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

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

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

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

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

Responding Factum of the "Class A LPs"

(YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc., 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc.)

(Ms. Athanasoulis' Appeal from the Disallowance of her Profit-Sharing Claim)

November 22, 2023

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PART I - OVERVIEW

1. Ms. Athanasoulis' claim to a share in the profits of the YG Limited Partnership (the "**Profit-Sharing Claim**") is a claim for a benefit flowing from a breach of fiduciary duty. It would be inequitable to enforce it for that reason, in addition to the reasons articulated by the Proposal Trustee. Ms. Athanasoulis' appeal should be dismissed.

2. There is no controversy that the YSL Project ended in failure. It was a "hole in the ground" when YG Limited Partnership and YSL Residences Inc. (the "**Debtors**") were forced to declare their insolvency and when the YSL Project was sold to the Project Sponsor. Despite this failure, Ms. Athanasoulis claims an entitlement to a share of the partnership's theoretical profits in an amount to be determined at a subsequent hearing, if necessary, but which she values as at least $7.9 million.[1]

3. Ms. Athanasoulis' claim, if allowed, would leave her with a windfall taken directly from the pockets of the holders of Class A Preferred limited partnership units (the "**Class A LPs**") in the YG Limited Partnership. There is no chance of the Class A LPs recovering all of their investment or any of their guaranteed return on investment in this proceeding. The Profit-Sharing Claim, if allowed, would mean the Class A LPs lose their investments from a project that Ms. Athanasoulis incredibly asserts was "profitable".

4. In addition to the flaws outlined by the Proposal Trustee in its factum, Ms. Athanasoulis' Profit-Sharing Claim fails because it is predicated on an unenforceable agreement. The secret, unwritten, agreement that Ms. Athanasoulis alleges entitles her to a share of profits from a

[1] Factum of Maria Athanasoulis dated October 27, 2023, at paras 121 and 135.

partnership in advance (and, in the result, to the exclusion) of any distribution to the limited partners contravenes basic tenets of partnership law and fiduciary duties as well as the terms of the governing limited partnership agreement. Ms. Athanasoulis' participation in misrepresentations made to the Class A LPs about the priority of repayment from the Project gives rise to further grounds to declare it as unenforceable or to set it aside. Courts have repeatedly rejected attempts by fiduciaries such as Ms. Athanasoulis to profit from secret self-dealing transactions such as her Profit-Sharing Claim.

5. The Class A LPs request that this Court uphold the Proposal Trustee's determination of Ms. Athanasoulis' claim and dismiss the appeal.

PART II - BACKGROUND FACTS

i. The YSL Project

6. The debtors YG Limited Partnership and YSL Residences Inc. (the "**Debtors**") were members of the Cresford Group, a condominium developer. The Debtors controlled the "**YSL Project**", a condominium development near Yonge Street and Gerrard Street in Toronto.

7. The Debtor YG Limited Partnership is governed by an Amended and Restated Limited Partnership Agreement (the "**LP Agreement**"). The general partner of YG Limited Partnership is 9615334 Canada Inc. (the "**GP**").

8. The Class A LPs collectively advanced $14.8 million to the Debtors in exchange for Class A Preferred units in YG Limited Partnership.

ii. Ms. Athanasoulis

9. Maria Athanasoulis was a principal and the "face" of the Cresford Group.[2] She was the President and Chief Operating Officer of the Cresford group of companies, including the Debtors, and held a significant role in Cresford's management.[3]

iii. The Profit-Sharing Claim

10. The Proposal Trustee accepted that Ms. Athanasoulis had an agreement with the Debtors (the "**Profit-Sharing Agreement**") pursuant to which she was entitled to 20% of the profits of the Debtors.[4] The Class A LPs dispute that Ms. Athanasoulis could have an enforceable agreement with the Debtors, as she alleges.

11. Ms. Athanasoulis alleges that her entitlement to the YSL Project's profits crystallized as a debt when her employment was terminated. She alleges that,

(a) prior to the termination of her employment, she "expected that my payment would be calculated *after* accounting for payment to" the Class A LPs,[5] however,

(b) as a result of her termination, there was "a practical change to what would otherwise have occurred" and she became entitled to be paid **before** the Class A LPs.[6] She says that

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[2] Partial Award of William G. Horton dated March 28, 2022 ("**Arbitration Award**") at para 72, Motion Record of Maria Athanasoulis ("**MR**"), Volume 3 of 10, Tab 2, p. 384.

[3] Affidavit of Maria Athanasoulis sworn May 5, 2023 ("**Athanasoulis Affidavit**") at paras 1 and 14, MR, Volume 1 of 10, Tab 4, pp. 88 and 91.

[4] Notice of Disallowance dated August 10, 2023 (the "**Disallowance**"), p. 2, MR, Volume 1 of 10, Tab 2, p. 30.

[5] Athanasoulis Affidavit at paras 81-82 and 88-89 (*emphasis in original*), MR, Volume 1 of 10, Tab 4, pp. 105-107; Submissions of Maria Athanasoulis – Response to Trustee's Draft Notice of Disallowance ("**Athanasoulis Submissions**") at paras 156-157 and 159, MR, Volume 2 of 10, Tab 5, pp. 244-246.

[6] Athanasoulis Submissions at paras 161-163, MR, Volume 2 of 10, Tab 5, p. 246.

her admissions that repayments to the Class A LPs "were treated as expenses that would be repaid prior to the calculation of [her] payment" were true only "if YSL had not terminated me and then used the Proposal to secure funds for Cresford".[7]

iv. Ms. Athanasoulis' Representations to the Class A LPs

12. Ms. Athanasoulis "cultivated relationships" with investors and real estate agents and leveraged those relationships to obtain financing for the YSL Project. Ms. Athanasoulis, directly or through brokers, actively solicited investments from the Class A LPs and explained how the proceeds of the YSL Project would be distributed.[8]

13. The explanation given to investors was that, after payment of project expenses, the profits of the YSL Project would be distributed first to external lenders, then to the Class A LPs on account of their principal and return on investment, then to Cresford (the "**Waterfall**"). The Waterfall was included in presentations Ms. Athanasoulis gave to the Class A LPs.[9]

14. For example, in March 2017, Ms. Athanasoulis met with Eric Li of YongeSL Limited Partnership at Cresford's office. During the meeting, Ms. Athanasoulis confirmed that the investors in the YSL Project would receive their full return of principal, plus return thereon. It was so important to the Class A LPs that they be repaid before any amount was paid to Cresford that

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[7] Athanasoulis Affidavit at para 89, MR, Volume 1 of 10, Tab 4, p. 107.

[8] Athanasoulis Affidavit at paras 21-24 and 29, MR, Volume 1 of 10, Tab 4; Affidavit of Lue (Eric) Li sworn December 20, 2022 (the "**Li Affidavit**") at paras 3-11, Joint Brief to the Proposal Trustee, Tab C – included at Exhibit "B" to the Affidavit of Alvin Hui sworn October 16, 2023 (the "**Hui Affidavit**"), Responding Record of the Proposal Trustee, KSV Restructuring Inc. ("**RMR**"), Tab B, pp. 154-156; Affidavit of Yuan (Michael) Chen sworn December 14, 2022 (the "**Chen Affidavit**") at paras 2-8, Joint Brief to the Proposal Trustee, Tab D – included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, pp. 489-491.

[9] Athanasoulis Affidavit at paras 30, 32 and 34, MR, Volume 1 of 10, Tab 4, pp. 95-96.

the LP Agreement was amended to provide that no class of limited partner could be created in priority to the Class A LPs without their unanimous consent (s.10.14(d) of the LP Agreement).[10]

15. On June 1, 2017, Ms. Athanasoulis met with Michael Chen of E&B Investment Corporation at Cresford's office. During the meeting, Mr. Chen asked how the proceeds of the YSL Project would be distributed. Ms. Athanasoulis told him that she would email him a document containing that information, which she did. That document confirmed the Waterfall.[11]

16. On June 13, 2017, Ms. Athanasoulis sent the investor presentation to Paul Lam, the agent for 2504670 Ontario Inc.[12] The next day, she and Mr. Casey met with the principals of 2504670 Ontario Inc., Anthony Szeto and Lorraine Ng. Ms. Athanasoulis and Mr. Casey confirmed the Waterfall and that the investors would be paid before Cresford received any distributions.[13]

17. The Waterfall became a material term of the Class A LPs' subscription agreements[14] and was reflected in the LP Agreement (section 6.3(b)). The Class A LPs relied on Ms. Athanasoulis' representations when making their advances.[15]

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[10] Li Affidavit at paras 6-8 and 14, Joint Brief to the Proposal Trustee, Tab C - included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, pp. 154-156.

[11] Chen Affidavit at paras 6-8, Joint Brief to the Proposal Trustee, Tab D – included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, pp. 490-491; June 1, 2017, email from Maria Athanasoulis to Michael Chen, with attached investor presentation – Exhibit "A" to the Chen Affidavit, pp. 494-508.

[12] June 13, 2017 email from Howard Ng to Paul Lam copying Maria Athanasoulis, with attached investor presentation, Joint Brief to the Proposal Trustee, Tab E – included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, p. 597.

[13] Affidavit of Paul Lam sworn November 28, 2022, para 8, Joint Brief to the Proposal Trustee, Tab F – included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, p. 615.

[14] Subscription Agreement of 2504670 Canada Inc, Joint Brief to the Proposal Trustee, Tab G – included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, p. 1019.

[15] Li Affidavit at paras 19-21, Joint Brief to the Proposal Trustee, Tab C - included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, pp. 157-158; Chen Affidavit at paras 15-17, Joint Brief to the Proposal Trustee, Tab D – included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, pp. 491-492.

18. There was no mention in the Waterfall that Cresford or any of its representatives, including Ms. Athanasoulis, would receive a distribution of the profits of the YSL Project in priority to the Class A LPs, nor did Ms. Athanasoulis discuss that with the Class A LPs.

19. Ms. Athanasoulis never told the Class A LPs that she claimed any entitlement to the proceeds of the YSL Project, let alone an entitlement that might rank ahead of their entitlement. She did not "because [she] did not at that time have any idea that it might one day be relevant" to the Class A LPs.[16] She justifies her omission by noting that the Class A LPs did not inquire whether she had a secret agreement with Cresford to siphon profits from the YSL Project.[17]

v. The LP Agreement

20. Pursuant to section 6.3(b) of the LP Agreement, 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.[18] The preferred return was up to 100% of the Class A LPs' investment. In total, the Class A LPs expected (and were told by Ms. Athanasoulis and others at Cresford to expect) to be paid $29.6 million.

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[16] Athanasoulis Affidavit at para 48, MR, Volume 1 of 10, Tab 4, p. 99; Submissions of Maria Athanasoulis – Response to Trustee's Draft Notice of Disallowance ("**Athanasoulis Submissions**") at paras 19 and 49, MR, Volume 2 of 10, Tab 5, pp. 201 and 210.

[17] Athanasoulis Affidavit at para 35, MR, Volume 1 of 10, Tab 4, p. 96.

[18] Amended and Restated Limited Partnership Agreement dated August 4, 2027 ("**LP Agreement**") at s. 6.3(b), Joint Brief to the Proposal Trustee, Tab A - included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, p. 104.

21. The LP Agreement strictly prohibits non-arm's length transactions. Section 3.6(b) prevents the GP from entering into any contract with a "Related Party"[19] other than on market terms.[20] Ms. Athanasoulis is such a Related Party because she was a senior officer of the Cresford companies.

22. The LP Agreement did disclose other agreements between Cresford companies and YG Limited Partnership, none of which were for a share of profits that took priority to the Class A LPs' rights.[21]

A. Procedural History

i. The Proposal

23. Pursuant to the Debtors' court-sanctioned proposal (the "**Proposal**"), the YSL Project was transferred to Concord Properties Developments Corp. ("**Concord**") in exchange for Concord assuming the Debtors' secured liabilities and paying $30.9 million to the Proposal Trustee. From that pool, unsecured creditors will receive up to 100% of their claims.

24. The Proposal was only approved after an earlier proposal was defeated due to the Class A LPs' opposition.[22]

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[19] The LP Agreement defines "Related Party" as including any Affiliates of the GP and any of their respective directors, officer, employees and shareholders. The term "Affiliates" is defined to include any entity directly or indirectly controlling, controlled by, or under common control with the GP.

[20] LP Agreement at s. 1.1 "Affiliate" and "Related Party" and 3.6(b), Joint Brief to the Proposal Trustee, Tab A - included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, pp. 85, 88 and 93-94.

[21] For example, the Construction Management Agreement, Development Management Agreement and Sales Management Agreement described in the Amended and Restated Limited Partnership Agreement, effective August 4, 2017, Joint Brief to the Proposal Trustee, Tab A – included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, pp. 86 and 88.

[22] *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, per Dunphy J.

25. Article 5.05 of the Proposal expressly provides that the Class A LPs are entitled to any residue of the Proposal after final distributions to creditors.[23]

26. The Proposal Trustee conducted a claims process. Only the Profit-Sharing Claim remains outstanding. Subject to the determination of that claim, $13.8 million will be available for distribution to the Class A LPs.[24]

ii. The Arbitration and the Court's directions to the Proposal Trustee

27. The Proposal Trustee and Ms. Athanasoulis agreed to a bifurcated arbitration (the "**Arbitration**") of Ms. Athanasoulis' claim, without involvement of the Class A LPs or Concord.[25]

28. The Class A LPs were not invited to participate in the arbitration and were not informed about its scope until after a decision was released in the first phase of the Arbitration. This Court has already found that the Class A LPs "were left out of the process" and "cannot be precluded from raising the legal objections" to the arbitration process.[26]

29. This Court subsequently directed that the Proposal Trustee determine the Profit-Sharing Claim. Ms. Athanasoulis' objections about the Proposal Trustee's roles in the arbitration and then determination of her claim have already been heard and rejected by this Court.[27] She did not appeal that order.

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[23] Fourth Report to Court of KSV Restructuring Inc. as Proposal Trustee of YG Limited Partnership and YSL Residences Inc. dated July 15, 2021 (the "**Fourth Report**"), Appendix B, Amended Proposal #3, article 5.05, MR, Volume 10 of 10, Tab 27, p. 2145.

[24] Disallowance dated August 10, 2023 ("**Disallowance**"), p. 4, MR, Volume 1 of 10, Tab 2, p. 32.

[25] *YG Limited Partnership (Re)*, 2022 ONSC 6138 at paras 12 - 14, 48, 81 and 83, per Kimmel J; *YG Limited Partnership (Re)*, 2023 ONSC 4638 at para 5, per Kimmel J.

[26] *YG Limited Partnership (Re)*, 2022 ONSC 6138 at paras 81 and 83, per Kimmel J.

[27] *YG Limited Partnership (Re)*, 2023 ONSC 4638 at para 33, per Kimmel J.

30. As part of its determination, the Proposal Trustee was entitled to take into account,

(a) the "inputs" from the Arbitration,[28] being the information put before the arbitrator, including admissions made by Ms. Athanasoulis, and

(b) further evidence in the form of (i) an examination of Ms. Athanasoulis conducted by the Proposal Trustee, and (ii) submissions from, and evidence adduced by, Ms. Athanasoulis and the Class A LPs.[29]

31. Pursuant to the Disallowance, the Proposal Trustee disallowed the Profit-Sharing Claim.[30] Ms. Athanasoulis appeals from that determination.

PART III - ISSUES & ARGUMENT

A. Position of the Class A LPs

32. The Class A LPs agree that Ms. Athanasoulis' Profit-Sharing Claim should be disallowed and support the arguments made by the Proposal Trustee in its factum.

33. In addition, the Profit-Sharing Claim should be disallowed because it is unenforceable. It is an advantage secured by Ms. Athanasoulis flowing from the breaches of fiduciary duty owed by the GP and Ms. Athanasoulis to the Class A LPs. The Profit-Sharing Claim also violates the LP Agreement and contradicts the specific representations made by Ms. Athanasoulis to the Class A LPs for the purpose of inducing them to make advances to the Debtors.

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[28] *YG Limited Partnership (Re)*, 2022 ONSC 6138 at para 49, per Kimmel J.

[29] *YG Limited Partnership (Re)*, 2023 ONSC 4638 at para 61, per Kimmel J.

[30] Disallowance, pp. 2-6, MR, Volume 1 of 10, Tab 2, pp. 30-34.

B. Context for this Appeal

i. Standard of Review

34. This appeal is a "true appeal" of the Proposal Trustee's determination. The standard of review is palpable and overriding error absent an extricable question of law (which is reviewable on a correctness standard).[31] Ms. Athanasoulis has the onus of demonstrating such errors.[32]

35. The framework for the standard of review is not that applicable to an appeal from an administrative tribunal. The Ontario cases[33] that suggest that questions of fact should be determined on a "reasonableness" standard all follow a 2004 decision of the British Columbia Court of Appeal – *Galaxy Sports*.[34] The proposition in *Galaxy Sports* that administrative law standards of review apply to appeals from a claims determination was rejected in a reasoned 2018 decision of the British Columbia Court of Appeal – *Re 864*.

36. The sole issue before the Court in *Re 864* was whether the applicable standards of review were (a) those enunciated in *Housen v Nikolaisen* or (b) the administrative law standards of review referred to in *Galaxy Sports*. The Court accepted that, since *Galaxy Sports* was decided, the law had evolved and the *Housen v Nikolaisen* standards were the correct ones to apply.[35] Those standards were accepted as having application in appeals from claims officers in *Companies'*

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[31] *8640025 Canada Inc (Re)*, 2018 BCCA 93 at para 65 [*Re 864*].

[32] *Re 864* at paras 41, 65-66.

[33] See, for example, *Charleston Residential School, Re*, 2010 ONSC 4099 at para 17.

[34] *Galaxy Sports Inc, Re*, 2004 BCCA 284 [*Galaxy Sports*]. Note that there are two propositions arising from *Galaxy Sports*: (1) that appeals should generally be treated as "true appeals" and not appeals *de novo*, and (2) that the administrative law standards of review apply: *Re 864* at paras 58-60. The first proposition remains good law. The second was rejected in *Re 864*.

[35] This is consistent with the Supreme Court of Canada's guidance that where legislation contemplates an appeal to a court, the appeal should apply *Housen v Nikolaisen* standards of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 36-37.

Creditors Arrangement Act and *Bankruptcy and Insolvency Act* receivership proceedings.[36] Applying the same standard of review to appeals pursuant to s.135(4) of the *Bankruptcy and Insolvency Act* would accord with the Supreme Court of Canada's directive in *Century Services* that *Companies' Creditors Arrangement Act* and *Bankruptcy and Insolvency Act* proceedings should be treated as one "integrated body of insolvency law".[37]

ii. Context for the Class A LPs' Arguments

37. In order to succeed on her appeal, Ms. Athanasoulis must demonstrate that the Proposal Trustee made palpable and overriding errors in respect of **all three** of its determinations that:

(a) based on Ms. Athanasoulis' own evidence, the terms of the Profit-Sharing Agreement provide that the Class A LPs are to be paid first from the proceeds of the YSL Project. This is a finding of fact;

(b) the Profit-Sharing Claim is not a provable claim because it is,

(i) too remote or speculative, and any amount to which Ms. Athanasoulis was entitled would not have been payable to her within her reasonable notice period. These are findings of fact or mixed fact and law; and

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[36] *Re 864* at paras 41 (*Housen v Nikolaisen* standards apply), 55 (Ontario cases like *Re Tiercon Industries Inc*, 2009 CanLII 72341 at para 12 (ONSC), aff'd 2010 ONCA 666 accepted the *Housen v Nikolaisen* standard), 59-60 (the law has "changed substantially" since *Galaxy Sports*. Matters of mixed fact and law are now subject to the same standard as purely factual matters. Administrative law considerations should not apply), and 64 (factual determinations and those of mixed fact and law should be subject to a standard of palpable and overriding error).

[37] *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at paras 76-78.

(ii) an equity claim. This is a finding of mixed fact and law as it considers both the nature of an equity claim (a question of law) and the nature of the Profit-Sharing Claim (a question of fact); and

(c) in any event, there was no profit to share. This is a finding of fact.

38. Ms. Athanasoulis has not demonstrated any palpable and overriding error affecting any of those findings, let alone all three.

C. Ms. Athanasoulis should not Benefit from a Breach of Fiduciary Duty

39. The Profit-Sharing Agreement should not be enforced. To do so would be to endorse the breaches of fiduciary duty owed by the GP and Ms. Athanasoulis to the Class A LPs. Those fiduciaries allegedly entered into a secret agreement that benefitted Ms. Athanasoulis. That agreement was not disclosed to the Class A LPs before (or after) they made their advances to the Debtors. The Class A LPs were deprived from making an informed decision as to whether to make such advances. They had reasonable expectations that such an agreement would not exist given the terms of the LP Agreement and Ms. Athanasoulis' misrepresentations by omission. In all these circumstances it would be inequitable to enforce the Profit-Sharing Agreement.

40. Furthermore, the Profit-Sharing Agreement predates the existence of YG Limited Partnership. There is no basis for Ms. Athanasoulis to assert that her secret agreement binds the Class A LPs and no evidence before this Court that the GP subsequently affirmed that the Profit-Sharing Agreement applied to the return owed to the Class A LPs.

i. Inequitable to profit from the GP's breach of fiduciary duty

41. It is not controversial that the GP owed a fiduciary duty to the Class A LPs.[38] General partners are trustees holding the property of the limited partnership on behalf of all other partners.[39] Those circumstances give rise to a fiduciary duty.

42. The terms of the LP Agreement are relevant to the scope of that fiduciary duty.[40] The LP Agreement,

(a) requires that the GP exercise its powers and discharge its duties under the LP Agreement honestly, in good faith and in the Class A LPs' best interests (s.3.5(a)); and

(b) prohibits the GP from entering into agreements, like the Profit-Sharing Agreement, with Related Parties, like Ms. Athanasoulis (s.6.3(b)).

43. By failing to disclose to the Class A LPs that it had entered into a secret profit-sharing deal with Ms. Athanasoulis, in violation of the LP Agreement, the GP breached its fiduciary duty.

(a) *Naramalta*

44. *Naramalta* is an analogous case.[41] In that case, McBean owned the parent company ("**Omnex**") of the general partner ("**NDC**") of a limited partnership. McBean caused NDC and Omnex to enter into a secret agreement for management services despite the terms of the limited

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[38] *Extreme Venture Partners Fund I LP v Varma*, 2021 ONCA 853 at para 98 [*Extreme Venture*], leave to appeal refused by the Supreme Court of Canada; *YG Limited Partnership and YSL Residence (Re)*, 2021 ONSC 4178 at para 69, per Dunphy J.

[39] *Molchan v Omega Oil & Gas Ltd* (1988), 47 DLR (4th) 481 at para 36 (SCC) [*Molchan*].

[40] *Extreme Venture* at para 103. See also *Molchan* at para 37 (terms of the parties' agreement are relevant to the scope of the fiduciary duty).

[41] *Naramalta Development Corp v Therapy General Partner Ltd*, 2012 BCSC 191 [*Naramalta*].

partnership agreement that prohibited NDC from receiving any profits until the limited partners had received a certain return on investment. The Court in *Naramalta* held that this secret deal was a breach of fiduciary duty and an attempt to circumvent the terms of the limited partnership agreement.[42] Omnex and NDC were both held liable for this breach of fiduciary duty.

(b) *Go-To Developments*

45. *Go-To Developments* was another analogous case.[43] In that case, Mr. Furtado was the sole director of the general partner of a limited partnership. He submitted a proof of claim relying on certain fee agreements that had not been disclosed to the limited partners. The Court upheld the receiver's (KSV Restructuring Inc.) disallowance of his claim on the basis that the agreement "constitutes undisclosed, related-party agreements made by a fiduciary in breach of the fiduciary's contractual and/or common law duties" to the limited partners.[44] The Court held that the limited partners were entitled to expect that a lucrative related party transaction like Mr. Furtado's guarantee fee agreements would be disclosed to them. Mr. Furtado's failure to do so amounted to a breach of fiduciary duty.[45]

46. Like in *Naramalta* and *Go-To Developments*, Ms. Athanasoulis knew, or ought to have known,

(a) what the LP Agreement required and prohibited;

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[42] *Naramalta* at paras 3-5 13, 63-64 and 71.

[43] *OSC v Go-To Developments Holdings Inc.* (31 October 2023), Toronto CV-21-00673521-00CL (ONSC Commercial List) per Steele J [*Go-To Developments*].

[44] *Go-To Developments* at para 10(a).

[45] *Go-To Developments* at paras 20, 25 and 26.

(b) that the Class A LPs were unaware of her Profit-Sharing Agreement;

(c) that by failing to disclose the Profit-Sharing Agreement to the Class A LPs, the GP would breach its fiduciary duty to the Class A LPs.

47. Ms. Athanasoulis participated in the GP's breach of fiduciary duty by not disclosing her secret agreement when inducing the Class A LPs to advance funds. In these circumstances, Ms. Athanasoulis is in the same position as the GP *vis-à-vis* the Class A LPs.[46]

ii. Inequitable to profit from Ms. Athanasoulis' own breach of fiduciary duty

48. In her capacity as an officer of the GP, Ms. Athanasoulis owed both the GP and the Class A LPs a fiduciary duty.[47]

49. By failing to disclose the existence of her secret agreement to share in the profits of the YSL Project to the Class A LPs, she breached her fiduciary duty to them. Fiduciaries are required to make full disclosure of self-interested transactions involving trust property (here, the proceeds of the YSL Project).[48] Full disclosure of all material facts which place or may place an agent in a conflict of interest is necessary so that the beneficiary of the trust property (the Class A LPs) can make informed decisions.[49]

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[46] *Extreme Venture* at paras 74 and 86-89. See also *Naramalta* at para 75; *Caja Paraguaya De Jubilaciones Y Pensiones Del Personal De Itaipu Binacional v Garcia*, 2018 ONSC 5379 at para 440; *DBDC Spadina Ltd v Walton*, 2018 ONCA 60 at para 212 (dissent), dissent aff'd 2019 SCC 30 (CanLII).

[47] *Extreme Venture* at paras 96, 99-101 and 103. See also s.134 of the *Business Corporations Act*, RSO 1990, c B16 and *Go-To Developments* at para 13.

[48] *Advanced Realty Funding Corp v Bannink* (1979), 27 OR (2d) 193 (CA), 1979 CanLII 1681 (ON CA); *Go-To Developments* at para 16.

[49] *Extreme Venture* at para 68. See also *Molchan* at paras 37 (majority) and 71 (dissent) and *Rochwerg v Truster* (2002), 58 OR (3d) 687 (CA) at para 36; *Klana v Jones*, 2003 CanLII 42363 (ON SC) at para 44 [*Klana*]; *Go-To Developments* at para 26.

50. Ms. Athanasoulis' contention that she was not required to disclose the Profit-Sharing Agreement because the Class A LPs did not inquire about it is particularly troubling. In *Extreme Venture*, the Court of Appeal rejected a similar argument as "specious".[50] The onus was not on the Class A LPs to inquire. Ms. Athanasoulis had a positive duty to inform them if she had a secret deal with the GP that would prejudice their right to recovery.[51]

51. Permitting Ms. Athanasoulis to recover pursuant to this secret arrangement in priority to the Class A LPs would give effect to inappropriate conduct by a fiduciary. It would offend the well-established principle that a person, but in particular a fiduciary, "is not allowed to derive any advantage from his own wrongdoing".[52]

(a) *Extreme Venture*

52. *Extreme Venture* is an analogous case. In that case, Varma and Madra owned and controlled the general partner of a limited partnership. They entered into a preferential deal with the limited partnership to purchase a valuable asset that was not disclosed to the limited partners.[53] The Ontario Court of Appeal upheld the trial judge's conclusion that Varma and Madra were liable for breach of fiduciary duty and rejected the argument that their duty was to the general partner only.

53. The Court held that that Varma and Madra owed a duty to the limited partnership and the limited partners – to hold otherwise would lead to an "anomalous" result that would permit them

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[50] *Extreme Venture* at para 78.

[51] *Klana* at para 44 (even general statements regarding having an interest in the investment, or that would signal the need for an inquiry, are not enough There must be actual, full disclosure of material facts that might create a conflict of interest); *Go-To Developments* at para 26.

[52] *Turvey and Mercer v Lauder* (1956), 4 DLR (2d) 225 (SCC) at p. 235. See also *Peso Silver Mines Ltd v Cropper*, [1966] SCR 673, 1966 CarswellBC 90 at paras 22 and 31.

[53] *Extreme Venture* at paras 3, 15-16.

to act "with impunity to damage the interests of the limited partnership, including by engaging in self-dealing".[54] The Court expressly adopted the following principles from a Delaware decision:[55]

(a) directors **and officers** have a duty not to engage in self-dealing;[56]

(b) any officer who knowingly causes the corporation to commit a breach of trust is personally liable to the beneficiary of the trust (here, the Class A LPs);

(c) a director **or officer** of a corporate trustee (like the GP) who improperly acquires an interest in trust property (like the proceeds of the YSL Project) is subject to personal liability to the beneficiaries; and

(d) the directors **and officers** of a corporate trustee are in a fiduciary relation not merely to the corporation but to the beneficiaries of the trust (the Debtor YG Limited Partnership) administered by the corporation.

54. Like in *Extreme Venture*, Ms. Athanasoulis owed YG Limited Partnership and the Class A LPs a fiduciary duty. The Class A LPs and the Debtor YG Limited Partnership constituted "a class of vulnerable and defined beneficiaries, whose legal and substantial practical interests stood to be and in fact were adversely affected" by Ms. Athanasoulis' exercise of discretion as an officer of the GP. Her undertaking to exercise that discretion in the Class A LPs' best interests arose from (a) the nature of the business and the role of the general partner in a limited partnership, and (b)

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[54] *Extreme Venture* at paras 96, 99-101 and 103.

[55] *Extreme Venture* at paras 104-106.

[56] See also *Merklinger v Jantree No 3 Limited Partnership & Snapdragon Ltd*, 2004 CanLII 54553 at paras 104-106 (ONSC) [*Merklinger*]; *Molchan* at para 36.

the terms of the limited partnership agreement which recognized the duty of a general partner towards limited partners, like the LP Agreement does.[57]

iii. Remedy given the breaches of fiduciary duty

55. The Court has the flexibility to fashion a "fair remedy" for the wrongdoing described above.[58] In the circumstances of this case, the fair remedy would be to refuse to enforce the Profit-Sharing Agreement until the Class A LPs receive what they are entitled to – a return of their principal and their return on investment.

56. It would be inequitable for Ms. Athanasoulis to recover in priority to the Class A LPs given her knowledge of the arrangements between the GP and the Class A LPs and her decision to conceal the existence of her Profit-Sharing Agreement despite her positive duty of disclosure. It would make no sense to permit Ms. Athanasoulis to recover pursuant to her Profit-Sharing Claim now, only to force the Class A LPs to assert these positions later in a subsequent proceeding.[59]

D. Misrepresentation

57. The Profit-Sharing Agreement should not be enforced given Ms. Athanasoulis' representations regarding how the proceeds of the YSL Project would be distributed.

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[57] *Extreme Venture* at para 103. See also *Molchan* at para 37 (terms of the parties' agreement are relevant to the scope of the fiduciary duty).

[58] *Extreme Venture* at paras 89 and 116.

[59] A claim has been commenced against Ms. Athanasoulis seeking to recover any funds she receives from the Debtors on account of the alleged Profit-Sharing Agreement (Court File No.: CV-22-006888107-00CL). The claims against Ms. Athanasoulis are for breach of fiduciary duty, breach of trust, knowing assistance, knowing receipt, inducing breach of contract, misrepresentation and/or unjust enrichment.

58. Ms. Athanasoulis told the Class A LPs that they would receive their share of the distribution of the proceeds of the YSL Project before Cresford.[60] Ms. Athanasoulis now says that, though the Waterfall refers to "Cresford", when presenting the Waterfall to the Class A LPs she intended to refer to Cresford (Yonge) Limited Partnership, the Class B unit holder of the Debtor YG Limited Partnership.[61]

59. Ms. Athanasoulis claims that nothing prohibits a distribution of profit to other representatives of Cresford, like her,[62] because certain Cresford companies would be paid for services relating to development, marketing and construction management. Unlike the Profit-Sharing Agreement, those arrangements were disclosed to the Class A LPs in the LP Agreement. Furthermore, in opposing the Proposal, the Class A LPs did successfully challenge other alleged undisclosed payments and transfers between the Cresford companies and the YG Limited Partnership on the basis they were inconsistent with the Waterfall. Justice Dunphy held that there was "substantial evidence that the related party advances were intended to be subordinated to holders of "A" units of YG LP".[63]

60. Ms. Athanasoulis' contention that the Waterfall only subordinates distributions to Cresford (Yonge) Limited Partnership flies in the face of this earlier finding and the "substantial evidence" that the Class A LPs stand in priority to any payments to the Cresford Group and related parties such as Ms. Athanasoulis.

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[60] Athanasoulis Affidavit at paras 30, 32 and 34, MR, Volume 1 of 10, Tab 4, pp. 95-96.

[61] Factum of Maria Athanasoulis dated October 27, 2023, at paras 42-43.

[62] Athanasoulis Affidavit at paras 39-42, MR, Volume 1 of 10, Tab 4; Athanasoulis Submissions at para 19, MR, Volume 2 of 10, Tab 5, p. 201.

[63] *YG Limited Partnership and YSL Residence (Re)*, 2021 ONSC 4178 at paras 34-47, per Dunphy J.

61. Even if Ms. Athanasoulis has an agreement that entitles her to a distribution from the proceeds of the YSL Project in priority to the Class A LPs, she is guilty of misrepresentation by omission. Misrepresentations include half-truths and representations that are false because of something unsaid. There is an obligation to speak up when an omission effectively makes a representation inaccurate.[64]

62. The Class A LPs would have never made advances to the Debtors had they known that Cresford representatives, like Ms. Athanasoulis, could share in the distribution of proceeds from the YSL Project ahead of them.[65] They insisted on amendments to the LP Agreement in an attempt to ensure that this would not happen.[66]

63. Ms. Athanasoulis' discussions with the Class A LPs were for the purpose of inducing them to invest in the YSL Project. By hiding her secret agreement for profits, Ms. Athanasoulis induced the Class A LPs to make those advances. It would be inequitable to enforce the Profit-Sharing Agreement given Ms. Athanasoulis' misrepresentation by omission.

E. Arbitration did not determine whether the Profit-Sharing Agreement was Enforceable

64. Contrary to Ms. Athanasoulis' assertions, the arbitration before Mr. Horton did not determine that she had an enforceable Profit-Sharing Agreement against the Debtors.

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[64] *Caroti v Vuletic*, 2022 ONSC 4695 at para 543, per Doi J.

[65] Li Affidavit at paras 19-21, Joint Brief to the Proposal Trustee, Tab C - included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, pp. 157-158; Chen Affidavit at paras 15-17, Joint Brief to the Proposal Trustee, Tab D – included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, pp. 491-492.

[66] Li Affidavit at paras 13-15, Joint Brief to the Proposal Trustee, Tab C - included at Exhibit "B" to the Hui Affidavit, RMR, Tab B, pp. 156-157.

65. As this Court has previously found, the Class A LPs were excluded from and were not parties to the arbitration process. Other than receiving the pleadings, they did not receive any evidence and were not informed of the scope of the arbitration between the Proposal Trustee and Ms. Athanasoulis until after the first phase was completed.[67]

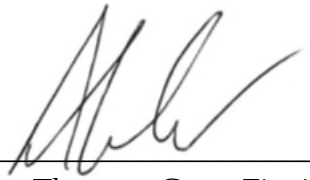
66. The law is clear that an arbitration cannot bind non-parties.[68]

67. In addition, none of the arguments put forward by the Class A LPs on this appeal were before Mr. Horton in the arbitration. The arbitration decision does not address the LP Agreement, Ms. Athanasoulis' and the GP's fiduciary obligations and whether the alleged Profit-Sharing Agreement is a breach of those duties or the representations regarding the Waterfall made to the Class A LPs. There is no basis for arguing that those issues have been determined or that the Class A LPs are precluded from raising them in opposition to the Profit-Sharing Claim.

PART IV - CONCLUSION & ORDER SOUGHT

68. On the basis of the foregoing and the submissions of the Proposal Trustee, the Class A LPs respectfully request that this Court uphold the Proposal Trustee's determination of Ms. Athanasoulis' claim and dismiss the appeal, with costs payable to the Class A LPs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of November, 2023.



Per Thornton Grout Finnigan LLP
and per Lax O'Sullivan Lisus Gottlieb LLP
of counsel to the Class A LPs

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[67] *YG Limited Partnership (Re)*, 2022 ONSC 6138 at para 81, per Kimmel J.

[68] *Bedard v Bedard*, 2018 ONSC 2220 at paras 9-17, per Stinson J.

SCHEDULE "A"
List of Authorities

No.	Case
1.	*YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178
2.	*YG Limited Partnership (Re)*, 2022 ONSC 6138
3.	*YG Limited Partnership (Re)*, 2023 ONSC 4638
4.	*8640025 Canada Inc (Re)*, 2018 BCCA 93
5.	*Charleston Residential School, Re*, 2010 ONSC 4099
6.	*Galaxy Sports Inc. (Re)*, 2004 BCCA 284 (CanLII)
7.	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
8.	*Re Tiercon Industries Inc*, 2009 CanLII 72341 (ONSC), *aff'd* 2010 ONCA 666
9.	*Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60
10.	*Extreme Venture Partners Fund I LP v Varma*, 2021 ONCA 853, leave to appeal refused by the Supreme Court of Canada
11.	*Molchan v Omega Oil & Gas Ltd (1988)*, 47 DLR (4th) 481
12.	*Naramalta Development Corporation v. Therapy General Partner Ltd.*, 2012 BCSC 191 (CanLII)
13.	*OSC v Go-To Developments Holdings Inc.* (31 October 2023), Toronto, CV-21-00673521-00CL (ONSC Commercial List)
14.	*Caja Paraguaya De Jubilaciones Y Pensiones Del Personal De Itaipu Binacional v Garcia*, 2018 ONSC 5379
15.	*DBDC Spadina Ltd v Walton*, 2018 ONCA 60, dissent aff'd 2019 SCC 30 (CanLII)
16.	*Advanced Realty Funding Corp v Bannink (1979)*, 27 OR (2d) 193 (CA)
17.	*Rochwerg v Truster (2002)*, 58 OR (3d) 687 (CA)
18.	*Klana v Jones*, 2003 CanLII 42363 (ON SC)
19.	*Turvey and Mercer v Lauder (1956)*, 4 DLR (2d) 225 (SCC)
20.	*Peso Silver Mines Ltd v Cropper*, [1966] SCR 673, 1966 CarswellBC 90

No.	Case
21.	*Merklinger v Jantree No 3 Limited Partnership & Snapdragon Ltd*, 2004 CanLII 54553
22.	*Caroti v Vuletic*, 2022 ONSC 4695
23.	*Bedard v Bedard*, 2018 ONSC 2220

SCHEDULE "B"
Excerpts of Relevant Statutes

Bankruptcy and Insolvency Act, RSC 1985, c B-3, Section 135

Admission and Disallowance of Proofs of Claim and Proofs of Security

Trustee shall examine proof

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

Determination of provable claims

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

Disallowance by trustee

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

(a) any claim;

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

(c) any security.

Notice of determination or disallowance

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

Determination or disallowance final and conclusive

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

Expunge or reduce a proof

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

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

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