CITATION: YG Limited Partnership and YSL Residences Inc. (Re), 2024 ONSC 1617
COURT FILE NO.: BK-21-02734090-0031
DATE: 20240319

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, as amended

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

BEFORE: KIMMEL J.

COUNSEL: *Mark Dunn and Brittni Tee,* Lawyers for the Appellant, Maria Athanasoulis

Matthew Milne-Smith and Chenyang Li, Lawyers for the Proposal Trustee, KSV Restructuring Inc.

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

Alexander Soutter, Lawyers for 2576725 Ontario Inc., Yonge SL Investment Limited Partnership, 2124093 Ontario Inc., E&B Investment Corporation, SixOne Investment Ltd., Taihe International Group Inc.

HEARD: December 18 and 22, 2023

ENDORSEMENT
(APPEAL FROM DISALLOWANCE OF CLAIM)

The Appeal

[1] The debtor YSL Residences Inc. ("YSL") owned a development property (upon which it was intended that an 85-story retail and condominium complex in downtown Toronto would be built in two stages, the "YSL Project"). YSL was the general partner and held the YSL Project as bare trustee for the YG Limited Partnership ("YG"). Maria Athanasoulis was employed by YSL and the Cresford group of companies, owned and controlled by Daniel Casey and his family members (the "Cresford Group").

[2] YSL and YG filed a Proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") and were deemed bankrupt on April 21, 2021. The Proposal Trustee, KSV Restructuring Inc. ("Proposal Trustee"), was appointed in the context of the Proposal proceedings.

[3] Maria Athanasoulis filed a proof of claim against YSL for two unsecured claims (together, the "Athanasoulis Claim"):

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

b. $18 million in respect of damages for breach of an oral agreement that Ms. Athanasoulis would be paid 20 percent of the profits earned on the YSL Project (the "Profit Share Claim").

[4] In accordance with the established claims procedure,

a. On March 30, 2023, the Proposal Trustee delivered to Ms. Athanasoulis notice that it would accept her Wrongful Dismissal Claim in the amount of $880,000.39.

b. On August 10, 2023, the Proposal Trustee delivered to Ms. Athanasoulis a Notice of Disallowance of her $18 million Profit Share Claim (the "Disallowance").

[5] The Proposal Trustee's partial allowance of the Wrongful Dismissal Claim has not been challenged. This is an appeal (by way of motion under the BIA) from the Proposal Trustee's Disallowance in full of Ms. Athanasoulis' $18 million Profit Share Claim.

[6] Ms. Athanasoulis moves for an order setting aside the Disallowance of her Profit Share Claim and directing a reference to quantify the value of her damages, and ancillary relief with respect to the validity, value and priority of that claim, among other relief. The Disallowance is ordered to be set aside and certain of the other requested relief is granted (as detailed at the end of this endorsement), for the reasons that follow.

The Proposal Proceedings

[7] YG and YSL (together in the context of these proceedings referred to as "YSL" or the "Debtor") filed Notices of Intention to Make a Proposal under the BIA, which were procedurally consolidated pursuant to an Order dated May 14, 2021. The original filing and deemed date of bankruptcy was on April 30, 2021.

[8] An Amended Third Proposal dated July 15, 2021 (the "Proposal") was supported by the unsecured creditors of the Debtors and approved by this court on July 16, 2021. Under the Proposal, the Proposal Trustee was authorized to deal with various claims against the Debtor, some of which (such as the Athanasoulis Claim) were disputed.

[9] The Proposal provided that Concord Properties Developments Corp. (the "Sponsor") would acquire the YSL Project in exchange for three principal forms of consideration: (i) the Sponsor would assume 100% liability for of all secured creditor claims and construction lien claims; (ii) the Sponsor would pay to the Proposal Trustee a pool of cash of $30.9 million to be distributed to unsecured creditors with proven claims; and (iii) any residual amounts left unclaimed from the cash pool to be distributed to equity stakeholders through the limited partners or as they may direct in accordance with the limited partnership agreements.

[10] These equity stakeholders include the Class A limited partners (unitholders) of the YG Limited Partnership (the "LPs"). The LPs include 2504670 Canada Inc., 8451761 Canada Inc. and Chi Long Inc. (collectively sometimes referred to as the "250 LPs"), and 2576725 Ontario Inc., Yonge SL Investment Limited Partnership, 2124093 Ontario Inc., E&B Investment Corporation, SixOne Investment Ltd., and Taihe International Group Inc. The LPs collectively advanced $14.8 million to the Debtors in exchange for Class A Preferred units in YG Limited Partnership.

[11] The Athanasoulis Claim is an unsecured claim that, if proven, would be funded from the $30.9 million pool of cash that has been set aside to satisfy proven unsecured creditor claims.

[12] Dunphy J. made the following findings (in *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206, 93 C.B.R. (6th) 139) at the time the Proposal was approved:

a. Whatever questions there may be regarding the solvency of the debtors from the perspective of the realizable value of their assets, there can be no question of the insolvency of the debtors from a liquidity point of view: secured and unsecured claims alike are overdue and unpaid and the debtors have no means to satisfy their claims in a timely way. Lien claims are more than a year in arrears for the most part while all forbearance periods have expired for the secured debt (para. 17).

b. The Proposal does not answer the question of what the value of the project might have been had the project been offered on the open market in a competitive process (para. 21).

c. This project is, at its core, a hard asset consisting of real estate, a bundle of approvals and a hole in the ground. There is no goodwill to speak of. It has been held in limbo for much more than a year (para. 33(a)).

[13] Dunphy J. made certain findings in his decision not to approve an earlier proposal put forward by the Debtors, in *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, 93 C.B.R. (6th) 109 as follows:

a. Few things are more precious in the restructuring business than time. YG LP was able to "purchase" more than a year of time with the forbearance arrangements that it worked out. That precious time appears to have been devoted solely to finding transactions that offered the greatest level of benefits for the Cresford group of companies (para. 76).

b. There was a window of time to find an out-of-court solution, but it would appear that the debtors have squandered it (para. 82).

The Arbitration

[14] The Proposal Trustee and Ms. Athanasoulis agreed to submit the Athanasoulis Claim to arbitration. The arbitration was to proceed in two stages. The first stage proceeded and Arbitrator William Horton issued an initial award on March 22, 2022 (the "Arbitral Award") in which he held that an oral Profit Sharing Agreement had been entered into as a term of Ms. Athanasoulis' employment (the "Profit Sharing Agreement") entitling her to 20% of the profits earned on all

current and future Cresford projects, including the YSL Project.[1] This Profit Sharing Agreement was expected to represent fair compensation for her existing and expected future contributions to the profitability of the projects.

[15] Arbitrator Horton found that the Profit Sharing Agreement was not a standalone agreement. It was an existing part of an integral contract of employment that had been acted on by both sides for fifteen years as Ms. Athanasoulis worked her way up through the ranks of the Cresford Group.

[16] The Arbitrator found the key terms of the Profit Sharing Agreement as they pertain to the YSL Project to be the following:

a. Profits were to be calculated, on a good faith basis, based on the pro forma budgets prepared by Cresford using revenues less expenses for each project (updated from time to time as expenses were incurred and circumstances evolved). It was understood that the realized profits for each project would ultimately have to be accounted for with third party investors.

b. Profits could not be artificially reduced by "bad faith" transactions.

c. It was expected to take several years (possibility 5–7 years) in the normal course to complete a project like the YSL Project. This implied a mutual commitment on both sides.

d. Ms. Athanasoulis' profit-share interest was to be paid by YSL.

e. The Profit Share was to be paid to Ms. Athanasoulis when profits were earned, usually at the completion of a project.

f. There was no requirement that Ms. Athanasoulis remain employed at the time that a profit was earned.

[17] Arbitrator Horton made certain findings about Ms. Athanasoulis' employment history with the Cresford Group. She began working at the Cresford Group in 2004 as a Manager, Special Projects. She had limited prior education or experience. By 2013 she had worked her way up to one of the two senior officer positions reporting directly to the founder, president and sole director, Daniel Casey. She served as an officer of various companies in the Cresford Group and was the Vice President and Secretary of YSL.

[1] The Arbitrator found that there had been an earlier profit sharing agreement dating back to 2014 to pay Ms. Athanasoulis an agreed upon 10% of the profits from a successfully completed project that was then expanded to cover other future projects and eventually increased to 20%.

[18] Arbitrator Horton found that Ms. Athanasoulis was constructively dismissed by YSL in December 2019. She was, at the time of her termination in December 2019, the President and COO of the Cresford Group, and an employee and officer of YSL.

[19] The Proposal Trustee and Ms. Athanasoulis agree that they are bound by the findings made by the Arbitrator in the Arbitral Award.

[20] In her testimony during the Arbitration, Ms. Athanasoulis testified in response to questions about the terms of the oral Profit Sharing Agreement and specifically about how the profit would be calculated under that agreement: "it would be calculated after paying the [specific project] costs and after the equity was repaid to the LP investors."

[21] In the second stage of the Arbitration, the Proposal Trustee and Ms. Athanasoulis had intended (and agreed) that the Arbitrator would determine any damages payable arising out of his findings in the first stage (as reflected in the Arbitral Award) regarding the Profit Sharing Agreement and Ms. Athanasoulis' constructive dismissal, corresponding with her Profit Share Claim and her Wrongful Dismissal Claim.

[22] However, after the first stage Arbitral Award was released, as a consequence of opposition raised by the LPs and the Sponsor (who had not been privy to the original submission to arbitration), this court ordered in the Funding Decision (described below) that the second phase of the Arbitration would not proceed. Instead, the court directed the Proposal Trustee to determine the Athanasoulis Claim. It is the Proposal Trustee's initial determination, and Disallowance, of the Profit Share Claim that is the subject of this appeal.

The Funding Decision: Directions for the Proposal Trustee to Determine the Athanasoulis Claim

[23] The Sponsor's obligation to fund administrative fees and expenses incurred by the Proposal Trustee in connection with the resolution of the Athanasoulis Claim was determined in a November 1, 2022 endorsement: *YG Limited Partnership (Re)*, 2022 ONSC 6138, 5 C.B.R. (7th) 389 (the "Funding Decision").

[24] The Funding Decision determined that the Sponsor was not obligated to fund phase two of the arbitration in which Ms. Athanasoulis and the Proposal Trustee had agreed to participate. That conclusion was reached on the basis that phase two of the proposed arbitration improperly delegated to the Arbitrator the responsibility of determining the Athanasoulis Claim. Neither the Sponsor nor the LPs had been privy to the submission to Arbitration. For different reasons, they each objected to the Arbitration proceeding to phase two.

[25] The Funding Decision directed the Proposal Trustee to determine and value the Athanasoulis Claim in a timely and principled manner based on the findings in the Arbitral Award and building on them. Upon the request of the Proposal Trustee, the court provided advice and directions concerning the process for determining of the Athanasoulis Profit Share Claim and any appeal therefrom (the "Claim Procedure"). See *YG Limited Partnership (Re)*, 2023 ONSC 4638 (the "Claims Procedure Endorsement").

[26] The LPs were granted standing to participate in the Claim Procedure for the determination of the Profit Sharing Claim and any appeal thereof, subject to the discretion and further direction of the appeal judge. The rationale and terms for the standing granted to the LPs is described at paragraphs 55 and 56 of the Claims Procedure Endorsement:

> [55] Here, the LPs have been afforded standing to provide evidence and make submissions to the Proposal Trustee in connection with the Notice of Determination regarding the "provability" of the Profit Share Claim. They have a unique perspective to offer with respect to their argument that the Profit Share Agreement should be found to be unenforceable because it is contrary to the Limited Partnership Agreement (a ground not relied upon by the Proposal Trustee but raised and therefore forms part of the record for appeal purposes that Ms. Athanasoulis must respond to).
>
> [56] The LPs may also have a unique perspective on the preliminary question of whether the Profit Share Agreement can be enforced in the face of Ms. Athanasoulis' admissions that she agreed with the LPs that they would be paid out before her. These unique perspectives have been placed before the Proposal Trustee; Ms. Athanasoulis will be permitted to respond to and challenge them, and they will be "in play" on any appeal.

[27] The Proposal Trustee had indicated that there were threshold issues that it wished to raise that did not involve an in-depth valuation of the Profit Share Claim and that might be dispositive. The parties agreed that they should not be required to go to the expense of fully briefing the valuation issues, with experts if deemed appropriate, until those threshold issues had been considered.

[28] That is how the Proposal Trustee has proceeded, leading to its Disallowance of the Profit Share Claim. The Claims Procedure Endorsement (at paras. 44 and 63) indicated that it was not expected that there would be any material or submissions at this time regarding the future oriented (or "but-for") damages, whether calculated at the repudiation date or the date of bankruptcy. If Ms. Athanasoulis is successful on her appeal of any disallowance of the Profit Share Claim, the Claims Procedure Endorsement directs the parties to make an appointment for a case conference to seek directions about the process for the determination of the more complex valuation questions that may require expert input.

The Grounds for the Disallowance and Grounds of Appeal

[29] Following the Funding Decision and the Claims Procedure Endorsement, and the implementation of the procedures contemplated thereby, the Proposal Trustee issued its Notice of Disallowance in respect of the Athanasoulis Claim. The Proposal Trustee's stated grounds in the Notice of Disallowance for disallowing the Profit Share Claim were that:

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.

d. It is subordinated to the LPs' entitlements because she was only to receive her share of the profits when Cresford did, which would occur only after the LPs had been repaid their capital and earned their entire preferred return. The LPs have not, and due to lack of available funds will not, receive all such amounts.

[30] The following errors are identified in Ms. Athanasoulis' September 8, 2023 Notice of Motion appealing from the Trustee's Disallowance of her Profit Share Claim:

a. The Trustee erred in its conclusion that the Profit Share Claim is not a claim provable in bankruptcy, having erroneously characterized it as:

   i. "in substance" an "equity claim" without regard to the statutory definition of an "equity claim" in the BIA, which provides that an equity claim can exist if, and only if, it is "in relation to" an "equity interest";

   ii. a contingent claim that is too speculative or remote.

   (Collectively, the "Provable Claim Errors")

b. The Trustee erred in valuing the Profit Share Claim at zero:

   i. based on the erroneous assumption that Ms. Athanasoulis is only entitled to 20% of the actual profits earned by YSL or that YSL is capable of earning, taking into consideration its subsequent insolvency, whereas damages for breach of contract must put the injured party in the position she would be in if the other party had met its contractual obligations, calculated at the time of the breach or repudiation of the contract without regard to subsequent events;

   ii. without even attempting to calculate either YSL's revenues or expenses to determine its profits earned on the relevant date (of repudiation), despite the existence of contemporaneous evidence about the prospect of a sale of the YSL Project or YSL's contemporaneous pro forma projections that indicated YSL's expectation of profits at that time.

   (Collectively, the "Claim Valuation Errors")

c. The Trustee erred in concluding that Ms. Athanasoulis is not entitled to be paid anything unless and until the LPs are paid in full, thereby subordinating her Profit Share Claim to the LPs equity claims.

(The "Subordination Error")

[31] The alleged errors addressed in the written and oral submissions made on behalf of Ms. Athanasoulis on the appeal generally fall within the originally identified above three categories of errors identified in the Notice of Motion on appeal. These core errors are focused on the extricable errors of law that were identified during oral submissions and subject to review on the standard of correctness. To the extent that they depend upon mixed errors of fact and law, Ms. Athanasoulis argues that they reflect unreasonable findings and palpable and overriding errors that warrant this court's intervention.

Economic/Financial Implications

[32] The available pool of funds set aside upon the sale to the Sponsor under the approved Proposal will be paid first to satisfy accepted claims of all unsecured creditors with proven claims and then the remaining balance will be paid to the LPs. The total amount of other unsecured claims is not yet known, but the Proposal Trustee does not expect them to come close to the available $30.9 million in the pool. The estimate at the time of this appeal was that the total of other unsecured claims that the Trustee has accepted add up to approximately $14.9 million. However, even if the Profit Share Claim is not allowed (or valued at or close to zero) and the LPs receive the balance of the pool of available funds, it is not expected to cover the full amount of their claims.

[33] If Ms. Athanasoulis is found to have a provable claim, the available pool of funds will be distributed *pro rata* to her (based on the value of her claim once determined) and to the other unsecured creditors whose claims have been allowed. If the Profit Share Claim is allowed and is valued at or close to what has been claimed, the other unsecured creditors will receive something (although possibly not the full amount of their allowed claims) but it is not expected that the LPs will be repaid any of their investments in this scenario.

[34] The "either or" scenario comes down to the competing claims of the LPs and Ms. Athanasoulis if her Profit Share Claim is allowed and is valued as she suggests. However, there are variables in the valuation of the Profit Share Claim that could lead to amounts being paid to both, for example under the alternative valuation scenario that Ms. Athanasoulis proposes of $7.8 million the unsecured creditors (including Ms. Athanasoulis) and the LPs may all receive something from the pool.

The Standard of Review

[35] The parties agree that is a "true appeal" of the Proposal Trustee's determination.

[36] Although a reasonableness standard of review was suggested by both Ms. Athanasoulis and the Proposal Trustee as one that may apply in Ontario, I have concluded that the appropriate standard of review is palpable and overriding error absent an extricable question of law, which is reviewable on a correctness standard. See *8640025 Canada Inc. (Re)*, 2018 BCCA 93, 8 B.C.L.R. (6th) 225 at para. 65. See also *Re Casimir Capital*, 2015 ONSC 2819, 25 C.B.R. (6th) 149, at para.

33 regarding the standard of review for extricable errors of law. Ms. Athanasoulis has the onus of demonstrating such errors.

[37] Earlier cases dealing with the standard of review of a decision of a trustee disallowing a claim under the BIA on a reasonableness standard (including cases in Ontario, such as *Re Charlestown Residential School*, 2010 ONSC 4099, 70 C.B.R. (5th) 13, at para. 17) followed the earlier case of the British Columbia Court of Appeal, in *Galaxy Sports Inc. (Re)*, 2004 BCCA 284, 29 B.C.L.R. (4th) 362, at paras. 39 and 43. It was brought to the court's attention in the course of the full briefing on this appeal that the line of reasoning emanating from *Galaxy Sports* has been superceded by the later decision of the same (BC) Court of Appeal in *864*.

[38] While the decision in *864* deals specifically with appeals from decisions of claims officers under the *Companies' Creditors Arrangement Act* ("CCAA"), applying the same standard of review to appeals brought in respect of determinations of claims made pursuant to s. 135(4) of the BIA would accord with the Supreme Court of Canada's directive that CCAA and BIA proceedings should be treated as one "integrated body of insolvency law". See *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 76–78.

[39] The Ontario Court of Appeal has made reference to the standard of review of determinations of BIA claims applied in *Galaxy Sports*, but also observed that "reasonableness" standard has not been explicitly adopted in Ontario. See, for example, *Credifinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160, 277 O.A.C. 377, at paras. 24–27). The Supreme Court's decision in *Canada v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 which held that statutory appeals from administrative decision makers are subject to the ordinary appellate review standard as opposed to a reasonableness standard, supports the evolved reasoning of the British Columbia Court of Appeal in the more recent decision in *864*.

[40] Ms. Athanasoulis contends that there are errors of law underpinning all of the grounds of appeal, which are reviewable on the standard of correctness. Ms. Athanasoulis further contends that to the extent any errors are not found to be reviewable on the correctness standard because they are dependent upon factual determinations or the application of the law to the facts, those errors fail under both the reasonableness and the palpable and overriding error standards.

[41] The following analysis applies the standard used in *864* of palpable and overriding error to any of the identified errors not found to be extricable errors of law (which are reviewed applying the standard of correctness). However, the outcome would have been the same if the errors not subject to the correctness standard had been reviewed on the reasonableness standard.

Summary of Outcome

[42] Ultimately, while the court does so cautiously and only sparingly, I have concluded that the grounds for the Disallowance are predicated upon a fundamental and extricable error in the mischaracterization of the nature of the Profit Share Claim as an equity claim contingent upon existing or future profits that have not been, and will now never be, realized. This mischaracterization of the Profit Share Claim has led to further compounding errors, in that the Disallowance also failed to properly consider and assess the type of loss that the Profit Share Claim seeks to recover, which is in damages for breach of contract that crystalized when Ms.

Athanasoulis was constructively dismissed in December 2019 (once she accepted the repudiation and sued for damages).

[43] As a result of these mischaracterizations of the nature of the Profit Share Claim and the type of loss that it entails, the Proposal Trustee did not to attempt to value it. That is the valuation exercise that the Claims Procedure Decision contemplated might be required if the threshold "provability" determinations were found to be in error, which they have been.

[44] The Profit Share Claim must now be valued, even if it might be difficult to do so and might depend upon expert inputs to quantify her damages. It is not guaranteed that the result of that process will be that its value is established at, or even near, the levels that Ms. Athanasoulis has claimed; however, that exercise cannot be avoided by the Proposal Trustee's threshold determinations that were predicated upon fundamental mischaracterizations of the nature of the Profit Share Claim and the appropriate timing and measure of the loss.

[45] The court understands why the Proposal Trustee proposed to proceed in the manner it did, by its initial determination of the Profit Share Claim based on somewhat complex threshold "provability" considerations that might have saved considerable time and expense had the Proposal Trustee's characterizations been correct in law. However, they were not. The Profit Share Claim is significant, and its ultimate determination has implications for other creditors (not just the LPs). Thus, the further time and effort to determine this claim will need to be invested by the Proposal Trustee.

[46] The court also understands why the Proposal Trustee and Ms. Athanasoulis originally agreed to arbitrate the Athanasoulis Claims given the complexity of the issues underlying the necessary determinations. However, that is water under the bridge in light of the objections raised by the Sponsor and the LPs in conjunction with the Funding Decision (and the later Process Decision). Whether this procedure of having the Proposal Trustee do its best to determine and value the Athanasoulis Claims and then have the court review those determinations on appeal proves to be less expensive remains to be seen, but, absent further agreement, this is the process that the parties are now engaged in. It is more transparent for the stakeholders.

Analysis: Allege Errors of the Proposal Trustee in the Notice of Disallowance

[47] Each of the categories of errors alleged by Ms. Athanasoulis to have been made by the Proposal Trustee will be addressed in turn, followed by a discussion of the additional points raised by the LPs that do not come directly within the parameters of the alleged errors.

A) The Provable Claim Errors

[48] Did the Proposal Trustee err in its conclusion that the Profit Share Claim is not a claim provable in bankruptcy, on the basis that:

a. it is "in substance" an "equity claim"; and/or

b. it is a contingent unliquidated claim that is too speculative or remote.

[49] A "provable claim" is defined in s. 121(1) of the BIA, which provides: "All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt ... shall be deemed to be claims provable in proceedings under this Act."

[50] Sections 121(2) and 135(1.1) or the BIA require the Proposal Trustee to determine whether any contingent claim or unliquidated claim is a provable claim, and, if it is a provable claim, to value it.

Equity Claim

[51] An equity claim is not a debt or liability and is not a provable claim under the BIA.

[52] An "equity claim" is defined in s. 2 of the BIA to be a claim "that is in respect of an equity interest." Section 2 of the BIA states that an equity interest means "a share in the corporation, or warrant or option or another right to acquire a share in the corporation...".

[53] 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. See *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; *Alexander College Corp. v. R.*, 2016 FCA 269, 410 D.L.R. (4th) 299, at para 14.

[54] 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 the ownership, purchase or sale of an equity interest, or a claim for contribution or indemnity in respect of these other 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 respect of an equity interest", meaning a share (or warrant or option to acquire a share).

[55] The Trustee asserts in its Notice of Disallowance that it "does not consider it relevant that Ms. Athanasoulis does not hold equity in YSL". Its position on this appeal is that the Profit Share Claim is "in substance" an equity claim. It argues that since the Profit Share Claim is derivative of the residual "profit" or equity that would be left for the owners (the Class B Unitholders) it is a claim inextricably linked to and therefore in respect of an ownership interest even if not itself an ownership interest.

[56] The Proposal Trustee relies on the Ontario Court of Appeal's decision in *Sino-Forest Corporation (Re)*, 2012 ONCA 816, 114 O.R. (3d) 304, at para. 44, which states that the term equity interest should be given 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 falls 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.

[57] In each case cited by the Proposal Trustee where a claim has been found to be an equity claim, it was in some way related to a direct or indirect equity interest within the meaning of the BIA.

a. *Sino-Forest* concerned a claim for contribution and indemnity relating to a shareholder class action.

b. *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732, 16 C.B.R. (6th) 173 concerned a shareholder's claim against the debtor that had been reduced to a court judgment before the bankruptcy filing.

c. *Return on Innovation v. Gandi Innovations*, 2011 ONSC 5018, 83 C.B.R. (5th) 123 involved a claim relating to the recovery of a $50 million dollar equity investment through an arbitration.

d. *US Steel Canada Inc. (Re)*, 2016 ONSC 569, 34 C.B.R. (6th) 226 concerned a claim relating to the recovery of loans advanced by the parent company/sole shareholder of the debtor.

e. *Tudor Sales Ltd. (Re)*, 2017 BCSC 119, 44 C.B.R. (6th) 45 concerned a claim relating to advances made by a shareholder of the debtor and its sole officer and director.

f. *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, 93 C.B.R. (6th) 109 (Dunphy J.'s judgment declining to approve the proposal, referred to earlier) concerned claims brought by parties related to Cresford that had an equity interest in the YSL Project.

[58] The suggested approach of the Proposal Trustee relies upon *Re Central Capital Corp.* (1996), 27 O.R. (3d) 494 (C.A.), at para. 67 and *Re Canada Deposit Insurance Corp.* [1992] 3 S.C.R. 558). These cases were decided before there was a statutory definition of "equity claim". They seek to characterize a claim as debt or equity by looking at "the surrounding circumstances to determine whether the true nature of the relationship is that of a shareholder who has equity or whether it is that of a creditor owed a debt or liability by the company". In *Sino-Forest* (at para. 53) the court stated that the statutory definition of equity claim "is sufficiently clear to alter the pre-existing common law". Thus, the earlier approach adopted in these cases is not instructive.

[59] Even if profit sharing has equity features, there is no evidence or suggestion that the Profit Sharing Agreement granted, or in any way relates to the granting of, shares or rights to acquire shares in YSL or any of the Cresford Group of companies to Ms. Athanasoulis. There is no evidence or finding that Ms. Athanasoulis was a shareholder or held any right to become a shareholder. Nor is her claim for contribution and indemnity in respect of ownership or equity rights.

[60] The only connection to equity or ownership is her acknowledgement that the Profit Share Claim is to be calculated as a percentage of the profits that would otherwise be payable to the

Cresford Group Class B unitholders[2] comprised of Mr. Casey and his family members (the ultimate owner/developer of the YSL Project and the Cresford Group). Ms. Athanasoulis' testimony at the Arbitration was that the profit under the Profit Sharing Agreement "would be calculated after paying the [specific project] costs and after the equity was repaid to the LP Investors". She testified that profits were to be calculated as revenues less expenses, consistent with the YSL Project pro formas, which included among the other expenses or project costs the repayment of funds advanced by the LPs.

[61] A claim by terminated employees for damages in respect of incentive-based compensation, including where such compensation is calculated with reference to sales or profitability, can be, and has been, successfully pursued as a claim for damages against a bankrupt company. See *Noble v. Principal Consultants Ltd. (Trustee of)*, 2000 ABCA 133, 17 C.B.R. (4th) 274, at paras. 41–42.

[62] The fact that the parties chose to tie the quantification of the amounts payable under the Profit Sharing Agreement to the YSL's (and the Cresford Group') performance (profits, after deducting, or net of, amounts payable to the LPs) 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 LPs.

[63] The present situation did not arise in the normal course and was not specifically contemplated when the Profit Sharing Agreement was made. As the Arbitral Award found (at para. 147), "it is not essential to the enforceability of the agreement that every option regarding the calculation of profits be affirmed or negated" at the time it is made.

[64] The definition of equity claim under the BIA is clearly and unequivocally a claim in respect of shares or rights to acquire shares in a company. There is no suggestion that the Profit Share Claim is in respect of that type of interest. At best, it is a claim to be calculated based on the residual profits remaining in YSL that would otherwise be available to be distributed or paid to the Cresford Group, the ultimate owners or equity holders. The calculation of this claim based on profits is separate and distinct from a claim in respect of shares or the right to acquire shares.

[65] The concept of an equity claim "in substance" was introduced into the Notice of Disallowance by the Proposal Trustee. There is no concept of an equity claim "in substance" under the BIA, even giving the definition of equity claim an expansive meaning.

[66] The Proposal Trustee made an extricable error in law by expanding the definition of "equity claim" under the BIA to a claim that is not in respect of an equity interest (shares or the right to

[2] These Cresford Group members are referred to by the parties sometimes as shareholders and sometimes as unitholders, but always with the understanding that they have the status of shareholders or equity holders for purposes of this decision.

acquire shares or an ownership interest in YSL) within the meaning of s. 2 of the BIA. This determination is reviewable on the standard of correctness.

[67] Having regard to the definitions of "equity claim" and "equity interest" under the BIA, I find that the Profit Share Claim is not an equity claim within the meaning of the BIA.

ii. Contingent vs. Unliquidated Damages Claim and Remoteness

[68] There are two aspects to the Proposal Trustee's determination that the Profit Share Claim is a contingent claim that is too speculative or remote. The first requires consideration of the distinction between a contingent claim and an unliquidated claim. The second requires consideration of the remoteness of damages more generally.

[69] The cases relied upon by the Proposal Trustee dealing with contingent claims that were found to be too remote and speculative to be provable claims in a bankruptcy are all claims that were contingent upon a future uncertain event that had not yet occurred and was not inevitable. As the Supreme Court held in *Newfoundland and Labrador v. AbitibiBowater Inc*., 2012 SCC 67, [2012] 3 S.C.R. 443, at para. 36, the determination of whether such contingent claims are provable claims depends on "whether the event that has not yet occurred is too remote or speculative". See also *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 138.

[70] Here, the hypothetical contingency that the Proposal Trustee relies upon was whether any profits would be earned by YSL or any other entities in the Cresford Group: unless and until there were profits (calculated after repayment of the amounts advanced by the LPs), there would be nothing to share under the Profit Sharing Agreement. That hypothetical contingency assumes the continuation of the Profit Sharing Agreement.

[71] However, the Arbitrator found that Ms. Athanasoulis' employment contract was repudiated in December 2019 and found that the Profit Sharing Agreement was part of that integral contract of employment (and her employment compensation). The Arbitrator also found that her entitlement to compensation under the Profit Share Agreement was not dependent upon her continued employment (in other words, that compensation could not be avoided by her termination). While no express finding was made that the Profit Share Agreement was breached, it follows from these findings that the Profit Sharing Agreement, an integral part of her employment contact, was also repudiated when she was constructively dismissed.

[72] Ms. Athanasoulis accepted the repudiation by YSL in early January 2020 and she sued YSL (and others) for breach of contract and damages, including damages in respect of the Profit Sharing Agreement, in January 2020.[3] In her January 21, 2020 Statement of Claim she claimed

[3] Little was said in the course of submissions about the parallel civil proceedings between Ms. Athanasoulis and the Cresford Group and between the LPs and the Cresford Group and Ms. Athanasoulis, although it was generally agreed

damages for, among other things, breach of the Profit Sharing Agreement equal to 20% of what she estimated the anticipated profits would be on all projects, the most significant of which was YSL.

[73] 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 January 2020.[4]

[74] 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 a 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. This is explained in more detail later in this endorsement.

[75] The Proposal Trustee made an extricable error in law by characterizing the Profit Share Claim, which is a claim for unliquidated damages for breach of contract, as a contingent claim dependent upon actual profits having been or being earned.

[76] The erroneous characterization of the Profit Share Claim as a contingent claim led the Proposal Trustee to the further erroneous determination that it, as contingent claims often are, was too remote and speculative to be a "provable" claim under the BIA.[5]

[77] I turn to the second aspect of the remoteness of the Profit Share Claim. Even if not a contingent claim dependent upon an event that has not occurred, unliquidated claims are still subject to quantification and related considerations of remoteness or speculation.

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that those proceedings would be subject to arguments of *res judicata* and estoppel if determinations are made on this appeal in respect of any overlapping issues involving the same parties.

[4] Even if the Profit Sharing Agreement continued, the Profit Share Claim might still have been a provable claim. The court in *Abitibi* held (at para. 34) that "the broad definition of "claim" in the BIA includes *contingent and future* claims that would be unenforceable at common law or in the civil law."

[5] If a claim is contingent, the claimant must demonstrate sufficient certainty that the contingency will occur during the relevant period for the damages calculation. See *Abitibi* at para. 36 and 84 and *Confederation Treasury Services Ltd., Re* (1997), 96 O.A.C. 75 (C.A.), at para. 4.

[78] The court in *Abitibi* specifically found at para. 34 (in the context of a CCAA proceeding) that a court (in that case, the CCAA court) assessing unliquidated claims in statutory insolvency proceedings "has the same power to assess their amounts as would a court hearing a case in a common law or civil law context." The Profit Share Claim should be viewed under the same lens in terms of its provability.

[79] The Court of Appeal explained in *Schnier v. Canada (Attorney General)*, 2016 ONCA 5, 128 O.R. (3d) 537, at para. 49, that "a creditor's inability to enforce a claim bears directly on the creditor's ability to prove its claim under the BIA. In order to be a provable claim within the meaning of BIA s. 121, a claim must be one recoverable by legal process". Ms. Athanasoulis says her Profit Share Claim is recoverable by legal process, and that was the very course she was following by the lawsuit that she commenced in January 2020.

[80] In *Schnier*, the court found the opposite because the claim in that case was dependent upon the outcome of ongoing tax proceedings. The Proposal Trustee seeks to analogize the Profit Share Claim (said to be dependent upon the outcome of litigation that Ms. Athanasoulis had commenced following her wrongful dismissal from YSL, and thus contingent in that sense) to the situation in *Schnier*. The analogy is not apt, for various reasons including that:

a. *Schnier* was about whether the special provisions of the BIA regarding income-tax driven bankruptcies applied to unpaid tax assessments that were being appealed. The trustee had found that the tax claim in question was not provable. That finding was not challenged (at para. 14). The court conducted a detailed review of the statutory scheme and concluded that those rules were not meant to be triggered by contingent tax claims that the trustee has determined to be unproven (see paras. 24–50 and 73).

b. The mere fact that a disputed claim is in litigation but has not yet resulted in a judgment cannot be sufficient to render a claim unprovable under the BIA. If that were the case, it would mean that anyone who claims to have been wronged by a debtor would be disqualified from making a claim in a bankruptcy proceeding if they had not been able to obtain a pre-BIA judgment.

c. Through the Arbitration, it has already been established in this case that there was an oral Profit Sharing Agreement that was part of Ms. Athanasoulis' employment agreement, that she was wrongfully (constructively) dismissed in December 2019 and that her Profit Sharing Agreement did not depend upon her continuing to be employed. Her claim for damages arising out of the breach of that agreement is a claim that is recoverable by legal process even if that legal process has not yet run its course.

[81] The Proposal Trustee considered the potential for damages associated with the Profit Share Claim insofar as that might inform the assessment of whether it is too remote or speculative to be a provable claim. Even if it is not a contingent claim, the Proposal Trustee determined that the Profit Share Claim is too remote and speculative to qualify as a provable claim because it seeks:

a. a share of the profits in a failed project that never did, and never will, generate any profits; and

b. profits to be calculated on the basis of an agreed formula that assumes that the amounts owing to the LPs will be treated as expenses and netted out of the calculated profits even though they have not been paid and are not expected to be paid in full under any scenario.

[82] The Proposal Trustee points to the earlier findings of Hainey J. (in an insolvency proceeding involving a different Cresford entity) and Dunphy J. in this proceeding that Ms. Athanasoulis' Profit Share Claim was too speculative or remote to be valued for voting purposes. However, those earlier determinations were made at a time when there was uncertainty about the existence of the Profit Sharing Agreement and about whether Ms. Athanasoulis had been wrongfully terminated from her employment. Those aspects of the claim are no longer subject to speculation. I do not consider those earlier assessments to be determinative of the question of whether the Profit Share Claim is too remote or speculative to be provable. That must be independently assessed in the context of the Disallowance.

[83] The Proposal Trustee's rationales for the Profit Share Claim being too remote or speculative (above) are, in part, a function of its original error in having failed to recognize it to be an unliquidated damages claim for breach of contract. This resulted in a compounding further extricable error of law because it led the Proposal Trustee not to consider the well-established legal principle that damages for breach of contract are presumptively to be calculated at the date of breach. See *Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp.* (2004), 192 O.A.C. 24 (C.A.), at para. 125; see also *Kipfinch Developments Ltd. v. Westwood Mall (Mississauga) Limited*, 2010 ONCA 45, 260 O.A.C. 110, at para. 15; *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633, at p. 648.

[84] The value of the promised performance is measured by evaluating what would have happened if the contract had been performed. The correct approach is illustrated in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678. In that case, one party to an option agreement breached the contract and, as a result, the other party lost the opportunity to develop the land. The Supreme Court of Canada upheld the trial judge's award of the profits that the wronged party would have made. In *Sylvan* no one actually earned profits. But that did not matter.

[85] The Proposal Trustee points out in response to these submissions on the appeal that the presumptive date for assessing damages (as of the date of the breach) is not an absolute. The Court of Appeal has departed from this presumptive date in appropriate circumstances, such as in *Maple Leaf Foods Inc. v. Ryanview Farms*, 2022 ONCA 532, at paras. 35 and 41. In that case, it was found that the assessment of damages at the date of breach would not fairly reflect a party's loss in light of intervening events rendering the loss suffered to be more uncertain, such that it would not be just to burden the breaching party with more than its fair share of the liability.

[86] On this appeal, the Proposal Trustee suggested that it considered that the COVID-19 pandemic, record inflation, rapidly increasing interest rates, the state of the real estate market and the fact that YSL became insolvent and entered into these proposal proceedings all would have

adversely affected the profitability of YSL even if Ms. Athanasoulis had never been constructively dismissed. Thus, the consideration of what would have happened if the Profit Share Agreement had not been repudiated still would lead to the conclusion that the prospect of any damages is too remote and speculative for there to be any provable loss.

[87] Ms. Athanasoulis points out that these considerations were not all set out in the stated grounds for the Disallowance of her Profit Share Claim and would, at most, be factors that might be considered in the eventual valuation of her Profit Share Claim, but not grounds for the Disallowance without any attempt to value it.

[88] As previously outlined, absent a breach and in the normal course Ms. Athanasoulis would have been paid out of YSL's earned profits, and the timing of the actual payments to the LPs and to Ms. Athanasoulis would have followed the completion of the YSL Project. However, when YSL repudiated the Profit Share Agreement and the repudiation was accepted as of January 2020, Ms. Athanasoulis' future right to receive a 20% share of earned profits was converted into a current right to receive damages for breach of contract. If the appropriate approach to the assessment of damages had been adopted, speculation and concerns about the remoteness of those future events (the actual profits that may or may not be earned, and the order in which they might have been distributed in the normal course) might not be relevant at all to the determination of the Profit Share Claim under the BIA, but even if relevant at the valuation stage, those concerns would not be determinative at this threshold "provability" stage in the face of the presumptive valuation date.

[89] There are two branches to remoteness in assessing damages, that have to do with the type of loss at issue. In *The Rosseau Group Inc. v. 2528061 Ontario Inc.*, 2023 ONCA 814 at paras. 68–70, the Court of Appeal reminds us that damages will not be considered to be too remote and may be recovered 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.

Damages that fall outside of either branch are not recoverable because they are too remote.

[90] Importantly, the Court of Appeal explains in *The Rosseau Group* (at para. 70) that "the remoteness test deals with the 'type' of loss that is recoverable, while the measure is about how it is quantified." 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 the damages, not the type of loss.

[91] There is a well-established legal principle that a party should not be denied damages just because those damages are difficult to calculate or measure. See *General Mills Canada Ltd. v. Maple Leaf Mills Ltd*., 52 C.P.R. (2d) 218 (Ont. H. Ct.), at para. 4; *Gould Outdoor Advertising Co. v. Clark*, [1994] O.J. No. 3094 (Gen. Div.), at para. 26. In such cases, damages are assessed with a broad axe and a sound imagination. See *Colonial Fastener Co. Ltd. v. Lightning Fastener Co. Ltd*., [1937] S.C.R. 36, at p. 44; *Apotex Inc. v. Eli Lilly and Company*, 2018 FCA 217, 161 C.P.R.

(4th) 411, at para. 142; *Janssen Inc. v. Teva Canada Limited*, 2016 FC 593, 141 C.P.R. (4th) 1, at para. 69. This is an issue for another day in these proceedings.

[92] The Proposal Trustee's consideration of subsequent events in its determination that the Profit Share Claim is not a provable claim under the BIA was an extricable error of law. While those subsequent events may be relevant to the measure or calculation of the ultimate loss, to say that they affect the type of loss and render it so remote as to be unprovable results in a misapplication of the law of remoteness.

[93] The bar for establishing a provable claim is low and only requires that a claimant proves that there is an "air of reality" to their claim. See *Oil Lift Technology Inc. v. Deloitte & Touche Inc.*, 2012 ABQB 357, 98 C.B.R. (5th) 77, at para. 18. There is an air of reality to the Profit Share Claim, particularly since the Arbitrator has determined that: the Profit Sharing Agreement existed, it was a key element of Ms. Athanasoulis' employment contract, Ms. Athanasoulis was constructively terminated from her employment in December 2019, but the Profit Sharing Agreement was not dependent upon her continuing to be employed. The fact that a claim involves some complexity in quantification is not a bar to it being a provable claim.

[94] Considering the Profit Share Claim in its proper light (which the Proposal Trustee did not do as a result of its previously identified errors), I find it to be a provable claim.

B) The Valuation Errors

[95] Ms. Athanasoulis alleges that it was an error for the Proposal Trustee to value her Profit Share Claim at zero based on the determination that there was no profit to share, as at the date of the breach (December 2019), the date of these insolvency proceedings (April 2021) or two years after the breach when her claimed employment termination notice period ran out (December 2021), because doing so was predicated on the absence of any actual, earned profits on any of these dates.

[96] It is alleged that the Proposal Trustee erred in valuing the Profit Share Claim at zero:

a. Based on the erroneous assumption that Ms. Athanasoulis is only entitled to 20% of the actual profits earned by YSL or that YSL is capable of earning in light of its insolvency and the Proposal, whereas damages for breach of contract must put the injured party in the position she would be in if the other party had met its contractual obligations, calculated at the time of the breach or repudiation of the contract;

b. Without even attempting to calculate either YSL's revenues or expenses to determine its profits earned on the relevant date (of repudiation);

c. Without considering contemporaneous evidence (on the repudiation date) about the prospect of a sale of the YSL Project or YSL's contemporaneous pro forma projections for continued development that indicate a reasonable expectation of profits.

[97] The Arbitrator's finding that Ms. Athanasoulis' employment contract, of which the Profit Sharing Agreement was found to have been an integral part, was breached in December 2019 crystalized her claim for damages for breach of the Profit Sharing Agreement. No assessment was

undertaken of what her loss was as of that date, to put her in the position she would have been in if the Profit Sharing Agreement had not been breached in December 2019. The Proposal Trustee did not undertake this exercise because her losses were assumed to be zero given that no profits have been or will be earned by YSL. This approach built upon the previously described errors in the mischaracterization of the Profit Share Claim. Much of the same analysis applies to here to the Valuation Errors, as was applied to the Provable Claim Errors discussed in the previous section of this endorsement.

[98] The Proposal Trustee's answer to this, when considered from a claim valuation (as opposed to provability) perspective, is to treat the Profit Share Claim as part of the Wrongful Dismissal Claim, such that Ms. Athanasoulis would only be entitled to reasonably foreseeable amounts payable under the Profit Sharing Agreement during her claimed termination notice period (specified in her statement of claim issued in January 2020 to be two years). This approach was adopted based on the case of *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, [2020] 3 S.C.R. 64, at para. 49 involving a terminated employee whose profit sharing agreement was found to have been limited to actual profits earned during the notice period. Since the YSL Project was not completed and no profits were earned or paid out by it during that notice period, nor would the parties have expected them to be given the usual five to seven year completion period for a project such as the YSL Project, the Proposal Trustee maintains that there could be no damages or losses suffered as a result of the repudiation of the Profit Share Agreement.

[99] However, there is an important distinguishing feature of this case compared to *Matthews*. In *Matthews*, the profit sharing was expressly tied to his continued employment (see para. 63). In *Matthews*, there was a long-term incentive plan that required the claimant to be employed full time at time of triggering event (sale), but he had been constructively terminated 13 months before (para. 18).

[100] The Proposal Trustee's position is that the Arbitrator's finding that entitlements under the Profit Sharing Agreement are not dependent upon Ms. Athanasoulis' continued employment with YSL (or equivalent notice period) should not give her an indefinite claim to 20% of any and all profits earned, beyond the notice period. However, this position is not tied to any finding of fact or legal principle.

[101] Conversely, 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 entitlement 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.

[102] Further, the fact that these voluntary insolvency proceedings occurred is not evidence that they were inevitable. Dunphy J. specifically found that the effort to sell or refinance the YSL Project that culminated in the earlier proposal was "indelibly tainted" by Mr. Casey's self-interest

(see *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, 93 C.B.R. (6th) 109, at para. 76).

[103] The Proposal Trustee's determination that, with no profits having been earned during the two-year notice period or thereafter, the damages for the repudiation of the Profit Share Claim are zero, was an extricable error of law. In order to justify this conclusion, the Trustee departed from the law of damages for breach of contract.

[104] The Trustee also relies upon equity, by arguing that it is not "just and reasonable" to calculate profits on the repudiation date because "no profit had been earned" and the LPs had not been repaid. This is not grounded in any authority, but if relevant at all it would arise in the context of the calculation of the loss and valuation of the claim, not at this threshold stage before any attempt has been made to value the Profit Share Claim. That too was an extricable error of law.

[105] Even if the Valuation Errors involve a misapplication of the law to the facts, which might be viewed as mixed errors rather than extricable errors of law, those errors were palpable and overriding in this case.

[106] In this vein, in addition to the extricable legal errors, Ms. Athanasoulis argues that there is evidence to contradict the Proposal Trustee's underlying factual assumptions. The failure to consider that evidence is reviewable on a standard of palpable and overriding error (or reasonableness). However, given the findings to this point, there is no need to go into an in-depth analysis of what are errors of fact and mixed fact and law.

[107] The primary point that is made by Ms. Athanasoulis at this stage is that the Proposal Trustee has not done any in-depth analysis to attempt to assess the damages as at the date of repudiation. It is sufficient for purposes of this appeal to have identified that there will be points of contention to be considered when the Profit Share Claim is valued, for example:

a. According to Ms. Athanasoulis, when she was terminated the YSL Project had progressed significantly. The YSL Project was purchased for $157 million but was appraised in July 2019 for $375 million. YSL had invested approximately $241 million in the project. YSL's October 2019 pro forma, which had been vetted by experienced third party professionals, forecast a profit of close to $200 million. Even the Proposal Trustee's third report implies YSL was profitable. Further, Ms. Athanasoulis points to contemporaneous evidence about the prospect of a sale of the YSL Project. According to her testimony, there was a buyer for the YSL Project that would have yielded profits, who Casey inexplicably rejected around the time of her wrongful dismissal. She claims that, at that time, YSL was fine financially and that it was other Cresford projects that were in trouble.

b. The Proposal Trustee points to a letter that Ms. Athanasoulis wrote in December 2019 about ongoing financial issues. She has since admitted that there were statements made in that letter that were untrue and she has apologized for sending it. However, the Proposal Trustee says it is evidence from Ms. Athanasoulis herself about the dire financial situation that YSL and the Cresford Group were in at that time.

c. The Proposal Trustee urges the court to look at other contemporaneous evidence that had been in the Arbitration record to counter the evidence Ms. Athanasoulis put forward and the anticipated profitability of the YSL Project at the time of the Profit Sharing Agreement. The Proposal Trustee points to high-level financial information that it says demonstrates that YSL was underwater in December 2019 (and that is consistent with its eventual insolvency). Ms. Athanasoulis objected to the Proposal Trustee's last-minute reliance upon this evidence, that was not a stated basis for the Disallowance of her Profit Share Claim and that she claims is selective and unreliable. For example, certain of the reports referenced had been previously ruled to be unreliable by Dunphy J. and another expresses opinions about the value of the YSL Project as at May 2021 which is after the December 2019 repudiation date.

[108] At this stage in these proceedings where the damages have been bifurcated in accordance with the court's earlier Claims Procedure Endorsement, it is sufficient for Ms. Athanasoulis to have demonstrated that damages could be calculated (based on either actual profits earned as of the date of contract repudiation or "but-for", future oriented profits calculated, possibly with the assistance of expert evidence, as at that date), since it was not intended that there be a valuation of the Profit Share Claim at this stage. The very existence of this evidentiary controversy is itself reason to require a more fulsome damages assessment, as the Claims Procedure Endorsement provides for.

[109] Sufficient grounds have been established to satisfy me that the damages valuation phase should proceed.

C) Subordination Error

[110] Ms. Athanasoulis' testimony at the Arbitration that the profit under the Profit Sharing Agreement "would be calculated after paying the [specific project] costs and after the equity was repaid to the LP Investors" led the Proposal Trustee to conclude that the Profit Share Claim was an equity claim that was subordinated to the equity claims of the LPs. For the reasons previously indicated, the Profit Share Claim does not come within the BIA definition of "equity claim". Not all entitlements calculated on the basis of profits are equity claims. The formula used to calculate the amount of an entitlement is also not determinative of the priority of a claim in a bankruptcy. Here, the calculation of the entitlement under the Profit Sharing Agreement was to be based on a percentage of funds distributable to the owners (equity holders) whose claims were subordinated to the LPs. That does not mean that the Profit Share Claim was subordinated.

[111] The LPs assert that Ms. Athanasoulis (and others) told them that they would be paid ahead of the Cresford Group , who were themselves Class B unitholders. However, Ms. Athanasoulis was not a shareholder. Nor did she enter into any agreement directly with the LPs to subordinate her claims or interests to theirs.

[112] The Proposal Trustee made an extricable error of law when it found the Profit Share Claim to be subordinated to the equity claims of the LPs and that Ms. Athanasoulis is not entitled to be paid anything unless and until the LPs are paid in full, in the absence of any agreement between Ms. Athanasoulis and the LPs to subordinate her claims to theirs.

[113] This error originated from the same incorrect determination that led to earlier errors, namely that all claims calculated based on profits are equity claims. It was further compounded by the incorrect conclusion that by agreeing with YSL and the Cresford Group that the profits to which the 20% profit sharing would be applied would be calculated net of amounts to be paid to the LPs, Ms. Athanasoulis had agreed to subordinate her entitlements under the Profit Sharing Agreement to the claims of the LPs claims for insolvency and BIA purposes.

[114] It is common ground that each LP holds an "equity claim" within the meaning of the BIA. The BIA provides that every creditor who does not hold an "equity claim" is entitled to be paid before any creditor that has an equity claim. These statutory priorities were ignored by the Proposal Trustee because of the error in mis-characterizing the Profit Share Claim (entitlements under the Profit Sharing Agreement) as an equity claim.

D) Other Identified Errors

[115] Other errors were identified by Ms. Athanasoulis. However, the appeal can be decided based on the identified extricable errors of law (above).

The Unique Perspective of the LPs on the Validity/Enforceability of the Profit Sharing Agreement

[116] The LPs argue that there are specific provisions in two contracts that they entered into that render the Profit Sharing Agreement unenforceable, namely that the Profit Sharing Agreement:

a. breaches s. 3.6(b) of the Amended and Restated Limited Partnership Agreement dated August 4, 2017 (the "LPA") that prohibits non-arm's length transactions with a "Related Party" (meaning the Affiliates of the General Partner in the sense of controlling or controlled by or under common control with, YSL and their officers and directors, employees and shareholders) other than on market terms; and

b. breaches s. 3.2 of the Sales Management Agreement dated February 16, 2016 (the "Management Agreement") that prohibits any compensation being paid to the corporation or its Affiliates (defined under the LPA to be the Affiliates of the General Partner in the sense of controlling or controlled by, or under common control with, YSL) that is not specifically provided for in that agreement (and there is no reference to the Profit Sharing Agreement).

[117] These are the matters that the LPs were granted standing to address in the Claims Procedure Endorsement. They provided their submissions to the Proposal Trustee on these (and other) issues. These grounds were not adopted or relied upon by the Proposal Trustee as a reason for its Disallowance of the Profit Share Claim. There is no reviewable error by the Proposal Trustee in relation to the LPs' submissions.

[118] In terms of the merits of the LPs arguments if they are to be addressed *de novo*, there is no evidentiary foundation for the suggestion that Ms. Athanasoulis is an Affiliate of YSL that would render the Profit Sharing Agreement to be offside of s. 3.2 of the Management Agreement. Ms. Athanasoulis maintains that she was neither a shareholder nor an affiliate of the Cresford Group and was never represented to be such in any written or oral presentation made to the LPs, nor is it

apparent on what legal basis a declaration of unenforceability would be the appropriate remedy for such a breach, in any event. The alleged breaches of Management Agreement appear to have been an after-thought (not mentioned in the LPs' factum on this appeal). There is no basis upon which to find that the Profit Sharing Agreement was a breach of the Management Agreement.

[119] It has also not been established that the Profit Sharing Agreement constitutes a prohibited Related Party agreement under s. 3.6(b) of the LPA. The Profit Sharing Agreement was entered into before the LPA, although the percentage of shared profits increased after the LPA was signed). The LPs claim not to have been told about either the original or amended Profit Sharing Agreement. The Profit Sharing Agreement was found by the Arbitrator to be binding and enforceable as between the parties to it, YSL and Ms. Athanasoulis.

[120] The LPs have presented no evidence to establish that the Profit Sharing Agreement was not on market terms. The Arbitrator found that there was "nothing disproportionate, in the realm of executive compensation," about the Profit Sharing Agreement, in light of Ms. Athanasoulis' value and contributions to the YSL Project (and the Cresford Group's other projects). The evidence before the Arbitrator was that a third party marketing company would have charged 1.5% of sales and expected to have been paid earlier. The LPs were not party to the Profit Sharing Agreement and complain that they were not party to the Arbitration and should not be bound by findings made by the Arbitrator. If the LPs had wanted the court to revisit that determination for purposes of this appeal that would have required some further direct evidence.

[121] There is no basis upon which the court could or should conclude based on the record on this appeal that the Profit Sharing Agreement is unenforceable as a result of the alleged breaches of the LPA and the Sales Management Agreement. These arguments raised by the LPs do not affect the court's determinations earlier in this endorsement that the Profit Sharing Claim is a provable claim and should be valued.

Additional Issues Raised by the LPs

[122] The LPs claim that the Profit Sharing Agreement was a "secret" undisclosed agreement. They assert that she made misrepresentations by omission (by not disclosing the existence and terms of the Profit Sharing Agreement). They claim that statements made by Ms. Athanasoulis regarding the priority of payments to the LPs over any payments out to Cresford Group members were misleading if they were not intended to include payments to Ms. Athanasoulis, who they (rightly or wrongly) understood to be a member of the Cresford Group. They say they were induced to advance funds as a result of these representations. They assert that even if she owed no duty to them directly, she knowingly assisted in the alleged misrepresentations made to them by others.

[123] The LPs rely on cases that extend fiduciary disclosure duties and duties not to self-deal to general partners and their directors and officers such as *Naramalta Development Corp. v. Therapy General Partner Ltd.* 2012 BCSC 191, at paras. 63–64 and 71–72; *OSC v. Go-to Developments Holdings Inc.* (October 31, 2023), Toronto, CV-21-00673521(S.C.), *per* Steele J.; *Advanced Realty Funding Corp. v. Bannink* (1979), 27 O.R. (2d) 193 (C.A.); and *Extreme Venture Partners Fund 1 LP v. Varma*, 2021 ONCA 853, 24 B.L.R. (6th) 38, at paras. 74 and 86–89, leave to appeal refused.

[124] Ms. Athanasoulis denies that the existence of the Profit Sharing Agreement renders her statements about the Cresford Group to be untrue or misleading. Further, she denies any duty to make disclosure and argues that this situation (that she and the LPs would be competing for the same pool of funds) was not reasonably foreseeable. In any event, these alleged misrepresentations are not properly raised in the context of the Proposal Trustee's determination of the validity and quantum of the Profit Share Claim.

[125] The 250 LPs have commenced a separate lawsuit against Ms. Athanasoulis, and others, asserting claims against them personally in respect of the alleged misrepresentations and breaches of fiduciary and other duties arising out of the failure to disclose her Profit Sharing Agreement to them. All of the LPs have raised these issues with the Proposal Trustee as further grounds for disallowing her Profit Share Claim, but their allegations were not among the grounds relied upon in the Disallowance.

[126] While the 250 LPs confirmed that there would be a *res judicata* or estoppel argument against re-litigating these claims in another context if the court decides these issues in this appeal, there remains the more fundamental concern that these issues fall outside of the scope of the standing that was granted to the LPs in the context of the Profit Share Claim, which was to raise issues that they were uniquely situated to address relating to the determination of that claim. Those issues include matters relating to the validity and enforceability of the Profit Share Agreement having regard to the provisions and restrictions under the agreements that the LPs were party to, such as the LPA and the Management Agreement. Those grounds have been addressed in the preceding section of this endorsement.

[127] The other claims of the LPs, which include an estoppel argument arising out of the alleged misrepresentations and breaches of duties by Ms. Athanasoulis, or her alleged knowing assistance of breaches by others, are not properly adjudicated in the context of the determination and valuation of the Profit Share Claim. Further, Ms. Athanasoulis points out that the LPs have not put forward evidence of their reliance on the representations to enable any ruling to be made in their favour.

[128] The mere allegation of an "omission" to make disclosure is not sufficient to determine their claims in the circumstances of this case. Not only is there a dispute about Ms. Athanasoulis' status as a member of the "Cresford Group", but the LPAs expressly preclude reliance upon extra-contractual representations. The facts surrounding these allegations against Ms. Athanasoulis are not settled, which could explain why this was not one of the reasons relied upon by the Proposal Trustee in the disallowance of the Profit Share Claim. This case is distinguishable from *OSC v. Go-To Developments Holdings Inc.*, at paras. 10-16; 25-26 that the LPs seek to rely upon, involving alleged misrepresentations made by a director and shareholder.

[129] This is not the forum for determining those other claims by the LPs. The determination of those claims involves contentious factual disputes and credibility assessments. The issues raised by the LPs 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 LPs outside of the context of these insolvency proceedings. It would not be reasonable or appropriate for the court to attempt to determine the LPs' claims for breach of fiduciary duty and misrepresentation, etc. on this appeal.

[130] These claims by the LPs (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. 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.[6]

[131] 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 proceedings and will be binding upon the LPs in any future proceedings.

Valuation and Damages

[132] At paragraph 63 of the Claims Procedure Endorsement, the court clarified that:

> To be clear, it is not expected that there will be any material or submissions at this time regarding the Future Oriented Damages (whether calculated at the repudiation date or the Proposal date). If Ms. Athanasoulis is successful on appeal of any disallowance of the Profit Share Claim, the parties shall make an appointment for a case conference before me (if my schedule permits within the time frame requested) to seek directions about the process for the determination of the more complex valuation question that will likely require expert input.

[133] Since Ms. Athanasoulis has succeeded on her appeal of the Disallowance, the Profit Share Claim needs to be valued. The Profit Share Claim is a claim for unliquidated damages for the breach of the Profit Sharing Agreement in December 2019 that was accepted in January 2020 (by correspondence and eventually the issuance of a statement of claim seeking to recover damages for this breach, among other damages). The April 30, 2021 bankruptcy date may also be relevant to this determination. The relevance and impact of intervening events remains an open question. Expert inputs may be appropriate on this and other points. That will be for Ms. Athanasoulis and the Proposal Trustee to decide.

[134] Ms. Athanasoulis has provided sufficient foundational evidence to satisfy the court that, while it may be difficult, efforts should be made to value the Profit Share Claim. As previously directed, the parties shall arrange to attend before me on a case conference at which proposals will be made and directions will be provided regarding the process for the valuation of the Profit Share Claim.

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[6] The same may be true for the ongoing litigation that Ms. Athanasoulis has commenced against Mr. Casey regarding the alleged breaches of his fiduciary and other duties to attain, or at least maintain, the profitability of the YSL Project (and other Cresford Group projects) and to keep the YSL Project out of insolvency.

[135] At that case conference, directions may also be provided regarding any continued participation of the LPs, whose standing was granted for purposes of this stage because of unique perspectives that they might provide on the question of the validity or enforceability of the Profit Sharing Agreement (discussed later in this endorsement). It is not apparent that they have any unique perspective or entitlement to participate in the valuation of the Profit Share Claim, any more so than the other unsecured creditors who may also be impacted by that determination and who have not been granted standing. No standing arises merely from an economic interest in the outcome of the Proposal Trustee's determination (or valuation) of a proof of claim in these proceedings. See *YG Limited Partnership and YSL Residences Inc. (Re)*, 2023 ONCA 50, at para.19

Costs

[136] The parties have now uploaded their Bills of Costs or Costs Outlines referable to this appeal.

[137] All costs are presented on a partial indemnity basis. The amounts certified are as follows:

a. By the Proposal Trustee, $100,000 in fees (for approximately 157 lawyer hours, excluding the time of students and clerks) plus disbursements and applicable taxes, for a total of $114,745.85;

b. By the 250 LPs, approximately $62,927.21 in fees (for approximately 145 lawyer hours) inclusive of applicable taxes;

c. By the other LPs, $77,377.69 in fees (for approximately 190 lawyer hours), inclusive of applicable taxes;

d. By Ms. Athanasoulis, $193,612.50 in fees (for in excess of 400 lawyer hours) plus applicable disbursements and taxes, for a total of $231,057.19. By my estimation, approximately $24,000 of these fees claimed were for the earlier Jurisdiction Motion heard on October 17, 2022 and $13,000 of these fees claimed were for the Claims Procedure motion heard on January 16, 2023.

[138] At the hearing of the appeal, in the event that the court allows the appeal and sets aside the Disallowance the Proposal Trustee and LPs asked that any award of costs be deferred until after damages have been determined and the Profit Share Claim has been valued, on the premise that there still may be no, or a lower, amount attributed than has been claimed. It was also submitted that Ms. Athanasoulis should not be permitted to claim costs incurred for the earlier Jurisdiction and Claims Procedure motions.

[139] In that event, Ms. Athanasoulis asked for her costs to be fixed and ordered payable forthwith. She argues that this is consistent with the principles under r. 57 and that the only relevant prior costs ruling was that she was denied the right to claim costs thrown away relating to the work that had been done in respect of phase two of the Arbitration which the court ordered be terminated in the Funding Decision and replaced with this Claims Procedure.

[140] The total partial indemnity costs of Ms. Athanasoulis of just over $231,000 is just slightly less than the combined total costs of the Proposal Trustee and LPs of just over $240,000. The total lawyer hours are less for Ms. Athanasoulis compared to the aggregate lawyer hours on the opposing side. On that basis, there is no need for the court to get into a line-by-line review of the amounts claimed, hours spent or hourly rates. All parties were represented by excellent counsel who charged accordingly for their work. Ms. Athanasoulis had to address the arguments raised from all perspectives.

[141] Ms. Athanasoulis is a private individual who is funding this dispute regarding her Profit Share Claim herself. She was facing, as a result of the Disallowance, the complete loss of her $18 million Profit Share Claim. As a result of her success on this appeal she can now pursue that claim through the next valuation stage.

[142] The issues are important to Ms. Athanasoulis and to the other creditors of YSL from a financial perspective. She, also has reputational issues at stake. The private arbitration process that she and the Proposal Trustee had agreed to for the determination of the Athanasoulis Claims was derailed part way through as a result of objections raised by the Sponsor and the LPs, and through no fault of her own. While the bifurcation of the damages/valuation means there will be another stage, this stage dealing with the provability of the Profit Share Claim was decided in favour of Ms. Athanasoulis and she is entitled, as the successful party, to her partial indemnity costs as claimed.

[143] Costs associated with the damages/valuation stage will be separately determined and, if Ms. Athanasoulis is not successful at that stage, there may be cost consequences for her at that time. However, I do not agree that she should be deprived of any award of costs associated with this appeal and with the motion that determined the Claims Procedure that got the parties to this point. I do agree that the costs of the earlier Jurisdiction Motion (that resulted in the Funding Decision dealing with the Arbitration) should not be included and I have deducted those fees from the total partial indemnity fees that I am awarding to Ms. Athanasoulis, fixed in the amount of $169,715.93 plus applicable taxes and total disbursements of $6,812.08 (inclusive of HST).

[144] These costs have been determined in the exercise of my discretion under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and with regard to the applicable factors under r. 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, including those discussed above and the principles of proportionality and indemnity.

[145] I did not hear any submissions about whether these costs are sought only from the Proposal Trustee or if any party takes the position that some should be paid by the LPs. Unless there are submissions that any party wishes to make on that point (in which case, a case conference may be arranged to speak to this issue), I order the partial indemnity costs fixed at the amount of $169,715.93 plus applicable taxes and total disbursements of $6,812.08 (inclusive of HST) to be paid to Ms. Athanasoulis by the Proposal Trustee forthwith. If there are submissions to be made about the source of funds to be used by the Proposal Trustee to pay those costs, I may be spoken to about that as well.

Order and Final Disposition

[146] The following orders, declarations and directions are made or granted based on the relief requested in Ms. Athanasoulis' Notice of Motion on appeal:

a. The Proposal Trustee's Disallowance of the Profit Share Claim dated August 10, 2023 is set aside;

b. The Profit Share Claim is declared not to be an equity claim, and to be a provable claim within the meaning of s. 121(1) of the BIA;

c. The Profit Share Claim is entitled to priority over the claims asserted by the LPs;

d. Maria Athanasoulis' Profit Share Claim against YSL is declared to be a valid claim and ought to be allowed in an amount to be determined by further order of this court or by such other process as the court may direct;

e. Maria Athanasoulis shall be paid forthwith her partial indemnity costs of this motion/appeal from the Disallowance fixed in the amount of $169,715.93 plus applicable taxes and total disbursements of $6,812.08 (inclusive of HST), subject to further directions from the court to be provided at a case conference, if requested, regarding by whom, in what proportions and from what source these costs are to be paid;

f. The parties shall arrange a case conference before me for the purpose of making submissions and receiving directions regarding the process for the determination of the amount (valuation) of the Profit Share Claim. The Sponsor (or its counsel) shall also attend this case conference as it may have implications for the ongoing funding of administrative and other expenses of the Proposal Trustee associated with the determination of the Profit Share Claim;

g. The ongoing civil proceedings among and between Ms. Athanasoulis and the LPs and members of the Cresford Group may continue, subject only to the determinations herein regarding the validity, provability and priority of the Profit Share Claim.

[147] This endorsement and the orders, declarations and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out, although any party may take out a formal order if so advised by following the procedure under r. 59.

Kimmel J.

Date: March 19, 2024