SCC File No. _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE 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. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
APPLICANT, KSV RESTRUCTURING INC.

TAKE NOTICE that the Applicant, KSV Restructuring Inc., hereby applies for leave to appeal to the Supreme Court of Canada, pursuant to section 40(1) of the *Supreme Court of Canada Act*, R.S.C. 1985, c. S-26, as amended, and rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156 as amended, from the judgment of the Court of Appeal of Ontario (File Number: COA-24-CV-0468) made on August 14, 2025, and for any further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave to appeal is made on the following grounds:

1. Is any claim in bankruptcy that does not fall within the definition of "equity claim" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 necessarily a "provable claim" under sections 121 and 135 of the *BIA*?

Dated at Toronto, Ontario this 14th day of October, 2025.

SIGNED BY:

for:

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NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

SCHEDULE TO NOTICE OF APPLICATION FOR LEAVE TO APPEAL

A. Endorsement (Appeal from Disallowance of Claim) Superior Court of Justice Reasons, dated March 19, 2024 [2024 ONSC 1617];

B. Formal Order Superior Court of Justice, dated March 19, 2024;

C. Court of Appeal for Ontario Reasons, dated August 14, 2025 [2025 ONCA 591];

D. Formal Order Court of Appeal for Ontario, dated August 14, 2025.

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

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

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

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

BEFORE: KIMMEL J.

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

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

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

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

HEARD: December 18 and 22, 2023

ENDORSEMENT
(APPEAL FROM DISALLOWANCE OF CLAIM)

The Appeal

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

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

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

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

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

[4] In accordance with the established claims procedure,

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

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

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

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

The Proposal Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

The Arbitration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Grounds for the Disallowance and Grounds of Appeal

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

a. It is not a debt obligation or liability of YSL but rather, in substance, an equity claim, that is not a provable claim under the BIA.

b. There was no profit to be shared, because none had been earned by YSL as of the date of either the termination of Ms. Athanasoulis' employment (December 2019) or the date of bankruptcy (April 2021). Ms. Athanasoulis cannot claim a share of a non-existent profit.

c. Further, to the extent it is based upon projected future profitability, it is a contingent claim for a lost profit share that is far too remote to be capable of being considered a provable claim. Nor can it be the subject of any meaningful and reasonable computation, and it is thus valued at zero.

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

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

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

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

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

   (Collectively, the "Provable Claim Errors")

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

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

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

   (Collectively, the "Claim Valuation Errors")

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

(The "Subordination Error")

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

Economic/Financial Implications

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

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

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

The Standard of Review

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

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

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

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

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

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

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

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

Summary of Outcome

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

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

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

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

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

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

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

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

A) The Provable Claim Errors

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

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

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

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

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

Equity Claim

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

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

[53] When a word or phrase is defined with reference to what it "means" that has been held to signal that this definition is intended to be exhaustive, in accordance with well-accepted principles of statutory interpretation. See *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, at para. 42; *Alexander College Corp. v. R.*, 2016 FCA 269, 410 D.L.R. (4th) 299, at para 14.

[54] The definition of "equity claim" in s. 2 goes on to provide, by way of example, a non-exhaustive list of types of equity claims, including a claim for a dividend, return of capital, redemption or retraction, monetary loss resulting from the ownership, purchase or sale of an equity interest, or a claim for contribution or indemnity in respect of these other types of claims. However, all of these examples are tied to the originally essential component of the definition that it be "a claim that is in respect of an equity interest", meaning a share (or warrant or option to acquire a share).

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

[56] The Proposal Trustee relies on the Ontario Court of Appeal's decision in *Sino-Forest Corporation (Re)*, 2012 ONCA 816, 114 O.R. (3d) 304, at para. 44, which states that the term equity interest should be given an expansive meaning. In that case, the claim by the auditors for contribution and indemnity was derivative of a claim against them by corporate shareholders (equity holders). A claim for contribution and indemnity in respect of a claim for a monetary loss resulting from the ownership, purchase or sale of shares falls squarely within the examples of equity claims expressly provided for in the definition of equity claims under s. 2 of the BIA. In *Sino Forest*, the Court's expanded view was in its recognition that the auditors' claim grounded in a cause of action for breach of contract did not change its essential character as a claim for contribution and indemnity in respect of shareholder (equity) claims.

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

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

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

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

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

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

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

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

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

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

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

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

[62] The fact that the parties chose to tie the quantification of the amounts payable under the Profit Sharing Agreement to the YSL's (and the Cresford Group') performance (profits, after deducting, or net of, amounts payable to the LPs) does not transform a contractual obligation or debt to Ms. Athanasoulis into an equity claim within the meaning of the BIA, even if the practical effect of this would have been that payments under the Profit Sharing Agreement in the normal course would be made after payments to the LPs.

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

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

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

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

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

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

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

ii. Contingent vs. Unliquidated Damages Claim and Remoteness

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

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

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

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

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

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

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

[73] Until there was a breach, the Profit Sharing Agreement would remain in place and any claim for payment under that agreement might reasonably be considered to be contingent upon profits actually being earned (to be calculated based on revenues less expenses, where expenses would include any amounts payable to the LPs). It might have been open to Ms. Athanasoulis not to accept the repudiation of the Profit Sharing Agreement and let it continue even though she was no longer employed by YSL and wait to be paid in the normal course, but she clearly did the opposite, as evidenced by her civil claim for damages for breach of that agreement commenced in January 2020.[4]

[74] As a matter of law, the accepted repudiation of the Profit Sharing Agreement converted a future right to receive actual profits if and when earned into a current right to receive damages for breach of contract. Once converted to a damages claim, the "normal course" that Ms. Athanasoulis would be paid once the profits had been earned, usually at the end of a project, no longer applied. Rather, the Profit Share Claim became an unliquidated claim for damages for breach of contract that would presumptively be assessed at the time of repudiation. This is explained in more detail later in this endorsement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. In the "usual course of things", they arise fairly, reasonably, and naturally as a result of the breach of contract; or

b. They were within the reasonable contemplation of the parties at the time of contract.

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

[90] Importantly, the Court of Appeal explains in *The Rosseau Group* (at para. 70) that "the remoteness test deals with the 'type' of loss that is recoverable, while the measure is about how it is quantified." The type of loss at issue here is in respect of the lost opportunity to contribute to and eventually share in the profits that the parties anticipated would eventually be earned by YSL when the YSL Project was completed. The remoteness concerns identified by the Proposal Trustee are in respect of the measure of the damages, not the type of loss.

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

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

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

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

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

B) The Valuation Errors

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

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

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

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

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

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

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

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

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

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

[101] Conversely, even if Ms. Athanasoulis had been given two-years working notice and her employment had then terminated, it is not a given that her entitlements under the Profit Sharing Agreement would have automatically ended. The preservation of entitlement under the Profit Sharing Agreement is consistent with the Arbitrator's finding that the Profit Sharing Agreement was intended to recognize her past and continuing contributions and was not just an incentive for future contributions. The Arbitrator expressly found that YSL could not eliminate Ms. Athanasoulis' claim by terminating her and could not reduce her share to zero after her prior years of contributions in the form of advance sales, etc. simply by terminating her employment on notice (at para. 160). It follows from these findings of the Arbitrator that, unlike in *Matthews*, the termination notice period is not determinative of the Profit Share Claim.

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

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

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

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

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

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

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

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

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

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

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

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

C) Subordination Error

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

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

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

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

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

D) Other Identified Errors

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

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

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

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

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

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

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

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

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

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

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

Additional Issues Raised by the LPs

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

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

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

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

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

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

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

[129] This is not the forum for determining those other claims by the LPs. The determination of those claims involves contentious factual disputes and credibility assessments. The issues raised by the LPs cannot be properly adjudicated in a summary fashion on a paper record in the context of this appeal. Ultimately, these are matters that are more properly addressed between Ms. Athanasoulis and the LPs outside of the context of these insolvency proceedings. It would not be reasonable or appropriate for the court to attempt to determine the LPs' claims for breach of fiduciary duty and misrepresentation, etc. on this appeal.

[130] These claims by the LPs (for alleged misrepresentations, breaches of fiduciary and other duties, estoppel and knowing assistance) are extraneous to the Trustee's Disallowance and to any future valuation of the Profit Share Claim. It may be that the valuation of the Profit Share Claim for purposes of the BIA process could have some bearing upon those other claims, but that is an issue for another day and another court.[6]

[131] However, findings have been made regarding the enforceability and validity of the Profit Sharing Agreement and the subordination issue for purposes of the determination of priority of claims in these BIA proceedings and will be binding upon the LPs in any future proceedings.

Valuation and Damages

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

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

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

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

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

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

Costs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Order and Final Disposition

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

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

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

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

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

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

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

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

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

Kimmel J.

Date: March 19, 2024

Court File No. BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	TUESDAY, THE 19TH
	)	
JUSTICE KIMMEL	)	DAY OF MARCH, 2024

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

ORDER

THIS MOTION, made by the Moving Party, Maria Athanasoulis, for an Order allowing an appeal of the Notice of Disallowance issued by the Responding Party, KSV Restructuring Inc. (the "**Proposal Trustee**"), on August 10, 2023 was heard on December 18 and 22, 2023 at the court house, 330 University Avenue, Toronto, Ontario, M5G 1R7.

ON READING the motion record dated September 8, 2023, supplementary motion record dated October 31, 2023, factum of the Moving Party dated October 27, 2023, reply factum of the Moving Party dated December 13, 2023, oral argument compendium of the Moving Party dated December 18, 2023, supplementary oral argument compendium of the Moving Party dated December 22, 2023, joint factum of the Class A Limited Partners ("**Class A LPs**") dated November 22, 2023, oral argument compendium of the Class A LPs dated December 15, 2023, costs outline of the Moving Party dated December 28, 2023, the two costs outlines of the Class A LPs dated December 18, 2023, responding record of the Proposal Trustee dated October 16, 2023, supplemental responding record

of the Proposal Trustee dated November 10, 2023, second supplemental responding record of the Proposal Trustee dated December 14, 2023, factum of the Proposal Trustee dated November 10, 2023, oral argument compendium of the Proposal Trustee dated December 15, 2023, and costs outline of the Proposal Trustee dated December 18, 2023.

ON HEARING the submissions of counsel for the Moving Party, counsel for the Proposal Trustee, and counsel for both groups of Class A LPs.

1. **THIS COURT ORDERS** that the Notice of Disallowance of the "**Profit Share Claim**" (as defined in paragraph 3(b) of the reasons for decision reported at *YG Limited Partnership and YSL Residences Inc. (Re)*, 2024 ONSC 1617 (the "**Reasons**")) dated August 10, 2023 is set aside.

2. **THIS COURT DECLARES** that the Profit Share Claim is not an equity claim, and is a provable claim within the meaning of s. 121(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

3. **THIS COURT ORDERS** that the Profit Share Claim is entitled to priority over the claims asserted by the Class A LPs.

4. **THIS COURT DECLARES** that the Profit Share Claim against "**YSL**" (as defined in paragraph 1 of the Reasons) is a valid claim and ought to be allowed in an amount to be determined by further order of this court or by such other process as the court may direct.

5. **THIS COURT ORDERS** that the Moving Party shall be paid forthwith costs of this motion in the amount of $169,715.93 plus applicable taxes and total disbursements of $6,812.08 (inclusive of HST) by the Proposal Trustee, subject to further directions from

the court to be provided at a case conference, if requested, regarding by whom, in what proportions and from what source these costs are to be paid.

6. **THIS COURT DIRECTS** that the parties shall arrange a case conference before Justice Kimmel for the purpose of making submissions and receiving directions regarding the process for determination of the amount (valuation) of the Profit Share Claim. Concord Properties Development Corp. (or its counsel) shall also attend this case conference.

7. **THIS COURT DECLARES** that the ongoing civil proceedings among and between the Moving Party and the Class A LPs and members of the "**Cresford Group**" (as defined in paragraph 1 of the Reasons) may continue, subject only to the determinations in the Reasons regarding the validity, provability and priority of the Profit Share Claim.

COURT OF APPEAL FOR ONTARIO

CITATION: YG Limited Partnership and YSL Residences Inc. (Re), 2025 ONCA 591
DATE: 20250814
DOCKET: COA-24-CV-0468 & COA-24-CV-0550

George, Favreau and Gomery JJ.A.

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

Matthew Milne-Smith, Robin B. Schwill and Chenyang Li, for the appellant, KSV Restructuring Inc.

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

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

Mark Dunn, Sarah Stothart and Brittni Tee, for the respondent, Maria Athanasoulis

Heard: December 17, 2024

On appeal from the order of Justice Jessica Kimmel of the Superior Court of Justice, dated March 19, 2024, with reasons reported at 2024 ONSC 1617.

Favreau J.A.:

A. INTRODUCTION

[1] YSL Residences Inc. (“YSL”) and YG Limited Partnership (“YG”) owned a property on which they intended to develop an 85-storey building (the “YSL project”). YSL and YG filed a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “*BIA*”) before the project was built. The appellant, KSV Restructuring Inc., was appointed as proposal trustee (the “Trustee”). The other appellants are limited partners of YG.

[2] The appeal arises from a claim made by the respondent, Maria Athanasoulis, a former employee of YSL. She claims $1 million in damages for wrongful dismissal, and $18 million in damages for breach of a profit-sharing agreement pursuant to which she was to receive 20% of the profits from the YSL project. The Trustee disallowed the profit-sharing claim on the basis that (1) it was an equity claim, and (2) it was too contingent and remote.

[3] The appeal judge allowed Ms. Athanasoulis’ appeal, finding that the profit-sharing claim is not a claim in equity, but is, instead, a claim for unliquidated damages for breach of contract that arose from her wrongful dismissal. The appeal judge also found that, while Ms. Athanasoulis’ profit-sharing claim may be difficult to calculate, it is not a contingent claim nor is it too remote. The appeal judge directed that the next step in the proceedings was to hold a hearing for the purpose of quantifying Ms. Athanasoulis’ profit-sharing claim.

[4] The Trustee submits that the appeal judge erred in finding that the profit-sharing claim is not "in substance" a claim in equity. It argues that the appeal judge misinterpreted and misapplied the relevant provisions of the *BIA*. The Trustee also argues that the appeal judge erred in finding that the profit-sharing claim is not too contingent and remote. The limited partners raise additional issues, including whether the appeal judge complied with her own procedural order by limiting the issues she was prepared to decide.

[5] I would dismiss the appeal. I see no error in the appeal judge's determination that the profit-sharing claim is not a claim in equity under the *BIA*, or in her conclusion that the claim is not too contingent or remote. I also see no merit to the additional grounds of appeal raised by the limited partners.

B. BACKGROUND

[6] The proceedings leading to the order under appeal are complex. I summarize them to give context to the issues on appeal.

(1) YSL and Ms. Athanasoulis

[7] YSL owned a development property. The intention was to develop the property as an 85-storey retail and condominium complex in downtown Toronto. The YSL project was to be completed by 2025.

[8] YSL was one of several companies ultimately owned and controlled by Daniel Casey, which used Cresford as the companies' trade name (the "Cresford

Group”). Besides the YSL project, in 2019, the Cresford Group was developing three other building projects.

[9] YSL was the general partner of YG, and held the project as a bare trustee for the limited partnership. Besides YSL as the general partner, YG is comprised of several Class A limited partners (otherwise known as unitholders).[1] The limited partners collectively advanced $14.8 million to YSL and YG in exchange for their Class A units in the YG limited partnership. The Cresford Group holds the Class B units of the partnership. The limited partnership agreement provides that the limited partners, as the holders of Class A units, are entitled to repayment of their investment and a 100% return on their investment for a total of $29.6 million, before the Cresford Group, as holder of Class B units, is entitled to any profit from the YSL project.

[10] Ms. Athanasoulis began working for the Cresford Group in 2004 as a Manager, Special Projects. At that time, she had limited education or prior experience. By 2013, she had worked her way up to one of two senior officer positions, reporting directly to Mr. Casey, who was the founder, president and sole director of the Cresford Group. In 2019, Ms. Athanasoulis had a falling out with Mr. Casey, which led to her being dismissed. At the time of her dismissal in

[1] The Class A limited partners include the appellants 2504670 Canada Inc., 8451761 Canada Inc., Yonge SL Investment Limited Partnership, 2124093 Ontario Inc., E&B Investment Corporation, SixOne Investment Ltd., Chi Long Inc., and TaiHe International Group Inc.

December 2019, Ms. Athanasoulis was the Chief Operating Officer and President of the Cresford Group, and an employee and officer of YSL.

(2) The proposal proceedings

[11] At some point after Ms. Athanasoulis' dismissal, the Cresford Group ran into financial difficulties. In the spring of 2021, YG and YSL filed Notices of Intention to Make a Proposal under the *BIA*. The deemed date of the bankruptcy was April 30, 2021. (The three other Cresford Group projects were also subject to earlier unrelated insolvency proceedings.)

[12] YSL and YG made a number of proposals. Ultimately, the court approved an Amended Third Proposal on July 16, 2021 (the "Proposal"): *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206, 93 C.B.R. (6th) 139.

[13] The Proposal provided that Concord Properties Developments Corp. (the "Sponsor") would acquire the project on the following terms: (i) the Sponsor would assume liability for all secured creditor claims and construction lien claims; (ii) the Sponsor would pay $30.9 million to the Trustee to be distributed to unsecured creditors with proven claims; and (iii) any amounts left over after the distribution to unsecured creditors were to be distributed to equity stakeholders, including the limited partners.

[14] At the time of the approval, the secured debt was approximately $260 million. The motion judge who approved the Proposal estimated that the

unsecured debt was between $20 and $25 million. He did not include Ms. Athanasoulis' profit-sharing claim as part of the unsecured debt for voting purposes because he decided that it was too speculative.

(3) Ms. Athanasoulis' claim

[15] Ms. Athanasoulis filed a proof of claim against YSL for two unsecured claims:

1. $1 million in damages for wrongful dismissal based on a claim of constructive dismissal; and
2. $18 million in damages for breach of an oral agreement that Ms. Athanasoulis would be paid 20% of the profits earned from the project.

[16] There is no dispute that if Ms. Athanasoulis is able to prove her claims, they are to be paid out of the $30.9 million the Sponsor has provided to the Trustee to pay unsecured claims. Ms. Athanasoulis' profit-sharing claim is by far the largest unsecured claim made against YSL. If the full $18 million is paid out, recovery for unsecured creditors would be reduced from an anticipated 100% to 70%. Further, absent the profit-sharing claim, the limited partners stand to recover $13.8 million of their $14.8 million investment. However, if the full $18 million is paid out, the limited partners will receive nothing.

[17] The Trustee and Ms. Athanasoulis agreed to submit her claims to arbitration.

(4) The arbitration

[18] William Horton was appointed as arbitrator. The arbitration was to proceed in two phases. As discussed below, ultimately only the first phase of the arbitration proceeded.

[19] The first phase addressed two issues: (a) whether Ms. Athanasoulis was employed by YSL and, if so, whether she was wrongfully terminated, and (b) whether Ms. Athanasoulis had a profit-sharing agreement with YSL that would entitle her to 20% of the profits from the YSL project and, if so, the terms of that agreement.

[20] The arbitrator released his award from the first phase on March 28, 2022. He found that Ms. Athanasoulis was constructively dismissed from her employment in December 2019. He also found that Ms. Athanasoulis and the Cresford Group had entered into an oral profit-sharing agreement pursuant to which she was entitled to 20% of the profits earned on all current and future Cresford projects, including the YSL project. Profits were to be calculated based on the pro forma budgets prepared by the Cresford Group, which used revenues less expenses and were updated on an ongoing basis. As a practical matter, profits were to be calculated after all costs on the project were paid out, including after the limited partners were repaid the equity they had invested in the project. The arbitrator further found that the profit-sharing agreement was not a standalone

agreement, but that it was part of Ms. Athanasoulis' contract of employment. Finally, the arbitrator found that YSL was to pay Ms. Athanasoulis her share of the profits when the profits were earned, which would usually be after the project was completed. Accordingly, there was no requirement that Ms. Athanasoulis remain employed for her to be entitled to payment of her share of the profits.

[21] The second phase of the arbitration was meant to determine the damages Ms. Athanasoulis was entitled to receive for constructive dismissal and from the profit-sharing agreement.

[22] However, after the first arbitration award was released, the Sponsor and the limited partners opposed the arbitration process because they had not had a chance to participate.

(5) The funding decision and procedural directions

[23] As a result of the opposition from the Sponsor and limited partners, the appeal judge heard a motion in connection with the Sponsor's obligation to fund the fees and expenses the Trustee had incurred up to that point in resolving Ms. Athanasoulis' claim. This resulted in a funding decision released on November 1, 2022: *YG Limited Partnership (Re)*, 2022 ONSC 6138, 5 C.B.R. (7th) 389.

[24] In the funding decision, the appeal judge required the Sponsor to reimburse the Trustee for its reasonable expenses in the first phase of the arbitration.

However, she determined that the Sponsor was not obligated to fund the second phase because this second phase would improperly delegate the determination of Ms. Athanasoulis' claim to the arbitrator. The appeal judge further directed the Trustee to determine how it would proceed next for the purpose of valuing Ms. Athanasoulis' claim.

[25] Following the issuance of the funding decision, on March 30, 2023, the Trustee allowed Ms. Athanasoulis' claim for wrongful dismissal in the amount of $880,000 based on a 24-month notice period.

[26] In a further decision, the appeal judge provided directions regarding the process the Trustee was to follow in determining the value of Ms. Athanasoulis' profit-sharing claim: *YG Limited Partnership (Re)*, 2023 ONSC 4638, 17 C.B.R. (7th) 388. In her directions, the appeal judge set a schedule and process for the Trustee to determine this claim. She also granted the limited partners a right to participate in the process, including in any appeal from the Trustee's decision. The limited partners' appeal raises issues regarding that direction, and I address the scope of their right to participate more fully in the analysis below.

(6) The Trustee's decision

[27] As part of the process before the Trustee, the parties first made submissions on threshold issues that the parties agreed may dispose of the matter. Therefore, at that stage, the parties did not provide any evidence or submissions for the

purpose of determining the amount, if any, of Ms. Athanasoulis' profit-sharing claim.

[28] On August 10, 2023, the Trustee released a Notice of Disallowance, denying Ms. Athanasoulis' profit-sharing claim. The appeal judge characterized the basis on which the Trustee disallowed the claim as follows:

> a. It is not a debt obligation or liability of YSL but rather, in substance, an equity claim, that is not a provable claim under the *BIA*.
>
> b. There was no profit to be shared, because none had been earned by YSL as of the date of either the termination of Ms. Athanasoulis' employment (December 2019) or the date of bankruptcy (April 2021). Ms. Athanasoulis cannot claim a share of a non-existent profit.
>
> c. Further, to the extent it is based upon projected future profitability, it is a contingent claim for a lost profit share that is far too remote to be capable of being considered a provable claim. Nor can it be the subject of any meaningful and reasonable computation, and it is thus valued at zero.
>
> d. It is subordinated to the [limited partners'] entitlements because [Ms. Athanasoulis] was only to receive her share of the profits when Cresford did, which would occur only after the [limited partners] had been repaid their capital and earned their entire preferred return. The [limited partners] have not, and due to lack of available funds will not, receive all such amounts.

(7) The appeal judge's decision

[29] Ms. Athanasoulis appealed the Trustee's decision disallowing her profit-sharing claim to the appeal judge. The appeal judge allowed the appeal.

[30] In her decision, citing the decision of the Court of Appeal for British Columbia in *8640025 Canada Inc. (Re)*, 2018 BCCA 93, 8 B.C.L.R. (6th) 225, at para. 65, the appeal judge determined that she was to apply the appellate standard of review.

[31] The appeal judge concluded that the Trustee made a legal error in characterizing the profit-sharing claim as an equity claim. She found that, based on the definitions of "equity claim" and "equity interest" in the *BIA*, the profit-sharing agreement was not in respect of an equity interest in YSL or YG because it did not give Ms. Athanasoulis "a share in the corporation, or warrant or option or another right to acquire a share in the corporation".

[32] The appeal judge rejected the Trustee's characterization of the claim as a claim for lost profit that was too contingent, remote and speculative to be quantified. Instead, she held that Ms. Athanasoulis' profit-sharing claim is a claim for unliquidated damages for breach of contract. In the normal course, damages were to be determined from the date of the breach.

[33] The appeal judge also found that the Trustee erred in valuing the claim at $0 on the basis that no profit was earned during the notice period. The arbitrator had found that the profit-sharing agreement did not depend on Ms. Athanasoulis' continued employment. Therefore, the claim could only be valued at $0 if it was inevitable that no profits would have been earned on the project; however, there

was some evidence that the project's failure and the bankruptcy were not inevitable.

[34] The appeal judge rejected the Trustee's conclusion that Ms. Athanasoulis' claim was subordinate to the limited partners' claim. She acknowledged that, under the profit-sharing agreement, profits were to be calculated as revenues minus expenses, and the repayment of funds invested by the limited partners was to be an expense. However, this calculation method did not reverse the priority of claims in the bankruptcy context or affect the characterization of Ms. Athanasoulis' claim. Since Ms. Athanasoulis' claim was for damages for breach of contract and did not derive from an equity interest, it took priority over the limited partners' claims, which are equity claims.

[35] The appeal judge further rejected the limited partners' argument that the profit-sharing agreement was unenforceable because it breached the agreements they had entered with YG, namely the Amended Limited Partnership Agreement and the Sales Management Agreement, which included terms that prohibited payments to related parties or affiliates. The motion judge noted that there was no evidence that Ms. Athanasoulis was a related party or affiliate under the agreements at issue.

[36] Finally, the appeal judge dismissed the limited partners' arguments that Ms. Athanasoulis made misrepresentations or breached a fiduciary duty or other

duties she owed them. The appeal judge held that this argument went beyond the scope of the issues on which the limited partners had been granted standing. She further noted that there was insufficient evidence that would allow her to find that Ms. Athanasoulis owed or breached a fiduciary duty to the limited partners. She stated that these issues would be better decided in the separate action the limited partners had commenced against Ms. Athanasoulis.

[37] Having found that Ms. Athanasoulis' claim under the profit-sharing agreement is valid, the appeal judge indicated that the next step in the proceedings was to value the claim. She stated that, "while it may be difficult, efforts should be made to value" the profit-sharing claim. She directed the parties to attend a case conference to address the process for valuing the claim.

C. ISSUES RAISED BY THE TRUSTEE

[38] The Trustee and the limited partners both appeal the appeal judge's order. They raise separate issues on appeal. In this section, I address the issues raised by the Trustee. I will address the issues raised by the limited partners in the next section.

[39] The Trustee raises three main issues:

a. Did the appeal judge err in finding that the profit-sharing claim is not an equity claim under the *BIA*?

b. Did the appeal judge err in finding that the profit-sharing claim is not a contingent unliquidated claim that is too speculative or remote?

c. Did the appeal judge err in failing to find that the common law notice period applies to the profit-sharing claim?

[40] I would dismiss these three grounds of appeal. I address each in turn.

Issue 1: The appeal judge did not err in finding that the profit-sharing claim is not an equity claim under the *BIA*

(a) Introduction

[41] The Trustee submits that the appeal judge erred in finding that Ms. Athanasoulis' profit-sharing claim is not an equity claim. In making this argument, the Trustee submits that the appeal judge misinterpreted the definitions of "equity claim" and "equity interest" in s. 2 of the *BIA*, and specifically erred in applying an overly narrow interpretation of these terms; rather, she should have applied a contextual approach to find that Ms. Athanasoulis' profit-sharing claim is "in substance" an equity claim. The Trustee argues that its proposed approach is consistent with the common law, which was not meant to be altered by the definition of "equity claim" introduced in the *BIA* in 2009.

[42] I see no error in the appeal judge's interpretation of the definitions of "equity claim" and "equity interest" in s. 2 of the *BIA*. Her interpretation is consistent with the wording and intent of the provision.

(b) Relevant provisions of the *BIA*

[43] Section 121(1) of the *BIA* deems that provable claims in the context of a bankruptcy consist of:

> 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…. [Emphasis added.]

[44] Section 121(2) of the *BIA* directs that the determination of whether a contingent or unliquidated claim is a provable claim is to be decided in accordance with s. 135. Section 135(1.1) of the *BIA* requires a trustee to determine whether a contingent claim or an unliquidated claim is a provable claim and, if it is a provable claim, to value it.

[45] An equity claim is not a debt or liability under the *BIA*, and is therefore not a provable claim: *Central Capital Corp. (Re)* (1996), 27 O.R. (3d) 494 (C.A.), at p. 532, *per* Weiler J.A. This principle developed at common law. One rationale for the difference in treatment of debts and equity investments is that "shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential": *Re Sino-Forest Corporation*, 2012 ONCA 816, 114 O.R. (3d) 304, at para. 30.

[46] In 2009, both the *BIA* and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") were amended to add definitions of "equity claim" and "equity interest".

[47] Section 2 of the *BIA* defines an equity claim as follows:

> ***equity claim*** means a claim that is in respect of an equity interest, including a claim for, among others,
>
> **(a)** a dividend or similar payment,
>
> **(b)** a return of capital,
>
> **(c)** a redemption or retraction obligation,
>
> **(d)** a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> **(e)** contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)

[48] Section 2 of the *BIA* defines an "equity interest" as "in the case of a corporation other than an income trust, a share in the corporation – or a warrant or option or another right to acquire a share in the corporation – other than one that is derived from a convertible debt" (emphasis added).

(c) Analysis

[49] There is no dispute that the proper interpretation of s. 2 of the *BIA* is a question of law. The standard of review is correctness. I see no error in the appeal judge's analysis and conclusion that Ms. Athanasoulis' profit-sharing claim is not an equity claim.

[50] Before us, the Trustee renews the argument it made to the appeal judge that Ms. Athanasoulis' profit-sharing claim is "in substance" an equity claim, and therefore not a provable claim under the *BIA.* The Trustee submits that Ms. Athanasoulis' profit-sharing claim is "in substance" an equity claim because it is dependent on the Cresford Group's ownership interest in YSL and YG; Ms. Athanasoulis was to receive 20% of the profits that the Cresford Group was to earn on the YSL project, and only after the limited partners received their return on their investments.

[51] The Trustee submits that the scope of equity claims that do not qualify as debts or liabilities is not constrained by the definition of "equity claim" or "equity interest" in the *BIA*. Rather, equity claims not eligible to be provable claims under the *BIA* include those defined under the common law, which include equity claims "in substance", such as Ms. Athanasoulis' profit-sharing claim. In other words, while the Trustee appears to accept that the definition of "equity claim" in the *BIA* does not include a profit-sharing claim that is not based on an ownership interest, such claims could nevertheless fall within the scope of an equity claim not provable under the *BIA* because of the common law. This argument depends on the following two premises: (1) the definition of equity claim in the *BIA* is not exhaustive; and (2) at common law, the meaning of "equity claim" would include a claim in the nature of Ms. Athanasoulis' profit-sharing claim.

[52] I would reject the Trustee's argument.

[53] I agree with the appeal judge that the definition of “equity claim” in the *BIA* is meant to be exhaustive. As she explained:

> When a word or phrase is defined with reference to what it “means” that has been held to signal that this definition is intended to be exhaustive, in accordance with well-accepted principles of statutory interpretation.
>
> The definition of “equity claim” in s. 2 goes on to provide, by way of example, a non-exhaustive list of types of equity claims, including a claim for a dividend, return of capital, redemption or retraction, monetary loss resulting from ownership, purchase or sale of an equity interest, or a claim for contribution or indemnity in respect of these types of claims. However, all of these examples are tied to the originally essential component of the definition that it be “a claim that is in effect of an equity interest”, meaning a share (or warrant or option to acquire a share). [Citations omitted.]

[54] This interpretation of “equity claim” is consistent with the principles of statutory interpretation. In *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, at para. 42, the Supreme Court explained that where a definition uses the term “means”, the scope of a definition is ordinarily exhaustive: see also *R. v. McColman*, 2023 SCC 8, 167 O.R. (3d) 559, at para. 38. Even where “means” is followed by “includes”, the enumerated terms can be illustrative rather than expansive.

[55] In this case, s. 2 of the *BIA* defines an “equity claim” to “mean” a claim “in respect of an equity interest”. “Equity interest” is specifically defined, with respect

to a corporation, as “share in the corporation – or a warrant or option or another right to acquire a share in the corporation”. This is an exhaustive list of ownership interests. The use of the word “in respect of” and “including” in the definition of “equity claim” does not expand or modify the meaning of “equity interest”; it simply lists the types of claims that might arise from an equity interest, which are a claim for (a) a dividend or similar payment, (b) a return of capital, (c) a redemption or retraction obligation, (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest, or (e) contribution or indemnity relating to any of (a) to (d). A careful reading of the definitions of “equity claim” and “equity interest” signals that an equity claim is meant to arise from nothing other than an ownership interest in a corporation. This definition may give rise to a wide variety of claims, but the origin of the claim is meant to be limited to an ownership interest.[2]

[56] Contrary to the Trustee’s submissions, the amendments made to the *BIA* in 2009 leave no room to read in an intention to include what it describes as equity claims “in substance”. The wording of the definitions of “equity claim” and “equity interest” demonstrate an intention to broaden the scope of claims that can be

[2] Following the hearing of the appeal, the Trustee submitted two additional cases which it said were relevant: *Re Atlantic Sea Cucumber Ltd.*, 2025 NSSC 234 and *Re Organic Garage*, 2025 ONSC 2476. Neither of these cases assists the Trustee. Both cases review in detail the jurisprudence on the definition of “equity claim”. Neither supports the Trustee’s position that the *BIA* envisions an equity claim “in substance” unconnected from an equity interest.

characterized as equity claims but to nevertheless require that such claims originate from an ownership interest.

[57] Prior to 2009, the classification of investments was left to the discretion of the courts. In *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, at pp. 587-590, the Supreme Court stated that the court should characterize hybrid investments based on their "substance" by performing a contextual analysis akin to a contractual interpretation; the courts were to determine the nature of the claim based on the intention of the parties and the surrounding circumstances. In *Re Central Capital Corp.*, at pp. 524-530, *per* Weiler J.A., and pp. 536-540, *per* Laskin J.A., this court expanded on the contextual approach, and considered such things as share purchase agreements, conditions attached to the shares, articles of incorporation, and the treatment of shares in financial statements for the purpose of determining whether the claim at issue was an equity claim.

[58] The 2009 amendments were introduced to remove the uncertainty in this type of analysis: Office of the Superintendent of Bankruptcy, "Bill C-12: Clause-by-Clause Analysis—Clauses 1-10", online: Office of the Superintendent of Bankruptcy <ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/legislation/bill-c-12-clause-clause-analysis>. The 2009 amendments sought to increase creditor protection by broadening and clarifying the types of shareholder claims

that would, pursuant to ss. 60(1.7) and 140.1 of the *BIA*[3], be subordinated to the interests of creditors: see *Sino-Forest*, at para. 56 (discussing a similar provision, s. 6(8), in the *CCAA*). This explains why the statutory language in s. 2 of the *BIA* includes both breadth and specificity. In *Sino-Forest*, at paras. 39-41, this court noted that the definition of "equity claim" incorporates "two expansive terms", namely "in respect of" and "including", which serve to create a broad range of claims that can be characterized as equity claims. At the same time, the restrictive definition of "equity interest", through the use of the word "means", signals that the type of interest that can give rise to an equity claim is limited to an ownership interest. This broad meaning of "equity claim" and restrictive meaning of "equity interest" are consistent with the 2009 amendments; they offer wide protection to creditors from the types of claims that can be made by shareholders, while clarifying the type of interest that can give rise to an equity claim.

[59] Contrary to the Trustee's submissions, this interpretation of "equity claim" and "equity interest" is consistent with this court's decision in *Sino-Forest*. That case was decided under the *CCAA*, which includes the same definitions of "equity claim" and "equity interest" as the *BIA.* The issue in *Sino-Forest* was whether the definition of "equity claim" was broad enough to include cross-claims for

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[3] Section 60(1.7) of the *BIA* provides that: "No 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 provides that: "A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied."

contribution and indemnity made by auditors and underwriters arising from proposed class actions by shareholders. In that context, this court stated that it was necessary to focus on the substance of the claim rather than the identity of the claimant. However, in deciding that these were equity claims, the court focused on the expansive definition of "equity claim", which includes claims for "contribution and indemnity" in relation to the types of claims specifically listed in the definition of "equity claim". The court's focus in that case was not on the definition of "equity interest". As the appeal judge explained:

> The Proposal Trustee relies on the Ontario Court of Appeal's decision in *Sino-Forest*, at para. 44, which states that the term equity should be give an expansive meaning. In that case, the claim by the auditors for contribution and indemnity was derivative of a claim against them by corporate shareholders (equity holders). A claim for contribution and indemnity in respect of a claim for a monetary loss resulting from the ownership, purchase or sale of shares fall squarely within the examples of equity claims expressly provided for in the definition of equity claims under s. 2 of the BIA. In *Sino-Forest*, the Court's expanded view was in its recognition that the auditors' claim grounded in a cause of action for breach of contract did not change its essential character as a claim for contribution and indemnity in respect of shareholder (equity) claims. [Citation omitted.]

[60] The Trustee suggests that Ms. Athanasoulis' claim is akin to the claims of the auditors and underwriters in *Sino-Forest* because her entitlement to share in the profits of the YSL project is dependent on the ownership interests of the Cresford Group. I do not see the analogy. Ms. Athanasoulis' claim is not derivative

of a claim asserted by the Cresford Group. Rather, it is a claim asserted against her former employer. As the appeal judge stated:

> The fact that the parties chose to tie the quantification of the amounts payable under the Profit Sharing Agreement to YSL's (and the Cresford Group's) performance (profits, after deducting, or net of, amounts payable to the [limited partners]) does not transform a contractual obligation or debt to Ms. Athanasoulis into an equity claim within the meaning of the BIA, even if the practical effect of this would have been that payments under the Profit Sharing Agreement in the normal course would be made after payments to the [limited partners].

[61] The Trustee also relies on a number of decisions that it says support its position that equity claims "in substance", such as Ms. Athanasoulis' profit-sharing claim, fall within the scope of equity claims under the *BIA*. However, the cases that post-date the 2009 introduction of the definitions of "equity claim" and "equity interest" in the *BIA* do not support this position. While it is true that these decisions consider the "substance" of the claim at issue, each of the cases on which the Trustee relies deals with an "equity interest" as that term is specifically defined in the *BIA*.

a) *Re Nelson Financial Group Ltd.*, 2010 ONSC 6229, 75 B.L.R. (4th) 302: The claims of preferred shareholders in the capital stock of Nelson Financial were equity claims because they were in respect of equity interests, including declared but unpaid dividends and unperformed requests for redemption.

b) *Re U.S. Steel Canada Inc.*, 2016 ONSC 569, 34 C.B.R. (6th) 226, aff'd 2016 ONCA 662, leave to appeal granted but appeal discontinued, [2016] S.C.C.A. No. 480: A capital contribution by a sole shareholder of a company, unaccompanied by a further issue of shares, constituted a payment in respect of a share of the company. The shareholder's claim for repayment was therefore an equity claim.

c) *Re Bul River Mineral Corp.*, 2014 BCSC 1732, 16 C.B.R. (6th) 173: Shareholder claimants had received a judgment with respect to their claim before the bankruptcy filing. The judgment did not transform the original equity claim into a debt.

d) *Re All Canadian Investment Corporation*, 2019 BCSC 1488: Redemption notices delivered by preferred shareholders did not transform the shareholders' equity claim into a debt.

e) *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd.*, 2021 BCSC 607, aff'd 2023 BCCA 376: The plaintiffs' material contributions to the acquisition of property resulted in a beneficial ownership interest, *not* an equity interest.

f) *Avis d'intention de Cryogénique inc.*, 2021 QCCS 4100, aff'd 2022 QCCA 1387: An amalgamated company became the debtor for the balance of the share sale price for shares sold on the same day as the amalgamation occurred. The amalgamation did not change the nature of the claim, which was an equity claim for the sale of an equity interest.

g) *Syndic de Société de vélo en libre service*, 2023 QCCA 368, leave to appeal refused, [2023] S.C.C.A. No. 204: Loans from a sole shareholder were, in substance, contributions to capital. The shareholder's claim for repayment was an equity claim.

[62] In this case, Ms. Athanasoulis' profit-sharing claim is not based on an equity interest. She did not own shares in any of the Cresford Group companies, nor did she own any units in the limited partnership. Her claim is not based on an ownership interest, but rather, on a term of her employment, under which she was entitled to a share of the profits. This is not an equity interest as defined under the *BIA*, and accordingly the appeal judge made no error in finding that her profit-sharing claim is not an equity claim.

[63] Finally, the Trustee's proposed interpretation is result-driven. The circumstances of this case are unusual. Given the terms of the profit-sharing agreement, if Ms. Athanasoulis had not been terminated, she would not have received payments under the profit-sharing agreement until after the limited partners' investments were repaid. However, the apparent unfairness of Ms. Athanasoulis being paid ahead of the limited partners in the context of the bankruptcy proceedings cannot drive the determination of whether the profit-sharing claim is an equity claim. Bad facts should not make bad law. The court must base its decision on a correct interpretation of the *BIA* and not on what seems fair in the unique circumstances of this case. In any event, as noted by the appeal

judge, the only issue at this stage of the proceedings is whether the profit-sharing claim is a provable claim; the quantification of the claim, which will depend on multiple factors, may nevertheless lead to a conclusion that the claim is worth far less than Ms. Athanasoulis submits, and possibly even $0.

[64] Accordingly, I find that the appeal judge did not err in finding that the profit-sharing claim is not an equity claim under the *BIA*.

Issue 2: The appeal judge did not err in finding that the profit-share claim is not a contingent claim and that it is not too remote and speculative

(a) Introduction

[65] The Trustee submits that the appeal judge erred in finding that Ms. Athanasoulis' profit-sharing claim is not a contingent claim and that it is not too remote and speculative. The Trustee points out that, given that the Cresford Group did not ultimately build the YSL project, there were no profits earned on it. Moreover, had any profits been earned, they would have first gone to the limited partners.

[66] I disagree with the Trustee's position. The appeal judge correctly explained that, once Ms. Athanasoulis' claim is characterized as a claim for breach of her employment contract, damages are to be assessed from the date of the breach. Her claim is therefore not a contingent claim, but rather a claim for unliquidated damages. Calculating damages may be difficult and may even lead to the

conclusion that Ms. Athanasoulis is entitled to no damages, but this does not make her claim for breach of the profit-sharing agreement too remote and speculative as understood in the context of bankruptcy law and contract law.

(b) Relevant legal principles

[67] As noted above, s. 135(1.1) of the *BIA* requires a trustee to determine whether a contingent claim or unliquidated claim is provable and, if so, to value it.

[68] A contingent claim is a claim that may or may not ripen into a debt, depending on whether future events occur: *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 36. If a contingent claim is too remote or speculative, it is not a provable claim and a trustee can disallow it: *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443, at para. 36.

[69] A contingent claim must be distinguished from an unliquidated claim. An unliquidated claim is a claim whose value cannot be ascertained by mere arithmetic: L.W. Houlden, G.B. Morawetz, and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (2025-Rel 7), 4th ed (Toronto: Thomson Reuters, 2009) at §6:127.

[70] An unliquidated claim that is non-contingent is still subject to considerations of remoteness or speculation. In valuing an unliquidated claim, the trustee must

apply the law of damages relevant to that claim. I address the principles applicable to this calculation further below.

(c) Analysis

(i) Ms. Athanasoulis' claim is not a contingent claim

[71] On appeal, the Trustee renews the arguments made to the appeal judge that Ms. Athanasoulis' claim is a contingent claim because it depended on the completion of the YSL project and distribution of profits to the limited partners and then to the Cresford Group.

[72] In making the argument that the profit-sharing claim is a contingent claim, the Trustee ignores the appeal judge's determination that the profit-sharing claim is a claim for damages based on the breach of Ms. Athanasoulis' employment contract. The claim is therefore not contingent on a future event, namely the construction of the YSL project and earning of profits; rather, the breach occurred in January 2020 when Ms. Athanasoulis accepted the repudiation of her employment agreement. As the appeal judge stated, as in any employment context, damages are generally to be calculated from the date of the breach:

> Until there was a breach, the Profit Sharing Agreement would remain in place and any claim for payment under that agreement might reasonably be considered to be contingent upon profits actually being earned (to be calculated based on revenues less expenses, where expenses would include any amounts payable to the LPs). It might have been open to Ms. Athanasoulis not to accept the repudiation of the Profit Sharing Agreement

> and let it continue even though she was no longer employed by YSL and wait to be paid in the normal course; but she clearly did the opposite, as evidenced by her civil claim for damages for breach of that agreement commenced in 2020.
>
> As a matter of law, the accepted repudiation of the Profit Sharing Agreement converted a future right to receive actual profits if and when earned into a current right to receive damages for breach of contract. Once converted to a damages claim, the "normal course" that Ms. Athanasoulis would be paid once the profits had been earned, usually at the end of the project, no longer applied. Rather, the Profit Share Claim became an unliquidated claim for damages for breach of contract that would presumptively be assessed at the time of repudiation. [Emphasis added.]

[73] I see no error in the appeal judge's finding that Ms. Athanasoulis' profit-sharing claim is not a contingent claim. It is consistent with the treatment of other wrongful dismissal claims in the context of a bankruptcy, including claims based on future events, such as the payment of a bonus or a share of profits: *Noble v. Principal Consultants Ltd. (Bankrupt)*, 2000 ABCA 133, 187 D.L.R. (4th) 80, at para. 41; see also *Bankruptcy and Insolvency Law of Canada*, at §6:319. The fact that an employer became a bankrupt after the breach does not turn a valid wrongful dismissal claim into a contingent claim.

[74] The Trustee argues that this case is different from other employment cases because Ms. Athanasoulis' entitlement to share in the profits of the YSL project depended on the project going ahead and being profitable, which did not occur. I disagree. Again, this argument misses the point that the claim arose on the date

of the breach. At that point, as found by the arbitrator, Ms. Athanasoulis had an interest in the profit-sharing agreement. The breach of her employment contract means that she lost the opportunity to earn profits under the profit-sharing agreement. Although it may be difficult to quantify this lost opportunity, arguments about quantification do not transform this claim into a contingent claim.

[75] The Trustee relies on this court's decision in *Schnier v. Canada (Attorney General),* 2016 ONCA 5, 128 O.R. (3d) 537, to support its argument that the profit-sharing claim is a contingent claim. I agree with the appeal judge that *Schnier* has no application to the circumstances of this case. In *Schnier*, this court accepted that an amount claimed by the federal government for outstanding income tax which was under appeal by the bankrupt constituted a non-provable contingent claim because it depended on a determination to be made by a third party, namely the Tax Court, at a later date. Unlike in *Schnier*, the determination of Ms. Athanasoulis' profit-sharing claim does not depend on a future decision by a third party. Once her claim is properly viewed as a claim for breach of contract, it is evident that the breach has already occurred, and the only issue remaining is the quantification of damages.

(ii) Ms. Athanasoulis' claim is not too remote or speculative

[76] The Trustee's argument that Ms. Athanasoulis' profit-sharing claim is too remote and speculative is primarily based on its position that it is a contingent claim.

[77] As noted by the appeal judge, once it is determined that the profit-sharing claim is not a contingent claim, remoteness is only a bar to the recovery of damages if, as a matter of contract law, the type of loss at issue is too remote. There are two branches to the remoteness test: damages may be recoverable if (a) in the "usual course of things", they arise fairly, reasonably and naturally as a result of the breach of contract, or (b) they were within the reasonable contemplation of the parties at the time of contract: *The Rosseau Group Inc. v. 252801 Ontario Inc*., 2023 ONCA 814, 169 O.R. (3d) 192, at para. 68. Damages that fall outside of either branch are not recoverable because they are too remote: *Rosseau*, at para. 68. Importantly, remoteness in a breach of contract case deals with the "type" of loss that is recoverable, not with the measure or quantification of the loss: *Rosseau*, at para. 70. Damages that are difficult to calculate are not inherently too remote: *General Mills Canada Ltd. v. Maple Leaf Mills Ltd.* (1980), 52 C.P.R. (2d) 218 (Ont. H. Ct.), at p. 219; Jason W. Neyers, *Fridman's The Law of Contract in Canada*, 7th ed. (Toronto: Thomson Reuters, 2024), at §22:24.

[78] In applying these principles to this case, the appeal judge found:

> The type of loss at issue here is in respect of the lost opportunity to contribute to and eventually share in the profits that the parties anticipated would eventually be earned by YSL when the YSL Project was completed. The remoteness concerns identified by the Proposal Trustee are in respect of the measure of damages, not the type of loss.

[79] I see no error in the appeal judge's determination that the type of loss claimed by Ms. Athanasoulis is not the type of loss that is too remote for recovery. At the time of the breach, she lost the opportunity to work towards and share in YSL's profits. Her lost opportunity flowed naturally from the breach and was within the reasonable contemplation of the parties when the profit-sharing agreement was formed.

[80] As noted by the appeal judge and already stated above, quantifying the loss in this case may be complicated and may involve taking many different factors into consideration, but this does not make the type of loss too remote as a matter of contract law. As the appeal judge stated, quantifying damages will be "an issue for another day in these proceedings".

Issue 3: The appeal judge did not err in finding that the common law notice period does not apply to the profit-sharing claim

[81] The Trustee submits that the appeal judge erred in finding that the profit-sharing claim is not tied to the notice period. The Trustee had argued that the notice period in this case was 24 months. Because the YSL project was not meant to be completed within the 24 months following Ms. Athanasoulis' termination, she

would not have been entitled to a share of the profits once the project was completed. In making this argument, the Trustee relied on *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, [2020] 3 S.C.R. 64, at para. 49, wherein the Supreme Court stated that, in the normal course, the remedy for breach of an implied term to provide reasonable notice is to award as damages what the employee would have earned during the notice period.

[82] The appeal judge rejected this argument, reasoning that the facts in this case are distinguishable from the general principle enunciated in *Matthews* because, in this case, Ms. Athanasoulis' entitlement to share in the profits of the YSL project was not dependent on her continued employment with YSL:

> [Even] if Ms. Athanasoulis had been given two-years working notice and her employment had then terminated, it is not a given that her entitlements under the Profit Sharing Agreement would have automatically ended. The preservation of her entitlements under the Profit Sharing Agreement is consistent with the Arbitrator's finding that the Profit Sharing Agreement was intended to recognize her past and continuing contributions and was not just an incentive for future contributions. The Arbitrator expressly found that YSL could not eliminate Ms. Athanasoulis' claim by terminating her and could not reduce her share to zero after her prior years of contributions in the form of advance sales, etc. simply by terminating her employment on notice (at para. 160). It follows from these findings of the Arbitrator that, unlike in *Matthews*, the termination notice period is not determinative of the Profit Share Claim.

[83] I see no error in this reasoning. The arbitrator had found that Ms. Athanasoulis' entitlement to share in the profits of the YSL project did not end

with the termination of her employment. The parties proceeded on the understanding that the findings of the arbitrator were binding on the Trustee and on any appeals from the Trustee's disallowance decision. In the circumstances, the appeal judge did not commit any errors in distinguishing *Matthews* from this case and in finding that Ms. Athanasoulis' profit-sharing claim survives her notice period.

D. ISSUES RAISED BY THE LIMITED PARTNERS

[84] As indicated above, following the first phase of the arbitration, the limited partners objected to the arbitration process and obtained leave to participate in the proceedings before the Trustee and in the appeal from the disallowance decision.

[85] In her decision giving directions for the process to be followed in these proceedings, the appeal judge circumscribed the scope of the issues the limited partners could address on appeal. She made her decision "[s]ubject to the discretion of the appeal judge":

> Subject to the discretion of the appeal judge, the [limited partners'] 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 Sharing Claim and in respect of the priority/subordination of the Profit Share Claim to the [limited partners'] recovery of their initial investment based on alleged breaches of contractual and fiduciary duties and alleged misrepresentations. [Emphasis added.]

[86] The appeal judge explained the rationale for granting the limited partners a right to participate for the purpose of addressing these issues as follows:

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

[87] In her decision allowing Ms. Athanasoulis' appeal from the Trustee's disallowance decision, the appeal judge characterized the issues the limited partners were granted standing to address differently than in her procedural decision. She described the issues as (1) whether the profit-sharing agreement breaches the prohibition in s. 3.6(b) of the Amended and Restated Limited Partnership Agreement against non-arm's length transactions with a related party, and (2) whether the profit-sharing agreement breaches s. 3.2 of the Sales

Management Agreement, which prohibits compensation being paid to the corporation or its affiliates that is not specifically provided for in that agreement.

[88] The appeal judge noted that the Trustee did not adopt or rely on these grounds in the disallowance decision and found that the Trustee did not commit any reviewable errors in relation to the limited partners' submissions. She nevertheless went on to consider the issues raised by the limited partners *de novo.* She found that there was no evidentiary basis to find that Ms. Athanasoulis was an affiliate of YSL under the Sales Management Agreement or that the profit-sharing agreement was a prohibited "related party agreement" under the Amended and Restated Limited Partnership Agreement. She further found that the limited partners had not presented any evidence to support a finding that the profit-sharing agreement was "not on market terms", particularly in light of Ms. Athanasoulis' contributions to the Cresford Group and the YSL project.

[89] The appeal judge went on to consider what she described as "additional issues" raised by the limited partners. The most significant of these was a claim that Ms. Athanasoulis failed to disclose the profit-sharing agreement to the limited partners and that, as a result, she made a misrepresentation by omission and breached a fiduciary duty and other duties owed to the limited partners.

[90] The appeal judge decided that the appeal before her was not the proper forum in which to decide these additional issues. She stated that these issues went

beyond the scope of what the limited partners had been granted standing to address. Further, there was an insufficient evidentiary record to decide them. The appeal judge noted that the limited partners have commenced a separate claim against Ms. Athanasoulis and others, including Mr. Casey. She concluded that these "additional" issues raised by the limited partners could be decided in those separate proceedings, although she acknowledged that the court's decision in the *BIA* matter may have some bearing on them:

> This is not the forum for determining those other claims by the [limited partners]. The determination of those claims involves contentious factual disputes and credibility assessments. The issues raised by the [limited partners] cannot be properly adjudicated in a summary fashion on a paper record in the context of this appeal. Ultimately, these are matters that are more properly addressed between Ms. Athanasoulis and the [limited partners] outside of the context of these insolvency proceedings. It would not be reasonable or appropriate for the court to attempt to determine the [limited partners'] claims for breach of fiduciary duty and misrepresentation, etc. on this appeal.
>
> These claims by the [limited partners] (for alleged misrepresentations, breaches of fiduciary and other duties, estoppel and knowing assistance) are extraneous to the Trustee's Disallowance and to any future valuation of the Profit Share Claim. <u>It may be that the valuation of the Profit Share claim for purposes of the BIA process could have some bearing upon those other claims, but that is an issue for another day and another court.</u>
>
> <u>However, findings have been made regarding the enforceability and validity of the Profit Sharing Agreement and the subordination issue for purposes of the determination of priority of claims in these BIA</u>

> proceedings and will be binding upon the LPs in any future proceedings. [Emphasis added.]

[91] The limited partners raise the following issues on appeal:

1. Did the appeal judge err in failing to follow her own procedural order;
2. Did the appeal judge err in failing to determine the issues of misrepresentation and breach of fiduciary duty raised by the limited partners while holding that her decision would be *res judicata* and binding on the limited partners; and
3. Did the appeal judge err in failing to find that the profit-sharing agreement was unenforceable?

Issue 1: The appeal judge did not commit a reversible error in failing to follow her procedural order

[92] There is no doubt that the issues the appeal judge said she would address in her original procedural order are different from the issues she considered on appeal. In the original order, the appeal judge granted leave to the limited partners to address a range of issues, including on the question of the enforceability of the profit-sharing agreement "based on alleged breaches of contractual and fiduciary duties and alleged misrepresentations". Yet, in her decision on appeal, she stated that the issues of misrepresentation, breach of fiduciary duty and self-dealing fall outside of the scope of the standing that she granted to the limited partners in the context of the profit-sharing claim. Despite this discrepancy, I am not persuaded

that it was an error for the appeal judge not to decide the issues of misrepresentation, breach of fiduciary duty and other breaches of duty in the context of the proceedings before her.

[93] First, it is worth remembering that, generally, equity owners do not have standing to participate in the determination of creditors' claims: *YG Limited Partnership and YSL Residences Inc. (Re)*, 2023 ONCA 505, 484 D.L.R. (4th) 486, at para. 16. In this case, the limited partners were granted standing on an exceptional basis because they had a unique perspective on the issue of whether the profit-sharing agreement was enforceable.

[94] Second, in her procedural decision granting standing to the limited partners, the appeal judge made her ruling "[s]ubject to the discretion of the appeal judge". While the appeal judge did not explicitly refer to this discretion in her appeal decision, it is evident from her reasons for not addressing the issues of misrepresentation, breach of fiduciary duty and other breaches of duty that she concluded that there was an insufficient evidentiary basis to address these issues in the appeal, and that they would be more properly addressed in the litigation between the limited partners and Ms. Athanasoulis. The result would have been no different had the appeal judge recognized that she granted leave to the limited partners to address these issues, but, having reached a different stage in the proceedings, including having the benefit of the record presented before her by the

parties, she exercised her discretion not to consider the issues of misrepresentation, breach of fiduciary duty and breach of other duties.

[95] Finally, and perhaps most importantly, the only task before the Trustee and, in turn, the appeal judge was to determine whether Ms. Athanasoulis' profit-sharing claim was a provable claim in the context of YSL's bankruptcy. While agreements YSL entered into with the limited partners may have been relevant to this issue, allegations of misconduct by Ms. Athanasoulis vis-à-vis the limited partners would not be relevant to this determination. Bankruptcy proceedings are generally not the forum in which to resolve legal conflicts between creditors: *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 241 (C.A.), at para. 32. It is still open to the limited partners to proceed with their claim against Ms. Athanasoulis and to seek damages from her directly.

[96] In the circumstances, it was not an error for the appeal judge to refuse to decide the allegations of misrepresentation, breach of fiduciary duty and breaches of other duties against Ms. Athanasoulis and to determine that these issues were best decided in another forum.

Issue 2: The appeal judge did not improperly direct that her findings would be binding on a court dealing with the limited partners' claims against Ms. Athanasoulis

[97] The limited partners allege that, if it was indeed open to the appeal judge not to decide the issues of misrepresentation and breach of fiduciary duty and to

leave those issues to another proceeding, then she improperly stated that her findings would be *res judicata* in that subsequent proceeding.

[98] This is not actually what the appeal judge said. As reviewed above, after stating that the *BIA* proceeding was not the proper forum in which to decide the limited partners' claims against Ms. Athanasoulis, the appeal judge stated that "[i]t may be that the valuation of the Profit Share Claim for purposes of the BIA process could have some bearing upon those other claims, but that is an issue for another day and another court" (emphasis added). She then stated that "[h]owever, findings have been made regarding the enforceability and validity of the Profit Sharing Agreement and the subordination issue for purposes of the determination of priority of claims in these BIA proceedings and will be binding upon the LPs in any future proceedings" (emphasis added).

[99] The motion judge thereby distinguished between the aspects of her decision that may be binding on a future court. Quite correctly, she stated that her finding that the profit-sharing claim is a provable claim that has priority over the limited partners' equity claims in the context of the bankruptcy proceedings will be binding in future proceedings where this issue may be relevant. However, she did not determine what aspects of her decision would or would not "have some bearing" on the limited partners' claims against Ms. Athanasoulis for misrepresentation, breach of fiduciary duty or other breaches of duty. She simply stated that the valuation of Ms. Athanasoulis' claim may have "some bearing" on those future

proceedings. It will be up to the court in those future proceedings to decide that issue.

[100] I see no reversible error in the appeal judge's statements regarding the potential impact of her decision on future proceedings. She has left it open to the limited partners to proceed with their claim against Ms. Athanasoulis, without making any determinations regarding how her decision may affect their claim.

Issue 3: The appeal judge did not err in concluding that the profit-sharing agreement was enforceable

[101] The limited partners submit that the appeal judge erred in finding that the Amended Limited Partnership Agreement and the Sales Management Agreement do not render Ms. Athanasoulis' profit-sharing claim unenforceable. I see no merit to this argument.

[102] This aspect of the appeal judge's decision was based on factual and evidentiary findings. The appeal judge held that there was no evidentiary foundation for the limited partners' allegation that Ms. Athanasoulis was an affiliate of YSL, and on that basis she dismissed the claim that YSL breached the Sales Management Agreement by entering into the profit-sharing agreement with Ms. Athanasoulis. The appeal judge further found that the limited partners did not establish that the profit-sharing agreement was a prohibited "related party agreement" under the Amended Limited Partnership Agreement, in part because

the profit-sharing agreement was entered into before the limited partners entered into the Amended Limited Partnership Agreement. Finally, the appeal judge found that the limited partners presented no evidence that the profit-sharing agreement was not on market terms.

[103] This court owes deference to the appeal judge's factual and evidentiary findings. I see no palpable and overriding error in the appeal judge's determinations that the evidentiary record before her did not allow her to conclude that the profit-sharing agreement breached the terms of agreements between the limited partners and YSL.

[104] The limited partners also argue that the appeal judge did not properly understand their argument. They submit the appeal judge failed to appreciate that the breaches of the Sales Management Agreement and Limited Partnership Agreement were interconnected with Ms. Athanasoulis' misrepresentations and breaches of fiduciary and other duties. They submit that it was an error to consider the alleged breaches of the Sales Management Agreement and the Limited Partnership Agreement in isolation.

[105] This argument is also without merit. The appeal judge made no error in determining that there was no breach of the Sales Management Agreement and Limited Partnership Agreement without reference to the alleged misrepresentations or breaches of fiduciary duty, given her finding that there was

an inadequate record on which to adjudicate these claims. Ultimately, it will be for a judge in the proceedings between Ms. Athanasoulis and the limited partners to determine the merits of the limited partners' claims against her, including the impact, if any, of the decisions in these bankruptcy proceedings related to her profit-sharing claim.

[106] I would therefore dismiss this ground of appeal.

E. DISPOSITION

[107] I would dismiss the appeal.

[108] In accordance with the agreement of the parties, costs are payable by the Trustee to Ms. Athanasoulis in the sum of $45,000, all-inclusive, in court file number COA-24-CV-0468, and by the appellant limited partners to Ms. Athanasoulis in the sum of $30,000, all-inclusive, in court file number COA-24-CV-0550.

Released: August 14, 2025 J.D.

C. Fairburn J.A.

I agree. Paul J. C.

I agree. A. Gomery J.A.

Court of Appeal File No.: COA-24-CV-0468 & COA-24-CV-0550

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE JUSTICE GEORGE	)	THURSDAY, THE 14TH DAY
	)	
THE HONOURABLE JUSTICE FAVREAU	)	OF AUGUST, 2025
	)	
THE HONOURABLE JUSTICE GOMERY	)	

B E T W E E N :

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

ORDER

THESE APPEALS, brought by the Appellants, KSV Restructuring Inc. in its capacity as Proposal Trustee, Proposal Trustee for YSL Residences Inc and YG Limited Partnership (COA-24-CV-0468), and Certain Limited Partners (COA-24-CV-0550) from the Order of Justice Kimmel of the Ontario Superior Court of Justice dated March 19, 2024 heard together on December 17, 2024 at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, with judgment released on this date.

UPON READING the Appeal Book and Compendiums, Exhibit Books, Factums, Compendium for Oral Argument, Book of Authorities, and the Respondents Compendium, Factums, Book of Authorities and Compendium for Oral Argument and on hearing the submissions made by counsel for the Appellant and counsel for the Respondent,

1. **THIS COURT ORDERS** these appeals are dismissed.

2. **THIS COURT FURTHER ORDERS** costs are payable by the Trustee to Ms. Athanasoulis in the agreed upon sum of $45,000, all-inclusive, in court file number COA-24-CV-0468, and by the appellant limited partners to Ms. Athanasoulis in the agreed upon sum of $30,000, all-inclusive, in court file number COA-24-CV-0550

3. **THIS ORDER SHALL BEAR INTEREST** at the rate of five per cent (5%) per year commencing on August 14, 2025.

ENTERED AT / INSCRIPT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

Oct. 10, 2025

PER / PAR:

R.A.

Ramla Ahmed
Registrar
Court of Appeal for Ontario