Court File No. BK-21-02734090-0031

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

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

RESPONDING MOTION RECORD OF MARIA ATHANASOULIS

(Motion Returnable January 16, 2023)

January 4, 2023

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Mark Dunn LSO No. 55510L
mdunn@goodmans.ca
Sarah Stothart LSO No. 73068O
sstothart@goodmans.ca

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for Maria Athanasoulis

INDEX

I N D E X

1

Court File No. BK-21-02734090-0031

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

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

AFFIDAVIT OF EMILY SEABY
(Sworn January 4, 2023)

I, Emily Seaby of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a legal assistant with the law firm of Goodmans LLP ("**Goodmans**"), solicitors for Maria Athanasoulis, a creditor in this matter, and as such have knowledge of the matters to which I hereinafter depose, unless otherwise indicated.

2. Attached as Exhibit "A" is a copy of the Statement of Issues of Maria Athanasoulis (Damages Quantification Hearing) that was delivered on May 4, 2022.

3. Attached as Exhibit "B" is a copy of a draft Statement of Claim delivered by Chi Long Inc., 8451761 Canada Inc. and 2504670 Canada Inc. (collectively, the "**Chi Long LPs**"), dated June 2022.

4. Attached as Exhibit "C" is a copy of a Notice of Motion delivered by the Chi Long LPs, YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B

Investment Corporation, and TaiHe International Group Inc. (excluding the Chi Long LPs, the "**YongeSL LPs**"), dated October 13, 2022.

5. Attached as Exhibit "D" is a copy of email correspondence between Mark Dunn, counsel for Ms. Athanasoulis, Alexander Soutter, counsel for the YongeSL LPs, and Shaun Laubman, counsel for the Chi Long LPs, dated October 25-26, 2022.

6. Attached as Exhibit "E" is a copy of the Partial Award of Arbitrator William G. Horton dated March 28, 2022.

SWORN REMOTELY by Emily Seaby of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on January 4, 2023 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely.*

Sarah Stothart

Commissioner for Taking Affidavits
(or as may be)

Emily Seaby

Emily Seaby

This is **Exhibit "A"** referred to in the
Affidavit of Emily Seaby
sworn remotely before me this
4th day of January 2023

Sarah Stothart
A Commissioner for Taking Affidavits

Consolidated Court File No. 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

Claim of Maria Athanasoulis against
YG Limited Partnership and YSL Residences Inc.

STATEMENT OF ISSUES OF MARIA ATHANASOULIS

(Damages Quantification Hearing)

GOODMANS LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Mark Dunn LSO#: 55510L
mdunn@goodmans.ca
Sarah Stothart LSO#: 73068O
sstothart@goodmans.ca
Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for the Claimant, Maria Athanasoulis

PART I. OVERVIEW

1. By Partial Award dated March 28, 2022 (the "Partial Award"), William G. Horton (the "Arbitrator") found that:

   (a) YSL [1] agreed to pay Maria Athanasoulis 20% of the profits earned from the development and construction of the YSL Project (the "Profit Sharing Entitlement"); and

   (b) YSL constructively terminated Ms. Athanasoulis in December 2019.

2. Ms. Athanasoulis is therefore entitled to:

   (a) damages caused by YSL's repudiation of the Profit Sharing Entitlement (the "Profit Sharing Entitlement Damages"); and

   (b) damages for wrongful termination (the "Termination Damages") in the amount of approximately $1 million, less approximately $120,000 that has already been paid to her.

3. In December 2019, the Profit Sharing Entitlement was very valuable. The YSL Project was projected to earn profits of nearly $200 million, and that projection rested on a sound foundation of pre-sales and fixed price contracts. Even if YSL was unwilling or unable to proceed with the

[1] Capitalized terms not otherwise defined have the meaning ascribed to them in the Partial Award.

development, the YSL Project was a thriving development that could have been sold for a substantial profit.

4. Thus, Ms. Athanasoulis had a valuable contractual opportunity to be compensated from what would have been a very successful project. According to Justice Dunphy's decision in the underlying *BIA* proceeding, which is binding on YSL in this proceeding, Mr. Casey "squandered" this opportunity by trying to enrich himself at the expense of other stakeholders.[2] This effort culminated in YSL's proposal under the *BIA* (the "Proposal") and the sale of the YSL Project to an affiliate of Concord Developments Inc. ("Concord").

5. But nothing that Mr. Casey or YSL did *after* the breach affected the damages *caused* by the breach. YSL repudiated its contract with Ms. Athanasoulis, which included the Profit Sharing Entitlement (the "Agreement"), in December 2019 when it terminated her. As a matter of law, damages for breach of contract must be calculated as of the date of the breach. The injured party does not benefit from – and cannot be harmed by – events that occur after the breach. As a matter of fact, Ms. Athanasoulis could and would have steered YSL away from the disastrous course that Mr. Casey followed if she had not been terminated, and the YSL Project would have realized profits.

6. The Profit Sharing Entitlement Damages are, therefore, equal to the value of the Profit Sharing Entitlement in December 2019 when Ms. Athanasoulis was terminated. That value must

[2] *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178 at paras. 73 and 82 (the "Interim Reasons")

be calculated according to the real and significant chance that existed in December 2019 that the YSL Project would ultimately generate profits.

7. In the alternative, even if Mr Casey's post-breach conduct or the Proposal are somehow relevant to Ms. Athanasoulis' damages, she is still entitled to substantial damages for breach of the Profit Sharing Entitlement. This is because, despite Mr. Casey's machinations, the YSL Project earned a significant profit through early withdrawals of equity and the Proposal.

PART II. THE ISSUES PREVIOUSLY DETERMINED IN THIS ARBITRATION

A. Ms. Athanasoulis was Entitled to 20% of the Profits Earned by the YSL Project

8. Ms. Athanasoulis repeats and relies on the allegations in her Statement of Claim, the Partial Award, and the Interim Reasons of Justice Dunphy.

9. Mr. Casey induced Ms. Athanasoulis to work for, and add substantial value to, YSL by promising her the Profit Sharing Entitlement, a payment that would be based on YSL's profits on the YSL Project (the "Profits"). Mr. Casey denied that Ms. Athanasoulis had any Profit Sharing Entitlement in the first phase of this Arbitration. His evidence was rejected. In the Partial Award, the Arbitrator held that the Profit Sharing Entitlement required that:

(a) YSL pay Ms. Athanasoulis 20% of the Profits;

(b) Profits were to be calculated, on a good faith basis, based on the *pro forma* budgets prepared by Cresford;

(c) Profits could not be artificially reduced by "bad faith" transactions; and

(d) The Profit Sharing Entitlement was to be paid to Ms. Athanasoulis when Profits were earned, usually at the completion of a project.[3]

B. YSL's Breach of the Agreement

10. In the fall and culminating in December of 2019 (the "Repudiation Date"), Mr. Casey caused YSL to repudiate the Agreement. He took a series of actions that "separately and in combination, precluded Athanasoulis from performing most of the functions critical to her role at Cresford and had serious potential reputational consequences for Ms. Athanasoulis."[4] This rendered Ms. Athanasoulis' continued employment at Cresford "untenable".[5] Ms. Athanasoulis was constructively terminated.

11. YSL's constructive termination was, as a matter of law, repudiation of the Agreement in its entirety, including the Profit Sharing Entitlement. If any doubt remained about YSL's repudiation of the Profit Sharing Entitlement, that doubt was resolved in February 2020 when YSL specifically denied in a pleading that it was bound by it.

PART III. DAMAGES FOR BREACH OF THE PROFIT SHARING ENTITLEMENT

A. Damages for Lost Opportunity to Receive Profit Sharing Entitlement Based on Profits YSL *Would Have* Realized

12. The Profit Sharing Entitlement was an integral part of Ms. Athanasoulis' employment contract. This was a valuable right that was eliminated when YSL repudiated the Agreement. Her lost opportunity is based on the value of the Profit Sharing Entitlement at the time YSL repudiated

[3] Partial Award, paras. 146, 151 and 166
[4] Partial Award, para. 183
[5] Partial Award, para. 182

the Agreement. This value is substantial whether calculated based on the chance that the YSL Project would have been developed or sold.

(i) Damages are to be calculated on the date of the breach

13. The losses suffered by Ms. Athanasoulis are to be calculated based on the value of the Profit Sharing Entitlement on the Repudiation Date. Whether the value of the Profit Sharing Entitlement increased or decreased after the Repudiation Date is not relevant. As such, the decline in value of the YSL Project after the Repudiation Date due to Mr. Casey's actions has no bearing on Ms. Athanasoulis' damages.

14. This is a well-established legal rule,[6] and also required to do justice in this case. Pursuant to the Agreement, Ms. Athanasoulis was entitled to be paid based on the Profits earned by YSL *and* she was to play a key role in creating these Profits. If YSL had not repudiated the Agreement, then the YSL Project would have retained its value because Ms. Athanasoulis (and the other employees who left after she did) would have ensured that the YSL Project was managed for the benefit of all stakeholders and not to enrich Mr. Casey personally.

15. Any steps taken by Cresford to increase or decrease the value of the YSL Project *after* the Repudiation Date do not affect the damages to which Ms. Athanasoulis is entitled because Ms. Athanasoulis' damages had already crystallized.

---

[6] See for e.g., *Akelius Canada Ltd. v. 2436196 Ontario Inc.*, 2022 ONCA 259, para. 22 and *Kipfinch Developments Ltd. v. Westwood Mall (Mississauga) Ltd.*, 2010 ONCA 45, para. 15

(ii) The YSL Project was likely to realize Profits as of the Repudiation Date

16. As of the Repudiation Date, the parties had every expectation that the YSL Project would earn Profits and that Ms. Athanasoulis would be paid 20% of those Profits pursuant to the Profit Sharing Entitlement. The YSL Project was also *already* profitable on the Repudiation Date, because the value of the YSL Project increased substantially after YSL acquired it. Even though most of these Profits had not yet been *realized*, they were recognized in YSL's pro forma and could have been realized through a sale of the YSL Project at any time.

17. YSL was likely to realize Profits in one of two primary ways. It could have completed the YSL Project, sold condominium units, and realized the profits projected on its *pro forma*; or it could have sold the YSL Project and immediately realized the Profits it had already earned.

18. YSL could have (and probably should have) sold the YSL Project in or around December 2019. The value of the YSL Project significantly exceeded any investment by YSL therein. The increased value of the YSL Project was the result of many years of hard work by Ms. Athanasoulis and other employees working under her supervision. YSL had successfully completed (or partially completed) several important parts of the development process. Specifically, YSL had:

(a) designed the YSL Project and redeveloped the property to permit construction;

(b) raised the equity required to build the YSL Project;

(c) arranged construction financing, which was ready to be advanced once the retail component of the YSL Project was subject to a firm purchase agreement;

(d) sold condominium units with a total value of approximately $650 million;

(e) entered into fixed price contracts for approximately 70% of the total projected costs; and

(f) completed the excavation and shoring work required for the YSL Project.

19. Each of these steps increased the value of the YSL Project and, by December 2019, that value significantly exceeded the amounts invested by YSL.

20. A fair, open and transparent marketing process would have yielded a very substantial profit. By way of illustration (which may be revised once documentary disclosure is complete), YSL had invested approximately $247 million in the YSL Project and the YSL Project had an appraised value of $375 million. Based on these figures, the Profit Sharing Entitlement had a value of approximately $25 million.

21. Alternatively, if YSL had been able to proceed with the development, it would also have earned very substantial profits. Based on the pro forma prepared in October 2019, the YSL Project was projected to earn a profit of more than $196 million if developed. Both Mr. Casey and Ms. Athanasoulis testified that the projections in the pro forma, which were vetted by a leading cost consultant, were reliable. These projections were based on condominiums already sold, fixed price contracts already settled, and construction financing loans already agreed subject to conditions that YSL could have satisfied with appropriate management. Even after accounting for the risks associated with the development of the YSL Project, there was a real and substantial chance of Profits in this scenario.

22. Thus, as of the Repudiation Date, it was more likely than not that the YSL Project would earn a substantial profit. It follows that the Profit Sharing Entitlement had significant value and Ms. Athanasoulis is entitled to significant damages.

23. Unfortunately, as set out below, Mr. Casey breached the Agreement not only by causing YSL to terminate Ms. Athanasoulis, but also by pursuing a self-serving – and ultimately destructive – attempt to enrich Cresford at the expense of other stakeholders including Ms. Athanasoulis.

(iii) YSL breached the Agreement by incurring improper debt

24. YSL borrowed funds that it did not need to fund the YSL Project and used those funds to make payments for the benefit of other Cresford entities. As will be described below, this was a breach of YSL's loan documents that resulted in the loss of YSL's key construction financing.

25. On December 20, 2017, YSL, 33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership entered into a $20 million Loan Agreement with OTB. The loan was used to fund the purchase of a separate property at 33 Yorkville Avenue (the "Yorkville Property"). YSL had no interest in the Yorkville Property and received no benefit from these borrowed funds.

26. On December 17, 2019, YSL borrowed a further $10 million from OTB. The loan was secured by a mortgage registered on properties adjacent to the YSL Project that YSL purchased during the development process. These funds were used to pay other Cresford expenses and to pay Mr. Casey personally.

27. These loans were bad faith transactions that themselves breached the Agreement. In remedying the breach of Ms. Athanasoulis' Profit Sharing Entitlement, Ms. Athanasoulis is entitled to be put in the position she would have been in but for these additional breaches. Ms. Athanasoulis' Profit Sharing Entitlement Damages are therefore equal to what YSL's Profits would have been if it had not engaged in these bad faith transactions that diverted funds away from YSL.

(iv) Mr. Casey's self-serving – and self-defeating – actions do not reduce the value of the Profit Sharing Entitlement

28. When the parties entered into the Agreement, and particularly when the Profit Sharing Entitlement was increased to 20%, all parties involved expected that Ms. Athanasoulis was going to continue to oversee YSL's operations until the YSL Project was complete. In addition to the right to be paid based on the profits that YSL earned, Ms. Athanasoulis was to play a key role in *generating* those profits.

29. This is not what happened. After repudiating the Agreement, YSL denied that Ms. Athanasoulis had *any* entitlement under the Profit Sharing Entitlement or any other interest in YSL. Ms. Athanasoulis was not even served with a copy of the Proposal.

30. After ridding himself of Ms. Athanasoulis, Mr. Casey and YSL had essentially two options. YSL could proceed with the development of the YSL Project or it could sell the YSL Project to realize the Profits that had been earned by developing, marketing, and selling condominium units. YSL did neither. It *never* made any meaningful or competent attempt to maximize the value of the YSL Project. Instead, Mr. Casey took a series of steps that significantly reduced the value of the YSL Project and caused YSL to pursue a process that was found by Justice Dunphy in the Interim

Reasons to be "indelibly tainted" by Mr. Casey's attempts to enrich himself at the expense of other stakeholders in YSL's proposal proceedings.[7] These steps did not reflect what was would have happened if YSL had not breached the Agreement and do not impact the damages to which Ms. Athanasoulis is entitled because those damages crystallized on the Repudiation Date.

31. Moreover, Mr. Casey's actions were themselves breaches of YSL's obligation to maximize the value of the YSL Project. Ms. Athanasoulis is entitled to be put in the position she would have been in but-for those breaches.

(v) YSL lost its construction financing because of Mr. Casey's improper loans

32. A key element of YSL's development efforts was the construction financing that Otera agreed to provide (the "Otera Loan"). Otera agreed to loan YSL more than $600 million, subject to certain conditions being satisfied. The last remaining condition, at the time of termination, was an agreement to sell the retail component of YSL. According to Mr. Casey, this condition was satisfied in January 2020.

33. However, Otera terminated the Otera Loan on the basis that YSL breached its loan agreement by entering into the improper loans described above.

34. Despite YSL not itself being in a position to continue the YSL Project without the Otera Loan, the YSL Project remained valuable. That value would have been realized if YSL had engaged in an open and honest attempt to secure a purchaser or investor for the YSL Project. It did not.

---

[7] Interim Reasons, para. 76

(vi) Mr. Casey's attempt to enrich himself destroyed the value of the YSL Project

35. The management of the YSL Project between December 2019 (when Ms. Athanasoulis was terminated) and July 2021 (when YSL's proposal under the *BIA* was accepted) had one goal: to enrich Mr. Casey and the entities he controlled.

36. In the proposal proceedings that led to this Arbitration, Justice Dunphy specifically found that in the year between Cresford terminating Ms. Athanasoulis and agreeing to sell the YSL Project, "good faith took a back seat to self-interest".[8] As a result, Mr. Casey "squandered" YSL's opportunity to maximize the value of the YSL Project:

> [76] Few things are more precious in the restructuring business than time. YG LP was able to "purchase" more than a year of time with the forbearance arrangements that it worked out. That precious time appears to have been devoted solely to finding transactions that offered the greatest level of benefits for the Cresford group of companies. There is no evidence that any canvassing of the market – however constrained the market of developers capable of undertaking the completion of an 85-story mixed use tower in downtown Toronto may be – took place that was not indelibly tainted by the imperative of finding value for the Cresford group of companies rather than for the partnership itself. [9]

37. YSL is bound by these findings, and cannot dispute them in this proceeding. It also cannot credibly claim that Mr. Casey's wrongdoing, and any resulting decrease in the value of the YSL Project, eliminated Ms. Athanasoulis' contractual entitlement under the Profit Sharing Entitlement or impacted her ability to recover damages for its breach.

---

[8] Interim Reasons, para. 74
[9] Interim Reasons, para. 76

(vii) The value of the YSL Project was not established in the Proposal proceedings

38. The value of an asset sold under court supervision is usually proven either by a fair and transparent sales process or reliable valuation evidence. That did not happen in this case.

39. As noted, Justice Dunphy found that the sales process undertaken by Mr. Casey was "indelibly tainted" by self-interest. His Honour also specifically rejected the appraisal evidence tendered in support of the Proposal.[10]

40. YSL and Concord, the purchaser of the YSL Project in the Proposal, relied on a CBRE appraisal dated April 30, 2021 indicating that the YSL Project was worth approximately $278.5 million (the "Concord Appraisal"). CBRE had concluded approximately two years earlier, in July 2019, that the YSL Project was worth approximately $375 million. Justice Dunphy did not accept the Concord Appraisal because there was no satisfactory explanation for this very substantial decrease or the instructions given to CBRE. No further valuation evidence was tendered by YSL, or any other party.

41. When Justice Dunphy ultimately approved the Proposal, he specifically did not make any findings of "what the value of the project might have been had the project been offered on the open market in a competitive process"[11].

---

[10] Interim Reasons, para. 26

[11] *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206, para. 21

(viii) Justice Dunphy's approval of the Proposal does not affect Ms. Athanasoulis' damages

42. As the Arbitrator noted in the Partial Award, Ms. Athanasoulis' claim for her Profit Sharing Entitlement is unusual because YSL underwent insolvency proceedings beginning in April 2021.[12] But nothing about YSL's insolvency proceedings undermines Ms. Athanasoulis' claim.

43. After YSL improved the terms of the Proposal, Justice Dunphy approved the Amended Proposal without altering the earlier findings about Mr. Casey's conduct and the value of the YSL Project. The approval was a pragmatic response to the predicament caused by Mr. Casey's wrongdoing. Mr. Casey had "squandered" the time available to maximize the value of the YSL Project and Justice Dunphy found that, by that time, it was unfair to require that creditors bear the delays and risks associated with a sales process.

44. YSL's insolvency and subsequent Proposal occurred long after YSL repudiated the Agreement, Ms. Athanasoulis accepted the repudiation, and Ms. Athanasoulis' damages crystallized. The profits that YSL did or did not earn when it sold the YSL Project approximately 18 months *after* the Repudiation Date are not relevant to measuring damages that crystallized *on* the Repudiation Date.

45. Nothing about the Proposal, or Justice Dunphy's findings, undermines Ms. Athanasoulis' claim. To the contrary, it was definitively established that there was no attempt to maximize the value of the YSL Project after the Repudiation Date because Mr. Casey prioritized his own interests over those of YSL. That finding cannot be challenged in this case.

---

[12] Partial Award, para. 164.

B. Damages Based on Actual Profits Realized by YSL

46. In the alternative, even if Ms. Athanasoulis can only claim for payments based on the Profits *actually earned* on the YSL Project, she is still entitled to a substantial damages award because YSL did actually earn a Profit.

(i) YSL paid out Profits beginning in 2017

47. Unbeknownst to Ms. Athanasoulis, YSL realized its first Profit in August 2017, when it re-financed the Property and bought out its former joint venture partner, British Columbia Investment Management Corporation ("BcIMC").

48. YSL funded the purchase of BcIMC's interest using a vendor take-back mortgage from BcIMC, mortgage financing from Timbercreek Mortgage Investment Corp. ("Timbercreek"), a mortgage from OTB, and funds from outside investors who purchased Class "A" LP Units (the "LPs").

49. But YSL was able to raise much more than it needed, because the value of the Property had increased so much since it was purchased.

50. The additional funds raised in connection with the BcIMC buyout did not stay with YSL. Instead, and without Ms. Athanasoulis' knowledge or consent, the additional funds were transferred to other Cresford entities. These transfers represented an early payout of Profits earned on the YSL Project.

51. Thus, Cresford earned substantial Profits on the YSL Project and paid these Profits to Cresford before the Project was completed. These Profits were concealed from Ms. Athanasoulis and other stakeholders.

52. Cresford, at the direction of Mr. Casey and without Ms. Athanasoulis' knowledge, took further steps to drain Profits from the YSL Project before it was complete. The particulars of these steps are not currently known to Ms. Athanasoulis, but they will be particularized before the hearing.

53. Pursuant to her Profit Sharing Entitlement, Ms. Athanasoulis should have received 20% of any Profits taken out of the YSL Project, regardless of when or how they were paid. She received nothing. Ms. Athanasoulis is entitled to damages for this breach of the Agreement.

(ii) YSL earned a Profit as part of the Proposal

54. YSL earned a further Profit when it sold the YSL Project as part of the Proposal.

55. The YSL Project's Profits are equal to revenues less expenses. YSL's sale of the YSL Project generated revenues that significantly exceeded its expenses.

56. The implied purchase price for the YSL Project under the Proposal totalled approximately $291 million. In addition to the amounts paid under the Proposal itself, a company related to Concord paid Cresford $6.7 million. This payment was made by a different Concord entity, to avoid the *BIA* restriction on paying any amount to equity without paying all creditors in full. However, the payments were undeniably part of the consideration that Concord paid to acquire the

YSL Project. The true purchase price for the YSL Project is therefore approximately $297.7 million.

57. YSL's expenses were significantly less than its revenues, although particulars of those expenses have not yet been provided.

58. Even though YSL *earned* a Profit, it did not have funds available for distribution after the Proposal was approved and completed because Cresford had already *paid* itself these Profits (without Ms. Athanasoulis' knowledge or approval) earlier in the YSL Project.

59. YSL has not provided any meaningful information required to quantify the Profit earned on the YSL Project, because the Trustee does not have the relevant information and Cresford has refused to produce any documents. Further particulars of the damages claimed by Ms. Athanasoulis will be provided once the necessary information has been produced.

60. Even assuming (as YSL does) that Ms. Athanasoulis' damages are calculated based on 20% of the actual Profits drawn out of YSL, rather than a damages award for loss of opportunity as detailed above, that amount is still substantial (although it cannot be quantified without access to YSL's detailed accounting records).

C. Termination Damages

61. Ms. Athanasoulis was constructively dismissed without notice or cause. YSL is liable for damages in an amount equal to what Ms. Athanasoulis would have earned during the notice period to which she was entitled. Ms. Athanasoulis is entitled to a 24 months' notice period, having regard to:

(a) **Character of employment:** Ms. Athanasoulis was Cresford's most senior employee except for Mr. Casey, with overall responsibility for virtually all aspects of Cresford's business except financing. In that capacity, she successfully executed some of the most ambitious development and construction projects in Canada;

(b) **Age and length of employment:** Ms. Athanasoulis worked at Cresford for 16 years and is 42 years old;

(c) **Availability of similar employment:** Similar employment is not currently available to Ms. Athanasoulis and will not be available to her for the foreseeable future**;** and

(d) **YSL's conduct:** Ms. Athanasoulis' damages have been significantly exacerbated by the allegations made by YSL. Specifically, YSL (and the other Cresford defendants) have accused Ms. Athanasoulis of very significant wrongdoing including embezzling $1 million. The Trustee investigated these allegations, and decided not to advance them in this proceeding. But the allegations against Ms. Athanasoulis have significantly harmed her prospects, and warrant an enhanced notice period.

D. Conclusion

62. YSL repudiated the Agreement, and then exacerbated that repudiation by its further wrongdoing. It must make good the losses that it caused.

May 4, 2022

Goodmans LLP

Barristers & Solicitors

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Mark Dunn LSO#: 55510L
mdunn@goodmans.ca
Sarah Stothart LSO#: 73068O
sstothart@goodmans.ca

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for the Claimant, Maria Athanasoulis

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

Consolidated Court File No. 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

STATEMENT OF ISSUES OF MARIA ATHANASOULIS

(Damages Quantification Hearing)

GOODMANS LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Mark Dunn LSO#: 55510L
mdunn@goodmans.ca
Sarah Stothart LSO#: 73068O
sstothart@goodmans.ca

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for the Claimant, Maria Athanasoulis

B

This is **Exhibit "B"** referred to in the
Affidavit of Emily Seaby
sworn remotely before me this
4th day of January 2023

Sarah Stothart
_____
A Commissioner for Taking Affidavits

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

(Court Seal)

2504670 CANADA INC., 8451761 CANADA INC. and CHI LONG INC.

Plaintiffs

and

MARIA ATHANASOULIS, 9615334 CANADA INC. and DANIEL CASEY

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date June , 2022 Issued by _____
Local Registrar

Address of court office: Superior Court of Justice
330 University Avenue, 8th Floor
Toronto ON M5G 1R7

TO: Maria Athanasoulis

AND TO: 9615334 Canada Inc.

AND TO: Daniel Casey

CLAIM

1. The Plaintiffs claim:

   (a) a Declaration that there was no "Profit Sharing Agreement" as alleged by the Defendant, Maria Athanasoulis ("**Athanasoulis**");

   (b) in the alternative, a Declaration that any such Profit Sharing Agreement is unenforceable and/or a nullity as against the YG Limited Partnership (the "**Partnership**") and the Plaintiffs as it was entered into in breach of the LP Agreement (defined below) and/or in breach of the fiduciary duties owed by the Defendants to the Plaintiffs;

   (c) in the alternative, a Declaration that Athanasoulis is not entitled to any payment under the Profit Sharing Agreement until the Plaintiffs have recovered their full investment capital and return on investment pursuant to the LP Agreement and the Defendants' representations;

   (d) in the further alternative, damages:

      (i) against the Defendant, 9615334 Canada Inc., (the "**General Partner**"), in the amount of any payment Athanasoulis receives under the Profit Sharing Agreement, for breach of the LP Agreement, breach fiduciary duty, breach of trust and/or misrepresentation;

(ii) against the Defendant, Daniel Casey ("**Casey**"), in the amount of any payment Athanasoulis receives under the Profit Sharing Agreement, for breach of fiduciary duty, breach of trust, knowing assistance, inducing breach of contract and/or misrepresentation; and/or

(iii) against Athanasoulis, in the amount of any payment she receives under the Profit Sharing Agreement, for breach of fiduciary duty, breach of trust, knowing assistance, knowing receipt, inducing breach of contract, misrepresentation and/or unjust enrichment;

(e) prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(f) postjudgment interest in accordance with section 129 of the *Courts of Justice Act*;

(g) the costs of this proceeding, plus all applicable taxes; and

(h) Such further and other Relief as to this Honourable Court may seem just.

The Parties

2. The Plaintiffs are companies incorporated pursuant to the laws of Canada and are limited partners of the Partnership.

3. The Defendant, the General Partner, was the general partner of the Partnership and is affiliated with a group of companies operating under the "Cresford" name (the "**Cresford Entities**"). The Cresford Entities together marketed themselves as "**Cresford**", "The Cresford Group" or "Cresford Developments".

4. The Defendant, Casey, is an individual residing in the province of Ontario. Casey was the founder and President of Cresford and the sole director of all Cresford Entities at all material times.

5. The Defendant, Athanasoulis, is an individual residing in the province of Ontario and held various roles as a Cresford employee from 2004 until January 2, 2020.

The Partnership

6. The Partnership is a limited partnership established under the laws of the Province of Manitoba to own, construct, develop, and sell a high-rise condominium building near the intersection between Yonge Street and Gerrard Street in Toronto, Ontario (the "**YSL Project**"). The Partnership was the direct or indirect owner of YSL Residences Inc., a bare trustee that owned the lands on which the Project is located.

7. The Plaintiffs entered into an Amended and Restated Limited Partnership Agreement (the "**LP Agreement**") dated August 4, 2017 with the General Partner, the Cresford (Yonge) Limited Partnership (a Cresford-related entity, holding Class B Units) and the other limited partners to establish the Partnership.

8. The "equity" in the partnership effectively resided in the Class "A" unit holders (including the Plaintiffs) with approximately $14.8 million in capital and a capped right to return on that capital equivalent to the greater of 12.25% annually or 100% of the capital. After payment of the Class "A" unit holders, the Class "B" unit holders would receive all the residual profits without limit.

9. The General Partner had only nominal capital and nominal interest in the Partnership.

10. Both the Class “B” Units holders and the General Partner were Cresford Entities.

11. The LP Agreement provides that:

(a) the General Partner shall exercise its powers and discharge its duties honestly, in good faith and in the best interests of the limited partners and it shall exercise the care, diligence and skill that a reasonably prudent operator of a similar business would exercise in comparable circumstances (Section 3.5(a));

(b) the General Partner shall not enter into any contract with any Related Party, other than on market terms (Section 3.6(b));

(i) Related Party means any of the affiliates of the General Partner or any of their respective directors, officers, employees and shareholders (Section 1.1);

(ii) Affiliate includes any entity directly or indirectly controlling, controlled by, or under common control with the General Partner (Section 1.1);

(c) the Plaintiffs as Class A Preferred Unit holders are entitled to a preferred return of the profits and Distributable Cash (as defined in the LP Agreement), reimbursement of all their capital contributions plus *the greater of*

(i) an amount equal to the Plaintiffs’ capital contribution (i.e.100% of the invested capital); and

(ii) compounded and cumulative preferred annual return of 12.25% interest, calculated from the date that each capital contributions was made (Section 4.2);

(d) the LP Agreement and any Subscription Agreements constitute the entire agreement among the General Partner and limited partners of the Partnership with respect to the subject matter hereof, and supersede any prior agreement or understanding among them with respect to such matters. The representations and warranties of the General Partner and the limited partners in the LP Agreement and in any Subscription Agreements (and all other provisions of the Subscription Agreements) shall survive the execution and delivery of the LP Agreement (Section 14.9).

12. The Plaintiffs each became a limited partner in the Partnership pursuant to one or more Subscription Agreements entered into with the General Partner.

13. The Subscription Agreement attached and incorporated an information package that Cresford presented to investors. The presentation, attached as Schedule "A" to the Subscription Agreement, made the following representations regarding the YSL Project:

(a) a projection of full return of the investment capital plus an investment return of 100% of the invested capital;

(b) the limited partners would receive security for their investments in the form of a corporate guarantee by the registered owner of the land and a personal guarantee by Casey;

(c) revenues would be paid in the following order:

(i) external lenders;

(ii) return of invested capital to the limited partners plus distribution of agreed upon return on investment to the limited partners; and

(iii) lastly, distribution to Cresford.

14. The Plaintiffs' capital contributions to the Partnership and the return on investment are in the sum of $9.4 million:

(a) $2 million capital contribution from 8451761 Canada Inc., plus $2 million return on investment/accrued interest;

(b) $2 million capital contribution from 2504670 Canada Inc. plus $2 million return on investment/accrued interest; and

(c) $700,000 capital contribution from Chi Long Inc. plus $700,000 return on investment/accrued interest.

15. The Defendants repeatedly represented to the Plaintiffs that Cresford would not be paid any amounts by the Partnership until after the Plaintiffs and the other limited partners had received their full return of capital and profit entitlement.

Athanasoulis Made Representations to the Plaintiffs

16. Maria joined Cresford as Manager, Special Projects in 2004.

17. She was promoted to Vice-President, Sales and Marketing in 2005, and President, Sales and Marketing in 2012.

18. She became the President and Chief Operating Officer of Cresford in or around August 2018 and held that role until her departure from Cresford.

19. Athanasoulis oversaw the sales and marketing for the YSL Project and introduced potential investors to Cresford. She solicited the Plaintiffs' investments in the Project and was the primary representative of Cresford who dealt with them.

20. To induce the Plaintiffs to invest in the YSL Project, Athanasoulis (as well as Casey and the General Partner, which is a Cresford Entity) repeatedly represented to them that they would be paid their investment capital plus 100% investment return before the General Partner or Cresford (and by extension, Athanasoulis), as memorialized in the LP Agreement and the Subscription Agreement.

21. At no time prior to or after the Plaintiffs made their investments and the LP Agreement was entered into did Athanasoulis or the other Defendants advise them that she had an agreement entitling her to any share of the profits in connection with the YSL Project.

Athanasoulis Commences Action Against Cresford

22. Athanasoulis left Cresford on January 3, 2020.

23. On January 21, 2020, Athanasoulis commenced an action against Casey and Cresford Entities, including the YG Limited Partnership and YSL Residences Inc., seeking $1,000,000 in damages for wrongful dismissal, as well as 20% the profits earned on the Cresford Projects

(including the YSL Project and other Cresford projects) under an alleged Profit Sharing Agreement with Cresford through Casey.

24. She alleged that since the expected profits at the time of her departure from Cresford was $242 million, she was entitled to a profit share of $48 million.

25. None of the Defendants had ever informed the Plaintiffs of the existence of any such Profit Sharing Agreement.

26. In her original claim, Athanasoulis did not allege that she was entitled to any share of YSL Project profits in priority to the Plaintiffs. She admitted that Casey and YSL Residences Inc. had guaranteed that the Plaintiffs' investments would be repaid along with interests.

27. Athanasoulis also filed a Proof of Claim for an identical claim with respect to another Cresford project, the "Clover Project", which was subject to a *Companies' Creditors Arrangement Act* proceeding (the "**Clover CCAA Proceeding**").

28. The Monitor in the Clover CCAA Proceeding disallowed the claim because it found the profit sharing claim was contingent on the Clover Project earning a profit, which remained unknown at that stage.

29. Justice Hainey in the Clover proceedings also described the profit sharing claim as being too speculative.

30. Similarly, the YSL Project has not generated any profit to date and has been placed under a Proposal pursuant to the *Bankruptcy and Insolvency Act* (the "***BIA***"), as further described below.

31. The Plaintiffs have not been repaid any of their investments nor have they received any interest or return on capital.

YSL Placed under *BIA* Proposal

32. On April 30, 2021, the General Partner filed a Notice of Intention to Make a Proposal under the *BIA* with respect to the Partnership and YSL Residences Inc.

33. On May 27, 2021, the General Partner filed a Proposal under the *BIA* despite objections from the limited partners and an application by the limited partners to remove the General Partners.

34. On June 29, 2021, Justice Dunphy rejected the Proposal and found that the General Partner had breached its fiduciary duties to the limited partners, the LP Agreement and *The Partnership Act* (Manitoba) in filing the Proposal.

35. The General Partners subsequently filed an amended proposal on July 9, 2021, which Justice Dunphy approved on July 16, 2021 (the "***BIA* Proposal**"). Justice Dunphy left undisturbed his findings regarding the General Partner's breaches of the LP Agreement, *The Partnership Act*, and fiduciary duty.

Proposal Trustee and Athanasoulis Agreed to Arbitrate Her Claim

36. Subsequent to the Partnership and YSL Residences Inc. being placed under the *BIA* Proposal, Athanasoulis and KSV Restructuring Inc., the designated trustee for the *BIA* Proposal (the "**Proposal Trustee**"), agreed to refer certain issues with respect to her claim to a private and confidential arbitration.

37. The Plaintiffs and the other limited partners were not invited to be a part of the arbitration, nor were they parties to the arbitration agreement between the Proposal Trustee and Athanasoulis or were even provided a copy of the agreement.

38. Athanasoulis filed an amended claim in the arbitration suggesting, for the first time, that she had a Profit Sharing Agreement that entitled her to a share of profits of the YSL Project regardless of whether the Plaintiffs and other limited partners received any return of their investment or guaranteed interest.

39. However, Athanasoulis has subsequently admitted that any payment she is entitled to under the alleged Profit Sharing Agreement would rank lower in priority to the limited partners' entitlement to their investment capital and returns.

40. As mentioned above, the YSL Project has not been profitable. Athanasoulis is therefore not entitled to any payment under the Profit Sharing Agreement even if it existed and is enforceable.

41. Further, any payment Athanasoulis is entitled to under the alleged Profit Sharing Agreement would rank lower in priority to the limited partners' entitlement to their investment capital and returns.

No Profit Sharing Agreement

42. There is no written Profit Sharing Agreement.

43. To the extent that there was any oral Profit Sharing Agreement, which the Plaintiffs deny, such Agreement could not have provided that Athanasoulis would be entitled to a profit share

payment from the Partnership in priority to payment to the limited partners for their investment capitals and investment return. Such terms would be in breach of the LP Agreement and the Defendants' fiduciary duties and contrary to their representations to the Plaintiffs as well as Athanasoulis' own admissions.

Profit Sharing Agreement Unenforceable

44. If there was a Profit Sharing Agreement, which the Plaintiffs deny, such an Agreement is in breach of the LP Agreement, the Defendants' fiduciary duties and contrary to their representations to the Plaintiffs and is therefore unenforceable as against the Partnership and the limited partners.

45. In the alternative, Athanasoulis is not entitled to any payment under the Profit Sharing Agreement until after the Plaintiffs have recovered their full investment capital and profit pursuant to the LP Agreement and the Defendants' representations.

46. In the further alternative, the Plaintiffs are entitled to damages in the amount of any payment Athanasoulis receives under the Profit Sharing Agreement, for breach of fiduciary duty, breach of trust, breach of the LP Agreement, knowing assistance, knowing receipt, inducing breach of contract, misrepresentation and/or unjust enrichment.

Breach of the LP Agreement

47. The alleged Profit Sharing Agreement breaches the LP Agreement.

48. The LP Agreement provides that the Plaintiffs are entitled to a preferred return of their investment capitals and profits. It also requires the General Partner to act honestly, in good faith and in the best interests of the limited partners.

49. The LP Agreement further provides that the General Partner cannot enter into any contract on behalf of the Partnership with an affiliate, including its directors or officers, other than on market terms.

50. Cresford is an affiliate of the General Partner, and Athanasoulis was a director or officer of Cresford. The alleged Profit Sharing Agreement is not on market terms.

51. If Athanasoulis and Casey/Cresford entered into the alleged Profit Sharing Agreement that has the effect of subordinating the Plaintiffs' payment entitlements to Athanasoulis', then they breached the terms of the LP Agreement.

Inducing Breach of Contract

52. Further, if Athanasoulis and Casey/Cresford entered into the alleged Profit Sharing Agreement, Athanasoulis and Casey are liable to the Plaintiffs for inducing the General Partner to breach the LP Agreement.

53. As directors and officers of Cresford (and by extension, the General Partner), both Athanasoulis and Casey were aware of the existence of the LP Agreement, which was a valid and enforceable contract between the General Partner and the limited partners.

54. If Athanasoulis and Casey/Cresford entered into the alleged Profit Sharing Agreement, they intended to and did procure the General Partner's breach of the LP Agreement, as described above.

55. To the extent Athanasoulis receives any payment under the alleged Profit Sharing Agreement, the Plaintiffs have suffered damages in the corresponding amount.

Breach of Fiduciary Duties

56. The Defendants owed fiduciary duties to the Partnership and the Plaintiffs:

(a) as described above, Athanasoulis became the President, Sales and Marketing of Cresford in 2012 and became its President and Chief Operating Officer in 2018;

(b) she also directly dealt with the Plaintiffs in soliciting their investments for the YSL Project;

(c) further, Athanasoulis undertook to act in the best interests of the Partnership and the Plaintiffs;

(d) the Partnership and the Plaintiffs as limited partners were vulnerable to the control of Athanasoulis by virtue of her role with the General Partner and Cresford;

(e) the legal and substantial practical interests of the Partnership and the limited partners stood to be and in fact were adversely affected by Athanasoulis' exercise of discretion;

(f) as such, Athanasoulis owed a fiduciary duty to the Partnership and the Plaintiffs;

(g) the General Partner also owed a fiduciary to the Partnership and the Plaintiffs;

(h) Casey, being the directing mind of Cresford including the General Partner, also owed a fiduciary duty to the Partnership and the Plaintiffs.

57. The Defendants breached their fiduciary duties to the Partnership and the Plaintiffs by entering into the alleged Profit Sharing Agreement contrary to the terms of the LP Agreement

and their representations to the Plaintiffs, and subordinating the interests of the Plaintiffs to those of the Defendants'.

Breach of Trust

58. The General Partner had a trust relationship with the Plaintiffs as limited partners.

59. By virtue of their roles in Cresford, including with the General Partner, Athanasoulis and Casey also had trust relationships with the Plaintiffs.

60. The Defendants are liable for breach of trust by entering into the alleged Profit Sharing Agreement that purportedly prioritizes Athanasoulis' interests to those of the Plaintiffs, contrary to the terms of the LP Agreement and the Defendants' fiduciary duties and representations to the Plaintiffs.

Knowing Assistance

61. In the alternative, Athanasoulis and Casey knowingly assisted the General Partner in its breach of fiduciary duty to the Plaintiffs:

(a) as described above, the General Partner owes a fiduciary duty to the Plaintiffs;

(b) the General Partner breached the duty in a dishonest manner if it entered into the alleged Profit Sharing Agreement with Athanasoulis in breach of the LP Agreement and contrary to the representations to the Plaintiffs;

(c) Athanasoulis and Casey, being directors and officers of Cresford (and by extension, the General Partner), had actual knowledge of the fiduciary

relationship between the General Partner and the Plaintiffs, as well as the General Partner's dishonest conduct; and

(d) if Athanasoulis entered into the alleged Profit Sharing Agreement with the General Partner through Casey, Athanasoulis and Casey knowingly participated in or assisted the General Partner's dishonest conduct.

Knowing Receipt

62. If Athanasoulis receives any payment under the alleged Profit Sharing Agreement, she is liable for knowing receipt:

(a) any such payment flows directly from the General Partner's breach of fiduciary duty and/or breach of trust to the Plaintiffs;

(b) Athanasoulis receives the resulting payment for her own benefit in her own personal capacity; and

(c) Athanasoulis receives the payment with actual or constructive knowledge that the payment directly resulted from the General Partner's breach of fiduciary duty and/or breach of trust to the Plaintiffs.

Misrepresentation

63. As described above, there was a special relationship between the Defendants and the Plaintiffs.

64. The Defendants represented to the Plaintiffs that they would receive preferred return of their investment capital plus profits.

65. If the Defendants entered into the Profit Sharing Agreement and it prioritizes Athanasoulis' interests over those of the Plaintiffs, the Defendants' representations to the Plaintiffs regarding their entitlements were untrue, inaccurate or misleading.

66. The Defendants made the misrepresentations knowing they were false or were reckless as to its truth.

67. In the alternative, the Defendants made the misrepresentations in a negligent manner.

68. The Plaintiffs invested $4.7 million into the Partnership and the YSL Project in reasonable reliance of the representations.

69. The Plaintiffs relied on the representations to their detriment because any amount Athanasoulis is allowed to receive under the alleged Profit Sharing Agreement would reduce the amount the Plaintiffs are able to recover on their investments and returns.

Unjust Enrichment

70. To the extent Athanasoulis receives any payment under the alleged Profit Sharing Agreement in priority to the Defendants, Athanasoulis would be enriched by the amount of the payment.

71. The Defendants would suffer a corresponding deprivation in that their ability to recover their investment capital and return would be reduced.

72. There would be no juristic reason for Athanasoulis to retain the benefit, as any such Profit Sharing Agreement would be directly contrary to the LP Agreement and her fiduciary duty and representations.

73. This action should be heard in Toronto on the Commercial List.

June , 2022
(Date of issue)

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSO#: 32268B
mgottlieb@lolg.ca
Tel: 416 644 5353

Shaun Laubman LSO#: 51068B
slaubman@lolg.ca
Tel: 416 360 8481

Xin Lu (Crystal) Li LSO#: 76667O
cli@lolg.ca
Tel: 416 956 0112

Lawyers for the Plaintiffs

2504670 CANADA INC. et al.
Plaintiffs

-and-

MARIA ATHANASOULIS et al.
Defendants

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

STATEMENT OF CLAIM

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSO#: 32268B
mgottlieb@lolg.ca
Tel: 416 644 5353

Shaun Laubman LSO#: 51068B
slaubman@lolg.ca
Tel: 416 360 8481

Xin Lu (Crystal) Li LSO#: 76667O
cli@lolg.ca
Tel: 416 956 0112

Lawyers for the Plaintiffs

C

This is **Exhibit "C"** referred to in the
Affidavit of Emily Seaby
sworn remotely before me this
4th day of January 2023

Sarah Stothart

A Commissioner for Taking Affidavits

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

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

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

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

NOTICE OF MOTION
(re Athanasoulis Claim)

YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc. (the "**YongeSL LPs**") and Chi Long Inc., 8451761 Canada Inc. and 2504670 Canada Inc. (the "**Chi Long LPs**" and together with the YongeSL LPs, the "**Class A LPs**") will make a motion to a Judge of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") on a date to be set by the Court, by video conference via Zoom or in person, as directed by the Court, at Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. Declarations that:

   (a) the Profit-Sharing Claim is a claim subordinate to the Class A LPs' entitlement to the Surplus (as such terms are defined below); and

   (b) the Profit-Sharing Claim is unenforceable against YG Limited Partnership and YSL Residences Inc. (the "**Debtors**").

2. An order for the costs of this motion as against Ms. Athanasoulis.

3. Such further and other relief as counsel may request and this Court deems just.

THE GROUNDS FOR THE MOTION ARE:

Summary

1. The Class A LPs made advances to the Debtors in 2017. The Class A LPs relied on the agreement governing YG Limited Partnership (the "**LP Agreement**") that provided, and Ms. Athanasoulis' statements to the Class A LPs which confirmed, that they would be repaid and receive their preferred return on investment before Cresford, the developer in control of the Debtors and the lands owned by the Debtors (the "**YSL Project**"), received any return from the YSL Project. To date, the Class A LPs have received nothing.

2. Ms. Athanasoulis was the face of Cresford and an officer of YSL Residences Inc. She claims that she made an oral agreement with Cresford entitling her to a share in the YSL Project's profits. She claims that, after Cresford terminated her employment, she immediately became entitled to profits from the YSL Project and should recover approximately $19 million from the Debtors.

3. The Proposal Trustee agreed to a bifurcated arbitration of Ms. Athanasoulis' claim. The first phase resulted in findings that the oral agreement existed.

4. Ms. Athanasoulis also repeatedly admitted that her entitlement to profits arose only when the Class A LPs were repaid. This is consistent with the LP Agreement and Ms. Athanasoulis' statements to the Class A LPs when they made their advances to the Debtors.

5. Ms. Athanasoulis' claim to a share in the YSL Project's profits is, on her own evidence, subordinate to the Class A LPs' rights to the proceeds of the YSL Project. Further, her claim is unenforceable because Ms. Athanasoulis' alleged profit-sharing agreement is unenforceable pursuant to the LP Agreement and would violate her fiduciary duties to the Debtors. These narrow issues undermine Ms. Athanasoulis' claim and should be determined.

The YSL Project & the Parties

6. Cresford is a condominium developer controlled by Daniel Casey. Ms. Athanasoulis was the President Sales & Marketing of Cresford, and an officer of the Debtor YSL Residences Inc., until December 2019.

7. The Debtors were the beneficial and registered owners of certain lands in Toronto that Cresford intended to develop into a mixed-use condominium building (the YSL Project).

8. YG Limited Partnership is comprised of three groups of partners:

(a) a general partner ("**GP**"), 9615334 Canada Inc., a Cresford entity;

(b) holders of Class A Preferred Units (the Class A LPs); and

(c) the holder of Class B Units (formerly a Cresford entity, now Concord Developments Properties Corp. ("**Concord**" or the "**Proposal Sponsor**"), or an affiliate).

9. The YongeSL LPs represent approximately two-thirds (by value and number) of the Class A LPs. The Chi Long LPs represent the balance. There are no other limited partners holding Class A Preferred Units in YG Limited Partnership. The Class A LPs collectively advanced the principal amount of $14.8 million to YG Limited Partnership in exchange for their Class A Preferred Units.

Background to this Proceeding

10. In April 2021, the Debtors filed Notices of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

11. KSV Restructuring Inc. was appointed as the Debtors' proposal trustee (in that capacity, the "**Proposal Trustee**").

12. The Debtors made their proposal in May 2021, which they amended twice in June 2021. The proposal, as amended, was approved by the Debtors' creditors in June 2021.

13. The Class A LPs all opposed the approval of the Debtors' amended proposal on the basis that it was not made in good faith and was designed to prefer Cresford's interests.

14. Justice Dunphy agreed and refused to approve the proposal (*YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178). His Honour did, however, permit the Debtors to file a further amended proposal that addressed the concerns he identified in his reasons for refusing to allow the proposal. The Debtors did file such a further amended proposal (the "**Proposal**"), which Justice Dunphy approved (*YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206).

15. Generally, the Proposal provides for the transfer of the YSL Project lands to the Proposal Sponsor. The Proposal Sponsor would then pay in full or assume secured and other priority claims, and pay a fund of $30.9 million for distributions to the Debtors' unsecured creditors. If, after distribution of such amount to the unsecured creditors, there remains a surplus ("**Surplus**"), that Surplus will be distributed to the Class A LPs.

16. After interim distributions, the Proposal Trustee still holds $20.5 million.

17. Subject to the resolution of 3 outstanding claims (including Ms. Athanasoulis' claim) in a manner favourable to the Debtors' estates, there will be amounts available to distribute to the Class A LPs. Ms. Athanasoulis' claim, however, would wipe out any return to the Class A LPs if determined in her favour.

The Athanasoulis Claim

18. The Proposal Trustee has been administering a claims process against the Debtors.

19. Ms. Athanasoulis submitted a Proof of Claim to the Proposal Trustee. Ms. Athanasoulis' claim has two components:

(a) a claim for wrongful dismissal damages; and

(b) a claim that, pursuant to an *oral agreement* (the "**Profit-Sharing Agreement**") with Cresford's principal, Daniel Casey, she was entitled to a 20% share in the profits of all of Cresford's projects, including the YSL Project (the "**Profit-Sharing Claim**").

The Athanasoulis Arbitration

20. The Proposal Trustee and Ms. Athanasoulis agreed to participate in a bifurcated arbitration of Ms. Athanasoulis' claim (the "**Athanasoulis Arbitration**") before William Horton (the "**Arbitrator**").

21. The first phase of the Athanasoulis Arbitration involved a determination of whether: (a) Ms. Athanasoulis was constructively dismissed; and (b) the Profit-Sharing Agreement existed. The Arbitrator found that Ms. Athanasoulis was constructively dismissed and that the Profit-Sharing Agreement existed.

22. The Class A LPs were not parties to the Athanasoulis Arbitration and were not permitted to participate. They were told that the Athanasoulis Arbitration was confidential. The issues and arguments they raise against Ms. Athanasoulis' claim (including but not limited to those described herein) were not advanced or determined.

The Profit-Sharing Claim is Subordinate to the Class A LPs' Entitlement to the Surplus, and Unenforceable Against the Debtors

23. The LP Agreement provides that:

(a) the Class A LPs are entitled to a preferred return from the proceeds of the YSL Project after its arm's length creditors are paid;

(b) when the Class A LPs were fully repaid and received their full preferred return, any proceeds of the YSL Project would be paid to the Class B Unit holder;

(c) the GP shall exercise its powers and discharge its duties honestly, in good faith and in the best interests of the limited partners and it shall exercise the care, diligence and skill that a reasonably prudent operator of a similar business would exercise in comparable circumstances; and

(d) the GP shall not enter into any contract with any Related Party (which definition includes Ms. Athanasoulis), other than on market terms.

24. When the Class A LPs were considering making their advances to the Debtors, Ms. Athanasoulis was the representative and "face" of Cresford. Directly or through brokers, she explained to the Class A LPs how the proceeds of the YSL Project would be distributed:

(a) first to external lenders,

(b) then to the Class A LPs,

(c) then to Cresford.

25. This explanation of the "waterfall" was included in a presentation to potential investors in the YSL Project, including the Class A LPs. This waterfall was reflected in the Class A LPs' subscription agreements, and in the LP Agreement.

26. Ms. Athanasoulis presented this waterfall to the Class A LPs directly or through brokers when she:

(a) sent the Class A LPs the YG Limited Partnership Agreement that would bind them upon subscribing for units in the partnership, or directed that such document be sent to them;

(b) met with Yuen (Michael) Chen of E&B Investment Group Inc. on May 31 and June 1, 2017, and when Ms. Athanasoulis sent Mr. Chen a document setting out the waterfall, on May 31, 2017;

(c) met with Lue (Eric) Li of YongeSL Limited Partnership on or about June 24, 2017, and when Ms. Athanasoulis sent Mr. Li a document setting out the waterfall, on or about March 27, 2017, or alternatively, caused that document to be sent to him on or about that date by a broker, Henry Zhang;

(d) caused a broker, Simon Yeung, to send a document setting out the waterfall to one of the principals of SixOne Investment Ltd., Jacob Wai, on or about February 21 and 23, 2018;

(e) caused Mr. Yeung to send a document setting out the waterfall to Xi (Vicky) Chen of Taihe International Group Inc. on or about February 8, 2018;

(f) met with Anthony Szeto and Lorraine Ng, of 2504670 Canada Inc. on or about June 14, 2017, assured them that investors' investment capital would be repaid along with 100% invested return, and that investors would be repaid their investment capital and return before any payment to Cresford, caused an information package containing the waterfall to Mr. Szeto and Ms. Ng shortly after the June 14, 2017, meeting; and

(g) caused the Chi Long LPs' real estate broker, Paul Lam, to (i) assure the Chi Long LPs that the repayment of their investment capital and payment investment profit would be guaranteed, and in priority to any payment to Cresford or its principals, and (ii) send the Chi Long LPs the information package containing the waterfall.

27. Ms. Athanasoulis knows that the Profit-Sharing Claim is subordinate to the Class A LPs' entitlement to the Surplus. She made the following admissions during the first phase of the Athanasoulis Arbitration:

(a) profit is calculated by taking revenue, less costs and "the amount returned on equity", leaving a balance which is profit;

(b) with respect to the YSL Project, her profit-sharing amount "would be paid after the equity was repaid to the LP investors"; and

(c) profits are calculable when the condominium development is registered, **after** trades, management companies and lenders are paid **and** equity is returned to investors.

28. Ms. Athanasoulis' admissions are consistent with what the Class A LPs were told all along: they would be repaid, and receive their preferred return, before Cresford received anything. As the "face" of Cresford, Ms. Athanasoulis fell into the Cresford category.

29. The Profit-Sharing Agreement violates the terms of the LP Agreement and was never disclosed to the Class A LPs when they made their advances to the Debtors or at any time until the Class A LPs learned of Ms. Athanasoulis' action against Cresford and Mr. Casey.

30. As an officer of Cresford (including the Debtor YSL Residences Inc.), Ms. Athanasoulis owed YG Limited Partnership fiduciary duties and could not bind it to the Profit-Sharing Agreement.

31. Given the terms of the LP Agreement, Ms. Athanasoulis' statements to the Class A LPs, her duties to the Debtor YG Limited Partnership, and her own admissions regarding the nature of her claim made during the Athanasoulis Arbitration, the Profit-Sharing Claim is subordinate to the entitlement of the Class A LPs to the proceeds of the YSL Project, and is unenforceable against the Debtors.

Procedural Steps Following the First Phase of the Athanasoulis Arbitration

32. After the Arbitrator released his decision on the first phase of the Athanasoulis Arbitration, the YongeSL LPs brought a motion for a declaration, among other things, that Ms. Athanasoulis' claim was subordinate to the Class A LPs' entitlement to the Surplus.

33. On May 24, 2022, following an unrelated motion in this proceeding, the YongeSL LPs asked Justice Gilmore to schedule their motion. Her Honour did not schedule the YongeSL LPs'

motion that day but asked the parties to discuss the potential for the Class A LPs to advance their positions in the Athanasoulis Arbitration.

34. Justice Gilmore did not rule that the YongeSL LPs were barred from bringing their motion. Her Honour simply directed the parties to discuss the potential for alternative dispute resolution. A motivating factor behind Her Honour's direction in this respect was the fact that the second phase of the Athanasoulis Arbitration was already scheduled for September 2022. Her Honour directed that the parties return for a case conference on June 8, 2022, after their discussions.

35. By June 8, 2022, the primary stakeholders (the Class A LPs, the Proposal Trustee and Ms. Athanasoulis) had agreed in principle that the Class A LPs could participate in the second phase of the arbitration and raise all of their issues with Ms. Athanasoulis' claim. They also agreed that the Class A LPs could claim damages against Ms. Athanasoulis for any amount that she would otherwise be entitled to in respect of the Profit-Sharing Claim.

36. At no point did the Class A LPs agree to contribute to the costs of the Athanasoulis Arbitration.

37. At the June 8, 2022 case conference, Justice Gilmore gave effect to the parties' agreement on procedure. She declined to require that the Class A LPs contribute to the costs of the Athanasoulis Arbitration, despite Concord's submissions, and left the issue of costs to the Arbitrator. Justice Gilmore expressed the hope that the arbitration could be scheduled for October or November 2022.

38. After the June 8, 2022 case conference, the Proposal Trustee wrote to the Class A LPs and requested that they contribute to a deposit for the arbitration. This issue was never raised during

the discussions leading to the YongeSL LPs agreeing not to schedule their motion. They would not have agreed to forego their motion had they been required to pay any up-front costs.

39. Subsequently, Concord threatened to refuse to continue funding the Proposal Trustee if the Proposal Trustee proceeded with the Athanasoulis Arbitration. This disrupted the schedule for the Athanasoulis Arbitration. It will no longer be heard in 2022.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this motion:

1. affidavits of certain Class A LPs, to be sworn;

2. the affidavit of Roxana G. Manea, to be sworn;

3. the transcript from the first phase of the Athanasoulis Arbitration; and

4. such further and other evidence as counsel may advise and this Court may permit.

October 13, 2022

THORNTON GROUT FINNIGAN LLP
100 Wellington St. West
Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

D. J. Miller (LSO #34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Alexander Soutter (LSO #72403T)
Tel: (416) 304-0595
Email: asoutter@tgf.ca

Lawyers for the YongeSL LPs

LAX O'SULLIVAN LISUS GOTTLEIB LLP
Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Shaun Laubman (LSO #51068B)
Tel: (416) 360-8481/ Email: slaubman@lolg.ca
Xin Lu (Crystal) Li (LSO #76667O)
Tel: (416) 956-0112 / Email: cli@lolg.ca

Lawyers for the Chi Long LPs

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

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

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

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

Proceedings commenced at Toronto, Ontario

NOTICE OF MOTION

(re Athanasoulis Claim)

THORNTON GROUT FINNIGAN LLP
100 Wellington St. West, Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

D. J. Miller (LSO #34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Alexander Soutter (LSO #72403T)
Tel: (416) 304-0595
Email: asoutter@tgf.ca

Lawyers for the YongeSL LPs

LAX O'SULLIVAN LISUS GOTTLEIB LLP
Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Shaun Laubman (LSO #51068B)
Tel: (416) 360-8481
Email: slaubman@lolg.ca

Xin Lu (Crystal) Li (LSO #76667O)
Tel: (416) 956-0112
Email: cli@lolg.ca

Lawyers for the Chi Long LP

This is **Exhibit "D"** referred to in the
Affidavit of Emily Seaby
sworn remotely before me this
4th day of January 2023

Sarah Stothart
_____
A Commissioner for Taking Affidavits

Seaby, Emily

From: Dunn, Mark
Sent: Wednesday, October 26, 2022 11:40 AM
To: Shaun Laubman
Cc: Alexander Soutter; Milne-Smith, Matthew; Schwill, Robin; Li, Chenyang; Stothart, Sarah
Subject: Re: YSL - LPs motion [IMAN-CLIENT.FID6731] [LOLG-DMS.FID106454]

I am not trying to muddy the waters. I am trying to assess whether we have a dispute over what was said at these meetings or only about the meaning of the LP Agreement and the presentation included in the application materials.

Ms. Athanasoulis is aware of what she *said* at the meetings, but she does not know exactly what she is *alleged* to have said. I'm not sure what "full summaries" you are referring to. If the LPs have a summary of what they allege was said at each of these meetings then that would be very helpful.

To be clear, Ms. Athanasoulis denies that she made any misrepresentation and so the LPs will need to specifically prove (among other things) what representations were made and that they were false.
Hopefully this clarifies why I am asking these questions. If the LPs choose not to provide further answers, we can address it at the case conference.

Sent from my iPad

> On Oct 26, 2022, at 11:22 AM, Shaun Laubman <slaubman@lolg.ca> wrote:
>
> Mark,
>
> With respect to your enquiries, I'm having difficulty understanding the purpose for them. You beat a similar drum over the summer and we gave you full summaries of the representations made by your client. I don't believe there is any mystery at this stage and, in any event, your client is well aware about what she said and what information she provided to the LPs as they made their investments. We do not have any indication from your client that she disputes that those representations were in fact made or what she said is inaccurate about them (if anything). Therefore, for now at least, it appears that she is simply trying to muddy the waters. If you would like to set out your client's position in more detail then we can fairly consider your assessment that a longer motion is required to address the facts.

Shaun Laubman (he/him)
Direct 416 360 8481
Cell 416 315 4122
slaubman@lolg.ca

Lax O'Sullivan Lisus Gottlieb LLP
Suite 2750, 145 King St W
Toronto ON M5H 1J8 Canada
T 416 598 1744 F 416 598 3730
www.lolg.ca

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: October-26-22 11:05 AM
To: Alexander Soutter <ASoutter@tgf.ca>
Cc: Shaun Laubman <slaubman@lolg.ca>; Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>; Stothart, Sarah <sstothart@goodmans.ca>
Subject: Re: YSL - LPs motion [IMAN-CLIENT.FID6731]

Thank you for your response.

I would suggest that we proceed to boost he case conference now. I do not recall Justice Kimmel giving any indication that she would give directions relating to the LPs' motion, and it is not clear what directions would be given since neither side asked for any directions and the LPs indicated they intended to seek a case conference.

Since the LPs have indicated that a case conference will be required whatever the result of the motion, we should proceed to book one. The case has been delayed enough already.

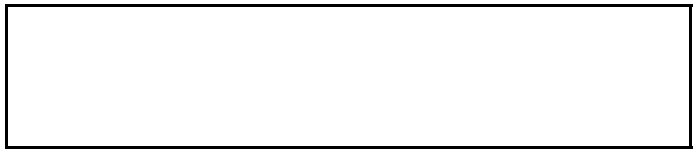
As for your responses to my questions, since you have declined to provide any further particulars we will be forced to proceed on the basis that your motion will require the resolution of contested credibility issues relating to each of the alleged representations. This obviously cannot be done in the four hours the LPs have proposed.

From a procedural perspective, it seems from your e-mail that the LPs contemplate a three stage process: first, the LPs' motion; second, a hearing to determine valuation; third, an action to adjudicate their damages claim. I appreciate that not all of these stages will be required if Ms. Athanasoulis fails at any of them, but it is hard to see how this is a preferable procedure to the arbitration we all agreed to (even if we admit that the LPs only agreed "in principle", which we do not accept).

Sent from my iPad

> On Oct 26, 2022, at 10:33 AM, Alexander Soutter <ASoutter@tgf.ca> wrote:
>
> Hi Mark,
>
> We thought it best to wait until Justice Kimmel released her reasons on the motion before seeking a case conference. Her Honour may give directions relating to our motion and said that future attendances should be scheduled before her where possible. It did not seem efficient to schedule a case conference before her reasons were released.
>
> Regarding your two questions: (a) the notice of motion has adequate particulars regarding Ms. Athanasoulis' statements; and (b) the limited partners do not waive any claims.

Thanks,
Alex



Alexander Soutter | Associate | ASoutter@tgf.ca | Direct Line +1 416-304-0595 | Suite 3200, TD West Tower, 100 Wellingto
West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | www.tgf.ca

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: Tuesday, October 25, 2022 2:32 PM
To: Alexander Soutter <ASoutter@tgf.ca>; slaubman@lolg.ca
Cc: Milne-Smith, Matthew <MMilne-Smith@dwpv.com>; Schwill, Robin <rschwill@dwpv.com>; Li, Chenyang <CLi@dwpv.com>; Stothart, Sarah <sstothart@goodmans.ca>
Subject: YSL - LPs motion

I hope that you're both well.

I would like to follow up on the LPs' motion. In their submissions on Concord's motion, the LPs indicated that they intend to move forward with their motion whatever the outcome of Concord's motion and would proceed to book a case conference. We have not seen any correspondence relating to the case conference, and would like to see that booked as soon as possible to minimize any further delays.

In addition, there are two aspects of the motion that I would like to fully understand so that we can respond intelligently to the request to schedule the case conference.

First, we need to understand what exactly Ms. Athanasoulis is alleged to have said to the LPs. At paragraph 26 of the Notice of Motion, the LPs claim that Ms. Athanasoulis "presented" a "waterfall" to the LPs "directly or through brokers". At paragraph 28, for example, Ms. Athansaoulis the LPs claim that they were told that Ms. Athanasoulis "fell into the Cresford category" and would only be paid anything after the LPs were repaid in full. We need to understand whether the LPs are alleging that Ms. Athanasoulis told the LPs that she would not be paid anything until they were or whether they inferred that from their interpretation of the relevant agreements. This is important, from a procedural perspective, because we need to assess whether determining the motion will require contested findings about what was said in a series of meetings. This has a direct impact on whether the Notice of Motion is a straightforward process, as the LPs allege. If the LPs' motion require disputed findings about what was said at a series of meetings held at different times with different participants then it is hard to see how these issues could be resolved on a summary motion. We would appreciate clarification on this issue or, better yet, service of the LPs' supporting affidavits.

Second, the LPs have served a draft Statement of Claim and said that they would assert a damages claim in the arbitration. The Notice of Motion does not refer to the damages

claim. We would like to understand whether the LPs have abandoned their claim for damages, or whether they will assert it if their motion fails and Ms. Athanasoulis received payment. This is also important, since it raises the possibility of a multiplicity of proceedings if Ms. Athanasoulis succeeds on the motion (ie., the LPs motion, followed by the damages arbitration and then a claim for damages by the LPs).

We look forward to hearing from you.

Regards,
Mark

Mark Dunn
He/Him
Goodmans LLP

416.849.6895 (office) 647.294.3866 (mobile)
mdunn@goodmans.ca

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
goodmans.ca

This is **Exhibit "E"** referred to in the
Affidavit of Emily Seaby
sworn remotely before me this
4th day of January 2023

Sarah Stothart
A Commissioner for Taking Affidavits

In the Matter of an Arbitration pursuant to the Arbitration Act, S.O. 1991

of a Claim between:

Maria Athanasoulis

("Claimant")

and

KSV Restructuring Inc.
in its capacity as Proposal Trustee
of YG Limited Partnership and YSL Residences Inc.

("Respondent")

In relation to Consolidated Court File No. 31-2734090 in the *ONTARIO* SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST) IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, as amended IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

Counsel for Claimant:	Mark Dunn Sarah Stothart
Counsel for Respondent:	Matthew Milne-Smith Chenyang Li Robin Schwill
Hearing Dates:	February 22, 23, 24 and 25, 2022
Arbitrator:	William G. Horton, FCIArb, C.Arb.

PARTIAL AWARD
(March 28, 2022)

I. Introduction

1. This arbitration arises in the context of a court proceeding relating to the insolvency of YG Limited Partnership and YSL Residences Inc. (together, "**YSL**").

2. Until its insolvency, YSL was part of a group of companies (collectively, "**Cresford**" or the "**Cresford Group**") which was engaged in the development, construction, marketing and sale of condominiums in Toronto, Ontario. Cresford incorporated a separate company for each condominium project upon which it embarked. YSL was incorporated to pursue a high-rise condominium project at the corner of Yonge Street and Gerrard Street in Toronto (the "**YSL Project**").

3. Mr. Dan Casey ("**Casey**") is the founder and President of Cresford, and the sole director of all the companies in the Cresford Group.

4. KSV Restructuring Inc. ("**KSV**") was appointed as the Proposal Trustee for YSL pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**") on April 30, 2021. It should be noted at the outset that, while counsel for KSV advances the position of Cresford in this arbitration, they are not in fact counsel for Cresford and are not in a solicitor client relationship with Cresford or Casey.

5. Ms. Maria Athanasoulis ("**Athanasoulis**"), who was employed by Cresford in various roles between 2004 and 2020, advances this claim against the insolvent estate of YSL.

6. Athanasoulis alleges that she was entitled to a share of the profits earned by Cresford, on the YSL Project among others, pursuant to an oral agreement ("**PSA**") or agreements with Casey. She claims that the most recent PSA entitled her to 20% of the profits (the "**20% PSA**"). She asserts that the existence of this agreement is corroborated by the evidence of Mr. John Papadakis ("**Papadakis**") who attended a meeting at which the alleged agreement was discussed. Papadakis was a lawyer acting for Cresford at the time and is also a friend of Athanasoulis through a family connection with her husband.

7. Athanasoulis further alleges that Cresford repudiated her employment contract and constructively terminated her employment in or around early or mid-December 2019.

8. Prior to the proceedings under the BIA which led to this arbitration, Athanasoulis' claims were advanced in an action in the Superior Court of Ontario (the "**Action**") against various corporate entities within the Cresford Group and against Casey (collectively the "**Defendants**"). In the Action, Athanasoulis delivered a Statement of Claim and the Defendants delivered a Statement of Defence and Counterclaim.

9. In their Statement of Defence and Counterclaim, the Defendants alleged that Athanasoulis would only have been entitled to 10% of the net profits realized on the successful completion of certain projects, including the YSL Project, if she remained an employee of Cresford at the date of the project's completion. Subsequently, in this arbitration, Casey denied ever entering into any PSA with Maria Athanasoulis.

10. KSV takes the position that none of the discussions Athanasoulis relies upon gave rise to any PSA that was binding and enforceable. KSV maintains that Athanasoulis was fairly compensated by Cresford for her services at all material times.

11. KSV further alleges that Athanasoulis was not constructively dismissed; rather, she resigned from her employment at Cresford effective January 2, 2020. KSV does not allege any cause for Athanasoulis' dismissal, in the event she is found to have been dismissed.

II. Agreement to Arbitrate

12. The parties appointed me as sole arbitrator to determine this dispute by way of Terms of Appointment dated December 9, 2021.

13. Paragraph 2 of the Terms of Appointment sets out the parties' agreement to bifurcate Athanasoulis' claim such that the arbitration scheduled to proceed from February 22 to 25, 2022 was to resolve only the liability of YSL.

14. In the event that I were to find that YSL is liable to Athanasoulis, the parties have agreed to schedule an additional hearing before me to determine the quantum of YSL's liability.

III. Issues to be Determined

15. The issues to be decided in this phase of the arbitration are as follows:

a. Did Athanasoulis have a PSA that entitled her to 20% of the profits earned by the YSL Project?

b. If so, what were the terms of the PSA?

c. Was Athanasoulis employed by YSL?

d. Was Athanasoulis constructively dismissed, i.e. did she resign or was she constructively dismissed?

IV. Agreed Facts

16. The parties provided various documents to assist me:

    a. an Agreed Statement of Facts delivered on February 18, 2022;

    b. a Chronology; and

    c. a cast of Characters.

17. In order to avoid duplication, I have incorporated the contents of these documents into my factual findings rather than separately identifying the agreed facts for the purposes of this Award.

V. Evidence of Fact Witnesses

18. The witness evidence in the arbitration was provided by oral testimony given under solemn affirmation as to truth. Three witnesses testified: Athanasoulis, Casey and Papadakis.

19. By agreement, each of the witnesses had previously been examined for discovery in the arbitration.

VI. Findings of Fact

20. Based on the facts agreed upon between the parties, and upon the evidence adduced in the arbitration with respect to facts not covered by their agreement, the following are my findings of fact.

A. The Parties

21. YSL was part of the Cresford Group, which was engaged in the development, construction, marketing and sale of significant condominium projects in the central core of the City of Toronto, Ontario.

22. Daniel Casey was the founder and President of Cresford and the sole director of all Cresford entities at all material times.

23. Each of Cresford's development and construction projects was owned by a separate legal entity (each an "**Owner**"). That entity purchased the land where the relevant project was to be built, obtained the required permissions, marketed the project to proposed purchasers, hired contractors to build the project and took all of the other steps to convert real estate into a major condominium development. Each project pursued by a Cresford entity had its own financing and involved family trusts which Casey controlled, or Limited Partnerships involving third party investors.

24. YSL was the Owner of the YSL Project.

25. Athanasoulis joined Cresford in 2004 as Manager, Special Projects. Her prior education and experience were limited. She had graduated from high school and took a business administration course at Seneca College which she did not finish. While at Seneca College she had a part time job at Canada Trust (as it then was), which she decided to focus on instead of college. She worked with two individuals at TD Canada Trust, Ted Dowbiggin ("**Dowbiggin**") and Ian Scott ("**Scott**"). Following the merger of Canada Trust with TD Bank, Dowbiggin and Scott left to join Cresford and offered Athanasoulis a job in the finance department of Cresford. She was also given a role as manager of special projects.

B. Career of Athanasoulis at Cresford before February 16, 2019

26. In her capacity as manager of special projects, Athanasoulis quickly demonstrated a particular talent for marketing condominiums.

27. Athanasoulis was promoted to Vice-President, Sales and Marketing in 2005. In that position she worked with Casey and outside marketing consultants hired by Cresford in the marketing aspects

of Cresford's business. At that time, Cresford paid its outside marketing consultants on average about 1.5% of total sales as a marketing fee. This was a substantial expense as total sales from a single Cresford condominium project normally ran into the hundreds of millions of dollars. In addition, these fees were payable at the time condominiums were sold, whereas a developer usually only earns the revenues from condominium sales when the condominium corporation is registered upon completion of the project.

28. In about 2007, based on Athanasoulis' success in the marketing field, Cresford began to be less dependent on outside consultants and relied more on her leadership, thus saving on external sales marketing fees. She was promoted to President, Sales and Marketing in 2012.

29. By the end of 2013, Athanasoulis and Dowbiggin were the only two senior officers of Cresford reporting directly to Casey and, together with Casey they formed the Executive Committee of Cresford. Dowbiggin was President, Land and Finance and Athanasoulis was President, Marketing and Sales. During this period, Athanasoulis was responsible for operational matters: sales, marketing, customer service, construction and property management. The only aspects of Cresford's business Athanasoulis did not manage were financing and land acquisition.

30. Around August 2018, Dowbiggin left Cresford. Athanasoulis assumed Dowbiggin's responsibilities and became the President and Chief Operating Officer. After Dowbiggin's departure, all of Cresford's employees reported, directly or indirectly, to Athanasoulis and she reported to Casey. However, Casey retained the responsibility for raising the capital necessary for Cresford's business and remained the primary contact with Cresford's lenders.

31. As part of her responsibilities, Athanasoulis oversaw a property management company within Cresford, which was a fee generating business for which many developers hire a third party. She also oversaw a high-rise construction team, which allowed Cresford to manage its product and earn additional fees.

32. Athanasoulis also served as an officer of individual companies within Cresford. In the case of YSL, she was Vice-President and Secretary.

33. At all times, Casey had the ultimate authority to make decisions on behalf of Cresford and each of its constituent entities, including YSL, and to enter into contracts on behalf of Cresford.

C. The YSL Project

34. The YSL Project was planned as an 85-story condominium tower, potentially to be built in two stages with each stage being a separately registered condominium corporation.

35. Cresford initially bought the YSL Project as part of a joint venture but bought out its joint venture partner's interest. Cresford considered selling the YSL Project after it achieved zoning for high rise condominium development but did not ultimately proceed with a sale.

36. The marketing of the YSL Project was launched in October 2018. Under the leadership of Athanasoulis, the launch was very successful. The YSL Project achieved the highest price per square foot that had ever been achieved in the neighbourhood and was "a first" in terms of pre-sale numbers in a short period of time.

37. YSL sold condominium units worth approximately $650 million in the period up to January 2, 2020, with the bulk of the sales coming in the early stages of the campaign. At the time Athanasoulis was terminated, Cresford expected to earn a net profit of $196,641,600 on the YSL Project, and to generate fees of $59,462,617 for Cresford.

D. Cresford's Other Projects During the Period at Issue

38. In addition to the YSL Project, Cresford had three other active projects as of January 2020:

a. The Clover on Yonge (the "**Clover**"), a 44-story condominium located near Yonge and Bloor in Toronto. Clover was owned by Clover on Yonge Inc. in its capacity as General Partner of Clover on Yonge Limited Partnership. Pursuant to a plan of compromise and arrangement that was approved in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**") commenced by Clover on Yonge Inc. and Clover on Yonge Limited Partnership on June 22, 2020, all of Clover's equity was acquired by entities related to Concord Pacific Developments Inc. ("**Concord**").

b. Halo Residences on Yonge ("**Halo**"), a 38-story condominium tower located on Yonge Street between Wellesley and Carlton in Toronto. Halo was owned by 480 Yonge Street Inc., the general partner of 480 Yonge Street Limited Partnership. 480 Yonge Street Inc. and 480 Yonge Street Limited Partnership were the subject of a Receivership Order issued on March 27, 2020. An Approval and Vesting Order issued September 15, 2021 vested Halo in 494 Yonge Street Inc.

c. The Residences of 33 Yorkville ("**33 Yorkville**"), a condominium with one 64-story tower and one 41-story tower. 33 Yorkville was owned by 33 Yorkville Residences Inc., in its capacity as general partner of 33 Yorkville Residences Limited Partnership. 33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership were the subject of a Receivership Order issued on March 27, 2020. Pursuant to an Approval and Vesting Order issued March 11, 2021, 33 Yorkville was vested in PEM (Yorkville) Holdings Inc.

39. Casey explained that the difficulties faced by these three projects were largely the result of rising construction costs in the period before construction of those projects began. The YSL Project was launched later and did not suffer from the same difficulties.

40. As of the beginning of 2020, the costs recorded in YSL's *pro forma* projections were regarded by both Casey and Athanasoulis as being current and reliable projections.

E. Athanasoulis Compensation History

41. The management of Cresford was conducted on a very informal basis. Corporate formalities were not observed. Many aspects of the business especially in relation to employment and compensation issues were conducted on the basis of oral discussions and understandings. Employment agreements, on the rare occasions in which they were put in writing (usually at the request of an employee) were made out between the employee and "Cresford Developments", a name which does not correspond to any distinct legal entity.

42. If Athanasoulis ever signed an employment contract with Cresford, it was early in her career with Cresford and no copy of it has been located.

43. The property management and other fee generating entities within the Cresford Group, generated the cash necessary to pay expenses of the organization, including the salaries, on a current basis.

44. Fees earned within Cresford were ultimately collected within East Downtown Redevelopment Partnership ("**EDRP**") which paid employee salaries within Cresford. EDRP did not own any projects and conducted no business in its own name. There is nothing to suggest that EDRP exercised any management or control over Athanasoulis, or indeed communicated with her in any way relative to her employment. On the evidence in this arbitration, EDRP essentially served the role of paymaster and financial clearing house with the Cresford Group of companies.

45. Throughout most of her employment, Athanasoulis reported directly to Casey. Latterly, the ambit of her employment encompassed all of Cresford's development activities, with some of her energies being directed to the service of the entire group and some of her energies being directed to the fulfillment of responsibilities with respect to individual projects, to the benefit of Cresford, the Owners and other stakeholders in those projects.

46. Athanasoulis' compensation included a base salary and, from time-to-time, bonuses. Her base salary was paid by EDRP. It is not clear from the evidence on record, whether all performance bonuses were paid by the individual Owners to which the performance that earned the bonus related. It is admitted by KVC that one cash bonus was paid by YSL to a company owned by Athanasoulis husband. Bonuses were paid either in cash or through credits on condominium units within the relevant Owner's project. Clearly, bonuses paid by way of credits on condominium purchases had to come from the relevant Owners. There is no evidence as to cash flows between EDRP and the Owners.

47. Athanasoulis' compensation in and before 2014 was summarized in a consultant's report as comprising a base salary of $200,000 with eligibility for a bonus up to $100,000 on certain parameters (sales of units on three projects and input to the Strategic Advisory Committee) and a further bonus of 0.125% to 0.175 % on total sales of the newly launched Casa III project.

48. Casey's evidence that Athanasoulis was never paid commissions on sales, is not credible. His memory of such matters is poor and is contradicted by the positions taken on behalf of him and the other Cresford Defendants in their Statement of Defence and Counterclaim. However, there is room for debate in relation to exactly how Athanasoulis' compensation at any point in time related to previously agreed terms. Her compensation appears to have been finalized in periodic

discussions between her and Casey. There is no evidence of any issue ever arising as to whether she was properly compensated in relation to prior agreements.

49. In 2014, in light of the successful launch of a Cresford condominium project known as Vox ("**Vox Project**"), Casey agreed to pay Athanasoulis 10% of the profits earned on the Vox Project (the "**10% PSA**"). At about the same time they agreed that Athanasoulis' base salary would be increased to $500,000.

50. Again, Casey's denial of having agreed to this (as part of his blanket denial of having agreed to pay any commissions, including the 10% PSA in relation to future projects) is contradicted by factual assertions in paragraph 51 of the Statement of Defence where it was stated: "After the Vox Project, Casey agreed to pay Athanasoulis 10% of the net profits realized on the successful completion of future projects." In addition, the Defence in this arbitration contains the admission that "…Cresford agreed to pay Athanasoulis 10% of the net profits realized on the completion of certain projects, including YSL." Both pleadings assert that "…Athanasoulis would only be entitled to this benefit if she contributed to the successful completion of the project and remained an employee of Cresford at the date of project completion."

51. Casey admits that the information in these pleading must have come from him and that he would very likely have had an opportunity to review and correct the pleading, but he has no explanation as to how his counsel or KSV's counsel came to acknowledge the existence of an agreement to pay a bonus in the amount of 10% of net profits – albeit on an alleged condition of continued employment which is itself subject to dispute – an agreement to which only he could have committed on behalf of Cresford.

52. With respect to the condition of continued employment, I note that neither pleading asserts that the condition was specifically discussed and agreed upon between Casey and Athanasoulis. Athanasoulis denies that any such condition was discussed, and Casey is in no position to assert that it was, having now testified that no such discussion took place.

53. Athanasoulis did attempt to put the 10% PSA into written form, using as a template the written agreement of another employee. She gave her draft, dated November 14, 2014 ("**November 14 Draft**") to Casey. However, it does not appear that either of them followed up, and there is no

evidence that it was ever discussed. This is not surprising in the corporate culture that prevailed at Cresford. As with all prior agreements relating to Athanasoulis' employment, the 10% PSA was not documented. The details surrounding the arrangement were never clarified. Athanasoulis trusted Casey to fulfill the promise and continued to replicate and surpass her prior success.

54. In this arbitration, both sides sought to use the November 14 Draft to argue what Athanasoulis' understanding of the 10% PSA must have been, especially with respect to any condition of continued employment. The submissions of the parties focussed on the following provisions:

    a. Under the heading "The Employee's employment may be terminated as follows" Paragraph 4 states: "Bonus payments will be paid in full at the completion of any project in the construction phase."

    b. Schedule A 4): "A bonus of 10% of final profits will be paid on final closing on any future site Cresford acquires."

55. Despite the failure to follow up on the November 14 Draft, Athanasoulis was generously compensated in the years after the 10% PSA, although no occasion arose to apply the 10% PSA. It is difficult on the evidence in this arbitration to reconcile the compensation she received to the agreements or understandings that were in place. However, there is no suggestion that she was undercompensated by reference to what is set out in the November 14 Draft. As no projects were completed or sold at a profit during this period of time, the 10% PSA was not triggered.

56. Athanasoulis' taxable income from employment as declared on her T4 slips was as follows for the years indicated:

2014 - $301,900
2015 - $314,400
2016 - $617,195
2017 - $621,871
2018 - $889,400
2019 - $889,400

57. Between 2014 and 2019, Athanasoulis received, as part of her compensation, discounts on the purchase of condominium units on Cresford projects totalling a minimum of $3,717,378. These

discounted transactions were done with companies held by Athanasoulis and/or her husband. These agreements required no investment or deposit until closing, at which time any additional value of the unit over the launch price would also accrue to the benefit of Athanasoulis and her husband. Given the rising prices of condominiums in Toronto, the discounts were therefore considered to be the minimum value of the benefit. There is some overlapping between compensation recorded on Athanasoulis' T4 slips and compensation paid by way of discounted transactions with Athanasoulis and her husband. Compensation paid in cash was paid through EDRP. Compensation paid by way of discounted transactions was "paid" by the relevant Owner, sometimes by way of discounts in favour of companies owned by Athanasoulis' husband.

58. Although there is a lack of arithmetical specificity in the evidence, it is not disputed that Athanasoulis was paid substantial bonuses from the project Owners, including a cash bonus from YSL. Unlike profit share, which in the normal course could only be calculated at the end of a project, bonuses were paid primarily based on sales of condominiums in each project in any given year.

59. Athanasoulis was never paid a profit share while she was at Cresford. None of the projects, other than the Vox Project, reached the point of registration or were otherwise disposed of at a profit. The Vox Project was not profitable. Athanasoulis testified that the project was primarily acquired to earn fees and was expected to be a "tight deal".

60. Following the 10% PSA, Athanasoulis became an increasingly valuable contributor to the success of Cresford. Casey and Athanasoulis discussed raising her profit share from 10% to 15%. However, these discussions were not concluded before they were overtaken by other events.

61. After the successful launch of the 33 Yorkville Project in 2017, Casey and Athanasoulis discussed increasing Athanasoulis' profit share to 20% of current and future projects. The evidence of Athanasoulis is somewhat inconsistent as to whether she thought that they came to an agreement with respect to increasing the profit share to 20% at that time, or later after the successful launch of YSL in 2018. As with all matters surrounding Athanasoulis' compensation, there is a lack of clarity and no documentary confirmation. Nevertheless, it rings true that such discussions began in 2017 and rose to the level of a mutual understanding after the launch of the YSL Project, by which time Dowbiggin had left Cresford.

62. The YSL Project was off to an exceptional start, with initial sales of approximately $550 million, and was at all times projected to be profitable. Athanasoulis was the only employee of Cresford who spoke at the launch event. In her capacity as an officer of YSL she signed contracts on behalf of YSL.

63. Athanasoulis' role continued to expand. Following Dowbiggin's departure at the beginning of 2018, and even more so after a health issue experienced by Casey in December 2018, she was responsible for essentially all of Cresford's operations. This included:

    a. all aspects of design, marketing, and sales;

    b. Cresford's relationship with its contractors, including negotiating contracts and addressing any ongoing issues;

    c. Cresford's relationship with its lenders. Mr. Casey had little contact with lenders, in this period, apart from what he described as "social" interactions; and

    d. overseeing all of Cresford's employees.

F. Meeting with John Papadakis

64. At some point in late 2018, Casey had a serious health issue. In light of that, and to secure Athanasoulis' conditions of employment and continued role in the company, Casey and Athanasoulis decided that a meeting would take place to discuss putting a written agreement in place with respect to Athanasoulis' compensation, in case Casey was "hit by a bus". It is not clear from the evidence, who initiated the meeting. However, Athanasoulis was the one who contacted Papadakis to set up the meeting. She told Papadakis that the purpose of the meeting was to discuss putting her agreement with Casey into writing.

65. Papadakis was a partner in the Blaney McMurtry law firm which acted for Cresford. He practices commercial law and commercial real estate lending and acquisition. His primary dealings with Cresford were through Athanasoulis, although he did meet with Casey on occasion.

66. Papadakis was also a close family friend of Athanasoulis. Athanasoulis' husband's parents were Papadakis' godparents. Papadakis was best man at Athanasoulis' wedding and her husband is a

godparent to Papadakis' child. He was called upon to give evidence in the arbitration by Athanasoulis.

67. Athanasoulis and Mr. Casey met with John Papadakis on Saturday, February 16, 2019 at Cresford's office. The meeting, which was described as "informal", included a discussion of Casey's health as well as a review of Athanasoulis' employment arrangements. While there is an issue in this arbitration as to whether or not an enforceable agreement was reached at, or before, the meeting, it is important to note that there is no evidence as to any disagreement or point of contention as to any matter that was discussed at the meeting.

68. The meeting lasted about two hours. In broad terms, it is clear that the purpose of the meeting was not to negotiate any new terms but to review the terms of the existing arrangements with a view to putting them into a formal document. The purpose of putting the arrangements into a written document was described to Papadakis at the meeting by Casey as being "in case I get hit by a bus". Casey agrees that he made this statement.

69. The 20% profit share was discussed at the meeting as part of the arrangements that were already in place.

70. Casey presented evidence regarding the meeting which differed in some respects from the evidence given by Athanasoulis and Papadakis. To a large extent these differences are matters of characterization rather than matters of fact. To the extent that Casey's evidence differs I accept the evidence of Athanasoulis and Papadakis. Casey's memory is imprecise and is at odds with highly germane allegations, clearly pleaded on his behalf in two different legal proceedings, that could only have originated from, or been confirmed by, him. His characterizations of the facts do not ring true in the overall context.

71. I was urged by KSV to make findings of credibility against Athanasoulis on the basis of her conduct following her departure from Cresford in January 2020. As Athanasoulis has acknowledged, her conduct (as described below in relation to the Mann Letters) was inexcusable – although she did provide an explanation. However, KSV has not sought to at this stage to justify certain conduct of Casey which is referenced in the Mann letters, which also does not reflect well on him. I have not based my findings of credibility on general observations or judgments

regarding the conduct of Athanasoulis or Casey, or a consideration as to which of them behaved less badly. Rather, I have based my findings on an evaluation of the evidence in relation to the events to which the evidence relates and its congruency with the overall context.

72. Athanasoulis had become critically important to the success of Cresford. There was nothing unusual, unfair or contentious about the arrangements that were in place with Athanasoulis, including the 20% profit share which would, by its nature, depend entirely on the size of the overall profit. Casey had every reason to want to make her feel secure in her position. In light of his recent health concerns, he wanted to ensure that she would carry on and complete the projects even if something happened to him, as he explained to Papadakis at the meeting. Although she remained an employee in legal terms, Casey often referred to her in public as his "partner". For many important entities doing business with Cresford, she had become the "face" of Cresford especially after Dowbiggin's departure and Casey's illness. Casey was in no position to create any doubt in Athanasoulis' mind that he would not fulfill that which he had promised in relation to her compensation, or resist it being put into writing. It is clear, even on his own evidence, that he did not do so at the meeting.

73. Despite his personal ties to Athanasoulis and her family, I found the evidence of Papadakis to be balanced and objective. On a number of important points where it would have been easy for him to fabricate answers useful to Athanasoulis, he did not do so. He was careful to distinguish between what was actually said at the meeting and things he assumed based on his understanding of the situation. Apart from legal characterizations of what took place at the meeting, the evidence of Papadakis is not substantially at odds with Casey's evidence.

74. I accept the evidence of Papadakis that, at the meeting, it was confirmed that Athanasoulis was to receive 20% of the profits from existing and future projects. There was no discussion of which entities within the Cresford Group would pay the profits. Papadakis assumed that each entity that earned the profit would be obligated to pay, but he did not recall any specific discussion of that point. He did recall that he asked for a list of the companies involved to assist him in drafting the agreement. There was no discussion about how profits would be calculated, other than that they would be *bona fide* profits, i.e. there would not be any sort of non-bona fide transactions that would

decrease profits. There was no discussion about when profits would be paid. No restrictions or conditions were discussed in relation to the profit sharing.

75. At the conclusion of the meeting, Papadakis asked to be given a corporate chart so that he could begin drafting the agreement. He received the corporate chart from a senior employee of Cresford about 2 weeks later. However, he never did create a written agreement. YSL objected, on grounds of legal privilege, to Papadakis providing evidence as to why he did not do so. In this context, I would note that legal privilege attaches to communications between lawyers and their clients. In this case, Papadakis and his firm were the lawyers. Cresford was the client.

76. Thereafter, Athanasoulis would occasionally remind Papadakis not to forget that "we've got to get to that agreement". There is no evidence that she was ever told that Papadakis did not prepare the written agreement as a result of the privileged communications with Cresford.

77. After the events (described below) which led to the end of Athanasoulis' employment with Cresford, Athanasoulis brought the previously mentioned action against Cresford in the Superior Court of Ontario. In that context, Papadakis was interviewed over the phone by Mr. Al O'Brien ("**O'Brien**") litigation counsel for Cresford, with respect to the meeting of February 16, 2019. O'Brien prepared a memorandum relating to that telephone conversation dated February 4, 2020 ("**O'Brien Memo**").

78. Counsel for Athanasoulis objected to the introduction of the O'Brien Memo into evidence. The memo was offered as a document that had been given to counsel for KSV in this arbitration by Aird & Berlis, Cresford's current litigation counsel. No one was called to give evidence as to the document itself. O'Brien has since passed away. Significant portions of the document have been redacted on the basis of privilege.

79. After receiving submissions as to the admission of the O'Brien Memo into evidence, for reasons stated on the record, I admitted the document into evidence subject to weight and to give Papadakis an opportunity to confirm, deny or explain the assertions in the O'Brien Memo.

80. The O'Brien Memo recounts that O'Brien had sent Papadakis extracts from Athanasoulis' Statement of Claim prior to the telephone conversation. Prior to the call Papadakis had informed O'Brien that he had not been able to locate any notes of the February 16, 2019 meeting.

81. The O'Brien memo stated that Papadakis had made the following comments:

    a. The February 16, 2019 meeting was a "informal" and "very preliminary meeting" and Papadakis "was not to be drafting anything". "He was never instructed to draft anything and in fact never did draft anything".

    b. Papadakis "will state that Maria and Dan never got to a point of "meeting of the minds" as to how to move forward".

    c. Papadakis stated that he was "never in a position to draft anything" and "Dan never told him not to proceed with drafting anything". "They were never at a stage to start drafting an agreement."

82. With a few unimportant exceptions, Papadakis flatly contradicted these statements in the O'Brien Memo. He agreed that the meeting was informal in that it was conducted in an informal manner, i.e., not in a boardroom wearing suits. However, he disagreed that he told O'Brien that he was "not to be drafting anything". He testified that he advised O'Brien that there was a verbal agreement in place that he was asked to put in writing. Papadakis testified that the term "meeting of the minds" never came up in his conversation with O'Brien and that it was not correct to say that there was no meeting of the minds. He testified that it was outside the realm of possibility that he would have said that to O'Brien because it was a legal conclusion and is incorrect. He would not have used that term in his conversation with O'Brien.

83. Papadakis gave evidence that the discussion on February 16, 2019 was not a negotiation, it was a verbal arrangement that he was asked to put into writing. He agreed that he told O'Brien that there was no written contract. He agreed that he was not in a position to draft the agreement right after the meeting because he needed the information he had requested about the corporate structure.

84. I accept the evidence of Papadakis in preference to the information in the O'Brien Memo.

85. Papadakis' evidence was clear, consistent and convincing as summarized in the following exchange during his cross examination:

> Q. Let me rephrase. I'm going to put it to you, Mr. Papadakis, that on January 31st, 2020, you told Mr. O'Brien that there was no enforceable contract between Mr. Casey and Athanasoulis. Will you accept that?
>
> A. No. No. I said exactly what I've been saying this whole time. There was a verbal agreement in place. You're talking about me using the words "enforceable contract"; those terms did not come up in my conversation. What he asked me is what was asked of me earlier, what was said, what happened at that meeting. He did not go into any, was there an enforceable contract, was there a meeting of the minds. It was what was said, you know -- going back to what you had shown me earlier, those paragraphs, that just talks about what happened at the meeting. That's what we talked about.

86. At the time of their conversation, both Papadakis and O'Brien had potential reasons not to be objective: Papadakis for the reasons previously mentioned in paragraph 66 above and O'Brien because he was not just Cresford's counsel but also a personal friend of Casey and a Trustee of Casey's Estate. However, the objective evidence and surrounding circumstances favour Papadakis' evidence.

87. It is not credible that Papadakis told O'Brien that he was "not to be drafting anything" after the meeting when it is known that the purpose of asking Papadakis to attend the meeting was to create a written agreement in case Casey was "hit by a bus". Any such statement by Papadakis would also be inconsistent with the fact that he did not draft anything after the meeting because of a communication which took place after the meeting, for which Cresford claims privilege.

88. Given that there were in fact no matters of disagreement at the meeting (a matter on which all three attendees at the meeting agree) to say that there was "no meeting of the minds" is a strikingly inapt comment – one that is not supported by the facts, and is at best an arguable legal conclusion. Ironically, the biases alleged against Papadakis make it all the more unlikely that he would have made that comment.

89. Certainly, as Papadakis agreed under cross examination, the matters on which Casey and Athanasoulis confirmed their agreement at the meeting were at a high level of generality. Casey testified that he and Athanasoulis had a "conceptual agreement". Thus, the issue arises as to whether or not their conceptual agreement lacked any contractual intent or essential terms needed to create an agreement enforceable at law. That is a matter for legal argument and analysis, as

discussed below. But there was no reason based on what occurred at the meeting to conclude that there was not, or would not continue to be, a "meeting of the minds".

90. In the circumstances, I am unable to give the O'Brien Memo any weight as against the testimony given by Papadakis in this arbitration.

G. Terms of the PSA

91. The following facts are relevant to the issue of reasonable certainty regarding the calculation of profits in the context of Cresford's business. They are not intended to be definitive findings in terms of how profits should be calculated in the circumstances of any particular project.

92. Cresford prepared budgets, called *pro formas*, that were submitted to lenders and used for internal decision-making. The *pro formas* were prepared on a project by project basis and included a profit calculation.

93. Project profits were calculated by taking project revenues and deducting project expenses.

94. It was Athanasoulis' evidence that the *pro formas* served as a basis to calculate the profits to which she was entitled and that this was something she discussed with Casey. Casey agreed that he and Athanasoulis had a shared understanding as to what was meant when they discussed project profits.

95. The *pro formas* for each project began as pure projections of revenue and categories of expenses at the beginning of each project. They show how all the anticipated financial elements would be treated in the overall calculation of profits. For example, fees charged to a project by other Cresford companies were treated as expenses to the project. As the project progressed, the components of revenues and expenses would be updated with new estimates based on changing circumstances, and with known costs as they were incurred. *Pro formas* became more reliable as construction of the project progressed.

96. Projections can prove to be wrong and events could occur that would significantly affect projections. The COVID pandemic which began in early 2020 is a dramatic example. However, revenues from condominium projects are not earned until construction is completed and the

condominium corporation is registered. By the time the project is registered and revenues are released, costs and revenues are known and, using the *pro formas*, profits can be calculated.

97. Profits can also be earned on projects prior to registration, although not from sales of the condominium units themselves. For example, land may be sold after successful rezoning of the property or at a point where a partial development has occurred.

98. There was never any discussion between Casey and Athanasoulis as to any condition attaching to Athanasoulis' entitlement to a share of the profits. Specifically, it was never discussed that Athanasoulis would cease to be entitled to a share of the profits if her employment was terminated. Casey agreed that Cresford could not extinguish any entitlement by simply terminating Athanasoulis' employment.

H. Events of 2019

99. In the course of 2019, a number of challenges unfolded with respect to the Cresford projects.

100. The three ongoing projects, other than the YSL Project, began to experience serious cost over-runs due to conditions in the construction industry at that time.

101. The YSL Project, which had proceeded to the demolition and excavation stage, was experiencing some difficulties satisfying a condition relating to drawing down its construction loan for the erection of the tower. The condition was that the retail segment of the project had to be pre-sold. Athanasoulis had attempted to put together a consortium to purchase the retail space, but that had been unsuccessful. Casey then engaged in discussions to sell the retail space to Hawalius Inc. ("**Hawalius**").

102. In the course of dealing with these issues, Casey and Athanasoulis discussed the possibility of selling the entire Cresford business. Patrick Dovigi ("**Dovigi**"), the owner of GFL Environmental, which had worked on the foundation for the YSL Project, had expressed an interest in owning rental projects. Casey and Athanasoulis agreed that Dovigi would be approached to see if he had any interest in acquiring Cresford. Dovigi expressed interest, but on the condition that Athanasoulis join him and take a 50% interest. Casey was aware of this and promoted Athanasoulis in his discussions with Dovigi. Casey was extravagant in his praise to Athanasoulis

herself for being in a position to facilitate such a transaction. However, the potential sale to Dovigi created significant issues which ultimately led to Athanasoulis leaving the company without any transaction with Dovigi taking place.

103. Casey testified that he asked Athanasoulis to focus on the transaction with Dovigi. However, he himself took the lead in negotiations with Dovigi and asked Athanasoulis to "remain totally quiet regarding [Dovigi] so he cannot triangulate". In his text message to Athanasoulis of November 22, 2019 Casey went on to say:

> I have a good feeling we can do the deal. If any new information comes up, I will keep you informed.
>
> [Underlining added.]

104. Nevertheless, it appears that Athanasoulis did continue to have discussions with Dovigi. She appears to have played a role in providing information regarding Cresford to Dovigi to inform the negotiations.

105. At the same time, Casey continued to negotiate with Hawalius, without involving Athanasoulis.

106. Casey sought and obtained the assistance of Dowbiggin and Joe Bolla, as external advisors to assist him with the negotiations with Dovigi and Hawalius, and with the other financial issues facing Cresford.

107. While these events were unfolding, Casey instructed employees of Cresford who previously reported to Athanasoulis to report to him instead, and to take other measures regarding record keeping, that caused the employees serious distress. On December 11, 2019, Sean Fleming, Cresford's VP of Finance and Planning ("**Fleming**") stated in an email to Dan Casey, among other things:

> We were asked to join you for a confidential meeting on Wednesday December 11, 2019 that left us feeling uncomfortable. The direction to no longer put anything in writing and to only communicate by way of telephone was alarming. We are also concerned with the sudden change in leadership and decision making without any explanation as to why and for how long.

[Underlining added.]

108. In the arbitration, Casey sought to explain his instructions to Cresford employees not to report to Athanasoulis as a temporary measure which was to remain only in place while she was focussed on negotiations with Dovigi. However, this was never explained to Athanasoulis or other Cresford employees.

109. Casey achieved an agreement in principle (expressed in an unsigned letter of intent ("**LOI**")) with Hawalius and represented to the construction lender that the condition regarding the sale of the retail space had been satisfied. Athanasoulis was aware that Dovigi wanted to acquire the retail space as part of any transaction to acquire Cresford. Athanasoulis felt that the Hawalius transaction negatively impacted the negotiations with Dovigi and that she had been blindsided.

110. On December 13, 2019, Fleming forwarded to Casey an email from the construction lender which sought additional information regarding the LOI. Fleming also raised a number of issues regarding the accuracy and business intent of a number of aspects of the LOI.

111. In a telephone conversation with Bolla, Athanasoulis also disputed whether the agreement in principle with Hawalius satisfied the condition for the construction loan advance. Athanasoulis felt that the lender was being misled regarding the satisfaction of the condition and she raised various issues with Bolla regarding the LOI. Athanasoulis also sent an email to Casey suggesting that he was "presenting a suspicious LOI to the bank".

112. Later the same day, O'Brien on behalf of Cresford sent an email to Athanasoulis in which he referred to the conversation and stated that Athanasoulis had "threatened to take steps to interfere with the closing of the YSL financing". In the email (which was sent by O'Brien's assistant on his behalf) O'Brien reminded Athanasoulis of her fiduciary duties to Cresford and warned her not to interfere in the Hawalius transaction, or with the drawdown of the construction loan.

113. During her involvement with the Dovigi transaction, Athanasoulis also discovered what she believed to be a major violation of Cresford's obligations to its lenders in that it had represented

that it had invested significant equity in the order of $20 million in the YSL Project (as required by the terms of the loan agreement), whereas Casey had borrowed the money and was charging the interest as an expense to the project. The financial difficulties experienced by Cresford and the issues regarding the YSL construction financing caused Athanasoulis to question Casey's past assurances that he had substantial means and assets at his disposal to support Cresford's business.

114. Over the course of the fall of 2019, Casey excluded Athanasoulis from all aspects of Cresford's business except the transaction with Dovigi. In addition to the particular matters noted above, he instructed her to have no further dealings with lenders and conducted certain discussions regarding the potential acquisition of a major new site, the Chelsea Hotel, without her involvement. When Athanasoulis complained, at a meeting on December 5, 2019, Casey berated her and called her "crazy".

115. In his evidence, Casey sought to characterize the situation as Athanasoulis having been instructed to focus on negotiating with Dovigi and being "on assignment" during that period. There was some variation in the evidence as to whether Casey told Athanasoulis to work "exclusively" on the Dovigi transaction, or to give that transaction her primary attention. Casey has complained in his Statement of Defence and Counterclaim regarding her failure to follow up on another matter that was brought to her attention during this period. On the other hand, he agreed in cross-examination with counsel's suggestion that Athanasoulis' attention to the Dovigi transaction was to be exclusive.

116. Casey's evidence was that Athanasoulis' primary or exclusive concern with the Dovigi transaction to the exclusion of other matters was to be temporary, and that the direction to her employees not to report to her was temporary and part of an ethical screen, given Athanasoulis' potential involvement with Dovigi in any purchase of Cresford. Whether or not this was so, these intentions were not communicated to Athanasoulis or to any of the staff, or third parties with whom Athanasoulis had been dealing on behalf of Cresford. There is no evidence of any communication to Athanasoulis or Cresford employees regarding an ethical screen.

I. Athanasoulis' Departure from Cresford

117. On January 2, 2020, Mark Dunn, as counsel for Athanasoulis, wrote to O'Brien indicating that Athanasoulis considered her employment with Cresford to have been constructively terminated, and that she would cease to work for Cresford effective that day. The letter set out the grounds for that contention, most of which have been referred to above. The letter set out various steps to be taken to formalize and communicate the fact that Athanasoulis was no longer employed by Cresford. The letter advised that a claim would be filed on January 10, 2020 if an amicable settlement could not be reached by that date.

118. O'Brien responded to Dunn's letter disputing the allegation of constructive dismissal, but agreeing to discuss the steps to be taken in light of her departure.

119. Athanasoulis' last day of work was January 2, 2020.

J. Subsequent Events

120. Athanasoulis filed a lawsuit against Cresford in the Ontario Superior Court of Justice on January 21, 2020.

121. The Statement of Claim, in addition to advancing the claims that are the subject of this arbitration, contained allegations as to Cresford's financial difficulties and Athanasoulis' concerns regarding dealings with Cresford's lenders which are referenced above.

122. Before delivering the Statement of Claim, Athanasoulis sent a letter to each of two lenders to Cresford: QuadReal Finance and Otera Capital ("**Mann Letters"**). Each letter contained serious allegations of financial wrongdoing against Casey and Cresford, and expressly alleged fraud. Athanasoulis falsely signed the letter in the name of David Mann, the Chief Financial Officer of Cresford ("**Mann**"), a fact that she has since acknowledged.

123. Apart from the allegation of "fraud", KSV does not contest the accuracy of the information in the Mann Letters, and in fact relies on those facts in support of its position that Cresford would never have achieved the profit in which Athanasoulis is claiming a share.

124. As stated above, KSV relies on the Mann Letters as going to Athanasoulis' credibility.

125. On February 21, 2020, the Statement of Defence and Counterclaim was filed. By way of defence, the Defendants denied any liability, including for damages in lieu of notice or for a share of profits. By way of counterclaim, the Defendants sued for damages for, among other things, breach of fiduciary duty, breach of contract and intentional interference with contractual relationships and for defamation. None of the claims raised in the Counterclaim are being dealt with in this arbitration.

126. YSL became subject to a Notice of Intent for Proposal pursuant to the BIA on April 30, 2021.

K. Issues and Analysis

127. By way of preliminary comments, it is useful to address four points which KSV identifies as unusual aspects of this case that should guide the decisions in this case.

128. First, KSV asserts that it is important to note that this case concerns an equity claim, i.e. a claim to a share of the profits, by an employee who has invested no equity. However, I would note that the ranking of the PSA claim in the insolvency proceedings is not an issue that I have been tasked with addressing. I am not aware of any principle of law that the only legally adequate consideration for a promise to share profits, is a contribution to the capital structure of the promisor by way of an investment of equity.

129. KSV's second over-arching point is that this is a claim for a share of profits in an insolvent company, in relation to a project that has not been built and will never be built by this group of companies. However, the existence or non-existence of an agreement, and the determination of the terms of the agreement, does not depend upon whether or not the subject matter of the contract had a favourable outcome. The existence or non-existence of a profit, payable by YSL as a profit share or as damages in lieu, in the circumstances of this case would appear to be a potentially complex determination which – apparently for that reason – has been reserved by agreement of the parties to the second stage of this arbitration.

130. Third, KSV points out that this claim concerns a "life changing amount of money" based on the "flimsiest of alleged oral agreements". However, the existence or non-existence of any agreement is to be determined based on legal tests that are to be applied to the facts of the case at

the time the agreement was allegedly formed. Any opinion the arbitrator may hold as to the providence or fairness of the bargain is not relevant. In addition, as KSV itself points out in other submissions, an agreement to share profits is highly contingent and as of February 16, 2019 Cresford had not yet achieved a profit.

131. Fourth, KSV argues that the claim for wrongful dismissal is unusual in that it is made by a senior employee who was merely asked to step aside from certain duties where there was a potential conflict of interest, until that conflict of interest was resolved. Certain aspects of this assertion are factually contentious.

i. Did Athanasoulis have a PSA that entitled her to 20% of the profits earned by the YSL Project?

132. The fundamental issue in relation to the first question is whether or not Athanasoulis and Casey (representing Cresford) entered into a complete and binding agreement with respect to 20% of the profits earned by the YSL Project. The primary argument against this conclusion by KSV is that there were many other terms that were essential to any such agreement that were not in fact discussed or agreed upon. KSV takes the position that, as stated by Casey, what the parties had was at best a "conceptual agreement" that was subject to details being fleshed out in a written agreement that was yet to be drafted. For example, it is suggested that details would need to be set out as to which entity within the Cresford Group would be responsible to pay the profit share, how profit share was to be calculated, when it would be paid, and so on.

133. In my view, it is clear that Athanasoulis and Casey believed by February 16, 2019 that they had agreed that, as a term of her employment, Athanasoulis would receive 20% of the profits of current and future projects completed by companies in the Cresford Group. They understood the agreement to be binding. They expected Athanasoulis to act upon it as representing fair compensation for her existing, and expected future, contributions to the profitability in which she was to share. Their instructions to Papadakis to reduce the agreement to writing were given for the purpose of memorializing the agreement so that Athanasoulis could rely on it in case Casey "was hit by a bus". What was objectively conveyed by this explanation was that a written agreement was only necessary if Casey was not available to honour the agreement since the parties otherwise trusted each other to give effect to their oral agreements as they had in the past. When

giving those instructions, they did not identify any issues upon which they disagreed or sought advice.

134. At the meeting Papadakis sought further information so that the agreement could be reduced to writing. In particular, he required a corporate chart so as to identify which companies within the Cresford Group would need to be parties. However, Casey at all times had the power to bind all of the relevant entities on behalf of which the 20% PSA was entered into.

135. It is possible that many additional issues could have been identified and provided for in any draft of a written agreement prepared by Papadakis, had his work not been discontinued as a result of privileged communications with Cresford. While Cresford is within its rights to claim privilege over communications related to why the agreement was not drafted, it is not open to KSV (standing in the shoes of Cresford) to offer an affirmative explanation as to why Papadakis was unable to draft an agreement, for example based on a lack of instructions as to "essential terms". In any event, there is no reason to believe that any such terms would have been contentious.

136. Given, as I have found, the subjective intention of the parties that their agreement with respect to the PSA was binding as of February 16, 2019, the issue is whether the agreement nevertheless fails to be enforceable because of a lack of essential terms.

137. The need for an agreement to include all essential terms in order to be enforceable has been dealt with in a number of cases. In general, the legal principles may be summarized as follows:

a. *Bawitko Investments Ltd. v. Kernels Popcorn Ltd*., [1991] O.J. No. 495:

> "20. As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement *containing* specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon

become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

21. However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself. See, generally, Von Hatzfeld Wildenburq v. Alexander, [1912] 1 Ch. 284; Canada Square Corp. Ltd. et al. v. Versafood Services Ltd. et al. (1980), 1979 CanLII 2042 (ON SC), 25 O.R. (2d) 591 (H.Ct.), aff'd., (1981), 1981 CanLII 1893 (ON CA), 34 O.R. (2d) 250 (C.A.); Bahamaconsult Ltd. v. Kellogg Salad Canada Ltd. (1976), 1975 CanLII 379 (ON SC), 9 O.R. (2d) 630 (H.Ct.), rev'd, (1977), 1976 CanLII 554 (ON CA), 15 O.R. (2d) 276 (C.A.); Chitty on Contracts, 26th ed. (1990), at pp.79-91; Corbin on Contracts, (1963), Vol. 1, § 29-30; and Treitel, Law of Contract, 7th ed. (1987), at pp.42-47."

b. *Canada Square Corp. v. Versafood Services Ltd.*, [1981] O.J. No. 3125 (Ont. C.A.) at para. 37:

"… accepting that the parties intended to create a binding relationship and were represented by experienced businessmen who had full authority to represent their respective companies, a court should not be too astute to hold that there is not that degree of certainty in any of its essential terms which is the requirement of a binding contract."

c. *McPherson v. Scully*, [2004] O.J. No. 5235 at para. 56:

"It is the tendency of modern courts to favour enforcement of contracts, particularly where there has been reliance."

138. As with the application of all legal principles relating to contract formation and interpretation, the exercise is highly fact dependent. For example, the *Bawitko* case involved a complex legal arrangement involving a possible franchise agreement. A draft of over 50 pages had already been produced by the franchisor, but had not been subject to any detailed discussions. The parties did not have any prior business dealings to inform their contractual expectations. The court held that the parties had not achieved a meeting of the minds on all essential terms. In the *Canada Square* case, although the final lease had not been signed, the landlord had sent a letter to the tenant outlining basic terms which were described by the court as "crudely expressed", containing "some very loose language" and "not crystal clear". Nevertheless, in that case, the agreement to lease an entire floor of an as yet unconstructed project was enforced. In the *McPherson* case, the court placed considerable reliance on the dealings between the parties over an extended period of time to find that an enforceable agreement had been reached.

139. The important context for the issue in this case is that the 20% PSA was not a standalone agreement nor the first profit sharing agreement between the parties. It was an integral part of an existing contract of employment. That contract was oral and had been acted on by both sides for about 15 years. Despite being referred to in a few documents and despite an inconclusive attempt in 2014 by Athanasoulis to document the employment relationship, no definitive written agreement containing the PSA ever came into existence.

140. None of the written documents, including the November 14 Draft, could be confidently stated to set out the complete and precise terms of her employment. For example, the November 14 Draft was based on an employment agreement of another employee that Athanasoulis modified. It is not certain that she understood the implications of all the terminology, and there is no evidence that the specific wording was ever agreed to (or, for that matter, disagreed to) by Casey. Nevertheless, there is no doubt that Athanasoulis was employed by Cresford and held office in various Cresford entities based on an oral agreement that was defined by an ongoing pattern of conduct between the parties which appear to have given rise to few, if any, disagreements regarding compensation prior to February 16, 2019. On the contrary, there is a history of Athanasoulis being paid compensation that was broadly consistent with what she has alleged to be the terms of her employment.

141. Clearly, the avoidance of uncertainty regarding a contractual relationship is one of the virtues of a written agreement. However, it should be borne in mind that most commercial *disputes* are based on the interpretation of agreements which *have* been reduced to writing. For example, written agreements that require a sharing of profits regularly give rise to disputes regarding the calculation of profits, even when the agreement contains specific terms as to how profit is to be calculated (for example "in accordance with GAAP" or IFRS). Indeed, profit sharing agreements are notoriously more litigious than, for example, agreements that involve sharing of top line revenues (such as sales).

142. To assert that any particular issue that might arise with respect to the calculation of profit must be addressed as an "essential term" sets a very high standard for the degree of certainty required by commercial agreements, oral or written. For example, if an express statement as to whether profit is to be calculated before or after tax is an "essential term", that would mean that <u>any</u> agreement that failed to contain a particular term in that regard would lack an essential term and be unenforceable. In my view, the relevant legal principles are not to be applied in that manner, and do not lead to that conclusion.

143. Here, there was continuous performance/reliance by Athanasoulis (before and after February 16, 2019) on the terms of her employment, including incentive-based elements, as defined by her discussions with Casey. The recording of their agreement into a written document would have been a departure from their previous practices and was embarked upon for a specific reason, the emergence of health issues with Casey.

144. In this case, the relationship is one of long-term employment. This is not a case where a claimant with a scant prior relationship to the defendant claims a massive finder's fee based on an off-hand comment at a cocktail party. Over a period of 15 years, Athanasoulis had risen to the level of being the most senior officer reporting to the CEO in an organization with projects in the hundreds of millions of dollars (and in the case of the YSL Project exceeding $1 billion). Her contributions to the operational success of the Cresford Group appear to have eclipsed that of Casey, although his involvement remained crucial in terms of sourcing capital. Her work had justified significant bonuses and incentives being added to her compensation. Cresford had already agreed to a PSA of 10%, and was discussing increasing that to 15%. With Dowbiggin's

departure and Casey's illness, it is perfectly logical that Casey would see a need to confirm an increase in the PSA to 20% and seek to memorialize that agreement in a formal document. Despite KSV's attempt to minimize the contributions of Athanasoulis as simply those of an employee with a talent for condo sales, there is nothing disproportionate, in the realm of executive compensation, about the agreement to increase her profit share to 20%.

145. The situation here is not analogous to that in the case of *Ayers v. Carewell Holdings Inc*., 2002 CarswellOnt 1761 (Sup. Ct.). The individual who claimed the bonus in that case was found not to be credible because of an inconsistency in how he documented a lesser bonus for his wife as compared to the larger bonus he claimed for himself. Also, the bonus was found to be "too one sided and the amount to be too rich to be credible" based precisely on the fact that it was allegedly payable even if there was no increase in profitability. In the present case, the failure to record the agreement, despite the parties' intention to do so, was consistent with past practice (including prior fruitless attempts to document their agreements). Athanasoulis had been paid significant bonuses based on sales long before profitability from a particular project could be determined, and the 20% PSA did not require any payment to Athanasoulis unless a profit was obtained. Were that to be the case, her anticipated contribution to the result was not in doubt.

146. When they agreed to the 20% PSA, Athanasoulis and Casey had a common understanding of what "profits" meant. Broadly speaking they understood that profits are revenues less expenses. It is reasonable to infer that they understood profits to be as calculated within the *pro forma* process that they used generally for all projects within their business. As given in evidence by Papadakis, they agreed that profits would not be artificially reduced by "bad faith" transactions.

147. In my view, given that the calculation of ultimate profits was an ongoing exercise with respect to each of the projects through the *pro forma* process, and would ultimately have to be accounted for with third party investors, there is a strong factual matrix and history of dealings between the parties within which any dispute regarding the meaning or calculation of profits could be determined. It is not essential to the enforceability of the agreement that every option regarding the calculation of profits be affirmed or negated.

148. I therefore find that Athanasoulis and Casey did agree, on or before February 16, 2019, to amend her employment agreement to provide for a 20% share of the profits calculated in good faith on the basis of the *pro forma* statements used in Cresford's business.

149. As to the question of who were parties to the agreement, I find that the intention of the 20% PSA was to bind all relevant entities that Casey had the power to bind – hence Papadakis' need for a corporate chart when memorializing the agreement. The profits that Casey and Athanasoulis had in mind were profits from the projects carried on by the Owners, such as YSL. Sharing of profits earned by any entity other than YSL is not the subject of the present claim. In the case of the YSL Project, any profit to be shared would necessarily have to be shared by YSL, and it is an inescapable inference that was the common intention of the Athanasoulis and Casey.

150. I therefore find that Athanasoulis did have a PSA that entitled her to 20% of the profits earned by the YSL Project.

ii. If so, what were the terms of the PSA?

151. In the course of answering the first question, I have found that the 20% PSA did not lack essential terms. The essential terms of that agreement, emerging from the foregoing analysis, were:

a. Athanasoulis was to be entitled to 20% of the profits earned on any of Cresford's current and future projects.

b. Profits were to be calculated, on a good faith basis, based on the pro forma budgets prepared by Cresford with respect to each project.

c. Athanasoulis' share of the profits was to be paid by the relevant Owner that earned the profit.

d. Profits were to be shared when earned, usually at the completion of a project.

152. Beyond these terms, certain other issues regarding the terms of the agreement arise in the context of the present situation. In particular:

a. the termination of Athanasoulis' employment before the completion of the YSL Project raises an issue as to whether her right to a share of the profits survived termination of her employment;

b. the fact that an insolvency proposal has been approved by the court at a time when the YSL Project has not proceeded to above-ground construction places in doubt whether, on any interpretation of the agreement, YSL has earned or will earn a profit; and

c. the circumstances giving rise to the termination of Athanasoulis' employment, her subsequent lawsuit against Cresford and Casey, her revelation of damaging information regarding Cresford finances, and the insolvency of YSL raise issues regarding causation in terms of the YSL Project not being completed and whether YSL would have earned a profit.

153. There is no evidence that any of these circumstances were in the minds of the parties when they entered into the 20% PSA. Indeed, each of these circumstances would appear to be contrary to the assumptions on the basis of which the 20% PSA was entered into. In particular:

a. the notion that Athanasoulis employment might be terminated without cause was the furthest thing from the minds of the parties. The entire premise of the 20% PSA was that she was a key employee whose contributions were needed in order to achieve a profit;

b. the object of the agreement was retention of Athanasoulis as a key employee until a profit was earned; and

c. the objective of earning and sharing a profit was the antithesis of Cresford or the Owners becoming insolvent.

154. Unquestionably, parties can and should provide in their agreements for events that commonly occur, even if they consider that they are unlikely to arise in their case. As observed in argument, that is the essence of what commercial lawyers do when they draft an agreement.

However, many if not most commercial disputes involve events that the parties did not anticipate or did not provide for, clearly or at all, in their agreement, despite the use of lawyers.

155. With respect to the issue of continued employment, Athanasoulis argues that the November 14 Draft provides the basis of a determination that the parties had an understanding that the PSA would be payable "on final closing" without any reference to Athanasoulis remaining employed by Cresford at that time. I am not prepared to draw that conclusion from the November 14 Draft as there is no evidence that that specific language was ever discussed or agreed to. Even if one were to accept the November 14 Draft as defining the terms of the PSA with respect to continued employment, it would leave open the questions as to whether the profit share could be defeated by a termination of Athanasoulis' employment for cause, or by voluntary resignation, before a profit was earned.

156. Nor is there any evidence of discussions on February 16, 2019 to the effect that Athanasoulis had to be employed at the end of a project in order to earn a share of the profit, as alleged (in the alternative) by Cresford and KSV.

157. There was no *express* term of the oral agreement regarding continued employment. However, there is a term which can readily be implied, and which Casey himself has accepted as obvious, namely that Cresford cannot avoid the obligation to pay a share of the profits by simply terminating Athanasoulis' employment. I understood his admission in this regard to relate to a situation where termination was without cause.

158. KSV accepts that the avoidance of such an obligation by terminating an employee just before the obligation falls due would not avail an employer. However, it argues that such a right could be defeated if it did not fall due within a contractual or common law notice period for termination without cause.

159. Athanasoulis argues that in the absence of any express agreement that the 20% PSA would be defeated by termination of Athanasoulis' employment, the result is that it cannot be so defeated.

160. The purpose of the profit share was to incentivize Athanasoulis to work towards the objective of creating and maximizing the profit to be earned by the Owners. It is not in dispute that, in the ordinary course, it would take several years (possibly 5 to 7 years) to complete the

types of projects Cresford was undertaking. That was the case with respect to the YSL Project. The 20% PSA necessarily implied a mutual commitment on both sides to work to the objective of making a profit over that period of time. It would defeat the fundamental purpose of the agreement if Cresford could increase its profit share by 20% and decrease Athanasoulis' share to zero, possibly after several years of crucial contributions by her in the form of advance sales etc, simply by terminating her employment on notice. It is not necessary to consider whether Cresford may have been able to do so in the event it terminated Athanasoulis' employment for cause, as that is not in issue in this case.

161. I therefore accept Athanasoulis' submission that, in the absence of an express agreement to the effect that the 20% PSA only applies if Athanasoulis is employed by Cresford when the profit is earned, there is no such limitation on that right.

162. Although I have found the November 14 Draft not to be determinative of the terms of the 10% PSA, my conclusion that employment at the time a profit is realized is not required pursuant to the 20% PSA is consistent with the provisions of the November 14 Draft.

163. In my view, there were no express or implied terms with respect to the issues relating to insolvency. These issues will have to be determined in the next phase of the arbitration by the application of the relevant legal principles to the factual circumstances giving rise to the insolvency.

164. I fully appreciate KSV's submissions that it appears incongruous to be discussing profit share in the context of companies that have subsequently gone through insolvency proceedings. However, the parties have agreed to bifurcate liability issues from damage issues, and to have me address specific questions relating to liability at this stage. Without hearing more evidence and submissions regarding what led to the insolvency proceedings and what their financial outcome was in terms of YSL, I am not in a position to accede to KSV's submission that I should find no breach on the basis that there has not been, and will never be, any profit to share. Equally, I do not rule out the possibility that the profit may be shown to be nil and the damages for any breach to be nominal.

165. Similarly, as a matter of causation, I am not able to determine at this stage whether or not the actions of Athanasoulis were the cause of Cresford's demise. All of those issues are necessarily reserved to the second stage of the arbitration.

166. Based on the foregoing analysis with respect to the first and second issue, I find the following with respect to the terms of the 20% PSA:

a. Athanasoulis was to be entitled to 20% of the profits earned on any of Cresford's current and future projects.

b. Profits were to be calculated, on a good faith basis, based on the pro forma budgets prepared by Cresford with respect to each project.

c. Athanasoulis' share of the profits was to be paid by the relevant Owner that earned the profit.

d. Profits were to be shared when earned, usually at the completion of a project.

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

iii. Was Athanasoulis employed by YSL?

167. KSV submits that Athanasoulis was not employed by YSL. Therefore, even if a PSA was found to exist, the obligations under it could not be owed by YSL. In KSV's oral submissions, various other possible candidates for the employer were suggested including: the Cresford organization, EDRP and "various other management organizations within the Cresford Group".

168. KSV relies primarily on the decision of the Ontario Court of Appeal in *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385 to support its submissions. KSV submits that YSL was among the lowest companies on the organization chart and did not exercise the degree of effective control over Athanasoulis which is required to give it the status of employer, and to impose upon it any attendant obligations.

169. In my view, the description of the common employer doctrine in the *O'Reilly* case, supports a finding that YSL was a common employer of Athanasoulis, along with other Owners and companies in the Cresford Group of companies. I base that finding on paragraphs 49 to 65 of the *O'Reilly* decision and the following facts in this case:

a. Athanasoulis was an officer of YSL. Her employment status is therefore not based merely upon the relationship between YSL and another company or companies by which she was employed. There is no issue of "piercing the corporate veil" in this case.

b. As with the *Downtown Eatery (1993) Ltd. v Ontario* 2001 CarswellOnt 1680, cited with approval in the *O'Reilly* case, Athanasoulis" employment "rested more on her relationship to the group of companies rather than the relationships among the companies in the group".

c. YSL was a distinct corporate entity (with distinct stakeholders) which was separately and directly benefitted by the work performed by Athanasoulis.

d. Casey had the authority to bind YSL. Where Casey made promises to Athanasoulis that only YSL was in a position to fulfill (e.g., an agreement to share YSL's profits) it is objectively reasonable to infer that those promises were made on behalf of YSL.

e. Although in the context of Cresford it may have been a formality, there is no reason to believe that YSL could not have exercised its control by making a different decision with respect to Athanasoulis' employment than other members of the group. The fact that YSL was structured to exercise that control through Casey (as were all other companies within the group) does not negate YSL's control over Athanasoulis with respect to its own business, as a legal matter.

f. There was no written agreement of employment, but such documents that refer to the relationship between Cresford and its employees do not refer to any particular legal entity within the Cresford Group. Where no individual employer is specified,

it is reasonable to conclude that each member of the group is an employer in relation to aspects of the employment relationship particular to it.

g. There is no evidence of EDRP as an entity being involved substantively in any of Athanasoulis' activities on behalf of the Cresford Group or exercising any control. EDRP was not identified on a corporate chart used by KSV counsel to make the argument that YSL was at the bottom of the corporate ladder. At best, it appears to have been a financial clearing house within the group.

h. In any event, the companies on the "bottom rung" of the corporate chart are the Owners. They are the operating companies. As such, they are precisely the companies for which Athanasoulis worked. Her activities related to their operations, not merely to aggregated "head office" types of functions. She was involved in dealing with contractors and lenders and with managing sales programs for specific projects, such as the YSL Project.

i. The agreement with Athanasoulis included elements of compensation (e.g., bonuses) which were directly attributable to her contributions to individual companies within the group (e.g., YSL) and which were in many instances advanced by those companies to her (e.g., in the form of discounts on condominium sales).

170. Based on the foregoing, I find that Athanasoulis was an employee of YSL.

iv. Was Athanasoulis constructively dismissed i.e., did she resign or was she constructively dismissed?

171. The basic legal framework for the law relating to constructive dismissal was set out by the Supreme Court of Canada in *Farber v. Royal Trust Co*., 1997 CanLII 387 (SCC), [1997] 1 SCR 846, in which it was stated:

> 24. Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking

> to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.
>
> 25. On the other hand, an employer can make any changes to an employee's position that are allowed by the contract, *inter alia* as part of the employer's managerial authority. Such changes to the employee's position will not be changes to the employment contract, but rather applications thereof. The extent of the employer's discretion to make changes will depend on what the parties agreed when they entered into the contract.

172. As set out in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, paragraph 63, the question in any constructive dismissal case is whether a reasonable person *in the employee's position* would conclude the essential terms of the contract had been substantially changed.

> "There is no requirement that the employer actually intend no longer to be bound by the contract. The question is whether, given the totality of the circumstances, a reasonable person in the employee's situation would have concluded that the employer's conduct evinced an intention no longer to be bound by it."

173. The issue is whether a breach of an express or implied term of the contract has occurred and whether that breach has caused a substantial change to an essential term of the employment contract.

174. The responsibilities that an employee must perform are, of course, part of the employment contract. Taking those responsibilities away will often result in constructive termination. The Supreme Court of Canada recognized in *Potter* (para. 83) that work is a "fundamental aspect" in a person's life and an "essential component of his or her sense of identity, self-worth and emotional well-being". That is particularly applicable in this case in which Athanasoulis success was completely defined by her role at Cresford, with few other qualifications or accomplishments, and her remarkable rise to be the "face" of Cresford to the public.

175. I accept Athanasoulis' submissions (and there does not appear to be any serious dispute) that the *Potter* case, and other authorities cited by her establish the following general principles:

- Employment is not only a way to earn money – the responsibilities associated with a position, and the reputation and status that flows from those responsibilities, are critically important.

  Potter, paras. 83-84;

  Blight v. Nokia Products Ltd., 2012 ONSC 2093, paras 23-24 and 31

- A reduction to an employee's responsibilities is a substantial breach of an essential term of the employment contract, and thereby constitutes constructive dismissal. This is especially the case if there is an associated loss of reputation or status.

  Farber, paras. 38 and 46;

  See also Schumacher *v. Toronto Dominion Bank*, [1999] O.J. No. 1772 (Ont. C.A.), paras. 27-28

- Changing reporting structures can also be a constructive termination.

  Robinson v. H. J. Heinz Company of Canada LP, 2018 ONSC 3424, para. 29

- Without proper justification, suspending or denying an employee the opportunity to work almost "inevitably" leads to a finding of constructive dismissal.

  Potter, para. 84 and para. 106;

  Shah v. Xerox Canada Ltd., [2000] O.J. No. 849, para. 9

- It is not generally enough for the employer to *have* cause for the suspension, it must almost always *articulate* that cause to the employee at the time of the suspension.

  Potter, paras. 98-99

- It is a fundamental implied term of any employment contract that the employer will treat the employee with dignity and respect. An employer who verbally abuses an employee has often effected a constructive termination of that employee.

  Drew v. Canadian National Railway, 2009 CarswellNat 2256, para 222;

  Nasser v. ABC Group Inc., 2007 CarswellOnt 8884, paras. 32-33, aff'd 2008 CanLII 4264 quoting *Lloyd Imperial Parking*, [1996] A.J. No. 1087, para. 41

176. KSV does not contest any of the above principles. It defends the constructive dismissal claim against Cresford by denying that Athanasoulis was treated in an unfair or disrespectful manner. On the contrary, KSV maintains, the changes in her role and responsibilities were fair and reasonable having regard to her potential involvement with Dovigi after his possible purchase

of Cresford. KSV argues that it was a reasonable measure in the legitimate interests of Cresford that Athanasoulis and Dovigi not be given any information about Cresford outside of the negotiations and that an "ethical screen" be established between Athanasoulis and other employees at Cresford. KSV maintains that these necessary arrangements were temporary and should have been understood by Athanasoulis to be temporary, and dependent on whether a transaction with Dovigi was achieved.

177. It is not unusual in M&A transactions for senior management employees to find themselves in near conflict positions, particularly when incentives are offered by the purchaser for them to remain in place after the transaction is complete. In this case, the incentive offered to Athanasoulis was unusually substantial in that she was offered a profit participation of 50%. However, it is important to keep this fact in the context of the actual dealings between Casey and Athanasoulis. The sale of the company was mutually identified by Casey and Athanasoulis as a solution to Cresford's financial difficulties and a possible sale to Dovigi was welcomed by Casey as much as by Athanasoulis. Casey was aware of the importance Dovigi placed on Athanasoulis continued involvement, he actively promoted her to Dovigi and was aware of the condition that she remain involved after the sale with an even greater share of the profits.

178. In the words of KSV's counsel:

> So Mr. Casey understood that Athanasoulis was to have a financial interest in the company, along with Mr.Dovigi, following the potential sale. And she gave evidence to that. She said I was going to, I was going to have a stake in it; we were going to be partners; we were going to split it 50/50.
>
> Mr. Casey instructed Athanasoulis to seek a deal that worked for Cresford and for Mr. Dovigi and for herself. Remember, he said it was those three parties.
> …
>
> … it probably wasn't the best idea in the world to have Athanasoulis trying to satisfy the interest of all three parties at once. But that's the situation they were in. They dealt with things informally. They trusted each other.
>
> As a result of her special interest in the sale to Mr. Dovigi, Mr. Casey assigned Athanasoulis to devote most of her work during that time period to the sale.

179. The foregoing is a fair summary of the situation with the possible qualification of the last paragraph. The exact role Athanasoulis was to play in negotiations with Dovigi is unclear. The evidence is somewhat inconsistent on this aspect. Clearly, Casey himself continued to conduct negotiations with Dovigi and at one point advised Athanasoulis to "…remain totally quiet regarding [Dovigi] so he cannot triangulate. I have a good feeling we can do the deal. If any new information comes up I'll keep you informed." [Underlining added.] Indeed, it seems an odd choice that Athanasoulis would be directed to devote most of her attention to the very transaction which gave rise to her conflict of interest. Nevertheless, Casey's evidence is that Athanasoulis was to devote most of her time to the sale and to negotiating with Dovigi.

180. In any event, Athanasoulis did continue to negotiate with Dovigi and, in that process, learned negative information regarding Cresford's financial dealings of which she was previously unaware. That information was eventually set out in the Mann Letters, after Athanasoulis' departure from Cresford.

181. Given that Casey continued to negotiate a sale to Hawalius of the retail space in YSL, which Dovigi considered to be inconsistent with his purchase of Cresford, a conflict was inevitable between the two transactions and between Casey and Athanasoulis.

182. In these challenging circumstances, some adjustments to the scope of Athanasoulis' role and responsibilities were justifiable. However, in my view, the extreme measures that were taken by Casey and, as importantly, the manner in which they were implemented were not justified and rendered Athanasoulis' continued employment untenable. Perhaps the most serious of these were:

a. Casey told Athanasoulis that she was not to deal with Cresford's lenders, despite the fact that Athanasoulis had played an important role in interfacing with lenders on behalf of Cresford. This was occurring at a time when irregularities in Cresford's lending arrangements were coming to light, and at a time when Casey had brought Dowbiggin back in as a consultant to deal with financial matters.

b. Casey excluded Athanasoulis completely from negotiations relating to the sale of YSL's retail component. In that regard, while directing Athanasoulis to focus on the Dovigi transaction, he negotiated an agreement with Hawalius that undermined the Dovigi transaction. At the same time Casey's representations to YSL's construction lender regarding the Hawalius transaction raised doubts in the minds of Athanasoulis and another senior Cresford employee as to whether the representations were accurate.

c. In response to the issues raised by Athanasoulis with respect to the Hawalius transaction, Casey had Cresford's litigation counsel write Athanasoulis to accuse her of breaching her fiduciary duty and re-iterating that she was not to contact any lenders. The involvement of an employer's litigation counsel to communicate with an employee, especially accompanied by accusations of breach of fiduciary duty and interference with contractual relations, is not usually a hallmark of secure employment.

d. Without notice to Athanasoulis or explanation to senior Cresford staff he instructed the latter to report directly to him, and not to Athanasoulis. At the same time, he instructed them not to put communications in writing.

e. Athanasoulis testified that Mr. Casey "berate[d]" her, "bl[ew] up" and called her "crazy" at a meeting on December 5, 2019.

183. The foregoing actions by Casey, separately and in combination, precluded Athanasoulis from performing most of the functions critical to her role at Cresford and had serious potential reputational consequences for Athanasoulis. In particular, the instructions to senior Cresford employees not to report to her – which they perceived as a change of leadership – combined with an instruction not to communicate in writing, created an aura of crisis and wrongdoing that understandably caused confusion and concern among those who had previously reported to Athanasoulis.

184. The case of *MacKinnon v Acadia University* 2009 NSSC 269, was cited by KSV as a case with many facts comparable to the present case in which no constructive dismissal was found to have occurred. In that case, the court found that, absent expressed restriction, the employer was entitled to change the scope of an employee's duties to meet changing circumstances and priorities, including by creating, deleting, or reallocating spheres of responsibility (para 83). KSV argues that the fact that, on a temporary basis, certain projects may have been removed from Athanasoulis' oversight does not amount to constructive dismissal when there is no change in title or salary. KSV argues that "implicitly" on the objective facts the changes to Athanasoulis' employment were temporary.

185. In reviewing the *MacKinnon* case, I note that the court observes that "Case law provides helpful but limited guidance and should be read with caution…" (Para 62). It notes that the cases have swung "like a pendulum" in concert with economic conditions but has probably reached the current position that "Legitimate business interests can justify a degree of change in the employees

duties, provided the degree of change is not fundamental to the employment contract." (para 63). The court concludes that the current test remains that described by Gonthier J. in *Farber* in that "save in exceptional cases, an employer's change must be fundamental (severe, serious, unilateral and substantial and without reasonable notice) to amount to a repudiation of the employment contract." (Para 69.)

186. In my view that test for constructive dismissal is met in this case. The degree of change in status and role which was abruptly imposed on Athanasoulis was fundamental to the employment contract. The change was "severe, serious, unilateral, substantial and without any notice".

187. While the actions of Cresford may have been justified in the abstract on a limited and temporary basis in terms of the Dovigi transaction, the indiscriminate and non-transparent manner in which they were implemented placed Athanasoulis in an untenable position in terms of critical relationships with other senior employees who reported to her and with third parties who looked to her as their principal contact.

188. It is not disputed that the changes were made without any notice to Athanasoulis and were not described to Athanasoulis nor to anyone else as being temporary. The suggestion that the temporary nature of these changes was implicit is not viable in the context of the financial irregularities which were then in play, the legal warnings given to Athanasoulis and Casey's deteriorating personal communications with her. The relationship of trust which had been the foundation of a very successful employment relationship, based entirely on oral agreements, was destroyed. In reality, the changes and the way in which they were implemented carried a very high risk that Athanasoulis' reputation and standing with others, upon whom her effectiveness as an employee and her future career in business depended, would be permanently compromised.

189. In the circumstances, I find that the changes in Athanasoulis' employment and in her relationship with Casey:

a. fundamentally changed the nature of Athanasoulis' employment and her ability to continue as an employee;

b. were not justified by any conduct on her part; and

c. were made unilaterally without reasonable notice or explanation.

190. I find that she was constructively dismissed by these actions.

L. Summary of findings

191. For the foregoing reasons, I make the following findings at this stage of the arbitration:

a. Athanasoulis did have a PSA that entitled her to 20% of the profits earned by the YSL Project.

b. I find that the terms of the 20% PSA were:

i. Athanasoulis was to be entitled to 20% of the profits earned on any of Cresford's current and future projects.
ii. Profits were to be calculated, on a good faith basis, based on the *pro forma* budgets prepared by Cresford with respect to each project.
iii. Athanasoulis' share of the profits was to be paid by the relevant Owner that earned the profit.
iv. Profits were to be shared when earned, usually at the completion of a project.
v. There was no requirement that Athanasoulis remain employed at the time that a profit was earned.

c. Athanasoulis was an employee of YSL.

d. Athanasoulis was constructively dismissed in December 2019.

M. Next Steps in the Arbitration

192. If either party wishes to make submissions as to costs at this stage of the arbitration, such submissions shall be made within 21 days of release of this Partial Award. Written responses to any requests for costs shall be delivered within the next 21 days. I will provide directions as to how any further submissions are to be made.

193. Counsel shall confer as to the procedures they wish to adopt for the next phase of the arbitration. Either or both sides may seek directions at any time. If no agreement is reached within 30 days of release of this Partial Award, I will convene a case management conference.

Date: March 28, 2022

William G. Horton, FCIArb, C.Arb.
Sole Arbitrator
Toronto

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

Court File No: BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

AFFIDAVIT OF EMILY SEABY
(Sworn January 4, 2023)

GOODMANS LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Mark Dunn LSO#: 55510L
mdunn@goodmans.ca
Sarah Stothart LSO#: 73068O
kcohen@goodmans.ca

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for Maria Athanasoulis

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

Court File No: BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

RESPONDING MOTION RECORD OF MARIA ATHANASOULIS

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Mark Dunn LSO No. 55510L
mdunn@goodmans.ca
Sarah Stothart LSO No. 73068O
sstothart@goodmans.ca

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for Maria Athanasoulis