a third party, namely the Tax Court, at a later date. Unlike in *Schnier*, the determination of Ms. Athanasoulis' profit-sharing claim does not depend on a future decision by a third party. Once her claim is properly viewed as a claim for breach of contract, it is evident that the breach has already occurred, and the only issue remaining is the quantification of damages.

(ii) Ms. Athanasoulis' claim is not too remote or speculative

[76] The Trustee's argument that Ms. Athanasoulis' profit-sharing claim is too remote and speculative is primarily based on its position that it is a contingent claim.

[77] As noted by the appeal judge, once it is determined that the profit-sharing claim is not a contingent claim, remoteness is only a bar to the recovery of damages if, as a matter of contract law, the type of loss at issue is too remote. There are two branches to the remoteness test: damages may be recoverable if (a) in the "usual course of things", they arise fairly, reasonably and naturally as a result of the breach of contract, or (b) they were within the reasonable contemplation of the parties at the time of contract: *The Rosseau Group Inc. v. 252801 Ontario Inc*., 2023 ONCA 814, 169 O.R. (3d) 192, at para. 68. Damages that fall outside of either branch are not recoverable because they are too remote: *Rosseau*, at para. 68. Importantly, remoteness in a breach of contract case deals with the "type" of loss that is recoverable, not with the measure or quantification of the loss: *Rosseau*, at para. 70. Damages that are difficult to calculate are not inherently too remote: *General Mills Canada Ltd. v. Maple Leaf Mills Ltd.* (1980), 52 C.P.R. (2d) 218 (Ont. H. Ct.), at p. 219; Jason W. Neyers, *Fridman's The Law of Contract in Canada*, 7th ed. (Toronto: Thomson Reuters, 2024), at §22:24.

[78] In applying these principles to this case, the appeal judge found:

> The type of loss at issue here is in respect of the lost opportunity to contribute to and eventually share in the profits that the parties anticipated would eventually be earned by YSL when the YSL Project was completed. The remoteness concerns identified by the Proposal Trustee are in respect of the measure of damages, not the type of loss.

[79] I see no error in the appeal judge's determination that the type of loss claimed by Ms. Athanasoulis is not the type of loss that is too remote for recovery. At the time of the breach, she lost the opportunity to work towards and share in YSL's profits. Her lost opportunity flowed naturally from the breach and was within the reasonable contemplation of the parties when the profit-sharing agreement was formed.

[80] As noted by the appeal judge and already stated above, quantifying the loss in this case may be complicated and may involve taking many different factors into consideration, but this does not make the type of loss too remote as a matter of contract law. As the appeal judge stated, quantifying damages will be "an issue for another day in these proceedings".

Issue 3: The appeal judge did not err in finding that the common law notice period does not apply to the profit-sharing claim

[81] The Trustee submits that the appeal judge erred in finding that the profit-sharing claim is not tied to the notice period. The Trustee had argued that the notice period in this case was 24 months. Because the YSL project was not meant to be completed within the 24 months following Ms. Athanasoulis' termination, she

would not have been entitled to a share of the profits once the project was completed. In making this argument, the Trustee relied on *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, [2020] 3 S.C.R. 64, at para. 49, wherein the Supreme Court stated that, in the normal course, the remedy for breach of an implied term to provide reasonable notice is to award as damages what the employee would have earned during the notice period.

[82] The appeal judge rejected this argument, reasoning that the facts in this case are distinguishable from the general principle enunciated in *Matthews* because, in this case, Ms. Athanasoulis' entitlement to share in the profits of the YSL project was not dependent on her continued employment with YSL:

> [Even] if Ms. Athanasoulis had been given two-years working notice and her employment had then terminated, it is not a given that her entitlements under the Profit Sharing Agreement would have automatically ended. The preservation of her entitlements under the Profit Sharing Agreement is consistent with the Arbitrator's finding that the Profit Sharing Agreement was intended to recognize her past and continuing contributions and was not just an incentive for future contributions. The Arbitrator expressly found that YSL could not eliminate Ms. Athanasoulis' claim by terminating her and could not reduce her share to zero after her prior years of contributions in the form of advance sales, etc. simply by terminating her employment on notice (at para. 160). It follows from these findings of the Arbitrator that, unlike in *Matthews*, the termination notice period is not determinative of the Profit Share Claim.

[83] I see no error in this reasoning. The arbitrator had found that Ms. Athanasoulis' entitlement to share in the profits of the YSL project did not end

with the termination of her employment. The parties proceeded on the understanding that the findings of the arbitrator were binding on the Trustee and on any appeals from the Trustee's disallowance decision. In the circumstances, the appeal judge did not commit any errors in distinguishing *Matthews* from this case and in finding that Ms. Athanasoulis' profit-sharing claim survives her notice period.

D. ISSUES RAISED BY THE LIMITED PARTNERS

[84] As indicated above, following the first phase of the arbitration, the limited partners objected to the arbitration process and obtained leave to participate in the proceedings before the Trustee and in the appeal from the disallowance decision.

[85] In her decision giving directions for the process to be followed in these proceedings, the appeal judge circumscribed the scope of the issues the limited partners could address on appeal. She made her decision "[s]ubject to the discretion of the appeal judge":

> Subject to the discretion of the appeal judge, the [limited partners'] standing on the appeal shall be limited to submissions in respect of the impact of the prohibition contained in the Limited Partnership Agreement on non-arm's length agreements (such as the Profit Sharing Agreement), on the question of enforceability of the Profit Sharing Claim and in respect of the priority/subordination of the Profit Share Claim to the [limited partners'] recovery of their initial investment based on alleged breaches of contractual and fiduciary duties and alleged misrepresentations. [Emphasis added.]

[86] The appeal judge explained the rationale for granting the limited partners a right to participate for the purpose of addressing these issues as follows:

> Here, the [limited partners] 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).
>
> The [limited partners] 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 [limited partners] 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.

[87] In her decision allowing Ms. Athanasoulis' appeal from the Trustee's disallowance decision, the appeal judge characterized the issues the limited partners were granted standing to address differently than in her procedural decision. She described the issues as (1) whether the profit-sharing agreement breaches the prohibition in s. 3.6(b) of the Amended and Restated Limited Partnership Agreement against non-arm's length transactions with a related party, and (2) whether the profit-sharing agreement breaches s. 3.2 of the Sales

Management Agreement, which prohibits compensation being paid to the corporation or its affiliates that is not specifically provided for in that agreement.

[88] The appeal judge noted that the Trustee did not adopt or rely on these grounds in the disallowance decision and found that the Trustee did not commit any reviewable errors in relation to the limited partners' submissions. She nevertheless went on to consider the issues raised by the limited partners *de novo.* She found that there was no evidentiary basis to find that Ms. Athanasoulis was an affiliate of YSL under the Sales Management Agreement or that the profit-sharing agreement was a prohibited "related party agreement" under the Amended and Restated Limited Partnership Agreement. She further found that the limited partners had not presented any evidence to support a finding that the profit-sharing agreement was "not on market terms", particularly in light of Ms. Athanasoulis' contributions to the Cresford Group and the YSL project.

[89] The appeal judge went on to consider what she described as "additional issues" raised by the limited partners. The most significant of these was a claim that Ms. Athanasoulis failed to disclose the profit-sharing agreement to the limited partners and that, as a result, she made a misrepresentation by omission and breached a fiduciary duty and other duties owed to the limited partners.

[90] The appeal judge decided that the appeal before her was not the proper forum in which to decide these additional issues. She stated that these issues went

beyond the scope of what the limited partners had been granted standing to address. Further, there was an insufficient evidentiary record to decide them. The appeal judge noted that the limited partners have commenced a separate claim against Ms. Athanasoulis and others, including Mr. Casey. She concluded that these "additional" issues raised by the limited partners could be decided in those separate proceedings, although she acknowledged that the court's decision in the *BIA* matter may have some bearing on them:

> This is not the forum for determining those other claims by the [limited partners]. The determination of those claims involves contentious factual disputes and credibility assessments. The issues raised by the [limited partners] cannot be properly adjudicated in a summary fashion on a paper record in the context of this appeal. Ultimately, these are matters that are more properly addressed between Ms. Athanasoulis and the [limited partners] outside of the context of these insolvency proceedings. It would not be reasonable or appropriate for the court to attempt to determine the [limited partners'] claims for breach of fiduciary duty and misrepresentation, etc. on this appeal.
>
> These claims by the [limited partners] (for alleged misrepresentations, breaches of fiduciary and other duties, estoppel and knowing assistance) are extraneous to the Trustee's Disallowance and to any future valuation of the Profit Share Claim. <u>It may be that the valuation of the Profit Share claim for purposes of the BIA process could have some bearing upon those other claims, but that is an issue for another day and another court.</u>
>
> <u>However, findings have been made regarding the enforceability and validity of the Profit Sharing Agreement and the subordination issue for purposes of the determination of priority of claims in these BIA</u>

> proceedings and will be binding upon the LPs in any future proceedings. [Emphasis added.]

[91] The limited partners raise the following issues on appeal:

1. Did the appeal judge err in failing to follow her own procedural order;
2. Did the appeal judge err in failing to determine the issues of misrepresentation and breach of fiduciary duty raised by the limited partners while holding that her decision would be *res judicata* and binding on the limited partners; and
3. Did the appeal judge err in failing to find that the profit-sharing agreement was unenforceable?

Issue 1: The appeal judge did not commit a reversible error in failing to follow her procedural order

[92] There is no doubt that the issues the appeal judge said she would address in her original procedural order are different from the issues she considered on appeal. In the original order, the appeal judge granted leave to the limited partners to address a range of issues, including on the question of the enforceability of the profit-sharing agreement "based on alleged breaches of contractual and fiduciary duties and alleged misrepresentations". Yet, in her decision on appeal, she stated that the issues of misrepresentation, breach of fiduciary duty and self-dealing fall outside of the scope of the standing that she granted to the limited partners in the context of the profit-sharing claim. Despite this discrepancy, I am not persuaded

that it was an error for the appeal judge not to decide the issues of misrepresentation, breach of fiduciary duty and other breaches of duty in the context of the proceedings before her.

[93] First, it is worth remembering that, generally, equity owners do not have standing to participate in the determination of creditors' claims: *YG Limited Partnership and YSL Residences Inc. (Re)*, 2023 ONCA 505, 484 D.L.R. (4th) 486, at para. 16. In this case, the limited partners were granted standing on an exceptional basis because they had a unique perspective on the issue of whether the profit-sharing agreement was enforceable.

[94] Second, in her procedural decision granting standing to the limited partners, the appeal judge made her ruling "[s]ubject to the discretion of the appeal judge". While the appeal judge did not explicitly refer to this discretion in her appeal decision, it is evident from her reasons for not addressing the issues of misrepresentation, breach of fiduciary duty and other breaches of duty that she concluded that there was an insufficient evidentiary basis to address these issues in the appeal, and that they would be more properly addressed in the litigation between the limited partners and Ms. Athanasoulis. The result would have been no different had the appeal judge recognized that she granted leave to the limited partners to address these issues, but, having reached a different stage in the proceedings, including having the benefit of the record presented before her by the

parties, she exercised her discretion not to consider the issues of misrepresentation, breach of fiduciary duty and breach of other duties.

[95] Finally, and perhaps most importantly, the only task before the Trustee and, in turn, the appeal judge was to determine whether Ms. Athanasoulis' profit-sharing claim was a provable claim in the context of YSL's bankruptcy. While agreements YSL entered into with the limited partners may have been relevant to this issue, allegations of misconduct by Ms. Athanasoulis vis-à-vis the limited partners would not be relevant to this determination. Bankruptcy proceedings are generally not the forum in which to resolve legal conflicts between creditors: *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 241 (C.A.), at para. 32. It is still open to the limited partners to proceed with their claim against Ms. Athanasoulis and to seek damages from her directly.

[96] In the circumstances, it was not an error for the appeal judge to refuse to decide the allegations of misrepresentation, breach of fiduciary duty and breaches of other duties against Ms. Athanasoulis and to determine that these issues were best decided in another forum.

Issue 2: The appeal judge did not improperly direct that her findings would be binding on a court dealing with the limited partners' claims against Ms. Athanasoulis

[97] The limited partners allege that, if it was indeed open to the appeal judge not to decide the issues of misrepresentation and breach of fiduciary duty and to

leave those issues to another proceeding, then she improperly stated that her findings would be *res judicata* in that subsequent proceeding.

[98] This is not actually what the appeal judge said. As reviewed above, after stating that the *BIA* proceeding was not the proper forum in which to decide the limited partners' claims against Ms. Athanasoulis, the appeal judge stated that "[i]t may be that the valuation of the Profit Share Claim for purposes of the BIA process could have some bearing upon those other claims, but that is an issue for another day and another court" (emphasis added). She then stated that "[h]owever, findings have been made regarding the enforceability and validity of the Profit Sharing Agreement and the subordination issue for purposes of the determination of priority of claims in these BIA proceedings and will be binding upon the LPs in any future proceedings" (emphasis added).

[99] The motion judge thereby distinguished between the aspects of her decision that may be binding on a future court. Quite correctly, she stated that her finding that the profit-sharing claim is a provable claim that has priority over the limited partners' equity claims in the context of the bankruptcy proceedings will be binding in future proceedings where this issue may be relevant. However, she did not determine what aspects of her decision would or would not "have some bearing" on the limited partners' claims against Ms. Athanasoulis for misrepresentation, breach of fiduciary duty or other breaches of duty. She simply stated that the valuation of Ms. Athanasoulis' claim may have "some bearing" on those future

proceedings. It will be up to the court in those future proceedings to decide that issue.

[100] I see no reversible error in the appeal judge's statements regarding the potential impact of her decision on future proceedings. She has left it open to the limited partners to proceed with their claim against Ms. Athanasoulis, without making any determinations regarding how her decision may affect their claim.

Issue 3: The appeal judge did not err in concluding that the profit-sharing agreement was enforceable

[101] The limited partners submit that the appeal judge erred in finding that the Amended Limited Partnership Agreement and the Sales Management Agreement do not render Ms. Athanasoulis' profit-sharing claim unenforceable. I see no merit to this argument.

[102] This aspect of the appeal judge's decision was based on factual and evidentiary findings. The appeal judge held that there was no evidentiary foundation for the limited partners' allegation that Ms. Athanasoulis was an affiliate of YSL, and on that basis she dismissed the claim that YSL breached the Sales Management Agreement by entering into the profit-sharing agreement with Ms. Athanasoulis. The appeal judge further found that the limited partners did not establish that the profit-sharing agreement was a prohibited "related party agreement" under the Amended Limited Partnership Agreement, in part because

the profit-sharing agreement was entered into before the limited partners entered into the Amended Limited Partnership Agreement. Finally, the appeal judge found that the limited partners presented no evidence that the profit-sharing agreement was not on market terms.

[103] This court owes deference to the appeal judge's factual and evidentiary findings. I see no palpable and overriding error in the appeal judge's determinations that the evidentiary record before her did not allow her to conclude that the profit-sharing agreement breached the terms of agreements between the limited partners and YSL.

[104] The limited partners also argue that the appeal judge did not properly understand their argument. They submit the appeal judge failed to appreciate that the breaches of the Sales Management Agreement and Limited Partnership Agreement were interconnected with Ms. Athanasoulis' misrepresentations and breaches of fiduciary and other duties. They submit that it was an error to consider the alleged breaches of the Sales Management Agreement and the Limited Partnership Agreement in isolation.

[105] This argument is also without merit. The appeal judge made no error in determining that there was no breach of the Sales Management Agreement and Limited Partnership Agreement without reference to the alleged misrepresentations or breaches of fiduciary duty, given her finding that there was

an inadequate record on which to adjudicate these claims. Ultimately, it will be for a judge in the proceedings between Ms. Athanasoulis and the limited partners to determine the merits of the limited partners' claims against her, including the impact, if any, of the decisions in these bankruptcy proceedings related to her profit-sharing claim.

[106] I would therefore dismiss this ground of appeal.

E. DISPOSITION

[107] I would dismiss the appeal.

[108] In accordance with the agreement of the parties, costs are payable by the Trustee to Ms. Athanasoulis in the sum of $45,000, all-inclusive, in court file number COA-24-CV-0468, and by the appellant limited partners to Ms. Athanasoulis in the sum of $30,000, all-inclusive, in court file number COA-24-CV-0550.

Released: August 14, 2025 "J.D."

"C. Fairburn J.A."

"I agree. Zarnett J.A."

"I agree. A. Gomery J.A."