Court File No. BK-21-02734090-0031
Court of Appeal No.: COA-23-CV-0288

COURT OF APPEAL FOR ONTARIO

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

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

EXHIBIT BOOK of the APPELLANTS

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

March 31, 2023

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Court File No. BK-21-02734090-0031
Court of Appeal No.: COA-23-CV-0288

COURT OF APPEAL FOR ONTARIO

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

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

INDEX

TAB 1

Eighth Report to Court of KSV Restructuring Inc. as Proposal Trustee of YG Limited Partnership and YSL Residences Inc.

December 30, 2022

Contents

Appendices

COURT FILE NO.: BK-21-02734090-0031

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

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

EIGHTH REPORT TO COURT OF KSV RESTRUCTURING INC. AS PROPOSAL TRUSTEE

DECEMBER 30, 2022

1.0 Introduction

1. This report ("Report")[1] is filed by KSV Restructuring Inc. ("KSV") in its capacity as Proposal Trustee (the "Proposal Trustee") in connection with Notices of Intention to Make a Proposal (the "NOIs") filed on April 30, 2021 (the "Filing Date") by YG Limited Partnership (the "Partnership") and YSL Residences Inc. ("Residences", and together with the Partnership, the "Companies") pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA").

2. On May 14, 2021, the Ontario Superior Court of Justice (Commercial List) (the "Court") issued an order (the "Consolidation Order") procedurally and substantively consolidating the NOIs (the "NOI Proceedings") for the purpose of simplifying the administration of the NOI Proceedings, including filing a joint proposal and convening a single meeting of creditors.

3. The principal purpose of the NOI Proceedings was to create a stabilized environment to allow the Companies to present a proposal to their creditors that provides them with a recovery greater than they would receive in a bankruptcy or alternative insolvency process.

4. On May 27, 2021, the Companies filed a proposal with the Official Receiver in accordance with Section 62(1) of the BIA (the "Proposal"). On June 3, 2021, the Companies filed an amended proposal (the "First Amended Proposal") and on June 15, 2021, the Companies filed a further amended proposal (the "Second Amended Proposal").

[1] Capitalized terms have the meaning provided to them in the Final Proposal (as defined herein), unless otherwise defined in this Report.

5. The creditors voted to accept the Second Amended Proposal at a meeting of creditors held on June 15, 2021.

6. On June 23, 2021, the Companies sought Court approval of the Second Amended Proposal. Pursuant to the Reasons for Interim Decision of the Court made on June 29, 2021, as amended on July 2, 2021 (the "Interim Decision"), the Court did not approve the Second Amended Proposal.

7. A motion to approve the Second Amended Proposal was scheduled to be heard on July 9, 2021 to allow the Companies time to address the Court's concerns set out in the Interim Decision and, should they wish, present a further amended proposal for the Court's consideration. A copy of the Interim Decision is provided in Appendix "A".

8. Shortly before the motion on July 9, 2021, Concord Properties Developments Corp., the sponsor of the proposals filed in this proceeding (the "Sponsor"), served a further amended proposal (the "Third Amended Proposal") and an offer of distributions to be made outside of the Third Amended Proposal by the Sponsor to any equityholders[2] of the Partnership willing to accept such offer.

9. Pursuant to Section 3.03 of the Second Amended Proposal and the Third Amended Proposal, the Companies required the consent of the Proposal Trustee to file the Third Amended Proposal. As the Third Amended Proposal was provided for the first time to the Proposal Trustee just prior to the motion on July 9, 2021, the Proposal Trustee did not have the time it required to review the Third Amended Proposal prior to that hearing. Accordingly, the motion was adjourned to July 16, 2021 to provide the Proposal Trustee with the opportunity to consider the Third Amended Proposal and to make a recommendation to the Court.

10. The Proposal Trustee's Fourth Report to Court dated July 15, 2021 set out, among other things, the Proposal Trustee's recommendation to the Court that it approve the Final Proposal.

11. Pursuant to Reasons for Decision dated July 16, 2021, as amended on July 27, 2021 (the "Decision"), the Court approved the Final Proposal. A copy of the Decision is provided in Appendix "B".

12. No inspectors were appointed in the Final Proposal.

13. Of the sixty-six (66) proofs of claim filed against the Companies, three claims remain unresolved (the "Disputed Claims"), being the claims of Maria Athanasoulis ($19 million), CBRE Limited ("CBRE") (approximately $1.2 million) and Henry Zhang (approximately $1.1 million).

[2] Defined in the Final Proposal as the holders of the limited partnership units of YG LP and those Equity Claims deemed to be equity pursuant to the Interim Decision.

14. The Proposal Trustee and the Sponsor had differing views on the approach to determine Ms. Athanasoulis' claim (the "Athanasoulis Claim") and the Sponsor's obligation to fund the fees and costs of the Proposal Trustee to complete these proceedings as set out in Sections 10.01 and 11.01 of the Final Proposal.

15. On October 17, 2022, Justice Kimmel heard a motion by the Proposal Trustee (the "Funding Motion") for an Order, among other things, declaring that the Sponsor is required to fund the Administrative Fees and Expenses of the Proposal Trustee pursuant to Section 11.01 of the Final Proposal and declaring that the commencement of arbitration to determine the Athanasoulis Claim by the Proposal Trustee was a valid exercise of the power conferred upon the Proposal Trustee under the Final Proposal and/or the BIA. The basis for this motion was provided in the Proposal Trustee's Sixth Report to Court dated August 19, 2022 and in other Court materials filed by the Proposal Trustee. A copy of the Sixth Report is provided in Appendix "C", without attachments.

16. On September 26, 2022, Justice Osborne heard CBRE's appeal of the Proposal Trustee's Notice of Disallowance of Claim dated February 10, 2022 (the "CBRE Appeal"). Background related to this motion was provided in the Proposal Trustee's Seventh Report to Court dated September 12, 2022 (the "Seventh Report") and in other Court materials filed by the Proposal Trustee. A copy of the Seventh Report is provided as Appendix "D", without attachments. Pursuant to the Seventh Report, the Proposal Trustee recommended that CBRE's claim in the amount of approximately $1.2 million be allowed and the appeal allowed, without costs. Certain of the Partnership's limited partners objected to the allowance of this claim and took the position that they had standing to do so as "aggrieved persons", as defined in Section 37 of the BIA.

17. On November 1, 2022, Justice Kimmel released her decision (the "November 1st Decision") requiring the Sponsor to fund the costs of the Proposal Trustee incurred to that date and in respect of the process to determine the claim filed by Ms. Athanasoulis, but that it was not in the Proposal Trustee's powers to have an arbitrator determine the value of Ms. Athanasoulis' claim. The November 1st Decision is discussed further in Section 5 of this Report. A copy of the November 1st Decision is provided as Appendix "E".

18. On November 22, 2022, Justice Osborne released his decision regarding the CBRE Appeal[3] (the "CBRE Decision"). Justice Osborne's decision states that "the limited partners do not have standing to oppose or *[sic]* the relief sought on this motion by the creditor [CBRE] supported by the Proposal Trustee and the Debtors" and that "the disallowance of CBRE's claim by the Proposal Trustee is set aside and the claim is allowed". A copy of the CBRE Decision is provided as Appendix "F". The limited partners represented by Thornton Grout Finnigan LLP ("TGF") opposed the Proposal Trustee's allowance of CBRE's claim and have appealed Justice Osborne's decision. A date has not been set to hear the appeal.

[3] The decision is dated November 16, 2022 but was sent by the Court on November 22, 2022.

1.1 Purposes of this Report

1. The purposes of this Report are to:

   a) provide background information about the Companies;

   b) summarize the Proposal Trustee's discussions with counsel representing Ms. Athanasoulis and counsel representing the Limited Partners (the "LPs")[4] regarding the Proposal Trustee's recommended approach to determine the Athanasoulis Claim and the manner each of the parties will be entitled to participate in the process (the "Athanasoulis Claim Process"); and

   c) seek advice and directions from the Court on the Athanasoulis Claim Process as set out in Section 5.1 below, or as may be modified following submissions from counsel for each of Ms. Athanasoulis and the LPs.

1.2 Currency

1. All references to currency in this Report are to Canadian dollars.

2.0 Background

1. Information regarding the Companies, the real estate project that was being developed by the Companies known as Yonge Street Living Residences (the "YSL Project"), the history of these proceedings, the receivership application filed by Timbercreek Mortgage Servicing Inc., the first mortgagee of the YSL Project, in advance of these proceedings, applications by certain of the LPs and the prior proposals filed in this proceeding is included in the Proposal Trustee's previous reports to Court and other materials filed with the Court.

2. Copies of the publicly available information filed in these proceedings can be found on the Proposal Trustee's case website at https://www.ksvadvisory.com/insolvency-cases/case/yg-limited-partnership.

3.0 Final Proposal

1. The Final Proposal provides for distributions to the Affected Creditors from the Affected Creditor Cash Pool, being a cash pool funded by the Sponsor in the amount of $30.9 million to be distributed *pro rata* to Affected Creditors with Affected Creditor Claims. The Final Proposal also provides that if any residual amount remains in the Affected Creditor Cash Pool following the final distributions to Affected Creditors, such residual funds, if any, would be held by the Proposal Trustee "pending receipt of a duly issued direction from all of the holders of Class A Preferred Units of YG LP, or otherwise by order of the Court". A copy of the Final Proposal is provided in Appendix "G".

[4] There are two groups of LPs. One is represented by TGF and the other by Lax O'Sullivan Lisus Gottlieb LLP.

2. On July 22, 2021, the Sponsor funded the Affected Creditor Cash Pool. The corporate transactions summarized in Section 6.01 of the Final Proposal were completed on the same day and resulted in, among other things, title to the YSL Project being transferred to an entity related to the Sponsor.

4.0 Creditors

1. As noted, sixty-six (66) claims have been filed against the Companies, including claims from trade creditors, real estate brokerages, professional advisors and former employees. The status of the claims filed in this proceeding is summarized in the table below.

	Amount ($000)		
Creditor	Filed	Accepted by Proposal Trustee	Difference
Proven Claims:			
Otis Canada Inc.	4,912	390	4,522
Landpower Real Estate Ltd.	4,500	3,847	653
Homelife Landmark Realty Inc.	3,170	3,145	25
Homelife New World Realty Inc.	1,855	1,541	314
Sarven Cicekian	767	383	384
David Ryan Millar	735	450	285
Sultan Realty Inc.	699	671	28
Mike Catsiliras	681	269	412
Home Standards Brickstone Realty	586	208	378
Louie Giannakopoulos	445	308	137
Other Proven Claims	4,140	3,721	419
Total Proven Claims	22,490	14,933	7,557
Disputed Claims:			
Maria Athanasoulis (disputed)	19,000	TBD	TBD
CBRE	1,239	1,239[5]	0
Henry Zhang (disputed by the LPs)	1,520	1,130	390
Total Unresolved Claims	21,759	2,369	19,390
Total Claims	44,249	17,302	26,947

2. The Sponsor took an assignment of 28 of 66 Affected Creditor claims, totalling approximately $12.1 million. As assignee, the Sponsor participated in the interim distribution and has received approximately $8.4 million of the total amounts distributed.

3. Of the claims in the table, the following claims are the Disputed Claims:

   a) Ms. Athanasoulis;

   b) CBRE; and

   c) Mr. Zhang.

[5] Pursuant to the CBRE Decision, this claim has been accepted. As referenced above, the CBRE Decision has been appealed.

4. The status of the Athanasoulis Claim is discussed in Section 5 below. The status of CBRE's and Mr. Zhang's claims is not relevant to the present motion other than any issues related to the LPs' standing resulting from the CBRE Decision, which has been appealed by the LPs represented by TGF.

5. On March 24, 2022, the Proposal Trustee paid an interim distribution of 70¢ on the dollar to the creditors with Proven Claims at that time.

6. Since the interim distribution, the Proposal Trustee has resolved various claims, including complex claims filed by four former employees of Cresford (the "Former Employees"). The Proposal Trustee negotiated settlements of these claims, which were approved by the Court on May 24, 2022.

7. The Proposal Trustee paid a catch-up distribution to the Former Employees and other creditors with Proven Claims, except those who continue to have Disputed Claims and several others whose claims were recently resolved.

8. The Proposal Trustee has reserved the balance of the Affected Creditor Cash Pool until the Disputed Claims can be determined. The balance of the Affected Creditor Cash Pool is presently approximately $20.5 million, excluding any interest, which accrues to the Sponsor pursuant to Section 5.01(a) of the Final Proposal.

9. The table below illustrates that resolution of the Disputed Claims will determine whether there will be any distributions to the LPs.

	Amount ($000)	
Estimated Distributions	High	Low
Affected Creditor Cash Pool	30,900	30,900
Claims		
Proven Claims	14,933	14,933
Ms. Athanasoulis	-	19,000
CBRE	1,239	1,239
Mr. Zhang	-	1,130
Total Claims	16,172	36,302
Dividend rate	100%	85.1%
Residual for LPs[6]	14,728	-

5.0 Ms. Athanasoulis' Claim

1. Ms. Athanasoulis, Cresford's former President and Chief Operating Officer, filed a proof of claim in the amount of $19 million. This is related to a Statement of Claim she filed on January 21, 2020 against the Companies, other Cresford affiliates and Dan Casey, Cresford's founder. The Athanasoulis Claim is in respect of, *inter alia*, allegations of:

   a) wrongful dismissal damages in the amount of $1 million; and

[6] If the CBRE, Zhang and Athanasoulis claims are disallowed in full, the estimated distributions to the LPs would be approximately $16 million.

b) damages in the amount of $18 million for breach of an oral agreement that the owner of each Cresford project, including the YSL Project, would pay Ms. Athanasoulis 20% of the profits earned on each project. The YSL Project is the only Cresford project that Ms. Athanasoulis alleges to have earned a profit.

2. Cresford denied the existence of an oral agreement entitling Ms. Athanasoulis to 20% of the profits earned on each project.

3. In order to determine whether an oral contract existed, witness testimony was required to be called under oath and the credibility of such evidence assessed. Given the limited Court time available for such a hearing, together with the desire to make a determination of the merits of the Athanasoulis Claim in a fair, expedient, and efficient manner, the Proposal Trustee and Ms. Athanasoulis agreed to arbitrate the determination of liability (*i.e.*, did an enforceable contract exist between Ms. Athanasoulis and Cresford, and was that contract breached?) in respect of her claim ("Phase 1") before William G. Horton (the "Arbitrator"), an experienced commercial litigator and arbitrator.

4. If a contract was found to exist, the parties also agreed to have the Arbitrator determine the quantum of damages, if any, flowing from breach of the contract in the second phase of the arbitration ("Phase 2").

5. On March 28, 2022, the Arbitrator rendered a decision in respect of Phase 1 of the arbitration. He held that an oral agreement existed between Ms. Athanasoulis and Cresford entitling her to 20% of the profits earned on each project.

6. After Ms. Athanasoulis prevailed in Phase 1, both the Sponsor and the LPs took the position that the Proposal Trustee acted without jurisdiction in arbitrating the Athanasoulis Claim rather than determining it itself, and then litigating an anticipated appeal on any such determination (by either the LPs or Ms. Athanasoulis, depending on the nature of the determination). The LPs and the Sponsor then took the position that the Proposal Trustee improperly delegated its authority to determine the Athanasoulis Claim to the Arbitrator. As detailed in Section 5.1 below, Justice Kimmel agreed with this position, in part.

7. The scheduling of Phase 2 of the arbitration was deferred pending the outcome of the Funding Motion.

5.1 Athanasoulis Claim Process

1. As referenced above, Justice Kimmel heard the Funding Motion. She decided, among other things, that:

   - "The continuation of phase 2 of the Arbitration provided for in the Agreement to Arbitrate the Athanasoulis Claim is not a valid exercise of the authority granted to the Proposal Trustee under the Proposal or s. 135 of the BIA. Therefore, the court no order [sic] requiring the Sponsor to fund (and/or indemnify the Proposal Trustee for) the budgeted Administrative Fees and Expenses associated with phase 2 of the Arbitration (of approximately $700,000)[7]." [paragraph 96 a)]

   - "The Sponsor is required to indemnify the Proposal Trustee for all of the reasonably incurred Administrative Fees and Expenses in relation to the determination and valuation of the Athanasoulis Claim, including for phase 1 of the Arbitration and for whatever procedure the Proposal Trustee, in its discretion, determines appropriate to receive the further evidence and positions of Ms. Athanasoulis and other interested stakeholders and any expert inputs deemed necessary." [paragraph 96 c)]

   - "The Proposal Trustee should first determine how it intends to proceed in light of the court's decision on this motion, and may prepare a budget for the anticipated Administrative Fees and Expenses associated with this exercise, or seek indemnification after the fact, as it deems appropriate." [paragraph 96 d)]

2. Since the date of the November 1st Decision, the Proposal Trustee has considered the process to determine the Athanasoulis Claim and has sought input from Ms. Athanasoulis, the LPs, the Companies and the Sponsor regarding this process. Based on the feedback received, the Proposal Trustee summarized its proposed approach which it presented to Ms. Athanasoulis, the LPs, the Companies and the Sponsor for comments.

3. On December 7, 2022, the Proposal Trustee's counsel sent the following recommended process by email to counsel representing Ms. Athanasoulis, the LPs, the Companies and the Sponsor:

[7] This represented the Proposal Trustee's estimated professional costs associated with Phase 2 of the arbitration.

All,

Here is a revised process proposal based on feedback received.

Steps Prior to Process Motion

1. LPs, Athanasoulis and Trustee to issue briefs “with prejudice” (whether based on their mediation briefs or otherwise as they see fit) as basis for Trustee’s determination. LPs and Athanasoulis may issue responding briefs at their discretion on an expedited schedule to be agreed between the parties. Please advise when you can deliver such briefs.

The Trustee would then bring a motion for directions before Justice Kimmel to determine the process. The Trustee will propose the following and the parties will have the opportunity to contest any portion of the Trustee’s recommendation. As per my previous email, please advise if you believe such a motion should be booked for more or less than two hours. We would like to book it as soon as possible.

Process Motion Proposed Steps/Process

1. Trustee to issue Notice of Determination on Athanasoulis Claim (a draft may be provided in advance of the motion so that parties may take it into consideration on the motion). The Notice of Determination will not be shared with any party prior to issuance but a copy will be provided to counsel to the LPs and Concord when issued.
2. Notice of Determination to be based on full record to date in these proceedings, including the “with prejudice” briefs noted above, the materials filed and evidence given at the Phase One arbitration the decision of Mr. Horton, and any responses to direct information requests from the Trustee. It will address both the wrongful dismissal and profit share claims.
3. The Notice of Determination shall set out all of the grounds supporting the Trustee’s determination in sufficient detail to appropriately frame the issues for any appeal.
4. Notwithstanding the position of the LPs, the Trustee considers Mr. Horton’s decision to be binding in this proceeding, consistent with Justice Kimmel’s direction that it be the “factual predicate upon which the determination of [Ms Athanasoulis’] claim will proceed”. The LPs will have an opportunity to argue before Justice Kimmel that Mr. Horton’s decision is merely non-binding “inputs” to the extent it is germane to the process.
5. Athanasoulis to file any appeal pursuant to Section 135 of the BIA.
6. Athanasoulis appeal shall not be required at this time to adduce detailed evidence valuing and quantifying her profit share claim but may address any issues raised in Notice of Determination.
7. Justice Kimmel to decide appeal procedure (e.g., de novo vs true appeal) based on submissions from the parties.
8. LPs shall be entitled only to raise issues in the appeal that pertain directly: (a) to whether the LPs must be repaid in full prior to any payments being made on the Athanasoulis Claim; and (b) the enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement.
9. Athanasoulis entitled to full response to any materials filed by LPs in this regard.
10. The LPs shall not be entitled to raise issues relating to any counterclaim or set-off they may assert against Ms. Athanasoulis.

4. As Ms. Athanasoulis and the LPs disagree with certain aspects of the process summarized above, the Proposal Trustee scheduled a case conference on December 21, 2022 with Justice Kimmel. The purpose of the case conference was to schedule a motion for advice and directions regarding the Athanasoulis Claim Process.

5. Pursuant to an endorsement dated December 21, 2022, Justice Kimmel scheduled a motion to be heard on January 16, 2023 to address the Athanasoulis Claim Process.

6. The Proposal Trustee has prepared a Notice of Disallowance regarding the Athanasoulis Claim (the "Notice"), a draft of which is provided as Appendix "H". The Notice has not yet been issued in order to avoid commencement of the 30-day appeal period but a draft is being filed with this Report in order to provide context to the Athanasoulis Claim and issues that may be raised at the hearing of the Proposal Trustee's motion.

6.0 Conclusion

1. In the Proposal Trustee's view, the Athanasoulis Claim Process fairly balances the interests of the stakeholders while also providing them an opportunity to make submissions regarding the procedure for an appeal of the Athanasoulis Claim to be heard.

* * *

All of which is respectfully submitted,

KSV Restructuring Inc.

KSV RESTRUCTURING INC.
IN ITS CAPACITY AS PROPOSAL TRUSTEE OF
YG LIMITED PARTNERSHIP AND
YSL RESIDENCES INC.,
AND NOT IN ITS PERSONAL CAPACITY

Appendix “A”

CITATION: YG Limited Partnership and YSL Residences (Re), 2021 ONSC 4178
COURT FILE NOS.: CV-21-00655373-00CL/BK-21-02734090-0031, CV-21-00661386-00CL & CV-21-00661530-00CL
DATE: 20210629

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

AND:

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

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

AND RE: 2504670 CANADA INC., 8451761 CANADA INC. and CHI LONG INC., Applicants

AND

CRESFORD CAPITAL CORPORATION, YSL RESIDENCES INC, 9615334 CANADA INC., YG LIMITED PARTNERSHIP and DANIEL CASEY, Respondents

AND RE: 2583019 ONTARIO INCORPORATED AS GENERAL PARTNER OF YONGESL INVESTMENT LIMITED PARTNERSHIP, 2124093 ONTARIO INC., SIXONE INVESTMENT LTD., E&B INVESTMENT CORPORATION and TAIHE INTERNATIONAL GROUP INC., Applicants

AND

9615334 CANADA INC. AS GENERAL PARTNER OF YG LIMITED PARTNERSHIP and YSL RESIDENCES INC., Respondents

BEFORE: S.F. Dunphy J.

COUNSEL: *Harry Fogul* and *Miranda Spence*, for YG Limited Partnership and YSL Residences Inc.

Shaun Laubman and *Sapna Thakker*, for 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc.

Alexander Soutter, for YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc.

David Gruber, Jesse Mighton, and *Benjamin Reedijk,* for Concord Properties Developments Corp. and its affiliates

Jane Dietrich and *Michael Wunder,* for 2292912 Ontario Inc. and Timbercreek Mortgage Servicing Inc.

Robin B. Schwill, for KSV Restructuring Inc. in its capacity as the proposal trustee

Roger Gillot and *Justin Kanji,* for Kohn Pedersen Fox Associates PC

Reuben S. Botnick, for Royal Excavating & Grading Limited COB as Michael Bros. Excavation

Daniel Naymark and *Jamie Gibson*, for Sarven Cicekian, Mike Catsiliras, Ryan Millar and Marco Mancuso

Brendan Bowles and *John Paul Ventrella*, for GFL Infrastructure Group Inc.

Mark Dunn and *Carlie Fox*, for Maria Athanasoulis

George Benchetrit, for 2576725 Ontario Inc.

Joshua B. Sugar, for R. Avis Surveying Inc.

Paul Conrod, for Restoration Hardware Inc.

James MacLellan and *Jonathan Rosenstein,* for Westmount Guarantee Services Inc.

Albert Engle, for Priestly Demolition Inc.

HEARD at Toronto: June 23, 2021

AMENDED REASONS FOR INTERIM DECISION

Note: these reasons were amended on July 2, 2021 as more fully described in the in the concluding paragraphs hereof.

[1] The debtors are seeking approval of a bankruptcy proposal that has obtained the near unanimous approval of those affected creditors who cast a vote. Two groups of limited partnership unitholders have challenged the actions of the General Partner of the debtor YG Limited Partnership for much of the past year and urge me to annul the bankruptcy entirely or to reject the proposal and, if need be, to allow a Receiver or Trustee in bankruptcy to canvass the market fairly and objectively. Another unsecured creditor urges me to disregard much of the appraisal evidence tendered because she has been excluded from examining it and the result is a record that casts grave doubt as to whether fair value for stakeholders is being realized by this process.

[2] For the reasons that follow, I have decided that I will not approve the Proposal in the form it has been presented to me. The Proposal is yet able to be amended pursuant to art. 3.01 thereof and it is possible that an amendment may be formulated to address the concerns raised by the findings I outline below before a final decision on the fate of the Proposal is made.

Background facts

[3] A central issue in this case is the value of the "YSL Project" – the property owned by the debtor YSL as bare trustee for the limited partnership (the debtor YG LP) charged with developing it. Valuation is an area on which I must tread lightly in terms of what I can record in writing so as not to impact adversely any potential sale process that may be necessary in future.

[4] What follows is a general description of the capital structure of the debtors and the project sufficient to permit an understanding of the issues. For comparison purposes, it is relevant to consider the size of the project. There is no dispute that the "as if completed" value of the project is above $1 billion. How much above and based on which assumptions is an issue, but I provide the round figure solely for comparison purposes relative to the debt and equity interests discussed.

[5] The project is fully zoned and permitted for construction of an 85-story retail and condominium complex planned for the corner of Yonge St. and Gerard in downtown Toronto. Substantial pre-sales have been made. Demolition of the old structures and shoring up of the excavation have been largely completed. Unfortunately, things ground to halt in March of 2020 and the project has been stuck in the "hole in the ground" stage ever since.

The project ownership structure

[6] YP GP has a General Partner with nominal capital and a nominal interest in the limited partnership. The "equity" in the partnership effectively resides in the "A" units with approximately $14.8 million in capital but a capped right to return on that capital equivalent

to interest (12.25% per year rate of return) and the “B” units who alone receive all of the residual profits from the project without limit.

[7] The owner of the “B” units and the General Partner are under common control within the Cresford group of companies as are the parties recorded as payees of the $38.3 million related party debt to which I shall refer.

The project debt structure

[8] The secured debt – including registered mortgages and construction liens – stands at about $160 million. The figure for secured debt is slightly misleading. There is just over $100 million in deposits from condominium pre-sales made for the most part prior to 2019. These are insured by the second secured creditor whose claim would increase dollar for dollar if the relevant purchase agreements were repudiated and the deposits had to be returned. For this reason and to have an “apples to apples” idea of the debt structure, a figure of about $260 million in secured debt is appropriate.

[9] The third-party unsecured debt that has been identified by the Trustee is in the range of approximately $20 million plus or minus a few million dollars depending upon reserves allowed for claims yet to be filed or finalized. There are also various litigation claims outstanding the largest of which is from a former officer claiming that the limited partnership was a common employer and seeking, among other things, to enforce oral profit-sharing agreements. I have reviewed the Trustee’s report and in particular the Trustee’s reasoned conclusion that these claims are too contingent to be considered valid for voting purposes. I concur in that assessment. A conservative and prudent assessment of potential total unsecured claims is thus in the range of about $25 million – a figure advanced with full knowledge that the total of all contingent claims identified could be in the same order of magnitude again. For the purposes of this motion, I find the figures estimated by me above are reasonable – those findings are, of course, without prejudice to the creditors holding such claims proving them in due course.

[10] There is also $38.3 million in outstanding advances to YG LP recorded on its books from related parties. I have found those claims to be equity claims for all purposes relevant to this hearing for reasons I shall expand upon below.

[11] In round figures, one can thus consider there to be approximately $260 million of secured debt and about $20-$25 million of unsecured debt outstanding. The Proposal assumes all of the former and would pay 58% of the latter when finalized. The “fulcrum” stakeholders in this case are thus the unsecured creditors to the extent of the 42% of their claims that are compromised ($8.4 to $10.5 million) plus the “A” limited partners in YG LP ($14.8 million plus accrued “interest” entitlements) – such figures based upon the estimates and rulings that I have made and explained herein.

Summary of nine findings made

[12] The process of sifting through the mountains of evidence presented to me by the parties has been made exceptionally time-consuming and tedious by reason of the lack of usable electronic indexing in much of the materials filed. Tabs or electronic hyperlinks within compilations of electronically filed documents are non-existent in all but the most recently filed documents and there are many, many thousands of pages of documents presented. The profession is going to need to get on top of this problem as judges cannot and will not in future undertake such gargantuan efforts to sift through a case when a few moments of care and attention at the front end could simplify it to such a great degree.

[13] Time does not permit me to set forth in writing a complete account of my review of the evidence and my conclusions – a written summary of which I was about 75% through before the impossibility of completing it in the form intended within the time available became obvious. I shall instead present below nine conclusions which encapsulate my reasons for finding that the Proposal as it currently stands has failed to satisfy me of the matters required by s. 59(2) of the BIA or the common law test of good faith.

(i) The McCracken Affidavit is inadmissible

[14] As is often the case in Commercial Court matters, this case proceeded on a "real time" schedule. In addition to the bankruptcy case that was commenced with an NOI filed on behalf of the debtors on April 30, 2021, there were two applications commenced the day before by two groups of YG LP limited partners seeking, among other things, the removal of the General Partner and various declarations challenging the authority of the General Partner to act on behalf of the partnership in any capacity and alleging breaches of fiduciary duty by the General Partner. The Proposal itself was filed on May 27, 2021 working towards a scheduled June 10, 2021 creditor meeting. On June 1, 2021 I issued directions for the conduct of all three proceedings with a view to having the sanction hearing ready to proceed on June 23, 2021.

[15] The Proposal Sponsor is Concord Properties. Concord is not a party to any of these proceedings although it is central to all three. Concord sponsored the Proposal and is bearing all the costs of it under a Proposal Sponsor Agreement dated April 30, 2021.

[16] The limited partner applicants issued subpoenas to Mr. McCracken – apparently the officer of Concord responsible for this Proposal. On the advice of counsel, Mr. McCracken declined to appear absent an order compelling him to do so. Counsel took the position that leave was required under the Bankruptcy Rules to compel him to appear in the bankruptcy proceeding and declined to produce him.

[17] The position taken was a curious one given my specific direction on June 1 that I was *not* applying the BIA stay to the two applications and that specific aspects of both

applications would be heard and decided together on June 23, 2021 when the fairness hearing was conducted. The case timetable made specific allowances for responding records with respect to the limited partner applications and facta in relation to them. My ruling on June 1, 2021 was in both the civil and bankruptcy proceedings and bore the style of cause of both.

[18] Whether leave was or was not formally required to *compel* Mr. McCracken to appear, his failure has consequences in terms of the fairness of the process leading to the approval motion in front of me. The opponents of the Proposal were deprived of the opportunity to explore aspects of the unfairness or unreasonableness of the Proposal that they had raised. There was insufficient time available in the tight timetable to drop everything and bring a leave application. The position taken ran utterly contrary to the spirit and intent of my ruling on June 1, 2021 at which Concord's counsel appeared *and made submissions*. This is the sort of issue that counsel applying the "three C's" of the Commercial List ought to have agreed to disagree upon and produced the witness without prejudice to objections that might be raised.

[19] It is against the foregoing backdrop that the affidavit of Mr. McCracken – delivered the day prior to the fairness hearing – must be considered.

[20] The affidavit was filed far too late to permit any interested party to respond to it effectively or to cross-examine upon it. None of the subject-matter of the affidavit was new information. The affidavit was entirely devoted to providing responses to various issues seen in written arguments or that arose on the cross-examination of other witnesses.

[21] Concord appeared to consider itself sufficiently at interest to appear through counsel on June 1, 2021 while declining to submit to examination because of its non-party status when preparations for this hearing were in full swing a few days later. Permitting the admission of this affidavit at this juncture would be to sanction unfairness of the highest order. A timetable was worked out for the hearing of this motion – worked out, I might add, at a motion that Concord was present at through counsel. Whether or not Concord had the *right* to insist upon a further motion to compel its attendance during the pre-hearing procedures, it certainly knew that taking that position when there was no time available to challenge it in court would have the practical effect that it did.

[22] Lying in the weeds is a strategy, but it does not confer the right to spring out of them at will. I find the McCracken affidavit to be inadmissible and attach no weight to it.

(ii) No weight can be attached to the CBR April 2021 Appraisal

[23] The parties have very hotly debated the valuation evidence that is on the record before me. A portion of that valuation evidence has been sealed. My reason for doing so is straightforward: the approval of the Proposal cannot be taken for granted and it is thus

reasonably foreseeable that the project may have to be sold by a Trustee or Receiver in the near future and the ability of whichever court officer is charged with undertaking that sale to achieve the highest and best price available ought not to be impaired more than the circumstances already have by the disclosure of appraisals that may serve to skew market expectations. A significant portion of such evidence is part of the public record and between the public information and the use of carefully-framed circumlocutions I believe that I can convey my conclusions and reasons for them regarding the valuation evidence with reasonable clarity.

[24] Two of the appraisals before me, both from CBRE, are the most central to the questions I must determine. The first in time is dated August 8, 2019 providing CBRE's opinion of value as at July 30, 2019. This appraisal was prepared for the parent company of the debtors within the Cresford group and is based on the particular assumptions set out therein, including some supplied by Cresford. The second in time, also by CBRE, is dated April 30, 2021 as of March 16, 2021. This latter appraisal was prepared for Concord based on the assumptions set out therein, including some supplied by Concord. I shall not discuss in a public document the actual appraisal amounts in either, focusing instead on the differences between them.

[25] For present purposes, it is sufficient for me to observe that the 2021 CBRE appraisal is lower than the 2019 CBRE appraisal and lower by an amount that is significantly higher than the sum of the compromised amount of unsecured claims under the Proposal plus the total capital of the "B" unitholders in YG LP.

[26] I find that I can attach little weight to the 2021 CBRE appraisal in these circumstances because:

a. The assumptions given to CBRE by Concord were materially different than those used in the 2019 CBRE appraisal including as to such things as leasable square footage of residential and retail space;

b. When it formulated the instructions to CBRE, Concord was in the process of attempting to negotiate a Proposal to acquire the property through the bankruptcy process given lack of limited partner consents and was being commissioned at a time when Concord had a clear and obvious interest in having appraisal evidence suggesting that the project was at least partly underwater;

c. The downward alterations made by Concord to the square footage assumptions used by CBRE are unexplained, untested and appear to be admitted as having been quite preliminary at all events;

d. Concord did not submit Mr. McCracken to cross-examination to examine in depth the reasons for the significant negative difference between the two instructions given to CBRE on the conflicting appraisals;

e. The differences between the two have not been reasonably or adequately reconciled. There has been no general downward correction to residential real estate in Toronto that has been brought to the court's attention nor can the difference between the two appraisals reasonably be attributed solely to pandemic-induced alterations to the retail environment.

(iii) ALL Construction Lien Claims are Unaffected Creditors under the Proposal

[27] Under the Proposal, Construction Lien Claims are defined as "Unaffected Creditors". The Trustee indicates that the total amount of such claims is $11.865 million. Of this total, fifteen lien claimants with $9.19 million in lien claims outstanding entered into assignment agreements with the Proposal Sponsor. As these are non-voting Unaffected Creditors under the Proposal, Concord required them to file claims as Affected Creditors in order to acquire the right to vote and to name a proxy designated by Concord.

[28] There was some controversy about what precisely the lien claimants received in return for agreeing to convert claims that were to be paid $1.00 per $1.00 of valid claims under the Proposal into claims receiving no more than $0.58 per dollar of claim value. The Trustee-reported second-hand information from Concord denying any "side" deals does little to address this concern. Assurances as to the lack of a side deal do not serve the purpose of permitting a reasonable understanding of the main deal. None of them have been disclosed beyond a skeletal summary and Concord declined to permit a representative to be examined prior to the hearing.

[29] It is of course open to the Proposal Sponsor to make any proposal that satisfies the formal requirements of the BIA if the debtor is prepared to adopt it and submit it to the creditors and the creditors are willing to accept it with their eyes open. In this case however the Proposal Sponsor has induced $9.19 million of otherwise Unaffected Creditors to file claims as something they are not by definition (i.e. Affected Creditors) thereby effectively reducing the size of the cap from $65 million to $55.8 million and the maximum pool of funds available to the actual Affected Creditors described by the Proposal from $37.7 million to $32.4 million. These are material changes impacting all Affected Creditors that follow from arrangements made by the Proposal Sponsor outside the terms of the Proposal.

[30] The Proposal makes no provision for creditors "downshifting" their claims voluntarily. Lien claims are defined as "Unaffected Claims" and I see no basis for them to be accepted under the Proposal on any other basis particularly where doing so operates to the obvious detriment of the affected class members. This is not a case of a

secured creditor valuing its security and filing an unsecured claim for the shortfall. There are consequences to such a valuation exercise that are absent here.

[31] The "electing" lien claimants have little in common with the actual Affected Creditors who had no election to make. Despite having made the election, assuming there was any basis in the Proposal to make such an election (and it appears to me that there was not), such creditors retained their security intact. Pursuant to art. 9.01 of the Proposal, the Proposal would have "no effect upon Unsecured Creditors" which definition does not cease to apply to them by virtue of a make-shift "election" for which the Proposal makes no provision. They did not agree to surrender their security nor even to value it in the bankruptcy process. They agreed to sell their claims on whatever terms they chose to accept from the Proposal Sponsor secure in the knowledge that if, for any reason, the Proposal does not move forward, their security remains intact and unaffected.

[32] This is an element of unfairness in this that I find particularly disturbing. It is all the more disturbing when I am not at all persuaded that the unsecured creditors face the spectre of near certain annihilation in the event of a bankruptcy or receivership but face the very real prospect of additional and illegitimate dilution of their claim value were I to approve the Proposal as presented with the presence of lien claimants in the Affected Creditor pool.

(iv) The related party claims must be treated as equity

[33] A fundamental principle of the BIA is that equity claims are subordinate to debt claims. This principle is voiced in s. 60(1.7) of the BIA that provides quite simply that "[n]o 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 expresses a similar requirement in respect of dividends more generally. While there is some similarity behind the concept of "equity claims" in Canadian insolvency law and that of "equitable subordination" the two are separate and one and must not be confused with the other: *U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662 (CanLII) at para. 101.

[34] The limited partner applicants submit that the intercompany advances appearing in the general ledger of YG LP should be treated as equity claims within the meaning of the BIA. The debtors on the other hand urge me to pass over this issue entirely arguing that approval of the proposal does not entail approval of any payment of intercompany claims. Such claims will ultimately be determined by the Trustee and if disallowed for any reason will receive no distribution.

[35] I cannot accept the debtors' argument that I should sweep the equity claims under the carpet to be dealt with another day in another forum. This is so for the following reasons:

a. The applicant limited partners have no standing to challenge the proof of the related party claims within the bankruptcy process even if their claims against related parties are not themselves released by the Proposal.

b. On June 1, 2021 I directed that issues raised in the two applications would be dealt with on June 23. A theme in those applications was, among others, the allegation that the General Partner had been seeking to divert substantial payments to Cresford from various investor proposals negotiated by the Cresford group ahead of limited partners, the allegations that representations had been made in the Subscription Documents and elsewhere that Cresford entities would be paid out of distribution after the "A" unit limited partners, that counsel for Cresford had confirmed that the intercompany loans were subordinated to the limited partners, that the General Partner had acted in breach of its fiduciary duties and that the Proposal was not being advanced in good faith; and
c. The timetable I approved on June 1 specifically contemplated the foregoing aspects of those applications being dealt with on June 23, 2021.

[36] If the related party claims are equity claims under the BIA, then it is also highly likely that the notional purchase price for the project being paid by the Proposal Sponsor under the Proposal must be viewed as being $22 million less than it might otherwise appear, a fact that is also material to the matters I must consider on this motion.

[37] The allegations of the applicant limited partners in the two outstanding applications challenge the good faith with which the Proposal has been advanced by the General Partner in part on the theory that the Proposal has in fact been advanced to secure payment of the related party claims in priority to the "A" unitholders and without securing their consent.

[38] For the foregoing reasons, I cannot avoid a consideration of whether the related party claims are equity claims. My conclusions on that subject are an integral part of any conclusion I must make on the subject of good faith or the criteria to be considered under s. 59(2) of the BIA.

[39] Are the related party claims identified by the Trustee in this case "equity claims"?

[40] The BIA contains a definition of "equity claims" that is deliberately non-exhaustive. In *Sino-Forest Corporation (Re),* 2012 ONCA 816 (CanLII) (at para. 44) the Court of Appeal found that the term should be given an expansive meaning to best secure the remedial intentions of Parliament.

[41] Subsequent cases have explored the concept of "equity claim" with a view to fleshing out its parameters. Some of the guidelines that can be distilled from that jurisprudence include the following:

a. Neither the "intention of the parties" as between non-arm's length parties nor the formal characterization they apply is conclusive as to the true nature of the transaction: *Tudor Sales Ltd. (Re),* 2017 BCSC 119 (CanLII) at para. 35 and *Alberta Energy Regulator v Lexin Resources Ltd*, 2018 ABQB 590 (CanLII) at para. 37.

b. The manner in which the transaction was implemented, and the economic reality of the surrounding circumstances must be examined to determine the true nature of the transaction with the form selected being merely the "point of departure" of the examination: *Lexin* at para. 37.

c. It is helpful to consider whether the parties to the transaction had a subjective intent to repay principal or interest on the alleged loan from the cash flows of the alleged borrower and, if so, was that expectation reasonable: *Lexin* at para. 41.

d. It is also helpful to consider the "list of factors" that courts have looked at in such cases – being careful not to apply them in a mechanical way or as a definitive checklist: *Lexin* at paras. 42-43.

e. Among the factors to examine are:

    i. the presence or absence of a fixed maturity date and schedule of payments (absence of such terms being a potential indicator of equity);

    ii. the presence or absence of a fixed rate of interest and interest payments. Again, it is suggested that the absence of a fixed rate of interest and interest payments is a strong indication that the advances were capital contributions rather than loans;

    iii. the source of repayments. If the expectation of repayment depends solely on the success of the borrower's business, the cases suggest that the transaction has the appearance of a capital contribution;

    iv. the security, if any, for advances; and

    v. the extent to which the advances were used to acquire capital assets. The use of the advance to meet the daily operating needs for the corporation, rather than to purchase capital assets, is arguably indicative of bona fide indebtedness: Lexin at paras. 42-43.

[42] The related party claims may be broken down into different buckets for the purposes of this analysis. The first one consists of payments that were made to retire loans taken out for the specific purpose of financing equity interests in YG LP. This

involved loans used to buy out the $15 million investment of a former limited partner, loans used to finance the Cresford group of companies' $15 million equity investment in Class B units as well as interest paid on both of these loans some or all of which has been recorded as obligations of YG LP on its books.

[43] Clearly advances made or charged to YG LP for the direct or indirect purpose of financing the purchase of an equity interest in YG LP are likely to the point of certainly to be characterized as equity claims of YG LP for the purposes of insolvency law. The evidence to this point supports the reasonable inference that a very substantial portion of the advances charged to YG LP by non-arm's length parties can be so characterized.

[44] A second category of advances made can only be described as "miscellaneous" comprised of various sporadic payments made by members of the Cresford group of companies that were recorded in the ledger of the limited partnership net of other payments made by the limited partnership to the Cresford group.

[45] The terms of the intercompany advances recorded on the general ledger of the limited partnership share the following characteristics:

a. They were all non-interest bearing without any defined term or maturity date; and

b. There are no loan documents evidencing any of them.

[46] Such payments as there were from YG LP on account of these advances were sporadic. The nature of the YG LP project is such that there is no cash flow nor any expectation of cash flow being available to repay the intercompany advances recorded until project completion when deposits and sales proceeds become available. The evidence does not suggest that intercompany advances were primarily short-term bridge advances pending the receipt of project financing that was to be used to repay them.

[47] There is substantial evidence that the related party advances were intended to be subordinated to holders of "A" units of YG LP and are thus equity claims. In the interest of time, I shall only summarize this evidence:

a. Direct written representations were made to the investors in YG LP "A" units as part of the subscription process that after payment of "project expenses" only "external lenders" debt would be repaid ahead of them and that distributions to "Cresford" – unambiguously referencing the group of companies rather than one entity – would come after repayment of invested capital and the agreed return on investment to the limited partner investors;

b. Cresford's communications to the limited partners never disclosed the existence of any "debt" owed to Cresford even when portraying "current debt" in various discussions with or disclosures made to them until very

recently (and long after the advances in question were recorded on YG LP's books);

c. Other Cresford group projects with similar capital structures also made representations that intercompany advances were treated as equity;

d. There was a direct, written representations made by prior counsel to the General Partner in October 2020 that such intercompany advances were "subsequent in priority" to the YG LP "A" unit investors – that admission has since been retracted without an adequate explanation for why it was an alleged error; and

e. Cresford's CFO also advised that the YG LP "A" unitholders would be paid in priority to "Cresford" a term used to describe the related group of Cresford companies under common control.

[48] A review of the foregoing factors in light of the jurisprudence leads me to the conclusion that the related party advances must be considered as equity claims for the purposes of this motion at least. Virtually all indicators reviewed point towards equity and there is little to no evidence leaning the other way.

(v) The implied value of the Proposal is $22 million less than assumed

[49] The Proposal operates to reduce the payments made to unsecured creditors if claims are lower than the $65 million cap. The converse is not the case. Absent the lien claims and the intercompany claims there is no mathematical prospect of the $65 million cap being operative unless the contingent and late-filed claims are resolved at levels far in excess of any reasonable estimate. This means that the consideration paid by Concord under the Proposal must be considered to be worth $22 million less than it might have been had the related party claims not been equity claims.

(vi) The general partner had authority to file the NOI

[50] The two groups of limited partners have raised three broad categories of objections to the capacity of the general partner to have filed the NOI and sought approval of the Revised Proposal: (i) as a matter of law, all partners including limited partners, must approve filing for bankruptcy; (ii) pursuant to the Limited Partnership Agreement, the general partner lacked the authority to file for bankruptcy; and (iii) the general partner ceased to be general partner prior to the filing. I shall consider each of these in turn.

S. 85(1) of the BIA

[51] Section 85(1) of the BIA provides that it "applies to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general

partners of a limited partnership becoming bankrupt, the property of the limited partnership vests in the trustee.”.

[52] The limited partners’ position was that since all partners of a general partnership must authorize a bankruptcy filing and since s. 85(1) of the BIA applies the law in relation to general partnerships to limited partnerships in “like manner”, it follows that an NOI must be authorized by all limited partners in addition to the general partner. In support of this interpretation they cite the case of *Aquaculture component Plant V Limited Partnership (Re)*, 1995 CanLII 9324 (NS SC) where two NOI’s filed on behalf of limited partnerships were annulled on this basis.

[53] While the decision of Hamilton J. in the *Aquaculture* case is entitled to deference, it is not binding upon me. I find that I am unable to agree with its reasoning.

[54] The *Aquaculture* case stands quite alone in the jurisprudence on this topic – alone in the sense that none appear to have followed *or* disagreed with it as far as the research conducted by the parties has been able to determine. In the 26 years since it was decided, a significant number of limited partnerships have passed through our bankruptcy courts either for proposals or liquidations without apparent objection on this score. That practice of course does not have the effect of altering the law but it is at least a factor to consider given the number of times since then that Parliament has examined the BIA including with the addition of s. 59(4) that authorized changes to the constating documents of a debtor including a limited partnership.

[55] I reach a different conclusion than was reached in *Aquaculture* for the following reasons:

a. The use of general “in like manner” language in s. 85(1) of the BIA is intended to ensure that the provision is interpreted consistent with the objects of the BIA and not in a manner as to defeat those objects or render the benefits of the BIA largely inaccessible to limited partnerships. The procedure for filing an NOI was intended to offer debtors a swift and relatively low cost means of seeking creditor protection after a secured creditor gives the required ten-day notice of its intention to enforce. Requiring unanimous consent for filing of an NOI would have the practical effect of making the benefits of bankruptcy law unavailable to limited partnerships in practice in a large number of cases. Limited partnerships often have large numbers of limited partners and the time required to convene a meeting and obtain unanimous consent would require more time than secured creditors are required by law to give in the way of notice.

b. Provincial law generally provides that only general partners may bind a limited partnership (in Manitoba, s. 54(1) of the *The Partnership Act*, CCSM c P30) and the BIA treats partnerships and limited partnerships as a full

"debtor". The policy behind requiring all *general* partners to authorize a bankruptcy filing is obvious – all are liable without limit for the liabilities of the partnership. The same is not the case with a limited partnership.

c. Section 59 of *The Partnership Act* also provides that actions or suits in relation to the limited partnership may be brought and conducted by and against the general partners as if there were no limited partners. This too supports the proposition that the consent of limited partners is not required for the filing of an NOI on behalf of the partnership.

[56] I find that s. 85(1) of the BIA did not require the asset of each limited partner to the filing of an NOI.

[57] The limited partners also pointed to provisions of the Limited Partnership Agreement to allege that the General Partner had automatically ceased to be general partner of the partnership by reason of certain actions or that that it lacked the authority to file on behalf of the partnership.

Did the General Partner cease to be a general partner of YG LP at any time?

[58] The Proposal Sponsor Agreement is dated April 30, 2021 and was entered into between Concord as Proposal Sponsor and YG LP acting through the General Partner. It was executed prior to filing the NOI but *after* the two limited partner groups had filed their separate applications seeking, among other things, to remove the General Partner. To the extent it is relevant, there can be no question but that Concord was aware of the terms of the Limited Partnership Agreement at all relevant times when negotiating and entering into the Proposal Sponsor Agreement.

[59] Pursuant to s. 1.1 of the Proposal Sponsor Agreement, YG LP agreed to "use commercially reasonable efforts to effect a financial restructuring of [YG LP] that will result in the acquisition of the Property by the Proposal Sponsor together with [YG LP's] rights, title and interests in and to such Project-related contracts as may be stipulated". A draft of a proposal, substantially similar to the Proposal before this court for approval, was appended as a schedule to the Proposal Sponsor Agreement. The agreement was signed by Mr. Daniel Casey on behalf of each of the Cresford companies named as parties including YG LP.

[60] Section 10.14 of the YG LP Limited Partnership Agreement provides that "None of the following actions shall be taken unless it has *first* been approved by Special Resolution: (a) approving or disapproving the sale or exchange of all or substantially all of the business or assets of the Partnership"(emphasis added).

[61] The Proposal contemplated by the Proposal Sponsor Agreement clearly provides for the sale or exchange of all or substantially all of the business or assets of the Partnership. Section 1.1 of the Proposal Sponsor Agreement obliged YG LP to "use

commercially reasonable efforts" to cause this to occur, including by filing the NOI and to requesting court approval of the Proposal. As obliged by the Proposal Sponsor Agreement, YG LP filed an NOI, filed the Proposal and subsequently sought court approval of the Proposal.

[62] Entering into the Proposal Sponsor Agreement constituted the "approval" of YG LP to the sale or exchange of all or substantially all of the business or assets of the Partnership" even if approvals of other parties were also required in order to *complete* the transaction. The prohibition in art. 10.14(a) attaches to the approval of the action and not its completion.

[63] Section 7.1(c) of the Limited Partnership Agreement creates an Event of Default if the General Partner "becomes insolvent … consents to or acquiesces in the benefit of [the BIA]". By filing the NOI as a general partner of YG LP, the General Partner necessarily admitted to being insolvent at the time the NOI was filled out. There is no evidence that such state of insolvency arrived suddenly that day. The General Partner has accordingly admitted to the existence of an insolvency default under s. 7.1(c) of the Limited Partnership Agreement at some time prior to filing the NOI failing which no NOI would have been possible. By signing the Proposal Sponsor Agreement and agreeing to file the NOI to advance the Proposal, the General Partner also consented to the receiving the benefit of the BIA proposal provisions.

[64] For all of the foregoing reasons, the signing of the Proposal Sponsor Agreement amounts to an admission of further breaches of the Limited Partnership Agreement.

[65] Do such breaches entail the automatic removal of the authority of the General Partner to act as such at the time the NOI was actually filed? The answer in my view is that none of them have that effect.

[66] Section 11.2 of the Limited Partnership Agreement concerns the removal of the General Partner. Pursuant to s. 11.2(a), the General Partner "'may be removed" by a court of competent jurisdiction on certain named grounds. That has not occurred. Section 11.2(b) provides that the General Partner "shall cease to be general partner" if any of the named events occurs. None of the agreement to file an NOI, the state of being insolvent or the signing of the Proposal Sponsor Agreement can be read to be included in the list of events listed in s. 11.2(b). The *aftermath* of the filing of the NOI may well be such a trigger but the answer to that question would require me to contend with the effects of the automatic stay which has not been raised before me.

[67] Accordingly, I find that the NOI filed by the General Partner was not void or subject to any similar infirmity. The foregoing conclusion refers only to the actual filing of the NOI and specifically does not apply to the breaches of the Limited Partnership Agreement consequent upon entering into the Proposal Sponsorship Agreement discussed above.

(vii) The Proposal was the product of a flawed process and breaches of fiduciary duty by the General Partner

[68] There are two aspects to this part of the objections raised by the objecting limited partners. First, it is alleged that during the year leading up to the Proposal Sponsor Agreement, the General Partner breached its fiduciary duty to act in the best interests of the partnership by seeking to advance the interests of non-arm's length parties to the detriment of the limited partners while simultaneously frustrating every effort of the limited partners to access the information that the Limited Partnership Agreement and the Manitoba *Partnership Act* gave them the rights to see. Second, it is alleged that negotiating and entering into the Proposal Sponsor Agreement was a breach of fiduciary duties of the General Partner in that this was nothing less than deliberately negotiating and entering into an agreement to breach the Limited Partnership Agreement.

[69] As the sole general partner of YG LP, the General Partner was responsible for the management of the affairs of the limited partnership and was the only one able to bind the partnership. The General Partner owed a fiduciary duty to all of the partners of the firm in discharging that role and pursuant to s. 64 of *The Partnership Act*, is liable to account, both at law and in equity to the limited partners for its management of the firm.

[70] As I have outlined above, entering into the Proposal Sponsor Agreement was a clear violation of s. 10.14 of the Limited Partnership Agreement as it agreed to a process whereby substantially all of the property of the firm would be conveyed to a third party without the assent of the limited partners. The fact that the BIA stay of proceeding may impede or prevent the limited partners from seeking a direct remedy for that breach when the agreement was subsequently put into action by filing the NOI does not detract from the existence of a present breach the moment pen was put to paper. Further, whether the negotiations of the Proposal Sponsor Agreement consumed two weeks or two months, it was a breach of fiduciary duty to plan and then put into execution a deliberate breach of the Limited Partnership Agreement and doing so in the teeth of a pending application to stop the General Partner adds further weight to that conclusion.

[71] The debtors suggested that being in the proximity of insolvency dissolved or altered the fiduciary duties of the general partner owed to the limited partners. It is true that the law recognizes that the interests of creditors assume a greater weight the closer to insolvency the enterprise approaches. None of this dissolves the fiduciary obligations of the General Partner so much as it adds to them. It is at this point that the other aspect of the complaint of the limited partners enters the analysis.

[72] Nothing in what I have written suggests that a general partner cannot file an NOI where doing so appears on all of the facts and in the good faith exercise of the best business judgment of the general partner to be in the best interests of the enterprise as a whole to do so – a judgment that necessarily accounts for the obligations of the firm owed to its creditors.

[73] This filing was different because it came with strings attached: a binding Proposal Sponsor Agreement that granted exclusivity to a single party and obliged the General Partner to pursue one path and one path only to emerge from the process. Those strings did not get attached as a result of a process which itself discharged faithfully the fiduciary duties of the General Partner. Rather they were attached as the culmination of almost a year of battling to keep information away from limited partners that they had a right to access (in most cases at least) and the squandering of an expensively purchased window of restructuring breathing room looking not for the solution best able to discharge all of the obligations of the partnership but rather looking for the investor best able to secure the optimal outcome for the Cresford group of companies generally. In that process the limited partners were an obstacle to be circumvented and bankruptcy provided a possible key.

[74] Good faith in such circumstances is not assumed but must be shown. The evidence presented to me has rather persuasively convinced me that good faith took a back seat to self-interest.

[75] The parties have expended considerable effort in outlining the details of what occurred in that time frame. In the interests of time, I shall summarize the important take-aways from those events:

a. Until the Proposal Sponsor Agreement and the April 2021 CBRE report prepared for Concord, *all* appraisal evidence showed a profitable project likely to result in full coverage for all of the outstanding third-party debt obligations plus all of the obligations owed to limited partners;

b. The General Partner presented two potential transactions to the “A” unit limited partners in the second half of 2020 that provided for the full payment of all debt, the payment of approximately $38 million to non-arm’s length parties related to the General Partner and payment of obligations owed to the limited partners at a discount – the latter of the two proposals emanated from Concord;

c. The two proposals failed to proceed primarily because the General Partner was unable to provide a satisfactory explanation as to why Cresford related parties were to receive a substantial payment when limited partners were asked to accept a compromise the obligations due to them and limited partners had been assured that Cresford group obligations ranked behind them both when they made their investment and as late as October 2020 in a letter from counsel the debtors; and

d. The limited partners were in a continual tug-of-war trying to pry information out of the General Partner having had to resort to a court order at the

beginning of this year to obtain access to information that should have been available to them as of right.

[76] 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. There is no evidence that any canvassing of the market – however constrained the market of developers capable of undertaking the completion of an 85-story mixed use tower in downtown Toronto may be – took place that was not indelibly tainted by the imperative of finding value for the Cresford group of companies rather than for the partnership itself.

(viii) The Affected Creditor vote was unanimous

[77] Despite the fact that I have found that fifteen of the forty-six votes cast in favour of the Proposal ought not to have been considered because they came from Unaffected Creditors, that determination does not impact the conclusion of the Trustee that the required statutory majorities voted in favour of the Proposal. There was but one negative vote cast and the Trustee disallowed that vote as being contingent. I have reviewed the Trustee's reasons for so ruling and find no fault with them. The removal of fifteen creditors and just over $9 million in claims does not detract from the fact that thirty-one creditors holding approximately $9 million in other claims cast votes in favour.

[78] While I am prepared to consider to some degree the impact of the assignment agreements negotiated by Concord (see below), I do not view such agreements as impacting the formal validity of the votes cast.

[79] I find that the Proposal received the required majority of two-thirds in value and over 50% in number of creditors voting in person or by proxy.

(ix) The probative value of most of the Affected Creditor vote is attenuated

[80] In the normal course, the agreement of a broad group of creditors to accept less than 100% of what they are owed is cogent evidence of the fairness and reasonable nature of a proposal. This is so as a matter of common sense and by a very long tradition in our law. It is not an indicator lightly to be ignored.

[81] I must also recognize that whatever doubts the evidence may raise as to the insolvency of the debtors in terms of the realizable value of their assets, there can be little doubt that the liquidity test for insolvency is met. The lien claimants have been unpaid for a year or more without any formal forbearance agreement. The first mortgagee has entered into a forbearance agreements but this expires on June 30, 2021.

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

[83] The vote of the Affected Creditors *is* probative of fairness, but I find that its weight is attenuated in this case by the following circumstances:

a. Only a relatively small minority voted who did not also enter into assignment agreements;

b. The evidence is equivocal about precisely what consideration was received by those who entered into such assignment agreements – a relayed denial of "side-deals" without more adds little to the equation particularly when the deal itself is not disclosed;

c. Clearly if assigning creditors received or stand to receive more than the value allocated to them under the Proposal, their positive vote says little about the business judgment of the creditors at large to accept the value offered to satisfy their claims but says more about the willingness of the Proposal Sponsor to pay more than has been reflected in the Proposal itself.

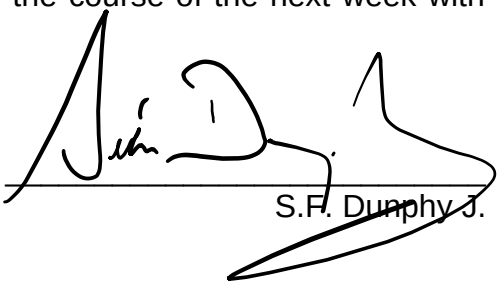
d. This last-in-line class of creditors did not have available to it the range of information produced in connection with this approval motion.

Disposition

[84] I will not approve the Proposal in its present form. I have concluded that, as presented, the Proposal is not reasonable, it is not calculated to benefit the general body of creditors and there are serious issues regarding the good faith with which it has been prepared and presented by the debtors. The debtors and the Proposal Sponsor have the authority under art. 3.06 of the Proposal to amend the Proposal to address the concerns I have raised. It is up to them – with the approval of the Trustee – to do so if they are so inclined.

[85] I am directing the parties to return on Wednesday June 30 at 2:15 pm either to propose amendments to the Proposal that address the concerns I have raised in a substantive way or to address next steps.

[86] These written reasons expand upon the summary reasons I presented orally in a hearing on June 29, 2021. I have released these reasons with relatively little opportunity to proof them and correct typographical errors or minor nits or stylistic glitches. I shall do so over the next week when I have more time available to me and the capacity to call upon my able assistant Ms. Daisy Ng to assist in that effort. Accordingly, I shall be releasing an amended version of these reasons over the course of the next week with such minor and non-substantive corrections.



S.F. Dunphy J.

Date: June 29, 2021

The foregoing is the corrected text of my reasons. Orphaned words have been removed or obvious missing words restored along with corrections of minor errors only. The parties have received a blackline version to compare the changes. Since releasing these reasons, I have adjourned the hearing scheduled for June 30, 2021 at 2:15 until July 9, 2021 at 10:00am. In so doing, I issued the following additional directions:

> As KSV Restructuring Inc. ("KSV") will become the bankruptcy trustee and court-appointed receiver on July 9, 2021 if no satisfactory amended proposal is approved at that time, this Court hereby authorizes and directs KSV to undertake the steps towards formulating a sales process that it would be undertaking if it had been appointed the receiver today.
> KSV's costs of doing so from July 1, 2021 shall be deemed costs of the receiver upon the granting of a receivership order on July 9, 2021 failing which all such costs will be deemed to be costs of the Proposal Trustee in the proposal proceeding.

Issued: July 2,2021

S.F. Dunphy J.

Appendix “B”

CITATION: YG Limited Partnership and YSL Residences (Re), 2021 ONSC 5206
COURT FILE NOS.: CV-21-00655373-00CL/BK-21-02734090-0031, CV-21-00661386-00CL & CV-21-00661530-00CL
DATE: 20210716

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

AND:

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

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

AND RE: 2504670 CANADA INC., 8451761 CANADA INC. and CHI LONG INC., Applicants

AND

CRESFORD CAPITAL CORPORATION, YSL RESIDENCES INC, 9615334 CANADA INC., YG LIMITED PARTNERSHIP and DANIEL CASEY, Respondents

AND RE: 2583019 ONTARIO INCORPORATED AS GENERAL PARTNER OF YONGESL INVESTMENT LIMITED PARTNERSHIP, 2124093 ONTARIO INC., SIXONE INVESTMENT LTD., E&B INVESTMENT CORPORATION and TAIHE INTERNATIONAL GROUP INC., Applicants

AND

9615334 CANADA INC. AS GENERAL PARTNER OF YG LIMITED PARTNERSHIP and YSL RESIDENCES INC., Respondents

BEFORE: S.F. Dunphy J.

COUNSEL: *Harry Fogul* and *Miranda Spence*, for YG Limited Partnership and YSL Residences Inc.

Shaun Laubman and *Sapna Thakker*, for 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc.

Alexander Soutter, for YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc.

David Gruber, Jesse Mighton, and *Benjamin Reedijk,* for Concord Properties Developments Corp. and its affiliates

Jane Dietrich and *Michael Wunder,* for 2292912 Ontario Inc. and Timbercreek Mortgage Servicing Inc.

Robin B. Schwill, for KSV Restructuring Inc. in its capacity as the proposal trustee

Roger Gillot and *Justin Kanji,* for Kohn Pedersen Fox Associates PC

Reuben S. Botnick, for Royal Excavating & Grading Limited COB as Michael Bros. Excavation

Jamie Gibson, for Sarven Cicekian, Mike Catsiliras, Ryan Millar and Marco Mancuso

Brendan Bowles, for GFL Infrastructure Group Inc.

Mark Dunn, for Maria Athanasoulis

James MacLellan and *Jonathan Rosenstein,* for Westmount Guarantee Services Inc.

Albert Engle, for Priestly Demolition Inc.

HEARD at Toronto: July 9 and 16, 2021

REASONS FOR DECISION #2 (REVISED PROPOSAL)

[1] On June 29, 2021, I rejected the debtor's application for approval of its Proposal (identified as "Amended Proposal #2) and provided my detailed reasons for doing so on July 2, 2021. In delivering my reasons, I indicated that that it remained possible for the debtors to amend their Proposal if they so chose. The debtors for their part asked me to adjourn the hearing until July 9, 2021 in order to permit them an opportunity to do so. I granted the requested adjournment.

[2] An amended proposal was filed immediately prior to the hearing on July 9, 2021 entitled "Amended Proposal #3" and I have been asked to consider approving such Amended Proposal. I held a hearing on whether Amended Proposal #3 ought to be approved on July 9, 2021. Amended Proposal #3 was filed only a short while prior to that

hearing. I delayed the start of the hearing for an hour to give parties time to review and analyse the document and proceeded to hear their submissions.

[3] As is usual, I called upon the Trustee to give its comments last. The Trustee requested a further week to review the document and to consider its position. I granted that request and the matter was adjourned to July 16, 2021 at 10:00 a.m. This second adjournment was granted – it must be noted – over the objections of the 1st mortgagee Timbercreek whose forbearance agreement with the debtors expired on June 30, 2021 and who has a long-standing hearing date for its receivership application on July 12, 2021. I adjourned the Timbercreek July 12, 2021 hearing to July 16, 2021 as well such that both proceedings were scheduled to appear before me on July 16, 2021.

[4] A term of the adjournment I granted was that the debtors and Timbercreek should both have circulated draft orders (Proposal approval order in the case of the debtors; Receivership Order in the case of Timbercreek) in advance of the hearing on July 16, 2021 with the expectation that I should sign one of the two orders on July 16, 2021.

[5] On July 15, 2021, a second version of Amended Proposal #3 was filed with the Official Receiver and the Trustee issued its Fourth Report commenting on version 2 of Amended Proposal #3. The Trustee's Fourth Report recommended approval of the Proposal as so amended.

[6] This Proposal has been through a few versions and the nomenclature can get confusing. The amendments made in version 2 of Amended Proposal #3 were minor and technical in nature – they did not adversely affect the rights of any Affected Creditor and at least one of them could just as easily have been added to the approval order outside of the Proposal without objection. My references to "Amended Proposal #3" below should be taken as referencing version 2 of Amended Proposal #3 unless the context requires otherwise.

[7] For the reasons that follow, I have decided to approve version 2 of Amended Proposal #3 and I have signed the approval order.

Background facts

[8] I shall not repeat my review of the facts nor my reasons for rejecting Amended Proposal #2 on June 29, 2021. My detailed reasons for that decision were released on July 2, 2021 and should be considered as if incorporated by reference herein.

[9] In broad strokes, the following summarizes the principal amendments made in Amended Proposal #3:

a. Lien claimants who assigned their claims to the Proposal Sponsor ($9.2 million) will not share in the pool of cash available to unsecured creditors under the Proposal – all lien claimants will be treated as Unaffected Creditors;

b. Related party claims ($38.3 million) will be treated as equity claims and not participate in the pool of cash available to unsecured creditors;

c. Unsecured creditors' recoveries will no longer be limited to $0.58 per dollar of proven claim but will share *pro rata* in the pool of cash available to unsecured creditors up to payment in full;

d. The Proposal Sponsor will fund the full cash pool on Proposal Implementation without reduction should proven claims come in below the amount of the cash pool ($30.9 million);

e. The pool of cash available to unsecured creditors is reduced from $37.7 million to $30.9 million but subject to the above changes reducing the claims eligible to share in the pool;

f. Secured creditors claims – including all construction lien claims – remain unaffected and are assumed by the Proposal Sponsor in purchasing the land and project assets;

g. After Affected Creditor claims have been resolved and all required payments made to them, any residual amount will be returned to the debtor YG Limited Partnership to be dealt with as the partners direct or the court orders; and

h. Proposal Implementation will occur three days after court approval.

[10] The Fourth Report of the Trustee summarized the impact of these changes. Some of the principal points made by the Trustee include the following:

a. Construction lien claimants who agreed to assign their claims to the Proposal Sponsor prior to these amendments might potentially receive less under their assignment agreements than they would under Amended Proposal #3 which had not been made when they agreed to assign their claims. The Trustee contacted the assigning creditors. Two were unable to be contacted but have voiced no objection one way or the other. The remainder of them expressed support for the approval of Amended Proposal #3 or made no objection to it. No assigning creditor was opposed.

b. Version 2 of Amended Proposal #3 contains material improvements to Amended Proposal #2 and addresses concerns raised in my decision of June 29, 2021.

c. Any payments to equity holders are entirely outside of the Proposal.

d. The Trustee has analyzed the known unsecured claims that would share in the $30.9 million pool available to Affected Creditors under Amended Proposal #3. The Trustee's estimate is that Affected Creditors will receive

> between 71% of their claims and payment in full under version 2 of Amended Proposal #3 as contrasted with between 40% and 58% of their claims under Amended Proposal #2. The lower assumption is based on all known claims being allowed in full as claimed with an identical estimate for claims not yet filed. In the event none of the disputed or contingent claims were allowed, the Affected Creditors would be paid in full and up to $19 million may be available to holders of equity claims.

[11] Amended Proposal #3 came with an additional element that the Proposal Sponsor felt it proper to disclose to the Court and the parties. The Proposal Sponsor made a parallel and entirely voluntary offer to holders of limited partnership units in YG LP as well as other claims found by me to be equity claims (i.e. the related party claims) to sell their equity interests for 12.5% of the value of such interests subject to certain structuring conditions.

[12] I cannot say at this juncture whether any equity holders will take the Plan Sponsor up on this offer. The objecting limited partners have shown little interest in it to date at least. The offer has conditions that may or may not be acceptable to them depending upon their own tax situation and their views of value.

[13] Fifty years after the Carter Commission report, it remains the case that business transactions are invariably structured to minimize tax which continues to impact similar economic transactions differently depending upon the structures used. I am satisfied that the "equity offer" is not a disguised transfer of value from creditors to holders of equity claims – the structures required to be used potentially deliver tax attributes to a buyer of the claims that would not otherwise be available. This proposal has been properly disclosed but I do not view it as being particularly relevant to my assessment of Amended Proposal #3. That proposal delivers additional value to creditors under all scenarios compared to its predecessor. There is no diversion of value from creditors to equity holders to be found here. I concur with the Trustee's assessment that the equity offer is quite independent of the Proposal and does not contravene the *BIA* provisions against payment to equity ahead of debt even if it turns out that creditors receive less than payment in full (and that would be a fairly speculative assumption to make).

[14] The Trustee's Fourth Report concluded that the Debtors were proceeding with the request for approval of the Amended Proposal #3 in good faith.

Analysis and discussion

[15] This amended proposal is not perfect. The process that led to it was far from ideal. However, as now amended, this Proposal provides a superior outcome for all classes of creditors under every conceivable scenario and addresses all of the concerns raised in my reasons of July 2, 2021 constructively and substantively.

[16] As so amended, I have no hesitation in finding that Amended Proposal #3 is reasonable, it is calculated to benefit the general body of creditors and is being advanced

at this juncture in good faith notwithstanding the defects that I found marred the negotiation and presentation of the initial version of the Proposal.

[17] There were some critical foundational findings that I made in my reasons of July 2, 2021 including:

a. whatever breaches of the Limited Partnership Agreement may have occurred in the weeks and months prior to the filing of the NOI, the general partner *did* have authority to file the NOI;

b. the Affected Creditor vote in support of Amended Proposal #2 was in fact unanimous; and

c. 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.

[18] While I found the probative value of the creditor vote to be attenuated somewhat by the factors I listed in those reasons, the vote did and does have probative value and it is material to note that unsecured creditors agreed to accept payment of less than full payment on their claims on June 15, 2021. All of the Affected Creditors will receive a superior outcome under Version 2 of Amended Proposal #3 under any reasonable assumptions. Their approval of the prior version of the Proposal remains as probative in the context of version 2 of Amended Proposal #3 if not more so.

[19] Version 2 of Amended Proposal #3 clearly satisfies the technical requirements of the *BIA* in that Amended Proposal #2 upon which the creditors did vote authorized the amendments that have been made in Amended Proposal #3 (including version 2 thereof).

[20] Version 2 of Amended Proposal #3 has constructively addressed each of the issues I raised in my June 29 ruling and my July 2 written reasons:

a. The construction lien claims will not dilute the recovery of the unsecured creditors in any way.

b. The related party claims are to be treated as equity claims and disentitled to share in the cash pool.

c. While I expressed grave concerns regarding the lack of good faith and the breaches of fiduciary duty that preceded the filing of the NOI and the entry into the Proposal Sponsor Agreement, those concerns were primarily focused on the efforts made to prefer related party claims over those of other stakeholders in the search for an investor. Amended Proposal #3

cannot undo the past of course but it has addressed those findings constructively. The related party claims are treated as equity claims.

d. There is a strong likelihood that proven creditor claims will be substantially lower than the $30.9 million pool available to satisfy them and Amended Proposal #3 ensures that such surplus is returned to the limited partnership instead of being retained by the Proposal Sponsor.

e. The claims of related parties and their priority relative to limited partners will be dealt with within the limited partnership structure itself, in broad daylight and subject to the full range of remedies open to the limited partners to protect their interests should the need arise. The conflicting interests that marred the development of Amended Proposal #2 have been substantially cured by the amendments effected by Amended Proposal #3. Related parties have been put in their proper place in the claims hierarchy.

[21] The strongest critique levelled at Amended Proposal #3 by the limited partners is that it 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. That is a fair criticism but not one that is sufficient to detract from the overwhelmingly positive attributes of this Proposal.

[22] The past cannot be undone and perfection is not the standard against which a proposal is to be measured. Section 59(2) of the *BIA* requires that approval of a proposal must be refused if its terms are not shown to be reasonable and calculated to benefit the general body of creditors. The common law has added to this the requirement that a proposal must be advanced in good faith.

[23] Amended Proposal #3 is both reasonable and calculated to benefit the general body of creditors. It provides for substantially improved outcomes to all creditors whose claims were impaired by Amended Proposal #2 under any reasonable assessment of the facts. As noted above, it is quite likely that a surplus will remain to be returned to the limited partnership after all affected unsecured claims have been paid in full to be dealt with as the limited partners direct (or by court order if necessary).

[24] The debtors are insolvent today. They are properly in bankruptcy proceedings. Their creditors have a right to payment and – to the extent reasonably possible – to payment in full as soon as possible. Amended Proposal #3 offers payment in full to most secured creditors within a matter of days following court approval. Unsecured creditor payments will be subject to reasonable reserves for unresolved claims but these too will begin flowing in short order. This contrasts to a delay of *many* months on the most optimistic of scenarios were a receiver directed to sell the project.

[25] There is a public interest in moving this very substantial project out of the quicksand in which it has become stuck for over a year. Approval of Amended Proposal #3 at this juncture ensures that the Project is in the hands of a solvent entity

with the wherewithal and experience necessary to put it back on track as soon as possible.

[26] The real question before me today is whether limited partners have the right to require creditors to run the risk of a sale process producing an inferior outcome to Amended Proposal #3 in order to test the hypothesis that a greater value might emerge from a fresh marketing of the project in a liquidation process that might result in payment of some or all of the limited partners' equity claims. In my view, they do not.

[27] It is possible that higher values could emerge from a liquidation process but that possibility is not a one way street. The dissatisfaction I expressed in my reasons of July 2, 2021 regarding the quality of the appraisal evidence before me does not imply any level of probability that market value today is *higher* than the values suggested by the April 2021 CBRE appraisal. I was dissatisfied with the quality of *all* of the appraisal evidence because of the lack of evidence reconciling the differences between them and, in particular, assessing the reasonableness of the assumptions made in each.

[28] It is noteworthy that version 2 of Amended Proposal #3 offers the real prospect that a return on equity of more than 100% of the invested capital of the limited partners may come back to YG LP. The limited partners assent will be needed to any use of those funds unless a court order is obtained. The possible upside to limited partners arising from a new sales process has thus become that much more remote under this last revision to the Proposal compared to the first.

[29] There are costs involved in conducting a receivership that would come ahead of any potential surplus being made available to equity claimants such as the limited partners. Some of the risk of a sale process producing a lower outcome could potentially be insured against by procuring a stalking horse bid to put a floor under the sale process. There is no guarantee that a stalking horse bid would be available at or near the implied value of Amended Proposal #3. Stalking horse bids come with a price tag in the form of a break fee that is usually calculated as a percentage of the price. That too would stand to reduce the recoveries to unsecured creditors and create an additional hurdle to any prospect of additional recovery to limited partners.

[30] This is a real bankruptcy. There is nothing artificial about it. Creditors have been unpaid for over a year. I have before me a transaction that provides a pathway to payment of creditor claims in full and quickly while leaving a realistic prospect for equity claims to receive some significant recovery. Every other option requires the creditors – who bear no responsibility for the mess that this project has found itself in – being subjected to the real risk of partial non-payment and substantial delay being added to the very lengthy delay to which they have already been subjected in order to test the hypothesis that a few percentage points of additional value might potentially be found. That is not a risk that it is fair to impose on creditors on these facts and having regard to the important favourable changes made to the Proposal.

Disposition

[31] Accordingly, an order shall issue approving version 2 of Amended Proposal #3. I have reviewed the draft form of approval order uploaded and approved and signed same. It was amended slightly to include in the preamble corrected references to the limited partners who appeared and the evidence they filed.

[32] This Proposal satisfies the technical requirements of the *BIA*. I have concluded that version 2 of Amended Proposal #3 represents a valid amendment to Amended Proposal #2 in accordance with its terms and thus has received the required double majority of creditor approval. The terms of this Proposal are reasonable and calculated to benefit the general body of creditors. The amendments presented have satisfied the concerns raised by me regarding the good faith of the debtors in pursuing *this* Proposal.

[33] I wish in particular to note that I have included, as requested, an order pursuant to s. 195 of the *BIA* permitting provisional execution of the approval order notwithstanding appeal. I have made this order in consideration of two primary factors:

a. The secured creditors of YG LP have been deferred and stayed for a very, very long time at this point. Some of that deferral was purchased in the form of forbearance agreements with Timbercreek but the last negotiated extension – an extension that included every possible assurance that no further extensions would be sought – expired on June 30, 2021. I made it clear on July 9, 2021 that I would be approving the Proposal or a Receiver today. It would be unjust to Timbercreek to have its period of limbo indefinitely extended by the simple expedient of filing a Notice of Appeal and forcing Timbercreek to seek a lifting of an automatic stay to enforce its security. 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 at this point and it must either be put in the hands of someone who will bring it forward to completion under the Proposal or of a Receiver who will find someone who can.

b. Our courts have generally sought to achieve a degree of uniformity of practice as between the CCAA and the *BIA*. Approval of a CCAA Plan Is not subject to an automatic stay. An automatic stay in this case would operate as a functional veto of the Proposal itself because the result would be an almost certain slide into receivership unless the stay were promptly lifted.

[34] Timbercreek's receivership application was adjourned by me from July 12, 2016 until today. Based upon my approval of the Proposal today *and subject to the closing of version 2 of Proposal #3 in accordance with its terms by no later than July 31, 2021*, Timbercreek agrees that its application is moot. There is no reason to believe the Proposal will not be completed as planned, however, nothing can be taken for granted. I

am adjourning Timbercreek's application to August 9, 2021 when I shall next be sitting. It is adjourned before me.

[35] Assuming (i) the Trustee confirms to me that the version 2 of Amended Proposal #3 has been completed and (ii) Timbercreek does not advise me in advance of August 9 of its intention to proceed, I shall endorse the Timbercreek application as withdrawn without costs on August 9, 2021. No attendances will be necessary from any party in that eventuality. If there is a reason for the application to move forward, I am relying on the Trustee and Timbercreek to so notify me as soon as practicable after July 31, 2021.

[36] A request was made by the limited partners to make submissions to me regarding costs of the bankruptcy proposal proceeding. For the avoidance of doubt, my signing of the order approving version 2 of Amended Proposal #3 has not disposed of the matter of costs of the proposal proceedings. I have made no order as to costs to this point nor have I heard submissions on the point.

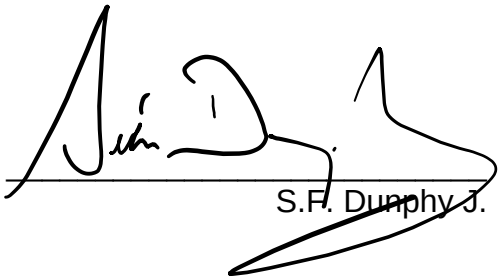
[37] Any party seeking an order of costs in their favour shall have ten days from today to file written submissions and an outline of costs. Submissions should not exceed ten pages excluding the outline of costs. Cases need not be included beyond a hyperlinked table of cases. The Debtors and the Proposal Sponsor shall each have a further ten days to respond to any such requests for costs with similar size restrictions. All submissions are to be uploaded to CaseLines and copied to the Trustee. I am asking the Trustee to provide me with a consolidated set of submissions to which the Trustee may – but shall not be required to – add its own additional comments in the form of a brief supplementary report.

[38] Lastly, I need to give some directions regarding the two civil applications that immediately preceded these bankruptcy proceedings brought by the limited partners of YG LP. My reasons of June 29, 2021 made a number of findings in relation to matters raised in those two applications. However, it must also be clear that neither my ruling of June 29, 2021 nor this decision has fully disposed of either civil application.

[39] It is certainly true that I made findings in the context of the bankruptcy proposal proceedings that were and are relevant to the two applications. Even if those findings were made in the context of the bankruptcy proceedings, the three proceedings were to a degree inextricably intertwined. I was asked to issue a formal order in relation to the findings I did make. I declined to do so not because I am resiling from any findings made – I do not – but because I did not and do not have the full scope of the claims of either application fleshed out before me. I directed certain matters to be explored and argued due to the interrelationship between the proceedings but I do not want my rulings in one context to be taken out of context in another.

[40] The safest course in my view is to let my rulings stand as made knowing that *res judicata* and issue estoppel can be applied as needed to avoid any abuse. I was asked to confirm – and do so now – that costs of those two civil applications have not been dealt

with by me at all. They have not. The limited partner applicants in those two proceedings asked to make submissions regarding costs of the bankruptcy proposal proceeding and I have given them leave to do so as provided above. The costs of the two civil applications remain reserved to the judge disposing of them.



S.F. Dunphy J.

Date: July 16, 2021

Addendum:

As noted, I have reviewed the originally signed reasons and made a small number of clerical and stylistic changes to the text as originally released. As well, I was advised by the Trustee that the transaction was in fact completed on July 22, 2021. Accordingly, I have issued an endorsement today vacating the August 9, 2021 appointment reserved to hear the Timbercreek application and endorsed that matter as being abandoned without costs because moot. No party will be required to appear on August 9, 2021.

Date: July 27, 2021

S.F. Dunphy J.

Appendix “C”

Sixth Report to Court of KSV Restructuring Inc. as Proposal Trustee of YG Limited Partnership and YSL Residences Inc.

August 19, 2022

Contents

Appendices

COURT FILE NO.: BK-21-02734090-0031

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

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

SIXTH REPORT TO COURT OF
KSV RESTRUCTURING INC. AS PROPOSAL TRUSTEE

AUGUST 19, 2022

1.0 Introduction

1. This report ("Report")[1] is filed by KSV Restructuring Inc. ("KSV") in its capacity as Proposal Trustee (the "Proposal Trustee") in connection with Notices of Intention to Make a Proposal (the "NOIs") filed on April 30, 2021 (the "Filing Date") by YG Limited Partnership (the "Partnership") and YSL Residences Inc. ("Residences", and together with the Partnership, the "Companies"), pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA").

2. On May 14, 2021, the Ontario Superior Court of Justice (Commercial List) (the "Court") issued an order (the "Consolidation Order") procedurally and substantively consolidating the NOIs (the "NOI Proceedings") for the purpose of simplifying the administration of the NOI Proceedings, including filing a joint proposal and convening a single meeting of creditors.

3. The principal purpose of the NOI proceedings was to create a stabilized environment to allow the Companies to present a proposal to their creditors that provides them with a recovery greater than they would have received in a bankruptcy or alternative insolvency process.

4. On May 27, 2021, the Companies filed a proposal with the Official Receiver in accordance with Section 62(1) of the BIA (the "Proposal"). On June 3, 2021, the Companies filed an amended proposal (the "First Amended Proposal") and on June 15, 2021, the Companies filed a further amended proposal (the "Second Amended Proposal").

[1] Capitalized terms have the meaning provided to them in the Final Proposal (as defined herein), unless otherwise defined in this Report.

5. At a meeting of creditors held on June 15, 2021 (the "Creditors' Meeting"), the creditors voted to accept the Second Amended Proposal.

6. On June 23, 2021, the Companies sought Court approval of the Second Amended Proposal. Pursuant to the Reasons for Interim Decision of the Court made on June 29, 2021, as amended on July 2, 2021 (the "Interim Decision"), the Court did not approve the Second Amended Proposal.

7. A Court hearing for approval of the Second Amended Proposal was scheduled for July 9, 2021 to allow the Companies time to address the Court's concerns set out in the Interim Decision and, should they wish, present a further amended proposal for the Court's consideration. A copy of the Interim Decision is provided in Appendix "A".

8. Shortly before the motion on July 9, 2021, Concord Properties Developments Corp., the sponsor of the proposals filed in this proceeding (the "Sponsor"), served a further amended proposal (the "Third Amended Proposal") and an offer of distributions to be made outside of the Third Amended Proposal by the Sponsor to any equityholders[2] of the Partnership (the "Equityholders") willing to accept such Offer (the "Equity Offer").

9. Pursuant to Section 3.03 of the Second Amended Proposal and the Third Amended Proposal, the Companies required the consent of the Proposal Trustee to file the Third Amended Proposal. As the Third Amended Proposal was provided for the first time to the Proposal Trustee just prior to the motion on July 9, 2021, the Proposal Trustee did not have the time it required to review the Third Amended Proposal prior to that hearing. Accordingly, the motion was adjourned to July 16, 2021 to provide the Proposal Trustee with the opportunity to consider the Third Amended Proposal and for the Proposal Trustee to make a recommendation to the Court.

10. The Proposal Trustee's Fourth Report to Court dated July 15, 2021 set out, among other things, the material changes between the Second Amended Proposal and the Third Amended Proposal, further changes to the Third Amended Proposal (the "Final Proposal"), and the Proposal Trustee's recommendation to the Court that it approve the Final Proposal.

11. Pursuant to Reasons for Decision dated July 16, 2021, as amended on July 27, 2021 (the "Decision"), the Court approved the Final Proposal. A copy of the Decision is provided in Appendix "B".

12. No inspectors were appointed in the Final Proposal.

[2] Defined in the Final Proposal as the holders of the limited partnership units of YG LP and those Equity Claims deemed to be equity pursuant to the Interim Decision.

13. The Second Amended Proposal and the Third Amended Proposal both contain identical Sections 10.01 and 11.01 that were drafted by representatives of the Companies and the Sponsor, without the input of the Proposal Trustee, and that read as follows:

10.01 Administrative Fees and Expenses

Administrative Fees and Expenses will be paid in cash by the Company on the Proposal Implementation Date together with a reserve in respect of the discharge of the Proposal Trustee.

11.01 Indemnification of Proposal Trustee

The Proposal Trustee shall be indemnified in full by the Company for all personal liability arising from fulfilling any duties or exercising any powers or duties conferred upon it by this Proposal or under the BIA, except for any willful misconduct or gross negligence.

14. Based on input from the Proposal Trustee, these sections were modified in the Final Proposal to read as follows:

10.01 Administrative Fees and Expenses

Administrative Fees and Expenses including a reserve[3] in respect of the reasonably estimated additional Administrative Fees and Expenses anticipated to be incurred in connection with the administration of Distributions, resolution of any unresolved Claims pursuant to Section 5.03, and the Proposal Trustee's discharge will be paid in cash by the Proposal Sponsor on the Proposal Implementation Date.

11.01 Indemnification of Proposal Trustee

The Proposal Trustee shall be indemnified in full by the Proposal Sponsor for: (a) all personal liability arising from fulfilling any duties or exercising any powers or duties conferred upon it by this Proposal or under the BIA, except for any willful misconduct or gross negligence; and (b) all Administrative Fees and Expenses reasonably incurred but not covered by the payment set out in Section 10.01.

15. These changes were made for several reasons, including to:

    a) ensure that the Administrative Fees and Expenses of the Proposal Trustee would not reduce creditor recoveries under the Final Proposal, which was a key consideration for various stakeholders, including the LPs (as defined below);

[3] The amount of the reserve was $1 million. See paragraph 1.16 below.

b) set out the Sponsor's obligation to fund the Administrative Fees and Expenses of the Proposal Trustee, subject to such fees and costs being reasonably incurred. Section 11.01 was included given the uncertainty regarding the fees and costs to complete the proceedings, including completing the claims determination process. The Proposal Trustee required this provision given the history of the litigation between the Companies and certain of its stakeholders that preceded these proceedings, and which continued during these proceedings; and

c) change the indemnifier from the Company to the Sponsor, as the Proposal Trustee was not prepared to be indemnified by the Company given its financial position.

16. Prior to implementation of the Proposal, the Sponsor provided the Proposal Trustee with $1 million (plus HST) in respect of the Proposal Trustee's future fees and costs (the "Initial Advance"). The Proposal Trustee's fees and cost have exceeded this amount due to, *inter alia*, ongoing litigation involving certain of the claims, the administration of the Final Proposal and numerous and ongoing procedural disputes, including the manner in which the Athanasoulis Claim (as defined below) is to be determined. The litigation concerning the Athanasoulis Claim ultimately became more complex and expensive than the Proposal Trustee had anticipated.[4]

17. The Sponsor has also consented to the payment to the Proposal Trustee for its fees and those of its counsel, Davies Ward Philips & Vineberg LLP ("Davies"), of approximately $170,000 of accrued interest on the Affected Creditor Cash Pool (as discussed in Section 3.01 below), the use of which was not addressed in the Final Proposal.

18. Despite the unambiguous language in Section 11.01 of the Final Proposal, on or about July 4, 2022 the Sponsor advised the Proposal Trustee that it was not prepared to continue to fund the fees and costs of the Proposal Trustee to complete these proceedings.

1.1 Purposes of this Report

1. The purposes of this Report are to:

a) provide background information about the Companies and the Final Proposal;

b) summarize the three remaining disputed claims (the "Disputed Claims") in these proceedings, including the manner in which the Proposal Trustee has attempted to determine them to-date and how it proposes to determine them going forward;

[4] Judges in proceedings concerning the restructuring of affiliates of the Companies remarked that the Athanasoulis Claim was "speculative". See, *e.g.*, the Endorsement of Justice Hainey dated January 8, 2021 attached in Appendix "C".

c) discuss the Proposal Trustee's dealings with the Sponsor in respect of its obligations under Section 10.01 and 11.01 of the Final Proposal;

d) summarize the Administration Fees and Expenses of the Proposal Trustee in these proceedings since July 22, 2021 (the "Implementation Date"), the date that the Final Proposal was implemented (the "Post-Implementation Fees"); and

e) recommend that the Court issue an order:

i. declaring that the conduct of the Proposal Trustee in determining the claims, including the Disputed Claims, has been reasonable, and accordingly, the Administrative Fees and Expenses have been reasonably incurred;

ii. declaring that the Sponsor remains bound by Section 11.01 of the Final Proposal;

iii. declaring that the Sponsor is required to fund the Administrative Fees and Expenses of the Proposal Trustee pursuant to Section 11.01 of the Final Proposal;

iv. declaring that the commencement of arbitration to determine the Athanasoulis Claim by the Proposal Trustee was a valid exercise of the power conferred upon the Proposal Trustee under the Final Proposal and/or the BIA;

v. declaring that, in discharging its duties under the Final Proposal and the BIA, the Proposal Trustee has not engaged in wilful misconduct or gross negligence;

vi. providing the Proposal Trustee with a charge on,

- all distributions made to-date to the Sponsor (or any of its affiliates) on the claims it purchased in this proceeding, including a reimbursement obligation, if required, and

- all future distributions that may be payable to the Sponsor in respect of the claims it purchased in this proceeding; and

vii. declaring that if the Sponsor fails to pay an invoice rendered by the Proposal Trustee or its counsel pursuant to Section 11.01 of the Final Proposal within 30 days of the invoice, the Proposal Trustee is entitled to set-off amounts owing by the Sponsor pursuant to such invoice against any amounts held by the Proposal Trustee and otherwise payable to the Sponsor as a result of any future distributions to the Sponsor in respect of claims it purchased in this proceeding.

1.2 Currency

1. All references to currency in this Report are to Canadian dollars.

1.3 Definitions

1. Capitalized terms not defined in the Report have the meanings provided to them in the Final Proposal.

2.0 Background

1. Information regarding the Companies, the real estate project that was being developed by the Companies known as Yonge Street Living Residences (the "YSL Project"), the history of these proceedings, the receivership application filed by the first mortgagee of the YSL Project in advance of these proceedings, Timbercreek Mortgage Servicing Inc. ("Timbercreek"), that was pending against the Companies, applications by certain of the Partnership's limited partners (the "LPs") and the prior proposals filed in this proceeding is included in the Proposal Trustee's reports to Court and other materials filed with the Court. Copies of all publicly available information in these proceedings can be found on the Proposal Trustee's case website at https://www.ksvadvisory.com/insolvency-cases/case/yg-limited-partnership.

2. The Companies are part of the Cresford Group of Companies ("Cresford"), a Toronto-based real estate developer. In addition to the NOI Proceedings, several of Cresford's other developments have been subject to restructuring proceedings.

3. Residences was the registered owner of the real properties municipally known as 363-391 Yonge Street and 3 Gerrard Street East, Toronto, Ontario (the "Real Property"), acting as a bare trustee and nominee of, for and on behalf of the Partnership.

4. The Partnership was the beneficial owner of the Real Property and was formed for the purpose of developing the Real Property into a mixed-use office, retail and residential condominium development comprised of approximately 1,100 residential units, 190,000 square feet of commercial/retail/institutional space and 242 parking spaces known as the YSL Project.

5. As a result of the successful implementation of the Final Proposal, title to the Real Property was transferred to an affiliate of the Sponsor.

6. In the context of Cresford's various restructuring proceedings, the credibility and availability of Cresford's management, and the reliability of its books and records have been significant issues. Those issues have increased the extent to which the Proposal Trustee has been involved in addressing the various disputed claims filed in the NOI Proceedings.

2.1 Applications by the Limited Partners and Senior Mortgagee

1. Prior to the Filing Date, certain of the LPs commenced applications (collectively, the "LP Applications") seeking Orders declaring that, among other things:

   a) 9615334 Canada Inc. (the "GP") is terminated as general partner of the Partnership;

   b) any agreements entered into by the GP with the Sponsor are null and void; and

   c) the GP breached its duty of good faith to the LPs. Additionally, certain of the LPs sought the appointment of an equitable receiver.

2. On June 1, 2021, the Court heard motions by the LPs to, among other things, lift the stay of proceedings pursuant to Section 69(1) of the BIA and to authorize the LPs to bring the LP Applications. Pursuant to an endorsement made on the same day, the Court, among other things, set a litigation timetable for a hearing scheduled for June 23, 2021 where certain of the LPs' arguments could be made at the same time as the Companies sought approval of the Amended Proposal, assuming that the Amended Proposal had been accepted by the Affected Creditors voting at the Meeting, which they did on June 23, 2021.

3. In advance of the Proposal, the Companies were in default of their loan agreement with Timbercreek. Pursuant to an agreement dated March 26, 2020 among Timbercreek, the Companies and two Cresford entities (the "Forbearance Agreement"), Timbercreek agreed to, among other things, forbear from enforcing its security against the Real Property. Timbercreek subsequently brought a motion to appoint a receiver on November 13, 2020. The receivership application was adjourned several times and remained pending when the NOIs were filed. On several occasions, Timbercreek scheduled an application for the appointment of a receiver if the Companies' NOI Proceedings were unsuccessful.

3.0 Final Proposal

1. The Final Proposal provides for distributions to the Affected Creditors from the Affected Creditor Cash Pool, being a cash pool funded by the Sponsor in the amount of $30.9 million to be distributed *pro rata* to Affected Creditors with Affected Creditor Claims. The Final Proposal also provides that if any residual amount remains in the Affected Creditor Cash Pool following the final distributions to Affected Creditors, such residual funds, if any, would be held by the Proposal Trustee "pending receipt of a duly issued direction from all of the holders of Class A Preferred Units of YG LP, or otherwise by order of the Court". A copy of the Final Proposal is provided in Appendix "D".

2. On July 22, 2021, the Sponsor funded the Affected Creditor Cash Pool. The corporate transactions summarized in Section 6.01 of the Final Proposal were completed on the same day and resulted in, among other things, title to the YSL Project being transferred to an entity related to the Sponsor.

3. Section 10.01 of the Final Proposal required the Sponsor to pay all "*Administrative Fees and Expenses including a reserve in respect of the reasonably estimated additional Administrative Fees and Expenses anticipated to be incurred in connection with the administration of Distributions, resolution of any unresolved Claims pursuant to Section 5.0, and the Proposal's Discharge*". Additionally, Section 11.01 of the Final Proposal requires the Sponsor to indemnify the Proposal Trustee for "*all Administrative Fees and Expenses reasonably incurred but not covered by the payment set out in Section 10.01*". Together, these provisions require the Sponsor to fund the Administrative Fees and Expenses of the Proposal Trustee separately from the Affected Creditor Cash Pool. The term Administrative Fees and Expenses is defined in the Final Proposal as "*the fees, expenses and disbursements incurred by or on behalf of the Proposal Trustee, the solicitors for the Proposal Trustee, the solicitors of the Company both before and after the Filing Date*". The Sponsor is therefore required to fund the costs reasonably incurred by the Proposal Trustee to determine all claims filed in these proceedings. Section 11.01 was required by the Proposal Trustee given the uncertain costs resolving various disputed claims in these proceedings.

4. The effects of Sections 10.01 and 11.01 of the Final Proposal were to: (i) guarantee that the Affected Creditor Cash Pool would be a certain amount not subject to reduction by the fees and costs of the Proposal Trustee and its counsel; and (ii) ensure that there would be funding for the Proposal Trustee to complete the administration of these proceedings. The indemnity in Section 11.01 is not subject to a fee cap or any other limitation other than the fees must have been reasonably incurred.

5. The Court approved the Final Proposal as it was superior to the Second Amended Proposal, for the following key reasons:

   a) creditor recoveries were not capped at 58¢ on the dollar, as they were under the Second Amended Proposal, and may end up being paid in full, with residual funds left over to be distributed to the LPs, depending on the determination of the Disputed Claims;

   b) related party claims were treated as equity claims; and

   c) construction lien creditors were treated as unaffected creditors.

6. The differences referenced above, among others, were made in response to the issues raised in the Interim Decision, based largely on submissions from counsel representing the LPs.

4.0 Creditors

1. Sixty-four (64) claims have been filed against the Companies, including claims from trade creditors, real estate brokerages, professional advisors and former employees. As reflected below, claims accepted to-date are almost $7.6 million less than the amount of the filed claims, the effect of which is to increase distributions to Affected Creditors with Proven Claims, including the Sponsor, due to its purchase of various Proven Claims.

	Amount ($000)		
Creditor	Filed	Accepted by Proposal Trustee	Difference
Proven Claims:			
Otis Canada Inc.	4,912	390	4,522
Landpower Real Estate Ltd.	4,500	3,847	653
Homelife Landmark Realty Inc.	3,170	3,145	25
Homelife New World Realty Inc.	1,839	1,524	315
Sarven Cicekian	767	383	384
David Ryan Millar	735	450	285
Sultan Realty Inc.	699	671	28
Mike Catsiliras	681	269	412
Home Standards Brickstone Realty	586	208	378
Louie Giannakopoulos	445	308	137
Other Proven Claims	4,105	3,642	463
Total Proven Claims	22,439	14,837	7,602
Unresolved Claims:			
Maria Athanasoulis (disputed)	19,000	TBD	TBD
CBRE Limited (“CBRE”)	1,239	TBD	TBD
Henry Zhang (disputed by the LPs)	1,520	1,130	390
Total Unresolved Claims	21,759	1,130	20,629
Total Claims	44,198	15,967	28,231

2. Of the claims in the table, the claims filed by the following parties are the remaining Disputed Claims:

   a) Ms. Athanasoulis;

   b) CBRE; and

   c) Mr. Zhang.

3. The status of the Disputed Claims is discussed in Section 5 below.

4. On March 24, 2022, the Proposal Trustee paid an interim distribution of 70¢ on the dollar to the creditors with Proven Claims.

5. Since the interim distribution, the Proposal Trustee has resolved various claims, including complex claims filed by four former employees of Cresford (the “Former Employees”), including common employer claims that each Former Employee filed against the Companies. The Proposal Trustee negotiated settlements of these claims, which were approved by the Court on May 24, 2022.

6. The Proposal Trustee paid a catch-up distribution to the Former Employees and other creditors with Proven Claims, except those who continue to have Disputed Claims and three creditors whose claims were recently resolved.

7. The Proposal Trustee reserved the balance of the Affected Creditor Cash Pool until the Disputed Claims can be determined. The Affected Creditor Cash Pool is presently approximately $20.5 million.

8. The Sponsor took an assignment of 28 of 64 Affected Creditor claims. As assignee, the Sponsor participated in the interim distribution and has received approximately $8.4 million of the total amounts distributed.

9. The table below shows the range of outcomes to stakeholders depending on the resolution of the Disputed Claims. The table illustrates that resolution of the Disputed Claims will determine the amount of distributions, if any, to the LPs.

	Amount ($000)	
Estimated Distributions	High	Low
Affected Creditor Cash Pool	30,900	30,900
Claims		
Proven Claims	14,837	14,837
Ms. Athanasoulis	-	19,000
CBRE	1,239	1,239
Mr. Zhang	-	1,130
Total Claims	16,076	36,206
Dividend rate	100%	85.3%
Residual for LPs	14,824	-

5.0 Status of the Disputed Claims

5.1 Ms. Athanasoulis

1. Ms. Athanasoulis, Cresford's former President and Chief Operating Officer, filed a claim in the amount of $19 million. This is related to a Statement of Claim she filed on January 21, 2020 against the Companies, other Cresford affiliates and Dan Casey, Cresford's founder (the "Athanasoulis Claim"). The Athanasoulis Claim is in respect of, *inter alia*, allegations of:

   a) wrongful dismissal in the amount of $1 million; and

   b) damages in the amount of $18 million for breach of an oral agreement that the owner of each Cresford project, including the YSL Project, would pay Ms. Athanasoulis 20% of the profits earned on each project.

2. Cresford denied the existence of an oral agreement entitling Ms. Athanasoulis to 20% of the profits earned on each project. In order to determine whether an oral contract existed, witness testimony was required to be called under oath and the credibility of such evidence assessed. Given the limited Court time available for such a hearing, together with the desire to make a determination of the merits of the Athanasoulis Claim in a fair, expedient, and efficient manner, the Proposal Trustee and Ms. Athanasoulis agreed to arbitrate the determination of liability (*i.e.*, did an enforceable contract exist between Ms. Athanasoulis and Cresford, and was that contract breached?) in respect of her claim ("Phase 1") before William G. Horton (the "Arbitrator"), an experienced commercial litigator and arbitrator.

3. If a contract was found to exist, the parties also agreed to have the Arbitrator determine the quantum of damages, if any, flowing from breach of the contract in the second phase of the arbitration ("Phase 2").

4. Cresford, the LPs, and the Sponsor were well aware of the Proposal Trustee's intention to arbitrate the Athanasoulis Claim before Phase 1 occurred. None of them objected to this manner of proceeding. However, after Ms. Athanasoulis prevailed in Phase 1, both the Sponsor and the LPs have taken the position that the Proposal Trustee acted without jurisdiction in arbitrating the Athanasoulis Claim rather than determining it itself, and then litigating an anticipated appeal on any such determination (by either the LPs or Ms. Athanasoulis, depending on the nature of the determination). The LPs and the Sponsor have taken the position that the Proposal Trustee improperly delegated its authority to determine the Athanasoulis Claim to the Arbitrator.

5. The Proposal Trustee does not view this process as having the Arbitrator determine whether to allow the claim in these proceedings, as suggested initially by the LPs and more recently by the Sponsor. Rather, the Proposal Trustee views the Arbitrator as an independent and impartial adjudicator who can assess whether an oral agreement existed, and if so, the nature and terms of that agreement and the potential damages flowing from a breach of that agreement. Based on those findings, the Proposal Trustee would be in a position to determine whether Ms. Athanasoulis's claim should be allowed or disallowed.

6. The Proposal Trustee, Ms. Athanasoulis and two other witnesses participated in Phase 1 of the arbitration, including Ms. Athanasoulis and Mr. Casey. The arbitration was conducted over five days. The involvement of the Companies and Cresford was limited as, among other things, Cresford has few remaining employees and, other than Mr. Casey, their first-hand knowledge of the issues raised by Ms. Athanasoulis is very limited. This and the credibility issues referenced above related to Mr. Casey required the Proposal Trustee to participate extensively in the arbitration.

7. The Proposal Trustee informed counsel to all relevant stakeholders, including the Sponsor, the LPs, the Companies, and Mr. Casey, in late 2021 before Phase 1 of the arbitration that the Proposal Trustee intended to arbitrate the Athanasoulis Claim in the manner described above, and that the Proposal Trustee would determine the Claim following the arbitration. Neither the Sponsor, the LPs, nor any other stakeholder took any steps to oppose the arbitration.

8. On March 28, 2022, the Arbitrator rendered a decision in respect of Phase 1 of the arbitration. He held that an oral agreement existed between Ms. Athanasoulis and Cresford that entitled Ms. Athanasoulis to 20% of the profits earned on each project. The Arbitrator's decision raised concerns with the credibility of the Companies, Mr. Casey and Ms. Athanasoulis.

9. As explained below, the parties have not yet scheduled Phase 2 of the arbitration. If scheduled, Phase 2 is to include evidence from Ms. Athanasoulis, the LPs, expert witnesses, Mr. Casey, and perhaps others. Much of the lay evidence will concern oral conversations where there is no documentary record.

5.2 CBRE

1. CBRE, a real estate brokerage, filed a proof of claim dated January 28, 2022 in the amount of approximately $1.2 million. The claim relates to an invoice submitted by CBRE to "Cresford" dated October 13, 2021 and refers to services rendered by CBRE serving as the exclusive listing broker for the YSL Project.

2. The Proposal Trustee disallowed CBRE's claim in full for the reasons set out in its Notice of Disallowance of Claim dated February 10, 2022 (the "CBRE Notice"). A copy of the CBRE Notice is provided as Appendix "E".

3. The CBRE Notice was issued based on representations the Proposal Trustee received from the Sponsor that the Sponsor dealt directly with Cresford and that it did not have any dealings with CBRE in respect of the YSL Project.

4. In light of the Sponsor's position, the Proposal Trustee determined that the best and most transparent way of determining CBRE's claim based on the information available to it at the time was to disallow the claim on the basis set out in the CBRE Notice and permit CBRE to file a full evidentiary response by way of an appeal on notice to all.

5. Following the issuance of the CBRE Notice, counsel for the Sponsor copied the Proposal Trustee on email correspondence with counsel for CBRE on February 11, 2022. In that correspondence, the Sponsor stated that while CBRE had introduced the Sponsor to Cresford, the Sponsor had no "knowledge of a brokerage agreement or similar arrangement between Cresford and CBRE relating to the project formerly known as Yonge Street Living (YSL) residences".

6. CBRE appealed the CBRE Notice and provided evidence regarding CBRE's role related to the YSL Project and its introduction to the Sponsor. CBRE's position is supported by an affidavit of Ted Dowbiggin, the President of Cresford Capital Inc. CBRE's evidence illustrates an ongoing dialogue between Concord and Cresford that resulted in the transaction implemented through the Final Proposal.

7. The appeal is scheduled to be heard on September 26, 2022. Based on the evidence provided by CBRE to the Proposal Trustee in response to the CBRE Notice, the Proposal Trustee intends to seek the Court's approval of a settlement of the appeal by admitting CBRE's claim, as filed, and withdrawing the appeal, on a without costs basis. The Proposal Trustee has informed the service list of this position and advised that should any party wish to file its own responding material, it should do so by the scheduled date and that the Proposal Trustee reserves the right to file reply materials to any responding materials.

5.3 Mr. Zhang

1. Mr. Zhang, a real estate broker, filed a proof of claim dated September 19, 2021 in the amount of approximately $1.5 million. For reasons that will be provided in a further report to Court, if necessary, the Proposal Trustee partially accepted the claim for $1 million (plus HST) that was filed by Harbour International Investment Group ("Harbour International"), a company owned by Mr. Zhang, and not by Mr. Zhang personally.

2. The LPs disagree with the Proposal Trustee's partial acceptance of this claim. Certain LPs issued a Notice of Motion in which they seek an Order, among other things, setting aside the Proposal Trustee's partial acceptance of Harbour International's claim.

3. The Proposal Trustee, the LPs, the Sponsor and the Companies are discussing procedural issues related to the proposed motion by the LPs, which has not yet been scheduled.

4. As a result of the concerns raised by the LPs and the status of this dispute, neither Mr. Zhang nor his company, Harbour International, has received an interim distribution in respect of this claim.

6.0 Proposal Sponsor Funding Dispute

1. After the Arbitrator determined that an oral agreement existed in respect of the Athanasoulis Claim, the LPs expressed concern regarding the manner and nature of the ongoing arbitration proceedings and a desire to participate in any further proceedings in respect of the Athanasoulis Claim. The LPs also wished to raise issues concerning whether the Athanasoulis Claim was debt or equity, the priority of the Athanasoulis Claim as against the LPs, certain claims that the LPs asserted against Ms. Athanasoulis, as well as the sequence in which various disputes concerning the Athanasoulis Claim should be addressed, *i.e.*, whether the priority of the Athanasoulis Claim vis-à-vis the LPs should be determined before the Arbitrator considers the amount of damages flowing from the oral agreement.

2. The Proposal Trustee welcomed the involvement of the LPs, as certain evidence from the LPs will likely be necessary in resolving the issues raised in Phase 2 of the arbitration.

3. Discussions between counsel to the LPs and counsel for Ms. Athanasoulis regarding the scope and parameters of the LPs' involvement have been contested. Among other things, the LPs (i) are not prepared to share in the funding of the initial costs of the Arbitrator in respect of Phase 2, (ii) believed that the priority issue should be determined prior to the quantum of damages issues, (iii) take the position that the Proposal Trustee had no jurisdiction to arbitrate matters related to the Athanasoulis Claim, and (iv) asserted that all remaining issues in respect of the Athanasoulis Claim should be adjudicated before this Court.

4. Throughout May 2022, counsel to the Proposal Trustee had numerous communications with all stakeholders, including the Sponsor, to encourage mediation to resolve the Athanasoulis Claim.

5. On May 24, 2022, the LPs asked the Court to schedule a motion to "stay the upcoming arbitration of Ms. Athanasoulis' claim". The Court refused to schedule the motion, agreed with the Proposal Trustee's submission that the Athanasoulis Claim was properly before the Arbitrator, and issued an endorsement (a copy of which is attached in Appendix "F") stating that arbitration "would be far more efficient than putting off the arbitration and scheduling a full day motion". The Court therefore declined to schedule the motion. Instead, the Court directed the parties "*to collaborate on the outstanding issues*", and the LPs to "*particularize their equitable claims against Ms. Athanasoulis*". Counsel to the Proposal Trustee also proposed mediation at this case conference, and the Court's endorsement recorded that "*the issues for the arbitration could be the subject of a mediation*". A further case conference was scheduled for June 8, 2022.

6. At no point up to the May 24, 2022 hearing had the Sponsor taken the position that the Proposal Trustee had acted improperly or that their fees and expenses had not been reasonably incurred, although the Sponsor had made clear that it preferred that the Athanasoulis Claim be resolved via mediation versus arbitration.

7. In advance of the June 8, 2022 case conference, the Proposal Trustee continued to encourage the parties to mediate the Athanasoulis Claim. Ultimately all stakeholders (including the Sponsor) except the LPs agreed to mediation. The Proposal Trustee, Ms. Athanasoulis, and the LPs also worked diligently in accordance with the Court's May 24th endorsement and agreed to a list of issues for arbitration. The Proposal Trustee undertook "*to ensure that it will avoid duplication and minimize its role in the arbitration except where required*".

8. The Sponsor did not agree to further arbitration and continued to propose mediation.

9. The Court's endorsement following the June 8, 2022 case conference (attached as Appendix "G") states that the Court was "*not inclined to order a mandatory mediation of the Athanasoulis/LP issues where the LPs do not agree*". The Court directed counsel to "*continue collaborating and refining the issues for the arbitration*" and to obtain dates from the Arbitrator. The Court recognized the Sponsor's concern about the costs of arbitration, but concluded that "arbitration must prevail". The Court also directed counsel for Cresford and Ms. Athanasoulis to work cooperatively on document production issues. Cresford complied with the direction of the Court and produced numerous documents to Ms. Athanasoulis in respect of the arbitration.

10. At the beginning of July 2022, the Sponsor asserted for the first time that the Proposal Trustee acted without jurisdiction in arbitrating the Athanasoulis Claim. The Sponsor also stated that it would refuse to fund the Proposal Trustee's ongoing costs, notwithstanding the express terms of Section 11.01 of the Final Proposal which require it to do so. The position taken by the Sponsor in this regard affects not only the Athanasoulis Claim but also the CBRE and Harbour International claims, and seems to be the case regardless of the manner in which the claims are determined (*i.e.*, by arbitration or a contested disallowance motion). Counsel to the Sponsor set out the Sponsor's position in this regard in a letter dated July 5, 2022 (attached as Appendix "H"). The Proposal Trustee responded to this letter on July 6, 2022 (attached as Appendix "I").

11. The Proposal Trustee cannot advance these proceedings if it does not have any means to pay its reasonable fees and costs, meaning that these proceedings will be at a standstill, claims will remain unresolved and millions of dollars will remain undistributed. As a result, the Proposal Trustee has scheduled a motion to confirm its right to indemnification from the Sponsor under the Final Proposal.

12. Notwithstanding the Court's direction that the Athanasoulis Claim is to be resolved by arbitration, the Sponsor takes the position that the Proposal Trustee acted without jurisdiction in proceeding to arbitration, and has therefore refused to fund the Proposal Trustee's outstanding Administrative Fees and Expenses totalling $88,266 (excluding HST)[5], plus the costs to complete these proceedings, which the Proposal Trustee and its counsel have estimated could be as much as $1.5 million, plus HST. A significant portion of the Proposal Trustee's unpaid costs relate to dealing with the issues in this motion.

13. The Sponsor's position appears to be that the Proposal Trustee was required to either allow or disallow the Athanasoulis Claim, and that it did not have the authority to refer aspects of that claim to arbitration to assist the Proposal Trustee in making its determination. This position is analogous to the position that certain LPs took in bringing a motion to stay arbitration in May 2022. The Court refused to schedule that motion on the grounds that arbitration was an appropriate process for resolving the Athanasoulis Claim.

14. Section 135 of the BIA provides that the Proposal Trustee has substantial discretion as to the process to determine and value of claims. The Proposal Trustee has not been provided with evidence at this time establishing that Ms. Athanasoulis has a valid claim that should be allowed. If the Proposal Trustee had disallowed or allowed the Athanasoulis Claim, the inevitable result would have been an appeal of that disallowance by Ms. Athanasoulis (as confirmed by her counsel) or the LPs, and an ensuing contested proceeding before the Court that would be nearly identical to the arbitration that the parties are attempting to conduct before Mr. Horton, albeit over an extended period of time due to limited Court availability.

[5] Comprised of $19,307 plus HST owing to the Proposal Trustee since July 1, 2022 and $68,959 plus HST owing to the Proposal Trustee's counsel since June 1, 2022.

15. The Proposal Trustee has at all times worked to administer the estate in the most fair and cost-efficient manner possible. In this regard, a summary of the invoices of the Proposal Trustee and its counsel to address all matters in this proceeding from the Implementation Date is provided in the table below.

	Amount ($000)			
Period	Fees	Disbursements	HST	Total
Proposal Trustee				
July 17-31, 2021	36,615	577	4,835	42,027
Aug 1-31, 2021	52,355	440	6,863	59,658
Sept 1-30, 2021	50,399	128	6,568	57,095
Oct 1-31, 2021	30,868	119	4,028	35,015
Nov 1-30, 2021	30,250	86	3,944	34,280
Dec 1-31, 2021	19,514	-	2,537	22,051
Jan 1-31, 2022	40,326	35	5,247	45,607
Feb 1-28, 2022	44,123	11	5,737	49,871
Mar 1-31, 2022	33,091	442	4,359	37,892
Apr 1-30, 2022	25,718	1	3,343	29,062
May 1-31, 2022	36,389	-	4,731	41,120
June 1-30, 2022	16,135	94	2,110	18,339
Total	415,783	1,933	54,302	472,017
Davies				
July 8-31, 2021	41,553	23	5,405	46,981
Aug 1-31, 2021	26,479	15	3,442	29,936
Sept 1-30, 2021	17,599	282	2,323	20,204
Oct 1-31, 2021	6,503	15	845	7,363
Nov 1-30, 2021	32,820	36	4,269	37,125
Dec 1-31, 2021	34,230	29	4,452	38,711
Jan 1-31, 2022	60,325	64	7,849	68,238
Feb 1-28, 2022	210,548	1,610	27,579	239,737
Mar 1-31, 2022	41,205	13,287	7,082	61,574
Apr 1-30, 2022	62,183	15	8,084	70,282
May 1-31, 2022	90,183	75	11,724	101,982
June 1-30, 2022	26,617	1,210	3,616	31,443
Total	650,245	16,661	86,670	753,576
Grand Total	1,066,028	18,594	140,972	1,225,593

16. In addition to the amounts in the table above, the unbilled time of the Proposal Trustee and Davies to the end of July 2022 totals approximately $60,439 plus HST, a substantial portion of which has been incurred dealing with the procedural and related issues addressed in this Report. The total amount owing to the Proposal Trustee and Davies for unpaid accounts and unbilled time as of July 31, 2022 is $88,266 plus HST.

17. The Proposal Trustee believes that such costs are reasonable in the context of these proceedings, which have been extensively contested and involve several Disputed Claims. The Proposal Trustee has been involved to a greater degree than would ordinarily be the case as a result of the poor state of the Companies' books and records, the lack of written documentation in respect of many of the Companies' material transactions, the absence of any inspectors, the credibility issues referenced herein regarding certain of the Companies' management and certain of the claimants, the limited involvement by representatives of the Companies in the administration of most of the estate, and the litigation commenced or pending by the LPs.

18. The Proposal Trustee's estimate of $1.5 million to complete the administration of these proceedings is broken down as follows[6], exclusive of HST:

    a) $88,266 regarding outstanding fees and costs of the Proposal Trustee and its counsel;

    b) $700,000 in respect of Phase 2 of the arbitration of the Athanasoulis Claim (which includes anticipated expert witness fees);

    c) $300,000 in respect of the appeal taken by certain of the LPs regarding the claim by Zhang/Harbour International; and

    d) approximately $400,000 in administrative steps to complete the Final Proposal, including making final distributions and seeking its discharge. If no other issues arise in these proceedings, these costs should be less than this estimate.

19. Costs in respect of a final determination of the CBRE claim, assuming no further materials are filed, are expected to be insignificant if determined consistent with the Proposal Trustee's recommendation herein. It should be noted, however, that on August 18, 2022, the LPs wrote to Davies to advise that they object to the proposed allowance of CBRE's claim.

20. The above is an estimate only and could vary significantly up or down depending on the manner in which Disputed Claims are resolved. The estimate does not contemplate any appeals of any decisions rendered by the Arbitrator or the Court.

21. All of the above cost estimates are provided on a best effort basis on currently available information. The costs will vary depending upon any number of factors that arise regularly in contested litigation. Other than the outstanding fees and costs of the Proposal Trustee and Davies, the cost estimates above do not include the costs of the Proposal Trustee and Davies in bringing the instant motion to compel the Sponsor to perform its obligations under the Final Proposal.

[6] Includes the Proposal Trustee's costs and Davies costs.

22. The Proposal Trustee is of the view that the delay in resolving the Athanasoulis Claim will be longer, and the costs greater, if the Athanasoulis Claim is adjudicated before the Court based on a disallowance of that claim by the Proposal Trustee. It has been estimated by the parties that a two-week trial would be required to adjudicate the Athanasoulis Claim. The Proposal Trustee will continue to make every effort to minimize its costs in determining the remaining claims.

23. The Sponsor has offered no reasonable recommendation to resolve the Athanasoulis Claim other than mediation (in which the LPs have advised they will not participate and which Justice Gilmore refused to order) and settlement, which does not appear to be possible at this time given the positions of the parties. The Proposal Trustee has attempted on numerous occasions to see if there is a middle ground acceptable to the parties. None has been found.

7.0 Conclusion

1. It is the Proposal Trustee's view that the position taken by the Sponsor to withhold any further funding is inconsistent with the explicit terms of the Final Proposal and the Sponsor's obligation to indemnify the Proposal Trustee. The Sponsor's position has delayed the administration of this proceeding and increased the costs for all parties.

2. The Proposal Trustee continues to believe that an arbitration of the Athanasoulis Claim is the most expedient and cost-efficient method to determine the claim and fits within the scope of Section 135 of the BIA, particularly given the estimated two-week trial required to determine the Athanasoulis Claim. As Justice Gilmore acknowledged at the May 24, 2022 case conference, a disallowance of the Athanasoulis Claim, followed by an appeal, will result in a similar procedural and fact-finding process, though likely longer and more expensive. The Proposal Trustee has therefore chosen a path, supported by Ms. Athanasoulis and, as of the date of this Report, accepted by the LPs, to determine the claim in the most efficient process possible in the circumstances.

3. Absent resolution of the funding issue, completion of the Final Proposal will be at a standstill.

4. Based on the foregoing, the Proposal Trustee recommends that the Court make an order:

    a) declaring that the conduct of the Proposal Trustee in determining the claims, including the Disputed Claims, has been reasonable, and accordingly, the Administrative Fees and Expenses have been reasonably incurred;

    b) declaring that the Sponsor remains bound by Section 11.01 of the Final Proposal;

    c) declaring that the Sponsor is required to fund the Administrative Fees and Expenses of the Proposal Trustee pursuant to Section 11.01 of the Final Proposal;

d) declaring that the commencement of arbitration to determine the Athanasoulis Claim by the Proposal Trustee was a valid exercise of the power conferred upon the Proposal Trustee under the Final Proposal and/or the BIA;

e) declaring that, in discharging its duties under the Final Proposal and the BIA, the Proposal Trustee has not engaged in wilful misconduct or gross negligence;

f) providing the Proposal Trustee with a charge on:

i. all distributions made to-date to the Sponsor (or any of its affiliates) on the claims it purchased in this proceeding (being distributions of $8.4 million), including a reimbursement obligation to the extent required; and

ii. all future distributions that may be payable to the Sponsor in respect of the claims it purchased in this proceeding (being a range of $1.8 million to $3.6 million, depending on the resolution of the Disputed Claims); and

g) declaring that if the Sponsor fails to pay an invoice rendered by the Proposal Trustee or its counsel pursuant to Section 11.01 of the Final Proposal within 30 days of the invoice, the Proposal Trustee is entitled to set-off amounts owing by the Sponsor pursuant to such invoice against any amounts held by the Proposal Trustee and otherwise payable to the Sponsor as a result of any future distributions to the Sponsor in respect of claims it purchased in this proceeding.

* * *

All of which is respectfully submitted,

KSV Restructuring Inc.

KSV RESTRUCTURING INC.
IN ITS CAPACITY AS PROPOSAL TRUSTEE OF
YG LIMITED PARTNERSHIP AND
YSL RESIDENCES INC.,
AND NOT IN ITS PERSONAL CAPACITY

Appendix “D”

Seventh Report to Court of KSV Restructuring Inc. as Proposal Trustee of YG Limited Partnership and YSL Residences Inc.

September 12, 2022

Contents

Appendices

COURT FILE NO.: BK-21-02734090-0031

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

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

SEVENTH REPORT TO COURT OF KSV RESTRUCTURING INC. AS PROPOSAL TRUSTEE

SEPTEMBER 12, 2022

1.0 Introduction

1. This report ("Report")[1] is filed by KSV Restructuring Inc. ("KSV") in its capacity as Proposal Trustee (the "Proposal Trustee") in connection with Notices of Intention to Make a Proposal (the "NOIs") filed on April 30, 2021 (the "Filing Date") by YG Limited Partnership (the "Partnership") and YSL Residences Inc. ("Residences", and together with the Partnership, the "Companies"), pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA").

2. On May 14, 2021, the Ontario Superior Court of Justice (Commercial List) (the "Court") issued an order (the "Consolidation Order") procedurally and substantively consolidating the NOIs (the "NOI Proceedings") for the purpose of simplifying the administration of the NOI Proceedings, including filing a joint proposal and convening a single meeting of creditors.

3. The principal purpose of the NOI proceedings was to create a stabilized environment to allow the Companies to present a proposal to their creditors that provides them with a recovery greater than they would have received in a bankruptcy or alternative insolvency process.

4. On May 27, 2021, the Companies filed a proposal with the Official Receiver in accordance with Section 62(1) of the BIA (the "Proposal"). On June 3, 2021, the Companies filed an amended proposal (the "First Amended Proposal") and on June 15, 2021, the Companies filed a further amended proposal (the "Second Amended Proposal").

[1] Capitalized terms have the meaning provided to them in the Final Proposal (as defined herein), unless otherwise defined in this Report.

5. At a meeting of creditors held on June 15, 2021 (the "Creditors' Meeting"), the creditors voted to accept the Second Amended Proposal.

6. On June 23, 2021, the Companies sought Court approval of the Second Amended Proposal. Pursuant to the Reasons for Interim Decision of the Court made on June 29, 2021, as amended on July 2, 2021 (the "Interim Decision"), the Court did not approve the Second Amended Proposal.

7. A Court hearing for approval of the Second Amended Proposal was scheduled for July 9, 2021 to allow the Companies time to address the Court's concerns set out in the Interim Decision and, should they wish, present a further amended proposal for the Court's consideration. A copy of the Interim Decision is provided in Appendix "A".

8. Shortly before the motion on July 9, 2021, Concord Properties Developments Corp., the sponsor of the proposals filed in this proceeding (the "Sponsor"), served a further amended proposal (the "Third Amended Proposal") and an offer of distributions to be made outside of the Third Amended Proposal by the Sponsor to any equityholders[2] of the Partnership (the "Equityholders") willing to accept such Offer (the "Equity Offer").

9. Pursuant to Section 3.03 of the Second Amended Proposal and the Third Amended Proposal, the Companies required the consent of the Proposal Trustee to file the Third Amended Proposal. As the Third Amended Proposal was provided for the first time to the Proposal Trustee just prior to the motion on July 9, 2021, the Proposal Trustee did not have the time it required to review the Third Amended Proposal prior to that hearing. Accordingly, the motion was adjourned to July 16, 2021 to provide the Proposal Trustee with the opportunity to consider the Third Amended Proposal and for the Proposal Trustee to make a recommendation to the Court.

10. The Proposal Trustee's Fourth Report to Court dated July 15, 2021 set out, among other things, the material changes between the Second Amended Proposal and the Third Amended Proposal, further changes to the Third Amended Proposal (the "Final Proposal"), and the Proposal Trustee's recommendation to the Court that it approve the Final Proposal.

11. Pursuant to Reasons for Decision dated July 16, 2021, as amended on July 27, 2021 (the "Decision"), the Court approved the Final Proposal. A copy of the Decision is provided in Appendix "B".

12. No inspectors were appointed in the Final Proposal.

[2] Defined in the Final Proposal as the holders of the limited partnership units of YG LP and those Equity Claims deemed to be equity pursuant to the Interim Decision.

1.1 Purposes of this Report

1. The purposes of this Report are to:

   a) provide background information about the Companies and the Final Proposal;

   b) summarize the claim of CBRE Limited ("CBRE") in these proceedings, including the open and transparent manner in which it has been determined by the Proposal Trustee; and

   c) recommend that the Court issue an order allowing the CBRE claim as filed in the amount of $1,239,377.40.

1.2 Currency

1. All references to currency in this Report are to Canadian dollars.

1.3 Definitions

1. Capitalized terms not defined in this Report have the meanings provided to them in the Final Proposal.

2.0 Background

1. Information regarding the Companies, the real estate project that was being developed by the Companies known as Yonge Street Living Residences (the "YSL Project"), the history of these proceedings, the receivership application filed by the first mortgagee of the YSL Project in advance of these proceedings, Timbercreek Mortgage Servicing Inc. ("Timbercreek"), that was pending against the Companies, applications by certain of the Partnership's limited partners (the "LPs") and the prior proposals filed in this proceeding is included in the Proposal Trustee's reports to Court and other materials filed with the Court. Copies of all publicly available information in these proceedings can be found on the Proposal Trustee's case website at https://www.ksvadvisory.com/insolvency-cases/case/yg-limited-partnership.

2. The Companies are part of the Cresford Group of Companies ("Cresford"), a Toronto-based real estate developer. In addition to the NOI Proceedings, several of Cresford's other developments have been subject to restructuring proceedings.

3. Residences was the registered owner of the real properties municipally known as 363-391 Yonge Street and 3 Gerrard Street East, Toronto, Ontario (the "Real Property"), acting as a bare trustee and nominee of, for and on behalf of the Partnership.

4. The Partnership was the beneficial owner of the Real Property and was formed for the purpose of developing the Real Property into a mixed-use office, retail and residential condominium development comprised of approximately 1,100 residential units, 190,000 square feet of commercial/retail/institutional space and 242 parking spaces known as the YSL Project.

5. As a result of the successful implementation of the Final Proposal, title to the Real Property was transferred to an affiliate of the Sponsor.

6. In the context of Cresford's various restructuring proceedings, the credibility and availability of Cresford's management, and the reliability of its books and records have been significant issues. As a result, the Proposal Trustee has been involved in addressing the various disputed claims filed in the NOI Proceedings, where in most proposal proceedings the debtor company takes a more active role in the claims process.

2.1 Applications by the Limited Partners and Senior Mortgagee

1. Prior to the Filing Date, certain of the LPs commenced applications (collectively, the "LP Applications") seeking Orders declaring that, among other things:

   a) the General Partner, 9615334 Canada Inc. (the "GP"), is terminated as general partner of the Partnership;

   b) any agreements entered into by the GP with the Sponsor are null and void; and

   c) the GP breached its duty of good faith to the LPs.

   Additionally, certain of the LPs sought the appointment of an equitable receiver.

2. On June 1, 2021, the Court heard motions by the LPs to, among other things, lift the stay of proceedings pursuant to Section 69(1) of the BIA and to authorize the LPs to bring the LP Applications. Pursuant to an endorsement made on the same day, the Court, among other things, set a litigation timetable for a hearing scheduled for June 23, 2021 where certain of the LPs' arguments could be made at the same time that the Companies sought approval of the Amended Proposal, assuming that the Amended Proposal had been accepted by the Affected Creditors voting at the Meeting, which they did on June 23, 2021.

3. In advance of the Proposal, the Companies were in default of their loan agreement with Timbercreek. Pursuant to an agreement dated March 26, 2020 among Timbercreek, the Companies and two Cresford entities (the "Forbearance Agreement"), Timbercreek agreed to, among other things, forbear from enforcing its security against the Real Property. Timbercreek subsequently brought a motion to appoint a receiver on November 13, 2020. The receivership application was adjourned several times and remained pending when the NOIs were filed. On several occasions, Timbercreek scheduled an application for the appointment of a receiver if the Companies' NOI Proceedings were unsuccessful.

3.0 Final Proposal

1. The Final Proposal provides for distributions to the Affected Creditors from the Affected Creditor Cash Pool, being a cash pool funded by the Sponsor in the amount of $30.9 million to be distributed *pro rata* to Affected Creditors with Affected Creditor Claims. The Final Proposal also provides that if any residual amount remains in the Affected Creditor Cash Pool following the final distributions to Affected Creditors, such residual funds, if any, would be held by the Proposal Trustee "pending receipt of a duly issued direction from all of the holders of Class A Preferred Units of YG LP, or otherwise by order of the Court". A copy of the Final Proposal is provided in Appendix "C".

2. On July 22, 2021, the Sponsor funded the Affected Creditor Cash Pool. The corporate transactions summarized in Section 6.01 of the Final Proposal were completed on the same day and resulted in, among other things, title to the YSL Project being transferred to an entity related to the Sponsor.

4.0 Creditors

1. Sixty-five (65) claims have been filed against the Companies, including claims from trade creditors, real estate brokerages, professional advisors and former employees[3]. The status of the claims filed in this proceeding is summarized in the table below.

	Amount ($000)		
Creditor	Filed	Accepted by Proposal Trustee	Difference
Proven Claims:			
Otis Canada Inc.	4,912	390	4,522
Landpower Real Estate Ltd.	4,500	3,847	653
Homelife Landmark Realty Inc.	3,170	3,145	25
Homelife New World Realty Inc.	1,839	1,524	315
Sarven Cicekian	767	383	384
David Ryan Millar	735	450	285
Sultan Realty Inc.	699	671	28
Mike Catsiliras	681	269	412
Home Standards Brickstone Realty	586	208	378
Louie Giannakopoulos	445	308	137
Other Proven Claims	4,142	3,679	463
Total Proven Claims	22,476	14,874	7,602
Disputed Claims:			
Maria Athanasoulis (disputed)	19,000	TBD	TBD
CBRE	1,239	TBD	TBD
Henry Zhang (disputed by the LPs)	1,520	1,130	390
Total Unresolved Claims	21,759	1,130	20,629
Total Claims	44,235	16,004	28,231

[3] Since the Proposal Trustee's last report, there has been one additional unsecured claim filed by a real estate broker.

2. Of the claims in the table, the following claims remain unresolved, as more fully discussed below (the "Disputed Claims"):

   a) Ms. Athanasoulis;

   b) CBRE; and

   c) Mr. Zhang.

3. On March 24, 2022, the Proposal Trustee paid an interim distribution of 70¢ on the dollar to the creditors with Proven Claims.

4. Since the interim distribution, the Proposal Trustee has resolved various claims, including complex claims filed by four former employees of Cresford (the "Former Employees"), including common employer claims that each Former Employee filed against the Companies. The Proposal Trustee negotiated settlements of these claims, which were approved by the Court on May 24, 2022.

5. The Proposal Trustee paid a catch-up distribution to the Former Employees and other creditors with Proven Claims, except those who continue to have Disputed Claims and four creditors whose claims were recently resolved.

6. The Proposal Trustee has reserved the balance of the Affected Creditor Cash Pool until the Disputed Claims can be determined. The Affected Creditor Cash Pool is approximately $20.5 million.

7. The Sponsor took an assignment of 28 of 65 Affected Creditor claims, totalling approximately $12 million. As assignee, the Sponsor participated in the interim distribution and has received approximately $8.4 million of the total amounts distributed.

8. The table below shows the range of outcomes to stakeholders depending on the resolution of the Disputed Claims. The table illustrates that resolution of the Disputed Claims will determine whether there will be any distributions to the LPs.

	Amount ($000)	
Estimated Distributions	High	Low
Affected Creditor Cash Pool	30,900	30,900
Claims		
Proven Claims	14,874	14,874
Ms. Athanasoulis	-	19,000
CBRE	1,239	1,239
Mr. Zhang	-	1,130
Total Claims	16,113	36,243
Dividend rate	100%	85.3%
Residual for LPs	14,787	-

5.0 Status of the CBRE Claim

1. CBRE, a real estate brokerage, filed a proof of claim dated January 28, 2022 in the amount of approximately $1.2 million. The claim relates to an invoice submitted by CBRE to "Cresford" dated October 13, 2021 and refers to services rendered by CBRE as the exclusive listing broker for the YSL Project pursuant to an unsigned listing agreement between CBRE and Residences (the "Listing Agreement").

2. The Proposal Trustee disallowed CBRE's claim in full for the reasons set out in its Notice of Disallowance of Claim dated February 10, 2022 (the "CBRE Notice"). A copy of the CBRE Notice is provided as Appendix "D".

3. One of the key issues in respect of CBRE's claim is the applicability of the "holdover clause" in the Listing Agreement, which reads as follows:

   > *HOLDOVER*
   > *4.1*
   > *The Owner further agrees to pay the Brokerage the Commission if, within 90 calendar days after the expiration of the Term, the Property is sold to, or the Owner enters into an agreement of purchase and sale for the Property with, or negotiations continue, resume or commence and thereafter continue leading to the execution of a binding agreement of purchase and sale for the Property, provided the transaction subsequently closes, with any person or entity (including his/her/its successors, assigns or affiliates) with whom the Brokerage has negotiated (either directly or through another agent) or to whom the Property was introduced or submitted, from any source whatsoever, or to whom the Owner was introduced, from any source whatsoever, prior to the expiration of the Term; with or without the involvement of the Brokerage. The Brokerage is authorized to continue negotiations with such persons or entities. The Brokerage agrees to submit a list of such persons or entities to the Owner within 10 business days following the expiration of the Term, provided, however, that if a written offer has been submitted, then it shall not be necessary to include the offeror's name on the list.*

4. The Term expired on August 20, 2020, and the Final Proposal was approved on July 16, 2021, well outside the 90-day period. Accordingly, the holdover provision would only be applicable if "*negotiations continue, resume or commence*" with the Sponsor within such 90-day period and the Sponsor was someone "*to whom the Property was introduced or submitted, …, or to whom the Owner was introduced … prior to the expiration of the Term*".

5. The CBRE Notice was issued based on, among other things, representations the Proposal Trustee received from the Sponsor that the Sponsor dealt directly with Cresford and that it did not have any dealings with CBRE in respect of the YSL Project.

6. Requiring CBRE to respond to the Sponsor's representations would have involved the Proposal Trustee receiving affidavit evidence from CBRE and, in light of that, possibly responding to affidavit evidence from the Sponsor.

7. Given the nature of these proceedings with the history of other stakeholders claiming to have information relevant to the Proposal Trustee's assessments, the Proposal Trustee determined that the best and most transparent way of determining CBRE's claim, based on the information available to it at the time, was to disallow the claim on the basis set out in the CBRE Notice and to permit CBRE to file a full evidentiary response by way of an appeal on notice to all. In this way, all parties would be able to review and respond to the evidence as they saw fit once on one complete record.

8. On February 11, 2022, following the issuance of the CBRE Notice, counsel for the Sponsor copied the Proposal Trustee on email correspondence with counsel for CBRE. In that correspondence, the Sponsor stated that while CBRE had introduced the Sponsor to Cresford, the Sponsor had no "*knowledge of a brokerage agreement or similar arrangement between Cresford and CBRE relating to the project formerly known as Yonge Street Living (YSL) residences*".

9. On March 10, 2022, CBRE served its notice of motion to appeal the CBRE Notice on the service list in these proceedings with scheduling to be dealt with at a case conference on March 16, 2022. Parties intending on taking a position on CBRE's motion were invited to attend at the case conference.

10. The case conference was held before Mr. Justice Cavanagh, at which the LPs' counsel attended. Mr. Justice Cavanagh scheduled the appeal to be heard on September 26, 2022.

11. The Proposal Trustee then canvassed with CBRE's counsel whether the dispute could be dealt with earlier by means of an arbitration, but no agreement could be reached on the terms for doing so.

12. On July 25, 2022, CBRE served its complete motion record containing its affidavit evidence regarding CBRE's role related to the YSL Project and its introduction to the Sponsor. CBRE's position is supported by an affidavit of Ted Dowbiggin, the President of Cresford Capital Inc. CBRE's evidence illustrates an ongoing dialogue between Concord and Cresford, after such introduction, that resulted in the transaction implemented through the Final Proposal. CBRE also provided evidence from Mr. Dowbiggin that Cresford dealt with CBRE on the basis that the listing agreement was in force, notwithstanding that it was never signed. In the Proposal Trustee's view, the ongoing dialogue between Cresford and the Sponsor, as well as Cresford's and CBRE's conduct related to the listing agreement, suggests that the holdover provisions apply and therefore entitle CBRE to its fee.

13. Based on the evidence provided by CBRE, the Proposal Trustee advised the service list that the Proposal Trustee would not be filing any responding material. Rather, at the hearing scheduled for September 26, 2022, the Proposal Trustee will seek the Court's approval of a settlement of the appeal with CBRE by admitting CBRE's claim, as filed, and the withdrawal of the appeal on a without costs basis. The Proposal Trustee informed the service list that, should any party wish to file their own responding material, the current schedule proposed this be done on or before August 18, 2022, and that the Proposal Trustee reserves the right to file reply materials to any responding materials.

14. On August 18, 2022, counsel to the LPs sent a letter to counsel to the Proposal Trustee, among other things, informing the Proposal Trustee that they had instructions to challenge CBRE's appeal and requesting a copy of CBRE's proof of claim and the CBRE Notice. The Proposal Trustee subsequently provided these documents to the LPs' counsel on a without prejudice basis to the Proposal Trustee's and CBRE's rights to contest the LPs' standing on CBRE's motion. A copy of the August 18, 2022 letter is attached as Appendix "E".

15. As of the date of this Report, no parties in these proceedings other than the LPs have contested the Proposal Trustee's allowance of CBRE's claim, including the Proposal Sponsor, which is the largest creditor in these proceedings by way of assignment of the claims discussed in paragraph 4.7 above.

16. The LPs served their responding motion record on August 19, 2022. Their motion record contained no evidence contesting or challenging any of the evidence submitted by CBRE.

17. The LPs then requested to cross-examine Mr. Dowbiggin and Mr. Gallagher, CBRE's other affiant and an Executive Vice President on the National Investment Team at CBRE. The Proposal Trustee understands that CBRE consented to the cross-examinations being conducted without prejudice to contesting the LPs rights to cross-examine CBRE's affiants.

18. The Proposal Trustee notes that the Final Proposal provides that all of the reasonable administrative fees and expenses of the Proposal Trustee must be funded by the Sponsor. Accordingly, all of the Proposal Trustee's costs and expenses, including those of its legal counsel, incurred in dealing with the LPs' opposition to this motion are ultimately payable by the Sponsor and, therefore, do not erode any of the potential recoveries of the LPs.

6.0 Conclusion

1. It is the Proposal Trustee's view that CBRE's claim in the amount of $1,239,377.40 should be allowed and the appeal dispensed, without costs.

* * *

All of which is respectfully submitted,

KSV Restructuring Inc.

KSV RESTRUCTURING INC.
IN ITS CAPACITY AS PROPOSAL TRUSTEE OF
YG LIMITED PARTNERSHIP AND
YSL RESIDENCES INC.,
AND NOT IN ITS PERSONAL CAPACITY

Appendix “E”

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

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

RE: IN THE MATTER OF *THE BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED
IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

BEFORE: Kimmel J.

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

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

Alexander Soutter, for Yonge SL LPs

Shaun Laubman, for Chi Long LPs

Mark Dunn and Sarah Stothart, for Maria Athanasoulis

HEARD: October 17, 2022

ENDORSEMENT
(FUNDING MOTION)

Overview

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

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

[3] In the Proposal, Concord Properties Developments Corp. (the "Sponsor") covenanted in sections 10.2 and 11.1 to indemnify the Proposal Trustee for "all Administrative Fees and Expenses (defined below) *reasonably incurred* [and not covered by the reserve established on the

Proposal Implementation Date by the Sponsor in respect of the reasonably estimated additional Administrative Fees and Expenses anticipated to be incurred in connection with the administration of Distributions, resolution of any unresolved Claims … and the Proposal Trustee's discharge]". [emphasis added]

[4] "Administrative Fees and Expenses" are defined in the Proposal as "the fees, expenses and disbursements incurred by or on behalf of the Proposal Trustee, the solicitors for the Proposal Trustee, the solicitors of the Company both before and after the Filing Date."

[5] The Proposal Trustee brings this motion to compel the Sponsor to provide funding for the Proposal Trustee's continuing work towards the determination and/or resolution of the outstanding proofs of claim against the Debtor.[1] Jurisdictional questions have been raised within the motion.

[6] For reasons given orally at the hearing, I declined to grant the contested adjournment of this motion that the Sponsor asked for at the outset.

[7] For the reasons that follow, I have concluded that the Sponsor is not obligated to fund phase 2 of the Arbitration that was intended to determine the Athanasoulis Claim (as those terms are later defined herein). The Sponsor is obligated to indemnify the Proposal Trustee for its Administrative Fees and Expenses reasonably incurred to determine that claim itself, with the benefit of the Award from phase 1 of the Arbitration. The specific orders and directions arising from this ruling are detailed in this endorsement.

Background to the Motion

[8] As of October 2022, most of the claims filed against the Debtor had been settled or accepted by the Proposal Trustee. The largest claim, by far, filed against the Debtor is made by Maria Athanasoulis. This claim is comprised of $1 million for wrongful dismissal damages and $18 million in damages for alleged breaches of an oral profit-sharing agreement by which she alleges YSL must pay her 20% of the profits earned on the YSL Project (the "Athanasoulis Claim").

[9] The Athanasoulis Claim is one of three disputed claims by various stakeholders that the Proposal Trustee says have increased the professional costs associated with the Proposal and prevented the Proposal Trustee from completing the administration of these proceedings.

[10] As of the end of July 2022, the Proposal Trustee's Administrative Fees and Expenses totalled just under $1.2 million, excluding Harmonized Sales Tax. Included in that total were the costs of phase 1 of an arbitration held from February 22-25, 2022 (the "Arbitration") before William G. Horton ("the Arbitrator"). The Proposal Trustee and Ms. Athanasoulis both

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[1] The motion originally sought the determination of the Sponsor's obligation to fund certain past expenses incurred by the Proposal Trustee; however, these expenses have been funded through previous advances from the Sponsor and the Sponsor advised that it is not seeking to "claw-back" monies previously advanced nor challenge the use of funds by the Proposal Trustee to date. Thus, the practical implication of this motion is only to deal with future funding obligations of the Sponsor.

participated in the Arbitration. It resulted in a partial award dated March 28, 2022 (the "Arbitration Award") that included findings that:

a. The Debtor had entered into an oral profit sharing agreement with Ms. Athanasoulis;

b. Ms. Athanasoulis was an employee of YSL; and

c. Ms. Athanasoulis was constructively dismissed by YSL in December 2019.

[11] The Proposal Trustee says that it agreed to arbitrate the Athanasoulis Claim because the existence of the oral profit sharing agreement upon which it was based, as well as Ms. Athanasoulis' status with the Debtors (and other entities within the same corporate group referred to as the Cresford Group), were disputed by the Debtor's representative(s) and the determination of those questions would turn on credibility assessments. In these circumstances, the Proposal Trustee believed that the determination of whether Ms. Athanasoulis had a profit sharing agreement, what its terms were and whether she was an employee who was constructively dismissed, could be best determined through a hearing with *viva voce* evidence.

[12] The Sponsor was told on December 1, 2021 "that arrangements are being made with [Mr.] Horton to arbitrate the claim in late February, which is the earliest available date."

[13] The terms of appointment of the arbitrator were signed by the Proposal Trustee and Ms. Athanasoulis on December 9, 2021 (the "Agreement to Arbitrate"). By its terms, the parties agreed to:

a. appoint Mr. Horton to serve as sole arbitrator of their dispute relating to the Athanasoulis Claim; and

b. bifurcate the Athanasoulis Claim such that the Arbitration shall initially resolve only the liability of YSL (in phase 1). In the event the Arbitrator finds that YSL is liable to Ms. Athanasoulis, the parties agreed to schedule an additional hearing before the Arbitrator to determine the quantum of YSL's liability (in phase 2).

[14] The Sponsor did not receiver a copy of the Agreement to Arbitrate at that time and was not privy to its specific terms.

[15] The Proposal Trustee was advised on March 31, 2022 that "[w]e received the decision in the fact finding phase just the other day or so. Arbitrator Horton found an enforceable 20% profit sharing agreement to exist."

[16] A few weeks later, the Proposal Trustee provided the Sponsor an updated budget. With only approximately $210,000 remaining from the original reserve established under s. 10.1 of the Proposal, the Proposal Trustee requested additional net funds of approximately $1.485 million in respect of Administrative Fees and Expenses anticipated to be incurred in connection with the resolution of the remaining three claims and to administer the distributions.

[17] Some limited partners of YSL (the Yonge SL LPs and Chi Long LPs, collectively the "LPs") questioned the Proposal Trustee's handling of certain disputed claims, including the Athanasoulis Claim. The LPs are entitled to any remaining cash in the $30.9 million "Affected Creditors Cash Pool" established by the Sponsor, after proven claims are paid out. That cash pool is only to be used by the Proposal Trustee to satisfy proven claims. Therefore, the determination of the Athanasoulis Claim could impact the LPs' recovery from the Affected Creditors Cash Pool.

[18] At a case conference on May 24, 2022, the LPs asked the court to schedule motions they proposed to bring. Their motions were described at that time to be directed to the Proposal Trustee's authority to arbitrate the Athanasoulis Claim and to determine whether the Athanasoulis' Claim is subordinate to the LPs' entitlements. They also requested that the court order a stay of phase 2 of the Arbitration of the Athanasoulis Claim. At that time, the authority of the Proposal Trustee to enter into the Agreement to Arbitrate was being challenged by at least one of the LPs.

[19] Instead of scheduling that motion, the court urged the parties to work out an arrangement that would allow the LPs' priority claims to be added to, and determined in, the existing Arbitration under an expanded comprehensive arbitration process (the "consolidated arbitration process").[2]

[20] At a further case conference on June 8, 2022, the parties updated the court about their ongoing discussions since the last case conference. The LPs indicated that they would be prepared to have their priority issues determined in a consolidated arbitration process. The Sponsor expressed concerns about the added cost of adding the LPs priority issues into the existing Arbitration process. The Sponsor asked for two conditions: i) that there be an attempt to settle through mediation before embarking upon stage 2 of the Arbitration and/or any consolidated arbitration process, and ii) that the LPs undertake to pay the Proposal Trustee's expenses associated with the next phase of the consolidated arbitration process. The LPs did not agree to either of these conditions.

[21] The court once again urged the parties to continue collaborating and refining the issues for a potential consolidated arbitration process and to try to reach an agreement about the additional cost of this expanded arbitration of all issues, in the face of the alternative of parallel proceedings and the added cost and delay that would ensue if the LPs' proposed motion was scheduled. The court summarized the outstanding issues to be addressed (or not to be addressed) in the context of a potential consolidated arbitration process and some of the terms that were under consideration, as had been identified by the parties at that time, in an endorsement dated June 8, 2022 as follows:

> a. The enforceability of the contract as found by Mr. Horton regarding Ms. Athanasoulis' claim and the quantum of any damages she may have suffered.

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[2] This reference to a "potential consolidated arbitration process" is not intended to resolve the dispute between Ms. Athanasoulis (and the Proposal Trustee), on the one hand, and the LPs on the other, about whether they did in fact reach an agreement to consolidate all issues into an arbitration. That issue was not squarely put before the court on this motion.

b. Whether any claim for damages by Ms. Athanasoulis is in the nature of debt or equity.

c. Any claim for damages that the LPs may assert against Ms. Athanasoulis.

d. The Arbitration will not consider any claims between Ms. Athanasoulis and Cresford Capital/Dan Casey.

e. The LPs will reserve their rights with respect to whether Mr. Horton's decision at phase 1 of the Arbitration regarding enforceability is rendered *res judicata*.

f. At the conclusion of the Arbitration the Proposal Trustee will make a determination as to whether Ms. Athanasoulis' claim is provable, will value it and determine its priority.

g. The parties' rights to appeal are preserved under the *BIA*.

The court directed counsel to return for a further case conference on July 29, 2022.

[22] On July 4, 2022 the Sponsor advised that it would be withdrawing funding from the Proposal Trustee. It objected to funding the estimated $1.485 million in additional funding that the Proposal Trustee and indicated would be needed by it and its external counsel to complete the administration of these proceedings.[3]

[23] By the July 29, 2022 case conference, the Sponsor had been provided with a copy of the Arbitration Award and the Agreement to Arbitrate. The parties continued to have differing views on whether the Proposal Sponsor was obligated to fund the Proposal Trustee's fees and expenses for phase 2 of the Arbitration. Accordingly, the Proposal Trustee's funding motion was scheduled.

[24] Although no formal stay was ordered, phase 2 of the Arbitration has not been rescheduled, pending the outcome of this motion, since the Proposal Trustee requires funds to participate in it. The Proposal Trustee and Ms. Athanasoulis anticipate that the phase 2 proceeding contemplated by the Agreement to Arbitrate will require additional fact and expert evidence. The original schedule had set aside two weeks in September, 2022 for phase 2 of the Arbitration, before any consideration of including the LPs' claims.

[25] In the intervening timeframe, the Proposal Trustee and Ms. Athanasoulis did attend a mediation to try to come to a resolution of the Athanasoulis Claim, but that mediation was not successful.

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[3] This estimate assumed that the three remaining disputed claims would be adjudicated in the manner indicated by the Proposal Trustee, with no further procedural motions. Also included in this budget were estimated Administrative Fees and Expenses associated with the phase 2 of the Arbitration. The amount for this portion of the future fees was initially estimated to be approximately $500,000, but that estimate is now approximately $700,000. However, other disputed claims have been resolved such that the overall estimate for future funding that the Proposal Trustee anticipates remains at an estimated $1.485 million.

[26] On October 13, 2022, shortly before the return of this funding motion, the LPs provided a draft notice of motion indicating their intention to bring a motion for declarations that: (a) any claim by Ms. Athanasoulis to the proceeds of the YSL Project under any profit-sharing arrangement is subordinate to their entitlement to such proceeds; and (b) Ms. Athanasoulis' profit-sharing claim is unenforceable against the Debtors. The LPs' assertions are based primarily on alleged representations and promises made to them by Ms. Athanasoulis.

[27] The Proposal Trustee's Notice of Motion on this motion seeks an order declaring that:

a. The Proposal Trustee's Administrative Fees and Expenses have been reasonably incurred.

b. The Sponsor remains bound by the Proposal.

c. The Sponsor is required to fund the Administrative Fees and Expenses of the Proposal Trustee pursuant to the Proposal.

d. The commencement and continuation of Arbitration to determine the Athanasoulis Claim was a valid exercise of the Proposal Trustee's power under the Proposal or the *BIA*.

[28] The Sponsor does not dispute that it remains bound by the Proposal to fund Administrative Fees and Expenses reasonably incurred. It disagrees on whether the Proposal requires it to fund the Proposal Trustee's fees and expenses that will be incurred in respect of phase 2 of the Arbitration.

[29] The court does not technically need to deal with the Proposal Trustee's request for a declaration that its Administrative Fees and Expenses have been reasonably incurred up until now. The Sponsor is no longer seeking to claw-back prior expenses that the Proposal Trustee has already been paid from the initial funding reserve. This includes fees and expenses associated with phase 1 of the Arbitration.

[30] During the hearing, and considering the most up to date positions, the Proposal Trustee re-stated the issues to be decided on this motion:

a. Whether the commencement and continuation of Arbitration to determine the Athanasoulis Claim was a valid exercise of the authority granted to the Proposal Trustee under the Proposal or the *BIA* (the "Jurisdiction Question" below), and therefore are any Administrative Fees and Expenses associated with it reasonably incurred?

b. If not, and in the alternative, is the question of whether the Sponsor is obligated to fund the Administrative Fees and Expenses of the Proposal Trustee and its counsel associated with phase 2 of the Arbitration *res judicata* and has this court already ruled that phase 2 of the Arbitration should proceed in some fashion, either with or without the added issues raised by the LPs?

c. Should there be any other order made at this time regarding the approval of the fees of the Proposal Trustee and its counsel?

d. Should the Sponsor pay the Proposal Trustee's costs of this motion, which are rolled up in its defence of the reasonableness and appropriateness of the Arbitration process?

Analysis

The Positions of the Parties

[31] The focus of the analysis is on the question of whether any Administrative Fees and Expenses associated with completing phase 2 of the Arbitration would be "reasonably incurred," such that the Sponsor is obligated to indemnify the Proposal Trustee for them under s. 11.01 of the Proposal.

[32] The Sponsor argues that the Proposal Trustee should have either allowed or disallowed the Athanasoulis Claim without resorting to arbitration. The Sponsor says the Proposal Trustee should determine and value that claim on its own, with such input from Ms. Athanasoulis and others as it deems appropriate. This process, the Sponsor postulates, could be completed more efficiently and at a significantly lesser cost than through the Arbitration.

[33] The Proposal Trustee argues that, even with the benefit of hindsight, a process outside of the Arbitration resulting in an allowance or disallowance of the Athanasoulis Claim would not necessarily have been more cost effective or timely. It postulates that both parties would have inevitably challenged the Proposal Trustee's decision regarding the determination of the Athanasoulis Claim under s. 37 of the *BIA*. Either Ms. Athanasoulis would appeal a decision against her to the court, or the LPs would further challenge a ruling that favoured Ms. Athanasoulis. The Proposal Trustee believes that these appeals or challenges to the court under s. 37 of the *BIA* would have the potential to involve the same evidentiary input, time and expense as the Arbitration.

[34] The Proposal Trustee likens the Arbitration to the appointment of a claims officer to adjudicate the Athanasoulis Claim and urges the court to permit that process to now run its course through phase 2 of the Arbitration.

[35] The Proposal Trustee also maintains that it was reasonable to have entered into the Agreement to Arbitrate and that it cannot now renege and disallow the Athanasoulis Claim simply because the Sponsor does not like the outcome of phase 1. The Sponsor counters that if the Agreement to Arbitrate, the terms of which it only had full disclosure of in July 2022, improperly delegates to the Arbitrator the Proposal Trustee's responsibility for determining and valuing the Athanasoulis Claim and was entered into without authorization or jurisdiction, then it is invalid *ab initio* and unenforceable.

[36] Ms. Athanasoulis supports the Proposal Trustee's position and adds that she is an innocent third party. Having contracted with the Proposal Trustee for an arbitration in two phases and having herself invested significant time and expense on phase 1, it would be unfair to her to now return to square one for the determination and valuation of her claim.

[37] Ms. Athanasoulis further argues that there is no principled distinction between the jurisdiction to arbitrate phase 1 vs. phase 2 of the Arbitration. She contends that the Sponsor's withdrawal of its objection to paying the fees and expenses for phase 1 is a concession that arbitrating in phase 1 was authorized and within the jurisdiction of the Proposal Trustee, and thus phase 2 must be as well.

[38] The LPs still intend to argue that they are not bound by any findings in the Arbitration or its outcome, and that the Athanasoulis Claim is subordinate to theirs. Neither of those arguments are before the court now. However, should the court find that the Proposal Trustee lacked the authority or jurisdiction to arbitrate the Athanasoulis Claim, that would make their intended motion less complicated and possibly moot, depending on the Proposal Trustee's timing and ultimate determination of the Athanasoulis Claim.

The Issues

A) The Jurisdiction Question

i) Contractual and Statutory Framework

[39] Section 3.02 of the Proposal provides that the Proposal Trustee will assess claims in accordance with s. 135 of the *BIA*.

[40] Section 135 of the *BIA* provides that:

> (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

ii) Relevant Jurisprudence Relied Upon by the Parties

[41] The Sponsor objects to providing additional funding for phase 2 of the Arbitration on the grounds that the Arbitration falls outside the Proposal Trustee's mandate under the Proposal, which is to determine and resolve disputed claims in accordance with s.135 of the *BIA*. The Sponsor maintains that because the Proposal Trustee improperly delegated that decision-making function to the Arbitrator and assumed the role of adversary, rather than the decision-maker, any Administrative Fees and Expenses associated with phase 2 of the Arbitration will not be reasonably incurred.

[42] The Sponsor relies upon the recent decision of this court *In the Matter of the Proposal to Creditors of Conforti Holdings Limited*, 2022 ONSC 3264, leave to appeal refused, 2022 ONCA 651. In *Conforti*, the court declined to relieve a trustee of its responsibility under s. 135 of the *BIA* to determine a particular claim through a single claims process under the supervision of the

Bankruptcy Court and declined to approve the trustee's suggestion that it be determined, instead, by a foreign court.

[43] This court held in *Conforti* that s. 135(1.1) of the *BIA* contains mandatory language that "unambiguously" requires the Proposal Trustee itself to determine and value claims. *Conforti* confirms, at para. 42, that:

> The regime under the *BIA* provides for a summary procedure for (i) determination by the trustee of whether a contingent or unliquidated claim is a provable claim, and, if so, (ii) for the trustee to value it. [...] Insolvency proceedings under the *BIA* are subject to court supervision, and the court is able to give directions for the timely and efficient determination of claims.

[44] This is not the first time a trustee's "mandatory statutory duty to review claims and value unliquidated or contingent claims" has been recognized: see *Asian Concepts Franchising Corporation (Re)*, 2018 BCSC 1022, 62 C.B.R. (6th) 123, at para. 99.

[45] Unlike in *Conforti*, the Proposal Trustee says it is not seeking to dispense with any obligation to determine the Athanasoulis Claim. It says it still intends to go through the motions of that determination but wishes to do so with the benefit of the Arbitrator's decision in phases 1 and 2.

[46] The Proposal Trustee also seeks to distinguish *Conforti* on the grounds that it has a very broad discretion under s. 135 of the *BIA* to obtain or require further evidence in support of a claim and has the power under s. 30 to bring, institute or defend any action or legal proceeding relating to the property of the bankrupt and to compromise any claim made by or against the estate. The Proposal Trustee argues that this permits a trustee to arbitrate a claim; or, at the very least, that this permits the Proposal Trustee to use an arbitration process to assist in the development of the evidence and facts that will be needed to determine and value a claim.

[47] The Proposal Trustee defends the Arbitration process as fair, reasonable and transparent. It emphasizes the importance of its role in ensuring all stakeholder interests are protected (as was envisioned in *Asian Concepts*, at paras. 55-56, 98, for example). The Proposal Trustee's contends that its decision to gather facts in respect of the Athanasoulis Claim by way of Arbitration was a reasonable decision and that it was an appropriate process to achieve a fair determination of the merits of the Athanasoulis Claim because it tested the potentially relevant evidence. It maintains that there is no single correct way to value a claim and that a trustee's decision should be afforded deference: see *Galaxy Sports Inc. (Re)*, 2004 BCCA 284, 29 B.C.L.R. (4th) 362, at paras. 39-43.

iii) The Agreement to Arbitrate – is it Beyond the Scope of s. 135 of the *BIA*?

[48] In theory, the Proposal Trustee does have a broad discretion under s. 135 of the *BIA* that might justify its participation in adversarial proceedings that could inform the eventual determination of claims. The Proposal Trustee seeks to characterize what the Arbitrator was asked to do as a fact finding exercise: to determine whether Ms. Athanasoulis was an employee who was constructively dismissed and whether she had an oral profit sharing agreement. The issue here is whether the Agreement to Arbitrate in this case—which was not before the court and had not been

disclosed to the Sponsor or the LPs until sometime in July, 2022—went beyond a fact finding exercise.

[49] Although no determination need be made on this point, the Proposal Trustee's participation in phase 1 of the Arbitration may have been sound in the sense that the necessary parties and information were before the Arbitrator to enable him to make determinations about the existence of the oral profit sharing agreement and a finding of constructive dismissal. The Proposal Trustee can consider and take into account these inputs from the Arbitration in its determination and valuation of the Athanasoulis Claim.

[50] Since the Sponsor is no longer challenging the right of the Proposal Trustee to be indemnified for the Administrative Fees and Expenses incurred in respect of phase 1 of the Arbitration, the issue now before the court is whether the Proposal Trustee is acting within the scope of s. 135 of the *BIA* by engaging in phase 2 of the Arbitration to determine whether to allow the Athanasoulis Claim, and if so in what amount.

[51] The Proposal Trustee concedes that the Arbitrator's determination of the damages question in phase 2 of the Arbitration would be both informative and probative, and that the Proposal Trustee's determination of the Athanasoulis Claim would be heavily influenced by the Arbitrator's decision. The suggestion that the Proposal Trustee could, after the Arbitration, still determine and value the Athanasoulis Claim in a manner inconsistent with the decision of the Arbitrator on liability and damages is difficult to reconcile with the words of the Agreement to Arbitrate and the intended binding nature of arbitrations under s. 37 of the *Arbitration Act 1991*, S.O. 1991, c. 17.

[52] I find that phase 2 of the Agreement to Arbitrate goes beyond a fact finding exercise. By its very terms, the Agreement to Arbitrate contemplates an eventual ruling from the Arbitrator on "damages" (the quantum of the Debtors' liability) at the end of phase 2. On their face, the terms of the Agreement to Arbitrate contemplate a final adjudication by the Arbitrator. That amounts to an improper delegation to the Arbitrator by the Proposal Trustee of its ultimate responsibility to determine and value the Athanasoulis Claim.

[53] It was suggested that the court would be effectively ordering, or approving, the Proposal Trustee to breach the Agreement to Arbitrate if the Sponsor's position with respect to the funding of phase 2 of the Arbitration is accepted. I do not see it that way. If the Proposal Trustee did not have the authority to agree to phase 2 of the Arbitration as was provided for in the Agreement to Arbitrate because it amounted to an improper delegation of its responsibility to the Arbitrator, then that aspect of the Agreement to Arbitrate is unenforceable as against the Proposal Trustee. Further, as a practical matter, if the Sponsor is not required to fund the Administrative Fees and Expenses associated with phase 2 of the Arbitration, it cannot proceed.

[54] I also do not accept the assertion that just because the Sponsor is no longer challenging its obligation to fund the Proposal Trustee's Administrative Fees and Expenses incurred in connection with phase 1 of the Arbitration, that the court is bound to accept that entering into the Agreement to Arbitrate was a valid exercise of the Proposal Trustee's discretion and a valid delegation of its responsibility to the Arbitrator in all respects, or that the Sponsor is estopped from asserting that any aspect of the Agreement to Arbitrate exceeded the Proposal Trustee's authority under s. 135 of the *BIA*.

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

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

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

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

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

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

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

[60] The Proposal Trustee has the power under s. 135 of the *BIA* to seek additional information and documents from the claimant: see *Urbancorp Cumberland 2 GP Inc.*, 2022 ONSC 2430, at paras. 23, 26. It remains open to the Proposal Trustee under s. 135 of the *BIA* to receive and consider expert input from Ms. Athanasoulis and other stakeholders.

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

[61] The broad discretion afforded to the Proposal Trustee also allows it to seek out its own expert input, as well as information and input from the LPs and other stakeholders in respect of the issues it must decide.

[62] In these circumstances, the Proposal Trustee will need to carry out its responsibilities under s. 135 of the *BIA*, get the factual and other inputs it requires from witnesses, other stakeholders, experts and the like and determine whether the Athanasoulis Claim has been proven and, if so, at what amount it should be valued.

[63] The Proposal Trustee complains that the Sponsor has not spelled out an alternative process to the Arbitration for doing this.

[64] In the absence of any proposed alternative, the Proposal Trustee is entirely unencumbered and may determine its own process for how it wishes to do this, which will be afforded significant deference. According to the Court of Appeal in *Galaxy*, at paras. 39 and 44,

a. the Proposal Trustee is entitled to evaluate the Athanasoulis Claim in accordance with s. 135(1.1) with significant discretion, taking into account factors that may appear in the *BIA*;

b. there is no one "correct" answer to the valuation of the Athanasoulis Claim;

c. the Proposal Trustee's valuation of the Athanasoulis Claim will be scrutinized on a "reasonableness" standard; and

d. the Proposal Trustee can use its knowledge and expertise to consider whether, as a factual matter, the valuation as to the full amount of the Athanasoulis Claim is appropriate.

[65] The Proposal Trustee is concerned that this may lead to *de novo* appeals or challenges (by either Ms. Athanasoulis or the LPs) and could end up being as much or more expensive than the anticipated cost of phase 2 of the Arbitration. There is no crystal ball that can foretell this.

[66] The Sponsor says that it will not micromanage this aspect of the Proposal Trustee's determination of the Athanasoulis Claim. While the Sponsor does not expect that this alternative process will end up costing as much as the current estimate for phase 2 of the Arbitration, it is prepared to accept the possibility that it does. The Sponsor has said it will pay for the Proposal Trustee to develop and follow a process to determine and value the Athanasoulis Claim in accordance with s. 135 of the *BIA*.

[67] The Proposal Trustee must determine how to reasonably determine and value the Athanasoulis Claim in a timely and principled manner. It will be afforded significant deference. All parties agree that it can use the Arbitration Award from phase 1 of the Arbitration and build on it so that time and effort is not wasted. The goal is not the gold standard of coming up with a process that cannot be challenged.

[68] The Proposal Trustee may choose to invite expert evidence and inputs from Ms. Athanasoulis and then determine if it needs its own expert to review and comment upon what is

provided. It may choose to share that plan with the other stakeholders participating in this motion and seek their input. If it chooses to share its plan with the Sponsor and/or other stakeholders, and if the parties require some further direction and assistance from the court, they may arrange a case conference before me.

[69] In any event, the parties will eventually need to come back on a scheduling appointment to determine the sequencing and timing of the LPs' priorities and enforceability motion, but only after that motion (with supporting evidence) has been served and the parties have met and conferred amongst themselves to consider the appropriate timing and sequencing of all that needs to occur.

[70] Whatever process the Proposal Trustee may adopt, the Sponsor remains obligated under the Proposal to indemnify the Proposal Trustee for the Administrative Fees and Expenses reasonably incurred going forward to the final determination of the Athanasoulis Claim.

B) The *Res Judicata* and Estoppel Argument(s)

i) Res Judicata

[71] There can be no finding of *res judicata* with respect to the issues raised on this funding motion regarding the Sponsor's obligation to fund phase 2 of the Arbitration.

[72] The Proposal Trustee and Ms. Athanasoulis argue that Gilmore J. held, at two separate case conferences in May and June 2022, that arbitration was an appropriate way to proceed, and that issue estoppel prevents the court from revisiting this in the context of this funding motion. I disagree.

[73] There are three requirements for invoking issue estoppel: (i) the same question has or could have been decided in a prior proceeding; (ii) the decision giving rise to estoppel is final; and (iii) the parties to the decision giving rise to estoppel are the same as the parties to the subsequent proceeding in which estoppel is claimed: see *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759, at para. 25. It is the first requirement upon which the *res judicata* argument fails in this case.

[74] The Proposal Trustee argues that the endorsement of Gilmore J. arising out of the June 8, 2022 case conference requires an arbitration of the Athanasoulis Claim because it was stated in the endorsement that the "arbitration must prevail" and the Sponsor never sought to appeal that declaration.

[75] I do not read the June 8, 2022 endorsement as ordering an arbitration. Rather, it was the court's strong preference that the parties agree to expand the Arbitration to address the issues raised by the LPs and avoid a parallel, costly and time consuming motion process to determine the priority and enforceability issues. I am not aware of any authority upon which the court can order unwilling parties to arbitrate a dispute; that is a matter of private agreement. The court was simply strongly encouraging the parties to make such an agreement, building upon the arbitration process already in place.

[76] Nor do I agree with the implicit suggestion that the same question about the authority of the Proposal Trustee to enter into the Agreement to Arbitrate and to delegate its responsibility for determining and valuing the Athanasoulis Claim to the Arbitrator has been or could have been previously decided by Gilmore J. at the earlier case conferences. Leaving aside the nature of those case conferences and the typical procedural scope of directions from the court, it is clear that is not what Gilmore J. understood to be happening. To the contrary, her June 8, 2022 endorsement records that:

> At the conclusion of the arbitration the Proposal Trustee will make a determination as to whether Ms. Anathasoulis' [*sic*] claim is provable and will value it and determine its priority.

[77] At that time, the court did not have the Agreement to Arbitrate with the full description of the issues being submitted to arbitration and cannot be taken to have made any meaningful assessment as to whether the statement that there was still something left for the Proposal Trustee to determine at the end of the Arbitration was a fair characterization of what had been agreed to. The court did not previously order the parties to arbitrate, nor did it make any finding that phase 2 of the Arbitration could be conducted in a manner consistent with s. 135 of the *BIA*. There is no *res judicata*.

ii) Other Estoppel Considerations

[78] That said, it was prudent of the Sponsor to drop its opposition to the Proposal Trustee's request for approval of the expenses associated with phase 1 of the Arbitration, already incurred and paid. Regardless of the court's determination of the threshold Jurisdiction Question in relation specifically and only to phase 2 of the Arbitration, the Sponsor would have faced other obstacles in attempting to claw back from the Proposal Trustee Administrative Fees and Expenses incurred and paid for out of the initial reserve, including for phase 1 of the Arbitration.

[79] These obstacles would include the Sponsor's inaction and failure to ask any questions or raise any complaint about, or object to phase 1 of the Arbitration proceeding while it was ongoing. However, the Sponsor's concession obviates the need for any ruling on this.

iii) The Timing of Objections and Related Considerations

[80] Ms. Athanasoulis is understandably concerned about having engaged in phase 1 of a two phase arbitration process in good faith and now facing objections to the jurisdiction or authority of the Proposal Trustee to have entered into the Agreement to Arbitrate.

[81] Unfortunately, the Sponsor and the LPs did not have a copy of the Agreement to Arbitrate until July, 2022. Their concerns were raised in a timely manner upon learning more about the scope of the Arbitration and its anticipated cost. The fact that this discovery also coincided with their learning that the phase 1 outcome favoured Ms. Athanasoulis does not automatically lead to the inference that their objections are disingenuous.

[82] In any event, no one is suggesting that the work done in phase 1 of the Arbitration is lost. It will be one of the inputs that the Proposal Trustee will use to determine and value the Athanasoulis Claim. All parties agree on this.

[83] While I do not go so far as to accept the suggestion by the Sponsor and LPs that Ms. Athanasoulis knowingly took on the risk of this challenge and outcome, the Sponsor and LPs were left out of the process and cannot be precluded from raising the legal objections that have ultimately dictated the outcome of this motion on the Jurisdiction Question, as it relates to phase 2 of the Arbitration.

C) Fee Approvals

[84] Gilmore J.'s endorsement scheduled this funding motion to determine the Proposal Trustee's entitlement to be indemnified for the costs of the Arbitration. The indemnity reimbursements taken up until now from the reserve fund are no longer at issue. The relief sought by the Proposal Trustee for the approval of its past activities and fees might have been warranted if the challenge to entitlement to indemnification for expenses incurred in phase 1 of the Arbitration was still at issue.

[85] However, this is no longer at issue. There is no immediate reason or need to attempt to deal with the broader requests for general approval of the activities and fees of the Proposal Trustee and its counsel.

[86] The Sponsor is right that, in general, such requests should be supported by fee affidavits: see *Jethwani v. Damji*, 2017 ONSC 1702, 46 C.B.R. (6th) 96, at paras. 8-11.

[87] For the same reason, it is also inappropriate to grant the requested charge over all past and future distributions to the Sponsor. This issue was not fully argued and I was not taken to the evidence or authority that I would need to consider to make such an order.

[88] Instead, the Proposal Trustee may now wish to prepare a new budget and request additional reserve funding for the indemnity obligations of the Sponsor. If the Sponsor does not agree to supplement the reserve, the parties can arrange to come back for a case conference for further consideration of the questions of up front funding and/or security for future funding to be provided by the Sponsor.

D) Costs

[89] Despite having found that the contemplated phase 2 of the Arbitration goes beyond the scope of what the Proposal Trustee was authorized to agree to, given the original position of the Sponsor that it was also challenging its obligation to fund expenses for phase 1 and given the added complications introduced by the LPs, I consider it to have been reasonable for the Proposal Trustee to have brought this motion for directions.

[90] The Proposal Trustee's and its counsel's costs of this motion were reasonably incurred as part of the administration of distributions and the resolution of unresolved claims such that those costs should be indemnified by the Sponsor under the s. 11.1 of the Proposal on the basis that they were reasonably incurred Administrative Fees and Expenses.

[91] Ms. Athanasoulis has asked to be awarded some reasonable costs thrown away in the event the Arbitration is not proceeding to phase 2. She spent $300,000 on phase 1 (in line with the Proposal Trustee's disclosed legal costs for phase 1) and had started working with her expert on

phase 2. I understand that there was an agreement that each side would bear their own costs of the Arbitration.

[92] I agree that if Ms. Athanasoulis had actually incurred costs thrown away of the Arbitration, that are now wasted, she might be entitled to an award for her trouble: see *Caldwell v. Caldwell*, 2015 ONSC 7715, 70 R.F.L. (7th) 397, at paras. 10-12.

[93] However, given that the phase 1 Arbitration findings will be the factual predicate upon which the determination of her claim will proceed and that it is reasonable to expect that Ms. Athanasoulis will require expert input, regardless of the procedure, to have her claim determined by the Proposal Trustee, I am not convinced that she has suffered any costs thrown away.

[94] The parties are just now pivoting to a different process for the final determination of the Athanasoulis Claim, but the onus is still on her to prove it. It is difficult to see how she has wasted the cost of whatever work she did in furtherance of her quest to persuade the Arbitrator to decide in her favour the same issue that the Proposal Trustee will now take into consideration when determining her claim. All the work should be usable to support the proof of her claim to the Proposal Trustee.

[95] As such, no costs thrown away are awarded to Ms. Athanasoulis.

Final Disposition

[96] The court's decision on each of the issues on this funding motion, as re-stated by the Proposal Trustee, is as follows:

a. The continuation of phase 2 of the Arbitration provided for in the Agreement to Arbitrate the Athanasoulis Claim is not a valid exercise of the authority granted to the Proposal Trustee under the Proposal or s. 135 of the *BIA*. Therefore, the court no order requiring the Sponsor to fund (and/or indemnify the Proposal Trustee for) the budgeted Administrative Fees and Expenses associated with phase 2 of the Arbitration (of approximately $700,000).

b. The questions of whether phase 2 of the Arbitration was a procedure that the Proposal Trustee had the jurisdiction to engage in, and the Sponsor's obligation to fund the Administrative Fees and Expenses of the Proposal Trustee associated therewith, are not barred by *res judicata* or any other estoppel or laches.

c. The Sponsor is required to indemnify the Proposal Trustee for all of the reasonably incurred Administrative Fees and Expenses in relation to the determination and valuation of the Athanasoulis Claim, including for phase 1 of the Arbitration and for whatever procedure the Proposal Trustee, in its discretion, determines appropriate to receive the further evidence and positions of Ms. Athanasoulis and other interested stakeholders and any expert inputs deemed necessary.

d. The Proposal Trustee should first determine how it intends to proceed in light of the court's decision on this motion, and may prepare a budget for the anticipated

Administrative Fees and Expenses associated with this exercise, or seek indemnification after the fact, as it deems appropriate.

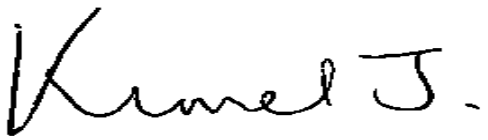
e. If asked to do so and the Sponsor is not prepared to top up the reserve for the funding of the Proposal Trustee's anticipated Administrative Fees and Expenses to complete the determination and valuation of the Athanasoulis Claim, the parties may request a case conference before me so that the court can provide further directions in this regard and any related issues. The parties are directed to confer about these issues before scheduling a case conference so that the appropriate amount of court time is reserved.

f. If the LPs are proceeding with their proposed motion, they shall serve their motion record(s) with supporting evidence and, after that, the parties shall confer about the timetabling and sequencing of those motions and then seek a scheduling appointment (if all agree) or a longer case conference (if all do not agree) for directions, timetabling and a motion hearing date if determined appropriate.

g. There have been no costs demonstrated to have been thrown away as a result of the court's ruling on this motion, and none are awarded.

h. The costs of the Proposal Trustee and its counsel for this motion were reasonably incurred and may be paid out of the remaining reserve fund and/or a claim for reimbursement by the Sponsor for those costs may be made under the Proposal.

[97] This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of the formal issuance and entry of an order.



KIMMEL J.

Date: November 1, 2022

Appendix “F”

CITATION: YG Limited Partnership and YSL Residences Inc., 2022 ONSC 6548
COURT FILE NO.: BK-22-02734090-0031
DATE: 20221116

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER of the *Bankruptcy and Insolvency Act*, R.SC. 1985, c.B-3 as amended

AND:

IN THE MATTER of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc.

BEFORE: Osborne J.

COUNSEL: *C. Haddon Murray and Elie Laskin*, CBRE Limited
A. Soutter, Yonge Street LPs
Robin Schwill, KSV, Proposal Trustee
Jesse Mighton, Concord Properties
Sarah Stothart, Maria Athanasoulis
Conner Sipa, Harbour International Investment Group and Yulei Zhang

HEARD: November 7, 2022

ENDORSEMENT

[1] This motion raises three questions that can arise where a Proposal Trustee has disallowed a Proof of Claim pursuant to section 135 of the *Bankruptcy and Insolvency Act* [”BIA”], and the claimant has appealed from that disallowance pursuant to section 135(4):

a. should the appeal proceed before this Court as a hearing *de novo*, or should the record be limited to those materials considered by the Proposal Trustee at the time [i.e., the materials filed in support of the claim];

b. do limited partners of a limited partnership that has filed an NOI have standing on such an appeal; and

c. should the appeal be allowed in this case?

[2] CBRE Limited [“CBRE”] moves for an order setting aside the disallowance of its claim by the Proposal Trustee in the Proposal of YSL Limited Partnership and YSL Residences Inc. [together, the “Debtors”], and allowing the claim.

[3] CBRE also seeks an order that this motion, which is effectively the appeal of the disallowance of its claim, be heard by way of hearing *de novo*.

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

Background and Context

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

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

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

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

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

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

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

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

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

[14] Indeed, the only parties opposing the relief sought are certain limited partners in the YG Limited Partnership.

[15] CBRE, supported by the Proposal Trustee, submits that the disallowance should be set aside and its claim should be allowed pursuant to the settlement agreement. It argues that, for the purposes of this motion, the Court should in any event consider the matter *de novo.*

[16] The limited partners submit that CBRE has failed to prove its claim with the requisite cogent evidence originally before the Proposal Trustee [i.e., the material originally filed in support of the CBRE claim], or at all.

ANALYSIS

Do the Limited Partners Have Standing?

[17] Section 135 of the BIA sets out the regime pursuant to which proofs of claim are admitted or disallowed.

[18] Pursuant to subsection (2), a trustee may disallow, in whole or in part, any claim.

[19] That disallowance is final and conclusive unless, pursuant to subsection (4), the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the *General Rules*.

[20] Pursuant to subsection (5), the court may expunge or reduce a proof of claim on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

[21] Here, the limited partners are limited partners in one of the Debtors, YG Limited Partnership. In my view, they lack the standing in this case to challenge the disallowance by the Proposal Trustee.

[22] For the purposes of this motion, the creditor is CBRE and the Debtor [or one of them] is YG Limited Partnership. As submitted by the Proposal Trustee, the whole bankruptcy regime is based upon all parties dealing with the debtor entity and/or the proposal trustee to address, determine and/or resolve claims.

[23] I agree with the submission of the Proposal Trustee that pursuant to subsection 135(5), the court may grant relief only where either one of two parties requests it: the creditor applies, or the debtor applies in circumstances where the trustee will not interfere.

[24] The limited partners are not creditors, but rather are exactly that - limited partners - in one of the Debtors. They hold limited partnership units in that entity. That is insufficient to make them debtors [within the meaning of this subsection or generally within the structure of the BIA], any more than shareholders of a debtor corporation would themselves automatically be debtors.

[25] Moreover, the particular contractual entitlements of the limited partners applicable to their units do not assist them here. The partnership agreement sets out the rights and obligations of the general partner to act on behalf of the limited partnership, and of the limited partners themselves.

[26] The contractual right in the partnership agreement to bind the partnership with respect to things such as claims is granted to the general partner. The general partner, on behalf of the limited partnership, consents to the relief sought on this motion.

[27] Finally, the Proposal Trustee has in fact "interfered" here, as contemplated in section 135(5). This is not a case where a trustee simply refuses to take a position or will not engage on the issue.

[28] I also observe that section 37 of the BIA provides that, where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

[29] I have already concluded that the limited partners are not creditors. Are they "persons aggrieved"? In my view they are not. Their grievance, or complaint, boils down to the fact that their ultimate potential recovery will presumably be reduced if the claim is allowed. That is not sufficient to make them aggrieved within the meaning of section 37. To conclude otherwise would mean that every creditor would have standing pursuant to section 37 to challenge the claim of every other creditor in a bankruptcy proceeding and I reject this notion.

[30] As observed in Holden & Morawetz, *The 2022 Annotated Bankruptcy and Insolvency Act*, Thomson Reuters, Toronto, 2022 at p. 102-103,

> "the words "any other person is aggrieved" must be broadly interpreted. They do not mean a person who is disappointed of a benefit that he or she might have received if some other order had been made. A "person aggrieved" is a person who has suffered a legal grievance, a person against whom a decision has been pronounced by the trustee that has wrongfully deprived him or her of something, or wrongfully refused him or her something, or wrongfully affected his or her title to something: *Re Sidebotham*, (1880), 14 Ch.D. 458 at 465; *Liu v. Sung*, (1989), 72. C.B.R. (N.S.) 224 (BCSC)."

[31] This Court reached the same conclusion in *Global Royalties Ltd. v. Brook*, 2016 ONSC 6277 at para. 13.

[32] I conclude that in this case, the limited partners lack the requisite standing to oppose the motion.

Should the Appeal Proceed *de Novo*?

[33] As stated above, the authority of the court to expunge or reduce a proof of claim is found in section 135(5) of the BIA.

[34] I am satisfied that this Court may direct that an appeal from a disallowance of a claim by a trustee proceed by way of hearing *de novo* where it determines that to proceed otherwise would result in an injustice to the creditor. (see *Credifinance Securities Limited v DSLC Capital Corp*, 2011 ONCA 160 at para. 24, citing *Charlestown Residential School, Re*, 2010 ONSC 4099 at paras. 1, 18, and *Re: Poreba*, 2014 ONSC 277 at para. 32).

[35] I recognize, as did the Court of Appeal in *Credifinance*, that this practice is not uniform across the country. I also recognize that a major legislative objective of the bankruptcy regime is to maximize efficiency and the expeditious determination of claims between and among the stakeholders, and that this, in turn, could support the exercise of deference in the review of a decision of a trustee. In my view, that is why appeals of this nature should generally proceed as true appeals, based on a record consisting of the materials relied upon by the trustee in its decision to disallow the claim.

[36] However, it seems to me that the present case is an example of precisely the type of case where to proceed otherwise than *de novo*, and limit the record to that material originally filed in support of the claim, would result in an injustice to the creditor. That is exactly what section 135(5) is designed to correct or avoid, and in circumstances such as this, the appeal can and should proceed *de novo* in the sense that materials not originally before the trustee can and should be considered by the court.

[37] The *Poreba* case is such an example, where the Master [now Associate Judge] concluded that a hearing *de novo* was appropriate because there were significant issues of credibility such that fairness required that the claimant be given an opportunity to provide *viva voce* evidence and to explain certain issues.

[38] The evidence that, in my view, is relevant both to a determination of the claim and to my conclusion that to exclude it would work an injustice on the creditor, is described below. The creditor and the Proposal Trustee acted openly and transparently and entering into the settlement agreement, in the context of the appeal by the creditor. They did not act in an underhanded or unfair manner.

Should the Appeal be Allowed?

[39] Notwithstanding my conclusion above that the limited partners lacked the requisite standing to oppose this motion, I have considered their evidence and arguments with respect to the merits of the appeal, in case I am wrong. Moreover, CBRE seeks an order allowing the appeal, in any event of opposition.

[40] In this case, what occurred was rather straightforward. Based on the information and material originally available to it, the Proposal Trustee disallowed the claim. This seems reasonable when one considers the summary nature of claims evaluation by a trustee, in the somewhat unique circumstances of this case where the listing agreement giving rise to the claim for the commission on the sale of the property was first oral and then reduced to writing but through inadvertence the written agreement was never executed.

[41] However, and as stated above, when additional material was filed with the Proposal Trustee, it was of the view that the claim ought properly to be allowed. The Proposal Trustee did not, however, purport to allow an appeal from its own decision. Rather, it agreed, pursuant to the provisions of the settlement agreement, to support and not oppose the appeal by the creditor, properly brought pursuant to section 135(5), in exchange for the agreement of the creditor not to seek costs against the Proposal Trustee.

[42] I point this out in part due to the argument advanced by the limited partners to the effect that the disallowance of a claim by the Proposal Trustee is final and conclusive with the result that the Proposal Trustee has no residual power to reconsider its own decision or reverse itself. Again, that is not what has occurred here. Rather, the settlement agreement was entered into in the context of the appeal properly brought by the creditor.

[43] There is no dispute on this motion as to several relevant facts:

a. CBRE entered into a listing agreement with YSL for the YSL Property;

b. CBRE introduced YSL to Concord for the purposes of acquiring the YSL Property;

c. Concord in fact did acquire the YSL Property; and

d. the commission claimed by CBRE is equal to 0.65% of the total consideration paid for the YSL Property.

[44] For its part, Concord agrees and acknowledges that CBRE introduced it to YSL, although it has no knowledge of the agreement with CBRE. The evidence on this motion is that the Proposal Trustee in making its decision relied on information provided by Concord to the effect that it dealt with the Debtors at all times and did not have dealings with CBRE.

[45] However, that information was not provided to the creditor that had advanced the claim, CBRE. CBRE accordingly did not have any opportunity to make submissions with respect to, or file evidence to challenge, that statement from Concord.

[46] The evidence of Concord as subsequently provided to the Proposal Trustee and filed on this motion is to the effect that CBRE in fact introduced it to YSL for the purposes of acquiring the YSL Property.

[47] Indeed, the clear and unequivocal evidence of both counterparties to the agreement [CBRE and YSL] is consistent and clear: there was an agreement, CBRE performed the agreement and indeed was involved in negotiations right up until the conveyance of the YSL Property pursuant to the amended Proposal, and the commission is payable according to its terms.

[48] I am satisfied that this is clear from the evidence, and in particular the affidavit of Mr. Ted Dowbiggin, the former president of Cresford, and the affidavit of Mr. Casey Gallagher, VP of CBRE, relied upon by CBRE.

[49] I referred above in these reasons to the oral agreement of January, 2020 and the subsequent written agreement of February 21, 2020 and the fact that the latter had never been formally signed. As noted, the written agreement provided that the term of the contract ended on August 20, 2020, and the holdover clause [section 4.1] essentially extended the entitlement to a commission for an additional 90 days.

[50] The limited partners submit that even if the YSL Property was conveyed pursuant to the [amended] Proposal, that occurred outside the 90-day period with the result that the commission ought not to be payable.

[51] I am satisfied based on the evidence described above and particularly the evidence of Messrs. Dowbiggin and Gallagher, and in the absence of any contrary evidence put forward by any party, that the negotiations between YSL and Concord commenced with their introduction and continued until the acquisition of the YSL Property by Concord through the proposal, and specifically during the holdover period. The limited partners did not cross-examine either of those witnesses on their evidence with respect to these points. CBRE continued to act as listing broker and responded to questions from YSL during the negotiations.

[52] In addition, the Debtors themselves support the claim and have confirmed such to the Proposal Trustee. This is consistent also with the conduct of both the Debtors on the one hand and CBRE on the other, prior to the claim being advanced, as the parties to the agreement performed it according to its terms and acted in all respects as if the written agreement had been executed.

[53] Finally, I observe that Concord itself supports the claim being allowed and it, very arguably, has the most to gain if the claim were denied.

[54] The limited partners oppose the relief sought but were not parties to the impugned agreement nor, obviously, were they present for any of the discussions leading to the oral agreement.

[55] The limited partners argue that the terms of the agreement did not entitle CBRE to the payment of the commission since the sale of the YSL Property was not a sale by agreement of purchase and sale within the meaning the commission agreement.

[56] CBRE, one of the parties to that agreement, supported by both the Debtors [the counterparty to the agreement] and the Proposal Trustee, submits that this includes an agreement pursuant to which consideration is given for the conveyance of title to the YSL Property. I agree. I also agree that a proposal is a form of contract [between the debtor and its creditors].[See *Jones v. Ontario*, (2003), 66 O.R.(3d) 674 (ONCA)].

[57] In the result, I am therefore satisfied that to exclude this clear and cogent evidence would result in the disallowance of the claim and that would be an unjust result in the circumstances of this case.

[58] For all of the above reasons,

a. the limited partners do not have standing to oppose or the relief sought on this motion by the creditor [CBRE] supported by the Proposal Trustee and the Debtors;

b. in this case, the appeal from the decision of the Proposal Trustee should be considered, and has been considered by me, as a hearing *de novo*, since to do otherwise would result in an injustice to the creditor [CBRE]; and

c. the appeal should be allowed and the motion granted.

[59] Accordingly, the disallowance of CBRE's claim by the Proposal Trustee is set aside and the claim is allowed.

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

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

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

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

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

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

Osborne, J.

Date: November 16, 2022

120

Appendix “G”

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. PURSUANT TO THE *BANKRUPTCY AND INSOLVENCY ACT*

AMENDED PROPOSAL #3

WHEREAS, pursuant to Notices of Intention to Make a Proposal dated April 30, 2021, YSL Residences Inc. and YG Limited Partnership (collectively, "**YSL**" or the "**Company**") initiated proceedings under the *Bankruptcy and Insolvency Act* (Canada) R.S.C. 1985, B-3 as amended (the "**BIA**"), pursuant to Section 50(1) thereof;

AND WHEREAS a creditor proposal was filed in accordance with section 50(2) of the BIA on May 27, 2021 (the "**Original Proposal**");

AND WHEREAS an amendment to the Original Proposal was filed in accordance with section 50(2) of the BIA on June 3, 2021 (the "**First Amended Proposal**");

AND WHEREAS an amendment to the First Amended Proposal was filed in accordance with section 50(2) of the BIA on June 15, 2021 (the "**Second Amended Proposal**");

AND WHEREAS, the Second Amended Proposal was approved by the Requisite Majority of creditors at the Creditors' Meeting held June 15, 2021;

AND WHEREAS, pursuant to the Amended Reasons for Interim Decision issued July 2, 2021 (the "**Interim Decision**"), the Second Amended Proposal was not approved by the Court in the form presented and the Company and the Proposal Sponsor were permitted to amend the Second Amended Proposal to address the issues set out in the Interim Decision;

AND WHEREAS the Company and the Proposal Sponsor wish to amend the Second Amended Proposal on the terms and conditions set out herein with the intention of addressing the issues set out in the Interim Decision;

NOW THEREFORE the Company hereby submits the following third amended proposal under the BIA to its creditors (as amended, the "**Proposal**").

ARTICLE I
DEFINITIONS

1.01 Definitions

In this Proposal:

"**Administrative Fees and Expenses**" means the fees, expenses and disbursements incurred by or on behalf of the Proposal Trustee, the solicitors for the Proposal Trustee, the solicitors of the Company both before and after the Filing Date;

"**Affected Creditor Cash Pool**" means a cash pool in the amount of $30,900,000 to be comprised of (i) all cash on hand in the Company's accounts as at the Proposal Implementation Date; (ii) any and all amounts refunded to or otherwise received by the Company in connection with the transfer of the YSL Project to the Proposal Sponsor as at the Proposal Implementation Date, and (iii) the balance to be provided by the Proposal Sponsor, subject to the refund of any surplus to the Proposal Sponsor in accordance with Section 5.01(a);

"**Affected Creditor Claim**" means a Proven Claim, other than an Unaffected Claim;

"**Affected Creditors**" means all Persons having Affected Creditor Claims, but only with respect to and to the extent of such Affected Creditor Claims;

"**Affected Creditors Class**" means the class consisting of the Affected Creditors established under and for the purposes of this Proposal, including voting in respect thereof;

"**Approval Order**" means an order of the Court, among other things, approving the Proposal;

"**Assumed Contracts**" means, subject to section 8.01(e), those written contracts entered into by or on behalf of the Company in respect of the Project to be identified by the Proposal Sponsor prior to the Proposal Implementation Date, which are to be assumed by the Proposal Sponsor upon Implementation with the consent of the applicable counterparty or otherwise pursuant to an order issued in pursuant to section 84.1 of the BIA;

"**BIA**" has the meaning ascribed to it in the recitals;

"**Business Day**" means a day, other than a Saturday or Sunday, on which banks are generally open for business in Toronto, Ontario;

"**Claim**" means any right or claim of any Person against the Company in connection with any indebtedness, liability, or obligation of any kind whatsoever in existence on the Filing Date (or which has arisen after the Filing Date as a result of the disclaimer or repudiation by the Company on or after the Filing Date of any lease or executory contract), and any interest accrued thereon to and including the Filing Date and costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise),

and whether or not such indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise against the Company with respect to any matter, cause or chose in action, but subject to any counterclaim, set-off or right of compensation in favour of the Company which may exist, whether existing at present or commenced in the future, which indebtedness, liability or obligation (A) is based in whole or in part on facts that existed prior to the Filing Date, (B) relates to a period of time prior to the Filing Date, or (C) is a right or claim of any kind that would be a claim provable in bankruptcy within the meaning of the BIA;

"**Company**" has the meaning ascribed to it in the recitals;

"**Conditional Claim**" means any Claim of an Affected Creditor that is not a Proven Claim as at the Filing Date because one or more conditions precedent to establish such Affected Creditor's entitlement to payment by the Company had not been completed in accordance with any applicable contractual terms as at the Filing Date, and such Affected Creditor has indicated in its proof of claim that the Claim should be treated as a Conditional Claim;

"**Conditional Claim Completion Deadline**" means 5:00pm (Toronto time) on September 27, 2021;

"**Conditional Claim Condition**" has the meaning ascribed to it in Section 2.03(a);

"**Conditions Precedent**" shall have the meaning given to such term in section 8.01 hereof;

"**Condo Purchase Agreement**" means an agreement of purchase and sale in respect of a residential condominium unit in the Project between the Company and a Condo Purchaser;

"**Condo Purchaser**" means a purchaser of a residential condominium unit in the Project pursuant to a Condo Purchase Agreement;

"**Condo Purchaser Claim**" means any Claim of a Condo Purchaser in respect of its Condo Purchase Agreement;

"**Construction Lien Claim**" means any Proven Claim in respect of amounts secured by a perfected lien registered against title to the Property and are valid in accordance with the *Construction Act* (Ontario);

"**Construction Lien Creditor**" means a creditor with a Construction Lien Claim;

"**Convenience Creditor**" means an Affected Creditor with a Convenience Creditor Claim;

"**Convenience Creditor Claim**" means (a) any Proven Claims of an Affected Creditor in an amount less than or equal to $15,000, and (b) any Proven Claim of an Affected Creditor in an amount greater than $15,000 if the relevant Creditor has made a valid election for the purposes of

this Proposal in accordance with this Proposal prior to the Convenience Creditor Election Deadline;

"**Convenience Creditor Consideration**" means, in respect of a Convenience Creditor Claim, the lesser of (a) $15,000, and (b) the amount of the Proven Claim of such Convenience Creditor;

"**Court**" means the Ontario Superior Court of Justice (Commercial List);

"**Court Approval Date**" means the date upon which the Court makes the Approval Order;

"**Creditors' Meeting**" means the duly convened meeting of the Affected Creditors which took place on June 15, 2021;

"**Crown**" means Her Majesty in Right of Canada or of any Province of Canada and their agents;

"**Crown Claims**" means the Claims of the Crown set out in Section 60(1.1) of the BIA outstanding as at the Filing Date against the Company, if any, payment of which will be made in priority to the payment of the Preferred Claims and to distributions in respect of the Ordinary Claims, and specifically excludes any other claims of the Crown;

"**Disputed Claim**" means any Claim which has not been finally resolved as a Proven Claim in accordance with the BIA as at the Proposal Implementation Date;

"**Distributions**" means a distribution of funds made by the Proposal Trustee from the Affected Creditor Cash Pool to Affected Creditors in respect of Affected Creditor Claims, in accordance with Article V;

"**Effective Time**" means 12:00 p.m. (Toronto time) on the Proposal Implementation Date;

"**Equity Claim**" has the meaning ascribed to it in Section 2 of the BIA, and includes, without limitation, the Claims of all limited partners of YG LP and those Equity Claims deemed to be equity pursuant to the Interim Decision;

"**Existing Equity**" means the limited partnership units of YG LP and those Equity Claims deemed to be equity pursuant to the Interim Decision;

"**Existing Equityholders**" means the holders of the Existing Equity immediately prior to the Effective Time;

"**Filing Date**" means April 30, 2021, being the date upon which Notices of Intention to Make a Proposal were filed by the Company with the Official Receiver in accordance with the BIA;

"**First Amended Proposal**" has the meaning ascribed to it in the recitals;

"**Governmental Authority**" means any government, regulatory authority, governmental department, agency, commission, bureau, official, minister, Crown corporation, court, board, tribunal or dispute settlement panel or other law, rule or regulation-making organization or entity: (i) having or purporting to have jurisdiction on behalf of any nation, province, territory or state or any other geographic or political subdivision of any of them; or (ii) exercising, or entitled or

purporting to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power;

"**Implementation**" means the completion and implementation of the transactions contemplated by this Proposal;

"**Implementation Certificate**" has the meaning ascribed to it in Section 8.01(j);

"**Interim Decision**" has the meaning ascribed to it in the recitals;

"**Official Receiver**" shall have the meaning ascribed thereto in the BIA;

"**Original Proposal**" has the meaning ascribed to it in the recitals;

"**Outside Date**" means July 31, 2021;

"**Permitted Encumbrances**" means those encumbrances on the Property listed in Schedule "A" hereto;

"**Person**" means any individual, sole proprietorship, partnership, unincorporated association, unincorporated syndicate, unincorporated organization, trust, body corporate, Governmental Authority and a natural person in such person's capacity as trustee, executor, administrator or other legal representative;

"**Preferred Claim**" means a Claim enumerated in Section 136(1) of the BIA outstanding as at the Filing Date against the Company, if any, the payment of which will be made in priority to distributions in respect of Affected Creditor Claims;

"**Pro Rata Share**" means the fraction that is equal to (a) the amount of the Proven Claim of an Affected Creditor that is not a Convenience Creditor, divided by (b) the aggregate amount of all Proven Claims held by Affected Creditors who are not Convenience Creditors;

"**Project**" means the mixed-used office, retail and residential condominium development to be constructed on the Property currently consisting of approximately 1,100 residential condominium units and 170 parking units and known as Yonge Street Living Residences;

"**Property**" means the real property owned by the Company and municipally known as 363-391 Yonge Street and 3 Gerrard Street East, Toronto, Ontario, and legally described by PIN numbers 21101-0042 (LT) to 21101-0049 (LT), inclusive;

"**Proposal**" means this Amended Proposal of the Company, and any amendments, modifications and/or supplements hereto made in accordance with the terms hereof;

"**Proposal Implementation Date**" means the date on which Implementation occurs, which shall occur following the satisfaction of the Conditions Precedent, and no later than the Outside Date;

"**Proposal Sponsor**" means Concord Properties Developments Corp.;

"**Proposal Sponsor Agreement**" means that agreement entered into among the Proposal Sponsor and the Company as of April 30, 2021, as amended from time to time;

"**Proposal Trustee**" means KSV Restructuring Inc. in its capacity as trustee in respect of this Proposal, or its duly appointed successor;

"**Proposal Trustee's Website**" means the following website: www.ksvadvisory.com/insolvency-cases/case/yg-limited-partnership;

"**Proven Claim**" means in respect of an Affected Creditor, the amount of a Claim as finally determined in accordance with the provisions of the BIA, provided that the Proven Claim of an Affected Creditor with a Claim in excess of $15,000 that has elected to be a Convenience Creditor by submitting a Convenience Creditor Election Form shall be valued for voting purposes as $15,000;

"**Released Claims**" means, collectively, the matters that are subject to release and discharge pursuant to Section 7.01;

"**Released Parties**" means, collectively, (i) the Company, (ii) each affiliate or subsidiary of the Company; (iii) the Proposal Sponsor, (iv) the Proposal Trustee, and (v) subject to section 7.01, each of the foregoing Persons' respective former and current officers, directors, principals, members, affiliates, limited partners, general partners, managed accounts or funds, fund advisors, employees, financial and other advisors, legal counsel, and agents, each in their capacity as such;

"**Required Majority**" means an affirmative vote of a majority in number and two-thirds in value of all Proven Claims in the Affected Creditors Class entitled to vote, who were present and voting at the Creditors' Meeting (whether online, in-person, by proxy or by voting letter) in accordance with the voting procedures established by this Proposal and the BIA;

"**Second Amended Proposal**" has the meaning ascribed to it in the recitals;

"**Secured Claims**" means:

(a) The Claim of Timbercreek which is secured by, among other things a mortgage, charge, lien or other security validly charging or encumbering the Property;

(b) The Claim of Westmount, which is secured by, among other things, a mortgage, charge, lien or other security validly charging or encumbering the Property;

(c) The Claim of 2576725 Ontario Inc. which is secured by, among other things, a mortgage, charge, lien or other security validly charging or encumbering the Property;

(d) All Construction Lien Claims but only to the extent of such Construction Lien Claims;

"**Secured Creditor**" means a Person holding a Secured Claim, with respect to, and to the extent of such Secured Claim;

"**Superintendent's Levy**" means the levy payable to the Superintendent of Bankruptcy pursuant to sections 60(4) and 147 of the BIA;

"**Timbercreek**" means, collectively, Timbercreek Mortgage Servicing Inc. and 2292912 Ontario Inc.;

"**Unaffected Claim**" means:

(a) the Administrative Fees and Expenses;

(b) the Claim of Timbercreek;

(c) the Claim of Westmount;

(d) the Claim of 2576725 Ontario Inc., which is secured by, among other things, an equitable mortgage encumbering the Property;

(e) any Claim of the City of Toronto;

(f) all Condo Purchaser Claims;

(g) all Construction Lien Claims, but only to the extent such Claims are valid in accordance with the *Construction Act* (Ontario) and have been perfected by the Proposal Implementation Date; and

(h) such other Claims as the Company and Proposal Sponsor may agree with the consent of the Proposal Trustee;

"**Unaffected Creditor**" means a creditor holding an Unaffected Claim, with respect to and to the extent of such Unaffected Claim;

"**Undeliverable Distributions**" has the meaning ascribed to it in Section 5.04;

"**Westmount**" means Westmount Guarantee Services Inc.;

"**YSL**" has the meaning ascribed to it in the recitals; and

"**YSL Project**" means the mixed-use commercial and residential condominium development to be constructed on the Property.

1.02 Intent of Proposal

This Proposal is intended to provide all Affected Creditors a greater recovery than they would otherwise receive if the Company were to become bankrupt under the BIA. More specifically, the Proposal will provide for a payment in full of Secured Claims and will provide a significant recovery in respect of Affected Creditor Claims. While the exact recovery cannot be determined until all Claims have been determined, the Company expects Affected Creditors to receive a significant, if not a full recovery, on their Claims and, in any event, a greater recovery than would occur if the Company were to become a bankrupt under the BIA.

In consideration for, among other things, its sponsorship of this Proposal, including the satisfaction of all Secured Claims, Preferred Claims and the establishment of the Affected Creditor Cash Pool, on the Proposal Implementation Date, title to the Property, subject only to the Permitted Encumbrances, as well as the Company's interests and obligations under the Assumed Contracts and Condo Purchase Agreements shall be acquired by the Proposal Sponsor, or its nominee in accordance with the terms hereof.

1.03 Date for Any Action

In the event that any date on which any action is required to be taken under this Proposal by any of the parties is not a Business Day, such action will be required to be taken on the next succeeding day which is a Business Day.

1.04 Time

All times expressed in this Proposal are local time in Toronto, Ontario, Canada unless otherwise stipulated. Time is of the essence in this Proposal.

1.05 Statutory References

Except as otherwise provided herein, any reference in this Proposal to a statute includes all regulations made thereunder, all amendments to such statute or regulation(s) in force from time to time, and any statute or regulation that supplements or supersedes such statute or regulation(s).

1.06 Successors and Assigns

The Proposal will be binding upon and will enure to the benefit of the heirs, administrators, executors, legal personal representatives, successors, and assigns of any Person named or referred to in the Proposal.

1.07 Currency

Unless otherwise stated herein, all references to currency and to "$" in the Proposal are to lawful money of Canada.

1.08 Articles of Reference

The terms "hereof", "hereunder", "herein" and similar expressions refer to the Proposal and not to any particular article, section, subsection, clause or paragraph of the Proposal and include any agreements supplemental hereto. In the Proposal, a reference to an article, section, subsection, clause or paragraph will, unless otherwise stated, refer to an article, section, subsection, clause or paragraph of the Proposal.

1.09 Interpretation Not Affected by Headings

The division of the Proposal into articles, sections, subsections, clauses or paragraphs and the insertion of a table of contents and headings are for convenience of reference only and will not affect the construction or interpretation of this Proposal.

1.10 Numbers

In this Proposal, where the context requires, a word importing the singular number will include the plural and *vice versa* and a word or words importing gender will include all genders.

ARTICLE II
CLASSIFICATION AND TREATMENT OF AFFECTED PARTIES

2.01 Classes of Creditors

For the purposes of voting on the Proposal, there was only one class of creditors, being the Affected Creditors Class. For the purposes of voting on the Proposal, each Convenience Creditor was deemed to vote in and as part of the Affected Creditors Class.

2.02 Treatment of Affected Creditors

(a) As soon practicable after the Proposal Implementation Date, and after taking an adequate reserve in respect of any unresolved Claims pursuant to Section 5.03:

i. all Affected Creditors (other than Convenience Creditors and Affected Creditors holding Conditional Claims where one or more Conditional Claim Conditions have not been completed) shall receive, in respect of such Affected Creditor Claim, its Pro Rata Share of the Affected Creditor Cash Pool, net of the Superintendent's Levy, made by the Proposal Trustee from the Affected Creditor Cash Pool from time to time in accordance with Article V hereof, provided that aggregate Distributions to an Affected Creditor shall not exceed 100% of the value of such Affected Creditor's Proven Claim; and

ii. all Convenience Creditors shall receive in respect of such Convenience Creditor Claims, the Convenience Creditor Consideration, net of the Superintendent's Levy;

(b) Subject to Section 2.03, on the Proposal Implementation Date, each Affected Creditor Claim shall, and shall be deemed to have been irrevocably and finally extinguished, discharged and released, and each Affected Creditor shall have no further right, title or interest in or to its Affected Creditor Claim.

2.03 Conditional Claims Protocol

If an Affected Creditor submits a proof of claim to the Proposal Trustee indicating that its Claim against the Company is a Conditional Claim due to the fact that one or more pre-conditions to such Affected Creditor's right to payment by the Company had not been satisfied as at the Filing Date due to the acts or omissions of such Affected Creditor, then:

(a) such Affected Creditor shall have until the Conditional Claim Completion Deadline to complete or otherwise satisfy all outstanding pre-conditions to payment in accordance with the terms of the applicable agreement between such Affected

Creditor and the Company (all such conditions, "**Conditional Claim Conditions**"), and provide notice of such completion to the Proposal Trustee along with reasonable proof thereof;

(b) if such Affected Creditor provides the Proposal Trustee with proof of the completion of all applicable Conditional Claim Conditions prior to the Conditional Claim Completion Deadline, then, subject to the Proposal Trustee's confirmation of same, such Affected Creditor's Conditional Claim shall be deemed to be a Proven Claim, and such Affected Creditor shall be entitled to a Distribution in accordance with Section 5.02, and, effective immediately upon issuance of such distribution to the Affected Creditor by the Proposal Trustee, the releases set out in Section 7.01 shall become effective; and

(c) if such Affected Creditor has not satisfied one or more Conditional Claim Conditions by the Conditional Claim Completion Deadline, then, effective immediately upon the Conditional Claim Completion Deadline, such Affected Creditor's Conditional Claim shall be irrevocably and finally extinguished and such Affected Creditor shall have no further right, title or interest in and to its Conditional Claim and the releases set out in Section 7.01 shall become effective in respect of such Conditional Claim.

2.04 Existing Equityholders and Holders of Equity Claims

Subject to Section 7.01, all Equity Claims shall be fully, finally and irrevocably and forever compromised, released, discharged, cancelled, extinguished and barred as against the Property on the Proposal Implementation Date in accordance with Section 6.011.1(1)(1)(h).

2.05 Application of Proposal Distributions

All amounts paid or payable hereunder on account of the Affected Creditor Claims (including, for greater certainty, any securities received hereunder) shall be applied as follows: (i) first, in respect of the principal amount of the Affected Creditor Claim, and (ii) second, in respect of the accrued but unpaid interest on the Affected Creditor Claim.

2.06 Full Satisfaction of All Affected Creditor Claims

All Affected Creditors shall accept the consideration set out in Section 2.02 hereof in full and complete satisfaction of their Affected Creditor Claims, and all liens, certificates of pending litigation, executions, or other similar charges or actions or proceedings in respect of such Affected Creditor Claims will have no effect in law or in equity against the Property, or other assets and undertaking of the Company. Upon the Implementation of the Proposal, any and all such registered liens, certificates of pending litigation, executions or other similar charges or actions brought, made or claimed by Affected Creditors will be and will be deemed to have been discharged, dismissed or vacated without cost to the Company and the Company will be released from any and all Affected Creditor Claims of Affected Creditors, subject only to the right of Affected Creditors to receive Distributions as and when made pursuant to this Proposal.

2.07 Undeliverable Distributions

Undeliverable Distributions shall be dealt with and treated in the manner provided for in the BIA and the directives promulgated pursuant thereto.

ARTICLE III
CREDITORS' MEETING AND AMENDMENTS

3.01 Meeting of Affected Creditors

As set out in the Interim Decision, the Requisite Majority approved the Proposal at the Creditors' Meeting.

3.02 Assessment of Claims

The provisions of section 135 of the BIA will apply to all proofs of claim submitted by Affected Creditors, including in respect of Disputed Claims. In the event that a duly submitted proof of claim has been disallowed or revised for voting purposes by the Proposal Trustee, and such disallowance has been disputed by the applicable Affected Creditor in accordance with Section 135(4) of the BIA, or in the case of any Claim that is a Conditional Claim as at the time of the Creditors' Meeting, then the dollar value for voting purposes at the Creditors' Meeting shall be the dollar amount of such disputed claim or Conditional Claim, as the case may be, set out in the proof of claim submitted by such Affected Creditor, without prejudice to the determination of the dollar value of such Affected Creditor's disputed claim or Conditional Claim for distribution purposes.

Except as expressly provided herein, the Proposal Trustee's determination of claims pursuant to this Proposal and the BIA shall only apply for the purposes of this Proposal, and such determination shall be without prejudice to a Creditor's right to submit a revised proof of claim in subsequent proceedings in respect of the Company should this Proposal not be implemented.

3.03 Modification to Proposal

Subject to the provisions of the BIA, after the Creditors' Meeting (and both prior to and subsequent to the issuance of the Approval Order) and subject to the consent of the Proposal Trustee and the Proposal Sponsor, the Company may at any time and from time to time vary, amend, modify or supplement the Proposal.

ARTICLE IV
PREFERRED CLAIMS AND MANDATORY PAYMENTS

4.01 Crown Claims

Within thirty (30) Business Days following the granting of the Approval Order, the Crown Claims, if any, will be paid by the Proposal Trustee, in full with related interest and penalties as prescribed by the applicable laws, regulations and decrees.

4.02 Preferred Claims

Within thirty (30) Business Days following the granting of the Approval Order, the Preferred Claims, if any, will be paid in full by the Proposal Trustee.

ARTICLE V
FUNDING AND DISTRIBUTIONS

5.01 Proposal Sponsor to Fund

(a) On the Proposal Implementation Date, the Proposal Sponsor shall deliver to the Proposal Trustee by way of wire transfer (in accordance with wire transfer instructions provided by the Proposal Trustee at least three (3) business days prior to the Proposal Implementation Date) the amount necessary to establish the Affected Creditor Cash Pool in accordance with the provisions of this Proposal, provided that any surplus amounts over and above the Affected Creditor Cash Pool amount of $30,900,000 that are returned to the Company in connection with the transfer of the YSL Project to the Proposal Sponsor shall be promptly returned to the Proposal Sponsor, including, without limitation, the cash collateral to be released by TD Bank when the letters of credit held by the City of Toronto and the Toronto Transit Commission are replaced by letters of credit to be provided by the Proposal Sponsor; and

(b) The Proposal Trustee shall hold the Affected Creditor Cash Pool in a segregated account and shall distribute such cash, net of any reserves established in respect of unresolved Claims, in accordance with Section 5.03 of the Proposal.

(c) The Proposal Sponsor shall effect payments in respect of the Unaffected Claims to those parties entitled to such payments directly and shall provide the Proposal Trustee with proof of such payments, as applicable.

5.02 Distributions

As soon as possible after the Proposal Implementation Date and the payments contemplated by Sections 4.01 and 4.02, the Proposal Trustee shall make a Distribution to each Affected Creditor with a Proven Claim, in an amount equal to such Affected Creditor's Pro Rata Share of the Affected Creditor Cash Pool, net of the Superintendent's Levy, and net of any amounts held in reserve in respect of unresolved Claims, in accordance with Section 5.03.

Thereafter, the Proposal Trustee may make further Distributions to Affected Creditors from time to time from the reserves established pursuant to Section 5.03, as unresolved Claims are resolved in accordance with the terms of Section 3.02.

5.03 Reserves for Unresolved Claims

Prior to making any Distribution to Affected Creditors pursuant to Section 5.02, the Proposal Trustee shall set aside in the Affected Creditor Cash Pool sufficient funds to pay all Affected

Creditors with Disputed Claims or Conditional Claims the amounts such Affected Creditors would be entitled to receive in respect of that particular Distribution pursuant to this Proposal, in each case as if their Disputed Claim or Conditional Claim, as the case may be, had been a Proven Claim at the time of such Distribution. Upon the resolution of each Disputed Claim in accordance with the BIA, or upon final resolution of any Conditional Claim, any funds which have been reserved by the Proposal Trustee to deal with such Disputed Claim or such Conditional Claim, as applicable, but which are not required to be paid to the Affected Creditor shall remain in the Affected Creditor Cash Pool and become available for further Distributions to Affected Creditors in respect of their Proven Claims.

5.04 Method of Distributions

Unless otherwise agreed to by the Proposal Trustee and an Affected Creditor, all Distributions made by the Proposal Trustee pursuant to this Proposal shall be made by cheque mailed to the address shown on the proof of claim filed by such Affected Creditor or, where an Affected Creditor has provided the Trustee with written notice of a change of address, to such address set out in that notice. If any delivery or distribution to be made pursuant to Article V hereof in respect of an Affected Creditor Claim is returned as undeliverable, or in the case of a distribution made by cheque, the cheque remains uncashed (each an "**Undeliverable Distribution**"), no other crediting or delivery will be required unless and until the Proposal Trustee is notified of the Affected Creditor's then current address. The Proposal Trustee's obligations to the Affected Creditor relating to any Undeliverable Distribution will expire six months following the date of delivery or mailing of the cheque or other distribution, after which date the Proposal Trustee's obligations under this Proposal in respect of such Undeliverable Distribution will be forever discharged and extinguished, and the amount that the Affected Creditor was entitled to be paid under the Proposal shall be distributed to the Proposal Sponsor.

5.05 Residue After All Distributions Made

In the event that any residual amount remains in the Affected Creditor Cash Pool following the Proposal Trustee's final Distribution to Affected Creditors as provided herein, such residual funds shall be held by the Proposal Trustee pending receipt of a duly issued direction from all of the holders of Class A Preferred Units of YG LP, or otherwise by order of the Court.

ARTICLE VI
IMPLEMENTATION

6.01 Proposal Implementation Date Transactions

Commencing at the Effective Time, the following events or transactions will occur, or be deemed to have occurred and be taken and effected, in the following order in five minute increments (unless otherwise indicated) and at the times and in the order set out in this Section 6.01 (or in such other manner or order or at such other time or times as the Company and the Proposal Sponsor may agree, each acting reasonably), without any further act or formality required on the part of any Person, except as may be expressly provided herein:

(a) Either the Proposal Sponsor will, at its election, but subject to obtaining the consent of the applicable Secured Creditor, assume the Secured Claims, or on behalf of the Company, the Proposal Sponsor will make payment in full to Secured Creditors in respect of their Secured Claims, in accordance with Section 5.01(c) calculated as at the Closing Date;

(b) the releases in respect of Secured Claims referenced in section 7.01 shall become effective, and any registrations on title to the Property in respect of such Secured Claims shall, unless otherwise agreed between the Secured Creditor and the Proposal Sponsor with the consent of the Proposal Trustee, be discharged from title to the Property;

(c) the Proposal Sponsor shall provide to the Proposal Trustee the amount necessary to establish the Affected Creditor Cash Pool, in accordance with Section 5.01(a), in full and final settlement of all Affected Creditor Claims;

(d) the Proposal Sponsor shall provide the Proposal Trustee with an amount necessary to satisfy the Administrative Fees and Expenses, including a reserve in respect of the reasonably estimated additional Administrative Fees and Expenses anticipated to be incurred in connection with the administration of Distributions, resolution of any unresolved Claims pursuant to Section 5.03, and the Proposal Trustee's discharge;

(e) title to the Property shall be registered in the name of the Proposal Sponsor, or its nominee, together with any charges applicable to security held by the lenders to the Proposal Sponsor in respect of the purchase of the Property and construction of the Project;

(f) the assumption of the Assumed Contracts by the Proposal Sponsor, or its nominee, shall become effective;

(g) all Affected Creditor Claims (including without limitation all Convenience Creditor Claims) shall, and shall be deemed to be, irrevocably and finally extinguished and the Affected Creditors shall have no further right, title or interest in and to their respective Affected Creditor Claims, except with respect to their right to receive a Distribution, if applicable, and in such case, only to the extent of such Distribution;

(h) subject to Section 7.01, all Equity Claims shall, and shall be deemed to be, irrevocably and finally extinguished and all Existing Equityholders shall have no further right, title or interest in and to their respective Equity Claims as against the Property; and

(i) the releases in respect of Affected Creditor Claims (other than Conditional Claims with Conditional Claim Conditions not satisfied as at the Effective Time) referred to in Section 7.01 shall become effective.

ARTICLE VII
RELEASES

7.01 Release of Released Parties

At the applicable time pursuant to Section 6.01(b), in the case of Secured Claims, and Section 6.01(i), in respect of Affected Creditor Claims, each of the Released Parties shall be released and discharged from all present and future actions, causes of action, damages, judgments, executions, obligations, liabilities and Claims of any kind or nature whatsoever arising on or prior to the Proposal Implementation Date in connection with this Proposal and the Project, and any proceedings commenced with respect to or in connection with this Proposal, the Project, the transactions contemplated hereunder, and any other actions or matters related directly or indirectly to the foregoing, provided that nothing in this paragraph shall release or discharge (i) any of the Released Parties from or in respect of their respective obligations under this Proposal or any order issue by the Court in connection with this Proposal or any document ancillary to any of the foregoing, (ii) any Released Party from liabilities or claims which cannot be released pursuant to s. 50(14) of the BIA, as determined by the final, non-appealable judgment of the Court, or (iii) any Released Party from any Secured Claim of Timbercreek. The foregoing release shall not be construed to prohibit a party in interest from seeking to enforce the terms of this Proposal, including with respect to Distributions, or any contract or agreement entered into pursuant to, in connection with or contemplated by this Proposal. Notwithstanding the forgoing, the directors and officers of the Company, its affiliates, the former directors and officers, and general partner of the Company shall not be released in respect of any (x) Equity Claim as defined in section 2 of the BIA or any analogous claim in respect of a partnership interest or (y) any claim by a former employee of the Company or its affiliates relating to unpaid wages or other employment remuneration.

7.02 Injunctions

All Persons are permanently and forever barred, estopped, stayed and enjoined, on and after the Proposal Implementation Date, with respect to any and all Released Claims, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever of any Person against the Released Parties, as applicable; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, guarantee, decree or order against the Released Parties; (iii) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or their property; or (iv) taking any actions to interfere with the implementation or consummation of this Proposal or the transactions contemplated hereunder; provided, however, that the foregoing shall not apply to the enforcement of any obligations under this Proposal or any document, instrument or agreement executed to implement this Proposal.

ARTICLE VIII
CONDITIONS PRECEDENT

8.01 Conditions Precedent

This Proposal will take effect on the Proposal Implementation Date. The Implementation of this Proposal on the Proposal Implementation Date is subject to the satisfaction or waiver (in the sole discretion of the Proposal Sponsor) of the following conditions precedent (collectively, the "**Conditions Precedent**"):

(a) the Proposal is approved by the Required Majority;

(b) the Approval Order, in form and substance satisfactory to the Proposal Sponsor, has been issued, has not been stayed and no appeal therefrom is outstanding;

(c) there shall not be in effect any preliminary or final decision, order or decree by a Governmental Authority, no application shall have been made to any Governmental Authority, and no action or investigation shall have been announced, threatened or commenced by any Governmental Authority, in consequence or in connection with the Proposal or the Project that restrains, impedes or prohibits (or if granted could reasonably be expected to restrain, impede or inhibit), the Proposal or any part thereof or the Project or any part thereof or requires or purports to require a variation of the Proposal or the Project;

(d) registrations in respect of all encumbrances, including without limitation any registrations in respect of Construction Lien Claims, but excluding the Permitted Encumbrances, shall have been deleted from title to the Property, provided that (a) should the Implementation of the Proposal not occur following the deletion of an Affected Creditor's encumbrance pursuant to this provision, such Affected Creditor shall have the right to renew such registration, and (b) the Company and/or the Proposal Sponsor shall be at liberty to pay security into Court (by way of a bond or similar instrument) in respect of any Construction Lien Claim;

(e) the Proposal Sponsor, or its nominee, shall have entered into assignment and assumption agreements in respect of all Assumed Contracts, or an assignment order pursuant to section 84.1 of the BIA shall have been issued, in each case in form and substance satisfactory to the Proposal Sponsor, provided that it shall be a condition of the assumption of each Assumed Contract that the written agreements set out in the list of Assumed Contracts provided by the Proposal Sponsor (as amended from time to time) represent the totality of the contractual arrangements between the Company and each applicable counterparty, and no verbal or extra-contractual arrangements will be recognized by the Proposal Sponsor;

(f) sufficient financing for the acquisition of the Property by the Proposal Sponsor, or its nominee, shall have been provided by Otera Capital Inc., on terms satisfactory to the Proposal Sponsor, and all material conditions precedent to such financing shall be capable of completion by the Proposal Sponsor prior to the Proposal Implementation Date;

(g) the Proposal Implementation Date shall occur on the day that is three Business Days following the issuance of the Approval Order, or such other date prior to the Outside Date as may be agreed by the Proposal Sponsor;

(h) any required resolutions authorizing the Company to file this Proposal and any amendments thereto will have been approved by the board of directors of the Company;

(i) the Proposal Sponsor Agreement shall not have been terminated by the Proposal Sponsor; and

(j) the Company and the Proposal Sponsor shall have delivered a certificate to the Proposal Trustee that all of the conditions precedent to the Implementation of the Proposal have been satisfied or waived (the "**Implementation Certificate**").

Upon the Proposal Trustee's receipt of the Implementation Certificate, the Affected Creditor Cash Pool and the funding required by Section 6.01(d), the Implementation of the Proposal shall have been deemed to have occurred and all actions deemed to occur upon Implementation of the Proposal shall occur without the delivery or execution of any further documentation, agreement or instrument.

ARTICLE IX
EFFECT OF PROPOSAL

9.01 Binding Effect of Proposal

After the issuance of the Approval Order by the Court, subject to satisfaction of the Conditions Precedent, the Proposal shall be implemented by the Company and shall be fully effective and binding on the Company and all Persons affected by the Proposal. Without limitation, the treatment of Affected Creditor Claims under the Proposal shall be final and binding on the Company, the Affected Creditors, and all Persons affected by the Proposal and their respective heirs, executors, administrators, legal representatives, successors, and assigns. For greater certainty, this Proposal shall have no effect upon Unaffected Creditors.

9.02 Amendments to Agreements and Paramountcy of Proposal

Notwithstanding the terms and conditions of all agreements or other arrangements with Affected Creditors entered into before the Filing Date, for so long as an event of default under this Proposal has not occurred, all such agreements or other arrangements will be deemed to be amended to the extent necessary to give effect to all the terms and conditions of this Proposal. In the event of any conflict or inconsistency between the terms of such agreements or arrangements and the terms of this Proposal, the terms of this Proposal will govern and be paramount.

9.03 Deemed Consents and Authorizations of Affected Creditors

At the Effective Time each Affected Creditor shall be deemed to have:

(a) executed and delivered to the Company all consents, releases, assignments, and waivers, statutory or otherwise, required to implement and carry out this Proposal in its entirety;

(b) waived any default by the Company in any provision, express or implied, in any agreement or other arrangement, written or oral, existing between such Affected Creditor and the Company that has occurred on or prior to the Proposal Implementation Date; and

(c) agreed, in the event that there is any conflict between the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Affected Creditor and the Company as at the date and time of Court approval of the Proposal (other than those entered into by the Company on, or with effect from, such date and time) and the provisions of this Proposal, that the provisions of this Proposal shall take precedence and priority and the provisions of such agreement or other arrangement shall be amended accordingly.

ARTICLE X
ADMINISTRATIVE FEES AND EXPENSES

10.01 Administrative Fees and Expenses

Administrative Fees and Expenses including a reserve in respect of the reasonably estimated additional Administrative Fees and Expenses anticipated to be incurred in connection with the administration of Distributions, resolution of any unresolved Claims pursuant to Section 5.03, and the Proposal Trustee's discharge will be paid in cash by the Proposal Sponsor on the Proposal Implementation Date.

ARTICLE XI
INDEMNIFICATION

11.01 Indemnification of Proposal Trustee

The Proposal Trustee shall be indemnified in full by the Proposal Sponsor for: (a) all personal liability arising from fulfilling any duties or exercising any powers or duties conferred upon it by this Proposal or under the BIA, except for any willful misconduct or gross negligence; and (b) all Administrative Fees and Expenses reasonably incurred but not covered by the payment set out in Section 10.01.

ARTICLE XII
POST FILING GOODS AND SERVICES

12.01 Payment of Payroll Deductions and Post Filing Claims

The following shall continue to be paid in the ordinary course by the Company prior to and after the Court Approval Date and shall not constitute Distributions or payments under this Proposal:

(a) all Persons, who may advance monies, or provide goods or services to the Company after the Filing Date shall be paid by the Company in the ordinary course of business;

(b) current source deductions and other amounts payable pursuant to Section 60(1.2) of the BIA, if applicable, shall be paid to Her Majesty in Right of Canada in full by the Company as and when due; and

(c) current goods and services tax (GST), and all amounts owing on account of provincial sales taxes, if applicable, shall be paid in full by the Company as and when due.

ARTICLE XIII
TRUSTEE, CERTIFICATE OF COMPLETION, AND DISCHARGE OF TRUSTEE

13.01 Proposal Trustee

KSV Restructuring Inc. shall be the Proposal Trustee pursuant to this Proposal and upon the making of the Distributions and the payment of any other amounts provided for in this Proposal, the Proposal Trustee will be entitled to be discharged from its obligations under the terms of this Proposal. The Proposal Trustee is acting in its capacity as Proposal Trustee under this Proposal, and not in its personal capacity and shall not incur any liabilities or obligations in connection with this Proposal or in respect of the business, liabilities or obligations of the Company, whether existing as at the Filing Date or incurred subsequent thereto.

The Proposal Trustee shall not incur, and is hereby released from, any liability as a result of carrying out any provisions of this Proposal and any actions related or incidental thereto, save and except for any gross negligence or willful misconduct on its part (as determined by a final, non-appealable judgment of the Court).

13.02 Certificate of Completion and Discharge of Proposal Trustee

Upon the Proposal Trustee having received the Implementation Certificate, and all Distributions to Affected Creditors having been administered in accordance with Article V, the terms of the Proposal shall be deemed to be fully performed and the Proposal Trustee shall provide a certificate to the Company, the Proposal Sponsor and to the Official Receiver pursuant to Section 65.3 of the BIA and the Proposal Trustee shall be entitled to be discharged.

ARTICLE XIV
GENERAL

14.01 Valuation

For purposes of voting and Distributions, all Claims shall be valued as at the Filing Date.

14.02 Preferences, Transfers at Undervalue

In conformity with Section 101.1 of the BIA, Sections 95-101 of the BIA and any provincial statute related to preference, fraudulent conveyance, transfer at undervalue, or the like shall not apply to this Proposal. As a result, all of the rights, remedies, recourses and Claims described therein:

(a) all such rights, remedies and recourses and any Claims based thereon shall be completely unavailable to the Proposal Trustee or any Affected Creditors against the Company, the Property, or any other Person whatsoever; and

(b) the Proposal Trustee and all of the Affected Creditors shall be deemed, for all purposes whatsoever, to have irrevocably and unconditionally waived and renounced such rights, remedies and recourses and any Claims based thereon against the Company, the Property any other Person.

14.03 Governing Law

The Proposal shall be governed by and construed in accordance with the laws of Ontario and the federal laws of Canada applicable therein. Any disputes as to the interpretation or application of the Proposal and all proceedings taken in connection with the Proposal shall be subject to the exclusive jurisdiction of the Court.

[*remainder of page left intentionally blank*]

Dated at Toronto, this 15th day of July, 2021.

YSL RESIDENCES INC.

Per: _____
Name: Daniel Casey
Title: President
I have the authority to bind the Corporation.

YG LIMITED PARTNERSHIP, by its general partner 9615334 CANADA INC.

Per: _____
Name: Daniel Casey
Title: President
I have the authority to bind the Corporation.

SCHEDULE A

PERMITTED ENCUMBRANCES

Instrument Number		Description
EP138153	-	Canopy Agreement with the City of Toronto
EP146970	-	Encroachment Agreement with the City of Toronto
CT114131	-	Encroachment Agreement with the City of Toronto
CT169812	-	Canopy Agreement with the City of Toronto
CA11215	-	Development Agreement with the City of Toronto
CA231470	-	Encroachment Agreement with the City of Toronto
AT5142530	-	Heritage Easement Agreement with the City of Toronto
AT5154721	-	Heritage By-Law
AT5154722	-	Heritage By-Law
AT5157423	-	Heritage By-Law
AT5157424	-	Heritage By-Law
AT5246455	-	Section 37 Agreement
AT5473163	-	Application to Register a Court Order (Equitable Mortgage)

Appendix “H”

FORM 77

Notice of Disallowance of Claim, Right to Priority or Security *or* Notice of Valuation of Claim
(Subsection 135(3) of the *Bankruptcy and Insolvency Act*)

TAKE NOTICE THAT:

As Licensed Insolvency Trustee acting IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. (collectively, "**YSL**"), KSV Restructuring Inc. (the "**Trustee**") has disallowed the unsecured claim of Maria Athanasoulis, in part, pursuant to subsection 135(2) of the *Bankruptcy and Insolvency Act* (the "**BIA**"), for the reasons set out below.

Your Proof of Claim, as filed with the Trustee, claims:

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

2. $18 million in respect of damages for breach of an oral agreement that YSL would pay Ms. Athanasoulis 20% of the profits earned on the YSL project (the "**Profit Share Claim**").

In determining your claims, the Trustee has reviewed and is relying on the following, which represents the support and record for your claim:

1. the Proof of Clam, as filed;

2. all material on the record in these proposal proceedings to date, together with all material on the record in the proceedings by the limited partners of YG Limited Partnership (the "**LPs**") against YSL Residences Inc. et al. in Court file numbers CV-21-00661386-00CL and CV-21-00661530-00CL;

3. the partial arbitration award of Mr. William G. Horton (the "**Arbitrator**") dated March 28, 2022 (the "**Partial Award**");

4. all material filed and produced, and all testimony given, in the "Phase 1" arbitration (the "**Arbitration**") before the Arbitrator; and

5. all responses received by the Trustee from counsel to the LPs and counsel to Ms. Athanasoulis in respect of any information requests of the Trustee.

Wrongful Dismissal Claim

Pursuant to the Partial Award, the Arbitrator held that: (i) YSL was a common employer of Ms. Athanasoulis; and (ii) Ms. Athanasoulis was constructively dismissed from her employment in December 2019. The Trustee accepts the findings of fact of the Arbitrator.

The records of the relevant Cresford entity reflect that Ms. Athanasoulis' employment income was $889,400 in each of 2017 and 2018.

The Trustee has confirmed that Ms. Athanasoulis received $120,000 as a combined, aggregate settlement in respect of both her similar wrongful dismissal and profit share claims in: (a) the 480 Yonge Street Inc. and 480 Yonge Street Limited Partnership proceedings; and (b) The Clover on Yonge Inc. and The Clover on Yonge Limited Partnership proceedings. The Trustee has confirmed with PricewaterhouseCoopers Inc., the court officer in those other proceedings, that such settlement did not incorporate any value in respect of the profit share claim. The Trustee has also determined that Ms. Athanasoulis has not received any other payments in respect of her claims in any other Cresford entity insolvency proceedings.

The Trustee has also taken into account Ms. Athanasoulis' mitigation efforts subsequent to the wrongful termination of her employment and the advice of its counsel on the amount of damages generally awarded by Ontario courts given similar facts and circumstances.

Given the foregoing, the Trustee has determined to allow the Wrongful Dismissal Claim in the amount of $880,000 as an unsecured claim.

The Trustee received objections from certain of the LPs to any allowance of the Wrongful Dismissal Claim and it has considered these objections in making its determination. The Trustee is of the view that the LPs have no standing to object to the Trustee's determination of the Wrongful Dismissal Claim for the reasons set out in the decision of Mr. Justice Osborne in respect of another claim in the proceedings in *YG Limited Partnership and YSL Residences Inc.*, 2022 ONSC 6548. The Trustee is aware that certain of the LPs have appealed this decision.

Profit Share Claim

The Trustee has determined to disallow the Profit Share Claim in full for several, independent reasons that follow.

Equity Not Debt

Pursuant to the Partial Award, the Arbitrator found that Ms. Athanasoulis had a profit share agreement (the "**PSA**") that entitled her to 20% of the profits earned on any of Cresford's current and future projects. The Arbitrator also found that: (a) profits were to be calculated, on a good faith basis, based on the *pro forma* budgets prepared by Cresford in respect of each project; (b) Ms. Athanasoulis' share of the profits was to be paid by the relevant owner that earned the profit; and (c) profits were to be shared when earned, usually at the completion of a project. The Trustee accepts the findings of fact of the Arbitrator.

Section 121 of the BIA provides as follows:

> 121 (1) 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 shall be deemed to be claims provable in proceedings under this Act.

An entitlement to a share of the profits earned by YSL (*i.e.*, the relevant owner) is not a "provable claim" pursuant to the BIA. It is not a debt obligation of YSL but rather, in substance, an equity entitlement. Profits are, by definition, the difference between the amount earned and the amount spent in buying, operating, or producing something. It is the amount remaining for distribution to

the owners of the enterprise. This is also reflected on YSL's *pro forma* budgets. As such, the Trustee has determined that the PSA, which is an agreement to share in the profits earned by the owner of the YSL project is, in substance, not a debt or liability to which YSL was subject on the day on which these proposal proceedings were commenced.

A claim based on a breach of the PSA that has not been reduced to a judgment debt is also not a "provable claim". The Partial Award also makes no finding as to whether or not the PSA has in fact been breached or the damages associated with such breach assuming one exists.

No Profits Earned by YSL

The Arbitrator held that Ms. Athanasoulis' share of profits resulting from the YSL project was to be paid by the relevant owner that earned the profit, meaning a profit must be earned by the owner of the YSL project for there to be any profit in which to share.

As of the date that these proposal proceedings were initiated, YSL had not completed the YSL project. Indeed, the initial excavation phase of the YSL project was not complete at that time and the construction schedule for the YSL project as of October 2019 contemplated that the YSL project would not be completed until 2025 at the earliest. Accordingly, as of the date of the proceedings, no profit had been earned by the YSL project and, therefore, there was no profit in which to share.

Without prejudice to the Trustee's determination that any claim based on the PSA is not a provable claim, to the extent that Ms. Athanasoulis relies upon the projected profitability of the YSL project as a contingent claim for a lost profit share, the Trustee values such a contingent and unliquidated claim at zero. The assumptions required to determine such a possible amount over such a long time horizon are far too speculative and the alleged damages far too remote to be capable of being considered a provable claim or the subject of any meaningful and reasonable computation.

In addition to the foregoing, the Trustee notes that an affiliate of Concord Properties Developments Corp. ("**Concord**"), the sponsor of the proposal filed and sanctioned by the Court in these proposal proceedings (the "**Proposal**"), became the owner of the YSL project upon implementation of the Proposal. Accordingly, even if the YSL project is successfully brought to completion, despite all of the intervening events challenging such an outcome, any profits earned on the YSL project will not accrue to the relevant owner, *i.e.*, YSL. Ms. Athanasoulis is not entitled to claim a profit-share under the PSA for amounts earned by Concord's affiliate who is not a party to the PSA.

Moreover, the LPs made a total capital contribution of $14.8 million to the YG Limited Partnership in exchange for Class A Preferred Units. Pursuant to the limited partnership agreement in respect of the YG Limited Partnership, the LPs are entitled to a preferred return from the proceeds of the YSL project. Once the LPs are repaid their capital contribution plus their preferred return, any remaining proceeds from the YSL project would be paid to the Class B unit holder, being Cresford (Yonge) Limited Partnership, a Cresford entity. Depending on the resolution of the remaining disputed claims in these proposal proceedings, the most that would be available for distribution to the LPs is approximately $16 million[1] which is less than the amount of their capital contribution

[1] Assuming that the CBRE, Zhang and Athanasoulis claims are all disallowed.

plus their preferred return. Accordingly, the disposition of the YSL project in these proceedings also has not resulted in any profit earned by Cresford (Yonge) Limited Partnership.

Ms. Athanasoulis provided evidence in the Arbitration that "profit" pursuant to her PSA is determined by taking revenue, minus costs, minus the amount returned to the LPs, "and the balance is your net profit".[2] Again, on this basis, there is no profit earned by YSL.

Lastly, to the extent that Ms. Athanasoulis claims that she is entitled to a share of unrealized hypothetical gains on the YSL project as of the date of her dismissal, the Trustee notes that this is contrary to an essential term of the PSA established by the Arbitrator. The Arbitrator found that profits were to calculated based on *pro formas*, but only payable when earned at the completion of the YSL project. There is no dispute that the *pro formas* would be revised continuously throughout the life of the YSL project in order to take into account actual events that transpired. Ms. Athanasoulis cannot claim a share in profits based on an unrealized vision of the YSL project that, as we now know, will never materialize. Such profits are not "earned" until the project is completed. Profits are not "earned" during the life of project because the paper value of the project may increase at a particular point in time. The earning of a profit and asset appreciation are two very different concepts. Furthermore, given that an essential term of the PSA requires profits to be calculated at project completion, any claim for damages for a breach of the PSA must take into account the actual profits earned by YSL upon completion of the project, which as noted above is zero.

Profit Share Claim is Subordinated

In connection with the Arbitration, Ms. Athanasoulis admitted three times under oath – in discovery, in direct examination, and on cross-examination – that any entitlement to a profit-share she may have would arise only after the LPs are repaid their original investment.

On examination for discovery on January 13, 2022, Ms. Athanasoulis stated:

> Q. Did you discuss anything about how profit would be calculated?
>
> A. It was going to be calculated -- you know, in my conversations with Dan, it would be calculated after paying the costs and any... and after paying the equity to... and specific to YSL and 33 Yorkville, it would be paid after the equity was repaid to the LP investors.
>
> Q. You said specific to YSL and 33 Yorkville that you discussed with Dan that profit would be after equity paid to limited partners. So is it right if I understand that Clover and Halo, that was not the definition of profit that you discussed?
>
> A. Clover and Halo didn't have limited partners. So it was after the equity was... like, the equity of -- Dan's equity was repaid.[3]

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[2] Transcript of Direct Examination of Ms. Athanasoulis on February 22, 2022, page 153, lines 13-23.

[3] Transcript of Discovery of Ms. Athanasoulis on January 13, 2022, qq. 211-212.

Ms. Athanasoulis confirmed the same understanding in her evidence in-chief during Phase 1 of the Arbitration:

> Q. Okay. And turning down to the profit listed here on the, on the pro forma, in general terms, how was this calculated on the pro forma?
>
> A. How is the profit calculated? So, basically, it takes your revenue, minuses your costs, minuses the amount returned on equity, and the balance is your net profit.
>
> Q. And was Cresford consistent in how it assessed and how it calculated profits?
>
> A. Yes.[4]

She also confirmed the same evidence on cross-examination at Phase 1 of the Arbitration:

> Q. Once construction of a condominium is complete, you register the condominium with the Condominium Authority of Ontario. Do I have that right?
>
> A. Correct. I mean, you register it with -- yes. You register it with the authorities that -- the city.
>
> Q. Right. And we talked about registration before. I'm just trying to make sure we have it clear what that means. And then, once it's registered, you turn the building over to the condominium corporation for that particular property, right?
>
> A. Yes.
>
> Q. And you collect the balances due from purchasers, and you sell any remaining units that might be in the building?
>
> A. Yes.
>
> Q. And then you pay the trades and any fees that might be owing to the kind of management companies that you've described?
>
> A. Sure. You would, you would be paying them along the way, yeah.
>
> Q. And you repay the loans and return equity to investors?
>
> A. Yes.
>
> Q. And it's at this point that you can calculate the actual profits earned by the project, correct?
>
> A. Okay, yes.[5]

---

[4] Transcript of Direct Examination of Ms. Athanasoulis on February 22, 2022, page 153, lines 13-23.

[5] Transcript of Cross-Examination of Ms. Athanasoulis on February 23, 2022, page 232, line 24 to page 234, line 3.

As the LPs will not be receiving a full return of their equity investment in the YSL project, it is unclear to the Trustee how Ms. Athanasoulis can make a successful claim for a share in profits amount when she has admitted repeatedly that her Profit Share Claim would be calculated after a full return of equity to the LPs.

AND FURTHER TAKE NOTICE that if you are dissatisfied with our decision in disallowing your claim in whole or in part (or a right to rank or your security or valuation of your claim), you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30-day period, allow.

Dated at Toronto, this ___ day of December, 2022.

KSV RESTRUCTURING INC.,
in its capacity as the proposal trustee
for YG LIMITED PARTNERSHIP AND
YSL RESIDENCES INC.

by _____
Name: Robert Kofman
Title: President

TAB 2

Court File No. BK-21-02734090-0031

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

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

AFFIDAVIT OF SARAH KARIM

I, Sarah Karim, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a legal assistant with the law firm of Bennett Jones LLP, lawyers for the Proposal Sponsor, Concord Properties Developments Corp. As such, I have knowledge of the matters contained in this affidavit.

2. Attached to my affidavit as **Exhibit A** is correspondence between counsel to the parties dated December 2 to 14, 2022.

3. Attached to my affidavit as **Exhibit B** is the Aide Memoire of the Proposal Trustee dated December 20, 2022 for the case conference before Justice Kimmel held on December 21, 2022.

4. Attached to my affidavit as **Exhibit C** is the endorsement of Justice Kimmel from the case conference held on December 21, 2022.

5. Attached to my affidavit as **Exhibit D** is correspondence between counsel to the parties dated December 22 to 28, 2022.

6. Attached to my affidavit as **Exhibit E** is correspondence between Bennett Jones LLP and counsel to the Proposal Trustee dated December 29, 2022.

SWORN by videoconference at the City of Toronto, in the Province of Ontario, before me on January 3, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits
(or as may be)

JASON M. BERALL

SARAH KARIM

This is Exhibit "A" referred to in the Affidavit of Sarah Karim sworn January 3, 2023.

Commissioner for Taking Affidavits (or as may be)

JASON M. BERALL

Sarah Karim

Subject: FW: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: Wednesday, December 14, 2022 6:19 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Shaun Laubman <slaubman@lolg.ca>
Cc: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; D. J. Miller <DJMiller@tgf.ca>; David Gruber <GruberD@bennettjones.com>; Jesse Mighton <MightonJ@bennettjones.com>; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

Matt,

We are not prepared to file a "brief" without knowing what issues it needs to address, what evidence needs to be filed and what the process will be.

By way of example, the process below seems to contemplate a potential valuation trial (which obviously implies some further evidence) but it is not clear what issues will be resolved before that trial is heard and what will be determined at trial.

In the circumstances, we should proceed to court and get clarity on process so everyone can know the rules. Let's proceed as soon as possible.

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Wednesday, December 14, 2022 5:05 PM
To: Dunn, Mark <mdunn@goodmans.ca>; Shaun Laubman <slaubman@lolg.ca>
Cc: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

Mark, thanks for your response. As you know, we cannot agree unilaterally to what evidence will be permitted following the process motion. That motion is required because of a fundamental disagreement between the stakeholders as to whether the appeal from KSV's determination will be a true appeal, or an appeal de novo.

The most we can offer for KSV's part is that if Ms. Athanasoulis submits a brief, it will be without prejudice to your ability to argue that she should be permitted to submit additional evidence in the future. I do not know whether the other stakeholders will make a similar concession.

Absent agreement on these issues I propose that we simply proceed with the motion and the Trustee will make the initial determination in the information and evidence available to it.

Yours very truly,

Matt

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: December 14, 2022 3:18 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Shaun Laubman <slaubman@lolg.ca>
Cc: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

We can provide a with prejudice brief by the end of next week. However, we require confirmation that we will have an opportunity to supplement the brief as necessary once the process is established. We are not prepared to submit a brief at this stage if others are going to take the position that the trustee will make its determination on the brief and that Ms. Athanasoulis will have no right to submit further evidence or argument.

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Wednesday, December 14, 2022 2:24 PM
To: Shaun Laubman <slaubman@lolg.ca>
Cc: Dunn, Mark <mdunn@goodmans.ca>; Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: Re: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

Thanks. Mark, can you do the same?

On Dec 14, 2022, at 11:08 AM, Shaun Laubman <slaubman@lolg.ca> wrote:

Assuming Ms. Athanasoulis does likewise, the LPs expect to get their brief to the trustee by the end of next week.

Shaun Laubman (he/him)
Direct 416 360 8481
Cell 416 315 4122
slaubman@lolg.ca

Lax O'Sullivan Lisus Gottlieb LLP
Suite 2750, 145 King St W
Toronto ON M5H 1J8 Canada
T 416 598 1744 F 416 598 3730
www.lolg.ca

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: December-12-22 5:49 PM
To: Dunn, Mark <mdunn@goodmans.ca>; Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; Shaun Laubman <slaubman@lolg.ca>; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

I agree that we should get in front of Justice Kimmel as soon as possible. When does everyone think they can get us “without prejudice” briefs, or are parties not willing to do so?

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: December 12, 2022 12:53 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

External Email / Courriel externe

We are writing further to the e-mail below. We appreciate that the Trustee has addressed some (but not all) of the concerns we have raised. It is also clear that there are outstanding disputes between the parties that will need to be resolved by the court, and we can hopefully use the time between now and the motion to narrow and clarify those disputes. In particular, and without limitation, the process below seems to contemplate a two stage process but it is not clear what issues will be addressed at what stage of the process.

In our view, the motion should be scheduled immediately so that we can get certainty on process and move this matter forward.

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Wednesday, December 7, 2022 5:19 PM
To: Dunn, Mark <mdunn@goodmans.ca>; Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

Without Prejudice

All,

Here is a revised process proposal based on feedback received.

Steps Prior to Process Motion

1. LPs, Athanasoulis and Trustee to issue briefs "with prejudice" (whether based on their mediation briefs or otherwise as they see fit) as basis for Trustee's determination. LPs and Athanasoulis may issue responding briefs at their discretion on an expedited schedule to be agreed between the parties. Please advise when you can deliver such briefs.

The Trustee would then bring a motion for directions before Justice Kimmel to determine the process. The Trustee will propose the following and the parties will have the opportunity to contest any portion of the Trustee's recommendation. As per my previous email, please advise if you believe such a motion should be booked for more or less than two hours. We would like to book it as soon as possible.

Process Motion Proposed Steps/Process

1. Trustee to issue Notice of Determination on Athanasoulis Claim (a draft may be provided in advance of the motion so that parties may take it into consideration on the motion). The Notice of Determination will not be shared with any party prior to issuance but a copy will be provided to counsel to the LPs and Concord when issued.
2. Notice of Determination to be based on full record to date in these proceedings, including the "with prejudice" briefs noted above, the materials filed and evidence given at the Phase One arbitration the decision of Mr. Horton, and any responses to direct information requests from the Trustee. It will address both the wrongful dismissal and profit share claims.
3. The Notice of Determination shall set out all of the grounds supporting the Trustee's determination in sufficient detail to appropriately frame the issues for any appeal.
4. Notwithstanding the position of the LPs, the Trustee considers Mr. Horton's decision to be binding in this proceeding, consistent with Justice Kimmel's direction that it be the "factual predicate upon which the determination of [Ms Athanasoulis'] claim will proceed". The LPs will have an opportunity to argue before Justice Kimmel that Mr. Horton's decision is merely non-binding "inputs" to the extent it is germane to the process.
5. Athanasoulis to file any appeal pursuant to Section 135 of the BIA.
6. Athanasoulis appeal shall not be required at this time to adduce detailed evidence valuing and quantifying her profit share claim but may address any issues raised in Notice of Determination.
7. Justice Kimmel to decide appeal procedure (e.g., de novo vs true appeal) based on submissions from the parties.
8. LPs shall be entitled only to raise issues in the appeal that pertain directly: (a) to whether the LPs must be repaid in full prior to any payments being made on the Athanasoulis Claim; and (b) the enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement.
9. Athanasoulis entitled to full response to any materials filed by LPs in this regard.
10. The LPs shall not be entitled to raise issues relating to any counterclaim or set-off they may assert against Ms. Athanasoulis.
11. To the extent that the decision on appeal finds that a debt is owing and payable to Athanasoulis on her PSA, then a summary trial on the quantification of damages will be scheduled.

Yours very truly,

Matt

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: December 7, 2022 11:59 AM
To: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

External Email / Courriel externe

We do not agree with either point advanced by the LPs, and believe that the second point was rejected by (or is at least inconsistent with) the decision of Justice Osborne relating to the CBRE claim. In any event, it is clear that there are matters that will require guidance from the court and I would suggest that we book a date as soon as possible so that we can all have certainty on the path forward.

From: Alexander Soutter <ASoutter@tgf.ca>
Sent: Wednesday, December 7, 2022 11:56 AM
To: Stothart, Sarah <sstothart@goodmans.ca>; Dunn, Mark <mdunn@goodmans.ca>; Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

Hi Matt,

With respect to the issues raised in Mark's November 21, 2022, letter:

1. Justice Kimmel held that the first phase of the arbitration resulted in inputs that the Proposal Trustee can take into account when it determines Ms. Athanasoulis' claim. The first phase of the arbitration is not binding on the Proposal Trustee.

2. The law regarding whether an appeal proceeds *de novo* is well established. Appeals should proceed as true appeals unless there has been an injustice that requires a hearing *de novo*. It is premature to draw a conclusion regarding whether a *de novo* appeal is necessary. Agreeing that any appeal should be *de novo* now, before any determination is made, is tantamount to conceding that the determination involves an injustice.

The evidence and arguments that the LPs intend to advance will be included in the briefs contemplated by the proposed procedure. We also confirm our position that the first phase of the arbitration does not bind the limited partners or address the issues that we raise in respect of Ms. Athanasoulis' claim.

Thanks,
Alex

Alexander Soutter | ASoutter@tgf.ca | Direct Line +1 416-304-0595 | www.tgf.ca

From: Stothart, Sarah <sstothart@goodmans.ca>
Sent: Tuesday, December 6, 2022 2:37 PM
To: Dunn, Mark <mdunn@goodmans.ca>; Alexander Soutter <ASoutter@tgf.ca>; Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

Alex – the letter referenced in our email is attached.

Thanks,

Sarah Stothart
(she/her)
Goodmans LLP

416.597.4200
sstothart@goodmans.ca
goodmans.ca

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: Tuesday, December 6, 2022 2:35 PM
To: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

We'll circulate a copy of our letter shortly.

From: Alexander Soutter <ASoutter@tgf.ca>
Sent: Tuesday, December 6, 2022 1:56 PM
To: Stothart, Sarah <sstothart@goodmans.ca>; Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Dunn, Mark <mdunn@goodmans.ca>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

Good afternoon Matt,

We would like a copy of the letter referred to and highlighted below, please.

Alex

Alexander Soutter | ASoutter@tgf.ca | Direct Line +1 416-304-0595 | www.tgf.ca

From: Stothart, Sarah <sstothart@goodmans.ca>
Sent: Monday, December 5, 2022 6:33 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Alexander Soutter <ASoutter@tgf.ca>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Dunn, Mark <mdunn@goodmans.ca>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

Matt,

Thank you for your e-mail.

As a preliminary matter, we would like to understand when a determination will be made on Ms. Athanasoulis' employment claim. We have previously expressed our concerns about delays to valuing that claim, since other similar claims have already been allowed and paid. Ms. Athanasoulis' wrongful termination claim should not be delayed further.

With respect to the proposal for the resolution of the other aspects of her claim, we have the following questions.

First, we require the Trustee's confirmation that Phase One of the Arbitration remains binding on it and that the Trustee's determination will only address matters that were to be addressed in the second phase of the arbitration. We believe this should be stated explicitly in the proposed process.

Second, we would like to understand the Trustee's position on appeal procedure. Your e-mail does not address what procedure will be followed and what evidence will be used or allowed. This is obviously an important point, especially given the relatively short time contemplated to file material. It would be unfair if Ms. Athanasoulis was forced to file material within one week (as proposed) and then prevented from filing any additional material. We explained why we believe an appeal should proceed *de novo* in our letter. But even if the appeal does not proceed *de novo,* it is important to have clarity on the process at the outset.

Third, the Trustee seems to be proposing a phased process whereby some issues would be determined at an issue appeal and others would be reserved for a trial. It is not clear what issues are to be addressed in the first hearing, or what issues are likely to be deferred to a later date. You refer to "valuation" issues, but in our view everything is a valuation issue because liability has been established. Without presuming the result of the Trustee's determination, if, for example, the Trustee determined that Ms. Athanasoulis has no claim because there are no profits, then our response would involve (among other positions) both a "legal" argument regarding the appropriate test to assess damages as well as a factual "valuation" argument regarding the fact there are actual profits that were earned by YSL. We are not clear on how these issues can be divided between separate steps in the Trustee's proposed process.

Fourth, with respect to the LPs, we agree with the Trustee that the LPs have no standing to provide their "views" on Ms. Athanasoulis' claim (as referenced in Mr. Soutter's claim below). To the extent that the LPs have standing to raise issues, and seek to raise those issues, we suggest that a process be established for that as well. The first step in the process would be for the LPs to serve whatever material they intend to rely on in support of their motion. This has not yet occurred. Once it does, we can address an appropriate procedure for resolving the dispute with the LPs. We have previously explained why we do not believe that a procedure for addressing the LPs' allegations can or should be set until there is further clarity about those allegations.

To be clear, as it relates to the LPs, we object to the Trustee considering the LPs' allegations unless those allegations are substantiated by appropriate evidence. If the LPs were to make allegations similar to those made in their mediation brief or notice of motion without providing evidence, then those allegations should not be considered by the Trustee.

Thank you,

Sarah Stothart
(she/her)
Goodmans LLP

416.597.4200
sstothart@goodmans.ca

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
goodmans.ca

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Monday, December 5, 2022 10:27 AM
To: Alexander Soutter <ASoutter@tgf.ca>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Dunn, Mark <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>
Subject: Re: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

Alex, to be clear the Trustee does not intend to refer to anything that was delivered on a "without prejudice" basis. The mediation materials referred to in paragraph two below would only be to the extent they were "re-filed" in accordance with Step One.

So we can start putting together a timeline, when do people think that they can deliver with prejudice briefs?

Matt

> On Dec 5, 2022, at 9:44 AM, Alexander Soutter <ASoutter@tgf.ca> wrote:
>
> **External Email / Courriel externe**
>
> ---
>
> Good morning,
>
> We have the following comments regarding the process suggested below.
>
> We can submit a brief to the Proposal Trustee regarding our views of Ms. Athanasoulis' claim within a reasonable amount of time. A one week turnaround for a responding brief might be unworkable if the holidays interfere, but we can respond as promptly as possible.
>
> Nothing in this process should refer to or rely on what was served in connection with or said at the mediation. If the parties decide to recycle arguments or views into a new, with prejudice brief, that is different. It would not be appropriate for the Proposal

Trustee to base its decision on the without prejudice mediation or any part of it as is suggested in paragraph 2 of the proposed process.

The LPs do not agree that there are any restrictions on their right to challenge the Proposal Trustee's determination or make submissions on any issue raised on any other stakeholder's challenge of such decision. We do not consent to the limitations relating to such challenges identified in your email below. If any order is sought that restricts such rights we will oppose the relevant terms.

Alex

Alexander Soutter | Associate | ASoutter@tgf.ca | Direct Line +1 416-304-0595 | Suite 3200, TD West Tower, 100 Wellingto
West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | www.tgf.ca

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Friday, December 2, 2022 3:11 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; Alexander Soutter <ASoutter@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; mdunn@goodmans.ca; sstothart@goodmans.ca
Subject: Re: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031

Counsel, the Trustee wishes to address the process moving forward for determination of the Athanasoulis claim. The following is what we would propose.

Steps Prior to Process Motion

1. LPs, Athanasoulis and Trustee to issue mediation briefs "with prejudice" as basis for Trustee's determination. LPs and Athanasoulis may issue responding briefs at their discretion within approximately one week.

The Trustee would then bring a motion for directions before Justice Kimmel to determine the process, and propose the following:

Process Motion Proposed Steps/Process

1. Trustee to issue Notice of Determination on Athanasoulis Claim. The Notice of Determination will not be shared with any party prior to issuance

but a copy will be provided to counsel to the LPs and Concord when issued.

2. Notice of Determination to be based on full record to date in these proceedings, the arbitration and the mediation plus any responses to direct information requests from the Trustee.
3. The Notice of Determination shall set out all of the grounds supporting the Trustee's determination in sufficient detail to appropriately frame the issues for any appeal.
4. Athanasoulis to file any appeal pursuant to Section 135 of the BIA.
5. Athanasoulis appeal shall not be required to adduce detailed evidence valuing and quantifying her profit share claim but may address any issues raised in Notice of Determination.
6. LPs shall be entitled only to raise issues in the appeal that pertain directly: (a) to whether the LPs must be repaid in full prior to any payments being made on the Athanasoulis Claim; and (b) the enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement.
7. Athanasoulis entitled to full response to any materials filed by LPs in this regard.
8. To the extent that the decision on appeal finds that a debt is owing and payable to Athanasoulis on her PSA, then a summary trial on quantification will be scheduled.

We are happy to consider any feedback before proceeding as indicated.

Yours very truly,

Matt

Matthew Milne-Smith **(he, him)**
T 416.863.5595
mmilne-smith@dwpv.com
Bio | vCard

DAVIES
155 Wellington Street West
Toronto, ON M5V 3J7
dwpv.com

This is Exhibit "B" referred to in the Affidavit of Sarah Karim sworn January 3, 2023.

Commissioner for Taking Affidavits (or as may be)

JASON M. BERALL

Court File No. BK-21-02734090-0031

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

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

AIDE MEMOIRE OF THE PROPOSAL TRUSTEE, KSV RESTRUCTURING INC.

(Hearing before Justice Kimmel on December 21, 2022)

December 20, 2022

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Matthew Milne-Smith (LSO# 44266P)
Tel: 416.863.5595
Email: mmilne-smith@dwpv.com
Robin B. Schwill (LSO# 38452I)
Tel: 416.863.5502
Email: rschwill@dwpv.com
Chenyang Li (LSO# 73249C)
Tel: 416.367.7623
Email: cli@dwpv.com

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Proposal Trustee,
KSV Restructuring Inc.

TO: **GOODMANS LLP**
Bay Adelaide Centre – West Tower
333 Bay Street, Suite 3400
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Email: sstothart@goodmans.ca

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Fax: 416.979.1234

Lawyers for Maria Athanasoulis

AND TO: **LAX O'SULLIVAN LISUS GOTTLIEB LLP**
Suite 2750
145 King Street West
Toronto, ON M5H 1J8

Shaun Laubman (LSO# 51068B)
Tel: 416.360.8481
Email: slaubman@lolg.ca
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Tel: 416.598.1744
Email: cli@lolg.ca

Tel: 416.598.1744
Fax: 416.598.3730

Lawyers for Limited Partners, 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc.

AND TO: **THORNTON GROUT FINNIGAN LLP**
Suite 3200
100 Wellington Street West
P.O. Box 329, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Alexander Soutter (LSO# 72403T)
Tel: 416.304.0595
Email: asouter@tgf.ca

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Fax: 416.304.1313

Lawyers for Limited Partners

AND TO: **BENNETT JONES LLP**
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Toronto, ON M5X 1A4

Jesse Mighton
Tel: 416.777.6255
Email: mightonj@bennettjones.com

Lawyers for the Proposal Sponsor

1. The Proposal Trustee, KSV Restructuring Inc. ("**KSV**"), delivers this aide memoire in respect of an anticipated motion for directions concerning the process for the resolution of a claim by Maria Athanasoulis.

2. This dispute centres around a condominium development in downtown Toronto that was being developed by YSL Residences Inc. and YG Limited Partnership (together, "**YSL**"). Maria Athanasoulis submitted a proof of claim within this process. Ms. Athanasoulis made a claim for $1 million (for what she characterizes as wrongful dismissal damages) and a claim for $18 million (for what she characterizes as lost profits pursuant to an oral contract). Ms. Athanasoulis's claim is the largest claim filed and has not been fully determined.

3. The Trustee agreed with Ms. Athanasoulis to arbitrate her claim. The arbitration was bifurcated between liability and damages. On March 28, 2022 the arbitrator Mr. Horton rendered a partial award in favour of Ms. Athanasoulis on the issue of liability.

4. Since that time the Trustee has been attempting to pursue the adjudication of the remaining issues relevant to Ms. Athanasoulis' claim. Various stakeholders, including the Proposal Sponsor (Concord) and certain Limited Partners in YSL (the "**LPs**"), objected to further arbitration. On November 1, 2022, Your Honour rendered a decision finding, among other things, that the continuation of Phase 2 of the arbitration exceeded the Trustee's authority under s. 135 of the *BIA* and directed the Trustee to develop an alternative method of resolving Ms. Athanasoulis' Claim.

5. In the weeks since Your Honour's decision, the Trustee has consulted extensively with the Parties about the proper path forward. After considering input from all stakeholders, the Trustee has proposed the following:

(a) The Proposal Trustee will distribute a draft Notice of Determination to the Service List in respect of the Athanasoulis Claim.

(b) The Notice of Determination will be based on the record to date in these proceedings, including the materials filed and evidence given at the Phase 1 arbitration, the decision of Mr. Horton, and any responses to direct information requests from the Trustee. It rejects the profit share claim in full, and allows the wrongful dismissal claim in full.

(c) The Trustee considers Mr. Horton's decision in Phase 1 of the arbitration to be binding in this proceeding, consistent with Justice Kimmel's direction in the Funding Decision that it be the "factual predicate upon which the determination of [Ms Athanasoulis'] claim will proceed".

(d) Ms. Athanasoulis may file any appeal pursuant to s. 135 of the *BIA*.

(e) Ms. Athanasoulis' appeal shall not be required to adduce detailed evidence valuing and quantifying her profit share claim, but may address any issues raised in the Notice of Determination.

(f) The LPs shall be entitled only to raise issues in the appeal that pertain directly: (a) to whether the LPs must be repaid in full prior to any payments being made on the Athanasoulis Claim; and (b) the enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement.

(g) Ms. Athanasoulis will be entitled to make a full response to any materials filed by the LPs in this regard.

(h) The LPs shall not be entitled to raise issues relating to any counterclaim or set-off that they may assert against Ms. Athanasoulis.

(i) To the extent that the decision on appeal finds that a debt is owing and payable to Ms. Athanasoulis on her profit share agreement, then a summary trial on the quantification of damages will be scheduled.

6. The foregoing proposal represents a compromise among the various competing views advanced by the LPs and Ms. Athanasoulis. However, neither side accepts the Trustee's proposal. The Trustee therefore intends to bring a motion for directions to seek

court authorization for the appropriate process. The Trustee was directed to attend this case conference in order to obtain a date for the motion.

7. To the Trustee's knowledge, all parties agree that a court order is appropriate to fix the process for resolution of the Athanasoulis Claim.

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

Davies Ward Phillips & Vineberg LLP
Counsel for the Proposal Trustee,
KSV Restructuring Inc.

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

Court File No. BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT
TORONTO

AIDE MEMOIRE OF THE PROPOSAL TRUSTEE, KSV RESTRUCTURING INC.

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Matthew Milne-Smith (LSO# 44266P)
Tel: 416.863.5595
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Robin B. Schwill (LSO# 38452I)
Tel: 416.863.5502
Email: rschwill@dwpv.com
Chenyang Li (LSO# 73249C)
Tel: 416.367.7623
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Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Proposal Trustee,
KSV Restructuring Inc.

This is Exhibit "C" referred to in the Affidavit of Sarah Karim sworn January 3, 2023.

Commissioner for Taking Affidavits (or as may be)

JASON M. BERALL

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: BK-21-02734090-0031 **DATE:** 21 December 2022

NO. ON LIST: 2

TITLE OF PROCEEDING: YSL RESIDENCES INC., et al

BEFORE JUSTICE: MADAM JUSTICE KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
MATTHEW MILNE-SMITH *(counsel)*	KSV Restructuring Inc. *(Trustee)*	Mmilne-smith@dwpv.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
HARRY FOGUL *(counsel)*	YSL Limited Partnership, YG Limited Partner, YSL Residences Inc. *(Debtor)*	hfogul@airdberlis.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
ALEXANDER SOUTTER *(counsel)*	Limited Partners	asouter@tgf.ca
JESSE MIGHTON *(counsel)*	Concord Pacific *(Proposal Sponsor)*	mightonj@bennettjones.com
MARK DUNN *(counsel)*	Maria Athanasoulis	mdunn@goodmans.ca
SHAUN LAUBMAN *(counsel)*	Limited Partners, 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc.	slaubman@lolg.ca

ENDORSEMENT OF JUSTICE KIMMEL:

1. My November 1, 2022 endorsement in this matter contemplated that there would be a procedure put in place by the Proposal Trustee to finally determine the claim filed by Maria Athanasoulis. The parties with an economic interest in this determination, Ms. Athanasoulis and the Limited Partners, do not agree on the procedure, nor have they accepted the compromise procedure that the Proposal Trustee has suggested.
2. The Proposal Trustee thus seeks to schedule a motion for directions from the court in respect of the proposed procedure that it suggests, in the context of which the interested stakeholders will be given the opportunity to put forward their respective positions.
3. The parties agree that a half-day will be sufficient time for this motion and it has been scheduled to be heard on January 16, 2023.
4. The parties who are participating in this motion shall work out a timetable for the exchange of all materials to be relied upon for this motion. That schedule shall ensure that all materials have been served, filed and uploaded onto CaseLines by no later that noon on Friday January 13, 2023.

KIMMEL J.

This is Exhibit "D" referred to in the Affidavit of Sarah Karim sworn January 3, 2023.

Commissioner for Taking Affidavits (or as may be)

JASON M. BERALL

Sarah Karim

Subject: FW: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454] [BJ-WSLegal.FID5464265]

From: Stothart, Sarah <sstothart@goodmans.ca>
Sent: Wednesday, December 28, 2022 10:20 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Shaun Laubman <slaubman@lolg.ca>
Cc: hfogul@airdberlis.com; daniel.rosenbluth@paliareroland.com; Crystal Li <cli@lolg.ca>; Alexander Soutter <ASoutter@tgf.ca>; D. J. Miller <DJMiller@tgf.ca>; Jesse Mighton <MightonJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>; Dunn, Mark <mdunn@goodmans.ca>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>
Subject: RE: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454]

If the Trustee does not intend to deliver a factum, then the respondents probably don't need 10 days in between delivery of their motion records and facta. Could we instead suggest January 4th for the responding records, to give the parties an extra day after the holidays? Then we are fine with Shaun's suggested January 13th date for responding facta, but would also be open to January 11th or 12th to allow time for any reply factum from the Trustee.

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Tuesday, December 27, 2022 1:24 PM
To: Shaun Laubman <slaubman@lolg.ca>
Cc: hfogul@airdberlis.com; daniel.rosenbluth@paliareroland.com; Crystal Li <cli@lolg.ca>; Alexander Soutter <ASoutter@tgf.ca>; D. J. Miller <DJMiller@tgf.ca>; Jesse Mighton <MightonJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>; Dunn, Mark <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>
Subject: Re: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454]

Shaun, I don't expect to do a factum. Whatever we need to say will be in the report. Perhaps we will do a reply. We hope to have the report to you this week.

On Dec 27, 2022, at 12:02 PM, Shaun Laubman <slaubman@lolg.ca> wrote:

Thank you Matt and I hope your holiday break is going well.

We can make that work. Will the trustee also be delivering a factum and if so, can it do so by the 6th? For the other respondents, can we agree on Jan. 3rd for any responding records and Jan. 13th for any responding factums?

Shaun Laubman (he/him)
Direct 416 360 8481
Cell 416 315 4122
slaubman@lolg.ca

Lax O'Sullivan Lisus Gottlieb LLP

Suite 2750, 145 King St W
Toronto ON M5H 1J8 Canada
T 416 598 1744 F 416 598 3730
www.lolg.ca

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: December-23-22 2:35 PM
To: Shaun Laubman <slaubman@lolg.ca>
Cc: hfogul@airdberlis.com; daniel.rosenbluth@paliareroland.com; Crystal Li <cli@lolg.ca>; Alexander Soutter <ASoutter@tgf.ca>; D. J. Miller <DJMiller@tgf.ca>; Jesse Mighton <MightonJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>; Mark Dunn (mdunn@goodmans.ca) <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>
Subject: RE: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454]

Shaun, I disagree that there was any substantive difference.

What if we deliver the draft Notice of Determination by the 30th and the Report by the 4th? I don't have instructions but will seek them if this is acceptable. There won't be any surprises in either document. You all can prepare your materials concurrently.

From: Shaun Laubman <slaubman@lolg.ca>
Sent: December 23, 2022 10:55 AM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; daniel.rosenbluth@paliareroland.com; Crystal Li <cli@lolg.ca>; Alexander Soutter <ASoutter@tgf.ca>; D. J. Miller <DJMiller@tgf.ca>; Jesse Mighton <MightonJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>; Mark Dunn (mdunn@goodmans.ca) <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>
Subject: RE: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454]

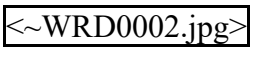
External Email / Courriel externe

The proposal set out in the NOM and case conference brief was not the same as what we had previously seen. As I said, I don't want to belabour the issue now but would like to know the timeline so we can build a schedule.

Thanks,

Shaun Laubman (he/him)
Direct 416 360 8481
Cell 416 315 4122
slaubman@lolg.ca

Lax O'Sullivan Lisus Gottlieb LLP
Suite 2750, 145 King St W
Toronto ON M5H 1J8 Canada



T 416 598 1744 F 416 598 3730
www.lolg.ca

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: December-23-22 10:51 AM
To: Shaun Laubman <slaubman@lolg.ca>
Cc: hfogul@airdberlis.com; daniel.rosenbluth@paliareroland.com; Crystal Li <cli@lolg.ca>; Alexander Soutter <ASoutter@tgf.ca>; D. J. Miller <DJMiller@tgf.ca>; Jesse Mighton <MightonJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>; Mark Dunn (mdunn@goodmans.ca) <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>
Subject: Re: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454]

Shaun, you have had our proposal for some time and it is repeated in our NoM. I am honestly not sure what you are unclear about with respect to our position.

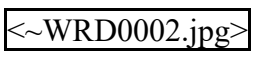
> On Dec 23, 2022, at 10:47 AM, Shaun Laubman <slaubman@lolg.ca> wrote:
>
> **External Email / Courriel externe**
>
> Matt,
>
> In fairness, I think we need to know the trustee's position in order to respond. While I don't particularly want to belabour the point right now, there have been a number of surprises throughout the process including over the past few months. We simply want to avoid being a position where we're hearing something for the first time from the trustee after we've responded to what we anticipate to be its position. Perhaps you can fix the date when we will get the trustee's material and clarify whether it will be a report, a factum or both and then we can build out the schedule from there? If the position will simply be what is set out in the notice of motion then we can likely prepare and deliver responding records but the balance of the schedule turns on when we will get the trustee's material.
>
> Thanks,
>
> **Shaun Laubman** (he/him)
> Direct 416 360 8481
> Cell 416 315 4122
> slaubman@lolg.ca
>
> **Lax O'Sullivan Lisus Gottlieb LLP**
> Suite 2750, 145 King St W
> Toronto ON M5H 1J8 Canada
> T 416 598 1744 F 416 598 3730
> www.lolg.ca
>
> <~WRD0002.jpg>

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: December-23-22 10:35 AM
To: Shaun Laubman <slaubman@lolg.ca>
Cc: hfogul@airdberlis.com; daniel.rosenbluth@paliareroland.com; Crystal Li <cli@lolg.ca>; Alexander Soutter <ASoutter@tgf.ca>; D. J. Miller <DJMiller@tgf.ca>; Jesse Mighton <MightonJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>; Mark Dunn (mdunn@goodmans.ca) <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>
Subject: Re: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454]

Shaun,

As I indicated at the case conference, the Trustee's report will not be delivered over the holidays but will await the new year. There will be nothing new or surprising in there and you can prepare your motion records regardless.

Matt

> On Dec 23, 2022, at 9:28 AM, Shaun Laubman <slaubman@lolg.ca> wrote:
>
> **External Email / Courriel externe**
>
> Thanks Matt.
>
> The LPs propose the following schedule to get to the motion on the 16th:
>
> 1. Trustee to file any record or report by December 28th
> 2. Responding records by January 3rd
> 3. Trustee factum (if any) by Jan. 6th
> 4. Responding factums by morning of Jan. 13th
>
> **Shaun Laubman** (he/him)
> Direct 416 360 8481
> Cell 416 315 4122
> slaubman@lolg.ca
>
> **Lax O'Sullivan Lisus Gottlieb LLP**
> Suite 2750, 145 King St W
> Toronto ON M5H 1J8 Canada
> T 416 598 1744 F 416 598 3730
> www.lolg.ca
>
> 
>

immediately by telephone at 416 598 1744 at our expense and delete this e-mail message and destroy all copies. Thank you.

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: December-22-22 5:55 PM
To: hfogul@airdberlis.com; Daniel.Rosenbluth@paliareroland.com; Shaun Laubman <slaubman@lolg.ca>; Crystal Li <cli@lolg.ca>; Alexander Soutter <ASoutter@tgf.ca>; D. J. Miller <DJMiller@tgf.ca>; Jesse Mighton <MightonJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>; Mark Dunn (mdunn@goodmans.ca) <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>
Cc: Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>
Subject: TRUSTEE - Notice of Motion re Process

Counsel,

Please find attached the Trustee's Notice of Motion for Directions, as promised. This will be filed in due course.

Best wishes to all for the holiday season.

Matt

Matthew Milne-Smith **(he, him)**
T 416.863.5595
mmilne-smith@dwpv.com
Bio | vCard

DAVIES
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dwpv.com

This is Exhibit “E” referred to in the Affidavit of Sarah Karim sworn January 3, 2023.

Commissioner for Taking Affidavits (or as may be)

JASON M. BERALL

Sarah Karim

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Thursday, December 29, 2022 9:38 AM
To: Jesse Mighton
Cc: Schwill, Robin; Li, Chenyang; Jason Berall; David Gruber
Subject: Re: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454] [BJ-WSLegal.FID5464265]

You can certainly argue that to Kimmel J. We aren't boxed into anything—the whole point of the motion is that nothing is done until Kimmel provides directions.

On Dec 29, 2022, at 7:23 AM, Jesse Mighton <MightonJ@bennettjones.com> wrote:

Good morning Matt,

Respectfully, I don't think your materials are clear on this point. For example, while the Aide Memoire did indicate the Proposal Trustee will distribute a draft NOD, the proposed process laid out in the Notice of Motion provides as a first step that the Proposal Trustee will "issue a Notice of Determination substantially in the form" of the draft to be attached to your report, then moves on to appeal considerations without dealing with issuing a non-draft NOD. It's actually less clear to me after your response below where in the process the Proposal Trustee proposes to issue a non-draft NOD.

From Concord's perspective, what is missing from the process proposed in the Notice of Motion are steps between the service of the draft NOD where (i) Maria and the LPs can submit any final evidence they intend to rely on upon appeal, based on the reasons for determination set out in the draft NOD, (ii) the Proposal Trustee can consider this additional evidence, and (iii) a final binding NOD is issued, thus kicking off the appeal phase. Having regard to the proposed process set out in paragraph 17 of your Notice of Motion, I envision these steps would be after step (a) (service of draft NOD), and before (b) (which I am interpreting to refer to the issuance of a final NOD, prior to appeal).

Without these steps, the Proposal Trustee may be boxing itself into a process that is more susceptible to an appeal de novo determination than what we are proposing. We are aligned on wanting the most streamlined process possible that results in an expeditious full and final resolution of Athanasoulis' claim, but in our view that process needs to avoid an appeal de novo.

Jesse Mighton, *Partner,* Bennett Jones LLP
T. 416 777 6255 | F. 416 863 1716

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Thursday, December 29, 2022 12:37 AM
To: Jesse Mighton <MightonJ@bennettjones.com>
Cc: Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>; Jason Berall <BerallJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>
Subject: Re: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454] [BJ-WSLegal.FID5464265]

Jesse,

As we have stated explicitly, both in our consultations in November and in our notice of motion, our intention is to deliver a *draft* notice of determination as part of our record, but to explicitly *not* render a notice until the process has been resolved.

The issue of “with prejudice” briefs has fallen away. The LPs and Maria have failed to agree on their use.

The issue of what constitutes a “full evidentiary record” is highly complex. For Maria to make out her full case she will need to lead expert valuation evidence. It seems highly wasteful for her (and responding parties) to devote resources to that when the claim is going to be denied on other grounds.

The parties have been given every opportunity to file briefs. Indeed, the LPs have done so. Maria is not willing to do so until she knows what the appeal will look like. Hence our impasse.

I frankly don’t see the point of a call. There is nothing that each of Concord, the LPs, and Maria will agree to. That’s why we have a motion. We are trying to streamline this as much as possible and limit our role. Kimmel can decide what should happen pre-determination, and what the appeal will look like. I think we should just deliver our report with the *draft* notice of determination and then let the stakeholders go to war over process, both pre- and post-determination.

Matt

On Dec 28, 2022, at 6:30 PM, Jesse Mighton <MightonJ@bennettjones.com> wrote:

External Email / Courriel externe

Matt,

We have removed the other parties from this email. We had understood that the purpose of the January 16 motion, as set out in Justice Kimmel's December 21, 2022 endorsement, was to set the procedure for the determination of Maria's claim. Based on your notice of motion and recent correspondence, we understand the trustee's intention is now to determine the claim in advance of the process motion, and without the benefit of the 'with prejudice' briefs that the trustee had requested in its originally-proposed process, and to ask instead for Justice Kimmel's guidance regarding the appeal process only.

Concord is concerned that proceeding in this manner (i.e. without a full evidentiary record) will increase the risk of an appeal de novo, which will increase the costs of these proceedings and lead to further delay. To reduce that risk, Concord believes that the parties must be given the opportunity to file briefs containing any evidence intended to be relief on at appeal before the trustee issues its notice of determination. Doing so would be consistent with the claim determination process you had proposed in advance of the case conference (prior to the submission of your Aide Memoire, which pivoted the process to its current conception), and Concord would support that approach.

With respect to appeal process, Concord's position is that it is premature to decide that issue before knowing the basis upon which the trustee determines the claim. That said, following the process set out above should result in any appeal being a true appeal and not an appeal de novo.

Let's discuss on a call tomorrow morning, before you issue the notice of determination, to ensure we have alignment on the process. Let me know if 10am works for you.

Thanks

Jesse Mighton, *Partner,* Bennett Jones LLP
T. 416 777 6255 | F. 416 863 1716

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Tuesday, December 27, 2022 1:24 PM
To: Shaun Laubman <slaubman@lolg.ca>
Cc: hfogul@airdberlis.com; daniel.rosenbluth@paliareroland.com; Crystal Li <cli@lolg.ca>; Alexander Soutter <ASoutter@tgf.ca>; D. J. Miller <DJMiller@tgf.ca>; Jesse Mighton <MightonJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>; Mark Dunn (mdunn@goodmans.ca) <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>
Subject: Re: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454]

Shaun, I don't expect to do a factum. Whatever we need to say will be in the report. Perhaps we will do a reply. We hope to have the report to you this week.

On Dec 27, 2022, at 12:02 PM, Shaun Laubman <slaubman@lolg.ca> wrote:

Thank you Matt and I hope your holiday break is going well.

We can make that work. Will the trustee also be delivering a factum and if so, can it do so by the 6th? For the other respondents, can we agree on Jan. 3rd for any responding records and Jan. 13th for any responding factums?

Shaun Laubman (he/him)
Direct 416 360 8481
Cell 416 315 4122
slaubman@lolg.ca

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From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: December-23-22 2:35 PM
To: Shaun Laubman <slaubman@lolg.ca>
Cc: hfogul@airdberlis.com; daniel.rosenbluth@paliareroland.com; Crystal Li <cli@lolg.ca>; Alexander Soutter <ASoutter@tgf.ca>; D. J. Miller <DJMiller@tgf.ca>; Jesse Mighton <MightonJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>; Mark Dunn (mdunn@goodmans.ca) <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>
Subject: RE: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454]

Shaun, I disagree that there was any substantive difference.

What if we deliver the draft Notice of Determination by the 30th and the Report by the 4th? I don't have instructions but will seek them if this is acceptable. There won't be any surprises in either document. You all can prepare your materials concurrently.

From: Shaun Laubman <slaubman@lolg.ca>
Sent: December 23, 2022 10:55 AM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; daniel.rosenbluth@paliareroland.com; Crystal Li <cli@lolg.ca>; Alexander Soutter <ASoutter@tgf.ca>; D. J. Miller <DJMiller@tgf.ca>; Jesse Mighton <MightonJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>; Mark Dunn (mdunn@goodmans.ca) <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>
Subject: RE: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454]

External Email / Courriel externe

The proposal set out in the NOM and case conference brief was not the same as what we had previously seen. As I said, I don't want to belabour the issue now but would like to know the timeline so we can build a schedule.

Thanks,

<~WRD0002.jpg>

Shaun Laubman (he/him)

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From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: December-23-22 10:51 AM
To: Shaun Laubman <slaubman@lolg.ca>
Cc: hfogul@airdberlis.com; daniel.rosenbluth@paliareroland.com; Crystal Li <cli@lolg.ca>; Alexander Soutter <ASoutter@tgf.ca>; D. J. Miller <DJMiller@tgf.ca>; Jesse Mighton <MightonJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>; Mark Dunn (mdunn@goodmans.ca) <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>
Subject: Re: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454]

Shaun, you have had our proposal for some time and it is repeated in our NoM. I am honestly not sure what you are unclear about with respect to our position.

> On Dec 23, 2022, at 10:47 AM, Shaun Laubman <slaubman@lolg.ca> wrote:
>
> **External Email / Courriel externe**
>
> ---
>
> Matt,
>
> In fairness, I think we need to know the trustee's position in order to respond. While I don't particularly want to belabour the point right now, there have been a number of surprises throughout the process including over the past few months. We simply want to avoid being a position where we're hearing something for the first time from the trustee after we've responded to what we anticipate to be its position. Perhaps you can fix the date when we will get the trustee's material and clarify whether it will be a report, a factum or both and then we can build out the schedule from there? If the position will simply be what is set out in the notice of motion then we can likely prepare and deliver

responding records but the balance of the schedule turns on when we will get the trustee's material.

Thanks,

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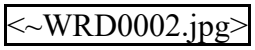

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: December-23-22 10:35 AM
To: Shaun Laubman <slaubman@lolg.ca>
Cc: hfogul@airdberlis.com; daniel.rosenbluth@paliareroland.com; Crystal Li <cli@lolg.ca>; Alexander Soutter <ASoutter@tgf.ca>; D. J. Miller <DJMiller@tgf.ca>; Jesse Mighton <MightonJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>; Mark Dunn (mdunn@goodmans.ca) <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>
Subject: Re: TRUSTEE - Notice of Motion re Process [LOLG-DMS.FID106454]

Shaun,

As I indicated at the case conference, the Trustee's report will not be delivered over the holidays but will await the new year. There will be nothing new or surprising in there and you can prepare your motion records regardless.

Matt

> On Dec 23, 2022, at 9:28 AM, Shaun Laubman <slaubman@lolg.ca> wrote:

External Email / Courriel externe

Thanks Matt.

The LPs propose the following schedule to get to the motion on the 16th:

1. Trustee to file any record or report by December 28th
2. Responding records by January 3rd
3. Trustee factum (if any) by Jan. 6th
4. Responding factums by morning of Jan. 13th

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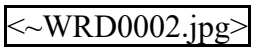

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: December-22-22 5:55 PM
To: hfogul@airdberlis.com; Daniel.Rosenbluth@paliareroland.com; Shaun Laubman <slaubman@lolg.ca>; Crystal Li <cli@lolg.ca>; Alexander Soutter <ASoutter@tgf.ca>; D. J. Miller <DJMiller@tgf.ca>; Jesse Mighton <MightonJ@bennettjones.com>; David Gruber <GruberD@bennettjones.com>; Mark Dunn (mdunn@goodmans.ca) <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>
Cc: Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>
Subject: TRUSTEE - Notice of Motion re Process

Counsel,

Please find attached the Trustee's Notice of Motion for Directions, as promised. This will be filed in due course.

Best wishes to all for the holiday season.

Matt

Matthew Milne-Smith (he, him)
T 416.863.5595
mmilne-smith@dwpv.com
Bio | vCard

DAVIES
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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

Court File No. BK-21-02734090-0031

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

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF SARAH KARIM

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Lawyers for Concord Properties Developments Corp.

TAB 3

Court File No. BK-21-02734090-0031

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

IN THE MATTER OF 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

AFFIDAVIT OF EMILY SEABY
(Sworn January 4, 2023)

I, Emily Seaby of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a legal assistant with the law firm of Goodmans LLP ("**Goodmans**"), solicitors for Maria Athanasoulis, a creditor in this matter, and as such have knowledge of the matters to which I hereinafter depose, unless otherwise indicated.

2. Attached as Exhibit "A" is a copy of the Statement of Issues of Maria Athanasoulis (Damages Quantification Hearing) that was delivered on May 4, 2022.

3. Attached as Exhibit "B" is a copy of a draft Statement of Claim delivered by Chi Long Inc., 8451761 Canada Inc. and 2504670 Canada Inc. (collectively, the "**Chi Long LPs**"), dated June 2022.

4. Attached as Exhibit "C" is a copy of a Notice of Motion delivered by the Chi Long LPs, YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B

Investment Corporation, and TaiHe International Group Inc. (excluding the Chi Long LPs, the "**YongeSL LPs**"), dated October 13, 2022.

5. Attached as Exhibit "D" is a copy of email correspondence between Mark Dunn, counsel for Ms. Athanasoulis, Alexander Soutter, counsel for the YongeSL LPs, and Shaun Laubman, counsel for the Chi Long LPs, dated October 25-26, 2022.

6. Attached as Exhibit "E" is a copy of the Partial Award of Arbitrator William G. Horton dated March 28, 2022.

SWORN REMOTELY by Emily Seaby of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on January 4, 2023 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely.*

Sarah Stothart

Commissioner for Taking Affidavits
(or as may be)

Emily Seaby

Emily Seaby

This is **Exhibit "A"** referred to in the
Affidavit of Emily Seaby
sworn remotely before me this
4th day of January 2023

Sarah Stothart
A Commissioner for Taking Affidavits

Consolidated Court File No. 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

Claim of Maria Athanasoulis against
YG Limited Partnership and YSL Residences Inc.

STATEMENT OF ISSUES OF MARIA ATHANASOULIS

(Damages Quantification Hearing)

GOODMANS LLP
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Bay Adelaide Centre
333 Bay Street, Suite 3400
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Mark Dunn LSO#: 55510L
mdunn@goodmans.ca
Sarah Stothart LSO#: 73068O
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Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for the Claimant, Maria Athanasoulis

PART I. OVERVIEW

1. By Partial Award dated March 28, 2022 (the "Partial Award"), William G. Horton (the "Arbitrator") found that:

   (a) YSL [1] agreed to pay Maria Athanasoulis 20% of the profits earned from the development and construction of the YSL Project (the "Profit Sharing Entitlement"); and

   (b) YSL constructively terminated Ms. Athanasoulis in December 2019.

2. Ms. Athanasoulis is therefore entitled to:

   (a) damages caused by YSL's repudiation of the Profit Sharing Entitlement (the "Profit Sharing Entitlement Damages"); and

   (b) damages for wrongful termination (the "Termination Damages") in the amount of approximately $1 million, less approximately $120,000 that has already been paid to her.

3. In December 2019, the Profit Sharing Entitlement was very valuable. The YSL Project was projected to earn profits of nearly $200 million, and that projection rested on a sound foundation of pre-sales and fixed price contracts. Even if YSL was unwilling or unable to proceed with the

[1] Capitalized terms not otherwise defined have the meaning ascribed to them in the Partial Award.

development, the YSL Project was a thriving development that could have been sold for a substantial profit.

4. Thus, Ms. Athanasoulis had a valuable contractual opportunity to be compensated from what would have been a very successful project. According to Justice Dunphy's decision in the underlying *BIA* proceeding, which is binding on YSL in this proceeding, Mr. Casey "squandered" this opportunity by trying to enrich himself at the expense of other stakeholders.[2] This effort culminated in YSL's proposal under the *BIA* (the "Proposal") and the sale of the YSL Project to an affiliate of Concord Developments Inc. ("Concord").

5. But nothing that Mr. Casey or YSL did *after* the breach affected the damages *caused* by the breach. YSL repudiated its contract with Ms. Athanasoulis, which included the Profit Sharing Entitlement (the "Agreement"), in December 2019 when it terminated her. As a matter of law, damages for breach of contract must be calculated as of the date of the breach. The injured party does not benefit from – and cannot be harmed by – events that occur after the breach. As a matter of fact, Ms. Athanasoulis could and would have steered YSL away from the disastrous course that Mr. Casey followed if she had not been terminated, and the YSL Project would have realized profits.

6. The Profit Sharing Entitlement Damages are, therefore, equal to the value of the Profit Sharing Entitlement in December 2019 when Ms. Athanasoulis was terminated. That value must

[2] *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178 at paras. 73 and 82 (the "Interim Reasons")

be calculated according to the real and significant chance that existed in December 2019 that the YSL Project would ultimately generate profits.

7. In the alternative, even if Mr Casey's post-breach conduct or the Proposal are somehow relevant to Ms. Athanasoulis' damages, she is still entitled to substantial damages for breach of the Profit Sharing Entitlement. This is because, despite Mr. Casey's machinations, the YSL Project earned a significant profit through early withdrawals of equity and the Proposal.

PART II. THE ISSUES PREVIOUSLY DETERMINED IN THIS ARBITRATION

A. Ms. Athanasoulis was Entitled to 20% of the Profits Earned by the YSL Project

8. Ms. Athanasoulis repeats and relies on the allegations in her Statement of Claim, the Partial Award, and the Interim Reasons of Justice Dunphy.

9. Mr. Casey induced Ms. Athanasoulis to work for, and add substantial value to, YSL by promising her the Profit Sharing Entitlement, a payment that would be based on YSL's profits on the YSL Project (the "Profits"). Mr. Casey denied that Ms. Athanasoulis had any Profit Sharing Entitlement in the first phase of this Arbitration. His evidence was rejected. In the Partial Award, the Arbitrator held that the Profit Sharing Entitlement required that:

(a) YSL pay Ms. Athanasoulis 20% of the Profits;

(b) Profits were to be calculated, on a good faith basis, based on the *pro forma* budgets prepared by Cresford;

(c) Profits could not be artificially reduced by "bad faith" transactions; and

(d) The Profit Sharing Entitlement was to be paid to Ms. Athanasoulis when Profits were earned, usually at the completion of a project.[3]

B. YSL's Breach of the Agreement

10. In the fall and culminating in December of 2019 (the "Repudiation Date"), Mr. Casey caused YSL to repudiate the Agreement. He took a series of actions that "separately and in combination, precluded Athanasoulis from performing most of the functions critical to her role at Cresford and had serious potential reputational consequences for Ms. Athanasoulis."[4] This rendered Ms. Athanasoulis' continued employment at Cresford "untenable".[5] Ms. Athanasoulis was constructively terminated.

11. YSL's constructive termination was, as a matter of law, repudiation of the Agreement in its entirety, including the Profit Sharing Entitlement. If any doubt remained about YSL's repudiation of the Profit Sharing Entitlement, that doubt was resolved in February 2020 when YSL specifically denied in a pleading that it was bound by it.

PART III. DAMAGES FOR BREACH OF THE PROFIT SHARING ENTITLEMENT

A. Damages for Lost Opportunity to Receive Profit Sharing Entitlement Based on Profits YSL *Would Have* Realized

12. The Profit Sharing Entitlement was an integral part of Ms. Athanasoulis' employment contract. This was a valuable right that was eliminated when YSL repudiated the Agreement. Her lost opportunity is based on the value of the Profit Sharing Entitlement at the time YSL repudiated

[3] Partial Award, paras. 146, 151 and 166
[4] Partial Award, para. 183
[5] Partial Award, para. 182

the Agreement. This value is substantial whether calculated based on the chance that the YSL Project would have been developed or sold.

(i) Damages are to be calculated on the date of the breach

13. The losses suffered by Ms. Athanasoulis are to be calculated based on the value of the Profit Sharing Entitlement on the Repudiation Date. Whether the value of the Profit Sharing Entitlement increased or decreased after the Repudiation Date is not relevant. As such, the decline in value of the YSL Project after the Repudiation Date due to Mr. Casey's actions has no bearing on Ms. Athanasoulis' damages.

14. This is a well-established legal rule,[6] and also required to do justice in this case. Pursuant to the Agreement, Ms. Athanasoulis was entitled to be paid based on the Profits earned by YSL *and* she was to play a key role in creating these Profits. If YSL had not repudiated the Agreement, then the YSL Project would have retained its value because Ms. Athanasoulis (and the other employees who left after she did) would have ensured that the YSL Project was managed for the benefit of all stakeholders and not to enrich Mr. Casey personally.

15. Any steps taken by Cresford to increase or decrease the value of the YSL Project *after* the Repudiation Date do not affect the damages to which Ms. Athanasoulis is entitled because Ms. Athanasoulis' damages had already crystallized.

---

[6] See for e.g., *Akelius Canada Ltd. v. 2436196 Ontario Inc.*, 2022 ONCA 259, para. 22 and *Kipfinch Developments Ltd. v. Westwood Mall (Mississauga) Ltd.*, 2010 ONCA 45, para. 15

(ii) The YSL Project was likely to realize Profits as of the Repudiation Date

16. As of the Repudiation Date, the parties had every expectation that the YSL Project would earn Profits and that Ms. Athanasoulis would be paid 20% of those Profits pursuant to the Profit Sharing Entitlement. The YSL Project was also *already* profitable on the Repudiation Date, because the value of the YSL Project increased substantially after YSL acquired it. Even though most of these Profits had not yet been *realized*, they were recognized in YSL's pro forma and could have been realized through a sale of the YSL Project at any time.

17. YSL was likely to realize Profits in one of two primary ways. It could have completed the YSL Project, sold condominium units, and realized the profits projected on its *pro forma*; or it could have sold the YSL Project and immediately realized the Profits it had already earned.

18. YSL could have (and probably should have) sold the YSL Project in or around December 2019. The value of the YSL Project significantly exceeded any investment by YSL therein. The increased value of the YSL Project was the result of many years of hard work by Ms. Athanasoulis and other employees working under her supervision. YSL had successfully completed (or partially completed) several important parts of the development process. Specifically, YSL had:

(a) designed the YSL Project and redeveloped the property to permit construction;

(b) raised the equity required to build the YSL Project;

(c) arranged construction financing, which was ready to be advanced once the retail component of the YSL Project was subject to a firm purchase agreement;

(d) sold condominium units with a total value of approximately $650 million;

(e) entered into fixed price contracts for approximately 70% of the total projected costs; and

(f) completed the excavation and shoring work required for the YSL Project.

19. Each of these steps increased the value of the YSL Project and, by December 2019, that value significantly exceeded the amounts invested by YSL.

20. A fair, open and transparent marketing process would have yielded a very substantial profit. By way of illustration (which may be revised once documentary disclosure is complete), YSL had invested approximately $247 million in the YSL Project and the YSL Project had an appraised value of $375 million. Based on these figures, the Profit Sharing Entitlement had a value of approximately $25 million.

21. Alternatively, if YSL had been able to proceed with the development, it would also have earned very substantial profits. Based on the pro forma prepared in October 2019, the YSL Project was projected to earn a profit of more than $196 million if developed. Both Mr. Casey and Ms. Athanasoulis testified that the projections in the pro forma, which were vetted by a leading cost consultant, were reliable. These projections were based on condominiums already sold, fixed price contracts already settled, and construction financing loans already agreed subject to conditions that YSL could have satisfied with appropriate management. Even after accounting for the risks associated with the development of the YSL Project, there was a real and substantial chance of Profits in this scenario.

22. Thus, as of the Repudiation Date, it was more likely than not that the YSL Project would earn a substantial profit. It follows that the Profit Sharing Entitlement had significant value and Ms. Athanasoulis is entitled to significant damages.

23. Unfortunately, as set out below, Mr. Casey breached the Agreement not only by causing YSL to terminate Ms. Athanasoulis, but also by pursuing a self-serving – and ultimately destructive – attempt to enrich Cresford at the expense of other stakeholders including Ms. Athanasoulis.

(iii) YSL breached the Agreement by incurring improper debt

24. YSL borrowed funds that it did not need to fund the YSL Project and used those funds to make payments for the benefit of other Cresford entities. As will be described below, this was a breach of YSL's loan documents that resulted in the loss of YSL's key construction financing.

25. On December 20, 2017, YSL, 33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership entered into a $20 million Loan Agreement with OTB. The loan was used to fund the purchase of a separate property at 33 Yorkville Avenue (the "Yorkville Property"). YSL had no interest in the Yorkville Property and received no benefit from these borrowed funds.

26. On December 17, 2019, YSL borrowed a further $10 million from OTB. The loan was secured by a mortgage registered on properties adjacent to the YSL Project that YSL purchased during the development process. These funds were used to pay other Cresford expenses and to pay Mr. Casey personally.

27. These loans were bad faith transactions that themselves breached the Agreement. In remedying the breach of Ms. Athanasoulis' Profit Sharing Entitlement, Ms. Athanasoulis is entitled to be put in the position she would have been in but for these additional breaches. Ms. Athanasoulis' Profit Sharing Entitlement Damages are therefore equal to what YSL's Profits would have been if it had not engaged in these bad faith transactions that diverted funds away from YSL.

(iv) Mr. Casey's self-serving – and self-defeating – actions do not reduce the value of the Profit Sharing Entitlement

28. When the parties entered into the Agreement, and particularly when the Profit Sharing Entitlement was increased to 20%, all parties involved expected that Ms. Athanasoulis was going to continue to oversee YSL's operations until the YSL Project was complete. In addition to the right to be paid based on the profits that YSL earned, Ms. Athanasoulis was to play a key role in *generating* those profits.

29. This is not what happened. After repudiating the Agreement, YSL denied that Ms. Athanasoulis had *any* entitlement under the Profit Sharing Entitlement or any other interest in YSL. Ms. Athanasoulis was not even served with a copy of the Proposal.

30. After ridding himself of Ms. Athanasoulis, Mr. Casey and YSL had essentially two options. YSL could proceed with the development of the YSL Project or it could sell the YSL Project to realize the Profits that had been earned by developing, marketing, and selling condominium units. YSL did neither. It *never* made any meaningful or competent attempt to maximize the value of the YSL Project. Instead, Mr. Casey took a series of steps that significantly reduced the value of the YSL Project and caused YSL to pursue a process that was found by Justice Dunphy in the Interim

Reasons to be "indelibly tainted" by Mr. Casey's attempts to enrich himself at the expense of other stakeholders in YSL's proposal proceedings.[7] These steps did not reflect what was would have happened if YSL had not breached the Agreement and do not impact the damages to which Ms. Athanasoulis is entitled because those damages crystallized on the Repudiation Date.

31. Moreover, Mr. Casey's actions were themselves breaches of YSL's obligation to maximize the value of the YSL Project. Ms. Athanasoulis is entitled to be put in the position she would have been in but-for those breaches.

(v) YSL lost its construction financing because of Mr. Casey's improper loans

32. A key element of YSL's development efforts was the construction financing that Otera agreed to provide (the "Otera Loan"). Otera agreed to loan YSL more than $600 million, subject to certain conditions being satisfied. The last remaining condition, at the time of termination, was an agreement to sell the retail component of YSL. According to Mr. Casey, this condition was satisfied in January 2020.

33. However, Otera terminated the Otera Loan on the basis that YSL breached its loan agreement by entering into the improper loans described above.

34. Despite YSL not itself being in a position to continue the YSL Project without the Otera Loan, the YSL Project remained valuable. That value would have been realized if YSL had engaged in an open and honest attempt to secure a purchaser or investor for the YSL Project. It did not.

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[7] Interim Reasons, para. 76

(vi) Mr. Casey's attempt to enrich himself destroyed the value of the YSL Project

35. The management of the YSL Project between December 2019 (when Ms. Athanasoulis was terminated) and July 2021 (when YSL's proposal under the *BIA* was accepted) had one goal: to enrich Mr. Casey and the entities he controlled.

36. In the proposal proceedings that led to this Arbitration, Justice Dunphy specifically found that in the year between Cresford terminating Ms. Athanasoulis and agreeing to sell the YSL Project, "good faith took a back seat to self-interest".[8] As a result, Mr. Casey "squandered" YSL's opportunity to maximize the value of the YSL Project:

> [76] 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. There is no evidence that any canvassing of the market – however constrained the market of developers capable of undertaking the completion of an 85-story mixed use tower in downtown Toronto may be – took place that was not indelibly tainted by the imperative of finding value for the Cresford group of companies rather than for the partnership itself. [9]

37. YSL is bound by these findings, and cannot dispute them in this proceeding. It also cannot credibly claim that Mr. Casey's wrongdoing, and any resulting decrease in the value of the YSL Project, eliminated Ms. Athanasoulis' contractual entitlement under the Profit Sharing Entitlement or impacted her ability to recover damages for its breach.

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[8] Interim Reasons, para. 74
[9] Interim Reasons, para. 76

(vii) The value of the YSL Project was not established in the Proposal proceedings

38. The value of an asset sold under court supervision is usually proven either by a fair and transparent sales process or reliable valuation evidence. That did not happen in this case.

39. As noted, Justice Dunphy found that the sales process undertaken by Mr. Casey was "indelibly tainted" by self-interest. His Honour also specifically rejected the appraisal evidence tendered in support of the Proposal.[10]

40. YSL and Concord, the purchaser of the YSL Project in the Proposal, relied on a CBRE appraisal dated April 30, 2021 indicating that the YSL Project was worth approximately $278.5 million (the "Concord Appraisal"). CBRE had concluded approximately two years earlier, in July 2019, that the YSL Project was worth approximately $375 million. Justice Dunphy did not accept the Concord Appraisal because there was no satisfactory explanation for this very substantial decrease or the instructions given to CBRE. No further valuation evidence was tendered by YSL, or any other party.

41. When Justice Dunphy ultimately approved the Proposal, he specifically did not make any findings of "what the value of the project might have been had the project been offered on the open market in a competitive process"[11].

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[10] Interim Reasons, para. 26
[11] *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206, para. 21

(viii) Justice Dunphy's approval of the Proposal does not affect Ms. Athanasoulis' damages

42. As the Arbitrator noted in the Partial Award, Ms. Athanasoulis' claim for her Profit Sharing Entitlement is unusual because YSL underwent insolvency proceedings beginning in April 2021.[12] But nothing about YSL's insolvency proceedings undermines Ms. Athanasoulis' claim.

43. After YSL improved the terms of the Proposal, Justice Dunphy approved the Amended Proposal without altering the earlier findings about Mr. Casey's conduct and the value of the YSL Project. The approval was a pragmatic response to the predicament caused by Mr. Casey's wrongdoing. Mr. Casey had "squandered" the time available to maximize the value of the YSL Project and Justice Dunphy found that, by that time, it was unfair to require that creditors bear the delays and risks associated with a sales process.

44. YSL's insolvency and subsequent Proposal occurred long after YSL repudiated the Agreement, Ms. Athanasoulis accepted the repudiation, and Ms. Athanasoulis' damages crystallized. The profits that YSL did or did not earn when it sold the YSL Project approximately 18 months *after* the Repudiation Date are not relevant to measuring damages that crystallized *on* the Repudiation Date.

45. Nothing about the Proposal, or Justice Dunphy's findings, undermines Ms. Athanasoulis' claim. To the contrary, it was definitively established that there was no attempt to maximize the value of the YSL Project after the Repudiation Date because Mr. Casey prioritized his own interests over those of YSL. That finding cannot be challenged in this case.

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[12] Partial Award, para. 164.

B. Damages Based on Actual Profits Realized by YSL

46. In the alternative, even if Ms. Athanasoulis can only claim for payments based on the Profits *actually earned* on the YSL Project, she is still entitled to a substantial damages award because YSL did actually earn a Profit.

(i) YSL paid out Profits beginning in 2017

47. Unbeknownst to Ms. Athanasoulis, YSL realized its first Profit in August 2017, when it re-financed the Property and bought out its former joint venture partner, British Columbia Investment Management Corporation ("BcIMC").

48. YSL funded the purchase of BcIMC's interest using a vendor take-back mortgage from BcIMC, mortgage financing from Timbercreek Mortgage Investment Corp. ("Timbercreek"), a mortgage from OTB, and funds from outside investors who purchased Class "A" LP Units (the "LPs").

49. But YSL was able to raise much more than it needed, because the value of the Property had increased so much since it was purchased.

50. The additional funds raised in connection with the BcIMC buyout did not stay with YSL. Instead, and without Ms. Athanasoulis' knowledge or consent, the additional funds were transferred to other Cresford entities. These transfers represented an early payout of Profits earned on the YSL Project.

51. Thus, Cresford earned substantial Profits on the YSL Project and paid these Profits to Cresford before the Project was completed. These Profits were concealed from Ms. Athanasoulis and other stakeholders.

52. Cresford, at the direction of Mr. Casey and without Ms. Athanasoulis' knowledge, took further steps to drain Profits from the YSL Project before it was complete. The particulars of these steps are not currently known to Ms. Athanasoulis, but they will be particularized before the hearing.

53. Pursuant to her Profit Sharing Entitlement, Ms. Athanasoulis should have received 20% of any Profits taken out of the YSL Project, regardless of when or how they were paid. She received nothing. Ms. Athanasoulis is entitled to damages for this breach of the Agreement.

(ii) YSL earned a Profit as part of the Proposal

54. YSL earned a further Profit when it sold the YSL Project as part of the Proposal.

55. The YSL Project's Profits are equal to revenues less expenses. YSL's sale of the YSL Project generated revenues that significantly exceeded its expenses.

56. The implied purchase price for the YSL Project under the Proposal totalled approximately $291 million. In addition to the amounts paid under the Proposal itself, a company related to Concord paid Cresford $6.7 million. This payment was made by a different Concord entity, to avoid the *BIA* restriction on paying any amount to equity without paying all creditors in full. However, the payments were undeniably part of the consideration that Concord paid to acquire the

YSL Project. The true purchase price for the YSL Project is therefore approximately $297.7 million.

57. YSL's expenses were significantly less than its revenues, although particulars of those expenses have not yet been provided.

58. Even though YSL *earned* a Profit, it did not have funds available for distribution after the Proposal was approved and completed because Cresford had already *paid* itself these Profits (without Ms. Athanasoulis' knowledge or approval) earlier in the YSL Project.

59. YSL has not provided any meaningful information required to quantify the Profit earned on the YSL Project, because the Trustee does not have the relevant information and Cresford has refused to produce any documents. Further particulars of the damages claimed by Ms. Athanasoulis will be provided once the necessary information has been produced.

60. Even assuming (as YSL does) that Ms. Athanasoulis' damages are calculated based on 20% of the actual Profits drawn out of YSL, rather than a damages award for loss of opportunity as detailed above, that amount is still substantial (although it cannot be quantified without access to YSL's detailed accounting records).

C. Termination Damages

61. Ms. Athanasoulis was constructively dismissed without notice or cause. YSL is liable for damages in an amount equal to what Ms. Athanasoulis would have earned during the notice period to which she was entitled. Ms. Athanasoulis is entitled to a 24 months' notice period, having regard to:

(a) **Character of employment:** Ms. Athanasoulis was Cresford's most senior employee except for Mr. Casey, with overall responsibility for virtually all aspects of Cresford's business except financing. In that capacity, she successfully executed some of the most ambitious development and construction projects in Canada;

(b) **Age and length of employment:** Ms. Athanasoulis worked at Cresford for 16 years and is 42 years old;

(c) **Availability of similar employment:** Similar employment is not currently available to Ms. Athanasoulis and will not be available to her for the foreseeable future**;** and

(d) **YSL's conduct:** Ms. Athanasoulis' damages have been significantly exacerbated by the allegations made by YSL. Specifically, YSL (and the other Cresford defendants) have accused Ms. Athanasoulis of very significant wrongdoing including embezzling $1 million. The Trustee investigated these allegations, and decided not to advance them in this proceeding. But the allegations against Ms. Athanasoulis have significantly harmed her prospects, and warrant an enhanced notice period.

D. Conclusion

62. YSL repudiated the Agreement, and then exacerbated that repudiation by its further wrongdoing. It must make good the losses that it caused.

May 4, 2022

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Lawyers for the Claimant, Maria Athanasoulis

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

Consolidated Court File No. 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

STATEMENT OF ISSUES OF MARIA ATHANASOULIS

(Damages Quantification Hearing)

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Lawyers for the Claimant, Maria Athanasoulis

This is **Exhibit "B"** referred to in the
Affidavit of Emily Seaby
sworn remotely before me this
4th day of January 2023

Sarah Stothart

A Commissioner for Taking Affidavits

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

(Court Seal)

2504670 CANADA INC., 8451761 CANADA INC. and CHI LONG INC.

Plaintiffs

and

MARIA ATHANASOULIS, 9615334 CANADA INC. and DANIEL CASEY

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date June , 2022 Issued by _____
Local Registrar

Address of court office: Superior Court of Justice
330 University Avenue, 8th Floor
Toronto ON M5G 1R7

TO: Maria Athanasoulis

AND TO: 9615334 Canada Inc.

AND TO: Daniel Casey

CLAIM

1. The Plaintiffs claim:

(a) a Declaration that there was no "Profit Sharing Agreement" as alleged by the Defendant, Maria Athanasoulis ("**Athanasoulis**");

(b) in the alternative, a Declaration that any such Profit Sharing Agreement is unenforceable and/or a nullity as against the YG Limited Partnership (the "**Partnership**") and the Plaintiffs as it was entered into in breach of the LP Agreement (defined below) and/or in breach of the fiduciary duties owed by the Defendants to the Plaintiffs;

(c) in the alternative, a Declaration that Athanasoulis is not entitled to any payment under the Profit Sharing Agreement until the Plaintiffs have recovered their full investment capital and return on investment pursuant to the LP Agreement and the Defendants' representations;

(d) in the further alternative, damages:

(i) against the Defendant, 9615334 Canada Inc., (the "**General Partner**"), in the amount of any payment Athanasoulis receives under the Profit Sharing Agreement, for breach of the LP Agreement, breach fiduciary duty, breach of trust and/or misrepresentation;

(ii) against the Defendant, Daniel Casey ("**Casey**"), in the amount of any payment Athanasoulis receives under the Profit Sharing Agreement, for breach of fiduciary duty, breach of trust, knowing assistance, inducing breach of contract and/or misrepresentation; and/or

(iii) against Athanasoulis, in the amount of any payment she receives under the Profit Sharing Agreement, for breach of fiduciary duty, breach of trust, knowing assistance, knowing receipt, inducing breach of contract, misrepresentation and/or unjust enrichment;

(e) prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(f) postjudgment interest in accordance with section 129 of the *Courts of Justice Act*;

(g) the costs of this proceeding, plus all applicable taxes; and

(h) Such further and other Relief as to this Honourable Court may seem just.

The Parties

2. The Plaintiffs are companies incorporated pursuant to the laws of Canada and are limited partners of the Partnership.

3. The Defendant, the General Partner, was the general partner of the Partnership and is affiliated with a group of companies operating under the "Cresford" name (the "**Cresford Entities**"). The Cresford Entities together marketed themselves as "**Cresford**", "The Cresford Group" or "Cresford Developments".

4. The Defendant, Casey, is an individual residing in the province of Ontario. Casey was the founder and President of Cresford and the sole director of all Cresford Entities at all material times.

5. The Defendant, Athanasoulis, is an individual residing in the province of Ontario and held various roles as a Cresford employee from 2004 until January 2, 2020.

The Partnership

6. The Partnership is a limited partnership established under the laws of the Province of Manitoba to own, construct, develop, and sell a high-rise condominium building near the intersection between Yonge Street and Gerrard Street in Toronto, Ontario (the "**YSL Project**"). The Partnership was the direct or indirect owner of YSL Residences Inc., a bare trustee that owned the lands on which the Project is located.

7. The Plaintiffs entered into an Amended and Restated Limited Partnership Agreement (the "**LP Agreement**") dated August 4, 2017 with the General Partner, the Cresford (Yonge) Limited Partnership (a Cresford-related entity, holding Class B Units) and the other limited partners to establish the Partnership.

8. The "equity" in the partnership effectively resided in the Class "A" unit holders (including the Plaintiffs) with approximately $14.8 million in capital and a capped right to return on that capital equivalent to the greater of 12.25% annually or 100% of the capital. After payment of the Class "A" unit holders, the Class "B" unit holders would receive all the residual profits without limit.

9. The General Partner had only nominal capital and nominal interest in the Partnership.

10. Both the Class "B" Units holders and the General Partner were Cresford Entities.

11. The LP Agreement provides that:

(a) the General Partner shall exercise its powers and discharge its duties honestly, in good faith and in the best interests of the limited partners and it shall exercise the care, diligence and skill that a reasonably prudent operator of a similar business would exercise in comparable circumstances (Section 3.5(a));

(b) the General Partner shall not enter into any contract with any Related Party, other than on market terms (Section 3.6(b));

(i) Related Party means any of the affiliates of the General Partner or any of their respective directors, officers, employees and shareholders (Section 1.1);

(ii) Affiliate includes any entity directly or indirectly controlling, controlled by, or under common control with the General Partner (Section 1.1);

(c) the Plaintiffs as Class A Preferred Unit holders are entitled to a preferred return of the profits and Distributable Cash (as defined in the LP Agreement), reimbursement of all their capital contributions plus *the greater of*

(i) an amount equal to the Plaintiffs' capital contribution (i.e.100% of the invested capital); and

(ii) compounded and cumulative preferred annual return of 12.25% interest, calculated from the date that each capital contributions was made (Section 4.2);

(d) the LP Agreement and any Subscription Agreements constitute the entire agreement among the General Partner and limited partners of the Partnership with respect to the subject matter hereof, and supersede any prior agreement or understanding among them with respect to such matters. The representations and warranties of the General Partner and the limited partners in the LP Agreement and in any Subscription Agreements (and all other provisions of the Subscription Agreements) shall survive the execution and delivery of the LP Agreement (Section 14.9).

12. The Plaintiffs each became a limited partner in the Partnership pursuant to one or more Subscription Agreements entered into with the General Partner.

13. The Subscription Agreement attached and incorporated an information package that Cresford presented to investors. The presentation, attached as Schedule "A" to the Subscription Agreement, made the following representations regarding the YSL Project:

(a) a projection of full return of the investment capital plus an investment return of 100% of the invested capital;

(b) the limited partners would receive security for their investments in the form of a corporate guarantee by the registered owner of the land and a personal guarantee by Casey;

(c) revenues would be paid in the following order:

(i) external lenders;

(ii) return of invested capital to the limited partners plus distribution of agreed upon return on investment to the limited partners; and

(iii) lastly, distribution to Cresford.

14. The Plaintiffs' capital contributions to the Partnership and the return on investment are in the sum of $9.4 million:

(a) $2 million capital contribution from 8451761 Canada Inc., plus $2 million return on investment/accrued interest;

(b) $2 million capital contribution from 2504670 Canada Inc. plus $2 million return on investment/accrued interest; and

(c) $700,000 capital contribution from Chi Long Inc. plus $700,000 return on investment/accrued interest.

15. The Defendants repeatedly represented to the Plaintiffs that Cresford would not be paid any amounts by the Partnership until after the Plaintiffs and the other limited partners had received their full return of capital and profit entitlement.

Athanasoulis Made Representations to the Plaintiffs

16. Maria joined Cresford as Manager, Special Projects in 2004.

17. She was promoted to Vice-President, Sales and Marketing in 2005, and President, Sales and Marketing in 2012.

18. She became the President and Chief Operating Officer of Cresford in or around August 2018 and held that role until her departure from Cresford.

19. Athanasoulis oversaw the sales and marketing for the YSL Project and introduced potential investors to Cresford. She solicited the Plaintiffs' investments in the Project and was the primary representative of Cresford who dealt with them.

20. To induce the Plaintiffs to invest in the YSL Project, Athanasoulis (as well as Casey and the General Partner, which is a Cresford Entity) repeatedly represented to them that they would be paid their investment capital plus 100% investment return before the General Partner or Cresford (and by extension, Athanasoulis), as memorialized in the LP Agreement and the Subscription Agreement.

21. At no time prior to or after the Plaintiffs made their investments and the LP Agreement was entered into did Athanasoulis or the other Defendants advise them that she had an agreement entitling her to any share of the profits in connection with the YSL Project.

Athanasoulis Commences Action Against Cresford

22. Athanasoulis left Cresford on January 3, 2020.

23. On January 21, 2020, Athanasoulis commenced an action against Casey and Cresford Entities, including the YG Limited Partnership and YSL Residences Inc., seeking $1,000,000 in damages for wrongful dismissal, as well as 20% the profits earned on the Cresford Projects

(including the YSL Project and other Cresford projects) under an alleged Profit Sharing Agreement with Cresford through Casey.

24. She alleged that since the expected profits at the time of her departure from Cresford was $242 million, she was entitled to a profit share of $48 million.

25. None of the Defendants had ever informed the Plaintiffs of the existence of any such Profit Sharing Agreement.

26. In her original claim, Athanasoulis did not allege that she was entitled to any share of YSL Project profits in priority to the Plaintiffs. She admitted that Casey and YSL Residences Inc. had guaranteed that the Plaintiffs' investments would be repaid along with interests.

27. Athanasoulis also filed a Proof of Claim for an identical claim with respect to another Cresford project, the "Clover Project", which was subject to a *Companies' Creditors Arrangement Act* proceeding (the "**Clover CCAA Proceeding**").

28. The Monitor in the Clover CCAA Proceeding disallowed the claim because it found the profit sharing claim was contingent on the Clover Project earning a profit, which remained unknown at that stage.

29. Justice Hainey in the Clover proceedings also described the profit sharing claim as being too speculative.

30. Similarly, the YSL Project has not generated any profit to date and has been placed under a Proposal pursuant to the *Bankruptcy and Insolvency Act* (the "***BIA***"), as further described below.

31. The Plaintiffs have not been repaid any of their investments nor have they received any interest or return on capital.

YSL Placed under *BIA* Proposal

32. On April 30, 2021, the General Partner filed a Notice of Intention to Make a Proposal under the *BIA* with respect to the Partnership and YSL Residences Inc.

33. On May 27, 2021, the General Partner filed a Proposal under the *BIA* despite objections from the limited partners and an application by the limited partners to remove the General Partners.

34. On June 29, 2021, Justice Dunphy rejected the Proposal and found that the General Partner had breached its fiduciary duties to the limited partners, the LP Agreement and *The Partnership Act* (Manitoba) in filing the Proposal.

35. The General Partners subsequently filed an amended proposal on July 9, 2021, which Justice Dunphy approved on July 16, 2021 (the "***BIA* Proposal**"). Justice Dunphy left undisturbed his findings regarding the General Partner's breaches of the LP Agreement, *The Partnership Act*, and fiduciary duty.

Proposal Trustee and Athanasoulis Agreed to Arbitrate Her Claim

36. Subsequent to the Partnership and YSL Residences Inc. being placed under the *BIA* Proposal, Athanasoulis and KSV Restructuring Inc., the designated trustee for the *BIA* Proposal (the "**Proposal Trustee**"), agreed to refer certain issues with respect to her claim to a private and confidential arbitration.

37. The Plaintiffs and the other limited partners were not invited to be a part of the arbitration, nor were they parties to the arbitration agreement between the Proposal Trustee and Athanasoulis or were even provided a copy of the agreement.

38. Athanasoulis filed an amended claim in the arbitration suggesting, for the first time, that she had a Profit Sharing Agreement that entitled her to a share of profits of the YSL Project regardless of whether the Plaintiffs and other limited partners received any return of their investment or guaranteed interest.

39. However, Athanasoulis has subsequently admitted that any payment she is entitled to under the alleged Profit Sharing Agreement would rank lower in priority to the limited partners' entitlement to their investment capital and returns.

40. As mentioned above, the YSL Project has not been profitable. Athanasoulis is therefore not entitled to any payment under the Profit Sharing Agreement even if it existed and is enforceable.

41. Further, any payment Athanasoulis is entitled to under the alleged Profit Sharing Agreement would rank lower in priority to the limited partners' entitlement to their investment capital and returns.

No Profit Sharing Agreement

42. There is no written Profit Sharing Agreement.

43. To the extent that there was any oral Profit Sharing Agreement, which the Plaintiffs deny, such Agreement could not have provided that Athanasoulis would be entitled to a profit share

payment from the Partnership in priority to payment to the limited partners for their investment capitals and investment return. Such terms would be in breach of the LP Agreement and the Defendants' fiduciary duties and contrary to their representations to the Plaintiffs as well as Athanasoulis' own admissions.

Profit Sharing Agreement Unenforceable

44. If there was a Profit Sharing Agreement, which the Plaintiffs deny, such an Agreement is in breach of the LP Agreement, the Defendants' fiduciary duties and contrary to their representations to the Plaintiffs and is therefore unenforceable as against the Partnership and the limited partners.

45. In the alternative, Athanasoulis is not entitled to any payment under the Profit Sharing Agreement until after the Plaintiffs have recovered their full investment capital and profit pursuant to the LP Agreement and the Defendants' representations.

46. In the further alternative, the Plaintiffs are entitled to damages in the amount of any payment Athanasoulis receives under the Profit Sharing Agreement, for breach of fiduciary duty, breach of trust, breach of the LP Agreement, knowing assistance, knowing receipt, inducing breach of contract, misrepresentation and/or unjust enrichment.

Breach of the LP Agreement

47. The alleged Profit Sharing Agreement breaches the LP Agreement.

48. The LP Agreement provides that the Plaintiffs are entitled to a preferred return of their investment capitals and profits. It also requires the General Partner to act honestly, in good faith and in the best interests of the limited partners.

49. The LP Agreement further provides that the General Partner cannot enter into any contract on behalf of the Partnership with an affiliate, including its directors or officers, other than on market terms.

50. Cresford is an affiliate of the General Partner, and Athanasoulis was a director or officer of Cresford. The alleged Profit Sharing Agreement is not on market terms.

51. If Athanasoulis and Casey/Cresford entered into the alleged Profit Sharing Agreement that has the effect of subordinating the Plaintiffs' payment entitlements to Athanasoulis', then they breached the terms of the LP Agreement.

Inducing Breach of Contract

52. Further, if Athanasoulis and Casey/Cresford entered into the alleged Profit Sharing Agreement, Athanasoulis and Casey are liable to the Plaintiffs for inducing the General Partner to breach the LP Agreement.

53. As directors and officers of Cresford (and by extension, the General Partner), both Athanasoulis and Casey were aware of the existence of the LP Agreement, which was a valid and enforceable contract between the General Partner and the limited partners.

54. If Athanasoulis and Casey/Cresford entered into the alleged Profit Sharing Agreement, they intended to and did procure the General Partner's breach of the LP Agreement, as described above.

55. To the extent Athanasoulis receives any payment under the alleged Profit Sharing Agreement, the Plaintiffs have suffered damages in the corresponding amount.

Breach of Fiduciary Duties

56. The Defendants owed fiduciary duties to the Partnership and the Plaintiffs:

(a) as described above, Athanasoulis became the President, Sales and Marketing of Cresford in 2012 and became its President and Chief Operating Officer in 2018;

(b) she also directly dealt with the Plaintiffs in soliciting their investments for the YSL Project;

(c) further, Athanasoulis undertook to act in the best interests of the Partnership and the Plaintiffs;

(d) the Partnership and the Plaintiffs as limited partners were vulnerable to the control of Athanasoulis by virtue of her role with the General Partner and Cresford;

(e) the legal and substantial practical interests of the Partnership and the limited partners stood to be and in fact were adversely affected by Athanasoulis' exercise of discretion;

(f) as such, Athanasoulis owed a fiduciary duty to the Partnership and the Plaintiffs;

(g) the General Partner also owed a fiduciary to the Partnership and the Plaintiffs;

(h) Casey, being the directing mind of Cresford including the General Partner, also owed a fiduciary duty to the Partnership and the Plaintiffs.

57. The Defendants breached their fiduciary duties to the Partnership and the Plaintiffs by entering into the alleged Profit Sharing Agreement contrary to the terms of the LP Agreement

and their representations to the Plaintiffs, and subordinating the interests of the Plaintiffs to those of the Defendants'.

Breach of Trust

58. The General Partner had a trust relationship with the Plaintiffs as limited partners.

59. By virtue of their roles in Cresford, including with the General Partner, Athanasoulis and Casey also had trust relationships with the Plaintiffs.

60. The Defendants are liable for breach of trust by entering into the alleged Profit Sharing Agreement that purportedly prioritizes Athanasoulis' interests to those of the Plaintiffs, contrary to the terms of the LP Agreement and the Defendants' fiduciary duties and representations to the Plaintiffs.

Knowing Assistance

61. In the alternative, Athanasoulis and Casey knowingly assisted the General Partner in its breach of fiduciary duty to the Plaintiffs:

(a) as described above, the General Partner owes a fiduciary duty to the Plaintiffs;

(b) the General Partner breached the duty in a dishonest manner if it entered into the alleged Profit Sharing Agreement with Athanasoulis in breach of the LP Agreement and contrary to the representations to the Plaintiffs;

(c) Athanasoulis and Casey, being directors and officers of Cresford (and by extension, the General Partner), had actual knowledge of the fiduciary

relationship between the General Partner and the Plaintiffs, as well as the General Partner's dishonest conduct; and

(d) if Athanasoulis entered into the alleged Profit Sharing Agreement with the General Partner through Casey, Athanasoulis and Casey knowingly participated in or assisted the General Partner's dishonest conduct.

Knowing Receipt

62. If Athanasoulis receives any payment under the alleged Profit Sharing Agreement, she is liable for knowing receipt:

(a) any such payment flows directly from the General Partner's breach of fiduciary duty and/or breach of trust to the Plaintiffs;

(b) Athanasoulis receives the resulting payment for her own benefit in her own personal capacity; and

(c) Athanasoulis receives the payment with actual or constructive knowledge that the payment directly resulted from the General Partner's breach of fiduciary duty and/or breach of trust to the Plaintiffs.

Misrepresentation

63. As described above, there was a special relationship between the Defendants and the Plaintiffs.

64. The Defendants represented to the Plaintiffs that they would receive preferred return of their investment capital plus profits.

65. If the Defendants entered into the Profit Sharing Agreement and it prioritizes Athanasoulis' interests over those of the Plaintiffs, the Defendants' representations to the Plaintiffs regarding their entitlements were untrue, inaccurate or misleading.

66. The Defendants made the misrepresentations knowing they were false or were reckless as to its truth.

67. In the alternative, the Defendants made the misrepresentations in a negligent manner.

68. The Plaintiffs invested $4.7 million into the Partnership and the YSL Project in reasonable reliance of the representations.

69. The Plaintiffs relied on the representations to their detriment because any amount Athanasoulis is allowed to receive under the alleged Profit Sharing Agreement would reduce the amount the Plaintiffs are able to recover on their investments and returns.

Unjust Enrichment

70. To the extent Athanasoulis receives any payment under the alleged Profit Sharing Agreement in priority to the Defendants, Athanasoulis would be enriched by the amount of the payment.

71. The Defendants would suffer a corresponding deprivation in that their ability to recover their investment capital and return would be reduced.

72. There would be no juristic reason for Athanasoulis to retain the benefit, as any such Profit Sharing Agreement would be directly contrary to the LP Agreement and her fiduciary duty and representations.

73. This action should be heard in Toronto on the Commercial List.

June , 2022
(Date of issue)

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Lawyers for the Plaintiffs

2504670 CANADA INC. et al.
Plaintiffs

-and-

MARIA ATHANASOULIS et al.
Defendants

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

STATEMENT OF CLAIM

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Lawyers for the Plaintiffs

This is **Exhibit "C"** referred to in the
Affidavit of Emily Seaby
sworn remotely before me this
4th day of January 2023

Sarah Stothart

A Commissioner for Taking Affidavits

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

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

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

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

NOTICE OF MOTION
(re Athanasoulis Claim)

YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc. (the "**YongeSL LPs**") and Chi Long Inc., 8451761 Canada Inc. and 2504670 Canada Inc. (the "**Chi Long LPs**" and together with the YongeSL LPs, the "**Class A LPs**") will make a motion to a Judge of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") on a date to be set by the Court, by video conference via Zoom or in person, as directed by the Court, at Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. Declarations that:

   (a) the Profit-Sharing Claim is a claim subordinate to the Class A LPs' entitlement to the Surplus (as such terms are defined below); and

   (b) the Profit-Sharing Claim is unenforceable against YG Limited Partnership and YSL Residences Inc. (the "**Debtors**").

2. An order for the costs of this motion as against Ms. Athanasoulis.

3. Such further and other relief as counsel may request and this Court deems just.

THE GROUNDS FOR THE MOTION ARE:

Summary

1. The Class A LPs made advances to the Debtors in 2017. The Class A LPs relied on the agreement governing YG Limited Partnership (the "**LP Agreement**") that provided, and Ms. Athanasoulis' statements to the Class A LPs which confirmed, that they would be repaid and receive their preferred return on investment before Cresford, the developer in control of the Debtors and the lands owned by the Debtors (the "**YSL Project**"), received any return from the YSL Project. To date, the Class A LPs have received nothing.

2. Ms. Athanasoulis was the face of Cresford and an officer of YSL Residences Inc. She claims that she made an oral agreement with Cresford entitling her to a share in the YSL Project's profits. She claims that, after Cresford terminated her employment, she immediately became entitled to profits from the YSL Project and should recover approximately $19 million from the Debtors.

3. The Proposal Trustee agreed to a bifurcated arbitration of Ms. Athanasoulis' claim. The first phase resulted in findings that the oral agreement existed.

4. Ms. Athanasoulis also repeatedly admitted that her entitlement to profits arose only when the Class A LPs were repaid. This is consistent with the LP Agreement and Ms. Athanasoulis' statements to the Class A LPs when they made their advances to the Debtors.

5. Ms. Athanasoulis' claim to a share in the YSL Project's profits is, on her own evidence, subordinate to the Class A LPs' rights to the proceeds of the YSL Project. Further, her claim is unenforceable because Ms. Athanasoulis' alleged profit-sharing agreement is unenforceable pursuant to the LP Agreement and would violate her fiduciary duties to the Debtors. These narrow issues undermine Ms. Athanasoulis' claim and should be determined.

The YSL Project & the Parties

6. Cresford is a condominium developer controlled by Daniel Casey. Ms. Athanasoulis was the President Sales & Marketing of Cresford, and an officer of the Debtor YSL Residences Inc., until December 2019.

7. The Debtors were the beneficial and registered owners of certain lands in Toronto that Cresford intended to develop into a mixed-use condominium building (the YSL Project).

8. YG Limited Partnership is comprised of three groups of partners:

(a) a general partner ("**GP**"), 9615334 Canada Inc., a Cresford entity;

(b) holders of Class A Preferred Units (the Class A LPs); and

(c) the holder of Class B Units (formerly a Cresford entity, now Concord Developments Properties Corp. ("**Concord**" or the "**Proposal Sponsor**"), or an affiliate).

9. The YongeSL LPs represent approximately two-thirds (by value and number) of the Class A LPs. The Chi Long LPs represent the balance. There are no other limited partners holding Class A Preferred Units in YG Limited Partnership. The Class A LPs collectively advanced the principal amount of $14.8 million to YG Limited Partnership in exchange for their Class A Preferred Units.

Background to this Proceeding

10. In April 2021, the Debtors filed Notices of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

11. KSV Restructuring Inc. was appointed as the Debtors' proposal trustee (in that capacity, the "**Proposal Trustee**").

12. The Debtors made their proposal in May 2021, which they amended twice in June 2021. The proposal, as amended, was approved by the Debtors' creditors in June 2021.

13. The Class A LPs all opposed the approval of the Debtors' amended proposal on the basis that it was not made in good faith and was designed to prefer Cresford's interests.

14. Justice Dunphy agreed and refused to approve the proposal (*YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178). His Honour did, however, permit the Debtors to file a further amended proposal that addressed the concerns he identified in his reasons for refusing to allow the proposal. The Debtors did file such a further amended proposal (the "**Proposal**"), which Justice Dunphy approved (*YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206).

15. Generally, the Proposal provides for the transfer of the YSL Project lands to the Proposal Sponsor. The Proposal Sponsor would then pay in full or assume secured and other priority claims, and pay a fund of $30.9 million for distributions to the Debtors' unsecured creditors. If, after distribution of such amount to the unsecured creditors, there remains a surplus ("**Surplus**"), that Surplus will be distributed to the Class A LPs.

16. After interim distributions, the Proposal Trustee still holds $20.5 million.

17. Subject to the resolution of 3 outstanding claims (including Ms. Athanasoulis' claim) in a manner favourable to the Debtors' estates, there will be amounts available to distribute to the Class A LPs. Ms. Athanasoulis' claim, however, would wipe out any return to the Class A LPs if determined in her favour.

The Athanasoulis Claim

18. The Proposal Trustee has been administering a claims process against the Debtors.

19. Ms. Athanasoulis submitted a Proof of Claim to the Proposal Trustee. Ms. Athanasoulis' claim has two components:

(a) a claim for wrongful dismissal damages; and

(b) a claim that, pursuant to an *oral agreement* (the "**Profit-Sharing Agreement**") with Cresford's principal, Daniel Casey, she was entitled to a 20% share in the profits of all of Cresford's projects, including the YSL Project (the "**Profit-Sharing Claim**").

The Athanasoulis Arbitration

20. The Proposal Trustee and Ms. Athanasoulis agreed to participate in a bifurcated arbitration of Ms. Athanasoulis' claim (the "**Athanasoulis Arbitration**") before William Horton (the "**Arbitrator**").

21. The first phase of the Athanasoulis Arbitration involved a determination of whether: (a) Ms. Athanasoulis was constructively dismissed; and (b) the Profit-Sharing Agreement existed. The Arbitrator found that Ms. Athanasoulis was constructively dismissed and that the Profit-Sharing Agreement existed.

22. The Class A LPs were not parties to the Athanasoulis Arbitration and were not permitted to participate. They were told that the Athanasoulis Arbitration was confidential. The issues and arguments they raise against Ms. Athanasoulis' claim (including but not limited to those described herein) were not advanced or determined.

The Profit-Sharing Claim is Subordinate to the Class A LPs' Entitlement to the Surplus, and Unenforceable Against the Debtors

23. The LP Agreement provides that:

(a) the Class A LPs are entitled to a preferred return from the proceeds of the YSL Project after its arm's length creditors are paid;

(b) when the Class A LPs were fully repaid and received their full preferred return, any proceeds of the YSL Project would be paid to the Class B Unit holder;

(c) the GP shall exercise its powers and discharge its duties honestly, in good faith and in the best interests of the limited partners and it shall exercise the care, diligence and skill that a reasonably prudent operator of a similar business would exercise in comparable circumstances; and

(d) the GP shall not enter into any contract with any Related Party (which definition includes Ms. Athanasoulis), other than on market terms.

24. When the Class A LPs were considering making their advances to the Debtors, Ms. Athanasoulis was the representative and "face" of Cresford. Directly or through brokers, she explained to the Class A LPs how the proceeds of the YSL Project would be distributed:

(a) first to external lenders,

(b) then to the Class A LPs,

(c) then to Cresford.

25. This explanation of the "waterfall" was included in a presentation to potential investors in the YSL Project, including the Class A LPs. This waterfall was reflected in the Class A LPs' subscription agreements, and in the LP Agreement.

26. Ms. Athanasoulis presented this waterfall to the Class A LPs directly or through brokers when she:

(a) sent the Class A LPs the YG Limited Partnership Agreement that would bind them upon subscribing for units in the partnership, or directed that such document be sent to them;

(b) met with Yuen (Michael) Chen of E&B Investment Group Inc. on May 31 and June 1, 2017, and when Ms. Athanasoulis sent Mr. Chen a document setting out the waterfall, on May 31, 2017;

(c) met with Lue (Eric) Li of YongeSL Limited Partnership on or about June 24, 2017, and when Ms. Athanasoulis sent Mr. Li a document setting out the waterfall, on or about March 27, 2017, or alternatively, caused that document to be sent to him on or about that date by a broker, Henry Zhang;

(d) caused a broker, Simon Yeung, to send a document setting out the waterfall to one of the principals of SixOne Investment Ltd., Jacob Wai, on or about February 21 and 23, 2018;

(e) caused Mr. Yeung to send a document setting out the waterfall to Xi (Vicky) Chen of Taihe International Group Inc. on or about February 8, 2018;

(f) met with Anthony Szeto and Lorraine Ng, of 2504670 Canada Inc. on or about June 14, 2017, assured them that investors' investment capital would be repaid along with 100% invested return, and that investors would be repaid their investment capital and return before any payment to Cresford, caused an information package containing the waterfall to Mr. Szeto and Ms. Ng shortly after the June 14, 2017, meeting; and

(g) caused the Chi Long LPs' real estate broker, Paul Lam, to (i) assure the Chi Long LPs that the repayment of their investment capital and payment investment profit would be guaranteed, and in priority to any payment to Cresford or its principals, and (ii) send the Chi Long LPs the information package containing the waterfall.

27. Ms. Athanasoulis knows that the Profit-Sharing Claim is subordinate to the Class A LPs' entitlement to the Surplus. She made the following admissions during the first phase of the Athanasoulis Arbitration:

(a) profit is calculated by taking revenue, less costs and "the amount returned on equity", leaving a balance which is profit;

(b) with respect to the YSL Project, her profit-sharing amount "would be paid after the equity was repaid to the LP investors"; and

(c) profits are calculable when the condominium development is registered, **after** trades, management companies and lenders are paid **and** equity is returned to investors.

28. Ms. Athanasoulis' admissions are consistent with what the Class A LPs were told all along: they would be repaid, and receive their preferred return, before Cresford received anything. As the "face" of Cresford, Ms. Athanasoulis fell into the Cresford category.

29. The Profit-Sharing Agreement violates the terms of the LP Agreement and was never disclosed to the Class A LPs when they made their advances to the Debtors or at any time until the Class A LPs learned of Ms. Athanasoulis' action against Cresford and Mr. Casey.

30. As an officer of Cresford (including the Debtor YSL Residences Inc.), Ms. Athanasoulis owed YG Limited Partnership fiduciary duties and could not bind it to the Profit-Sharing Agreement.

31. Given the terms of the LP Agreement, Ms. Athanasoulis' statements to the Class A LPs, her duties to the Debtor YG Limited Partnership, and her own admissions regarding the nature of her claim made during the Athanasoulis Arbitration, the Profit-Sharing Claim is subordinate to the entitlement of the Class A LPs to the proceeds of the YSL Project, and is unenforceable against the Debtors.

Procedural Steps Following the First Phase of the Athanasoulis Arbitration

32. After the Arbitrator released his decision on the first phase of the Athanasoulis Arbitration, the YongeSL LPs brought a motion for a declaration, among other things, that Ms. Athanasoulis' claim was subordinate to the Class A LPs' entitlement to the Surplus.

33. On May 24, 2022, following an unrelated motion in this proceeding, the YongeSL LPs asked Justice Gilmore to schedule their motion. Her Honour did not schedule the YongeSL LPs'

motion that day but asked the parties to discuss the potential for the Class A LPs to advance their positions in the Athanasoulis Arbitration.

34. Justice Gilmore did not rule that the YongeSL LPs were barred from bringing their motion. Her Honour simply directed the parties to discuss the potential for alternative dispute resolution. A motivating factor behind Her Honour's direction in this respect was the fact that the second phase of the Athanasoulis Arbitration was already scheduled for September 2022. Her Honour directed that the parties return for a case conference on June 8, 2022, after their discussions.

35. By June 8, 2022, the primary stakeholders (the Class A LPs, the Proposal Trustee and Ms. Athanasoulis) had agreed in principle that the Class A LPs could participate in the second phase of the arbitration and raise all of their issues with Ms. Athanasoulis' claim. They also agreed that the Class A LPs could claim damages against Ms. Athanasoulis for any amount that she would otherwise be entitled to in respect of the Profit-Sharing Claim.

36. At no point did the Class A LPs agree to contribute to the costs of the Athanasoulis Arbitration.

37. At the June 8, 2022 case conference, Justice Gilmore gave effect to the parties' agreement on procedure. She declined to require that the Class A LPs contribute to the costs of the Athanasoulis Arbitration, despite Concord's submissions, and left the issue of costs to the Arbitrator. Justice Gilmore expressed the hope that the arbitration could be scheduled for October or November 2022.

38. After the June 8, 2022 case conference, the Proposal Trustee wrote to the Class A LPs and requested that they contribute to a deposit for the arbitration. This issue was never raised during

the discussions leading to the YongeSL LPs agreeing not to schedule their motion. They would not have agreed to forego their motion had they been required to pay any up-front costs.

39. Subsequently, Concord threatened to refuse to continue funding the Proposal Trustee if the Proposal Trustee proceeded with the Athanasoulis Arbitration. This disrupted the schedule for the Athanasoulis Arbitration. It will no longer be heard in 2022.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this motion:

1. affidavits of certain Class A LPs, to be sworn;

2. the affidavit of Roxana G. Manea, to be sworn;

3. the transcript from the first phase of the Athanasoulis Arbitration; and

4. such further and other evidence as counsel may advise and this Court may permit.

October 13, 2022

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Lawyers for the Chi Long LPs

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.**

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

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

Proceedings commenced at Toronto, Ontario

NOTICE OF MOTION

(re Athanasoulis Claim)

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Lawyers for the Chi Long LP

This is **Exhibit "D"** referred to in the
Affidavit of Emily Seaby
sworn remotely before me this
4th day of January 2023

Sarah Stothart

A Commissioner for Taking Affidavits

Seaby, Emily

From: Dunn, Mark
Sent: Wednesday, October 26, 2022 11:40 AM
To: Shaun Laubman
Cc: Alexander Soutter; Milne-Smith, Matthew; Schwill, Robin; Li, Chenyang; Stothart, Sarah
Subject: Re: YSL - LPs motion [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

I am not trying to muddy the waters. I am trying to assess whether we have a dispute over what was said at these meetings or only about the meaning of the LP Agreement and the presentation included in the application materials.

Ms. Athanasoulis is aware of what she *said* at the meetings, but she does not know exactly what she is *alleged* to have said. I'm not sure what "full summaries" you are referring to. If the LPs have a summary of what they allege was said at each of these meetings then that would be very helpful.

To be clear, Ms. Athanasoulis denies that she made any misrepresentation and so the LPs will need to specifically prove (among other things) what representations were made and that they were false.
Hopefully this clarifies why I am asking these questions. If the LPs choose not to provide further answers, we can address it at the case conference.

Sent from my iPad

> On Oct 26, 2022, at 11:22 AM, Shaun Laubman <slaubman@lolg.ca> wrote:
>
> Mark,
>
> With respect to your enquiries, I'm having difficulty understanding the purpose for them. You beat a similar drum over the summer and we gave you full summaries of the representations made by your client. I don't believe there is any mystery at this stage and, in any event, your client is well aware about what she said and what information she provided to the LPs as they made their investments. We do not have any indication from your client that she disputes that those representations were in fact made or what she said is inaccurate about them (if anything). Therefore, for now at least, it appears that she is simply trying to muddy the waters. If you would like to set out your client's position in more detail then we can fairly consider your assessment that a longer motion is required to address the facts.

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From: Dunn, Mark <mdunn@goodmans.ca>
Sent: October-26-22 11:05 AM
To: Alexander Soutter <ASoutter@tgf.ca>
Cc: Shaun Laubman <slaubman@lolg.ca>; Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>; Stothart, Sarah <sstothart@goodmans.ca>
Subject: Re: YSL - LPs motion [IMAN-CLIENT.FID6731]

Thank you for your response.

I would suggest that we proceed to boost he case conference now. I do not recall Justice Kimmel giving any indication that she would give directions relating to the LPs' motion, and it is not clear what directions would be given since neither side asked for any directions and the LPs indicated they intended to seek a case conference.

Since the LPs have indicated that a case conference will be required whatever the result of the motion, we should proceed to book one. The case has been delayed enough already.

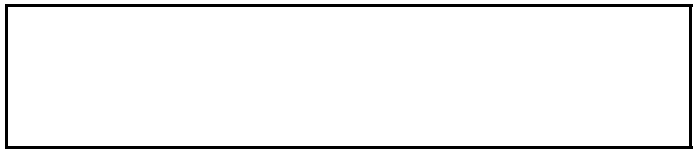
As for your responses to my questions, since you have declined to provide any further particulars we will be forced to proceed on the basis that your motion will require the resolution of contested credibility issues relating to each of the alleged representations. This obviously cannot be done in the four hours the LPs have proposed.

From a procedural perspective, it seems from your e-mail that the LPs contemplate a three stage process: first, the LPs' motion; second, a hearing to determine valuation; third, an action to adjudicate their damages claim. I appreciate that not all of these stages will be required if Ms. Athanasoulis fails at any of them, but it is hard to see how this is a preferable procedure to the arbitration we all agreed to (even if we admit that the LPs only agreed "in principle", which we do not accept).

Sent from my iPad

> On Oct 26, 2022, at 10:33 AM, Alexander Soutter <ASoutter@tgf.ca> wrote:
>
> Hi Mark,
>
> We thought it best to wait until Justice Kimmel released her reasons on the motion before seeking a case conference. Her Honour may give directions relating to our motion and said that future attendances should be scheduled before her where possible. It did not seem efficient to schedule a case conference before her reasons were released.
>
> Regarding your two questions: (a) the notice of motion has adequate particulars regarding Ms. Athanasoulis' statements; and (b) the limited partners do not waive any claims.

Thanks,
Alex



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West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | www.tgf.ca

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: Tuesday, October 25, 2022 2:32 PM
To: Alexander Soutter <ASoutter@tgf.ca>; slaubman@lolg.ca
Cc: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>; Stothart, Sarah <sstothart@goodmans.ca>
Subject: YSL - LPs motion

I hope that you're both well.

I would like to follow up on the LPs' motion. In their submissions on Concord's motion, the LPs indicated that they intend to move forward with their motion whatever the outcome of Concord's motion and would proceed to book a case conference. We have not seen any correspondence relating to the case conference, and would like to see that booked as soon as possible to minimize any further delays.

In addition, there are two aspects of the motion that I would like to fully understand so that we can respond intelligently to the request to schedule the case conference.

First, we need to understand what exactly Ms. Athanasoulis is alleged to have said to the LPs. At paragraph 26 of the Notice of Motion, the LPs claim that Ms. Athanasoulis "presented" a "waterfall" to the LPs "directly or through brokers". At paragraph 28, for example, Ms. Athansaoulis the LPs claim that they were told that Ms. Athanasoulis "fell into the Cresford category" and would only be paid anything after the LPs were repaid in full. We need to understand whether the LPs are alleging that Ms. Athanasoulis told the LPs that she would not be paid anything until they were or whether they inferred that from their interpretation of the relevant agreements. This is important, from a procedural perspective, because we need to assess whether determining the motion will require contested findings about what was said in a series of meetings. This has a direct impact on whether the Notice of Motion is a straightforward process, as the LPs allege. If the LPs' motion require disputed findings about what was said at a series of meetings held at different times with different participants then it is hard to see how these issues could be resolved on a summary motion. We would appreciate clarification on this issue or, better yet, service of the LPs' supporting affidavits.

Second, the LPs have served a draft Statement of Claim and said that they would assert a damages claim in the arbitration. The Notice of Motion does not refer to the damages

claim. We would like to understand whether the LPs have abandoned their claim for damages, or whether they will assert it if their motion fails and Ms. Athanasoulis received payment. This is also important, since it raises the possibility of a multiplicity of proceedings if Ms. Athanasoulis succeeds on the motion (ie., the LPs motion, followed by the damages arbitration and then a claim for damages by the LPs).

We look forward to hearing from you.

Regards,
Mark

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This is **Exhibit "E"** referred to in the
Affidavit of Emily Seaby
sworn remotely before me this
4th day of January 2023

Sarah Stothart

A Commissioner for Taking Affidavits

In the Matter of an Arbitration pursuant to the Arbitration Act, S.O. 1991

of a Claim between:

Maria Athanasoulis

("Claimant")

and

KSV Restructuring Inc.
in its capacity as Proposal Trustee
of YG Limited Partnership and YSL Residences Inc.

("Respondent")

In relation to Consolidated Court File No. 31-2734090 in the *ONTARIO* SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST) IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, as amended IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

Counsel for Claimant:	Mark Dunn Sarah Stothart
Counsel for Respondent:	Matthew Milne-Smith Chenyang Li Robin Schwill
Hearing Dates:	February 22, 23, 24 and 25, 2022
Arbitrator:	William G. Horton, FCIArb, C.Arb.

PARTIAL AWARD
(March 28, 2022)

I. Introduction

1. This arbitration arises in the context of a court proceeding relating to the insolvency of YG Limited Partnership and YSL Residences Inc. (together, "**YSL**").

2. Until its insolvency, YSL was part of a group of companies (collectively, "**Cresford**" or the "**Cresford Group**") which was engaged in the development, construction, marketing and sale of condominiums in Toronto, Ontario. Cresford incorporated a separate company for each condominium project upon which it embarked. YSL was incorporated to pursue a high-rise condominium project at the corner of Yonge Street and Gerrard Street in Toronto (the "**YSL Project**").

3. Mr. Dan Casey ("**Casey**") is the founder and President of Cresford, and the sole director of all the companies in the Cresford Group.

4. KSV Restructuring Inc. ("**KSV**") was appointed as the Proposal Trustee for YSL pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**") on April 30, 2021. It should be noted at the outset that, while counsel for KSV advances the position of Cresford in this arbitration, they are not in fact counsel for Cresford and are not in a solicitor client relationship with Cresford or Casey.

5. Ms. Maria Athanasoulis ("**Athanasoulis**"), who was employed by Cresford in various roles between 2004 and 2020, advances this claim against the insolvent estate of YSL.

6. Athanasoulis alleges that she was entitled to a share of the profits earned by Cresford, on the YSL Project among others, pursuant to an oral agreement ("**PSA**") or agreements with Casey. She claims that the most recent PSA entitled her to 20% of the profits (the "**20% PSA**"). She asserts that the existence of this agreement is corroborated by the evidence of Mr. John Papadakis ("**Papadakis**") who attended a meeting at which the alleged agreement was discussed. Papadakis was a lawyer acting for Cresford at the time and is also a friend of Athanasoulis through a family connection with her husband.

7. Athanasoulis further alleges that Cresford repudiated her employment contract and constructively terminated her employment in or around early or mid-December 2019.

8. Prior to the proceedings under the BIA which led to this arbitration, Athanasoulis' claims were advanced in an action in the Superior Court of Ontario (the "**Action**") against various corporate entities within the Cresford Group and against Casey (collectively the "**Defendants**"). In the Action, Athanasoulis delivered a Statement of Claim and the Defendants delivered a Statement of Defence and Counterclaim.

9. In their Statement of Defence and Counterclaim, the Defendants alleged that Athanasoulis would only have been entitled to 10% of the net profits realized on the successful completion of certain projects, including the YSL Project, if she remained an employee of Cresford at the date of the project's completion. Subsequently, in this arbitration, Casey denied ever entering into any PSA with Maria Athanasoulis.

10. KSV takes the position that none of the discussions Athanasoulis relies upon gave rise to any PSA that was binding and enforceable. KSV maintains that Athanasoulis was fairly compensated by Cresford for her services at all material times.

11. KSV further alleges that Athanasoulis was not constructively dismissed; rather, she resigned from her employment at Cresford effective January 2, 2020. KSV does not allege any cause for Athanasoulis' dismissal, in the event she is found to have been dismissed.

II. Agreement to Arbitrate

12. The parties appointed me as sole arbitrator to determine this dispute by way of Terms of Appointment dated December 9, 2021.

13. Paragraph 2 of the Terms of Appointment sets out the parties' agreement to bifurcate Athanasoulis' claim such that the arbitration scheduled to proceed from February 22 to 25, 2022 was to resolve only the liability of YSL.

14. In the event that I were to find that YSL is liable to Athanasoulis, the parties have agreed to schedule an additional hearing before me to determine the quantum of YSL's liability.

III. Issues to be Determined

15. The issues to be decided in this phase of the arbitration are as follows:

a. Did Athanasoulis have a PSA that entitled her to 20% of the profits earned by the YSL Project?

b. If so, what were the terms of the PSA?

c. Was Athanasoulis employed by YSL?

d. Was Athanasoulis constructively dismissed, i.e. did she resign or was she constructively dismissed?

IV. Agreed Facts

16. The parties provided various documents to assist me:

    a. an Agreed Statement of Facts delivered on February 18, 2022;

    b. a Chronology; and

    c. a cast of Characters.

17. In order to avoid duplication, I have incorporated the contents of these documents into my factual findings rather than separately identifying the agreed facts for the purposes of this Award.

V. Evidence of Fact Witnesses

18. The witness evidence in the arbitration was provided by oral testimony given under solemn affirmation as to truth. Three witnesses testified: Athanasoulis, Casey and Papadakis.

19. By agreement, each of the witnesses had previously been examined for discovery in the arbitration.

VI. Findings of Fact

20. Based on the facts agreed upon between the parties, and upon the evidence adduced in the arbitration with respect to facts not covered by their agreement, the following are my findings of fact.

A. The Parties

21. YSL was part of the Cresford Group, which was engaged in the development, construction, marketing and sale of significant condominium projects in the central core of the City of Toronto, Ontario.

22. Daniel Casey was the founder and President of Cresford and the sole director of all Cresford entities at all material times.

23. Each of Cresford's development and construction projects was owned by a separate legal entity (each an "**Owner**"). That entity purchased the land where the relevant project was to be built, obtained the required permissions, marketed the project to proposed purchasers, hired contractors to build the project and took all of the other steps to convert real estate into a major condominium development. Each project pursued by a Cresford entity had its own financing and involved family trusts which Casey controlled, or Limited Partnerships involving third party investors.

24. YSL was the Owner of the YSL Project.

25. Athanasoulis joined Cresford in 2004 as Manager, Special Projects. Her prior education and experience were limited. She had graduated from high school and took a business administration course at Seneca College which she did not finish. While at Seneca College she had a part time job at Canada Trust (as it then was), which she decided to focus on instead of college. She worked with two individuals at TD Canada Trust, Ted Dowbiggin ("**Dowbiggin**") and Ian Scott ("**Scott**"). Following the merger of Canada Trust with TD Bank, Dowbiggin and Scott left to join Cresford and offered Athanasoulis a job in the finance department of Cresford. She was also given a role as manager of special projects.

B. Career of Athanasoulis at Cresford before February 16, 2019

26. In her capacity as manager of special projects, Athanasoulis quickly demonstrated a particular talent for marketing condominiums.

27. Athanasoulis was promoted to Vice-President, Sales and Marketing in 2005. In that position she worked with Casey and outside marketing consultants hired by Cresford in the marketing aspects

of Cresford's business. At that time, Cresford paid its outside marketing consultants on average about 1.5% of total sales as a marketing fee. This was a substantial expense as total sales from a single Cresford condominium project normally ran into the hundreds of millions of dollars. In addition, these fees were payable at the time condominiums were sold, whereas a developer usually only earns the revenues from condominium sales when the condominium corporation is registered upon completion of the project.

28. In about 2007, based on Athanasoulis' success in the marketing field, Cresford began to be less dependent on outside consultants and relied more on her leadership, thus saving on external sales marketing fees. She was promoted to President, Sales and Marketing in 2012.

29. By the end of 2013, Athanasoulis and Dowbiggin were the only two senior officers of Cresford reporting directly to Casey and, together with Casey they formed the Executive Committee of Cresford. Dowbiggin was President, Land and Finance and Athanasoulis was President, Marketing and Sales. During this period, Athanasoulis was responsible for operational matters: sales, marketing, customer service, construction and property management. The only aspects of Cresford's business Athanasoulis did not manage were financing and land acquisition.

30. Around August 2018, Dowbiggin left Cresford. Athanasoulis assumed Dowbiggin's responsibilities and became the President and Chief Operating Officer. After Dowbiggin's departure, all of Cresford's employees reported, directly or indirectly, to Athanasoulis and she reported to Casey. However, Casey retained the responsibility for raising the capital necessary for Cresford's business and remained the primary contact with Cresford's lenders.

31. As part of her responsibilities, Athanasoulis oversaw a property management company within Cresford, which was a fee generating business for which many developers hire a third party. She also oversaw a high-rise construction team, which allowed Cresford to manage its product and earn additional fees.

32. Athanasoulis also served as an officer of individual companies within Cresford. In the case of YSL, she was Vice-President and Secretary.

33. At all times, Casey had the ultimate authority to make decisions on behalf of Cresford and each of its constituent entities, including YSL, and to enter into contracts on behalf of Cresford.

C. The YSL Project

34. The YSL Project was planned as an 85-story condominium tower, potentially to be built in two stages with each stage being a separately registered condominium corporation.

35. Cresford initially bought the YSL Project as part of a joint venture but bought out its joint venture partner's interest. Cresford considered selling the YSL Project after it achieved zoning for high rise condominium development but did not ultimately proceed with a sale.

36. The marketing of the YSL Project was launched in October 2018. Under the leadership of Athanasoulis, the launch was very successful. The YSL Project achieved the highest price per square foot that had ever been achieved in the neighbourhood and was "a first" in terms of pre-sale numbers in a short period of time.

37. YSL sold condominium units worth approximately $650 million in the period up to January 2, 2020, with the bulk of the sales coming in the early stages of the campaign. At the time Athanasoulis was terminated, Cresford expected to earn a net profit of $196,641,600 on the YSL Project, and to generate fees of $59,462,617 for Cresford.

D. Cresford's Other Projects During the Period at Issue

38. In addition to the YSL Project, Cresford had three other active projects as of January 2020:

a. The Clover on Yonge (the "**Clover**"), a 44-story condominium located near Yonge and Bloor in Toronto. Clover was owned by Clover on Yonge Inc. in its capacity as General Partner of Clover on Yonge Limited Partnership. Pursuant to a plan of compromise and arrangement that was approved in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**") commenced by Clover on Yonge Inc. and Clover on Yonge Limited Partnership on June 22, 2020, all of Clover's equity was acquired by entities related to Concord Pacific Developments Inc. ("**Concord**").

b. Halo Residences on Yonge ("**Halo**"), a 38-story condominium tower located on Yonge Street between Wellesley and Carlton in Toronto. Halo was owned by 480 Yonge Street Inc., the general partner of 480 Yonge Street Limited Partnership. 480 Yonge Street Inc. and 480 Yonge Street Limited Partnership were the subject of a Receivership Order issued on March 27, 2020. An Approval and Vesting Order issued September 15, 2021 vested Halo in 494 Yonge Street Inc.

c. The Residences of 33 Yorkville ("**33 Yorkville**"), a condominium with one 64-story tower and one 41-story tower. 33 Yorkville was owned by 33 Yorkville Residences Inc., in its capacity as general partner of 33 Yorkville Residences Limited Partnership. 33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership were the subject of a Receivership Order issued on March 27, 2020. Pursuant to an Approval and Vesting Order issued March 11, 2021, 33 Yorkville was vested in PEM (Yorkville) Holdings Inc.

39. Casey explained that the difficulties faced by these three projects were largely the result of rising construction costs in the period before construction of those projects began. The YSL Project was launched later and did not suffer from the same difficulties.

40. As of the beginning of 2020, the costs recorded in YSL's *pro forma* projections were regarded by both Casey and Athanasoulis as being current and reliable projections.

E. Athanasoulis Compensation History

41. The management of Cresford was conducted on a very informal basis. Corporate formalities were not observed. Many aspects of the business especially in relation to employment and compensation issues were conducted on the basis of oral discussions and understandings. Employment agreements, on the rare occasions in which they were put in writing (usually at the request of an employee) were made out between the employee and "Cresford Developments", a name which does not correspond to any distinct legal entity.

42. If Athanasoulis ever signed an employment contract with Cresford, it was early in her career with Cresford and no copy of it has been located.

43. The property management and other fee generating entities within the Cresford Group, generated the cash necessary to pay expenses of the organization, including the salaries, on a current basis.

44. Fees earned within Cresford were ultimately collected within East Downtown Redevelopment Partnership ("**EDRP**") which paid employee salaries within Cresford. EDRP did not own any projects and conducted no business in its own name. There is nothing to suggest that EDRP exercised any management or control over Athanasoulis, or indeed communicated with her in any way relative to her employment. On the evidence in this arbitration, EDRP essentially served the role of paymaster and financial clearing house with the Cresford Group of companies.

45. Throughout most of her employment, Athanasoulis reported directly to Casey. Latterly, the ambit of her employment encompassed all of Cresford's development activities, with some of her energies being directed to the service of the entire group and some of her energies being directed to the fulfillment of responsibilities with respect to individual projects, to the benefit of Cresford, the Owners and other stakeholders in those projects.

46. Athanasoulis' compensation included a base salary and, from time-to-time, bonuses. Her base salary was paid by EDRP. It is not clear from the evidence on record, whether all performance bonuses were paid by the individual Owners to which the performance that earned the bonus related. It is admitted by KVC that one cash bonus was paid by YSL to a company owned by Athanasoulis husband. Bonuses were paid either in cash or through credits on condominium units within the relevant Owner's project. Clearly, bonuses paid by way of credits on condominium purchases had to come from the relevant Owners. There is no evidence as to cash flows between EDRP and the Owners.

47. Athanasoulis' compensation in and before 2014 was summarized in a consultant's report as comprising a base salary of $200,000 with eligibility for a bonus up to $100,000 on certain parameters (sales of units on three projects and input to the Strategic Advisory Committee) and a further bonus of 0.125% to 0.175 % on total sales of the newly launched Casa III project.

48. Casey's evidence that Athanasoulis was never paid commissions on sales, is not credible. His memory of such matters is poor and is contradicted by the positions taken on behalf of him and the other Cresford Defendants in their Statement of Defence and Counterclaim. However, there is room for debate in relation to exactly how Athanasoulis' compensation at any point in time related to previously agreed terms. Her compensation appears to have been finalized in periodic

discussions between her and Casey. There is no evidence of any issue ever arising as to whether she was properly compensated in relation to prior agreements.

49. In 2014, in light of the successful launch of a Cresford condominium project known as Vox ("**Vox Project**"), Casey agreed to pay Athanasoulis 10% of the profits earned on the Vox Project (the "**10% PSA**"). At about the same time they agreed that Athanasoulis' base salary would be increased to $500,000.

50. Again, Casey's denial of having agreed to this (as part of his blanket denial of having agreed to pay any commissions, including the 10% PSA in relation to future projects) is contradicted by factual assertions in paragraph 51 of the Statement of Defence where it was stated: "After the Vox Project, Casey agreed to pay Athanasoulis 10% of the net profits realized on the successful completion of future projects." In addition, the Defence in this arbitration contains the admission that "…Cresford agreed to pay Athanasoulis 10% of the net profits realized on the completion of certain projects, including YSL." Both pleadings assert that "…Athanasoulis would only be entitled to this benefit if she contributed to the successful completion of the project and remained an employee of Cresford at the date of project completion."

51. Casey admits that the information in these pleading must have come from him and that he would very likely have had an opportunity to review and correct the pleading, but he has no explanation as to how his counsel or KSV's counsel came to acknowledge the existence of an agreement to pay a bonus in the amount of 10% of net profits – albeit on an alleged condition of continued employment which is itself subject to dispute – an agreement to which only he could have committed on behalf of Cresford.

52. With respect to the condition of continued employment, I note that neither pleading asserts that the condition was specifically discussed and agreed upon between Casey and Athanasoulis. Athanasoulis denies that any such condition was discussed, and Casey is in no position to assert that it was, having now testified that no such discussion took place.

53. Athanasoulis did attempt to put the 10% PSA into written form, using as a template the written agreement of another employee. She gave her draft, dated November 14, 2014 ("**November 14 Draft**") to Casey. However, it does not appear that either of them followed up, and there is no

evidence that it was ever discussed. This is not surprising in the corporate culture that prevailed at Cresford. As with all prior agreements relating to Athanasoulis' employment, the 10% PSA was not documented. The details surrounding the arrangement were never clarified. Athanasoulis trusted Casey to fulfill the promise and continued to replicate and surpass her prior success.

54. In this arbitration, both sides sought to use the November 14 Draft to argue what Athanasoulis' understanding of the 10% PSA must have been, especially with respect to any condition of continued employment. The submissions of the parties focussed on the following provisions:

    a. Under the heading "The Employee's employment may be terminated as follows" Paragraph 4 states: "Bonus payments will be paid in full at the completion of any project in the construction phase."

    b. Schedule A 4): "A bonus of 10% of final profits will be paid on final closing on any future site Cresford acquires."

55. Despite the failure to follow up on the November 14 Draft, Athanasoulis was generously compensated in the years after the 10% PSA, although no occasion arose to apply the 10% PSA. It is difficult on the evidence in this arbitration to reconcile the compensation she received to the agreements or understandings that were in place. However, there is no suggestion that she was undercompensated by reference to what is set out in the November 14 Draft. As no projects were completed or sold at a profit during this period of time, the 10% PSA was not triggered.

56. Athanasoulis' taxable income from employment as declared on her T4 slips was as follows for the years indicated:

2014 - $301,900
2015 - $314,400
2016 - $617,195
2017 - $621,871
2018 - $889,400
2019 - $889,400

57. Between 2014 and 2019, Athanasoulis received, as part of her compensation, discounts on the purchase of condominium units on Cresford projects totalling a minimum of $3,717,378. These

discounted transactions were done with companies held by Athanasoulis and/or her husband. These agreements required no investment or deposit until closing, at which time any additional value of the unit over the launch price would also accrue to the benefit of Athanasoulis and her husband. Given the rising prices of condominiums in Toronto, the discounts were therefore considered to be the minimum value of the benefit. There is some overlapping between compensation recorded on Athanasoulis' T4 slips and compensation paid by way of discounted transactions with Athanasoulis and her husband. Compensation paid in cash was paid through EDRP. Compensation paid by way of discounted transactions was "paid" by the relevant Owner, sometimes by way of discounts in favour of companies owned by Athanasoulis' husband.

58. Although there is a lack of arithmetical specificity in the evidence, it is not disputed that Athanasoulis was paid substantial bonuses from the project Owners, including a cash bonus from YSL. Unlike profit share, which in the normal course could only be calculated at the end of a project, bonuses were paid primarily based on sales of condominiums in each project in any given year.

59. Athanasoulis was never paid a profit share while she was at Cresford. None of the projects, other than the Vox Project, reached the point of registration or were otherwise disposed of at a profit. The Vox Project was not profitable. Athanasoulis testified that the project was primarily acquired to earn fees and was expected to be a "tight deal".

60. Following the 10% PSA, Athanasoulis became an increasingly valuable contributor to the success of Cresford. Casey and Athanasoulis discussed raising her profit share from 10% to 15%. However, these discussions were not concluded before they were overtaken by other events.

61. After the successful launch of the 33 Yorkville Project in 2017, Casey and Athanasoulis discussed increasing Athanasoulis' profit share to 20% of current and future projects. The evidence of Athanasoulis is somewhat inconsistent as to whether she thought that they came to an agreement with respect to increasing the profit share to 20% at that time, or later after the successful launch of YSL in 2018. As with all matters surrounding Athanasoulis' compensation, there is a lack of clarity and no documentary confirmation. Nevertheless, it rings true that such discussions began in 2017 and rose to the level of a mutual understanding after the launch of the YSL Project, by which time Dowbiggin had left Cresford.

62. The YSL Project was off to an exceptional start, with initial sales of approximately $550 million, and was at all times projected to be profitable. Athanasoulis was the only employee of Cresford who spoke at the launch event. In her capacity as an officer of YSL she signed contracts on behalf of YSL.

63. Athanasoulis' role continued to expand. Following Dowbiggin's departure at the beginning of 2018, and even more so after a health issue experienced by Casey in December 2018, she was responsible for essentially all of Cresford's operations. This included:

    a. all aspects of design, marketing, and sales;

    b. Cresford's relationship with its contractors, including negotiating contracts and addressing any ongoing issues;

    c. Cresford's relationship with its lenders. Mr. Casey had little contact with lenders, in this period, apart from what he described as "social" interactions; and

    d. overseeing all of Cresford's employees.

F. Meeting with John Papadakis

64. At some point in late 2018, Casey had a serious health issue. In light of that, and to secure Athanasoulis' conditions of employment and continued role in the company, Casey and Athanasoulis decided that a meeting would take place to discuss putting a written agreement in place with respect to Athanasoulis' compensation, in case Casey was "hit by a bus". It is not clear from the evidence, who initiated the meeting. However, Athanasoulis was the one who contacted Papadakis to set up the meeting. She told Papadakis that the purpose of the meeting was to discuss putting her agreement with Casey into writing.

65. Papadakis was a partner in the Blaney McMurtry law firm which acted for Cresford. He practices commercial law and commercial real estate lending and acquisition. His primary dealings with Cresford were through Athanasoulis, although he did meet with Casey on occasion.

66. Papadakis was also a close family friend of Athanasoulis. Athanasoulis' husband's parents were Papadakis' godparents. Papadakis was best man at Athanasoulis' wedding and her husband is a

godparent to Papadakis' child. He was called upon to give evidence in the arbitration by Athanasoulis.

67. Athanasoulis and Mr. Casey met with John Papadakis on Saturday, February 16, 2019 at Cresford's office. The meeting, which was described as "informal", included a discussion of Casey's health as well as a review of Athanasoulis' employment arrangements. While there is an issue in this arbitration as to whether or not an enforceable agreement was reached at, or before, the meeting, it is important to note that there is no evidence as to any disagreement or point of contention as to any matter that was discussed at the meeting.

68. The meeting lasted about two hours. In broad terms, it is clear that the purpose of the meeting was not to negotiate any new terms but to review the terms of the existing arrangements with a view to putting them into a formal document. The purpose of putting the arrangements into a written document was described to Papadakis at the meeting by Casey as being "in case I get hit by a bus". Casey agrees that he made this statement.

69. The 20% profit share was discussed at the meeting as part of the arrangements that were already in place.

70. Casey presented evidence regarding the meeting which differed in some respects from the evidence given by Athanasoulis and Papadakis. To a large extent these differences are matters of characterization rather than matters of fact. To the extent that Casey's evidence differs I accept the evidence of Athanasoulis and Papadakis. Casey's memory is imprecise and is at odds with highly germane allegations, clearly pleaded on his behalf in two different legal proceedings, that could only have originated from, or been confirmed by, him. His characterizations of the facts do not ring true in the overall context.

71. I was urged by KSV to make findings of credibility against Athanasoulis on the basis of her conduct following her departure from Cresford in January 2020. As Athanasoulis has acknowledged, her conduct (as described below in relation to the Mann Letters) was inexcusable – although she did provide an explanation. However, KSV has not sought to at this stage to justify certain conduct of Casey which is referenced in the Mann letters, which also does not reflect well on him. I have not based my findings of credibility on general observations or judgments

regarding the conduct of Athanasoulis or Casey, or a consideration as to which of them behaved less badly. Rather, I have based my findings on an evaluation of the evidence in relation to the events to which the evidence relates and its congruency with the overall context.

72. Athanasoulis had become critically important to the success of Cresford. There was nothing unusual, unfair or contentious about the arrangements that were in place with Athanasoulis, including the 20% profit share which would, by its nature, depend entirely on the size of the overall profit. Casey had every reason to want to make her feel secure in her position. In light of his recent health concerns, he wanted to ensure that she would carry on and complete the projects even if something happened to him, as he explained to Papadakis at the meeting. Although she remained an employee in legal terms, Casey often referred to her in public as his "partner". For many important entities doing business with Cresford, she had become the "face" of Cresford especially after Dowbiggin's departure and Casey's illness. Casey was in no position to create any doubt in Athanasoulis' mind that he would not fulfill that which he had promised in relation to her compensation, or resist it being put into writing. It is clear, even on his own evidence, that he did not do so at the meeting.

73. Despite his personal ties to Athanasoulis and her family, I found the evidence of Papadakis to be balanced and objective. On a number of important points where it would have been easy for him to fabricate answers useful to Athanasoulis, he did not do so. He was careful to distinguish between what was actually said at the meeting and things he assumed based on his understanding of the situation. Apart from legal characterizations of what took place at the meeting, the evidence of Papadakis is not substantially at odds with Casey's evidence.

74. I accept the evidence of Papadakis that, at the meeting, it was confirmed that Athanasoulis was to receive 20% of the profits from existing and future projects. There was no discussion of which entities within the Cresford Group would pay the profits. Papadakis assumed that each entity that earned the profit would be obligated to pay, but he did not recall any specific discussion of that point. He did recall that he asked for a list of the companies involved to assist him in drafting the agreement. There was no discussion about how profits would be calculated, other than that they would be *bona fide* profits, i.e. there would not be any sort of non-bona fide transactions that would

decrease profits. There was no discussion about when profits would be paid. No restrictions or conditions were discussed in relation to the profit sharing.

75. At the conclusion of the meeting, Papadakis asked to be given a corporate chart so that he could begin drafting the agreement. He received the corporate chart from a senior employee of Cresford about 2 weeks later. However, he never did create a written agreement. YSL objected, on grounds of legal privilege, to Papadakis providing evidence as to why he did not do so. In this context, I would note that legal privilege attaches to communications between lawyers and their clients. In this case, Papadakis and his firm were the lawyers. Cresford was the client.

76. Thereafter, Athanasoulis would occasionally remind Papadakis not to forget that "we've got to get to that agreement". There is no evidence that she was ever told that Papadakis did not prepare the written agreement as a result of the privileged communications with Cresford.

77. After the events (described below) which led to the end of Athanasoulis' employment with Cresford, Athanasoulis brought the previously mentioned action against Cresford in the Superior Court of Ontario. In that context, Papadakis was interviewed over the phone by Mr. Al O'Brien ("**O'Brien**") litigation counsel for Cresford, with respect to the meeting of February 16, 2019. O'Brien prepared a memorandum relating to that telephone conversation dated February 4, 2020 ("**O'Brien Memo**").

78. Counsel for Athanasoulis objected to the introduction of the O'Brien Memo into evidence. The memo was offered as a document that had been given to counsel for KSV in this arbitration by Aird & Berlis, Cresford's current litigation counsel. No one was called to give evidence as to the document itself. O'Brien has since passed away. Significant portions of the document have been redacted on the basis of privilege.

79. After receiving submissions as to the admission of the O'Brien Memo into evidence, for reasons stated on the record, I admitted the document into evidence subject to weight and to give Papadakis an opportunity to confirm, deny or explain the assertions in the O'Brien Memo.

80. The O'Brien Memo recounts that O'Brien had sent Papadakis extracts from Athanasoulis' Statement of Claim prior to the telephone conversation. Prior to the call Papadakis had informed O'Brien that he had not been able to locate any notes of the February 16, 2019 meeting.

81. The O'Brien memo stated that Papadakis had made the following comments:

    a. The February 16, 2019 meeting was a "informal" and "very preliminary meeting" and Papadakis "was not to be drafting anything". "He was never instructed to draft anything and in fact never did draft anything".

    b. Papadakis "will state that Maria and Dan never got to a point of "meeting of the minds" as to how to move forward".

    c. Papadakis stated that he was "never in a position to draft anything" and "Dan never told him not to proceed with drafting anything". "They were never at a stage to start drafting an agreement."

82. With a few unimportant exceptions, Papadakis flatly contradicted these statements in the O'Brien Memo. He agreed that the meeting was informal in that it was conducted in an informal manner, i.e., not in a boardroom wearing suits. However, he disagreed that he told O'Brien that he was "not to be drafting anything". He testified that he advised O'Brien that there was a verbal agreement in place that he was asked to put in writing. Papadakis testified that the term "meeting of the minds" never came up in his conversation with O'Brien and that it was not correct to say that there was no meeting of the minds. He testified that it was outside the realm of possibility that he would have said that to O'Brien because it was a legal conclusion and is incorrect. He would not have used that term in his conversation with O'Brien.

83. Papadakis gave evidence that the discussion on February 16, 2019 was not a negotiation, it was a verbal arrangement that he was asked to put into writing. He agreed that he told O'Brien that there was no written contract. He agreed that he was not in a position to draft the agreement right after the meeting because he needed the information he had requested about the corporate structure.

84. I accept the evidence of Papadakis in preference to the information in the O'Brien Memo.

85. Papadakis' evidence was clear, consistent and convincing as summarized in the following exchange during his cross examination:

> Q. Let me rephrase. I'm going to put it to you, Mr. Papadakis, that on January 31st, 2020, you told Mr. O'Brien that there was no enforceable contract between Mr. Casey and Athanasoulis. Will you accept that?
>
> A. No. No. I said exactly what I've been saying this whole time. There was a verbal agreement in place. You're talking about me using the words "enforceable contract"; those terms did not come up in my conversation. What he asked me is what was asked of me earlier, what was said, what happened at that meeting. He did not go into any, was there an enforceable contract, was there a meeting of the minds. It was what was said, you know -- going back to what you had shown me earlier, those paragraphs, that just talks about what happened at the meeting. That's what we talked about.

86. At the time of their conversation, both Papadakis and O'Brien had potential reasons not to be objective: Papadakis for the reasons previously mentioned in paragraph 66 above and O'Brien because he was not just Cresford's counsel but also a personal friend of Casey and a Trustee of Casey's Estate. However, the objective evidence and surrounding circumstances favour Papadakis' evidence.

87. It is not credible that Papadakis told O'Brien that he was "not to be drafting anything" after the meeting when it is known that the purpose of asking Papadakis to attend the meeting was to create a written agreement in case Casey was "hit by a bus". Any such statement by Papadakis would also be inconsistent with the fact that he did not draft anything after the meeting because of a communication which took place after the meeting, for which Cresford claims privilege.

88. Given that there were in fact no matters of disagreement at the meeting (a matter on which all three attendees at the meeting agree) to say that there was "no meeting of the minds" is a strikingly inapt comment – one that is not supported by the facts, and is at best an arguable legal conclusion. Ironically, the biases alleged against Papadakis make it all the more unlikely that he would have made that comment.

89. Certainly, as Papadakis agreed under cross examination, the matters on which Casey and Athanasoulis confirmed their agreement at the meeting were at a high level of generality. Casey testified that he and Athanasoulis had a "conceptual agreement". Thus, the issue arises as to whether or not their conceptual agreement lacked any contractual intent or essential terms needed to create an agreement enforceable at law. That is a matter for legal argument and analysis, as

discussed below. But there was no reason based on what occurred at the meeting to conclude that there was not, or would not continue to be, a "meeting of the minds".

90. In the circumstances, I am unable to give the O'Brien Memo any weight as against the testimony given by Papadakis in this arbitration.

G. Terms of the PSA

91. The following facts are relevant to the issue of reasonable certainty regarding the calculation of profits in the context of Cresford's business. They are not intended to be definitive findings in terms of how profits should be calculated in the circumstances of any particular project.

92. Cresford prepared budgets, called *pro formas*, that were submitted to lenders and used for internal decision-making. The *pro formas* were prepared on a project by project basis and included a profit calculation.

93. Project profits were calculated by taking project revenues and deducting project expenses.

94. It was Athanasoulis' evidence that the *pro formas* served as a basis to calculate the profits to which she was entitled and that this was something she discussed with Casey. Casey agreed that he and Athanasoulis had a shared understanding as to what was meant when they discussed project profits.

95. The *pro formas* for each project began as pure projections of revenue and categories of expenses at the beginning of each project. They show how all the anticipated financial elements would be treated in the overall calculation of profits. For example, fees charged to a project by other Cresford companies were treated as expenses to the project. As the project progressed, the components of revenues and expenses would be updated with new estimates based on changing circumstances, and with known costs as they were incurred. *Pro formas* became more reliable as construction of the project progressed.

96. Projections can prove to be wrong and events could occur that would significantly affect projections. The COVID pandemic which began in early 2020 is a dramatic example. However, revenues from condominium projects are not earned until construction is completed and the

condominium corporation is registered. By the time the project is registered and revenues are released, costs and revenues are known and, using the *pro formas*, profits can be calculated.

97. Profits can also be earned on projects prior to registration, although not from sales of the condominium units themselves. For example, land may be sold after successful rezoning of the property or at a point where a partial development has occurred.

98. There was never any discussion between Casey and Athanasoulis as to any condition attaching to Athanasoulis' entitlement to a share of the profits. Specifically, it was never discussed that Athanasoulis would cease to be entitled to a share of the profits if her employment was terminated. Casey agreed that Cresford could not extinguish any entitlement by simply terminating Athanasoulis' employment.

H. Events of 2019

99. In the course of 2019, a number of challenges unfolded with respect to the Cresford projects.

100. The three ongoing projects, other than the YSL Project, began to experience serious cost over-runs due to conditions in the construction industry at that time.

101. The YSL Project, which had proceeded to the demolition and excavation stage, was experiencing some difficulties satisfying a condition relating to drawing down its construction loan for the erection of the tower. The condition was that the retail segment of the project had to be pre-sold. Athanasoulis had attempted to put together a consortium to purchase the retail space, but that had been unsuccessful. Casey then engaged in discussions to sell the retail space to Hawalius Inc. ("**Hawalius**").

102. In the course of dealing with these issues, Casey and Athanasoulis discussed the possibility of selling the entire Cresford business. Patrick Dovigi ("**Dovigi**"), the owner of GFL Environmental, which had worked on the foundation for the YSL Project, had expressed an interest in owning rental projects. Casey and Athanasoulis agreed that Dovigi would be approached to see if he had any interest in acquiring Cresford. Dovigi expressed interest, but on the condition that Athanasoulis join him and take a 50% interest. Casey was aware of this and promoted Athanasoulis in his discussions with Dovigi. Casey was extravagant in his praise to Athanasoulis

herself for being in a position to facilitate such a transaction. However, the potential sale to Dovigi created significant issues which ultimately led to Athanasoulis leaving the company without any transaction with Dovigi taking place.

103. Casey testified that he asked Athanasoulis to focus on the transaction with Dovigi. However, he himself took the lead in negotiations with Dovigi and asked Athanasoulis to "remain totally quiet regarding [Dovigi] so he cannot triangulate". In his text message to Athanasoulis of November 22, 2019 Casey went on to say:

> I have a good feeling we can do the deal. If any new information comes up, I will keep you informed.
>
> [Underlining added.]

104. Nevertheless, it appears that Athanasoulis did continue to have discussions with Dovigi. She appears to have played a role in providing information regarding Cresford to Dovigi to inform the negotiations.

105. At the same time, Casey continued to negotiate with Hawalius, without involving Athanasoulis.

106. Casey sought and obtained the assistance of Dowbiggin and Joe Bolla, as external advisors to assist him with the negotiations with Dovigi and Hawalius, and with the other financial issues facing Cresford.

107. While these events were unfolding, Casey instructed employees of Cresford who previously reported to Athanasoulis to report to him instead, and to take other measures regarding record keeping, that caused the employees serious distress. On December 11, 2019, Sean Fleming, Cresford's VP of Finance and Planning ("**Fleming**") stated in an email to Dan Casey, among other things:

> We were asked to join you for a confidential meeting on Wednesday December 11, 2019 that left us feeling uncomfortable. The direction to no longer put anything in writing and to only communicate by way of telephone was alarming. We are also concerned with the sudden change in leadership and decision making without any explanation as to why and for how long.

[Underlining added.]

108. In the arbitration, Casey sought to explain his instructions to Cresford employees not to report to Athanasoulis as a temporary measure which was to remain only in place while she was focussed on negotiations with Dovigi. However, this was never explained to Athanasoulis or other Cresford employees.

109. Casey achieved an agreement in principle (expressed in an unsigned letter of intent ("**LOI**")) with Hawalius and represented to the construction lender that the condition regarding the sale of the retail space had been satisfied. Athanasoulis was aware that Dovigi wanted to acquire the retail space as part of any transaction to acquire Cresford. Athanasoulis felt that the Hawalius transaction negatively impacted the negotiations with Dovigi and that she had been blindsided.

110. On December 13, 2019, Fleming forwarded to Casey an email from the construction lender which sought additional information regarding the LOI. Fleming also raised a number of issues regarding the accuracy and business intent of a number of aspects of the LOI.

111. In a telephone conversation with Bolla, Athanasoulis also disputed whether the agreement in principle with Hawalius satisfied the condition for the construction loan advance. Athanasoulis felt that the lender was being misled regarding the satisfaction of the condition and she raised various issues with Bolla regarding the LOI. Athanasoulis also sent an email to Casey suggesting that he was "presenting a suspicious LOI to the bank".

112. Later the same day, O'Brien on behalf of Cresford sent an email to Athanasoulis in which he referred to the conversation and stated that Athanasoulis had "threatened to take steps to interfere with the closing of the YSL financing". In the email (which was sent by O'Brien's assistant on his behalf) O'Brien reminded Athanasoulis of her fiduciary duties to Cresford and warned her not to interfere in the Hawalius transaction, or with the drawdown of the construction loan.

113. During her involvement with the Dovigi transaction, Athanasoulis also discovered what she believed to be a major violation of Cresford's obligations to its lenders in that it had represented

that it had invested significant equity in the order of $20 million in the YSL Project (as required by the terms of the loan agreement), whereas Casey had borrowed the money and was charging the interest as an expense to the project. The financial difficulties experienced by Cresford and the issues regarding the YSL construction financing caused Athanasoulis to question Casey's past assurances that he had substantial means and assets at his disposal to support Cresford's business.

114. Over the course of the fall of 2019, Casey excluded Athanasoulis from all aspects of Cresford's business except the transaction with Dovigi. In addition to the particular matters noted above, he instructed her to have no further dealings with lenders and conducted certain discussions regarding the potential acquisition of a major new site, the Chelsea Hotel, without her involvement. When Athanasoulis complained, at a meeting on December 5, 2019, Casey berated her and called her "crazy".

115. In his evidence, Casey sought to characterize the situation as Athanasoulis having been instructed to focus on negotiating with Dovigi and being "on assignment" during that period. There was some variation in the evidence as to whether Casey told Athanasoulis to work "exclusively" on the Dovigi transaction, or to give that transaction her primary attention. Casey has complained in his Statement of Defence and Counterclaim regarding her failure to follow up on another matter that was brought to her attention during this period. On the other hand, he agreed in cross-examination with counsel's suggestion that Athanasoulis' attention to the Dovigi transaction was to be exclusive.

116. Casey's evidence was that Athanasoulis' primary or exclusive concern with the Dovigi transaction to the exclusion of other matters was to be temporary, and that the direction to her employees not to report to her was temporary and part of an ethical screen, given Athanasoulis' potential involvement with Dovigi in any purchase of Cresford. Whether or not this was so, these intentions were not communicated to Athanasoulis or to any of the staff, or third parties with whom Athanasoulis had been dealing on behalf of Cresford. There is no evidence of any communication to Athanasoulis or Cresford employees regarding an ethical screen.

I. Athanasoulis' Departure from Cresford

117. On January 2, 2020, Mark Dunn, as counsel for Athanasoulis, wrote to O'Brien indicating that Athanasoulis considered her employment with Cresford to have been constructively terminated, and that she would cease to work for Cresford effective that day. The letter set out the grounds for that contention, most of which have been referred to above. The letter set out various steps to be taken to formalize and communicate the fact that Athanasoulis was no longer employed by Cresford. The letter advised that a claim would be filed on January 10, 2020 if an amicable settlement could not be reached by that date.

118. O'Brien responded to Dunn's letter disputing the allegation of constructive dismissal, but agreeing to discuss the steps to be taken in light of her departure.

119. Athanasoulis' last day of work was January 2, 2020.

J. Subsequent Events

120. Athanasoulis filed a lawsuit against Cresford in the Ontario Superior Court of Justice on January 21, 2020.

121. The Statement of Claim, in addition to advancing the claims that are the subject of this arbitration, contained allegations as to Cresford's financial difficulties and Athanasoulis' concerns regarding dealings with Cresford's lenders which are referenced above.

122. Before delivering the Statement of Claim, Athanasoulis sent a letter to each of two lenders to Cresford: QuadReal Finance and Otera Capital ("**Mann Letters"**). Each letter contained serious allegations of financial wrongdoing against Casey and Cresford, and expressly alleged fraud. Athanasoulis falsely signed the letter in the name of David Mann, the Chief Financial Officer of Cresford ("**Mann**"), a fact that she has since acknowledged.

123. Apart from the allegation of "fraud", KSV does not contest the accuracy of the information in the Mann Letters, and in fact relies on those facts in support of its position that Cresford would never have achieved the profit in which Athanasoulis is claiming a share.

124. As stated above, KSV relies on the Mann Letters as going to Athanasoulis' credibility.

125. On February 21, 2020, the Statement of Defence and Counterclaim was filed. By way of defence, the Defendants denied any liability, including for damages in lieu of notice or for a share of profits. By way of counterclaim, the Defendants sued for damages for, among other things, breach of fiduciary duty, breach of contract and intentional interference with contractual relationships and for defamation. None of the claims raised in the Counterclaim are being dealt with in this arbitration.

126. YSL became subject to a Notice of Intent for Proposal pursuant to the BIA on April 30, 2021.

K. Issues and Analysis

127. By way of preliminary comments, it is useful to address four points which KSV identifies as unusual aspects of this case that should guide the decisions in this case.

128. First, KSV asserts that it is important to note that this case concerns an equity claim, i.e. a claim to a share of the profits, by an employee who has invested no equity. However, I would note that the ranking of the PSA claim in the insolvency proceedings is not an issue that I have been tasked with addressing. I am not aware of any principle of law that the only legally adequate consideration for a promise to share profits, is a contribution to the capital structure of the promisor by way of an investment of equity.

129. KSV's second over-arching point is that this is a claim for a share of profits in an insolvent company, in relation to a project that has not been built and will never be built by this group of companies. However, the existence or non-existence of an agreement, and the determination of the terms of the agreement, does not depend upon whether or not the subject matter of the contract had a favourable outcome. The existence or non-existence of a profit, payable by YSL as a profit share or as damages in lieu, in the circumstances of this case would appear to be a potentially complex determination which – apparently for that reason – has been reserved by agreement of the parties to the second stage of this arbitration.

130. Third, KSV points out that this claim concerns a "life changing amount of money" based on the "flimsiest of alleged oral agreements". However, the existence or non-existence of any agreement is to be determined based on legal tests that are to be applied to the facts of the case at

the time the agreement was allegedly formed. Any opinion the arbitrator may hold as to the providence or fairness of the bargain is not relevant. In addition, as KSV itself points out in other submissions, an agreement to share profits is highly contingent and as of February 16, 2019 Cresford had not yet achieved a profit.

131. Fourth, KSV argues that the claim for wrongful dismissal is unusual in that it is made by a senior employee who was merely asked to step aside from certain duties where there was a potential conflict of interest, until that conflict of interest was resolved. Certain aspects of this assertion are factually contentious.

i. Did Athanasoulis have a PSA that entitled her to 20% of the profits earned by the YSL Project?

132. The fundamental issue in relation to the first question is whether or not Athanasoulis and Casey (representing Cresford) entered into a complete and binding agreement with respect to 20% of the profits earned by the YSL Project. The primary argument against this conclusion by KSV is that there were many other terms that were essential to any such agreement that were not in fact discussed or agreed upon. KSV takes the position that, as stated by Casey, what the parties had was at best a "conceptual agreement" that was subject to details being fleshed out in a written agreement that was yet to be drafted. For example, it is suggested that details would need to be set out as to which entity within the Cresford Group would be responsible to pay the profit share, how profit share was to be calculated, when it would be paid, and so on.

133. In my view, it is clear that Athanasoulis and Casey believed by February 16, 2019 that they had agreed that, as a term of her employment, Athanasoulis would receive 20% of the profits of current and future projects completed by companies in the Cresford Group. They understood the agreement to be binding. They expected Athanasoulis to act upon it as representing fair compensation for her existing, and expected future, contributions to the profitability in which she was to share. Their instructions to Papadakis to reduce the agreement to writing were given for the purpose of memorializing the agreement so that Athanasoulis could rely on it in case Casey "was hit by a bus". What was objectively conveyed by this explanation was that a written agreement was only necessary if Casey was not available to honour the agreement since the parties otherwise trusted each other to give effect to their oral agreements as they had in the past. When

giving those instructions, they did not identify any issues upon which they disagreed or sought advice.

134. At the meeting Papadakis sought further information so that the agreement could be reduced to writing. In particular, he required a corporate chart so as to identify which companies within the Cresford Group would need to be parties. However, Casey at all times had the power to bind all of the relevant entities on behalf of which the 20% PSA was entered into.

135. It is possible that many additional issues could have been identified and provided for in any draft of a written agreement prepared by Papadakis, had his work not been discontinued as a result of privileged communications with Cresford. While Cresford is within its rights to claim privilege over communications related to why the agreement was not drafted, it is not open to KSV (standing in the shoes of Cresford) to offer an affirmative explanation as to why Papadakis was unable to draft an agreement, for example based on a lack of instructions as to "essential terms". In any event, there is no reason to believe that any such terms would have been contentious.

136. Given, as I have found, the subjective intention of the parties that their agreement with respect to the PSA was binding as of February 16, 2019, the issue is whether the agreement nevertheless fails to be enforceable because of a lack of essential terms.

137. The need for an agreement to include all essential terms in order to be enforceable has been dealt with in a number of cases. In general, the legal principles may be summarized as follows:

a. *Bawitko Investments Ltd. v. Kernels Popcorn Ltd*., [1991] O.J. No. 495:

> "20. As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement *containing* specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon

become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

21. However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself. See, generally, Von Hatzfeld Wildenburq v. Alexander, [1912] 1 Ch. 284; Canada Square Corp. Ltd. et al. v. Versafood Services Ltd. et al. (1980), 1979 CanLII 2042 (ON SC), 25 O.R. (2d) 591 (H.Ct.), aff'd., (1981), 1981 CanLII 1893 (ON CA), 34 O.R. (2d) 250 (C.A.); Bahamaconsult Ltd. v. Kellogg Salad Canada Ltd. (1976), 1975 CanLII 379 (ON SC), 9 O.R. (2d) 630 (H.Ct.), rev'd, (1977), 1976 CanLII 554 (ON CA), 15 O.R. (2d) 276 (C.A.); Chitty on Contracts, 26th ed. (1990), at pp.79-91; Corbin on Contracts, (1963), Vol. 1, § 29-30; and Treitel, Law of Contract, 7th ed. (1987), at pp.42-47."

b. *Canada Square Corp. v. Versafood Services Ltd.*, [1981] O.J. No. 3125 (Ont. C.A.) at para. 37:

"… accepting that the parties intended to create a binding relationship and were represented by experienced businessmen who had full authority to represent their respective companies, a court should not be too astute to hold that there is not that degree of certainty in any of its essential terms which is the requirement of a binding contract."

c. *McPherson v. Scully*, [2004] O.J. No. 5235 at para. 56:

"It is the tendency of modern courts to favour enforcement of contracts, particularly where there has been reliance."

138. As with the application of all legal principles relating to contract formation and interpretation, the exercise is highly fact dependent. For example, the *Bawitko* case involved a complex legal arrangement involving a possible franchise agreement. A draft of over 50 pages had already been produced by the franchisor, but had not been subject to any detailed discussions. The parties did not have any prior business dealings to inform their contractual expectations. The court held that the parties had not achieved a meeting of the minds on all essential terms. In the *Canada Square* case, although the final lease had not been signed, the landlord had sent a letter to the tenant outlining basic terms which were described by the court as "crudely expressed", containing "some very loose language" and "not crystal clear". Nevertheless, in that case, the agreement to lease an entire floor of an as yet unconstructed project was enforced. In the *McPherson* case, the court placed considerable reliance on the dealings between the parties over an extended period of time to find that an enforceable agreement had been reached.

139. The important context for the issue in this case is that the 20% PSA was not a standalone agreement nor the first profit sharing agreement between the parties. It was an integral part of an existing contract of employment. That contract was oral and had been acted on by both sides for about 15 years. Despite being referred to in a few documents and despite an inconclusive attempt in 2014 by Athanasoulis to document the employment relationship, no definitive written agreement containing the PSA ever came into existence.

140. None of the written documents, including the November 14 Draft, could be confidently stated to set out the complete and precise terms of her employment. For example, the November 14 Draft was based on an employment agreement of another employee that Athanasoulis modified. It is not certain that she understood the implications of all the terminology, and there is no evidence that the specific wording was ever agreed to (or, for that matter, disagreed to) by Casey. Nevertheless, there is no doubt that Athanasoulis was employed by Cresford and held office in various Cresford entities based on an oral agreement that was defined by an ongoing pattern of conduct between the parties which appear to have given rise to few, if any, disagreements regarding compensation prior to February 16, 2019. On the contrary, there is a history of Athanasoulis being paid compensation that was broadly consistent with what she has alleged to be the terms of her employment.

141. Clearly, the avoidance of uncertainty regarding a contractual relationship is one of the virtues of a written agreement. However, it should be borne in mind that most commercial *disputes* are based on the interpretation of agreements which *have* been reduced to writing. For example, written agreements that require a sharing of profits regularly give rise to disputes regarding the calculation of profits, even when the agreement contains specific terms as to how profit is to be calculated (for example "in accordance with GAAP" or IFRS). Indeed, profit sharing agreements are notoriously more litigious than, for example, agreements that involve sharing of top line revenues (such as sales).

142. To assert that any particular issue that might arise with respect to the calculation of profit must be addressed as an "essential term" sets a very high standard for the degree of certainty required by commercial agreements, oral or written. For example, if an express statement as to whether profit is to be calculated before or after tax is an "essential term", that would mean that <u>any</u> agreement that failed to contain a particular term in that regard would lack an essential term and be unenforceable. In my view, the relevant legal principles are not to be applied in that manner, and do not lead to that conclusion.

143. Here, there was continuous performance/reliance by Athanasoulis (before and after February 16, 2019) on the terms of her employment, including incentive-based elements, as defined by her discussions with Casey. The recording of their agreement into a written document would have been a departure from their previous practices and was embarked upon for a specific reason, the emergence of health issues with Casey.

144. In this case, the relationship is one of long-term employment. This is not a case where a claimant with a scant prior relationship to the defendant claims a massive finder's fee based on an off-hand comment at a cocktail party. Over a period of 15 years, Athanasoulis had risen to the level of being the most senior officer reporting to the CEO in an organization with projects in the hundreds of millions of dollars (and in the case of the YSL Project exceeding $1 billion). Her contributions to the operational success of the Cresford Group appear to have eclipsed that of Casey, although his involvement remained crucial in terms of sourcing capital. Her work had justified significant bonuses and incentives being added to her compensation. Cresford had already agreed to a PSA of 10%, and was discussing increasing that to 15%. With Dowbiggin's

departure and Casey's illness, it is perfectly logical that Casey would see a need to confirm an increase in the PSA to 20% and seek to memorialize that agreement in a formal document. Despite KSV's attempt to minimize the contributions of Athanasoulis as simply those of an employee with a talent for condo sales, there is nothing disproportionate, in the realm of executive compensation, about the agreement to increase her profit share to 20%.

145. The situation here is not analogous to that in the case of *Ayers v. Carewell Holdings Inc*., 2002 CarswellOnt 1761 (Sup. Ct.). The individual who claimed the bonus in that case was found not to be credible because of an inconsistency in how he documented a lesser bonus for his wife as compared to the larger bonus he claimed for himself. Also, the bonus was found to be "too one sided and the amount to be too rich to be credible" based precisely on the fact that it was allegedly payable even if there was no increase in profitability. In the present case, the failure to record the agreement, despite the parties' intention to do so, was consistent with past practice (including prior fruitless attempts to document their agreements). Athanasoulis had been paid significant bonuses based on sales long before profitability from a particular project could be determined, and the 20% PSA did not require any payment to Athanasoulis unless a profit was obtained. Were that to be the case, her anticipated contribution to the result was not in doubt.

146. When they agreed to the 20% PSA, Athanasoulis and Casey had a common understanding of what "profits" meant. Broadly speaking they understood that profits are revenues less expenses. It is reasonable to infer that they understood profits to be as calculated within the *pro forma* process that they used generally for all projects within their business. As given in evidence by Papadakis, they agreed that profits would not be artificially reduced by "bad faith" transactions.

147. In my view, given that the calculation of ultimate profits was an ongoing exercise with respect to each of the projects through the *pro forma* process, and would ultimately have to be accounted for with third party investors, there is a strong factual matrix and history of dealings between the parties within which any dispute regarding the meaning or calculation of profits could be determined. It is not essential to the enforceability of the agreement that every option regarding the calculation of profits be affirmed or negated.

148. I therefore find that Athanasoulis and Casey did agree, on or before February 16, 2019, to amend her employment agreement to provide for a 20% share of the profits calculated in good faith on the basis of the *pro forma* statements used in Cresford's business.

149. As to the question of who were parties to the agreement, I find that the intention of the 20% PSA was to bind all relevant entities that Casey had the power to bind – hence Papadakis' need for a corporate chart when memorializing the agreement. The profits that Casey and Athanasoulis had in mind were profits from the projects carried on by the Owners, such as YSL. Sharing of profits earned by any entity other than YSL is not the subject of the present claim. In the case of the YSL Project, any profit to be shared would necessarily have to be shared by YSL, and it is an inescapable inference that was the common intention of the Athanasoulis and Casey.

150. I therefore find that Athanasoulis did have a PSA that entitled her to 20% of the profits earned by the YSL Project.

ii. If so, what were the terms of the PSA?

151. In the course of answering the first question, I have found that the 20% PSA did not lack essential terms. The essential terms of that agreement, emerging from the foregoing analysis, were:

a. Athanasoulis was to be entitled to 20% of the profits earned on any of Cresford's current and future projects.

b. Profits were to be calculated, on a good faith basis, based on the pro forma budgets prepared by Cresford with respect to each project.

c. Athanasoulis' share of the profits was to be paid by the relevant Owner that earned the profit.

d. Profits were to be shared when earned, usually at the completion of a project.

152. Beyond these terms, certain other issues regarding the terms of the agreement arise in the context of the present situation. In particular:

a. the termination of Athanasoulis' employment before the completion of the YSL Project raises an issue as to whether her right to a share of the profits survived termination of her employment;

b. the fact that an insolvency proposal has been approved by the court at a time when the YSL Project has not proceeded to above-ground construction places in doubt whether, on any interpretation of the agreement, YSL has earned or will earn a profit; and

c. the circumstances giving rise to the termination of Athanasoulis' employment, her subsequent lawsuit against Cresford and Casey, her revelation of damaging information regarding Cresford finances, and the insolvency of YSL raise issues regarding causation in terms of the YSL Project not being completed and whether YSL would have earned a profit.

153. There is no evidence that any of these circumstances were in the minds of the parties when they entered into the 20% PSA. Indeed, each of these circumstances would appear to be contrary to the assumptions on the basis of which the 20% PSA was entered into. In particular:

a. the notion that Athanasoulis employment might be terminated without cause was the furthest thing from the minds of the parties. The entire premise of the 20% PSA was that she was a key employee whose contributions were needed in order to achieve a profit;

b. the object of the agreement was retention of Athanasoulis as a key employee until a profit was earned; and

c. the objective of earning and sharing a profit was the antithesis of Cresford or the Owners becoming insolvent.

154. Unquestionably, parties can and should provide in their agreements for events that commonly occur, even if they consider that they are unlikely to arise in their case. As observed in argument, that is the essence of what commercial lawyers do when they draft an agreement.

However, many if not most commercial disputes involve events that the parties did not anticipate or did not provide for, clearly or at all, in their agreement, despite the use of lawyers.

155. With respect to the issue of continued employment, Athanasoulis argues that the November 14 Draft provides the basis of a determination that the parties had an understanding that the PSA would be payable "on final closing" without any reference to Athanasoulis remaining employed by Cresford at that time. I am not prepared to draw that conclusion from the November 14 Draft as there is no evidence that that specific language was ever discussed or agreed to. Even if one were to accept the November 14 Draft as defining the terms of the PSA with respect to continued employment, it would leave open the questions as to whether the profit share could be defeated by a termination of Athanasoulis' employment for cause, or by voluntary resignation, before a profit was earned.

156. Nor is there any evidence of discussions on February 16, 2019 to the effect that Athanasoulis had to be employed at the end of a project in order to earn a share of the profit, as alleged (in the alternative) by Cresford and KSV.

157. There was no *express* term of the oral agreement regarding continued employment. However, there is a term which can readily be implied, and which Casey himself has accepted as obvious, namely that Cresford cannot avoid the obligation to pay a share of the profits by simply terminating Athanasoulis' employment. I understood his admission in this regard to relate to a situation where termination was without cause.

158. KSV accepts that the avoidance of such an obligation by terminating an employee just before the obligation falls due would not avail an employer. However, it argues that such a right could be defeated if it did not fall due within a contractual or common law notice period for termination without cause.

159. Athanasoulis argues that in the absence of any express agreement that the 20% PSA would be defeated by termination of Athanasoulis' employment, the result is that it cannot be so defeated.

160. The purpose of the profit share was to incentivize Athanasoulis to work towards the objective of creating and maximizing the profit to be earned by the Owners. It is not in dispute that, in the ordinary course, it would take several years (possibly 5 to 7 years) to complete the

types of projects Cresford was undertaking. That was the case with respect to the YSL Project. The 20% PSA necessarily implied a mutual commitment on both sides to work to the objective of making a profit over that period of time. It would defeat the fundamental purpose of the agreement if Cresford could increase its profit share by 20% and decrease Athanasoulis' share to zero, possibly after several years of crucial contributions by her in the form of advance sales etc, simply by terminating her employment on notice. It is not necessary to consider whether Cresford may have been able to do so in the event it terminated Athanasoulis' employment for cause, as that is not in issue in this case.

161. I therefore accept Athanasoulis' submission that, in the absence of an express agreement to the effect that the 20% PSA only applies if Athanasoulis is employed by Cresford when the profit is earned, there is no such limitation on that right.

162. Although I have found the November 14 Draft not to be determinative of the terms of the 10% PSA, my conclusion that employment at the time a profit is realized is not required pursuant to the 20% PSA is consistent with the provisions of the November 14 Draft.

163. In my view, there were no express or implied terms with respect to the issues relating to insolvency. These issues will have to be determined in the next phase of the arbitration by the application of the relevant legal principles to the factual circumstances giving rise to the insolvency.

164. I fully appreciate KSV's submissions that it appears incongruous to be discussing profit share in the context of companies that have subsequently gone through insolvency proceedings. However, the parties have agreed to bifurcate liability issues from damage issues, and to have me address specific questions relating to liability at this stage. Without hearing more evidence and submissions regarding what led to the insolvency proceedings and what their financial outcome was in terms of YSL, I am not in a position to accede to KSV's submission that I should find no breach on the basis that there has not been, and will never be, any profit to share. Equally, I do not rule out the possibility that the profit may be shown to be nil and the damages for any breach to be nominal.

165. Similarly, as a matter of causation, I am not able to determine at this stage whether or not the actions of Athanasoulis were the cause of Cresford's demise. All of those issues are necessarily reserved to the second stage of the arbitration.

166. Based on the foregoing analysis with respect to the first and second issue, I find the following with respect to the terms of the 20% PSA:

a. Athanasoulis was to be entitled to 20% of the profits earned on any of Cresford's current and future projects.

b. Profits were to be calculated, on a good faith basis, based on the pro forma budgets prepared by Cresford with respect to each project.

c. Athanasoulis' share of the profits was to be paid by the relevant Owner that earned the profit.

d. Profits were to be shared when earned, usually at the completion of a project.

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

iii. Was Athanasoulis employed by YSL?

167. KSV submits that Athanasoulis was not employed by YSL. Therefore, even if a PSA was found to exist, the obligations under it could not be owed by YSL. In KSV's oral submissions, various other possible candidates for the employer were suggested including: the Cresford organization, EDRP and "various other management organizations within the Cresford Group".

168. KSV relies primarily on the decision of the Ontario Court of Appeal in *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385 to support its submissions. KSV submits that YSL was among the lowest companies on the organization chart and did not exercise the degree of effective control over Athanasoulis which is required to give it the status of employer, and to impose upon it any attendant obligations.

169. In my view, the description of the common employer doctrine in the *O'Reilly* case, supports a finding that YSL was a common employer of Athanasoulis, along with other Owners and companies in the Cresford Group of companies. I base that finding on paragraphs 49 to 65 of the *O'Reilly* decision and the following facts in this case:

a. Athanasoulis was an officer of YSL. Her employment status is therefore not based merely upon the relationship between YSL and another company or companies by which she was employed. There is no issue of "piercing the corporate veil" in this case.

b. As with the *Downtown Eatery (1993) Ltd. v Ontario* 2001 CarswellOnt 1680, cited with approval in the *O'Reilly* case, Athanasoulis" employment "rested more on her relationship to the group of companies rather than the relationships among the companies in the group".

c. YSL was a distinct corporate entity (with distinct stakeholders) which was separately and directly benefitted by the work performed by Athanasoulis.

d. Casey had the authority to bind YSL. Where Casey made promises to Athanasoulis that only YSL was in a position to fulfill (e.g., an agreement to share YSL's profits) it is objectively reasonable to infer that those promises were made on behalf of YSL.

e. Although in the context of Cresford it may have been a formality, there is no reason to believe that YSL could not have exercised its control by making a different decision with respect to Athanasoulis' employment than other members of the group. The fact that YSL was structured to exercise that control through Casey (as were all other companies within the group) does not negate YSL's control over Athanasoulis with respect to its own business, as a legal matter.

f. There was no written agreement of employment, but such documents that refer to the relationship between Cresford and its employees do not refer to any particular legal entity within the Cresford Group. Where no individual employer is specified,

it is reasonable to conclude that each member of the group is an employer in relation to aspects of the employment relationship particular to it.

g. There is no evidence of EDRP as an entity being involved substantively in any of Athanasoulis' activities on behalf of the Cresford Group or exercising any control. EDRP was not identified on a corporate chart used by KSV counsel to make the argument that YSL was at the bottom of the corporate ladder. At best, it appears to have been a financial clearing house within the group.

h. In any event, the companies on the "bottom rung" of the corporate chart are the Owners. They are the operating companies. As such, they are precisely the companies for which Athanasoulis worked. Her activities related to their operations, not merely to aggregated "head office" types of functions. She was involved in dealing with contractors and lenders and with managing sales programs for specific projects, such as the YSL Project.

i. The agreement with Athanasoulis included elements of compensation (e.g., bonuses) which were directly attributable to her contributions to individual companies within the group (e.g., YSL) and which were in many instances advanced by those companies to her (e.g., in the form of discounts on condominium sales).

170. Based on the foregoing, I find that Athanasoulis was an employee of YSL.

iv. Was Athanasoulis constructively dismissed i.e., did she resign or was she constructively dismissed?

171. The basic legal framework for the law relating to constructive dismissal was set out by the Supreme Court of Canada in *Farber v. Royal Trust Co*., 1997 CanLII 387 (SCC), [1997] 1 SCR 846, in which it was stated:

> 24. Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking

> to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.
>
> 25. On the other hand, an employer can make any changes to an employee's position that are allowed by the contract, *inter alia* as part of the employer's managerial authority. Such changes to the employee's position will not be changes to the employment contract, but rather applications thereof. The extent of the employer's discretion to make changes will depend on what the parties agreed when they entered into the contract.

172. As set out in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, paragraph 63, the question in any constructive dismissal case is whether a reasonable person *in the employee's position* would conclude the essential terms of the contract had been substantially changed.

> "There is no requirement that the employer actually intend no longer to be bound by the contract. The question is whether, given the totality of the circumstances, a reasonable person in the employee's situation would have concluded that the employer's conduct evinced an intention no longer to be bound by it."

173. The issue is whether a breach of an express or implied term of the contract has occurred and whether that breach has caused a substantial change to an essential term of the employment contract.

174. The responsibilities that an employee must perform are, of course, part of the employment contract. Taking those responsibilities away will often result in constructive termination. The Supreme Court of Canada recognized in *Potter* (para. 83) that work is a "fundamental aspect" in a person's life and an "essential component of his or her sense of identity, self-worth and emotional well-being". That is particularly applicable in this case in which Athanasoulis success was completely defined by her role at Cresford, with few other qualifications or accomplishments, and her remarkable rise to be the "face" of Cresford to the public.

175. I accept Athanasoulis' submissions (and there does not appear to be any serious dispute) that the *Potter* case, and other authorities cited by her establish the following general principles:

- Employment is not only a way to earn money – the responsibilities associated with a position, and the reputation and status that flows from those responsibilities, are critically important.

  Potter, paras. 83-84;

  Blight v. Nokia Products Ltd., 2012 ONSC 2093, paras 23-24 and 31

- A reduction to an employee's responsibilities is a substantial breach of an essential term of the employment contract, and thereby constitutes constructive dismissal. This is especially the case if there is an associated loss of reputation or status.

  Farber, paras. 38 and 46;

  See also Schumacher *v. Toronto Dominion Bank*, [1999] O.J. No. 1772 (Ont. C.A.), paras. 27-28

- Changing reporting structures can also be a constructive termination.

  Robinson v. H. J. Heinz Company of Canada LP, 2018 ONSC 3424, para. 29

- Without proper justification, suspending or denying an employee the opportunity to work almost "inevitably" leads to a finding of constructive dismissal.

  Potter, para. 84 and para. 106;

  Shah v. Xerox Canada Ltd., [2000] O.J. No. 849, para. 9

- It is not generally enough for the employer to *have* cause for the suspension, it must almost always *articulate* that cause to the employee at the time of the suspension.

  Potter, paras. 98-99

- It is a fundamental implied term of any employment contract that the employer will treat the employee with dignity and respect. An employer who verbally abuses an employee has often effected a constructive termination of that employee.

  Drew v. Canadian National Railway, 2009 CarswellNat 2256, para 222;

  Nasser v. ABC Group Inc., 2007 CarswellOnt 8884, paras. 32-33, aff'd 2008 CanLII 4264 quoting *Lloyd Imperial Parking*, [1996] A.J. No. 1087, para. 41

176. KSV does not contest any of the above principles. It defends the constructive dismissal claim against Cresford by denying that Athanasoulis was treated in an unfair or disrespectful manner. On the contrary, KSV maintains, the changes in her role and responsibilities were fair and reasonable having regard to her potential involvement with Dovigi after his possible purchase

of Cresford. KSV argues that it was a reasonable measure in the legitimate interests of Cresford that Athanasoulis and Dovigi not be given any information about Cresford outside of the negotiations and that an "ethical screen" be established between Athanasoulis and other employees at Cresford. KSV maintains that these necessary arrangements were temporary and should have been understood by Athanasoulis to be temporary, and dependent on whether a transaction with Dovigi was achieved.

177. It is not unusual in M&A transactions for senior management employees to find themselves in near conflict positions, particularly when incentives are offered by the purchaser for them to remain in place after the transaction is complete. In this case, the incentive offered to Athanasoulis was unusually substantial in that she was offered a profit participation of 50%. However, it is important to keep this fact in the context of the actual dealings between Casey and Athanasoulis. The sale of the company was mutually identified by Casey and Athanasoulis as a solution to Cresford's financial difficulties and a possible sale to Dovigi was welcomed by Casey as much as by Athanasoulis. Casey was aware of the importance Dovigi placed on Athanasoulis continued involvement, he actively promoted her to Dovigi and was aware of the condition that she remain involved after the sale with an even greater share of the profits.

178. In the words of KSV's counsel:

> So Mr. Casey understood that Athanasoulis was to have a financial interest in the company, along with Mr.Dovigi, following the potential sale. And she gave evidence to that. She said I was going to, I was going to have a stake in it; we were going to be partners; we were going to split it 50/50.
>
> Mr. Casey instructed Athanasoulis to seek a deal that worked for Cresford and for Mr. Dovigi and for herself. Remember, he said it was those three parties.
> …
>
> … it probably wasn't the best idea in the world to have Athanasoulis trying to satisfy the interest of all three parties at once. But that's the situation they were in. They dealt with things informally. They trusted each other.
>
> As a result of her special interest in the sale to Mr. Dovigi, Mr. Casey assigned Athanasoulis to devote most of her work during that time period to the sale.

179. The foregoing is a fair summary of the situation with the possible qualification of the last paragraph. The exact role Athanasoulis was to play in negotiations with Dovigi is unclear. The evidence is somewhat inconsistent on this aspect. Clearly, Casey himself continued to conduct negotiations with Dovigi and at one point advised Athanasoulis to "…remain totally quiet regarding [Dovigi] so he cannot triangulate. I have a good feeling we can do the deal. If any new information comes up I'll keep you informed." [Underlining added.] Indeed, it seems an odd choice that Athanasoulis would be directed to devote most of her attention to the very transaction which gave rise to her conflict of interest. Nevertheless, Casey's evidence is that Athanasoulis was to devote most of her time to the sale and to negotiating with Dovigi.

180. In any event, Athanasoulis did continue to negotiate with Dovigi and, in that process, learned negative information regarding Cresford's financial dealings of which she was previously unaware. That information was eventually set out in the Mann Letters, after Athanasoulis' departure from Cresford.

181. Given that Casey continued to negotiate a sale to Hawalius of the retail space in YSL, which Dovigi considered to be inconsistent with his purchase of Cresford, a conflict was inevitable between the two transactions and between Casey and Athanasoulis.

182. In these challenging circumstances, some adjustments to the scope of Athanasoulis' role and responsibilities were justifiable. However, in my view, the extreme measures that were taken by Casey and, as importantly, the manner in which they were implemented were not justified and rendered Athanasoulis' continued employment untenable. Perhaps the most serious of these were:

a. Casey told Athanasoulis that she was not to deal with Cresford's lenders, despite the fact that Athanasoulis had played an important role in interfacing with lenders on behalf of Cresford. This was occurring at a time when irregularities in Cresford's lending arrangements were coming to light, and at a time when Casey had brought Dowbiggin back in as a consultant to deal with financial matters.

b. Casey excluded Athanasoulis completely from negotiations relating to the sale of YSL's retail component. In that regard, while directing Athanasoulis to focus on the Dovigi transaction, he negotiated an agreement with Hawalius that undermined the Dovigi transaction. At the same time Casey's representations to YSL's construction lender regarding the Hawalius transaction raised doubts in the minds of Athanasoulis and another senior Cresford employee as to whether the representations were accurate.

c. In response to the issues raised by Athanasoulis with respect to the Hawalius transaction, Casey had Cresford's litigation counsel write Athanasoulis to accuse her of breaching her fiduciary duty and re-iterating that she was not to contact any lenders. The involvement of an employer's litigation counsel to communicate with an employee, especially accompanied by accusations of breach of fiduciary duty and interference with contractual relations, is not usually a hallmark of secure employment.

d. Without notice to Athanasoulis or explanation to senior Cresford staff he instructed the latter to report directly to him, and not to Athanasoulis. At the same time, he instructed them not to put communications in writing.

e. Athanasoulis testified that Mr. Casey "berate[d]" her, "bl[ew] up" and called her "crazy" at a meeting on December 5, 2019.

183. The foregoing actions by Casey, separately and in combination, precluded Athanasoulis from performing most of the functions critical to her role at Cresford and had serious potential reputational consequences for Athanasoulis. In particular, the instructions to senior Cresford employees not to report to her – which they perceived as a change of leadership – combined with an instruction not to communicate in writing, created an aura of crisis and wrongdoing that understandably caused confusion and concern among those who had previously reported to Athanasoulis.

184. The case of *MacKinnon v Acadia University* 2009 NSSC 269, was cited by KSV as a case with many facts comparable to the present case in which no constructive dismissal was found to have occurred. In that case, the court found that, absent expressed restriction, the employer was entitled to change the scope of an employee's duties to meet changing circumstances and priorities, including by creating, deleting, or reallocating spheres of responsibility (para 83). KSV argues that the fact that, on a temporary basis, certain projects may have been removed from Athanasoulis' oversight does not amount to constructive dismissal when there is no change in title or salary. KSV argues that "implicitly" on the objective facts the changes to Athanasoulis' employment were temporary.

185. In reviewing the *MacKinnon* case, I note that the court observes that "Case law provides helpful but limited guidance and should be read with caution…" (Para 62). It notes that the cases have swung "like a pendulum" in concert with economic conditions but has probably reached the current position that "Legitimate business interests can justify a degree of change in the employees

duties, provided the degree of change is not fundamental to the employment contract." (para 63). The court concludes that the current test remains that described by Gonthier J. in *Farber* in that "save in exceptional cases, an employer's change must be fundamental (severe, serious, unilateral and substantial and without reasonable notice) to amount to a repudiation of the employment contract." (Para 69.)

186. In my view that test for constructive dismissal is met in this case. The degree of change in status and role which was abruptly imposed on Athanasoulis was fundamental to the employment contract. The change was "severe, serious, unilateral, substantial and without any notice".

187. While the actions of Cresford may have been justified in the abstract on a limited and temporary basis in terms of the Dovigi transaction, the indiscriminate and non-transparent manner in which they were implemented placed Athanasoulis in an untenable position in terms of critical relationships with other senior employees who reported to her and with third parties who looked to her as their principal contact.

188. It is not disputed that the changes were made without any notice to Athanasoulis and were not described to Athanasoulis nor to anyone else as being temporary. The suggestion that the temporary nature of these changes was implicit is not viable in the context of the financial irregularities which were then in play, the legal warnings given to Athanasoulis and Casey's deteriorating personal communications with her. The relationship of trust which had been the foundation of a very successful employment relationship, based entirely on oral agreements, was destroyed. In reality, the changes and the way in which they were implemented carried a very high risk that Athanasoulis' reputation and standing with others, upon whom her effectiveness as an employee and her future career in business depended, would be permanently compromised.

189. In the circumstances, I find that the changes in Athanasoulis' employment and in her relationship with Casey:

a. fundamentally changed the nature of Athanasoulis' employment and her ability to continue as an employee;

b. were not justified by any conduct on her part; and

c. were made unilaterally without reasonable notice or explanation.

190. I find that she was constructively dismissed by these actions.

L. Summary of findings

191. For the foregoing reasons, I make the following findings at this stage of the arbitration:

a. Athanasoulis did have a PSA that entitled her to 20% of the profits earned by the YSL Project.

b. I find that the terms of the 20% PSA were:

i. Athanasoulis was to be entitled to 20% of the profits earned on any of Cresford's current and future projects.

ii. Profits were to be calculated, on a good faith basis, based on the *pro forma* budgets prepared by Cresford with respect to each project.

iii. Athanasoulis' share of the profits was to be paid by the relevant Owner that earned the profit.

iv. Profits were to be shared when earned, usually at the completion of a project.

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

c. Athanasoulis was an employee of YSL.

d. Athanasoulis was constructively dismissed in December 2019.

M. Next Steps in the Arbitration

192. If either party wishes to make submissions as to costs at this stage of the arbitration, such submissions shall be made within 21 days of release of this Partial Award. Written responses to any requests for costs shall be delivered within the next 21 days. I will provide directions as to how any further submissions are to be made.

193. Counsel shall confer as to the procedures they wish to adopt for the next phase of the arbitration. Either or both sides may seek directions at any time. If no agreement is reached within 30 days of release of this Partial Award, I will convene a case management conference.

Date: March 28, 2022

William G. Horton, FCIArb, C.Arb.
Sole Arbitrator
Toronto

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

Court File No: BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

AFFIDAVIT OF EMILY SEABY
(Sworn January 4, 2023)

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TAB 4

Court File No. BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
IN BANKRUPTCY AND INSOLVENCY

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

AFFIDAVIT OF ASHLEY MCKNIGHT

I, Ashley McKnight, of the City of Oshawa, in the Regional Municipality of Durham, MAKE OATH AND SAY:

1. I am a law clerk with the law firm of Lax O'Sullivan Lisus Gottlieb LLP ("**LOLG**"), lawyers for the limited partners, 2504670 Canada Inc., 8451761 Canada Inc. and Chi Long Inc., and, as such, have knowledge of the matters contained in this Affidavit. Where my knowledge is based on information from another source, I state the source of that information and believe that information to be true.

2. I am informed by Shaun Laubman, counsel at LOLG, that in December 2021, KSV Restructuring Inc. (the "**Proposal Trustee**")'s counsel advised that the Proposal Trustee had entered into an arbitration process with Maria Athanasoulis to determine the existence of an alleged oral agreement between her and Cresford. The Proposal Trustee did not communicate

this fact to LOLG until after the arbitration agreement between the Proposal Trustee and Ms. Athanasoulis was entered into.

3. I am advised by Mr. Laubman that the limited partners' requests for access to the underlying arbitration material was denied by the Proposal Trustee, except for Ms. Athanasoulis' Statement of Claim, and the Proposal Trustee's Statement of Defence, which were provided. The Proposal Trustee stated that the arbitration process was designed to be a closed process between it and Ms. Athanasoulis, without third party participation, but that the limited partners of the debtor YG Limited Partnership would have full participation rights in a subsequent court approval hearing, as summarized below.

4. Mr. Laubman has also advised that the Proposal Trustee's counsel has repeatedly confirmed in discussions that the limited partners have an interest in respect of Ms. Athanasoulis' claim. The Proposal Trustee's counsel confirmed in discussions in December 2021 that the Proposal Trustee would bring an approval hearing once Ms. Athanasoulis' claim was determined on notice to the limited partners. The Proposal Trustee's counsel represented that the limited partners would have the right to raise any arguments they wished to make in connection with Ms. Athanasoulis' claim at the approval hearing.

5. I attach as **Exhibit "A"** an email from the Proposal Trustee's counsel to other parties' counsel sent May 11, 2022. The Proposal Trustee asked the limited partners to participate in the arbitration because it believed that their evidence will be necessary to respond to Ms. Athanasoulis' claim, and the Proposal Trustee is open to the limited partners seeking an expanded role.

6. I attach as **Exhibit "B"** correspondence between counsel for the Proposal Trustee and the limited partners sent May 13 to 17, 2022. In his email to the limited partners' counsel on May 16, 2022, the Proposal Trustee's counsel acknowledges that "with the broadened scope of relevance for Phase II, we solicited your clients' involvement and participation". Reference to "Phase II" was to the second phase of the bifurcated arbitration of Ms. Athanasoulis' claim.

7. I attach as **Exhibit "C"** the Aide Memoire of the Proposal Trustee dated May 20, 2022. At paragraph 15, the Proposal Trustee acknowledges that "Phase II of the arbitration raises broader issues and the Proposal Trustee explicitly invited the LPs to participate in it".

8. I attach as **Exhibit "D"** the Endorsement of Justice Gilmore dated May 24, 2022. Justice Gilmore urged the parties to work out an arrangement that would allow the limited partners' priority claims to be added to, and determined in, the existing arbitration

9. I attach as **Exhibit "E"** the Case Conference Brief of Maria Athanasoulis (without attachments) dated June 8, 2022, which states that:

> 5. **Ms. Athanasoulis agrees that the arbitration can and should be expanded to include the LPs**, provided that the arbitration can proceed efficiently and expeditiously to determine all issues relevant to her claim against YSL and her entitlement to payment in these proceedings.
>
> …
>
> 9. Ms. Athanasoulis agrees that the issues that are (arguably) relevant to her right to payment in these proposal proceedings should be determined in a single arbitration. The LOLG LPs identify three issues that they seek raise that are relevant to Ms. Athanasoulis' Claim against the debtors: (i) enforceability, (ii) priority, and (iii) damages. The TGF LPs identify substantially similar issues in their case conference brief and attached Amended Notice of Motion. **Ms. Athanasoulis does not object to the LPs asserting their claim for damages in the Arbitration in the interest of expedience.** [emphasis added]

10. I attach as **Exhibit "F"** the Endorsement of Justice Gilmore dated June 8, 2022. Justice Gilmore summarized that the Proposal Trustee had confirmed that the parties' counsel would work towards the terms of a newly consolidated arbitration which will deal with all outstanding issues including:

(a) The enforceability of the contract as found by Mr. Horton regarding Ms. Athanasoulis' claim and the quantum of any damages she may have suffered;

(b) Whether any claim for damages by Ms. Athanasoulis is in the nature of debt or equity;

(c) Any claim for damages that the Limited Partners may assert against Ms. Athanasoulis;

(d) The arbitration will not consider any claims between Ms. Athanasoulis and Cresford Capital/Dan Casey;

(e) The Limited Partners will reserve their rights with respect to whether Mr. Horton's decision at Phase 1 of the arbitration regarding enforceability is rendered *res judicata*;

(f) At the conclusion of the arbitration the Proposal Trustee will make a determination as to whether Ms. Athanasoulis' claim is provable and will value it and determine its priority; and,

(g) The parties' rights to appeal are preserved under the *Bankruptcy and Insolvency Act*.

11. The Proposal Trustee's motion record includes its Sixth Report of the Proposal Trustee dated August 19, 2022. The Report confirmed that it "welcomed the involvement of the LPs, as certain evidence from the LPs will likely be necessary in resolving the issues raised in Phase 2 of the arbitration".[1]

12. I am advised by Shaun Laubman that a mediation of Ms. Athanasoulis' claim was held on October 7, 2022. The Proposal Trustee, Ms. Athanasoulis, the proposal sponsor Concord Properties Developments Corp. and the limited partners all participated in the mediation. However, the mediation failed to resolve the dispute.

13. The Proposal Trustee's motion record also includes the Endorsement of Justice Kimmel dated November 1, 2022. In her decision, Justice Kimmel held that:

> [81] Unfortunately, the Sponsor and the LPs did not have a copy of the Agreement to Arbitrate until July, 2022. Their concerns were raised in a timely manner upon learning more about the scope of the Arbitration and its anticipated cost. The fact that this discovery also coincided with their learning that the phase 1 outcome favoured Ms. Athanasoulis does not automatically lead to the inference that their objections are disingenuous.
>
> …
>
> [83] While I do not go so far as to accept the suggestion by the Sponsor and LPs that Ms. Athanasoulis knowingly took on the risk of this challenge and outcome, the Sponsor and LPs were left out of the process and cannot be precluded from raising the legal objections that have ultimately dictated the outcome of this motion on the Jurisdiction Question, as it relates to phase 2 of the Arbitration.[2]

14. I attach as **Exhibit "G"** email correspondence between the parties' counsel sent December 2 to 21, 2022 regarding the process for adjudicating the remaining issues in Maria

---

[1] Motion Record of the Proposal Trustee dated December 30, 2022, Tab 2(C), p 74.

[2] *Ibid*, Tab 2(E), pp 107-108, paras 81 and 83.

Athanasoulis' claim and any potential appeal, with "without prejudice" correspondence redacted. Counsel also discussed the potential of conducting a mediation prior to continuing the arbitration.

15. I am advised by Mr. Laubman that on November 22, 2022, Justice Osbourne released a decision following an appeal, pursuant to s.135(4) of the *Bankruptcy and Insolvency Act*, by CBRE Limited from the Proposal Trustee's disallowance of its claim. A copy of the email from the Court enclosing that decision, and a copy of the decision, are attached collectively as **Exhibit "H".** Justice Osborne's decision is under appeal. A copy of the Notice of Appeal is attached as **Exhibit "I"**.

16. I attach as **Exhibit "J"** the endorsement of Justice Kimmel on December 21, 2022 scheduling the motion for directions with respect to the proposed procedure for January 16, 2023.

17. I am informed by Shaun Laubman that on December 27, 2022, the limited partners sent the Proposal Trustee a brief containing their evidence and submissions relating to Ms. Athanasoulis' claim to a share in the debtors' profits.

SWORN by Ashley McKnight before me at the City of Toronto, in the Province of Ontario, on January 4, 2023.

Commissioner for Taking Affidavits
(or as may be)
XIN LU (CRYSTAL) LI

ASHLEY MCKNIGHT

This is Exhibit “A” referred to in the Affidavit of Ashley McKnight sworn January 4, 2023.

Commissioner for Taking Affidavits (or as may be)

XIN LU (CRYSTAL) LI

From: Milne-Smith, Matthew
To: Milne-Smith, Matthew; Alexander Soutter; Shaun Laubman; Bobby Kofman; Li, Chenyang; Crystal Li; Mitch Vininsky; Murtaza Tallat; Schwill, Robin
Subject: RE: Update
Date: May-11-22 10:19:01 AM
Attachments: RE Athanasoulis.msg

Last Thursday Alex advised that you were declining to participate further in the arbitration and would be writing to us with your position. We have yet to hear from you in that regard. I attach an email we received late last night from Maria's counsel proposing a schedule for the arbitration. I believe that the evidence of your clients will be necessary to respond to her claims, and we are open to you seeking an expanded role.

As per my email of yesterday we are also hoping that a mediation may be appropriate, and that your participation would improve the odds of a mediation succeeding.

Things are going to move quickly and your clients are important stakeholders. I hope to hear your position as soon as possible.

Matt

Matthew Milne-Smith (he, him)
T 416.863.5595
mmilne-smith@dwpv.com

DAVIES
155 Wellington Street West
Toronto, ON M5V 3J7
dwpv.com

-----Original Message-----
From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: May 9, 2022 6:27 PM
To: Alexander Soutter <ASoutter@tgf.ca>; Shaun Laubman <slaubman@lolg.ca>; Bobby Kofman <bkofman@ksvadvisory.com>; Li, Chenyang <CLi@dwpv.com>; Crystal Li <cli@lolg.ca>; Mitch Vininsky <mvininsky@ksvadvisory.com>; Murtaza Tallat <mtallat@ksvadvisory.com>; Schwill, Robin <rschwill@dwpv.com>
Subject: Update

Shaun and Alex,

Could we have a call to check up on where your clients stand in respect of Maria’s claim? We understand you do not intend to participate in the ongoing arbitration but are not sure if you intend to take any steps to challenge or stay that process while it continues.

Matt

Crystal Li

From: Stothart, Sarah <sstothart@goodmans.ca>
Sent: May-10-22 5:31 PM
To: Milne-Smith, Matthew; Dunn, Mark
Cc: Li, Chenyang; Schwill, Robin
Subject: RE: Athanasoulis

Matt,

A proposed schedule is below. Please let us know if you have any comments.

These dates are subject to obtaining the documents we will request and that our expert needs to prepare its report on a timely basis. To the extent any delay impacts delivery of our expert report by the date stated below, we will advise.

1. Case management conference: **May 13**
2. Trustee to deliver responding pleading: **May 24**
3. Document motion to be heard by: **May 27**
4. Parties to exchange documents by: **June 3**
5. Any third party / LP motion by: **June 15**
6. Any oral discovery to be conducted by: **June 30**
7. Any answers to undertakings to be delivered by: **July 11**
8. Athanasoulis expert report: **July 22**
9. Responding expert report: **August 19**
10. Reply expert report: **September 2**
11. Written opening argument (mutual exchange): **September 8**
12. Hearing: **September 12 for 2 weeks** (excluding Sept. 20)
13. Written closing argument: **September 28**
14. Closing: **September 30**

Thanks,

Sarah Stothart
(she/her)
Goodmans LLP

416.597.4200
sstothart@goodmans.ca

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
goodmans.ca

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Tuesday, May 10, 2022 4:54 PM
To: Dunn, Mark <mdunn@goodmans.ca>
Cc: Stothart, Sarah <sstothart@goodmans.ca>; Li, Chenyang <CLi@dwpv.com>; Schwill, Robin <rschwill@dwpv.com>
Subject: RE: Athanasoulis

Thanks Mark. I would hope any mediation could be done expeditiously, and concurrently with our working on a responding pleading and you working on your expert reports. Let me reach out to Alex and Shaun.

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: May 10, 2022 4:51 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: Stothart, Sarah <sstothart@goodmans.ca>; Li, Chenyang <CLi@dwpv.com>; Schwill, Robin <rschwill@dwpv.com>
Subject: RE: Athanasoulis

External Email / Courriel externe

We are interested in a mediation, although a final determination would depend on the details in terms of timing, participation and mediator. We do not want any potential mediation to delay the litigation. Happy to discuss next steps if that is helpful, or you can canvass others and come back to me.

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Monday, May 9, 2022 11:21 PM
To: Dunn, Mark <mdunn@goodmans.ca>
Cc: Stothart, Sarah <sstothart@goodmans.ca>; Li, Chenyang <CLi@dwpv.com>; Schwill, Robin <rschwill@dwpv.com>
Subject: Re: Athanasoulis

As soon as possible. I think you, me and the LPs. And I think we want a mediator who will be willing to make a mediator's proposal.

Matthew Milne-Smith (he, him)
T 416.863.5595
mmilne-smith@dwpv.com
Bio | vCard

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155 Wellington Street West
Toronto, ON M5V 3J7
dwpv.com

> On May 9, 2022, at 6:32 PM, Dunn, Mark <mdunn@goodmans.ca> wrote:
>
> External Email / Courriel externe

Potentially. It would depend on timing and participants. What did you have in mind?

Sent from my iPhone

> On May 9, 2022, at 6:25 PM, Milne-Smith, Matthew <MMilne-Smith@dwpv.com> wrote:
>
> Mark, is there any interest on your part to trying to mediate your claim?
>
> Matt
>
>
> Matthew Milne-Smith (he, him)
> T 416.863.5595
> mmilne-smith@dwpv.com
>
> DAVIES
> 155 Wellington Street West
> Toronto, ON M5V 3J7
> dwpv.com
>
> DAVIES WARD PHILLIPS & VINEBERG LLP
> This email may contain confidential information which may be protected by legal privilege. If you are not the intended recipient, please immediately notify us by reply email or by telephone. Delete this email and destroy any copies.
>
>
>

***** Attention *****

This communication is intended solely for the named addressee(s) and may contain information that is privileged, confidential, protected or otherwise exempt from disclosure. No waiver of confidence, privilege, protection or otherwise is made. If you are not the intended recipient of this communication, or wish to unsubscribe, please advise us immediately at privacyofficer@goodmans.ca and delete this email without reading, copying or forwarding it to anyone. Goodmans LLP, 333 Bay Street, Suite 3400, Toronto, ON, M5H 2S7, www.goodmans.ca.

This is Exhibit “B” referred to in the Affidavit of Ashley McKnight sworn January 4, 2023.

Commissioner for Taking Affidavits (or as may be)

XIN LU (CRYSTAL) LI

Crystal Li

From: Alexander Soutter <ASoutter@tgf.ca>
Sent: May-17-22 1:23 PM
To: Milne-Smith, Matthew; Shaun Laubman
Cc: Crystal Li; Li, Chenyang; Schwill, Robin
Subject: RE: YG Limited Partnership - Athanasoulis claims [LOLG-DMS.FID106454] [IMAN-CLIENT.FID6731]

Matt,

We agree to use the May 24th court time as a case conference. We have instructions to bring a motion to set aside the arbitration process and determine the issues we have raised. We disagree with the analysis in your email and agree with the analysis in Shaun's most recent letter. We will send you our Notice of Motion soon and will ask the Court on May 24th to set a timetable for the motion and schedule a date.

Regards,
Alex

Alexander Soutter | Associate | ASoutter@tgf.ca | Direct Line +1 416-304-0595 | Suite 3200, TD West Tower, 100 Wellington Street West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | www.tgf.ca

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Monday, May 16, 2022 7:19 PM
To: Shaun Laubman <slaubman@lolg.ca>
Cc: Alexander Soutter <ASoutter@tgf.ca>; Crystal Li <cli@lolg.ca>; Li, Chenyang <CLi@dwpv.com>; Schwill, Robin <rschwill@dwpv.com>
Subject: RE: YG Limited Partnership - Athanasoulis claims [LOLG-DMS.FID106454]

Shaun,

We acknowledge receipt of your letter dated May 13, 2022.

We disagree that the chosen arbitration process is inconsistent with s. 135 of the *BIA*, as it is just another means of determining a claim where the Trustee lacked sufficient evidence to assess Ms. Athanasoulis' claim. Had the Trustee issued a Notice of Revision or Disallowance then the appeal of that disallowance would have wound up in a functionally identical process, only with the additional delay and expense of being intermediated by a court process. With the lack of availability of time on the Commercial List, a multi-day trial may very well have resulted in a delay of a year or more.

The Trustee rejects your suggestion that the arbitration process "ignores the rights of [your] clients". Your clients were at all times aware of the process and took no objection until it produced a preliminary result with which you disagreed. The Trustee provided you with copies of the pleadings and had numerous discussions with you about whether your clients could provide any relevant information to Phase 1 Phase I of the

arbitration was properly conducted with oral evidence from the only parties who were party to the alleged contract formation: Dan Casey, Maria Athanasoulis, and John Papadakis. With the broadened scope of relevance for Phase II, we solicited your clients' involvement and participation, including specifically at the first case conference with Mr. Horton. While Ms. Athanasoulis opposed your participation, the Trustee did not and you have made no material effort to participate, including by declining to participate in the case conference at the last minute.

With respect to your claims of breach of fiduciary duty and breach of the YG Limited Partnership's partnership agreement, the Trustee takes no position other than to note that any such claim can presumably be asserted against Ms. Athanasoulis if she succeeds in recovering any damages from the estate.

Finally, with respect to the issue of whether Ms. Athanasoulis' claim is a provable debt claim in bankruptcy as opposed to a claim for equity in the bankrupt estate, we invited your clients to participate in Phase II so that any evidence they may have relevant to that issue may be considered. Additionally, the Trustee has an agreement with Mr. Dunn as to the conduct of the arbitration. Nothing prevents your clients from bringing a motion to address the priority of any damages claim in favour of Ms. Athanasoulis.

In light of your clients' position, the Trustee proposes to use the court time reserved on May 24 as a case conference at which you can raise your concerns with Justice Gilmore and she can provide informal guidance on the issues. By copy of this email I would ask Mr. Soutter if he is amenable to such an approach. I will similarly contact Mr. Dunn by separate email.

Yours very truly,

Matt

Matthew Milne-Smith **(he, him)**
T 416.863.5595
mmilne-smith@dwpv.com
Bio | vCard

DAVIES
155 Wellington Street West
Toronto, ON M5V 3J7
dwpv.com

From: Shaun Laubman <slaubman@lolg.ca>
Sent: May 13, 2022 10:00 AM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Schwill, Robin <rschwill@dwpv.com>
Cc: Alexander Soutter <ASoutter@tgf.ca>; Dunn, Mark <mdunn@goodmans.ca>; Crystal Li <cli@lolg.ca>
Subject: YG Limited Partnership - Athanasoulis claims [LOLG-DMS.FID106454]

External Email / Courriel externe

Please see the attached letter sent on behalf of the limited partners.

Shaun Laubman (he/him)
Direct 416 360 8481
Cell 416 315 4122
slaubman@lolg.ca

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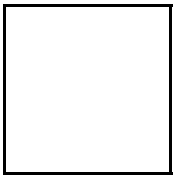

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Lax O'Sullivan Lisus Gottlieb

May 13, 2022

BY EMAIL

Matthew Milne-Smith / Robin Schwill
Davies Ward Phillips & Vineberg LLP
Barristers and Solicitors
155 Wellington Street West
Toronto ON M5V 3J7

Dear Sirs:

Maria Athanasoulis Arbitration – Objection to Arbitration Process

As you know, we are counsel for 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc. in respect of their claims arising from the YG Limited Partnership (the "**Partnership**") and the YSL Project. This letter is also sent on behalf of Mr. Soutter and his clients.

This letter constitutes our formal objection to the arbitration process between the Proposal Trustee and Maria Athanasoulis for the adjudication of Ms. Athanasoulis' claim against the Partnership. We have never consented to or supported the private arbitration of Ms. Athanasoulis' claim.

Our clients' understanding is that the Proposal Trustee and Ms. Athanasoulis have agreed to refer the issues of liability and quantum of her claim to a private and confidential arbitration. Our clients' position is that the referral is not a proper exercise of the Proposal Trustee's powers and duties under the *Bankruptcy and Insolvency Act* (the "***BIA***".

Section 135 of the *BIA* requires the Proposal Trustee to "examine every proof of claim" and "the grounds therefor" and determine whether a claim is a provable claim (and if a provable claim, the value of the claim):

> 135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and

> the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

If the Proposal Trustee is not satisfied that a claim has been established, it should issue a notice of determination or disallowance and the claimant can appeal the decision to the court within 30 days.[1] The *BIA* does not give the Proposal Trustee the right to refer a claim to adjudication by an arbitrator. Such a referral is not equivalent or analogous to requiring further evidence in support of the claim or security under section 135(1).

In the alternative, the Proposal Trustee can bring an application under section 34(1) of the *BIA* for court's directions with respect to the claim. Again, the *BIA* does not give the Proposal Trustee the right to refer a claim to adjudication by an arbitrator.

The arbitration procedure ignores the rights of our clients. Our clients have a direct interest in the outcome of Ms. Anathasoulis' claim, both as limited partners of the Partnership and as parties with claims to the Partnership's funds. Had Ms. Anathasoulis' claim proceeded in court, either through an appeal or application for directions, our clients would have rights to participate in the proceedings and the proceedings would be open and transparent.

However, the current arbitration process does not give our clients participation rights and the private nature of the arbitration means the materials and decisions in the arbitration will be confidential. The adjudication process is not open and transparent.

Significantly, it is not clear that the arbitration process between the Proposal Trustee and Ms. Athanasoulis is addressing or can address what we consider to be threshold and important issues with respect to Ms. Athanasoulis' claim. As we now understand that claim based on her most recent pleading, she is asserting that she had an oral agreement that binds the Partnership and entitles her to be paid notional profits of the Partnership in priority to any recovery by the limited partners.

The assertion by Ms. Anathasoulis of such an agreement is deeply concerning to our clients and raises serious issues of a breach of her fiduciary duties (as well as a corresponding breach by Dan Casey) and a breach of the YG Limited Partnership's Partnership Agreement, dated August 4, 2017 ("**Partnership Agreement**"). Ms. Athanasoulis' claim appears to be premised on an oral agreement with Mr. Casey that pre-dated the existence of the Partnership and that was never disclosed to the limited partners when their investments were solicited by Ms. Athanasoulis and others at Cresford. In fact, the existence of an agreement that entitles Ms. Athanasoulis to payments of the Partnership's profits in priority to the limited partners receiving the full return of their investment plus their guaranteed return on investment is directly contrary to the terms of their investments.

To the extent that Ms. Athanasoulis' claim is premised on an agreement between her and Mr. Casey that post-dates the formation of the Partnership and the effective date of

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[1] *Bankruptcy and Insolvency Act*, RSC, 1985, c B-13, s 135(4).

the Agreement, it is in breach of 3.2(b)(xix) and 3.6(b) of that agreement as well as a breach of the fiduciary duties owed to the limited partners by the General Partner, and by extension Ms. Athanasoulis.

Therefore, even if Ms. Athanasoulis could establish that the Partnership was somehow profitable and that her agreement was to profits of the Partnership rather than the Cresford entities that held Class B Units of the Partnership, our clients dispute that any such agreement would be enforceable against the Partnership. Our clients' position is also that Ms. Athanasoulis would be liable to them for the full amount of any payment she receives out of the claims process in relation to the alleged profit sharing agreement between her and Mr. Casey.

There is also the issue that Ms. Athanasoulis' claim is an equity claim and clearly subordinate to the limited partners' claims. It is unclear if, when or how this issue is to be determined in the arbitration process and why the Proposal Trustee has not already made a determination and rejected Ms. Athanasoulis' claim on this basis.

Our clients were not invited to participate in the arbitration process and are not parties to it. They are not bound by the process. It does not appear that the issues highlighted above are before the arbitrator.

As such, our clients object to the arbitration proceeding for the adjudication of Ms. Athanasoulis' claim. Our clients demand that the arbitration be stayed and the issues referred to a court for adjudication. It does not serve the interests of justice to proceed in a piecemeal fashion where discrete issues regarding Ms. Anthanasoulis' claim are adjudicated across multiple proceedings and between different parties. There should be a single proceeding, in Court, involving all interested parties including our clients, to finally determine the merits of Ms. Athanasoulis' claim and any claims that the limited partners have against her. Absent agreement to this, we will be bringing a motion to have the arbitration stayed and the issues determined by the Court.

Yours truly,

Shaun Laubman

SL/rp
cc: Mark Dunn, Goodmans LLP

This is Exhibit “C” referred to in the Affidavit of Ashley McKnight sworn January 4, 2023.

Commissioner for Taking Affidavits (or as may be)

XIN LU (CRYSTAL) LI

Court File No. BK-21-02734090-0031

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

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

AIDE MEMOIRE OF THE PROPOSAL TRUSTEE, KSV RESTRUCTURING INC.

(Hearing before Justice Gilmore on May 24, 2022)

May 20, 2022

DAVIES WARD PHILLIPS & VINEBERG LLP
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KSV Restructuring Inc.

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Lawyers for Maria Athanasoulis

AND TO: **LAX O'SULLIVAN LISUS GOTTLIEB LLP**
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Lawyers for Limited Partners, 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc.

AND TO: **THORNTON GROUT FINNIGAN LLP**
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Lawyers for Limited Partners

1. The Proposal Trustee, KSV Restructuring Inc. ("**KSV**"), delivers this aide memoire in respect of the notice of motion dated May 18, 2022[1] of YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc. (the "**YongeSL LPs**") and certain issues raised by 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc. (the "**250 LPs**", and together with the YongeSL LPs, the "**LPs**") in their letter dated May 13, 2022.[2]

A. Background to the Dispute

2. This dispute centres around a condominium development in downtown Toronto that was being developed by YSL Residences Inc. and YG Limited Partnership (together, "**YSL**"). YSL was a project company within the Cresford group of companies, created to develop the YSL project. In the course of 2020, the Cresford group encountered financial challenges, and in April 2021, YSL filed a notice of intention to make a proposal under s. 50.4(1) of the *Bankruptcy and Insolvency Act* (the "**BIA**"). KSV Restructuring was appointed the Proposal Trustee by the Court. A proposal was approved on July 16, 2021 by this Court. Concord Properties Developments Corp. ("**Concord**"), a third party, sponsored the proposal and became the owner of YSL's condominium development.

3. As part of the Proposal Trustee's mandate under the BIA, it is required to allow and disallow claims made by creditors against YSL. Pursuant to the proposal, the costs of the Proposal Trustee in adjudicating and settling creditor claims are being funded by Concord.

4. Maria Athanasoulis submitted a proof of claim within this process. Ms. Athanasoulis made

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1 Attached hereto as **Appendix "A"**.
2 Attached hereto as **Appendix "B"**.

a claim for $1 million (for what she characterizes as wrongful dismissal damages) and a claim for $18 million (for what she characterizes as lost profits pursuant to an oral contract). Ms. Athanasoulis's claim is the largest claim filed and has not been determined.

5. The Trustee lacks sufficient information to make a determination of Ms. Athanasoulis's claim given that the existence of any oral contract and her constructive dismissal were being disputed by Cresford. In order to determine certain facts pertinent to Ms. Athanasoulis's claim, the Proposal Trustee entered into an arbitration agreement with Ms. Athanasoulis. The arbitration was limited to the determination of the following three issues: (i) whether Ms. Athanasoulis had an oral profit sharing contract with YSL; (ii) whether Ms. Athanasoulis had beenconstructively dismissed; and (iii) if so, what is the quantum of damages in each case. These are all primarily factual determinations.

6. Under the arbitration agreement, the Proposal Trustee and Ms. Athanasoulis agreed to bifurcate the issues of liability and damages. Liability would be dealt with in Phase I of the arbitration, and damages would be dealt with in Phase II of the arbitration.

7. The arbitration procedure is authorized under s. 135(1) of the *Bankruptcy and Insolvency Act*, which provides that: "the trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security". Arbitration was the means the Trustee chose to "require further evidence".

8. The Trustee advised the LPs of the arbitration proceedings and provided them with a copy of the arbitration pleadings in December 2021. The Trustee also asked the LPs for any evidence that may have been relevant to Phase I of the arbitration proceedings, which evidence was considered by the Proposal Trustee. At no time did the LPs take any steps to stay or otherwise

prevent the arbitration from proceeding.

9. Phase I of the arbitration was tried in February 2022 before Arbitrator William Horton. Arbitrator Horton released his partial award in respect of Phase I of the arbitration on March 28, 2022. In his partial award, Arbitrator Horton held that Ms. Athansoulis had an oral profit sharing contract with YSL, and that YSL was liable to Ms. Athanasoulis for constructive dismissal and breach of the oral profit sharing contract.

10. Following the release of the partial award, the Proposal Trustee and Ms. Athanasoulis set tentative dates for the hearing of Phase II of the arbitration in September 2022.

B. Complaints of the LPs

(i) Notice

11. Following the release of the partial award, the Proposal Trustee reported to various stakeholders, including Concord and the LPs. Upon receiving notice of the partial award, the LPs for the first time raised objections to the arbitration process agreed to between the Proposal Trustee and Ms. Athanasoulis.

12. The 250 LPs claim that they "have never consented to or supported the private arbitration of Ms. Athanasoulis' claim". However, the Proposal Trustee was fully transparent with the LPs about its intention to enter into the arbitration agreement with Ms. Athanasoulis before it was executed, and the LPs did not raise any objection to that procedure.

(ii) Choice of Arbitration Process

13. The LPs further complain that the Proposal Trustee should have adjudicated the existence Ms. Athanasoulis's claim by issuing a Notice of Disallowance and then requiring Ms. Athanasoulis to appeal the disallowance, rather than going to arbitration. The Proposal Trustee agrees that this

was one course of action available to it. However, in the Proposal Trustee's view, the arbitration procedure was the faster and more efficient means of determining the facts in respect of Ms. Athanasoulis's claim. This is so because any appeal of a disallowance would have been adjudicated by the Court or under the Court's supervision. In the experience of the Proposal Trustee and its counsel, adjudication by the Court would have entailed significant delay given the demands on the Court's time.[3] Alternatively, the Court could have appointed a claims officer to adjudicate Ms. Athanasoulis's claim, in which case the final endpoint of that process would have been an out-of-court claims process very similar to the arbitration that the Proposal Trustee and Ms. Athanasoulis are currently engaged in. In both instances, the decision is appealable or subject to Court approval.

(iii) Participation in Arbitration

14. As described above, the Proposal Trustee was transparent with the LPs regarding the arbitration process with Ms. Athanasoulis. The Proposal Trustee did not invite the LPs to participate in Phase I because it raised narrow issues concerning whether an oral agreement had been entered into between Ms. Athanasoulis and Dan Casey, the principal of the Cresford Group. The LPs were not a party to any of the discussions concerning that oral agreement.

15. Phase II of the arbitration raises broader issues and the Proposal Trustee explicitly invited the LPs to participate in it. The LPs have advised that they do not intend to do so and have instead brought their motion to stay the arbitration.

16. With respect to the issue of priorities, the Proposal Trustee has entered into an agreement to arbitrate with Ms. Athanasoulis and she has refused to defer arbitration pending an adjudication of the priorities issue. In any event, it is unclear whether the question of priorities can be resolved

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[3] For reference, Phase I of the arbitration required a four day hearing.

until a final determination of Phase II of the arbitration is made.

(iv) Proposal Trustee's Position on Ms. Athanasoulis's Claim

17. Based on the evidence currently available, the Proposal Trustee presently takes the position that Ms. Athanasoulis has not suffered any damages flowing from YSL's breach of the oral profit sharing contract because YSL earned no profits, which is consistent with the position of the LPs. The Proposal Trustee also presently takes the position that that any damages owed to Ms. Athanasoulis pursuant to the oral profit sharing contract rank after the return of capital to the LPs in terms of priority in this claims adjudication process, and/or that Ms. Athanasoulis's claims are in the nature of equity, which is also consistent with the position of the LPs. However, those issues cannot be decided in this case conference. The first issue of damages should be decided by way of the agreed arbitration process between Ms. Athanasoulis and the Proposal Trustee. The second issue is difficult to adjudicate definitively while the nature of Ms. Athanasoulis's claim remains unresolved, and may ultimately be for the Court to determine upon considering the recommendation of the Proposal Trustee following the conclusion of arbitration.

C. Issues with LPs Position

18. Based on the submissions made in the YongeSL LPs notice of motion, the LPs appear to seek to expand significantly the issues involved in the adjudication of claims in this BIA process. By way of example only, the LPs assert claims against Ms. Athanasoulis for breach of fiduciary duty and breach of the LPs' partnership agreement. Those are not issues that involve YSL or the administration of the proposal process. Those are direct claims by the LPs against Ms. Athanasoulis, and they do not bear on Ms. Athanasoulis's claims against YSL. The LPs can commence legal proceedings against Ms. Athanasoulis outside of these proceedings if they believe their claims have merit.

19. In the Proposal Trustee's view, it is not in the interests of other creditors of YSL to suspend the final distribution of funds and the settlement of claims while the issues between the LPs and Ms. Athanasoulis are litigated. Nor is it fair or appropriate for Concord to bear the cost of funding the Proposal Trustee's participation in litigation that only involves the LPs and Ms. Athanasoulis.

20. The numerous issues raised in the LPs' Notice of Motion will give rise to significant cost and delay, particularly given the long delays already incurred in making distributions to creditors. In the context of the multitude of relatively complex issues being raised by several parties with opposing interests, and as an alternative to continued arbitration, the Proposal Trustee had canvassed the idea of the parties submitting their disputes to mediation as being a more pragmatic and effective approach. While not all parties have agreed to mediation, the Proposal Trustee continues to believe that there is significant merit to a mediation given that the economic interest of Ms. Athanasoulis is directly opposite the LPs and there remains the prospect of all creditors being paid in full. In the absence of a negotiated resolution, the Proposal Trustee would seriously consider the recommendation of a mediator in respect of the various outstanding issues.

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

Davies Ward Phillips & Vineberg LLP
Counsel for the Proposal Trustee,
KSV Restructuring Inc.

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

Court File No. BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT
TORONTO

AIDE MEMOIRE OF THE PROPOSAL TRUSTEE, KSV RESTRUCTURING INC.

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Lawyers for the Proposal Trustee,
KSV Restructuring Inc.

This is Exhibit “D” referred to in the Affidavit of Ashley McKnight sworn January 4, 2023.

Commissioner for Taking Affidavits (or as may be)

XIN LU (CRYSTAL) LI

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: BK-21-02734090-0031 **DATE:** 24 May 2022

NO. ON LIST: 3

TITLE OF PROCEEDING: YSL RESIDENCES INC., et al

BEFORE JUSTICE: JUSTICE GILMORE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Harry Fogul	YSL Residences Inc, YG Limited Partnership, Cresford Capital Corporation, and for Cresford (Rosedale) Developments Inc.	hfogul@airdberlis.com
Alexander Soutter	YongeSL Investment Limited Partnership, 2124093 Ontario Inc., Sixone Investment Ltd., E&B Investment Corporation, and Taihe International Group Inc.	asoutter@tgf.ca

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Jesse Mighton	Concord Properties Developments Corp.	mightonj@bennettjones.com
Mark Dunn	Maria Athanasoulis	mdunn@goodmans.ca
Daniel Naymark	Claimants- Ryan Millar, Louis Giannakopoulos, Marco Mancuso, Sarven Cicekian, and Mike Catsiliras	dnaymark@naymarklaw.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Robin B Schwill	**Interim Receiver – KSV Restructuring Inc.**	**Rschwill@dwpv.com**
Matthew Milne-Smith	**Interim Receiver – KSV Restructuring Inc.**	**Mmilne-smith@dwpv.com**
Shaun Laubman	**2505670 Canada, 8451761 Canada Inc. and Chi Long Inc.**	**slaubman@lolg.ca**

ENDORSEMENT OF JUSTICE GILMORE:

Two issues were dealt with at today's hearing; the motion of the Proposal Trustee to approve settlements with certain claimants, and issues related to Ms. Athanasoulis' claims against YSL.

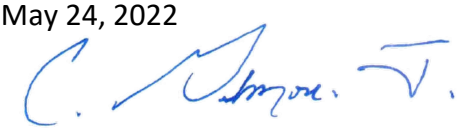
The motion in relation to the settlements was not opposed. The signed Order is attached.

With respect to the second issue, counsel for the LPs requested that the Court schedule motions related to the Proposal Trustee's authority, whether Ms. Athanasoulis' equitable claims are subordinate to the LP's entitlement, and a request to stay the upcoming arbitration of Ms. Athanasoulis' claim.

I declined to schedule the motion. It struck me that the priority issues and the damages could all be arbitrated at the arbitration already scheduled for September 2022. This would be far more efficient than putting off the arbitration and scheduling a full day motion (which likely could not be heard before November 2022 given the current Court schedule). Counsel for KSV, Ms. Athansoulis and Concord did not disagree that this would be an efficient way to proceed. Mr. Laubman did not disagree but Mr. Soutter who acts for 2/3 of the LPs objects to the arbitration process as his position is that it was never authorized.

Counsel are to return before me on **June 8, 2022 at 12:00 p.m. for one hour.** Counsel are directed to collaborate on the outstanding issues and the LPs are to particularize their equitable claims against Ms. Athanasoulis so that a meaningful discussion can take place on June 8th. If necessary, the issues for the arbitration could be the subject of a mediation.

May 24, 2022



Justice C. Gilmore

This is Exhibit “E” referred to in the Affidavit of Ashley McKnight sworn January 4, 2023.

Commissioner for Taking Affidavits (or as may be)

XIN LU (CRYSTAL) LI

Consolidated Court File No. 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

Claim of Maria Athanasoulis against
YG Limited Partnership and YSL Residences Inc.

CASE CONFERENCE BRIEF OF MARIA ATHANASOULIS

(Case Conference scheduled for June 8, 2022)

GOODMANS LLP
Barristers & Solicitors
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Lawyers for the Claimant, Maria Athanasoulis

TABLE OF CONTENTS

PART I. BACKGROUND

1. Maria Athanasoulis sued YSL Residences Inc. and YG Limited Partnership (collectively, "YSL") in February 2020 for breach of an agreement by which YSL agreed to pay her 20% of the profits on its real estate development project (the "Profit Sharing Agreement").

2. Ms. Athanasoulis' claim was stayed when YSL filed a bankruptcy proposal and she then delivered a Proof of Claim (the "Claim") to the Proposal Trustee, KSV Restructuring Inc. (the "Trustee"). Ms. Athanasoulis and the Trustee agreed to a bifurcated arbitration for the determination of her Claim (the "Arbitration").

3. Ms. Athanasoulis won the first phase of the Arbitration and established the existence and breach of the Profit Sharing Agreement. Ms. Athanasoulis and the Trustee agreed that if Ms. Athanasoulis won the first phase of the Arbitration, they would proceed to a second hearing to determine damages.

4. On May 18, 2022, a group of limited partner investors in YSL (the "LPs") served a Notice of Motion seeking to (among other things) set aside the arbitration process and raise a host of new issues relating to Ms. Athanasoulis' right to payment in these proceedings. Ms. Athanasoulis, and the Proposal Trustee, opposed scheduling the motion. The parties were directed to discuss an efficient process for resolving the various issues in dispute, and return for a further case conference on June 8, 2022.

5. Ms. Athanasoulis agrees that the arbitration can and should be expanded to include the LPs, provided that the arbitration can proceed efficiently and expeditiously to determine all issues relevant to her claim against YSL and her entitlement to payment in these proceedings.

6. In order for the arbitration to proceed efficiently, YSL must produce relevant documents. Although YSL has agreed to search for documents, its voluntary efforts have fallen far short of the candid disclosure that is required of a debtor that seeks the benefits of the *Bankruptcy and Insolvency Act* (the "*BIA*"). YSL claims that relevant documents were destroyed around the time that Ms. Athanasoulis made her document request, but that some (as yet unspecified) set of documents has been recovered. YSL has delayed production of documents that ought to be readily available, including its general ledger, and it has provided information contradicted by the sworn testimony of its principal at the first phase of the Arbitration.

7. In the circumstances, YSL should be directed to join the arbitration proceeding, for the sole purpose of being bound by document production orders made in that proceeding.

PART II. THE ARBITRATION PROCESS

8. The LPs represented by Lax O'Sullivan Lisus Gottlieb LLP (the "LOLG LPs") and those represented by Thornton Grout Finnegan LLP (the "TFG LPs") have each filed a case conference brief articulating the issues that they seek to raise in the arbitration before William G. Horton (the "Arbitrator").

9. Ms. Athanasoulis agrees that the issues that are (arguably) relevant to her right to payment in these proposal proceedings should be determined in a single arbitration. The LOLG LPs identify

three issues that they seek raise that are relevant to Ms. Athanasoulis' Claim against the debtors: (i) enforceability, (ii) priority, and (iii) damages. The TGF LPs identify substantially similar issues in their case conference brief and attached Amended Notice of Motion. Ms. Athanasoulis does not object to the LPs asserting their claim for damages in the Arbitration in the interest of expedience.

PART III. DOCUMENT PRODUCTION FROM THE DEBTORS

10. In the second phase of the Arbitration, Ms. Athanasoulis claims damages calculated based on:

(a) 20% of the profits that YSL would have earned but-for its breach of contract; or,

(b) In the alternative, 20% of the profits that YSL actually earned.

11. The LPs assert that YSL did not earn a profit, and so Ms. Athanasoulis is not entitled to any damages. But this assumes, without proving, that YSL's revenues were less than its expenses. Based on the financial disclosure available to date, YSL's revenues substantially *exceeded* its expenses. YSL earned a profit, even though that profit was not available for distribution in these proposal proceedings.

12. It is unclear, at this stage, what happened to the profits that YSL seems to have earned and why those profits were not available for distribution as part of these proceedings. Ms. Athanasoulis has pleaded that Mr. Casey caused YSL to divert the profits for his own purposes. This issue will be determined in the second phase of the Arbitration.

13. This aspect of Ms. Athanasoulis' Claim requires a detailed understanding of YSL's financial history, and that understanding requires documentary production from YSL. The Trustee does not have possession of the relevant documents.

14. Ms. Athanasoulis wrote to YSL's counsel on May 12, 2022 to demand production of relevant documents and records.[1]

15. The debtors did not provide a substantive response, and so Ms. Athanasoulis prepared and served a Notice of Motion to compel production of relevant records.[2]

16. After being served with the Notice of Motion, YSL claimed that many of the documents sought by Ms. Athanasoulis had been destroyed in an alleged ransomware attack.[3] The attack is alleged to have occurred approximately two weeks before Ms. Athanasoulis demanded documents required to assess whether YSL had improperly diverted profits. Stranger still, YSL knew that Ms. Athanasoulis and the Trustee were working toward an expedited arbitration but said nothing about the alleged attack for several weeks. These circumstances are likely to require further investigation to ensure the integrity of whatever documents YSL produces and determine how the absence of relevant documents should be treated in the arbitration.

17. On June 6, 2022, the debtors purported to provide certain limited documents and an explanation of why other documents could not be provided.[4] But the documents were not

[1] Emails between Sarah Stothart and Harry Fogul dated May 12-16, 2022, Case Conference Brief ("Brief"), Tab A
[2] Notice of Motion to Compel Production of Documents, Brief, Tab B
[3] Email from Harry Fogul dated June 2, 2022, Brief, Tab C
[4] Email from Harry Fogul dated June 6, 2022, Brief, Tab D

responsive and the information provided was contradicted by the sworn testimony of the debtors' *own principal*, Mr. Casey.

18. By way of example, Ms. Athanasoulis requested production of a loan agreement dated December 17, 2019.[5] Counsel to the debtors claimed, in response to the document request, that "there was no loan on December 17, 2019".[6] But Mr. Casey testified in the first phase of the arbitration that the debtors *had* taken out a $10 million loan on that date:[7]

> Q. So it's accurate to say that you took out a $10 million loan on December 17th, 2019?
>
> A. Yes.

19. YSL has been unwilling or unable to explain this inconsistency, and has not yet clarified in response to inquiries from Ms. Athanasoulis and the Proposal Trustee about it.

20. By way of further example, Ms. Athanasoulis requested production of documents relating to the termination of YSL's construction loan.[8] These documents are required to respond to an allegation made by the Trustee during the first phase that Ms. Athanasoulis herself caused that termination. But YSL produced only the term sheet for the loan. The term sheet provides no information at all with respect to when and why the construction loan was terminated.

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[5] Brief, Tab A
[6] Brief, Tab D
[7] Excerpt from Transcript of Daniel Casey dated February 24, 2022, Brief, Tab E
[8] Brief, Tab A

21. There is no doubt that the debtors must produce relevant documents. The debtors took the benefits of the *BIA*, including a payment of approximately $6.7 million made to a related party by an affiliate of the Proposal's sponsor. The debtors must also accept the burdens of the *BIA*, including their obligation to produce documents required to complete an efficient and expeditious evaluation of the Claim and to "aid to the utmost of [the bankrupt's] power in the . . . distribution of the proceeds among his creditors".[9]

22. The debtors' voluntary efforts have fallen well short of this requirement, and so Ms. Athanasoulis respectfully submits that the debtors should be directed to produce documents that are relevant to this proceeding. She further submits that the most effective way to accomplish this is to direct the debtors to execute the arbitration agreement with the Arbitrator, for the sole purpose of being bound by production orders made in the Arbitration.

[9] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 158(a), (b) and (k)

June 8, 2022

Goodmans LLP

Barristers & Solicitors

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Lawyers for the Claimant, Maria Athanasoulis

This is Exhibit “F” referred to in the Affidavit of Ashley McKnight sworn January 4, 2023.

Commissioner for Taking Affidavits (or as may be)

XIN LU (CRYSTAL) LI

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: 31-02734090 **DATE:** JUNE 8, 2022

NO. ON LIST: 12:00PM

TITLE OF PROCEEDING: YG LTD/YSL RESIDENCES INC

BEFORE JUSTICE: MADAM JUSTICE GILMORE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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For Defendant, Respondent, Responding Party, Defence:

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cli@lolg.ca **SARAH STOTHART FOR MARIA ATHANASOULIS** **sstothart@goodmans.ca**		

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MATTHEW MILNE-SMITH (PROPOSAL TRUSTEE) **mmilne-smith@dwpv.com**		

ENDORSEMENT OF JUSTICE GILMORE:

Today's conference was scheduled as per my endorsement of May 24,2022 wherein I asked counsel to collaborate on the issues to be arbitrated.

Mr. Milne-Smith, on behalf of the Proposal Trustee advised that counsel have collaborated and determined that they will work towards the terms of a newly constituted consolidated arbitration which will deal with all outstanding issues including the following:

1. The enforceability of the contract as found by Mr. Horton regarding Ms. Athanasoulis' claim and the quantum of any damages she may have suffered.
2. Whether any claim for damages by Ms. Athanasoulis is in the nature of debt or equity;
3. Any claim for damages that the Limited Partners may assert against Ms. Athansoulis.
4. The arbitration will **not** consider any claims between Ms. Athanasoulis and Cresford Capital/Dan Casey.
5. The Limited Partners will reserve their rights with respect to whether Mr. Horton's decision at Phase 1 of the arbitration regarding enforceability is rendered *res judiciata.*
6. At the conclusion of the arbitration the Proposal Trustee will make a determination as to whether Ms. Anathasoulis' claim is provable and will value it and determine its priority.
7. The parties' rights to appeal are preserved under the *BIA.*

Given concerns about delay I asked counsel to commit to having the arbitration before the end of 2022 which it is hoped will accommodate Mr. Soutter's parental leave and subject to Mr. Horton or another agreed upon arbitrator's availability.

Mr. Mighton, on behalf of the Proposal Sponsor, is concerned that including the issues between the LPs and Ms. Athanasoulis will increase the cost of the arbitration overall, expand the Trustee's role and delay the distribution of funds to creditors. His client does not support the arbitration proposal unless the LPs undertake to fund the Trustee's expenses. As the LPs would not do so, Mr. Mighton requests that the Court order a mandatory mediation of the issues between the LPs, Ms. Athanasoulis and the Trustee. If no settlement is achieved, he requests that the Court then direct the next steps regarding Ms. Athanasoulis' claims. Mr. Mighton also seeks to preserve his client's rights to amend the Proposal to provide that the administrative costs of the Trustee will be paid from the residual Creditor Cash Pool.

Mr. Laubman and Mr. Soutter do not agree. They are in favour of the arbitration procedure proposed. They point out that Ms. Athanasoulis' claim alone was originally scheduled for a two-week arbitration. The parties have now agreed on a two-week arbitration for **all** outstanding issues. The claims all arise from the same set of facts. The Trustee's role is not being expanded. Their clients are also incurring unanticipated costs in moving forward with the arbitration (which Mr. Soutter initially opposed) but now agree it is the most efficient process. The LPs do not consent to a mediation with Ms. Athanasoulis as suggested by Mr. Mighton.

The Trustee has undertaken to ensure that it will avoid duplication and minimize its role in the arbitration except where required.

Mr. Dunn raised an issue with respect to document production from the debtors. They are not parties to the arbitration agreement, but Mr. Dunn asks the Court to make them parties so they are obliged to provide documents as requested. Mr. Fogel on behalf of the debtors assured the Court that the request for documents received on May 12, 2022 will be complied with by June 24, 2022 or earlier and that the General Ledgers, Balance sheets and documents (and emails) related to the termination of the $650M construction loan will be provided today. Mr. Dunn remains unconvinced and concerned about the nature of the documents produced to date.

Directions for Counsel

This matter must be kept on track to ensure an arbitration occurs before the end of 2022. I am not inclined to order a mandatory mediation of the Athanasoulis/LP issues where the LPs do not agree. The LPs have come around to agreeing to an expanded arbitration process notwithstanding any additional cost which they may incur. The Proposal Sponsor is understandably concerned about additional cost as well.

However, balancing the efficiency of a slightly more costly consolidated arbitration against the cost and timing of various motions, the arbitration must prevail. I urge counsel to immediately contact Mr. Horton such that a date can be secured hopefully in October or November 2022.

The issue of apportionment of costs raised by Mr. Mighton is a reasonable concern. The arbitrator may, in his discretion, apportion costs as he deems appropriate. It is too difficult for the Court at this early stage to attempt to parse the parties' respective responsibility for costs.

Counsel are directed to continue collaborating and refining the issues for the arbitration. They are to return before me on July 29, 2022 at 11:30 a.m. for one hour. By that date it is expected that an arbitration date will have been secured and a finalized list of issues for the arbitration prepared. Counsel are to provide a two-page brief for the July 29th conference. The brief is to be uploaded to Caselines by July 27, 2022 at 11:30 a.m.

Mr. Dunn raises reasonable concerns about document production. Notwithstanding Mr. Fogler's undertakings to produce certain documents today and within two weeks, this matter cannot languish especially given Mr. Mann's imminent departure**. Mr. Dunn, Mr. Fogler and the Trustee are to return before me on June 15, 2022 at 11:00 a.m. for 30 minutes to discuss the status of document production from the debtors.**

June 8, 2022

Justice C. Gilmore

This is Exhibit “G” referred to in the Affidavit of Ashley McKnight sworn January 4, 2023.

Commissioner for Taking Affidavits (or as may be)

XIN LU (CRYSTAL) LI

Crystal Li

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: December-21-22 9:33 AM
To: Jesse Mighton; Shaun Laubman; Dunn, Mark
Cc: Alexander Soutter; Stothart, Sarah; hfogul@airdberlis.com; Schwill, Robin; D. J. Miller; David Gruber; Li, Chenyang
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454] [BJ-WSLegal.FID5464265]
Attachments: TRUSTEE - Aide Memoire for Case Conference on December 21, 2022.pdf

All, in case you missed it on CaseLines last night, we uploaded this Aide Memoire. It just gives a brief and uncontroversial background, and then sets out the Trustee's procedural proposal. I did not want to try to characterize your various objections to the proposal so just indicated that it did not have the support of the stakeholders, hence this case conference to request a motion.

From: Jesse Mighton <MightonJ@bennettjones.com>
Sent: December 15, 2022 5:06 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Shaun Laubman <slaubman@lolg.ca>; Dunn, Mark <mdunn@goodmans.ca>
Cc: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; D. J. Miller <DJMiller@tgf.ca>; David Gruber <GruberD@bennettjones.com>; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454] [BJ-WSLegal.FID5464265]

This time is ok for us.

Jesse Mighton, *Partner,* Bennett Jones LLP
T. 416 777 6255 | F. 416 863 1716

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Thursday, December 15, 2022 5:02 PM
To: Shaun Laubman <slaubman@lolg.ca>; Dunn, Mark <mdunn@goodmans.ca>
Cc: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; D. J. Miller <DJMiller@tgf.ca>; David Gruber <GruberD@bennettjones.com>; Jesse Mighton <MightonJ@bennettjones.com>; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

What Alsou said was "We need counsel to appear for scheduling before Justice Kimmel in order to book ½ day ."

I took that to mean she's not going to give us a ½ day motion without talking to us about whey we think it's needed. I certainly do not expect any substantive argument on the merits, though I wouldn't rule out us getting collectively yelled at for being unable to agree on a process.

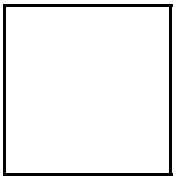
Matt

From: Shaun Laubman <slaubman@lolg.ca>
Sent: December 15, 2022 4:52 PM
To: Dunn, Mark <mdunn@goodmans.ca>; Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

Is this simply to book a motion date or longer case conference date and not to deal with any substantive matters? If so, that's fine.

Shaun Laubman (he/him)
Direct 416 360 8481
Cell 416 315 4122
slaubman@lolg.ca

Lax O'Sullivan Lisus Gottlieb LLP
Suite 2750, 145 King St W
Toronto ON M5H 1J8 Canada
T 416 598 1744 F 416 598 3730
www.lolg.ca



From: Dunn, Mark <mdunn@goodmans.ca>
Sent: December-15-22 4:50 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Shaun Laubman <slaubman@lolg.ca>
Cc: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

We will make that work on our end.

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Thursday, December 15, 2022 4:47 PM
To: Dunn, Mark <mdunn@goodmans.ca>; Shaun Laubman <slaubman@lolg.ca>
Cc: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

Everyone, I have been in touch with Alsou about booking a date. Justice Kimmel has asked that we appear to address scheduling, and we have been offered December 21 at 9:45 a.m. Can you please advise whether someone from your firm can attend. We are loathe to delay this any further.

Yours very truly,

Matt

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: December 14, 2022 6:19 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Shaun Laubman <slaubman@lolg.ca>
Cc: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

Matt,

We are not prepared to file a "brief" without knowing what issues it needs to address, what evidence needs to be filed and what the process will be.

By way of example, the process below seems to contemplate a potential valuation trial (which obviously implies some further evidence) but it is not clear what issues will be resolved before that trial is heard and what will be determined at trial.

In the circumstances, we should proceed to court and get clarity on process so everyone can know the rules. Let's proceed as soon as possible.

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Wednesday, December 14, 2022 5:05 PM
To: Dunn, Mark <mdunn@goodmans.ca>; Shaun Laubman <slaubman@lolg.ca>
Cc: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

Mark, thanks for your response. As you know, we cannot agree unilaterally to what evidence will be permitted following the process motion. That motion is required because of a fundamental disagreement between the stakeholders as to whether the appeal from KSV's determination will be a true appeal, or an appeal de novo.

The most we can offer for KSV's part is that if Ms. Athanasoulis submits a brief, it will be without prejudice to your ability to argue that she should be permitted to submit additional evidence in the future. I do not know whether the other stakeholders will make a similar concession.

Absent agreement on these issues I propose that we simply proceed with the motion and the Trustee will make the initial determination in the information and evidence available to it.

Yours very truly,

Matt

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: December 14, 2022 3:18 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Shaun Laubman <slaubman@lolg.ca>
Cc: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

External Email / Courriel externe

We can provide a with prejudice brief by the end of next week. However, we require confirmation that we will have an opportunity to supplement the brief as necessary once the process is established. We are not prepared to submit a brief at this stage if others are going to take the position that the trustee will make its determination on the brief and that Ms. Athanasoulis will have no right to submit further evidence or argument.

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Wednesday, December 14, 2022 2:24 PM
To: Shaun Laubman <slaubman@lolg.ca>
Cc: Dunn, Mark <mdunn@goodmans.ca>; Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: Re: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

Thanks. Mark, can you do the same?

> On Dec 14, 2022, at 11:08 AM, Shaun Laubman <slaubman@lolg.ca> wrote:
>
> **External Email / Courriel externe**
>
> ---
>
> Assuming Ms. Athanasoulis does likewise, the LPs expect to get their brief to the trustee by the end of next week.

Shaun Laubman (he/him)
Direct 416 360 8481
Cell 416 315 4122
slaubman@lolg.ca

Lax O'Sullivan Lisus Gottlieb LLP
Suite 2750, 145 King St W
Toronto ON M5H 1J8 Canada
T 416 598 1744 F 416 598 3730
www.lolg.ca

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: December-12-22 5:49 PM
To: Dunn, Mark <mdunn@goodmans.ca>; Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; Shaun Laubman <slaubman@lolg.ca>; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

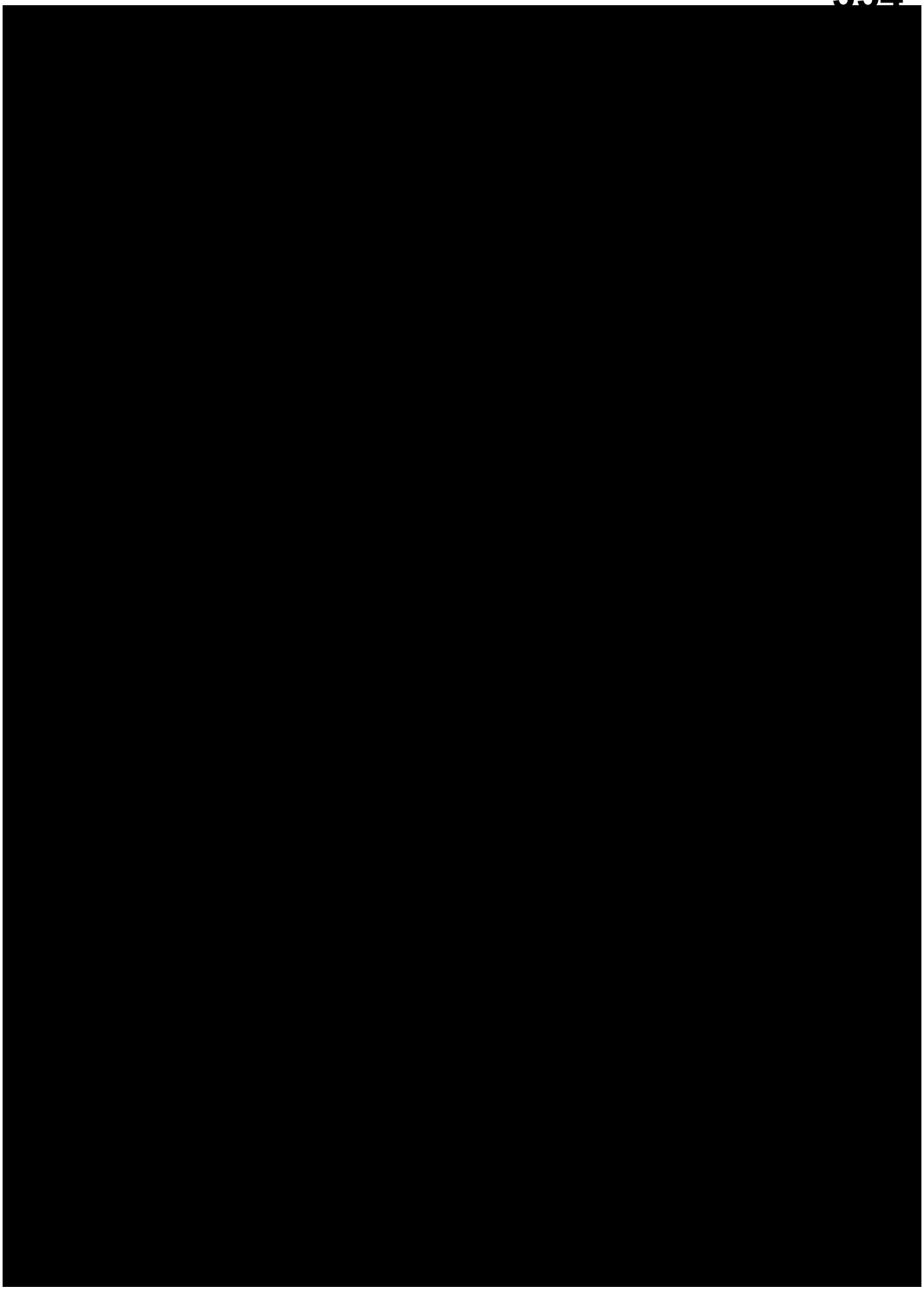
I agree that we should get in front of Justice Kimmel as soon as possible. When does everyone think they can get us “without prejudice” briefs, or are parties not willing to do so?

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: December 12, 2022 12:53 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Li, Chenyang <CLi@dwpv.com>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

External Email / Courriel externe

We are writing further to the e-mail below. We appreciate that the Trustee has addressed some (but not all) of the concerns we have raised. It is also clear that there are outstanding disputes between the parties that will need to be resolved by the court, and we can hopefully use the time between now and the motion to narrow and clarify those disputes. In particular, and without limitation, the process below seems to contemplate a two stage process but it is not clear what issues will be addressed at what stage of the process.

In our view, the motion should be scheduled immediately so that we can get certainty on process and move this matter forward.



[redacted]

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: December 7, 2022 11:59 AM
To: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

External Email / Courriel externe

We do not agree with either point advanced by the LPs, and believe that the second point was rejected by (or is at least inconsistent with) the decision of Justice Osborne relating to the CBRE claim. In any event, it is clear that there are matters that will require guidance from the court and I would suggest that we book a date as soon as possible so that we can all have certainty on the path forward.

From: Alexander Soutter <ASoutter@tgf.ca>
Sent: Wednesday, December 7, 2022 11:56 AM
To: Stothart, Sarah <sstothart@goodmans.ca>; Dunn, Mark <mdunn@goodmans.ca>; Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

Hi Matt,

With respect to the issues raised in Mark's November 21, 2022, letter:

1. Justice Kimmel held that the first phase of the arbitration resulted in inputs that the Proposal Trustee can take into account when it determines Ms. Athanasoulis' claim. The first phase of the arbitration is not binding on the Proposal Trustee.

2. The law regarding whether an appeal proceeds *de novo* is well established. Appeals should proceed as true appeals unless there has been an injustice that requires a hearing *de novo*. It is premature to draw a conclusion regarding whether a *de novo* appeal is necessary. Agreeing that any appeal should be *de novo* now, before any determination is made, is tantamount to conceding that the determination involves an injustice.

The evidence and arguments that the LPs intend to advance will be included in the briefs contemplated by the proposed procedure. We also confirm our position that the first phase of the arbitration does not bind the limited partners or address the issues that we raise in respect of Ms. Athanasoulis' claim.

Thanks,
Alex

From: Stothart, Sarah <sstothart@goodmans.ca>
Sent: Tuesday, December 6, 2022 2:37 PM
To: Dunn, Mark <mdunn@goodmans.ca>; Alexander Soutter <ASoutter@tgf.ca>; Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

Alex – the letter referenced in our email is attached.

Thanks,

Sarah Stothart
(she/her)
Goodmans LLP

416.597.4200
sstothart@goodmans.ca
goodmans.ca

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: Tuesday, December 6, 2022 2:35 PM
To: Alexander Soutter <ASoutter@tgf.ca>; Stothart, Sarah <sstothart@goodmans.ca>; Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

We'll circulate a copy of our letter shortly.

From: Alexander Soutter <ASoutter@tgf.ca>
Sent: Tuesday, December 6, 2022 1:56 PM
To: Stothart, Sarah <sstothart@goodmans.ca>; Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Dunn, Mark <mdunn@goodmans.ca>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

Good afternoon Matt,

We would like a copy of the letter referred to and highlighted below, please.

Alex

Alexander Soutter | ASoutter@tgf.ca | Direct Line +1 416-304-0595 | www.tgf.ca

From: Stothart, Sarah <sstothart@goodmans.ca>
Sent: Monday, December 5, 2022 6:33 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Alexander Soutter <ASoutter@tgf.ca>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Dunn, Mark <mdunn@goodmans.ca>
Subject: RE: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

Matt,

Thank you for your e-mail.

As a preliminary matter, we would like to understand when a determination will be made on Ms. Athanasoulis' employment claim. We have previously expressed our concerns about delays to valuing that claim, since other similar claims have already been allowed and paid. Ms. Athanasoulis' wrongful termination claim should not be delayed further.

With respect to the proposal for the resolution of the other aspects of her claim, we have the following questions.

First, we require the Trustee's confirmation that Phase One of the Arbitration remains binding on it and that the Trustee's determination will only address matters that were to be addressed in the second phase of the arbitration. We believe this should be stated explicitly in the proposed process.

Second, we would like to understand the Trustee's position on appeal procedure. Your e-mail does not address what procedure will be followed and what evidence will be used or allowed. This is obviously an important point, especially given the relatively short time contemplated to file material. It would be unfair if Ms. Athanasoulis was forced to file material within one week (as proposed) and then prevented from filing any additional material. We explained why we believe an appeal should proceed *de novo* in our letter. But even if the appeal does not proceed *de novo,* it is important to have clarity on the process at the outset.

Third, the Trustee seems to be proposing a phased process whereby some issues would be determined at an issue appeal and others would be reserved for a trial. It is not clear what issues are to be addressed in the first hearing, or what issues are likely to be deferred to a later date. You refer to "valuation" issues, but in our view everything is a valuation issue because liability has been established. Without presuming the result of the Trustee's determination, if, for example, the Trustee determined that Ms. Athanasoulis has no claim because there are no profits, then our response would involve (among other positions) both a "legal" argument regarding the appropriate test to assess damages as well as a factual "valuation" argument regarding the fact there are actual profits that were earned by YSL. We are not clear on how these issues can be divided between separate steps in the Trustee's proposed process.

Fourth, with respect to the LPs, we agree with the Trustee that the LPs have no standing to provide their "views" on Ms. Athanasoulis' claim (as referenced in Mr. Soutter's claim below). To the extent that the LPs have standing to raise issues, and seek to raise those issues, we suggest that a process be established for that as well. The first step in the process would be for the LPs to serve whatever material they intend to rely on in support of their motion. This has not yet occurred. Once it does, we can address an appropriate procedure for resolving the dispute with the LPs. We have previously explained why we do not believe that a procedure for addressing the LPs' allegations can or should be set until there is further clarity about those allegations.

To be clear, as it relates to the LPs, we object to the Trustee considering the LPs' allegations unless those allegations are substantiated by appropriate evidence. If the LPs were to make allegations similar to those made in their mediation brief or notice of motion without providing evidence, then those allegations should not be considered by the Trustee.

Thank you,

Sarah Stothart
(she/her)
Goodmans LLP

416.597.4200
sstothart@goodmans.ca

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
goodmans.ca

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Monday, December 5, 2022 10:27 AM
To: Alexander Soutter <ASoutter@tgf.ca>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; Dunn, Mark <mdunn@goodmans.ca>; Stothart, Sarah <sstothart@goodmans.ca>
Subject: Re: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031 [IMAN-CLIENT.FID6731]

Alex, to be clear the Trustee does not intend to refer to anything that was delivered on a "without prejudice" basis. The mediation materials referred to in paragraph two below would only be to the extent they were "re-filed" in accordance with Step One.

So we can start putting together a timeline, when do people think that they can deliver with prejudice briefs?

Matt

> On Dec 5, 2022, at 9:44 AM, Alexander Soutter <ASoutter@tgf.ca> wrote:
>
> **External Email / Courriel externe**
>
> Good morning,
>
> We have the following comments regarding the process suggested below.
>
> We can submit a brief to the Proposal Trustee regarding our views of Ms. Athanasoulis' claim within a reasonable amount of time. A one week turnaround for a responding brief might be unworkable if the holidays interfere, but we can respond as promptly as possible.
>
> Nothing in this process should refer to or rely on what was served in connection with or said at the mediation. If the parties decide to recycle arguments or views into a new, with prejudice brief, that is different. It would not be appropriate for the Proposal

Trustee to base its decision on the without prejudice mediation or any part of it as is suggested in paragraph 2 of the proposed process.

The LPs do not agree that there are any restrictions on their right to challenge the Proposal Trustee's determination or make submissions on any issue raised on any other stakeholder's challenge of such decision. We do not consent to the limitations relating to such challenges identified in your email below. If any order is sought that restricts such rights we will oppose the relevant terms.

Alex

Alexander Soutter | Associate | ASoutter@tgf.ca | Direct Line +1 416-304-0595 | Suite 3200, TD West Tower, 100 Wellingto
West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | www.tgf.ca

From: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Sent: Friday, December 2, 2022 3:11 PM
To: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>
Cc: hfogul@airdberlis.com; Schwill, Robin <rschwill@dwpv.com>; slaubman@lolg.ca; D. J. Miller <DJMiller@tgf.ca>; Alexander Soutter <ASoutter@tgf.ca>; gruberd@bennettjones.com; mightonj@bennettjones.com; mdunn@goodmans.ca; sstothart@goodmans.ca
Subject: Re: In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc. // Court File No. BK-21-02734090-0031

Counsel, the Trustee wishes to address the process moving forward for determination of the Athanasoulis claim. The following is what we would propose.

Steps Prior to Process Motion

1. LPs, Athanasoulis and Trustee to issue mediation briefs "with prejudice" as basis for Trustee's determination. LPs and Athanasoulis may issue responding briefs at their discretion within approximately one week.

The Trustee would then bring a motion for directions before Justice Kimmel to determine the process, and propose the following:

Process Motion Proposed Steps/Process

1. Trustee to issue Notice of Determination on Athanasoulis Claim. The Notice of Determination will not be shared with any party prior to issuance but a copy will be provided to counsel to the LPs and Concord when issued.
2. Notice of Determination to be based on full record to date in these proceedings, the arbitration and the mediation plus any responses to direct information requests from the Trustee.
3. The Notice of Determination shall set out all of the grounds supporting the Trustee's determination in sufficient detail to appropriately frame the issues for any appeal.
4. Athanasoulis to file any appeal pursuant to Section 135 of the BIA.
5. Athanasoulis appeal shall not be required to adduce detailed evidence valuing and quantifying her profit share claim but may address any issues raised in Notice of Determination.
6. LPs shall be entitled only to raise issues in the appeal that pertain directly: (a) to whether the LPs must be repaid in full prior to any payments being made on the Athanasoulis Claim; and (b) the enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement.
7. Athanasoulis entitled to full response to any materials filed by LPs in this regard.
8. To the extent that the decision on appeal finds that a debt is owing and payable to Athanasoulis on her PSA, then a summary trial on quantification will be scheduled.

We are happy to consider any feedback before proceeding as indicated.

Yours very truly,

Matt

Matthew Milne-Smith **(he, him)**
T 416.863.5595
mmilne-smith@dwpv.com
Bio | vCard

DAVIES
155 Wellington Street West
Toronto, ON M5V 3J7
dwpv.com

This is Exhibit “H” referred to in the Affidavit of Ashley McKnight sworn January 4, 2023.

Commissioner for Taking Affidavits (or as may be)

XIN LU (CRYSTAL) LI

From:	Waltenbury, Lorie (JUD)
To:	haddon.murray@gowlingwlg.com; elie.laskin@gowlingwlg.com; Alexander Soutter; rschwill@dwpv.com; mightonj.@bennettjones.com; sstothart@goodmans.ca; csipa@mccagueborlack.com
Subject:	YG Limited Partnership and YSL Residences Inc. - BK-21-02734090-0031
Date:	November-22-22 12:40:22 PM
Attachments:	BK-31-2734090 2022 ONSC 6548 YG Ltd Ptrshp YSL Residences Endorsement Nov 16 22.pdf

Good afternoon,

With respect to this matter, please find attached the Endorsement of Osborne J.

For tracking purposes, kindly confirm your receipt of the Endorsement by return email to me at your earliest opportunity.

Thank you!

Lorie Waltenbury
Judicial Assistant to:
J.E. Ferguson J., K. Corrick J. and W.D. Black J.
Superior Court of Justice
361 University Avenue
Toronto, ON M5G 1T3
Email: *lorie.waltenbury@ontario.ca*

CITATION: YG Limited Partnership and YSL Residences Inc., 2022 ONSC 6548
COURT FILE NO.: BK-22-02734090-0031
DATE: 20221116

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER of the *Bankruptcy and Insolvency Act*, R.SC. 1985, c.B-3 as amended

AND:

IN THE MATTER of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc.

BEFORE: Osborne J.

COUNSEL: *C. Haddon Murray and Elie Laskin*, CBRE Limited
A. Soutter, Yonge Street LPs
Robin Schwill, KSV, Proposal Trustee
Jesse Mighton, Concord Properties
Sarah Stothart, Maria Athanasoulis
Conner Sipa, Harbour International Investment Group and Yulei Zhang

HEARD: November 7, 2022

ENDORSEMENT

[1] This motion raises three questions that can arise where a Proposal Trustee has disallowed a Proof of Claim pursuant to section 135 of the *Bankruptcy and Insolvency Act* ["BIA"], and the claimant has appealed from that disallowance pursuant to section 135(4):

a. should the appeal proceed before this Court as a hearing *de novo*, or should the record be limited to those materials considered by the Proposal Trustee at the time [i.e., the materials filed in support of the claim];

b. do limited partners of a limited partnership that has filed an NOI have standing on such an appeal; and

c. should the appeal be allowed in this case?

[2] CBRE Limited ["CBRE"] moves for an order setting aside the disallowance of its claim by the Proposal Trustee in the Proposal of YSL Limited Partnership and YSL Residences Inc. [together, the "Debtors"], and allowing the claim.

[3] CBRE also seeks an order that this motion, which is effectively the appeal of the disallowance of its claim, be heard by way of hearing *de novo*.

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

Background and Context

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

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

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

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

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

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

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

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

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

[14] Indeed, the only parties opposing the relief sought are certain limited partners in the YG Limited Partnership.

[15] CBRE, supported by the Proposal Trustee, submits that the disallowance should be set aside and its claim should be allowed pursuant to the settlement agreement. It argues that, for the purposes of this motion, the Court should in any event consider the matter *de novo.*

[16] The limited partners submit that CBRE has failed to prove its claim with the requisite cogent evidence originally before the Proposal Trustee [i.e., the material originally filed in support of the CBRE claim], or at all.

ANALYSIS

Do the Limited Partners Have Standing?

[17] Section 135 of the BIA sets out the regime pursuant to which proofs of claim are admitted or disallowed.

[18] Pursuant to subsection (2), a trustee may disallow, in whole or in part, any claim.

[19] That disallowance is final and conclusive unless, pursuant to subsection (4), the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the *General Rules*.

[20] Pursuant to subsection (5), the court may expunge or reduce a proof of claim on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

[21] Here, the limited partners are limited partners in one of the Debtors, YG Limited Partnership. In my view, they lack the standing in this case to challenge the disallowance by the Proposal Trustee.

[22] For the purposes of this motion, the creditor is CBRE and the Debtor [or one of them] is YG Limited Partnership. As submitted by the Proposal Trustee, the whole bankruptcy regime is based upon all parties dealing with the debtor entity and/or the proposal trustee to address, determine and/or resolve claims.

[23] I agree with the submission of the Proposal Trustee that pursuant to subsection 135(5), the court may grant relief only where either one of two parties requests it: the creditor applies, or the debtor applies in circumstances where the trustee will not interfere.

[24] The limited partners are not creditors, but rather are exactly that - limited partners - in one of the Debtors. They hold limited partnership units in that entity. That is insufficient to make them debtors [within the meaning of this subsection or generally within the structure of the BIA], any more than shareholders of a debtor corporation would themselves automatically be debtors.

[25] Moreover, the particular contractual entitlements of the limited partners applicable to their units do not assist them here. The partnership agreement sets out the rights and obligations of the general partner to act on behalf of the limited partnership, and of the limited partners themselves.

[26] The contractual right in the partnership agreement to bind the partnership with respect to things such as claims is granted to the general partner. The general partner, on behalf of the limited partnership, consents to the relief sought on this motion.

[27] Finally, the Proposal Trustee has in fact "interfered" here, as contemplated in section 135(5). This is not a case where a trustee simply refuses to take a position or will not engage on the issue.

[28] I also observe that section 37 of the BIA provides that, where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

[29] I have already concluded that the limited partners are not creditors. Are they "persons aggrieved"? In my view they are not. Their grievance, or complaint, boils down to the fact that their ultimate potential recovery will presumably be reduced if the claim is allowed. That is not sufficient to make them aggrieved within the meaning of section 37. To conclude otherwise would mean that every creditor would have standing pursuant to section 37 to challenge the claim of every other creditor in a bankruptcy proceeding and I reject this notion.

[30] As observed in Holden & Morawetz, *The 2022 Annotated Bankruptcy and Insolvency Act*, Thomson Reuters, Toronto, 2022 at p. 102-103,

> "the words "any other person is aggrieved" must be broadly interpreted. They do not mean a person who is disappointed of a benefit that he or she might have received if some other order had been made. A "person aggrieved" is a person who has suffered a legal grievance, a person against whom a decision has been pronounced by the trustee that has wrongfully deprived him or her of something, or wrongfully refused him or her something, or wrongfully affected his or her title to something: *Re Sidebotham*, (1880), 14 Ch.D. 458 at 465; *Liu v. Sung*, (1989), 72. C.B.R. (N.S.) 224 (BCSC)."

[31] This Court reached the same conclusion in *Global Royalties Ltd. v. Brook*, 2016 ONSC 6277 at para. 13.

[32] I conclude that in this case, the limited partners lack the requisite standing to oppose the motion.

Should the Appeal Proceed *de Novo*?

[33] As stated above, the authority of the court to expunge or reduce a proof of claim is found in section 135(5) of the BIA.

[34] I am satisfied that this Court may direct that an appeal from a disallowance of a claim by a trustee proceed by way of hearing *de novo* where it determines that to proceed otherwise would result in an injustice to the creditor. (see *Credifinance Securities Limited v DSLC Capital Corp*, 2011 ONCA 160 at para. 24, citing *Charlestown Residential School, Re*, 2010 ONSC 4099 at paras. 1, 18, and *Re: Poreba*, 2014 ONSC 277 at para. 32).

[35] I recognize, as did the Court of Appeal in *Credifinance*, that this practice is not uniform across the country. I also recognize that a major legislative objective of the bankruptcy regime is to maximize efficiency and the expeditious determination of claims between and among the stakeholders, and that this, in turn, could support the exercise of deference in the review of a decision of a trustee. In my view, that is why appeals of this nature should generally proceed as true appeals, based on a record consisting of the materials relied upon by the trustee in its decision to disallow the claim.

[36] However, it seems to me that the present case is an example of precisely the type of case where to proceed otherwise than *de novo*, and limit the record to that material originally filed in support of the claim, would result in an injustice to the creditor. That is exactly what section 135(5) is designed to correct or avoid, and in circumstances such as this, the appeal can and should proceed *de novo* in the sense that materials not originally before the trustee can and should be considered by the court.

[37] The *Poreba* case is such an example, where the Master [now Associate Judge] concluded that a hearing *de novo* was appropriate because there were significant issues of credibility such that fairness required that the claimant be given an opportunity to provide *viva voce* evidence and to explain certain issues.

[38] The evidence that, in my view, is relevant both to a determination of the claim and to my conclusion that to exclude it would work an injustice on the creditor, is described below. The creditor and the Proposal Trustee acted openly and transparently and entering into the settlement agreement, in the context of the appeal by the creditor. They did not act in an underhanded or unfair manner.

Should the Appeal be Allowed?

[39] Notwithstanding my conclusion above that the limited partners lacked the requisite standing to oppose this motion, I have considered their evidence and arguments with respect to the merits of the appeal, in case I am wrong. Moreover, CBRE seeks an order allowing the appeal, in any event of opposition.

[40] In this case, what occurred was rather straightforward. Based on the information and material originally available to it, the Proposal Trustee disallowed the claim. This seems reasonable when one considers the summary nature of claims evaluation by a trustee, in the somewhat unique circumstances of this case where the listing agreement giving rise to the claim for the commission on the sale of the property was first oral and then reduced to writing but through inadvertence the written agreement was never executed.

[41] However, and as stated above, when additional material was filed with the Proposal Trustee, it was of the view that the claim ought properly to be allowed. The Proposal Trustee did not, however, purport to allow an appeal from its own decision. Rather, it agreed, pursuant to the provisions of the settlement agreement, to support and not oppose the appeal by the creditor, properly brought pursuant to section 135(5), in exchange for the agreement of the creditor not to seek costs against the Proposal Trustee.

[42] I point this out in part due to the argument advanced by the limited partners to the effect that the disallowance of a claim by the Proposal Trustee is final and conclusive with the result that the Proposal Trustee has no residual power to reconsider its own decision or reverse itself. Again, that is not what has occurred here. Rather, the settlement agreement was entered into in the context of the appeal properly brought by the creditor.

[43] There is no dispute on this motion as to several relevant facts:

a. CBRE entered into a listing agreement with YSL for the YSL Property;

b. CBRE introduced YSL to Concord for the purposes of acquiring the YSL Property;

c. Concord in fact did acquire the YSL Property; and

d. the commission claimed by CBRE is equal to 0.65% of the total consideration paid for the YSL Property.

[44] For its part, Concord agrees and acknowledges that CBRE introduced it to YSL, although it has no knowledge of the agreement with CBRE. The evidence on this motion is that the Proposal Trustee in making its decision relied on information provided by Concord to the effect that it dealt with the Debtors at all times and did not have dealings with CBRE.

[45] However, that information was not provided to the creditor that had advanced the claim, CBRE. CBRE accordingly did not have any opportunity to make submissions with respect to, or file evidence to challenge, that statement from Concord.

[46] The evidence of Concord as subsequently provided to the Proposal Trustee and filed on this motion is to the effect that CBRE in fact introduced it to YSL for the purposes of acquiring the YSL Property.

[47] Indeed, the clear and unequivocal evidence of both counterparties to the agreement [CBRE and YSL] is consistent and clear: there was an agreement, CBRE performed the agreement and indeed was involved in negotiations right up until the conveyance of the YSL Property pursuant to the amended Proposal, and the commission is payable according to its terms.

[48] I am satisfied that this is clear from the evidence, and in particular the affidavit of Mr. Ted Dowbiggin, the former president of Cresford, and the affidavit of Mr. Casey Gallagher, VP of CBRE, relied upon by CBRE.

[49] I referred above in these reasons to the oral agreement of January, 2020 and the subsequent written agreement of February 21, 2020 and the fact that the latter had never been formally signed. As noted, the written agreement provided that the term of the contract ended on August 20, 2020, and the holdover clause [section 4.1] essentially extended the entitlement to a commission for an additional 90 days.

[50] The limited partners submit that even if the YSL Property was conveyed pursuant to the [amended] Proposal, that occurred outside the 90-day period with the result that the commission ought not to be payable.

[51] I am satisfied based on the evidence described above and particularly the evidence of Messrs. Dowbiggin and Gallagher, and in the absence of any contrary evidence put forward by any party, that the negotiations between YSL and Concord commenced with their introduction and continued until the acquisition of the YSL Property by Concord through the proposal, and specifically during the holdover period. The limited partners did not cross-examine either of those witnesses on their evidence with respect to these points. CBRE continued to act as listing broker and responded to questions from YSL during the negotiations.

[52] In addition, the Debtors themselves support the claim and have confirmed such to the Proposal Trustee. This is consistent also with the conduct of both the Debtors on the one hand and CBRE on the other, prior to the claim being advanced, as the parties to the agreement performed it according to its terms and acted in all respects as if the written agreement had been executed.

[53] Finally, I observe that Concord itself supports the claim being allowed and it, very arguably, has the most to gain if the claim were denied.

[54] The limited partners oppose the relief sought but were not parties to the impugned agreement nor, obviously, were they present for any of the discussions leading to the oral agreement.

[55] The limited partners argue that the terms of the agreement did not entitle CBRE to the payment of the commission since the sale of the YSL Property was not a sale by agreement of purchase and sale within the meaning the commission agreement.

[56] CBRE, one of the parties to that agreement, supported by both the Debtors [the counterparty to the agreement] and the Proposal Trustee, submits that this includes an agreement pursuant to which consideration is given for the conveyance of title to the YSL Property. I agree. I also agree that a proposal is a form of contract [between the debtor and its creditors].[See *Jones v. Ontario*, (2003), 66 O.R.(3d) 674 (ONCA)].

[57] In the result, I am therefore satisfied that to exclude this clear and cogent evidence would result in the disallowance of the claim and that would be an unjust result in the circumstances of this case.

[58] For all of the above reasons,

a. the limited partners do not have standing to oppose or the relief sought on this motion by the creditor [CBRE] supported by the Proposal Trustee and the Debtors;

b. in this case, the appeal from the decision of the Proposal Trustee should be considered, and has been considered by me, as a hearing *de novo*, since to do otherwise would result in an injustice to the creditor [CBRE]; and

c. the appeal should be allowed and the motion granted.

[59] Accordingly, the disallowance of CBRE's claim by the Proposal Trustee is set aside and the claim is allowed.

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

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

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

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

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

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

Osborne, J.

Date: November 16, 2022

This is Exhibit “I” referred to in the Affidavit of Ashley McKnight sworn January 4, 2023.

Commissioner for Taking Affidavits (or as may be)

XIN LU (CRYSTAL) LI

Court File No. BK-21-02734090-0031
Court of Appeal No. COA-22-CV-0451

COURT OF APPEAL FOR ONTARIO

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

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

NOTICE OF APPEAL

THE APPELLANTS, YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc. (collectively, the "**YongeSL LPs**"), **APPEAL** to this Court from the Order of the Honourable Justice Peter Osborne of the Superior Court of Justice (the "**Motion Judge**") made on November 22, 2022 at Toronto, Ontario (the "**Order**").[1]

THE APPELLANTS ASK that the Order be set aside and that an order be granted in its place as follows:

1. Dismissing the motion brought by CBRE Limited ("**CBRE**") for an order setting aside the disallowance of its Proof of Claim in this proceeding by KSV Restructuring Inc., in its capacity as the proposal trustee (the "**Proposal Trustee**") of the debtors YG Limited Partnership and YSL Residences Inc. (together, the "**Debtors**");

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[1] The Motion Judge's reasons for decision were dated November 16, 2022, but only released to the parties by email on November 22, 2022. The YongeSL LPs have asked the Court to correct the typographical error in the date but, in the event that it is necessary, seek leave to extend the time to appeal.

2. Declaring that CBRE's Proof of Claim in this proceeding is disallowed in full;

3. Awarding the YongeSL LPs the costs of the motion below and of this appeal; and

4. Such further and other relief as this Court may deem just.

THE GROUNDS OF APPEAL are:

5. The YongeSL LPs represent the ultimate economic interest in this proceeding and it was an error of law to deny the YongeSL LPs standing on CBRE's motion. In particular, the Motion Judge:

   (a) erred in applying s.135(5) of the *Bankruptcy and Insolvency Act* ("***BIA***");

   (b) erred by not following the earlier decision of Justice Dunphy which determined that the YongeSL LPs had standing in this proceeding as an affected group; and

   (c) erred in determining that the Yonge SL LPs were not "persons aggrieved" under s.37 of the *BIA*.

6. The Motion Judge also committed a palpable and overriding error in allowing CBRE's claim. There was inadequate evidence before the Court such that CBRE's claim could succeed.

Background to the Proceeding

7. In summer 2021, the Debtors commenced this *BIA* proceeding as a pre-packaged liquidation designed primarily to benefit the Cresford Group, the developer that controlled the Debtors. The Debtors' original proposal would have seen the Cresford Group extract approximately $22 million from the "**YSL Project**", the condominium development

owned by the Debtors. Unsecured creditors would have recovered a maximum of 58% of their claims. Under the original proposal, the Class A Unit holders of YG Limited Partnership (the "**limited partners**"), who had invested $14.8 million in the YSL Project, would have recovered nothing.

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

9. By way of the Proposal, the Debtors transferred the YSL Project lands to Concord Properties Developments Corp. ("**Concord**"), another developer.

10. Article 5.05 of the Proposal expressly provides that the limited partners, including the YongeSL LPs, are entitled to any residue of the Proposal after final distributions to creditors.

Three Outstanding Claims Against the Debtors

11. Since the Proposal was sanctioned, the Proposal Trustee has been determining claims made against the Debtors. Three claims remain outstanding: (a) CBRE's claim of approximately $1.2 million; (b) a claim by Harbour International Investment Group Inc. ("**Harbour**") for

$1 million plus HST; and (c) an $18 million claim by the Cresford Group's former President of Marketing, Maria Athanasoulis.

12. Subject to the resolution of those three claims, the limited partners may yet recover their $14.8 million investment in the YSL Project, plus some return thereon.

13. The YongeSL LPs brought an application pursuant to s.37 of the *BIA* to challenge the Proposal Trustee's decision to allow Harbour's claim. That application has been held in abeyance pending a final determination of the Motion Judge's decision.

14. Ms. Athanasoulis' claim involves an allegation that she is entitled to share in the profits of the YSL Project. The Proposal Trustee and Ms. Athanasoulis agreed to a bifurcated arbitration of that claim, pursuant to which the Proposal Trustee defended the claim. The first phase of that arbitration resulted in a finding that Ms. Athanasoulis had an agreement with the Cresford Group whereby she would share in the profits of the YSL Project. The amount of that claim, if any, was not determined.

15. The limited partners and Concord were left out of this process. Once they learned of the outcome, the limited partners took steps to challenge the Proposal Trustee's right to arbitrate Ms. Athanasoulis' claim. Those steps are summarized in an October 17, 2022, decision of Justice Kimmel (*YG Limited Partnership (Re)*, 2022 ONSC 6138). Justice Kimmel held that the arbitration contemplated a final adjudication of Ms. Athanasoulis' claim and went beyond a mere fact-finding exercise. Her Honour held that it was an improper delegation to the arbitrator by the Proposal Trustee of its ultimate responsibility to determine and value Ms. Athanasoulis' claim. The Proposal Trustee is now in the process of developing its protocol for the determination of that claim.

16. Subject to the determination of the three outstanding claims against the Debtors, up to $16.038 million may be available for distribution to the limited partners.

CBRE's Claim

17. CBRE is a real estate broker retained by the Debtors before the Debtors filed Notices of Intention to Make a Proposal under the *BIA*. CBRE was retained to broker the sale of the YSL Project. The YSL Project was ultimately conveyed to Concord, the proposal sponsor, in this proceeding.

18. CBRE's claim is for more than $1.2 million as a commission arising after the conveyance of the YSL Project from the Debtors to Concord in this proceeding. CBRE's claim depends on there having been negotiations between the Debtors and Concord during a certain 90-day period (the "**Holdover Period**"). There was no evidence of such negotiations before the Proposal Trustee. The Proposal Trustee disallowed CBRE's claim.

CBRE's Appeal to the Motion Judge

19. CBRE appealed the Proposal Trustee's disallowance of its claim and filed new evidence of negotiations between the Debtors and Concord. The new evidence was set out in and limited to two sentences:

    (a) Mr. Gallagher, a Vice-President with CBRE, stated that "[a]round September 2020, I played golf with Mr. Dowbiggin and he again confirmed that the negotiations with Concord were ongoing for the purchase of the YSL Property". Mr. Dowbiggin, the former President of a company in the Cresford Group (not the Debtors), did not adopt this hearsay statement in his affidavit; and

(b) Mr. Dowbiggin's evidence was that,

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

20. The Proposal Trustee changed its position after CBRE appealed and consented to CBRE's appeal from the Proposal Trustee's disallowance of its claim. The Proposal Trustee agreed to seek the Court's approval of a settlement pursuant to which CBRE's claim and appeal would be allowed without costs.

21. The YongeSL LPs opposed CBRE's appeal and the Proposal Trustee's request that the Motion Judge approve its settlement of it. The YongeSL LPs took the position that Mr. Dowbiggin's vague statement that "negotiations were ongoing" during the Holdover Period was not cogent evidence capable of proving a claim. CBRE had not met its onus and the Proposal Trustee ought to have maintained its disallowance of CBRE's claim.

The Motion Judge's Decision

22. The Motion Judge concluded that the YongeSL LPs had no standing before the Court and found that CBRE had proven its claim. Respectfully, the Motion Judge (a) erred in law by concluding that the YongeSL LPs lacked standing; and (b) committed a palpable and overriding error in concluding that CBRE had proven its claim.

The Motion Judge erred in law by concluding that the YongeSL LPs lack standing

23. The Motion Judge held that the YongeSL LPs "lack the standing in this case to challenge the disallowance [of CBRE's claim] by the Proposal Trustee.". The effect of the Motion

Judge's ruling is to deny the YongeSL LPs the right to be heard in circumstances where their interests are affected by the decision. That conclusion is in error.

24. The Motion Judge erred in applying s.135(5) of the *BIA*, which had no application to the relief sought on CBRE's motion. Section 135(5) provides that the "court may expunge or reduce a proof of claim [...] on the application of a creditor or of the debtor if the trustee declines to interfere in the matter." The section does not apply where a creditor appeals the disallowance of its proof of claim, as CBRE sought on its motion in this proceeding.

25. The YongeSL LPs were not challenging the Proposal Trustee's disallowance of CBRE's claim. To the contrary, they supported it. The YongeSL LPs opposed (a) CBRE's appeal and request that its proof of claim be allowed; and (b) the Proposal Trustee's consent to CBRE's appeal, which consent amounted to the Proposal Trustee agreeing to set aside its own disallowance. Even if s.135(5) did apply, which it did not, the YongeSL LPs would still have standing on CBRE's motion.

26. The Motion Judge also erred in law by failing to apply the earlier decision of Justice Dunphy whereby the YongeSL LPs have already been granted standing in this proceeding, over the objections of Concord and the Debtors. Justice Dunphy addressed that issue in the weeks leading up to the Debtors' unsuccessful motion for approval of their original proposal. Justice Dunphy determined that it was plain that the limited partners' arguments on the Debtors' proposal ought to be fleshed out and heard, and that the sanction hearing was effectively the only opportunity that the limited partners would have to make their case and be heard. They were affected by the outcome of the motion to sanction the original proposal and were entitled to be heard.

27. As a result of the limited partners making that case, the original proposal was rejected and the improved Proposal put forward, to the benefit of all unsecured creditors and the limited partners.

28. The YongeSL LPs represent the ultimate economic interest in this proceeding. The Debtors' proposal expressly provides that the limited partners are entitled to the entire proceeds of the YSL Project after unsecured creditors are paid. Their interests are affected by the determination of CBRE's claim. This alone should have afforded them standing to make submissions on CBRE's appeal. The Motion Judge erred in law by concluding that they lacked standing.

The Motion Judge erred in law by concluding that the YongeSL LPs were not "aggrieved"

29. The YongeSL LPs' primary position was that they had standing to oppose CBRE's appeal and that the Proposal Trustee's purported settlement of the appeal was not determinative of the appeal. In the event that it was necessary, however, they brought a motion under s.37 of the *BIA* for the purpose of challenging the Proposal Trustee's decision to settle the appeal.

30. Without deciding whether the s.37 application was necessary at all, the Motion Judge concluded that the YongeSL LPs were not "persons aggrieved" within the meaning of s.37. The Motion Judge erred in law in his interpretation of that section, which provides that,

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

31. If it were necessary to bring a s.37 motion to challenge the Proposal Trustee's proposed settlement of the appeal, the YongeSL LPs were proper persons to make that challenge. The definition of "person aggrieved" should be afforded a wide scope and not be subjected to a restrictive interpretation. While such a person cannot be a "mere busybody", they include a person who has a genuine grievance because a decision of a trustee has prejudicially affected their interests. The YongeSL LPs are not mere busybodies. They have a real economic interest in the Debtors' estates. The Motion Judge's interpretation of s.37 was unduly narrow and constituted an error of law.

32. The Motion Judge held that the YongeSL LPs were not "persons aggrieved" because their complaint boiled down to the fact that their ultimate potential recovery would be reduced if CBRE's claim were allowed. The Motion Judge concluded that that was not sufficient to make them "persons aggrieved" because that would mean that every creditor would have standing to challenge the treatment of another creditor's claim in a bankruptcy, a notion which the Motion Judge rejected. This conclusion was an error of law.

33. A mechanism already exists for creditors to challenge the treatment of other creditors' claims. If a trustee does not disallow a claim, the creditors can apply for that relief under section 135(5). Section 37 is simply a broader, more flexible remedy for *any person*, including an equity claimant, who is aggrieved by a decision of a trustee to challenge that decision.

34. Courts have accepted that shareholders can be aggrieved persons. There is no reason to treat limited partners such as the YongeSL LPs differently.

35. Parties who have claims to the proceeds of an insolvent estate, as the YongeSL LPs do, have standing under s.37. It was an error of law for the Motion Judge to conclude otherwise.

The Motion Judge erred in allowing CBRE's appeal and claim

36. The Motion Judge committed a palpable and overriding error in allowing CBRE's appeal and claim. There was inadequate evidence before the Motion Judge such that CBRE's claim could succeed.

37. In the summary process set out in s.135 of the *BIA*, CBRE is expected to put its best foot forward, just as if it were seeking summary judgment. A creditor is expected to adduce all evidence it has in support of its claim. That evidence must be detailed and particularized as opposed to vague, unparticularized pieces of evidence, which is really no evidence at all. The fact that a summary process is to be used does not call for a lower standard of proof than used in a fuller process.

38. CBRE adduced only vague, unparticularized and hearsay pieces of evidence. The central issue on CBRE's appeal was whether negotiations between the Debtors and Concord took place during the Holdover Period. CBRE's evidence on this issue was limited to the two sentences reproduced above.

39. The Motion Judge's review of the merits of CBRE's claim was limited to mere reference to the affidavits of Mr. Gallagher and Mr. Dowbiggin.

40. It cannot be that such evidence is enough for a creditor to prove a claim in an insolvency proceeding. The Motion Judge committed a palpable and overriding error in accepting that such evidence could prove CBRE's claim.

Basis for the Court of Appeal's Jurisdiction

41. An appeal lies to the Court of Appeal from the Order pursuant to s.183(2) of the *BIA* and s.193(b) and (c), or alternatively (e), of the *BIA*.

42. Pursuant to s.193(b) of the *BIA*, the YongeSL LPs may appeal the Order without leave. The Order is likely to affect other cases of a similar nature in this proceeding:

(a) the YongeSL LPs have challenged the Proposal Trustee's decisions in respect of the Harbour claim. The limited partners might challenge the Proposal Trustee's ultimate decision in respect of the Athanasoulis claim or decide to participate in any appeal of such decision (eg if Ms. Athanasoulis appeals). The Motion Judge's conclusions that the YongeSL LPs lack standing affect those cases; and

(b) further, the Motion Judge's finding that the vague statements made by CBRE's deponents were sufficient to prove a claim sets too low a bar and affects the quality of evidence necessary for proof of the Harbour and Athanasoulis claims.

43. Pursuant to s. 193 (c) of the BIA, the YongeSL LPs may appeal the Order without leave. The property involved in the appeal exceeds ten thousand dollars in value. CBRE's claim is for approximately $1.2 million. The property involved in the appeal meets the statutory minimum.

44. Alternatively, if leave to appeal is required, the YongeSL LPs seek leave to appeal pursuant to s.193(e) of the *BIA* and ask that the motion for leave be heard at the same time as the appeal. This appeal involves matters of general importance to bankruptcy matters because it involves legal questions of (a) whether equity claimants have standing in bankruptcy

matters generally, (b) whether they have standing as "persons aggrieved" by an act or decision of a trustee; and (c) what minimum quality of evidence is required to prove a claim. This proceeding would not be unduly delayed by this appeal. The Debtors' only asset has been liquidated – they will have no ongoing business. Determinations of the outstanding claims described herein, particularly the Athanasoulis claim, will not be unduly delayed by this appeal.

December 2, 2022

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Lawyers for CBRE

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

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

Court File No. BK-21-02734090-0031
Court of Appeal No. COA-22-CV-0451

COURT OF APPEAL FOR ONTARIO

NOTICE OF APPEAL

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This is Exhibit “J” referred to in the Affidavit of Ashley McKnight sworn January 4, 2023.

Commissioner for Taking Affidavits (or as may be)

XIN LU (CRYSTAL) LI

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: BK-21-02734090-0031 **DATE:** 21 December 2022

NO. ON LIST: 2

TITLE OF PROCEEDING: YSL RESIDENCES INC., et al

BEFORE JUSTICE: MADAM JUSTICE KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
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For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
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MARK DUNN *(counsel)*	Maria Athanasoulis	mdunn@goodmans.ca
SHAUN LAUBMAN *(counsel)*	Limited Partners, 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc.	slaubman@lolg.ca

ENDORSEMENT OF JUSTICE KIMMEL:

1. My November 1, 2022 endorsement in this matter contemplated that there would be a procedure put in place by the Proposal Trustee to finally determine the claim filed by Maria Athanasoulis. The parties with an economic interest in this determination, Ms. Athanasoulis and the Limited Partners, do not agree on the procedure, nor have they accepted the compromise procedure that the Proposal Trustee has suggested.
2. The Proposal Trustee thus seeks to schedule a motion for directions from the court in respect of the proposed procedure that it suggests, in the context of which the interested stakeholders will be given the opportunity to put forward their respective positions.
3. The parties agree that a half-day will be sufficient time for this motion and it has been scheduled to be heard on January 16, 2023.
4. The parties who are participating in this motion shall work out a timetable for the exchange of all materials to be relied upon for this motion. That schedule shall ensure that all materials have been served, filed and uploaded onto CaseLines by no later that noon on Friday January 13, 2023.

KIMMEL J.

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

Court File No. BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

AFFIDAVIT OF ASHLEY MCKNIGHT
SWORN JANUARY 4, 2023

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TAB 5

Court File No. BK-21-02734090-0031

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

IN THE MATTER OF 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

SUPPLEMENTAL AFFIDAVIT OF EMILY SEABY
(Sworn January 12, 2023)

I, Emily Seaby of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a legal assistant with the law firm of Goodmans LLP ("**Goodmans**"), solicitors for Maria Athanasoulis, a creditor in this matter, and as such have knowledge of the matters to which I hereinafter depose, unless otherwise indicated.

2. Attached as Exhibit "A" is a copy of the initial document request sent to Matthew Milne-Smith on April 13, 2022.

3. Attached as Exhibit "B" is a copy of the further document request sent to Harry Fogul and Jeff Larry on May 12, 2022.

4. Attached as Exhibit "C" is a copy of the Letter from counsel for Maria Athanasoulis sent to Robin Schwill, Matthew Milne-Smith and Chenyang Li on November 21, 2022.

SWORN before me at the City of Toronto, in the Province of Ontario, on January 12, 2023.

Commissioner for Taking Affidavits
(or as may be)

Emily Seaby

This is **Exhibit "A"** referred to in the
Affidavit of Emily Seaby
sworn before me this
12th day of January 2023

A Commissioner for Taking Affidavits

Stothart, Sarah

From: Dunn, Mark
Sent: Wednesday, April 13, 2022 7:26 AM
To: Milne-Smith, Matthew
Cc: Li, Chenyang; Schwill, Robin; Stothart, Sarah
Subject: YSL Arbitration
Attachments: Fwd: bcIMC deal has closed

Mathew,

I am writing to request preliminary production of certain documents, which will assist Ms. Athanasoulis in drafting her pleading. These are primarily documents referenced in the motion materials relating to the proposal, but redacted in the copies provided to us.

Since the sale has closed, we do not believe that there is any need to seal the unredacted copies of the following court material:

- The *pro forma* referenced at exhibit X to the Affidavit of Lue (Eric) Li sworn May 3, 2021 (the "Li Affidavit");
- Copies of the appraisals referenced in Exhibits "CC" to the Li Affidavit
- Copies of the cost documents attached as Exhibit "DD" to the LI Affidavit;
- Copies of the CBRE appraisal effective July 30, 2019 (which may also be included in Exhibit CC above);
- Copies of the CBRE appraisal dated March 16, 2021 and referenced in the Trustee's Third Report.

In addition, I am forwarding an e-mail from Dale & Lessman from August 4, 2017 when the buyout of BcIMC's interest in the YSL Project occurred. We would appreciate production of the trust ledger. This is required to assess the profits earned on the project.

To be clear, this is a preliminary document request for documents that will assist with pleading the case. We expect that a process for more complete document disclosure (although still tailored to make it as efficient as possible) will be incorporated into the timeline for the arbitration.

Regards,
Mark

Mark Dunn
He/Him
Goodmans LLP

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This is **Exhibit "B"** referred to in the
Affidavit of Emily Seaby
sworn before me this
12th day of January 2023

A Commissioner for Taking Affidavits

Stothart, Sarah

From: Stothart, Sarah
Sent: Thursday, May 12, 2022 9:27 AM
To: 'hfogul@airdberlis.com'; 'jeff.larry@paliareroland.com'
Cc: Dunn, Mark; 'Milne-Smith, Matthew'; Li, Chenyang
Subject: Athanasoulis v. YSL - Document Request

Good morning,

As you know, we are counsel to Maria Athanasoulis in her claim against YSL (as represented by the Proposal Trustee) for damages for breach of contract. The claim is being adjudicated in an arbitration proceeding that was bifurcated into two stages. Since Ms. Athanasoulis was successful at the liability stage, the parties are now moving forward to the quantification stage to determine the quantum of damages to which Ms. Athanasoulis is entitled.

The quantification stage involves consideration of many issues relating to YSL's actual profits and the profits it would have earned in a "but-for" world. Determination of these issues will require consideration of documents and records that are within the possession and control of YSL, Cresford and Mr. Casey.

The Trustee has advised us that it does not have access to these documents and records.

Accordingly, please produce, by May 19, 2022, the following documents that are relevant to Ms. Athanasoulis' claim:

1. Financial statements for YG Limited Partnership and YSL Residences Inc. (collectively, "YSL");
2. Financing agreements, in draft or final form, relating to the Yonge Street Living Residences condominium tower at Yonge and Gerrard (the "YSL Project");
3. General ledger for YSL;
4. Bank statements for YSL;
5. All pro formas prepared on the YSL Project;
6. Reports or appraisals prepared by any third party, in draft or final form, that comment upon or review the financial status of the YSL Project, including at least:
    a. Altus Group cost reports
    b. CBRE appraisals
7. Documents relating to any potential sale processes or offers to purchase the YSL Project or parts thereof (including the two properties adjacent to the YSL Project);
8. Documents relating to any equity investments in the YSL Project, including the total amount invested by the LPs and Fei Han and when it was invested;
9. Documents relating to the purchase of BCIMC's interest in the YSL Project, including the trust ledger prepared in connection with the sale and the refinancing together with documents showing how any excess funds were distributed;
10. Documents relating to the $20 million loan agreement entered into between OTB Capital Inc. ("OTB"), YSL, 33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership on December 20, 2017;
11. Documents relating to the $10 million loan issued by OTB to YSL on December 17, 2019;
12. Documents relating to the construction financing agreement between Otera Capital and YSL and its termination;
13. Documents relating to any payments made by YSL or any entities related to Concord to Cresford, Mr. Casey, or any of Cresford's project companies;
14. Documents relating to the lending facility extended by Westmount to YSL, including draw information;
15. Documents relating to the vendor take-back mortgage advanced by BCIMC to YSL;
16. Documents relating to advances made by Timbercreek to YSL, and how they were used;

17. Documents provided to the Trustee to show that Cresford/Casey invested $38.2 million in YSL, as alleged in the *BIA* proceeding; and
18. Documents showing all payments from Concord (or any related entities) to Mr. Casey, Cresford, or any related entities in connection with the YSL *BIA* proceeding including, without limitation, documents relating to the payment disclosed to the court.

Thank you,

Sarah Stothart
(she/her)
Goodmans LLP

416.597.4200
sstothart@goodmans.ca
goodmans.ca

This is **Exhibit "C"** referred to in the
Affidavit of Emily Seaby
sworn before me this
12th day of January 2023

A Commissioner for Taking Affidavits

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Barristers & Solicitors

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November 21, 2022

VIA EMAIL

Our File No.: 200116

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto ON M5V 3J7

Attention: Robin Schwill, Matthew Milne-Smith and Chenyang Li

Dear Sirs/Mesdames:

Re: Claim Determination Process for the Claim of Maria Athanasoulis

We are writing in respect of the determination of Ms. Athanasoulis' claim by the Proposal Trustee. We understand that the Proposal Trustee is currently evaluating the appropriate procedure to follow to determine Ms. Athanasoulis' claim in light of the Endorsement of Justice Kimmel dated November 1, 2022 (the "Endorsement").

The following sets out Ms. Athanasoulis' position in respect of the appropriate procedure.

Clarity is critical: the claim determination process should be approved by the Court

The Proposal Trustee has made significant efforts to reach procedural consensus with stakeholders, but those efforts have unfortunately not yielded certainty with respect to how the claim will be determined. This matter has been significantly delayed because stakeholders objected to the determination procedure after it had advanced significantly. This should not be allowed to happen again. We therefore respectfully submit that whatever process the Proposal Trustee decides to follow should be incorporated into a Claims Procedure Order obtained on notice to the full service list. This will allow the process to proceed smoothly once settled.

Phase one of the Arbitration is binding on the Proposal Trustee

As a preliminary matter, we require confirmation that the determinations made at the first phase of the arbitration before Mr. Horton (the "Arbitration") bind the Trustee and the Debtors. If there is a dispute about this point then we need to know immediately, so that we can take the appropriate steps to address it.

That said, we do not believe there is (or should be) any dispute on this point. The Proposal Trustee executed the Arbitration Agreement with Mr. Horton, and proceeded with the Arbitration on notice to all stakeholders. Justice Kimmel noted that the necessary parties and information were before

Mr. Horton to allow him to make determinations about the existence of the oral profit sharing agreement and the finding of constructive dismissal. She also noted that deviation from the results of an arbitration that the Trustee participated in would be inconsistent with the Arbitration Agreement and the *Arbitration Act*, 1991, S.O. 1991, c. 17. Finally, Justice Kimmel found that the Phase One arbitration findings would be "inputs" and the "factual predicate" on which Ms. Athanasoulis' claim could be determined. (See generally, paragraphs 49-51, 54, and 93-94 of the Endorsement.)

In light of the foregoing, we ask the Proposal Trustee to confirm that the holdings made by Mr. Horton will be taken as binding inputs in the determination of Ms. Athanasoulis' claim. Any challenge to the results of the Arbitration ought to be brought forward now or it should not be brought forward at all. This will allow all parties to understand what facts remain to be determined and what facts can be challenged in the Proposal Trustee's process.

As you know, Ms. Athanasoulis takes the position that Phase 1 of the Arbitration is binding on the LPs as well, and that certain issues they have raised are *res judicata* because they could have been raised at the first phase of the Arbitration. We understand that the LPs dispute this position.

The appeal procedure should be determined as part of the claim procedure

In its Sixth Report, the Proposal Trustee confirmed that an appeal would be the "inevitable result" of the Proposal Trustee's allowance or disallowance of Ms. Athanasoulis' claim (see paragraph 6.0.14). This conclusion is entirely correct. Ms. Athanasoulis takes the position that she is entitled to all of the funds remaining for creditors. The LPs assert that Ms. Athanasoulis is entitled to nothing, and even oppose any payment on her wrongful termination claim.

Given the likelihood of an appeal, all parties should know in advance whether the appeal will proceed as a true appeal or an appeal *de novo*. The claims process will be more efficient if all involved know from the outset what procedure will be followed and can make strategic decisions with a complete understanding of that procedure.

An appeal should proceed *de novo*

We respectfully submit that any appeal of Ms. Athanasoulis' claim should proceed *de novo*. In the circumstances of this case, limiting the parties to a true appeal would work an injustice.

An appeal *de novo* is appropriate given the nature of the claim and the procedural history to date. Ms. Athanasoulis advances a complex commercial claim that turns on a number of factual and legal disputes. Evidence is required to make the appropriate determination. In such circumstances, Canadian courts have often proceeded by way of an appeal *de novo*.

The Proposal Trustee has already accepted that a full hearing, where all affected parties have an opportunity to present evidence, is the appropriate procedure for resolving Ms. Athanasoulis' claim. This is the basis on which it entered into the Arbitration Agreement. The Arbitration cannot

proceed, but the merits of a full evidentiary hearing have not changed. An appeal *de novo* would provide many of the procedural advantages offered by the Arbitration, without the technical frailties that prevented the Arbitration from proceeding. It also offers a transparent, expeditious and efficient manner for evaluating Ms. Athanasoulis' claim and any challenges to it.

In addition, the procedural history of this matter provides further justification for an appeal *de novo*. The Proposal Trustee participated in the arbitration process as Ms. Athanasoulis' adversary. Among its various positions, it urged Mr. Horton to find that there were no profits, and that Ms. Athanasoulis' claim should be dismissed. Mr. Horton decided that the arguments raised by the Proposal Trustee were damages arguments that ought to be determined in the second phase of the Arbitration.

The Proposal Trustee is, as a result of the Endorsement, effectively changing from an advocate to an adjudicator. It is therefore tasked with deciding whether the very arguments that it advanced at phase 1 of the Arbitration and in subsequent informal discussions with counsel are valid. Limiting Ms. Athanasoulis to a true appeal, in these circumstances, would be an injustice. This is not a criticism. Ms. Athanasoulis agreed to the arbitration process and the Proposal Trustee's role in it. The Proposal Trustee made arguments based on its assessment of the facts and the law. Its role changed because of an unforeseen challenge that it opposed. But the fact remains that the Proposal Trustee's prior positions put it in a very difficult position to evaluate Ms. Athanasoulis' claim and any evidence delivered in support of it in a neutral manner.

In our respectful submission, the best way to address this difficulty is to allow an appeal *de novo*.

If an appeal proceeds *de novo* then there is no need for further valuation evidence

Assuming that there will be an appeal *de novo*, there is no need at this stage for Ms. Athanasoulis to produce valuation evidence on the damages due to her. The positions articulated to date by the Proposal Trustee for not yet allowing Ms. Athanasoulis' claim do not relate to the value of the YSL Project in December 2019 (when Ms. Athanasoulis says damages should be calculated) or any other time. There is therefore little reason for either Ms. Athanasoulis or the Proposal Trustee to spend time and money on valuation evidence that has little or no likelihood of affecting the Proposal Trustee's determination.

The LPs should advance their own issues and should serve evidence as soon as possible

The LPs have raised a number of issues, and previously advised that they intended to bring a motion to determine those issues, whether or not the Arbitration was proceeding. The LPs have now said that they may not bring their motion, depending on what process the Proposal Trustee adopts to resolve Ms. Athanasoulis' claim.

In our view, the issues raised by the LPs do not relate to whether Ms. Athanasoulis' claim is quantified, allowed or disallowed. Ms. Athanasoulis asserts a claim against the Debtors. The LPs

are not parties to the contract that the Debtors breached. They have no independent evidence about the value of the YSL Project or whether it earned profits, on the date of breach or any other date.

The LPs argue, in effect, that Ms. Athanasoulis has a direct legal relationship with them and is subordinated to them or owes damages to them as a result of that relationship.

Pursuant to section 135(1) of the BIA, the Proposal Trustee is tasked with allowing or disallowing Ms. Athanasoulis' claim. It is not tasked with assessing claims made by one stakeholder against another. Those claims should be litigated between Ms. Athanasoulis and the LPs, without the Proposal Trustee's involvement.

Ms. Athanasoulis will submit further evidence of actual profit

Ms. Athanasoulis has consistently alleged that YSL earned a profit, as that term is defined in Mr. Horton's decision. We intend to submit evidence to support that position, and believe that this aspect of Ms. Athanasoulis' claim could be determined by the Proposal Trustee independently of its determination on the balance of the claim. We would be pleased to discuss with you a schedule for the submission of evidence, and for the Proposal Trustee to evaluate the evidence and conduct the necessary evaluation.

In order to facilitate an efficient resolution of this issue, we respectfully request that the Proposal Trustee confirm that its current position on actual profit is accurately summarized in the mediation brief it submitted to Justice Cunningham. This will allow us to address a calculation which was presumably calculated based on information provided by the Debtors.

There *may* be an opportunity for a preliminary determination of certain threshold issues

The Proposal Trustee and the LPs have each raised alleged issues that could potentially be determined by a preliminary motion. These issues are:

- Whether Ms. Athanasoulis' damages should be calculated based on the value of the Profit Share at the time of termination (as Ms. Athanasoulis says) or at the time of trial (as the Proposal Trustee seems to believe);

- Whether Ms. Athanasoulis' claim is in the nature of debt or equity or otherwise subordinate to the claims advanced by the LPs.

To be clear, we are not conceding that any preliminary motion is appropriate. The parties would need to cooperate to ensure that the motion can be heard in a timely way, and that the issues can be fairly determined by way of summary motion. This would require agreement on a defined set of issues and on the evidence that will be required to determine them.

Importantly, we do not believe that a preliminary motion is possible if there are credibility disputes between Ms. Athanasoulis and the LPs. We have asked for the information required to assess this issue, but have not yet received it.

Our client is also not conceding that the result of such a motion would be dispositive. It remains Ms. Athanasoulis' position that the YSL Project earned an actual profit, as the term was defined in Mr. Horton's decision, which can and should be determined independently on any determination on the legal issues noted above.

We would be pleased to discuss the foregoing at your convenience.

Yours truly,

Goodmans LLP

Mark Dunn
MD/es
7321225

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

Court File No: BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

SUPPLEMENTAL AFFIDAVIT OF EMILY SEABY
(Sworn January 12, 2023)

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Lawyers for Maria Athanasoulis

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

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

Court File No.: BK-21-02734090-0031
Court of Appeal No.: COA-23-CV-0288

COURT OF APPEAL FOR ONTARIO

EXHIBIT BOOK of the APPELLANTS

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