

**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 Jessica Kimmel of the Superior Court of Justice (the “**Motion Judge**”) made on February 10, 2023, at Toronto, Ontario (the “**Order**”).

**THE APPELLANTS ASK** that the Order be varied and an order be made in its place:

1. Declaring that the limited partners have standing to participate, without restriction, in any appeal by Maria Athanasoulis from the disallowance of her claim in this proceeding;
2. Awarding the YongeSL LPs the costs of this appeal; and
3. Granting such further and other relief as this Court may deem just.

**THE GROUNDS OF APPEAL** are:

4. The YongeSL LPs represent the ultimate economic interest in this proceeding and are directly affected by the determination of Ms. Athanasoulis’ claim, including any appeal

therefrom.. The Motion Judge erred in concluding that the YongeSL LPs have only limited standing to make submissions on certain legal issues in Ms. Athanasoulis' anticipated appeal, but not others.

5. The Order arises from an \$18 million claim by Maria Athanasoulis that she is entitled to a share in the profits of the insolvent debtors' failed condominium development. The debtors' proposal trustee (the "**Proposal Trustee**") intends to disallow that claim. Ms. Athanasoulis intends to appeal that disallowance pursuant to s.135(4) of the *Bankruptcy and Insolvency Act* (the "**BIA**"). The Proposal Trustee sought directions from the Motion Judge regarding Ms. Athanasoulis' anticipated future appeal from the notice of disallowance that the Proposal Trustee intends to deliver.
6. In connection with its motion for directions, the Proposal Trustee asked for a determination that the limited partners of the debtor YG Limited Partnership, including the YongeSL LPs, be restricted in their right to make submissions on Ms. Athanasoulis' anticipated appeal. The Motion Judge made that direction on the basis that the Yonge SL LPs' have limited standing in this proceeding.
7. In doing so, the Motion Judge erred by:
  - (a) failing to follow the earlier decision of Justice Dunphy which determined that the YongeSL LPs had standing in this proceeding as an affected group;
  - (b) assuming the position of the Proposal Trustee and the YongeSL LPs will be aligned on an appeal not yet commenced;
  - (c) determining that the YongeSL LP's legal standing is limited to certain issues in which they have a "unique perspective";

- (d) failing to recognize that a person’s standing and unfettered legal right to appear before a Court when they are affected by the relief being sought is distinct from the exercise of a Court’s discretion to control its own process and facilitate the efficient hearing of an appeal.

### **Background to the Proceeding**

- 8. In summer 2021, the debtors YG Limited Partnership and YSL Residences Inc. (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. The limited partners include the YongeSL LPs.
  
- 9. 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. Justice Dunphy refused to sanction the original proposal 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, including the Yonge SL LPs, may yet recover their investment in the YSL Project.

10. By way of the Proposal, the Debtors transferred the YSL Project lands to Concord Properties Developments Corp. (“**Concord**”), another developer.
11. 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**

12. Since the Proposal was sanctioned, the Proposal Trustee has been determining claims made against the Debtors. Three claims remain outstanding: (a) a claim by CBRE Limited (“**CBRE**”) for approximately \$1.2 million; (b) a claim by Harbour International Investment Group Inc. (“**Harbour**”) for \$1 million plus HST; and (c) a claim by the Cresford Group’s former President of Marketing, Maria Athanasoulis, for \$19 million.
13. Subject to the resolution of the CBRE, Harbour and Athanasoulis claims, up to \$16.038 million may be available for distribution to the limited partners.

### ***The CBRE and Harbour Claims***

14. CBRE’s claim is for a commission arising after the YSL Project was conveyed to Concord. The Proposal Trustee disallowed the claim but consented to CBRE bringing an appeal *de novo*. In the face of CBRE’s appeal, the Proposal Trustee reversed its position. It no longer supported its disallowance of CBRE’s claim and instead supporting CBRE’s appeal. The YongeSL LPs opposed CBRE’s appeal. In allowing CBRE’s appeal, the Court held that the YongeSL LPs lacked standing to oppose CBRE’s appeal (*YG Limited Partnership and YSL Residence Inc.*, 2022 ONSC 6548). The YongeSL LPs have perfected their appeal

from this decision (Court of Appeal File No. COA-22-CV-0451; the “**CBRE Appeal**”). A hearing date for the CBRE appeal has not yet been set.

15. 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 CBRE claim.

***Ms. Athanasoulis’ Claim***

16. Ms. Athanasoulis’ claim has two parts: (a) an \$18 million claim that she is entitled to share in the profits of the Debtors’ failed condominium project (the YSL Project) (the “**Profit-Sharing Claim**”); and (b) a \$1 million claim for wrongful dismissal damages.
17. 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.
18. Certain issues were not decided at the arbitration, including whether the Profit-Sharing Claim:
  - (a) is an equity claim;
  - (b) has any value at all;
  - (c) is unenforceable given (i) the terms of the limited partnership agreement that governs YG Limited Partnership, (ii) Ms. Athanasoulis’ fiduciary duties to YG Limited Partnership and the limited partners and/or (iii) statements made by Ms.

Athanasoulis to the limited partners when they made their advances to YG Limited Partnership; and

(d) entitles Ms. Athanasoulis to be paid before the limited partners have recovered their advances to YG Limited Partnership, plus their preferred return thereon.

19. The limited partners and Concord were left out of the arbitration process. Once they learned of the outcome, they took steps to challenge the Proposal Trustee's right to arbitrate Ms. Athanasoulis' claim. Those steps are summarized in an October 17, 2022, decision in this proceeding where the arbitration was found to be an improper delegation of the Proposal Trustee's ultimate responsibility to determine and value Ms. Athanasoulis' claim (*YG Limited Partnership (Re)*, 2022 ONSC 6138).

#### **The Proposal Trustee's Motion Before the Motion Judge**

20. The Proposal Trustee has confirmed that based on the evidence before it, it intends to:

(a) disallow the Profit-Sharing Claim in full because: (i) it is an equity claim; (ii) the Debtors did not actually earn any profit from the YSL Project, and therefore nothing was payable to Ms. Athanasoulis; and (iii) Ms. Athanasoulis has admitted that her entitlement to profit from the YSL Project arises only after the limited partners are repaid in full; and

(b) allow Ms. Athanasoulis' wrongful dismissal claim in the amount of \$880,000.

21. The Proposal Trustee has not yet formally determined Ms. Athanasoulis' claim. The Proposal Trustee expects that Ms. Athanasoulis will appeal its determination pursuant to

s.135(4) of the *BIA*. The Proposal Trustee sought directions from the Motion Judge regarding Ms. Athanasoulis' anticipated future appeal.

22. Among other things, the Proposal Trustee sought directions that,

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) to the enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement.

### **The Motion Judge's Decision**

23. The YongeSL LPs take no issue with several directions made by the Motion Judge in the Order. They agree that Ms. Athanasoulis should be given the evidentiary record before the Proposal Trustee, and that there is no basis to conclude now that an appeal by Ms. Athanasoulis should be an appeal *de novo*.

24. The YongeSL LPs also take no issue with the timetable imposed by the Motion Judge pursuant to which: (a) Ms. Athanasoulis will have until April 2023 to file further evidence with the Proposal Trustee; (b) the Proposal Trustee will have until June 2023 to gather further evidence and formally make its determination of Ms. Athanasoulis' claim; and (c) Ms. Athanasoulis will have 30 days following such determination to bring her anticipated appeal pursuant to s.135(4) of the *BIA*.

### ***Directions regarding the limited partners' standing***

25. The Motion Judge held that the limited partners' standing on any appeal by Ms. Athanasoulis should be restricted. The Motion Judge held that,

it is anticipated that the LPs will be afforded an opportunity to participate on the appeal to the extent of any unique or added

perspective or submissions that they have that are not advanced by the Proposal Trustee, or that the Proposal Trustee defers to the LPs on. In contrast, the LPs should not expect to be permitted to make submissions on points already being addressed by the Proposal Trustee, such as, the argument that the Profit Share Claim is a claim in equity, not a debt owing by the Debtor.

26. The Motion Judge also held that,

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

27. These directions are errors of law.

***The Motion Judge erred by concluding that the YongeSL LPs have limited standing***

28. The effect of the Motion Judge's directions is to deny the YongeSL LPs the right to be heard on key issues in circumstances where their interests are affected. Those directions are in error.

29. The limited partners are the ultimate economic interest in this proceeding. Their interests are affected by the determination of the Athanasoulis claim and any appeal from that determination. Subject to the treatment of the three outstanding claims against the Debtors, the limited partners may recoup their \$14.8 million in advances to the Debtors, plus some return thereon. Ms. Athanasoulis' \$18 million Profit-Sharing Claim is the largest of these outstanding claims. If it is allowed, the limited partners will receive nothing. They have the right to be heard in these circumstances. This alone should afford them standing to make submissions on any appeal of Ms. Athanasoulis' claim.

30. The Motion Judge 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.
31. 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.
32. The Motion Judge erred by assuming that the Proposal Trustee's position and the limited partners' positions will be aligned. The limited partners hope that the Proposal Trustee disallows the Profit-Sharing Claim in full and vigorously defends its decision to do so on an appeal. The Proposal Trustee has, however, changed its position before (eg. in respect of the CBRE claim). The limited partners should not be pre-emptively prohibited from protecting their interests and making submissions on any appeal brought by Ms. Athanasoulis.
33. The Motion Judge erred in law by restricting the limited partners' standing in this proceeding to certain issues where they have a "unique perspective". They are directly

affected by the outcome of Ms. Athanasoulis' appeal. They have standing to fully participate and make submissions in this proceeding and in any appeal as a matter of law.

34. The limited partners' standing to participate and make submissions is distinct from the Court's authority to control its own process (for example, by assigning time limits to parties' submissions). A party's legal standing is not affected by a Court's exercise of discretion in facilitating the efficient hearing of an appeal.
35. The Motion Judge recognized that the limited partners may have their own claims against Ms. Athanasoulis and that if certain issues are determined in this proceeding they will become *res judicata* and subject to issue estoppel vis-à-vis the limited partners. Having accepted that, it was an error to then restrict the limited partners' standing to certain of those issues but not others.
36. The Motion Judge erred by concluding that,

At some level, every creditor has an interest in minimizing or eliminating the claims of other creditors on equal footing. That is not a reason to grant the LPs advance standing on an appeal, or even to give them full standing in the determination of the Athanasoulis Claim.
37. This conclusion fails to recognize that a mechanism 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 s.135(5) of the *BIA*. Both creditors and interested persons, like the limited partners, can also challenge decisions of a trustee pursuant to s.37 of the *BIA*.

### **Basis for the Court of Appeal's Jurisdiction**

38. 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*.
39. 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. The YongeSL LPs have challenged the Proposal Trustee's decision in respect of the Harbour claim. The Motion Judge's conclusions that the YongeSL LPs lack unfettered standing in this proceeding affects the YongeSL LPs participation in its challenge of that claim.
40. 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. Ms. Athanasoulis' Profit-Sharing Claim is for \$18 million. The property involved in the appeal meets the statutory minimum.
41. 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.
42. This appeal involves matters of general importance to bankruptcy matters because it involves the legal question of whether equity claimants have standing in bankruptcy matters generally.
43. This proceeding and the determinations of the outstanding claims described herein, particularly the Athanasoulis claim, will not be unduly delayed by this appeal. The Debtors' only asset has been liquidated – they will have no ongoing business. As contemplated by

the Order, Ms. Athanasoulis can file further evidence with the Proposal Trustee, the Proposal Trustee can determine her claim, and Ms. Athanasoulis can appeal the Proposal Trustee's decision in advance of this appeal being heard.

44. If an appeal of the Motion Judge is not heard, there is risk of inconsistent decisions regarding standing in this proceeding having regard to the CBRE Appeal in this proceeding, also before this Court.
45. The YongeSL LPs ask that this appeal be heard at the same time as the CBRE Appeal.

February 21, 2023

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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.

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**COURT OF APPEAL FOR ONTARIO**

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**NOTICE OF APPEAL**

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