

**COURT OF APPEAL FOR ONTARIO**

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

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

**NOTICE OF APPEAL**

**THE APPELLANT, KSV RESTRUCTURING INC. (the “Proposal Trustee”), IN  
ITS CAPACITY AS PROPOSAL TRUSTEE, APPEALS** to the Court of Appeal for  
Ontario from the Order and Endorsement of the Honourable Justice Kimmel dated March  
19, 2024 (the “**Judgment**”), made at Toronto, Ontario.

**THE APPELLANT ASKS** that this Court to:

- (a) vacate the Judgment which set aside the Proposal Trustee’s disallowance of a proof of claim in the amount of \$18 million filed by Maria Athanasoulis on the basis of a 20% interest in the profits of the debtors (the “**Profit-Share Claim**”), YG Limited Partnership and YSL Residences Inc. (together, “**YSL**”), in the proposal proceedings of YSL administered under the *Bankruptcy and Insolvency Act*<sup>1</sup> (“**BIA**”);
- (b) affirm the Proposal Trustee’s disallowance of the Profit-Share Claim;

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<sup>1</sup> *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [BIA].

- (c) award costs of the appeal to the Proposal Trustee on a partial indemnity basis;
- (d) grant, in the event that leave to appeal is required, leave to appeal the Judgment pursuant to section 193(e) of the *BIA*;
- (e) grant, to the extent necessary or required, leave to appeal the costs award imposed in the Judgment; and
- (f) such further and other relief as the Proposal Trustee may request and this Honourable Court may deem just.

**THE GROUNDS OF APPEAL** are as follows:

**A. Overview**

2. The issue on this appeal is whether the Profit-Share Claim filed by Ms. Athanasoulis is a “provable claim” or “claim provable” under sections 121 and 135 of the *BIA*. A provable claim must be a claim by a creditor against the bankrupt debtor for a debt or liability that is not too remote or speculative.

3. The determination of whether a claim filed by a purported creditor in bankruptcy proceedings is a provable claim is a threshold issue. Only provable claims filed by creditors in bankruptcy proceedings need to be valued by a licensed insolvency trustee. A purported creditor that files a claim in the bankruptcy proceeding that is not a provable claim is not entitled to a *pro rata* share of the proceeds distributable from the bankrupt estate.

4. The *BIA* gives broad latitude and powers to a licensed insolvency trustee appointed to administer a bankrupt estate and to determine whether a claim filed by a purported creditor is a provable claim. The powers granted to a trustee in this regard include the power to require further evidence from stakeholders, establish a claims administration process, and allow or disallow any claim.<sup>2</sup>

5. The Proposal Trustee was appointed to administer YSL's proposal proceedings and claims process pursuant to a Court Order dated April 30, 2021. On August 10, 2023, the Proposal Trustee determined that the Profit-Share Claim filed by Ms. Athanasoulis was not a provable claim under the *BIA* and issued a Notice of Disallowance in that regard. The Proposal Trustee disallowed the Profit-Share Claim for two principal reasons: (i) the Profit-Share Claim arising from an oral profit sharing agreement ("**PSA**") for 20% of the profits of YSL was not a claim for the repayment of a debt or liability, but rather in substance a claim in the nature of equity; and in any event, (ii) the Profit-Share Claim was a contingent claim that was premised on the occurrence of an event that was too remote or speculative to constitute a provable claim in the claims process under the *BIA*. Ms. Athanasoulis disagreed with the Notice of Disallowance and brought a motion to appeal the Proposal Trustee's determination.

6. On March 19, 2024, Justice Kimmel issued her Judgment allowing Ms. Athanasoulis's appeal from the Notice of Disallowance. The motion judge held that the Notice of Disallowance was entitled to appellate deference, but found extricable errors of law. Among other things, the motion judge held that: (i) "[t]here is no concept of an equity claim 'in substance' under the *BIA*" and that the Proposal Trustee was not entitled to

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<sup>2</sup> *BIA*, ss. 135(1), 135 (1.1), and 135(2).

disallow the Profit-Share Claim on that basis; and (ii) it was an extricable error of law for the Proposal Trustee to have considered events that occurred after the date of breach of the PSA in assessing whether the Profit-Share Claim was too remote or speculative to be a provable claim. Both of these conclusions constitute reversible error.

7. First, a licensed insolvency trustee *must* assess the true nature of a claim to determine whether it is in substance in the nature of equity (rather than indebtedness) in the course of administering a claims process under the *BIA*.

8. Second, a licensed insolvency trustee *may* consider events arising after an alleged breach of contract to determine whether a claim is too remote or speculative to be a provable claim. A trustee's determination in this regard is entitled to deference.

9. The motion judge erred by misapplying the law and impermissibly replacing the Proposal Trustee's determinations of fact with her own. The Judgment dramatically alters how the law concerning fundamental principles of the administration of estates under the *BIA* and *Companies' Creditors Arrangements Act*<sup>3</sup> – particularly in respect of the claims determination process – is applied in Ontario. This Court should allow this appeal and set aside the Judgment.

## **B. Background Facts**

10. YSL was a single-purpose project entity established to develop an 85-plus storey, 300 metre tall condominium tower located at Yonge and Gerrard Streets in Toronto (the "YSL Project"). YSL was part of the Cresford group of companies ("Cresford"). Ms.

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<sup>3</sup> *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

Athanasoulis was the Chief Operating Officer and second highest ranking executive of Cresford.

11. YSL's capital structure includes approximately \$15 million received from limited partners holding Class A Units of the partnership (the "**LPs**"). The LPs are contractually entitled to a return of their \$15 million investment plus a 100% return on that investment before Cresford could receive any profits from the YSL Project.

12. Cresford experienced financial difficulties in 2019, and in late 2019 Ms. Athanasoulis was constructively dismissed. In early 2020, Ms. Athanasoulis commenced an action against Cresford asserting, among other things, the Profit-Share Claim based on the oral PSA in which Cresford's principal, Dan Casey, agreed to give her 20% of the profits of all Cresford projects.

13. Ms. Athanasoulis has admitted that she understood that a term of the PSA was that the LPs would receive a return of their capital plus their 100% return before YSL could earn a profit to which the PSA would apply.

14. Ultimately, the YSL Project failed and by Spring 2021 it was insolvent.

15. YSL filed a Notice of Intention to Make a Proposal under the *BIA* on April 30, 2021. At the time it filed for protection under the *BIA*, the forecasted costs to complete the YSL Project exceeded \$1 billion. The YSL Project was still at the excavation stage—literally, just a hole in the ground—at the time of insolvency, and even the most ambitious forecasts did not anticipate the Project being completed until 2025 at the earliest.

16. On July 16, 2021, the Ontario Superior Court of Justice approved a proposal pursuant to which the YSL Project was sold to a third party, Concord Properties Development Corp. (“**Concord**”). As consideration for the acquisition of the YSL Project, Concord: (i) assumed the obligation to pay all of the debts owed by YSL to secured lenders and construction lien claimants; (ii) agreed to pay \$30.9 million for distribution to unsecured creditors of YSL (the “**Cash Pool**”); and (ii) agreed to pay all of the administrative fees and expenses of the Proposal Trustee to administer the proposal process. The Cash Pool was paid to the Proposal Trustee for distribution in accordance with the claims process established under the court-approved proposal.

17. Under any scenario, there will be no funds left in the Cash Pool for the owners of YSL (*i.e.*, Cresford). Based on all of the evidence received to date, YSL is insolvent and will never generate a profit for Cresford.

**(i) The Profit-Share Claim**

18. On June 10, 2021, Ms. Athanasoulis submitted a proof of claim to the Proposal Trustee pursuant to section 124 of the *BIA*. In her proof of claim, Ms. Athanasoulis separated her claim into two elements: (i) a claim for damages for wrongful dismissal in the amount of \$1 million (the “**Wrongful Dismissal Claim**”); and (ii) a claim for a 20% interest in the profits of YSL, which she alleged totalled \$18 million (*i.e.*, the Profit-Share Claim). As explained below, the Wrongful Dismissal Claim has since been settled by the Proposal Trustee and accepted by Ms. Athanasoulis.

19. The Proposal Trustee and Ms. Athanasoulis agreed to a bifurcated arbitration to resolve her claim. The first phase of the arbitration was to resolve the issues of whether:

(a) Ms. Athanasoulis was constructively dismissed; and (b) the PSA was an enforceable agreement. The second phase of the arbitration, if applicable, was intended to address whether the PSA was breached, and whether any damages were owing for any such breach.

20. On March 22, 2022, the arbitrator rendered his award concerning the first phase of the arbitration. He held that Ms. Athanasoulis had been constructively dismissed, that the PSA was an enforceable contract, that the PSA was part and parcel of Ms. Athanasoulis's employment agreement, and that it was repudiated by YSL on the same date that Ms. Athanasoulis was constructively dismissed.

21. Following the release of the phase one arbitral award, Concord successfully brought a motion to prevent the parties from proceeding with the second phase of the arbitration. On November 1, 2022, the Court ordered that the second phase of the arbitration would not proceed, and that the Proposal Trustee was required to determine whether the Wrongful Dismissal and Profit-Share Claims submitted by Ms. Athanasoulis were provable claims pursuant to sections 121 and 135 of the *BIA*.

22. On March 30, 2023, the Proposal Trustee gave Ms. Athanasoulis notice that it was accepting her Wrongful Dismissal Claim as a provable claim in the insolvency proceedings in the amount of \$880,000. This amount represents the employment remuneration that Ms. Athanasoulis would have earned from YSL or its affiliates during a 24-month reasonable notice period. Ms. Athanasoulis has not appealed or contested the Proposal Trustee's determination and valuation of her Wrongful Dismissal Claim.

23. With regard to the Profit-Share Claim, the Proposal Trustee delivered a Notice of Disallowance to Ms. Athanasoulis on August 10, 2023. There were two principal bases for the disallowance. First, the Profit-Share Claim is in substance a claim in the nature of equity and is therefore not a provable claim. Second, in any event, the Profit-Share Claim was too remote or speculative to be a provable claim because it was an unliquidated claim that was contingent on the profitable completion of the YSL Project.

24. Given YSL's failure to return a profit, as demonstrated by the fact that the LPs have not and will not recover their investment plus their contractual 100% return, the Proposal Trustee determined that the condition precedent to the Profit-Share Claim (*i.e.*, the existence of profits being earned by YSL) has not and will never transpire because, including other things:

- (a) the YSL Project was sold to Concord, and will be completed by Concord rather than YSL or Cresford;
- (b) profits earned, if any, upon the completion of the YSL Project by Concord accrue to Concord and not to YSL;
- (c) all of the funds paid by Concord to acquire the YSL Project will be distributed to creditors of YSL or the LPs who have a contractual right to a return of their investment before there can be any funds remaining to be distributed to YSL or Cresford; and



- (d) from the amount paid by Concord to acquire the YSL Project, there will be no funds left for distribution to Cresford in respect of its partnership interests.

**C. The Motion Below and the Judgment**

25. By Notice of Motion dated September 8, 2023, Ms. Athanasoulis brought a motion to appeal the Proposal Trustee's disallowance of the Profit-Share Claim.

26. The motion was heard on December 18 and 22, 2023.

27. In her Judgment dated March 19, 2024, the motion judge granted the motion and reversed the Proposal Trustee's disallowance of the Profit-Share Claim. The principal bases for the motion judge's decision were as follows:

- (a) the definition of "equity claim" in the *BIA* is "exhaustive" and there is no such thing as an equity claim "in substance" that does not fit within the scope of the applicable statutory definitions. The only equity claims under the *BIA* applicable to a corporation are claims "in respect of shares or rights to acquire shares in a company". Because the Profit-Share Claim is not tied to shares or rights to acquire shares in YSL, it is not an equity claim and must be a provable claim; and
- (b) the Profit-Share Claim was not too remote or speculative because the PSA was part and parcel of Ms. Athanasoulis's employment agreement. As such, the PSA was breached when Ms. Athanasoulis was constructively dismissed in December 2019, and YSL's contractual obligation to Ms.

Athanasoulis crystallized on that date. However, YSL's liability to Ms. Athanasoulis for the breach of the PSA is not limited by a reasonable notice period despite the PSA being an integral part of her employment contract. On the contrary, the liability owed by YSL to Ms. Athanasoulis under the PSA runs indefinitely. Consequently, the fact that YSL earned no profit in the 24-month reasonable notice period following Ms. Athanasoulis's dismissal is irrelevant to the assessment of whether the Profit-Share Claim is a provable claim.

28. Both decisions of the motion judge are wrong in law and should be corrected by this Court.

**(i) The Motion Judge Erred in Applying the Test for Identifying Equity Claims in Bankruptcy Proceedings**

29. The Proposal Trustee, other court officers, and courts must apply a contextual test to determine in a claims process whether a claim submitted by an alleged creditor is in substance a debt claim or a claim in the nature of equity. This determination is important because debt claims rank ahead of equity claims in terms of priority to distributions from a bankrupt estate.

30. The statutory definition of equity claims in the *BIA* is non-exhaustive and the concept of equity claims that fall behind debt claims must be given an expansive meaning to best secure the remedial intentions of Parliament. Case law indicates that the following non-exhaustive list of considerations and factors should be taken into account in determining whether a claim is in substance an equity claim:

- (a) the intention of the parties, the purpose of the transaction/agreement, and the parties' reasonable expectations;
- (b) the manner in which the transaction/agreement that gave rise to the claim was implemented;
- (c) the economic reality of the surrounding circumstances giving rise to the claim;
- (d) the presence or absence of fixed repayment dates or interest terms;
- (e) whether there is an expectation that payment of the claim depends on the success of the debtor's business; and
- (f) the presence of security for the alleged debt or liability.

31. The jurisprudence also demonstrates that the factors above are not to be applied in a mechanical way or as a definitive checklist.

32. The motion judge failed to consider that even in the course of these proposal proceedings, various intercompany loans owed by YSL to related parties were held to be equity claims in substance because of the context surrounding those loans, notwithstanding that they did not meet the statutory definition of "equity interest" or "equity claim" in the *BIA*.

33. The motion judge erred in law when she held that the Proposal Trustee erred in assessing the Profit Share Claim contextually to determine whether it is in substance in the nature of equity. The motion judge also erred in law in determining that the statutory

definition of “equity interest” and by extension “equity claims” is exhaustive, and that any claim that does not fit within those strict confines must be a claim for a debt or liability.

34. The motion judge’s decision on this issue departs dramatically from jurisprudence across Canada concerning the determination of provable claims in bankruptcy proceedings.

**(ii) The Motion Judge Erred in Overturning the Proposal Trustee’s Determination that the Profit-Share Claim is Too Remote or Speculative to be a Provable Claim under the *BIA***

35. Licensed insolvency trustees in bankruptcy proceedings have a broad discretion to disallow claims on the basis that they are too remote or speculative, including because the claim is subject to ongoing litigation.

36. The Profit-Share Claim is contingent on the profitability of the YSL Project. The Proposal Trustee acted reasonably and did not commit an extricable error of law or a palpable and overriding error in determining that any claim for profit arising from the YSL Project was too remote and speculative, whether calculated at the date of Ms. Athanasoulis’s dismissal in 2019 or at the time of YSL’s insolvency in 2021.

37. Requiring licensed insolvency trustees to complete complex, costly and time-consuming valuation exercises for highly speculative claims like the Profit-Share Claim will result in significant prejudice to creditors of insolvent estates who will see their distributions held up in years of litigation and potentially diminished recoveries as trustees are forced to incur litigation costs to resolve such speculative claims. This case is a prime example of these dangers.

38. Finally, if the motion judge was correct that the PSA was an integral part of Ms. Athanasoulis's employment agreement, then the motion judge erred by refusing to apply well-established common law holding that damages for wrongful dismissal represent the remuneration that the employee would have earned during the reasonable notice period. The common law requires that the same 24-month reasonable notice period that applied to Ms. Athanasoulis's Wrongful Dismissal Claim be applied to the Profit-Share Claim as well.

39. Instead, the motion judge held that the damages owing to Ms. Athanasoulis under the PSA extended indefinitely because she reasoned that there was no term in the oral PSA requiring damages to be limited to the common law reasonable notice period. The motion judge's reasoning in this regard is backwards. The law is that the common law reasonable notice period applies as a default unless the parties unambiguously contract out of it. Here, the parties did no such thing in their oral employment agreement and oral PSA.

40. Had the motion judge properly applied the law of common law reasonable notice to the Profit-Share Claim, she would have concluded that no damages in respect of the Profit-Share Claim would be owing to Ms. Athanasoulis because YSL earned no profit during Ms. Athanasoulis's 24-month reasonable notice period that extended from December 2019 to December 2021. As such, Ms. Athanasoulis's Profit-Share Claim for amounts that would have accrued outside the reasonable notice period is too remote or speculative. The Profit-Share Claim is therefore not a provable claim under sections 121 and 135 of the *BIA*.

**THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:**

41. An appeal lies to the Court of Appeal as of right pursuant to sections 183(2), 193(a), and 193(c) of the *BIA*, including because:

- (a) the appeal concerns future rights under section 193(a) of the *BIA* because the Judgment awards Ms. Athanasoulis an indefinite right to future profits from YSL; and
- (b) the appeal concerns property that exceeds \$10,000 in value under section 193(c) as the Judgment grants Ms. Athanasoulis a claimed right to property valued at up to \$18 million.

42. In the alternative, if leave to appeal is required, this Court should grant leave to appeal the Judgment under section 193(e) of the *BIA*, including because:

- (a) the issues raised in this appeal are of significance to bankruptcy practice generally. In particular, the decision in the Judgment holding that the statutory definitions of "equity interest" and "equity claims" in the *BIA* are exhaustive and displace (as opposed to supplement) the common law runs contrary to longstanding case law;
- (b) the issues raised in this appeal are of significance to this proposal proceeding because the Profit-Share Claim, if allowed in any material manner, will dramatically reduce or entirely eliminate the amounts available to be distributed to other creditors and/or the LPs;

- (c) the appeal is not frivolous. On the contrary, it has significant merit;
- (d) the appeal will not unduly hinder the progress of this proposal proceeding.  
On the contrary, the appeal may effectively result in an end to the proceedings; and
- (e) the appeal seeks to correct significant errors of law in the Judgment.

March 28, 2024

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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 of Appeal File No. \_\_\_\_\_  
Superior Court File No. BK-21-02734090-0031

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**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

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