Court of Appeal File No. COA-24-CV-0468
Court File No. BK-21-02734090-0031

COURT OF APPEAL FOR ONTARIO

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

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

FACTUM OF THE RESPONDENT, MARIA ATHANASOULIS

October 16, 2024

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I. OVERVIEW

1. The Respondent, Maria Athanasoulis, had a contract with the debtors in this insolvency proceeding (collectively, "**YSL**"). YSL agreed to pay Ms. Athanasoulis 20% the profits earned from a major real estate project that it owned (the "**YSL Project**"). It also agreed that it would seek to maximize those profits. In exchange, Ms. Athanasoulis agreed to devote her considerable talents to managing the marketing, sales and construction of the YSL Project.

2. Ms. Athanasoulis upheld her end of the bargain. Under her leadership, the YSL Project sold condominium units in record time and at record prices. By October 2019, the YSL Project was projected to earn approximately $200 million in profits.

3. But YSL breached its agreement with Ms. Athanasoulis (the **"Agreement"**) in two important ways. First, YSL repudiated the Agreement in December 2019 by constructively terminating Ms. Athanasoulis. Second, following Ms. Athanasoulis' termination, YSL embarked on a campaign to enrich its principal, Daniel Casey, instead of maximizing profits.

4. Ms. Athanasoulis claimed against YSL for the damages caused by its breach of the Agreement. After YSL filed bankruptcy proposal proceedings, and after Ms. Athanasoulis established in binding arbitration that YSL had breached the Agreement, the proposal trustee (the **"Trustee"**) was tasked with determining Ms. Athanasoulis' claim in this insolvency proceeding. It disallowed Ms. Athanasoulis' breach of contract claim in its entirety (the **"Disallowance"**).[1]

5. Ms. Athanasoulis moved to set aside the Disallowance. In a thorough and well-reasoned decision dated March 19, 2924, Justice Kimmel applied well-established legal principles to the

[1] Ms. Athanasoulis' claim for wrongful dismissal damages was settled, and is not at issue on this appeal.

evidence and correctly concluded that the Disallowance could not stand and that Ms. Athanasoulis was entitled to have her claim properly valued.

6. The Trustee now asks this Honourable Court to set aside the Decision and re-instate the Disallowance. On appeal, the Trustee repeats the fundamental error identified by Justice Kimmel in the Decision. The Trustee did not recognize and consider the nature of the losses that Ms. Athanasoulis seeks to recover through her claim, namely: *damages* for breach of contract that must be valued in accordance with the well-established principles that govern all breach of contract claims.

7. The Trustee's primary argument on appeal (and before Justice Kimmel) is that the Claim is not a "provable claim" within the meaning of the *BIA* because it does not "sound in debt" and is "in substance" an "equity claim". But the *BIA* specifically defines the term "equity claim". Justice Kimmel held, correctly, that the Claim does not fall within the *BIA* definition. The Trustee does not challenge this conclusion. It argues, instead, that the Claim is some form of discretionary equity claim even though it does not meet the statutory definition. But "sound[ing] in debt" (to use the Trustee's words) is not a legal standard in the *BIA* or any of the cases cited by the Trustee. And neither the *BIA* nor the cases cited by the Trustee support its contention that the Claim is "in substance" an equity claim.

8. The Trustee's second ground of appeal is similarly flawed. The Trustee argues that it was entitled to deny the Claim because it was "contingent" on YSL *actually* earning profits. This ignores the basic principles that govern damages in Canada. Ms. Athanasoulis is entitled to the amount she *would have* earned if YSL had not breached the Agreement, calculated at the time of the breach. Her damages exist regardless of, and are not contingent on, YSL's *actual* profits.

Justice Kimmel correctly held that the Trustee must apply ordinary damages principles to the Claim.

9. Relatedly, the Trustee also argues that the Claim was not a "provable claim" because Ms. Athanasoulis did not establish a "probability of liability" in her civil action against YSL, which was stayed when these bankruptcy proceedings began. But the Trustee was specifically directed to determine the Claim in *this* proceeding and, in any event, this Court has rejected the "probability of liability" test that the Trustee relies on.

10. The Trustee's final ground of appeal, that Justice Kimmel erred by not applying the so-called "rule" that no employee can ever recover any damages unless those damages would have been paid during the common law notice period, is based on a misreading of an entirely unrelated case and was already rejected in the arbitration.

11. In summary, Justice Kimmel did not commit the errors alleged by the Trustee, or any error. The appeal should be dismissed.

II. RESPONDENT'S STATEMENT OF THE FACTS

12. The Trustee's recitation of the facts is highly selective. It references a number of irrelevant facts, including several court decisions that are tangential to this case and have no bearing on it. Additionally, it omits a number of relevant facts, including numerous binding factual findings in Ms. Athanasoulis' favour. The facts relevant to this appeal are set out below.

B. Ms. Athanasoulis was entitled to 20% of the Profits earned by YSL

(i) Ms. Athanasoulis' employment at Cresford

13. YSL was one of several companies that operated using the brand name "Cresford". It

engaged in the development, construction, marketing and sale of condominiums in Toronto. Cresford was founded by Mr. Casey, and owned by companies and trusts that he controlled.[2]

14. Ms. Athanasoulis began working for Cresford in 2004. She had no real estate experience and no post-secondary degree. But she quickly displayed a talent for marketing condominium projects and, over time, rose to become Cresford's President and COO.[3]

15. Ms. Athanasoulis did not have a written employment agreement. Her responsibilities and compensation were governed by an oral agreement negotiated with Mr. Casey on behalf of Cresford and all of its related entities (defined above as the "**Agreement**").[4] Ms. Athanasoulis and Mr. Casey agreed to the Profit Share in 2014, before YSL was founded, and it formed part of the Agreement.[5]

(ii) The Profit Share

16. Mr. Casey induced Ms. Athanasoulis to work for, and add substantial value to, Cresford's projects by entering in the Agreement, which stipulated that each project owner would pay her 20% of the profits that it earned (the "**Profit Share"**). The Profit Share was a key component of the Agreement and applied to YSL on the day it was created in 2016. The relevant terms of the Agreement, as it applied to the Profit Share and YSL, were:

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[2] Decision of Justice Kimmel dated March 19, 2024 (**"Decision"**) at paras. 1, 17-18, Appellants' Appeal Book and Compendium (**"ABC"**), Tab 3, p. 27, 30-31.

[3] Decision at paras. 17-18, ABC, Tab 3, p. 30-31; Partial Award of Arbitrator Horton dated March 28, 2022 (**"Partial Award"**) at para. 25, ABC, Tab 4, p. 61.

[4] Decision at paras. 14-15, ABC, Tab 3, p. 29-30.

[5] Decision at footnote 1, ABC, Tab 3, p. 30; Partial Award at paras. 49, 139, ABC, Tab 4, pp. 66, 85.

(a) YSL, as owner of the YSL Project, agreed to pay Athanasoulis the Profit Share;[6]

(b) There was no requirement that Ms. Athanasoulis remain employed by YSL to be entitled to the Profit Share;[7]

(c) Profits were to be calculated, on a good faith basis, based on the *pro forma* budgets prepared by YSL and equal to YSL's revenues less its expenses;[8]

(d) Profits could not be artificially reduced by "bad faith" transactions;[9]

(e) YSL had an obligation to try and maximize the value of the YSL Project;[10] and,

(f) The Profit Share was to be paid to Ms. Athanasoulis when Profits were earned, usually at the completion of a project.[11]

C. YSL had an obligation to maximize the value of the YSL Project. It breached that obligation.

(i) YSL

17. The Claim concerns Yonge Street Living Residences, which is an 85-story condominium development located at the corner of Yonge and Gerrard in Toronto (as defined above, the "**YSL Project**"). The YSL Project was owned by YSL Residences Inc. ("**YSL Inc.**") as general partner, which held the YSL Project as bare trustee for YG Limited Partnership ("**YG LP**").[12] YSL was

[6] Decision at para. 16(d), ABC, Tab 3, p. 30.

[7] Decision at para. 16(f), ABC, Tab 3, p. 30.

[8] Decision at para. 16(a), ABC, Tab 3, p. 30.

[9] Decision at para. 16(b), ABC, Tab 3, p. 30.

[10] Decision at para. 16(c), ABC, Tab 3, p. 30; Partial Award at para. 160, ABC, Tab 4, p. 90-91.

[11] Decision at para. 16(e), ABC, Tab 3, p. 30.

[12] Decision at para. 1, ABC, Tab 3, p. 27.

founded in 2016, and Ms. Athanasoulis worked for more than three years to make the YSL Project a success before she was terminated.[13]

(ii) YSL's success

18. The YSL Project was Cresford's largest project and its "crown jewel".[14] Every single forecast or appraisal prepared before the commencement of this bankruptcy proceeding forecast profits of the YSL Project in excess of $100 million.[15]

19. Contrary to the Trustee's description of the YSL Project's development, YSL had achieved significant progress on the YSL Project by December 2019 when, without just cause, it repudiated its employment agreement with Ms. Athanasoulis. It had (among other things) obtained all of the approvals required to build the YSL Project[16] and pre-sold approximately $650 million worth of condominium units at record-setting prices under Ms. Athanasoulis' leadership.[17] It had negotiated fixed-price contracts for the majority of its expenses, thereby achieving certainty on construction costs.[18]

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[13] Decision at paras. 17-18, ABC, Tab 3, p. 30-31; Affidavit of Maria Athanasoulis dated May 5, 2023 (**"Athanasoulis Affidavit"**) at paras. 5-9, 18, ABC, Tab 21, p. 1215-1216, 1218.

[14] Partial Award, paras. 36-37, 39, ABC, Tab 4, p. 63-64; Athanasoulis Affidavit at para. 5, ABC, Tab 21, p. 1195.

[15] YSL Pro Forma dated October 18, 2019 (**"October 2019 Pro Forma"**), ABC, Tab 24, p. 1279; Partial Award at para. 37, ABC, Tab 4, p. 63; See also CBRE Appraisal Reports as of the Effective Dates of July 30, 2019 (**"July 2019 CBRE Report"**), November 1, 2018 (**"November 2018 CBRE Report"**), April 20, 2018 (**"April 2018 CBRE Report"**) and February 1, 2016 (**"February 2016 Appraisal Report"**), Respondent's Compendium dated October 16, 2024 (**"RCOM"**), Tabs 1-4, pp. 9, 101, 198, 298. See also *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178 (the **"First Proposal Decision"**) at para. 75(a).

[16] November 2018 CBRE Report at pp. 15-16, RCOM, Tab 2, pp. 123-124; Transcript of the Arbitration before William G. Horton Held February 22, 2022 (**"Arbitration Transcript – February 22"**), at 174:3-12, RCOM, Tab 5, p. 431.

[17] Partial Award at para. 37, ABC, Tab 4, p. 63; October 2019 Pro Forma, ABC, Tab 24, p. 1279.

[18] Partial Award, paras. 39-40, ABC, Tab 4, p. 64; Arbitration Transcript - February 22 at 178:20-179:5, RCOM, Tab 5, p. 423-433; Mr. Casey agreed and testified that the YSL Project "didn't have cost issues or other issues", "the new numbers that went into the business were strong and correct numbers", and "it gave us strength as a company, that if we needed to put money into other projects, it gave us the option that we could use our position in that company to either borrow against the equity in some manner, or sell, or do a joint venture on that project that would create cash

20. This progress yielded tangible financial gains. By July 2019, the YSL Project was valued at $375.5 million,[19] approximately $125 million more than YSL had invested in it.[20] YSL's internal projections, which had been vetted by leading external consultants, forecasted profits of close to $200 million.[21]

(iii) The LPs invested in limited partnership units

21. In 2016, Cresford decided to raise funds from accredited investors. Individuals and entities (the "**LPs**") invested in the YSL Project by purchasing Class "A" limited partnership units in YG Limited Partnership ("**YSL LP**"). [22]

22. Each LP was entitled to the greater of: an annual interest rate of 12.5% or double its original investment.[23] Cresford LP was entitled to receive all of the proceeds remaining after creditors and LPs had been paid in full. Mr. Casey personally guaranteed YSL's obligations to the LPs.[24]

23. The Class "B" units in YSL LP were owned by Cresford Yonge Limited Partnership ("**Cresford LP**"), an entity controlled by Mr. Casey and/or his family trusts.

24. Ms. Athanasoulis did not own any interest in YSL, or Cresford LP. The Trustee admits

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for the other parts, and/or it created a much stronger company." Transcript of the Arbitration before William G. Horton held February 24, 2022 (**"Arbitration Transcript - February 24"**) at 421:4-22, RCOM, Tab 6, p. 455.

[19] July 2019 CBRE Report at p. 1, RCOM, Tab 1, p. 9.

[20] See the Preliminary Report on YSL prepared by Altus Group Cost Consulting & Project Management dated October 2, 2019 ("**Altus Report**") at p. 3, RCOM, Tab 7, p. 495, which illustrates investment by YSL of approximately $247 million. See also the explanation at Submissions of Maria Athanasoulis dated May 5, 2023 (**"Athanasoulis Submissions"**) at paras. 133, RCOM, Tab 8, p. 823.

[21] October 2019 Pro Forma, ABC, Tab 24, p. 1279.

[22] Decision at para. 10, ABC, Tab 3, p. 29.

[23] YG Limited Partnership Amended and Restated Limited Partnership Agreement dated August 4, 2017 (**"LP Agreement"**) at s. 4.2, ABC, Tab 19, p. 1161-1162.

[24] Example of Guarantee of Dan Casey to LPs, RCOM, Tab 9, p. 847; See also Investor Presentation Slide-deck, being Exhibit B to the Li Affidavit, RCOM, Tab , p. 860-861.

this, but asserts at paragraphs 6(b) and 25 of its factum, that the Profit Share was "derivative" of the amounts that Cresford LP might earn. This assertion is not supported by any evidence - indeed, it is specifically contradicted by the Partial Award. The Arbitrator specifically found that YSL – not Cresford LP – owed the Profit Share to Ms. Athanasoulis.[25] That finding is binding on the Trustee.

25. The LPs have commenced their own appeal in Court File No. COA-24-CV-0550. The factual issues relevant to that matter are set out in greater detail in Ms. Athanasoulis' factum responding to it.

D. YSL's Repudiation of the Agreement

(i) Cresford's Financial Difficulties on Other Projects

26. Cresford's other major projects suffered significant cash flow problems in 2019, which culminated in a series insolvency proceedings involving three other projects – but not YSL – in the spring of 2020.[26] YSL did not face similar difficulties.[27] It could and should have earned a profit.

(ii) YSL repudiated its Agreement with Ms. Athanasoulis

27. Ms. Athanasoulis discovered Cresford's financial difficulties and pressed Mr. Casey to take concrete steps to address Cresford's funding issues and preserve value for all stakeholders. In

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[25] Partial Award at para. 170-171, ABC, Tab 4, p. 93-94.

[26] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at paras. 4, 8-9.

[27] Arbitration Transcript - February 22 at 178:20-179:5, RCOM, Tab 5, p. 432-433; Mr. Casey agreed and testified that the YSL Project "didn't have cost issues or other issues", "the new numbers that went into the business were strong and correct numbers", and "it gave us strength as a company, that if we needed to put money into other projects, it gave us the option that we could use our position in that company to either borrow against the equity in some manner, or sell, or do a joint venture on that project that would create cash for the other parts, and/or it created a much stronger company." Arbitration Transcript - February 24 at 421:4-22, RCOM, Tab 6, p. 455.

response, Mr. Casey stripped Ms. Athanasoulis of all her duties. The Arbitrator found that YSL had repudiated the Agreement (including the Profit Share)[28] by constructively terminating Ms. Athanasoulis' employment in December 2019.[29]

28. Ms. Athanasoulis accepted YSL's repudiation of the Agreement, and, in January 2020, sued for the damages caused by the repudiation.[30]

29. This fundamentally changed Ms. Athanasoulis' relationship with YSL. Once she accepted the repudiation, Ms. Athanasoulis was not entitled to (and did not seek) *performance* of the Agreement. She became entitled to the *damages* caused by YSL's breach of the Agreement.

(iii) The YSL Project still had enormous value when Ms. Athanasoulis was terminated

30. All of the available evidence shows that, when Ms. Athanasoulis was terminated, the Profit Share had enormous value. YSL had invested approximately $241 million in the YSL Project and the YSL Project had an appraised value of $375 million.[31] The YSL Project was projected to earn profits of approximately $200 million.[32]

(iv) YSL breached the Agreement by trying to enrich Mr. Casey instead of maximizing the value of the YSL Project

31. If YSL had sought to maximize the value of the Project, as the Agreement required, then it would have earned significant profits. But YSL did not try to maximize the value of the YSL

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[28] Decision at para. 71, ABC, Tab 3, p. 40.

[29] Partial Award at paras. 189-191, ABC, Tab 4, pp. 100-101.

[30] Decision at paras. 71-72, ABC, Tab 3, p. 40.

[31] July 2019 CBRE Report at p. 1, RCOM, Tab 1, p. 9; Altus Report at p. 3, RCOM, Tab 7, p. 495; See also Athanasoulis Submissions at para. 133, RCOM, Tab 8, p. 823.

[32] October 2019 Pro Forma, ABC, Tab 24, p. 1279.

Project. This was a second breach of the Agreement, and it caused significant harm to Ms. Athanasoulis (and likely others in this bankruptcy proceeding).

32. Justice Dunphy found that YSL "squandered" the time between Ms. Athanasoulis' termination and YSL's bankruptcy proposal, and that efforts to sell or refinance the YSL Project in 2020 and 2021 were "indelibly tainted" by Mr. Casey's self-interest.[33]

> [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.**[34]

33. It necessarily follows that YSL breached its obligation under the Agreement to maximize the value of the YSL Project.

(v) YSL's amended proposal was approved but it had squandered its opportunity to maximize value

34. YSL and Concord tendered an amended proposal, after their initial proposla was rejected in the First Proposal Decision, which was approved on July 16, 2021 (the "**Second Proposal**").[35] The Trustee reported to the Court that the Second Proposal offered stakeholders an implied

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[33] First Proposal Decision, *supra*, at paras. 76, 82.

[34] First Proposal Decision, *supra*, at para. 76.

[35] YG Limited Partnership and YSL Residences (Re), 2021 ONSC 5206 (the **"Second Proposal Decision"**).

purchase price of $291 million for the YSL Project.[36]

35. On the motion below, Ms. Athanasoulis tendered evidence showing that YSL had, in fact, earned a profit of approximately $39.5 million. Specifically, YSL earned revenues of $305.4 million (comprised of an implied purchase price for the YSL Project under the Proposal of $291 million,[37] $7.6 million paid to purchase adjacent properties owned by YSL[38] and $6.6 million paid by a company related to the purchaser to Cresford). The Trustee purported to disallow the Claim *without* calculating—or even investigating—the above profit calculations or any others.[39]

36. Justice Dunphy *did not* find that the Second Proposal offered fair value for the YSL Project. The Proposal was approved because, by the time it came before the Court, creditors had not been paid for more than one year and Justice Dunphy found it would be unfair to force these creditors to wait through a prolonged sales process.[40]

37. As part of the Proposal, Concord acquired the YSL Project and set aside a pool of $30.9 million to satisfy creditor claims.[41] Residual amounts not paid out to creditors will be distributed to the LPs in respect of their equity claim. Ms. Athanasoulis seeks payment of her Claim from this pool of funds.

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[36] Trustee 3rd Report at 5.1(5), RCOM, Tab 11, p. 880.

[37] Trustee 3rd Report at 5.1(5), RCOM, Tab 11, p. 880; Report of Finnegan Marshall Inc. re: Project Pro Forma Completion Report for YSL Residences dated May 26, 2021 at p. 12, RCOM, Tab 13, p. 1307.

[38] Statement of Adjustments for 357 ½ Yonge Street and 357A Yonge Street as of December 18, 2020, RCOM, Tab 14, p. 1331.

[39] Reporting Letter from Dale & Lessman LLP to Cresford Holdings Limited dated June 10, 2022, RCOM, Tab 15, p. 1342; see also Trustee 4th Report at s. 3.3, RCOM, Tab 12, p. 1116.

[40] Decision at para. 12(b), ABC, Tab 3, p. 29; Second Proposal Decision, *supra*, at paras. 24-30.

[41] Decision at para. 9, ABC, Tab 3, p. 28; Second Proposal Decision, *supra*, at para. 9(e).

E. Procedural History

(i) The Action

38. Ms. Athanasoulis had sued YSL and the other Cresford entities for (among other things) breach of the Agreement in January 2020 (the "**Action**").[42] The Action against YSL was stayed when YSL served its proposal and Ms. Athanasoulis was forced to submit a claim in the bankruptcy proceedings in its place.[43] The Trustee asserts in its factum that the Claim should be determined in the underlying action.[44] This is simply wrong. Ms. Athanasoulis will recover from YSL in this proceeding, or not at all.

(ii) Ms. Athanasoulis Wins the First Phase of a Bifurcated Arbitration

39. Ms. Athanasoulis and the Trustee agreed to a bifurcated arbitration process to determine her Claim within the Proposal. The parties agreed to conduct a hearing to determine liability, and then to proceed to a damages hearing if Ms. Athanasoulis won on liability.[45]

40. The first phase of the arbitration proceeded over four days in February 2022 (the "**Arbitration**"). As noted above, Ms. Athanasoulis proved that she was entitled to the Profit Share and that YSL repudiated the Agreement by constructively terminating her employment in December 2019.[46]

41. Although the first phase of the Arbitration was expressly limited to liability issues, the Trustee raised several arguments about damages in that arbitration.[47] Thus, the Trustee had decided

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[42] Athanasoulis Affidavit at para. 55, ABC, Tab 21, p. 1226.

[43] Decision at para. 2-3, ABC, Tab 3, p. 27-28.

[44] Factum of the Trustee dated April 29, 2024 (**"Trustee Factum"**) at para. 76.

[45] Decision at para. 14, ABC, Tab 3, p. 29.

[46] Decision at paras. 14-18, 71, ABC, Tab 3, p. 29-30.

[47] Partial Award at para. 129, 164, ABC, Tab 4, p. 81, 91,

that the Claim should be valued at zero before there was any evidence or argument on damages issues.

(iii) Concord and the LPs challenged the arbitration process after Ms. Athanasoulis prevailed on the first phase

42. Shortly after the Arbitrator's Partial Award was released, the LPs and Concord objected to the arbitration process on the basis that it was too expensive and that the Trustee did not have the jurisdiction to agree to it. The LPs claimed, for the first time, that they were entitled to be paid in priority to Ms. Athanasoulis and that the Agreement was not enforceable.

43. Ms. Athanasoulis and the Trustee both argued that the value of the Claim should be determined in the Arbitration. But Justice Kimmel disagreed. By Endorsement dated November 1, 2022, Justice Kimmel found that the Trustee was required to "determine the value of the Athanasoulis Claim in a timely and principled manner".[48] A subsequent decision dated February 2, 2010 (the "**Process Decision**") established the procedure for the Trustee's determination and the appeal of that determination. Importantly, the specific value of the Claim (which will likely require expert evidence) was deferred to a future hearing if Ms. Athanasoulis successfully set aside the Trustee's disallowance.[49]

(iv) The Draft Disallowance and Ms. Athanasoulis' Submissions

44. Before the Process Decision was issued, and before Ms. Athanasoulis tendered evidence or detailed argument to support her damages claim, the Trustee issued a "Draft Notice of Disallowance" explaining why it believed that Ms. Athanasoulis was not entitled to any payment

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[48] *YG Limited Partnership (Re)*, 2023 ONSC 4638 (the **"Process Decision"**) at para. 7(a).

[49] Process Decision, *supra*, at para. 63.

in respect of the Profit Share Claim (the "**Draft Disallowance**").[50]

45. The Trustee invited Ms. Athanasoulis to submit evidence and argument responding to the positions in the Draft Disallowance. Beginning in February 2023, Ms. Athanasoulis delivered to the Trustee close to one hundred pages of written argument supported by thousands of pages of supporting evidence. Notwithstanding those submissions, the Trustee issued its formal Notice of Disallowance on August 10, 2023, setting out its determination of the nil value of Ms. Athanasoulis' Claim (the "**Disallowance**"). The Trustee did not make any material change to the reasoning or conclusions articulated in the Draft Notice of Disallowance.

46. The Trustee's disallowance asserted three independent reasons to deny the Claim. The Trustee claimed:

(a) the Claim was "equity not debt" and therefore not a provable claim under the BIA. The Trustee concluded that the Claim was "in substance" an equity claim *without* referencing the definition of an equity claim in the *BIA*;

(b) no profit had actually been earned, and so the Claim was too contingent and remote to be a provable claim. The Trustee reached this conclusion *without* referencing either the law that governs the quantification of damages for breach of contract the extensive evidence showing that the YSL Project *had* earned a profit; and

(c) that Ms. Athanasoulis' claim was "subordinated" to the LPs, without finding that there was any agreement between Ms. Athanasoulis and the LPs.

[50] Trustee's Draft Disallowance, RCOM, Tab 16, p. 1347.

47. The Trustee asserted that because of these "threshold issues" there was no need to perform an in-depth valuation of the Claim.[51] The Trustee did not reference *any* of the evidence submitted by Ms. Athanasoulis in the Disallowance. As Justice Kimmel recognized, the Disallowance was based on a fundamental misapprehension of both the *BIA* and the law of damages.

F. The Decision Below

48. Justice Kimmel correctly characterized the Claim as a claim for damages, and correctly found that the Trustee erred by failing to allow it. She found that the Trustee made compounding errors relating to its mischaracterization of the Claim as an equity claim that was too remote to be valued:

> **42. . . . [T]he grounds for the Disallowance are predicated upon a fundamental and extricable error in the mischaracterization of the nature of the Profit Share Claim as an equity claim contingent upon existing or future profits that have not been, and will now never be, realized**. This mischaracterization of the Profit Share Claim has led to further compounding errors, in that the Disallowance also failed to properly consider and assess the type of loss that the Profit Share Claim seeks to recover, which is in damages for breach of contract that crystalized when Ms. Athanasoulis was constructively dismissed in December 2019 (once she accepted the repudiation and sued for damages).[52]

49. Justice Kimmel concluded that the Profit Share Claim "must now be valued, even if it might be difficult to do so" because the Trustee's "threshold determinations" were "predicated upon fundamental mischaracterizations" of the Claim and the correct approach to valuing it.[53]

50. Justice Kimmel addressed each of the arguments raised by the Trustee on this appeal. She articulated the pertinent legal principles, and applied them to the facts. Her order setting aside the

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[51] Decision at para. 27, ABC, Tab 3, p. 32.

[52] Decision at para. 42, ABC, Tab 3, p. 35.

[53] Decision at para. 44, ABC, Tab 3, p. 36.

Trustee's disallowance of the Profit Share Claim discloses no reversible error. Respectfully it should be upheld. Her specific findings, and the Trustee's attack on them, are addressed in the sections that follow.

III. RESPONSE TO THE APPELLANT'S ISSUES

A. Issues Raised by the Trustee

51. This appeal raises three issues:

(a) Whether the Trustee may disallow claims that are "in substance" in the nature of equity rather than debt;

(b) Whether the Trustee may disallow a claim on the basis of being too remote or speculative when liability for breach of a contract had already been determined but the Claim may be difficult to quantify; and

(c) Whether the Trustee is entitled deny any and all payments claimed by Ms. Athanasoulis if they would not have been paid within the common law reasonable notice period.

52. Ms. Athanasoulis submits that each of these questions must be answered in the negative, as they were – correctly – by Justice Kimmel.

B. The Standard of Review

53. Ms. Athanasoulis agrees with the Trustee's position that the applicable standard of review

is correctness on points of law.[54] The Trustee also appeals questions of mixed fact and law for which the standard of care is palpable and overriding error.[55] The Trustee has not alleged any palpable and overriding error, and none exists. This is addressed further below.

C. Justice Kimmel Correctly held that an "equity claim" must meet the statutory definition

54. The Trustee decided, before receiving or reviewing any damages evidence, that Ms. Athanasoulis should recover no damages because the Profit Share Claim is really "equity and not debt".[56] But the Trustee's conclusion faced an insurmountable obstacle: the *BIA* contains a comprehensive definition of an "equity claim". The Profit Share Claim is *not* an equity claim within the meaning of the *BIA*. This should have been the end of the Trustee's equity claim analysis. But it was not.

55. The Trustee submits that even though the Claim is not an actual "equity claim" (as the term is defined in the *BIA*), it can still be disqualified because "in substance" it is an equity claim. The Trustee boldly asserts that the statutory definition of an equity claim is not relevant to its analysis.[57]

56. The Trustee's position is founded on the novel assertion that the *BIA* incorporates two separate concepts: claims that meet the statutory definition of an "equity claim" ("**Equity Claims**") and claims that do not meet the statutory definition but are equity claims "in substance" ("**Equity Claims in Substance**"). The Trustee asserts that, because the Profit Share Claim is an Equity

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[54] *Business Development Bank of Canada v Pinder Bueckert & Associates Inc*, 2009 SKQB 458 at para. 24.; *Casimir Capital Ltd, Re*, 2015 ONSC 2819 at para. 33; *Charlestown Residential School, Re*, 2010 ONSC 4099 at para 17, Respondent's BOA dated October 16, 2024 (**"AOR"**), Tab 7, p. 106.

[55] *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36.

[56] Trustee's Draft Disallowance, RCOM, Tab 16, p. 1347.

[57] Decision at para. 55, ABC, Tab 3, p. 37.

Claim in Substance, it is not a "provable claim" within the meaning of the *BIA*. Hence, Ms. Athanasoulis is not entitled to any payment.

57. Justice Kimmel carefully considered the Trustee's arguments, and concluded that there is no such thing as an Equity Claim in Substance. In this regard, she found that:

(a) there is no concept of an equity claim "in substance" under the *BIA*, even giving the definition of equity claim an expansive meaning;[58]

(b) each case cited by the Trustee in support of its position involved an *actual* Equity Claim and not an Equity Claim in Substance;[59]

(c) calculating payment by reference to profits does not transform a contractual obligation into an Equity Claim within the meaning of the *BIA*.[60]

58. Although the Trustee disagrees with these statements, their positon is not sustainable for the following reasons:

(a) The Claim fits squarely into the definition of a provable claim in the *BIA*;

(b) The Claim is not an Equity Claim within the meaning of the *BIA*;

(c) Neither the language of the *BIA* nor the cases cited by the Trustee establish that Equity Claims in Substance exist or that the Trustee could disallow the Claim because it was an Equity Claim in Substance.

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[58] Decision at para. 65, ABC, Tab 3, p. 39-40.

[59] Decision at para. 57, ABC, Tab 3, p. 38.

[60] Decision at para. 62, ABC, Tab 3, p. 39.

(i) The Profit Share Claim is a provable claim within the meaning of the BIA

59. The Trustee argues that the Claim is an Equity Claim in Substance and that such claims are not "provable claims" within the meaning of section 121(1) of the *BIA*. The *BIA* says no such thing.

60. Provable claims are critical to bankruptcy proceedings. When a party (such as YSL) files a bankruptcy proposal (as YSL did), all provable claims (and only provable claims) are stayed.[61] In order to receive any distribution, a creditor must have a provable claim *and* it must prove that claim.[62] A claim that is not a "provable claim" is effectively excluded from proceedings under the *BIA* altogether.

61. Section of the *BIA* 121(1) says that any amount owed for any reason is a provable claim: "***All debts and liabilities***, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt … ***shall be deemed to be claims provable*** in proceedings under this Act."[63]

62. The Profit Share Claim fits squarely into this definition. Ms. Athanasoulis proved that YSL wrongfully repudiated her employment agreement in December 2019. As a matter of law, she is entitled to the losses caused by that repudiation. This amount is a "debt or liability" owed by YSL on the date it became bankrupt.

63. The word "shall" in a statute is mandatory.[64] This means that the *BIA requires* that all

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[61] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (***"BIA"***) at s. 69(1). See also s. 69.3(1).

[62] *BIA* at s. 124(1).

[63] *BIA* at s. 121(1) [emphasis added].

[64] *Interpretation Act*, R.S.O. 1990, c. I.11 at s. 29(2).

claims that meet the statutory definition be provable claims. There is no discretion to exclude a provable claim because it does not "sound in debt" or is alleged to be an Equity Claim in Substance.

(ii) The Claim is not an Equity Claim

64. While an Equity Claim is actually still a provable claim (albeit one that would recover after creditors),[65] that is beside the point, because the Profit Share Claim is not an Equity Claim. The *BIA* provides a clear and binding definition of the term "equity claim". The Profit Share Claim does not meet that definition.

65. A claim can only be an "equity claim" if it is "**in respect of an equity interest**."[66] An equity interest "**means** … **a share in the corporation** – or warrant or option or another right to acquire a share."[67] The use of the word "means" dictates that this definition is intended to be exhaustive, in accordance with well-accepted principles of statutory interpretation.[68]

66. Justice Kimmel considered the evidence and held that the Profit Share Claim is *not* an Equity Claim because the Claim has no connection to any "equity interest." This finding is not challenged on appeal, and there is no basis to challenge it. At no time did Ms. Athanasoulis ever hold any shares, warrants, or options in YSL or any other Cresford project.[69] No one alleges that she did. More importantly, the Claim is not "in relation to" any such interest. This is a complete

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[65] This Court has specifically held that "equity claims by shareholders are provable in bankruptcy" *(Sino-Forest Corporation (Re)*, 2012 ONCA 816 at para. 43). This is apparent from the text of the *BIA*, which specifically permits payment of Equity Claims once all claims that are not Equity Claims have been paid. (*BIA*, s. 140(1)). This is yet another reason why the Trustee's assertion that a claim must "sound in debt" and not be an In Substance Claim in order to receive payment in bankruptcy proceedings is incorrect.

[66] *BIA* at s. 2, "equity claim" definition.

[67] *BIA* at s. 2, "equity interest" definition.

[68] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 (S.C.C.) at para. 42; *Alexander College Corp. v. R.*, 2016 FCA 269 at para 14.

[69] Athanasoulis Affidavit at para. 15, ABC, Tab 21, p. 1218.

answer to the allegation that Ms. Athanasoulis asserts an Equity Claim. As Justice Kimmel astutely observed:

> "The fact that the parties chose to tie the quantification of the amounts payable under the Profit Sharing Agreement to YSL's (and the Cresford Group') performance (profits, after deducting, or net of, amounts payable to the LPs) does not transform a contractual obligation or debt to Ms. Athanasoulis into an equity claim within the meaning of the BIA."[70]

67. This conclusion is supported by the persuasive decision of the Alberta Court of Appeal in *Noble v. Principal Consultants Ltd. (Bankrupt)*. That proceeding also involved a contractual entitlement quantified based on profitability.[71] The Court held that the claimant had a provable claim and was entitled to damages for breach of contract:

> Applying the basic principles of law set out earlier, Noble is entitled to **compensation for lost bonus monies that were part of his income and therefore, upon his unlawful dismissal, became damages to which he was entitled** based on the premise that he would have received them had the contract been performed. [...] Case law cited by the parties indicates that some courts have approved of using past performance in the calculation of bonuses and have awarded bonuses **even where the fortunes of the employer company have diminished**.[72]

(iii) The BIA does not contemplate or permit Equity Claims in Substance

68. In summary, Ms. Athanasoulis does not advance an Equity Claim. The Trustee argues that the Claim is nonetheless not a provable claim because it is an Equity Claim in Substance and such claims are not provable claims. This position has no foundation in either the *BIA* or the jurisprudence. Justice Kimmel committed no error when she rejected it.

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[70] Decision at para. 62, ABC, Tab 3, p. 39.

[71] *Noble v. Principal Consultants Ltd. (Bankrupt)*, 2000 ABCA 133 [*Noble*] at paras. 41-42.

[72] *Noble*, *supra*, at paras. 41-42 [Emphasis added].

69. The concept of an Equity Claim was added to the *BIA* by way of statutory amendments that came into force in 2009 (the "**2009 Amendments**"). The core purpose of the 2009 Amendments, according to the *Standing Senate Committee on Banking* was to subordinate the "loss of a claimant who holds shares or other equity instruments issued by a corporation" to other claims arising from the supply of "goods, services or credit" to the debtor.[73]

70. Contrary to the submissions of the Trustee, the 2009 Amendments codified and expanded prior common law.[74] The cases cited by the Trustee say this explicitly.[75] In any event, before the 2009 Amendments, there was a "long-standing rule" that creditors had to be paid "before any capital could be recovered".[76] The Profit Share Claim is not for the recovery of capital as Ms. Athanasoulis did not invest capital. Thus, even if the common law rule continued to apply after the 2009 Amendments (as the Trustee alleges) it would not affect this case.

(iv) The cases cited by the Trustee all involve Equity Claims

71. The Trustee says that there is a body of jurisprudence supporting the existence of Equity Claims in Substance. This is not correct. In each case cited by the Trustee after the 2009 Amendments, the Court considered the substance of the claim in order to assess whether it *was* an Equity Claim. The Trustee has not cited any case where a court *disregarded* the definition of

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[73] Standing Senate Committee on Banking, Trade and Commerce Report dated November 2003, pp. 158, ABOA, Tab 29, p. 1064.

[74] And in some express respects, expanded the common law, e.g. the addition of subsection (d) which was designed to address cases of misrepresentation relating to share purchases or (e) which was designed to capture downstream contractual claims premised on equity claims.

[75] *Sino-Forest Corporation (Re)*, 2012 ONSC 4377 at para. 78 [*Sino Forest ONSC*], aff'd 2012 ONCA 816 ; *Re Nelson Financial Group Ltd.*, 2010 ONSC 6229 [*Re Nelson*] at para. 27; *All Canadian Investment Corporation (Re)*, 2019 BCSC 1488 at para. 47; *Return on Innovation v. Gandi Innovations*, 2011 ONSC 5018 at para. 55; *Re Bul River Mineral Corporation (Re)*, 2014 BCSC 1732 [*Bul River*] at para. 66.

[76] *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd.*, 2021 BCSC 607 [*Panorama*] at para. 530.

Equity Claim in the *BIA* and disallowed a claim because it was an Equity Claim in Substance.

72. The only Ontario appellate authority cited by the Trustee is *Sino-Forest Corporation (Re)* ("***Sino-Forest***").[77] The Trustee argues that this Court "specifically rejected" the notion that an Equity Claim had to meet the statutory definition. The Trustee misstates this Court's holding. *Sino Forest* held that a claim could be "in respect of an equity interest" even if it was not advanced by the *owner* of an equity interest.[78] It *did not* find that the court could dispense with the requirement for an equity interest altogether. Nothing in *Sino Forest* supports the existence of Equity Claims in Substance.

73. The facts in *Sino Forest* (which are not referenced at all in the Trustee's factum) are important. Sino-Forest filed for *CCAA* protection after a short-sellers report alleged wide scale fraud at the company.[79] Sino-Forest's shareholders commenced class actions against (among other parties) its auditors and underwriters, and the auditors and underwriters sought contribution and indemnity from Sino Forest. It was common ground that the shareholders' class actions were Equity Claims, and the Court had to determine whether the claims for contribution and indemnity were also Equity Claims.

74. The *BIA* specifically states that a claim for contribution or indemnity in respect of an Equity Claim is, itself, an Equity Claim.[80] In any event, the auditors and underwriters sought indemnity for amounts they were ordered to pay the shareholders in respect of the *shareholders'* Equity

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[77] *Sino-Forest Corporation (Re)*, 2012 ONCA 816 [*Sino Forest ONCA*].

[78] *Sino Forest ONCA*, *supra*, at para. 46.

[79] *Sino Forest ONSC*, *supra*, at para. 32.

[80] *BIA* at s. 2, definition "equity claim" at s. (e).

Claim.[81]

75. The Court specifically held that the indemnity claims were "clearly connected to or in respect of" the *shareholders'* equity interest, and that, in any event, they were captured by the statutory definition of the term "equity claim" in the *BIA*, which encompasses claims for "contribution and indemnity" in respect of such claims.[82] Put simply, *Sino Forest* does not involve any Equity Claim in Substance that is not in actuality an Equity Claim.

76. The Trustee says that *Nelson Financial Group Ltd.* ("***Nelson Financial***") somehow supports the existence of Equity Claims in Substance. It does not. *Nelson Financial* teaches that the substance of a claim is relevant to determining whether a claim *meets* the statutory definition of an Equity Claim. It does not support the Trustee's position that an Equity Claims in Substance can exist outside of the statutory definition. The issue in *Nelson Financial* was whether preferred *shareholders* were advancing equity claims. Peppall J. (as she then was), specifically noted that her task was to determine whether the claim at issue was an "Equity Claim" within the meaning of the *CCAA* (which mirrors the language in the *BIA*).[83]

77. Specifically, Justice Peppall's conclusions were firmly grounded in the statutory language.[84] She concluded that the preferred shareholders' claims all sought to recover losses suffered in respect of their *shares*.[85] Since the claims were "in respect of an equity interest" they

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[81] *Sino Forest ONSC*, *supra*, at paras. 84-95.

[82] *Sino Forest ONSC*, *supra*, at paras. 84-95; *Sino Forest ONCA*, *supra*, at para. 53.

[83] *Re Nelson*, *supra*, at paras. 27-28.

[84] *Re Nelson*, *supra* at paras. 27-28.

[85] *Re Nelson*, *supra*. The same is true of *Re Central Capital Corporationn*, 1996 CanLII 1521 (Ont. C.A.), relied upon by Justice Pepall, in which the issue was again the characterization of preferred shareholder claims with a right to be redeemed on a fixed date. Despite one shareholder having exercised the right, this Court nonetheless considered the

were Equity Claims.[86] Peppall J. specifically held that the statutory definition allows for "little if any flexibility" but provides "greater certainty" with respect to whether claims are Equity Claims.[87]

78. The decision of Justice Wilton-Siegel in *U.S. Steel Canada Inc. (Re)* ("***U.S. Steel***")[88] also does not support the Trustee's position. The Trustee argues that Wilton-Siegel J. found that the statutory definition of Equity Claim "did not delineate exhaustively claims that are not provable claims."[89] This is not what Wilton-Siegel J. found.

79. The issue in *U.S. Steel* was whether amounts advanced by the debtor's shareholder were loans or Equity Claims. Wilton-Siegel J. specifically recognized that determining whether the claims were Equity Claims was "a matter of statutory interpretation".[90] To that end, he engaged in an analysis of the loans advanced by the debtor's parent company and sole shareholder in order to determine whether they were in respect of an "equity interest" and therefore Equity Claims.[91] Wilton Siegel J. considered the substance of the transactions in determining whether the claims were Equity Claims.[92] He did not recognize a separate category of Equity Claims in Substance.

80. The First Proposal Decision of Justice Dunphy, which held that various related party

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parties' intentions as reflected in the preferred shares being subject to a share purchase agreement with certain conditions attached thereto and thus determined that such claims were equity claims.

[86] *Re Nelson*, *supra* at para. 34.

[87] *Re Nelson*, *supra* at para. 34.

[88] *U.S. Steel Canada Inc. (Re)*, 2016 ONSC 569 [*U.S. Steel*].

[89] Trustee Factum at para. 56.

[90] *U.S Steel*, *supra*, at para. 152.

[91] *U.S. Steel*, *supra*, at paras. 153-154.

[92] *U.S. Steel*, *supra*, at para. 181.

transactions were equity claims, also applied the statutory definition of an Equity Claim.[93] This decision did not involve an analysis divorced from the statutory definition in the BIA, but rather an analysis of whether interests framed as loans by Cresford LP (which held an equity interest) were properly characterized as equity investments. Such interests have no parallel to Ms. Athanasoulis' Claim, which was not a loan or payment of money at all – least of all one by a related party – but a contractual promise in consideration for services rendered.

81. The decisions that the Trustee cites from other provinces follow the same pattern. In each case, the Court analyzed the substance of the transaction to determine whether a claim was an Equity Claim pursuant to the statutory definition.

82. In *Re Bul River Mineral Corp* ("***Bul River***"), the Supreme Court of British Columbia was again tasked with characterizing the nature of preferred shares as debt or equity, and found that "The claim is for the return of their capital investment . . . also included a claim to unpaid dividends . . . [and thus] fall[s] within the definition of "equity claim".[94] The fact that the shareholder had obtained default judgment did not change this analysis.

83. In *Avis d'intention de Azoxco Cryogénique inc.*, the Quebec Court of Appeal examined whether shares in a pre-amalgamation entity were an "equity interest" in respect of which an equity claim could be found, and held that they were.[95]

84. In *Syndic de Societe de velo en libre service*, the Quebec Court of Appeal considered whether a 2011 loan was in fact a contribution to capital, and found that it was as it had "all the

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[93] First Proposal Decision, *supra*, at paras. 33-48.

[94] *Bul River*, *supra*, at para. 83.

[95] *Avis d'intention de Azoxco Cryogénique inc.*, 2022 QCCA 1387.

hallmarks of a sole shareholder if not an alter ego".[96]

85. In *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd*. ("***Panorama***") the Supreme Court of British Columbia noted the common law rule that "a person who contributes to the capital of a business…has no right to receive any return on its capital until all creditors have been paid."[97] Whether or not this rule survived the 2009 Amendments, it has no application in this case because the Claim does not seek a return of capital.

86. The common thread that runs through all of the cases cited by the Trustee, and described above, is that courts can and should consider the substance of a claim in order to determine whether it meets the statutory definition of an Equity Claim. None of these cases establish that a court can dispense with the definition of an Equity Claim altogether or deny a claim because it is an Equity Claim in Substance.

(v) Justice Kimmel correctly applied the law

87. Justice Kimmel correctly applied the principles articulated by this Court in *Sino Forest*, and the other cases described above. She determined that the Claim was not an Equity Claim and that the Trustee erred by finding that it was an Equity Claim in Substance.[98] This conclusion is firmly grounded in the text of the *BIA* and the relevant jurisprudence. Justice Kimmel did not commit the error alleged by the Trustee, or any error.

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[96] *Syndic de Société de vélo en libre-service*, 2023 QCCA 368.

[97] *Panorama*, *supra*, at para. 526.

[98] Decision at para. 66-67, ABC, Tab 3, p. 39-40.

D. Justice Kimmel correctly held that the Claim is not contingent, speculative or remote; rather, it was to be determined in accordance with the law of damages

88. The Trustee's second ground of appeal rests on a fundamental misapprehension of the law of damages. The Trustee argues that in order to prove her claim, Ms. Athanasoulis was required to prove that YSL had *actually* earned profits.[99] The Trustee argues that because YSL did not *actually* earn profits, the Claim is too contingent, remote or speculative to be valued.[100]

89. Justice Kimmel correctly rejected the Trustee's position, finding that it ignores the basic legal principles which govern damages in Canada. Specifically, she held that YSL's repudiation of the Agreement and Ms. Athanasoulis' acceptance of the repudiation in December 2019 converted Ms. Athanasoulis' *future* entitlement to profits into a *current* right for losses *caused* by YSL's breach of the Agreement.[101] She did not err in this regard. On the contrary, she correctly applied the principles that govern damages, which the Trustee ignored.

(ii) The legal principles that govern assessment of the Claim

90. The law for assessing contractual damages is well-established. It is described in every leading text[102] and affirmed in all of the leading appellate decisions.[103] Professor Waddams articulated the applicable principles as follows:

> One of the most significant of all economic interests is the benefit of a favourable contract. **A person who has made a good bargain is treated by the law for many purposes as one who has a present right, the value of which is measured**

[99] Trustee's Factum at paras. 74-75.

[100] Trustee's Factum at paras. 74-75.

[101] Decision at para. 74, ABC, Tab 3, p. 41.

[102] Waddams, *Law of Damages*, 6th ed. (Carswell, 2021) at. 5.1; Swan, Adamski and Na, *Canadian Contract Law*, 4th ed. (LexisNexus, 2018) at 6.2; Fridman, *The Law of Contract in Canada*, 6th ed. (Carswell, 2011) at 19.3, AOR, Tabs 44-46.

[103] See for example *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43 at para. 27; *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at para. 27: *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para. 108; *Dasham Carriers Inc. v. Gerlach*, 2013 ONCA 707 at para. 17.

> **by the value of the promised performance.** The primary manifestation of this approach is reflected in the measure of damages for breach of contract; **the contract breaker is bound to make good the loss caused by the breach, a loss measured by the value of the performance promised.**[104]

91. The value of the promised performance is measured by evaluating what *would have* happened if the contract had been performed. The correct approach is illustrated by the decision of the Supreme Court of Canada in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd* ("***Sylvan***").[105] In that case, one party to an option agreement breached the contract, resulting in the other party losing the opportunity to develop the land. The Supreme Court upheld the Trial Judge's award of the profits that the wronged party *would have* made.[106] In *Sylvan*, no one *actually* earned profits. But that did not matter. The key question was what *would have* happened if the defendant had performed the contract instead of breaching it.

92. Applied to this case, *Sylvan* (and the many other cases articulating the same principle) makes clear that the key question is what Ms. Athanasoulis *would have* earned but-for YSL's breach of contract. The Trustee's approach, which explicitly focused on what profits Ms. Athanasoulis *actually* earned is not supported by – or consistent with – the law of damages.

93. It is also well-established, as recently affirmed by this Court,[107] that damages are presumptively to be calculated as of the date of breach.[108] Displacing this presumption is rare and

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[104] Waddams, *Law of Damages*, 6th ed. (Carswell, 2021) at. 5.1, AOR, Tab 44, p. 1588.

[105] *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 (CanLII) [*Sylvan*].

[106] *Sylvan*, *supra*, at paras. 72-76.

[107] *The Rosseau Group Inc. v. 2528061 Ontario Inc.*, 2023 ONCA 814 at para. 62.

[108] *Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp.*, 2004 CanLII 36051 (Ont. C.A.) at para. 125; see also *Kipfinch Developments Ltd. v. Westwood Mall (Mississauga) Limited*, 2010 ONCA 45 at para. 15 ; *Baud Corp., N.V. v. Brook*, 1978 CanLII 16 301 (SCC) at p. 648.

premised on fairness to the innocent party who has been harmed.[109]

94. Finally, Canadian courts have repeatedly stated no one should be denied damages just because those damages are (or may be) difficult to calculate. In such cases, damages must be assessed with a "broad axe and a sound imagination".[110]

(iii) Justice Kimmel correctly applied the law to the facts

95. Justice Kimmel found that, although a specific quantification of Ms. Athanasoulis' damages had been deferred in the Process Decision, to a later hearing, Ms. Athanasoulis had provided "sufficient foundational evidence" to show that a valuation should be undertaken.[111]

96. Justice Kimmel correctly held that the Claim is not contingent on any future event. It crystallized when YSL repudiated the Agreement and Ms. Athanasoulis accepted the repudiation. The Trustee's assertion that the Claim is contingent on YSL earning actual profits (or another future event) contravenes the most basic principles that govern the assessment of damages in Canada.

(iv) The Profit Share Claim is not contingent on any "parallel litigation"

97. The Trustee alleges that the Profit Share Claim is contingent on the outcome of parallel litigation and that Ms. Athanasoulis failed to prove a "probability of liability" in that litigation. Hence, it rejected the claim. It was wrong in doing so for four reasons:

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[109] *642947 Ontario Ltd. v. Fleischer*, 2001 CanLII 8623 (ONCA) at paras. 41-42; *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847at para. 50, citing *Dosanjh v. Liang*, 2015 BCCA 18 at para. 55.

[110] *Colonial Fastener Co. Ltd. v. Lightning Fastener Co. Ltd.*, [1937] SCR 36 at pg. 44; *Apotex Inc. v. Eli Lilly and Company*, 2018 FCA 217 at para. 142; *Janssen Inc. v. Teva Canada Limited*, 2016 FC 593 at para. 69.

[111] Decision at para. 134, ABC, Tab 3, p. 52.

(a) Justice Kimmel specifically ordered the Trustee to value the Share Profit Claim in the Process Decision.[112] It will be determined in *these* proceedings, not hypothetical future litigation. The Trustee's assertion that it was "contingent" on the outcome of different litigation is a collateral attack on the Process Decision. It should not be entertained.

(b) The so-called "parallel litigation" referenced by the Trustee was stayed by the instant proceedings in 2021, and cannot now proceed against YSL because it is bankrupt. The Trustee's assertion that the Share Profit Claim should be valued in the so-called parallel litigation is really an assertion that it should never be heard on the merits;

(c) The Profit Share Claim affords a current legal basis for relief, since a breach of the Agreement has already been established in binding arbitration;[113]

(d) The test that the Trustee says Justice Kimmel should have applied was specifically rejected by this Honourable Court.

98. Moreover, the Trustee's position conflates the *existence* of a claim with successful *proof* and *quantification* of that claim. A claim *exists* when the wrong occurs. In many cases, the existence or extent of the harm is disputed and must be proven in a legal proceeding. But legal proceedings are designed to *prove* if a claim *exists*. A legal proceeding does not create a claim.

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[112] Process Decision, *supra*, at para. 7(a), at paras. 44-47, 63.

[113] Decision at para. 18, ABC, Tab 3, p. 31; Partial Award at paras. 189-191, ABC, Tab 4, p. 100-101.

(v) Justice Kimmel applied the correct legal test

99. Justice Kimmel correctly articulated the test for a contingent claim that is too remote and speculative, as set out by the Supreme Court of Canada in *Newfoundland and Labrador v. AbitibiBowater Inc.*[114] and *Orphan Well Association v. Grant Thornton Limited*.[115] These cases illustrate the difference between a contingent claim and an unquantified claim. They also illustrate why the Share Profit Claim is not contingent on either the outcome of any litigation or any future event.

100. *Abitibi* involved environmental remediation orders issued against a company ("***Abitibi***") that had filed for *CCAA* protection. The province issued orders requiring that that Abitibi submit environmental remediation plans and complete the approved remediation.[116] If Abitibi did not complete the remediation, then the Province could claim against it for the remediation costs. The Province argued that the orders were not provable claims, and so any remediation claim would be excluded from any compromise imposed under the *CCAA.* [117]

101. The environmental claims in *Abitibi* did not yet exist. Unless and until certain statutory conditions were met, the claim *could not* exist. Despite this, the Supreme Court held that the claims *were* "provable claims". The Court specifically held that a provable claim includes claims that cannot yet be asserted in civil proceedings because liability is contingent on an event that has not yet occurred.[118] It also held that an insolvency court had the *same power* to assess unliquidated

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[114] *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 [*Abitibi*].

[115] *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 [*Orphan Wells*].

[116] *Abitibi*, *supra*, at para. 10.

[117] *Abitibi*, *supra*, at para. 14.

[118] *Abitibi*, *supra*, at para. 34.

claims as a court hearing a common law action.[119]

102. The distinction between a *contingent* claim and an *unquantified* claim is clarified in *Confederation Treasury Services*, which the Supreme Court in *Abitibi* cited with approval for the proposition that "the criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative."[120]

103. In *Confederation Treasury*, the Court considered an auditor's claim for contribution and indemnity relating to a separate claim against the bankrupt in Michigan. The auditor's claim was contingent: unless and until the auditor's liability was established in the Michigan proceeding, the auditor's claim for contradiction and indemnity did not exist. The Court held that the auditor asserted a valid contingent claim, without any determination of the strength of the claim in the Michigan proceeding.[121]

104. The Profit Share Claim is not a contingent claim, as the term is used in the *BIA* or the cases described above. No further event needs to occur in order to establish liability. The Claim already exists – it came into existence when the Agreement was breached through Ms. Athanasoulis' constructive dismissal. Further, there is more than a probability of liability – there is *actual* liability, as established in the Arbitration.

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[119] *Abitibi*, *supra*, at para. 34.

[120] *Abitibi*, *supra*, at para. 36; *Confederation Treasury Services Ltd. (Bankruptcy)*, 1997 CanLII 3544 (ON CA) [*Confederation Treasury*].

[121] *Confederation Treasury*, *supra*, at paras. 4-5.

(vi) The Trustee relies on a test that this Court specifically rejected

105. Despite this, the Trustee says – relying on *Re Wiebe* ("***Wiebe***") – that it was entitled to reject the Claim because Ms. Athanasoulis did not establish that there was a "probability of liability" in the "parallel litigation".[122] But this Court specifically rejected the "probability of liability" test relied upon by the Trustee in *Confederation Treasury*, holding that it imposes "too high a threshold for the establishment of such a claim."[123]

106. Even if *Wiebe* were good law, it does not support the Trustee's position that all claims subject to litigation must have met a "probability of liability" threshold.[124] The Trustee says that the issue in *Wiebe* was whether a "creditor advancing a claim for contractual liability had a provable claim when the claim was subject to ongoing litigation."[125] But *Wiebe* did not involve any litigation claim. *Wiebe* involved a loan that would be forgiven if the bankrupt remained employed for a specific period of time. The claim was, therefore, contingent on the bankrupt leaving during the specified period. The Court found that although there was no "present intention" to leave his employment, this could change and so the claim was a provable claim.[126] Nothing about *Wiebe* supports the Trustee's position.

107. In short, Justice Kimmel correctly identified and applied the test for contingent claims articulated by this Court and the Supreme Court. The Trustee's assertion that Justice Kimmel erred rests on a trial level decision that was specifically rejected by this Court and in any event, does not

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[122] *Confederation Treasury*, *supra*, at paras. 4-5.

[123] *Confederation Treasury*, *supra*, at para. 4.

[124] *Wiebe, Re*, 1995 CanLII 7367 (ON SC) [*Wiebe*].

[125] *Confederation Treasury*, *supra*, at para. 4.

[126] *Wiebe*, *supra*, at para. 8.

involve a similar issue. The Trustee's position is without merit and it should be rejected.

(vii) Justice Kimmel Considered Schnier and Correctly Declined to Apply it in the Manner Urged by the Trustee

108. Justice Kimmel did not fail to follow this Court's precedent in *Schnier*.[127] Put simply, *Schnier* does not have any application to Ms. Athanasoulis' Share Profit Claim. *Schnier* involved specialized bankruptcy rules that apply to tax debts. Justice Kimmel held, correctly, that *Schnier* does not stand for the proposition that any claim that is subject to any dispute is "contingent".[128]

109. In *Schnier*, Canada Revenue Agency ("**CRA**") objected to the individual debtor's discharge from bankruptcy on the basis it had outstanding claims against the debtor for income tax assessments, despite the debtor having appealed those assessments. The primary issue before this Court was whether income tax assessments are "amounts payable", such that the CRA had a binding entitlement to the funds which it could enforce at law and in a bankruptcy. It did not involve litigation, or the definition of "provable claims" within the meaning of the *BIA*. The Court found that the CRA's entitlement was contingent on the debtor's appeal being determined and thus, its claim that it could be disallowed on that basis.[129] *Schnier* was, on its face, limited to the specialized regime that governs tax claims under the *BIA*. It has no application to the Profit Share Claim in issue.

E. Reasonable Notice Period Has No Relevance to Whether There is a Provable Claim

110. The third ground of appeal raised by the Trustee is that the Trustee is entitled to limit the Share Profit Claim solely to damages that would have become payable during the common law

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[127] *Schnier v. Canada (Attorney General)*, 2016 ONCA 5 [*Schnier*].

[128] Decision at para. 80, ABC, Tab 3, p. 42.

[129] *Schnier*, *supra*, at paras. 30-50.

reasonable notice period. This argument was already rejected by the Arbitrator, who held that it would "defeat the fundamental purpose" of the Profit Share Agreement if Cresford could avoid payment by terminating Ms. Athanasoulis (on notice or otherwise).[130] The Partial Award was not appealed. The Trustee's current argument is a collateral attack on the Partial Award and, in any event, it is wrong.

111. The Profit Share Claim does not seek common law damages for wrongful dismissal.[131] The common law notice period is not relevant. Ms. Athanasoulis was entitled to the Profit Share whehter or not she was employed by YSL, and the fact that the Agreement had an employment aspect does not change that. She is entitled to the losses she suffered because of YSL's repudiation, whether or not the losses she suffered would have been paid during the reasonable notice period.

112. The only case relied on by the Trustee is completely consistent with this principle. In *Matthews v. Ocean Point*[132] an employee was entitled to certain payments if he was employed by the company when it was sold. The employee was terminated and the company was sold during the reasonable notice period. Because wrongful dismissal damages compensate for the failure to provide reasonable notice of termination, but for the breach, the employment contract would have "remain[ed] alive" during the notice period and the payment would have been earned.[133] In other words, the employee would have earned the bonus but-for the breach and so the bonus formed part of the damages award.

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[130] Partial Award at paras. 160-161, ABC, Tab 4, p. 90-91.

[131] A separate component of the Claim was for wrongful dismissal damages, but this was allowed and paid by the Trustee already.

[132] *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 [*Matthews*].

[133] *Matthews, supra,* at para. 54.

113. An employment contract is a contract like any other and is to be interpreted and enforced according to ordinary and well-established principles of contractual interpretation. The terminated employee is entitled to damages that will put her in the position she would occupy but-for the breach. *Matthews* simply extends the time period during which employees are entitled to compensation ***tied*** to their employment; it says nothing about employees' entitlements to amounts ***not tied*** to their employment.[134]

114. Accordingly, Justice Kimmel was correct in holding that the Arbitrator's findings distinguished the present case from *Matthews*. She noted that even if YSL had provided proper notice, "it is not a given that her entitlements under the Profit Sharing Agreement would have automatically ended".[135] The preservation of entitlement under the Profit Sharing Agreement is consistent with the findings of the Arbitrator. The Trustee's assertion to the contrary is unfounded.

IV. ORDER REQUESTED

115. It is respectfully submitted that the Trustee's Appeal should be dismissed with costs, Justice Kimmel Order should be affirmed, and the parties should proceed to a reference to determine damages in accordance with her Honour's order.

October 16, 2024 **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

GOODMANS LLP

[134] *Matthews, supra,* at para. 54; See also *Mikelsteins v. Morrison Hershfield Limited*, 2019 ONCA 515 at para. 16.

[135] Decision at para. 99, ABC, Tab 3, p. 46.

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SCHEDULE "A"

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SCHEDULE "B"

RELEVANT LEGISLATIVE PROVISIONS

***Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3**

Definitions

2 In this Act,

[…]

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

equity interest means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

[…]

Stay of proceedings — notice of intention

- **69 (1)** Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,
    - **(a)** no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,
    - **(b)** no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on
        - **(i)** the insolvent person's insolvency,

- **(ii)** the default by the insolvent person of an obligation under the security agreement, or
- **(iii)** the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

- **(c)** Her Majesty in right of Canada may not exercise Her rights under
  - **(i)** subsection 224(1.2) of the *Income Tax Act*, or
  - **(ii)** any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that
    - **(A)** refers to subsection 224(1.2) of the *Income Tax Act*, and
    - **(B)** provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

  in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

- **(d)** Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
  - **(i)** has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
  - **(ii)** is of the same nature as a contribution under the *Canada Pension Plan* if the province is a ***province providing a comprehensive pension plan*** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a ***provincial pension plan*** as defined in that subsection,

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

[...]

Stay of proceedings — directors

- **69.31 (1)** Where a notice of intention under subsection 50.4(1) has been filed or a proposal has been made by an insolvent corporation, no person may commence or continue any action against a director of the corporation on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the corporation where directors are under any law liable in their capacity as directors for the payment of such obligations, until the proposal, if one has been filed, is approved by the court or the corporation becomes bankrupt.
- **Exception**

  (2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the corporation's obligations or an action seeking injunctive relief against a director in relation to the corporation.
- **:Resignation or removal of directors**

  (3) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this section.

[…]

Claims provable

- **121 (1)** All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[...]

Creditors shall prove claims

- **124 (1)** Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.

[…]

140.1 A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.

***Interpretation Act*, R.S.O. 1990, c. I.11**

Imperative and permissive forms

(2) In the English version of an Act, the word “shall” shall be construed as imperative and the word “may” as permissive. In the French version, obligation is usually expressed by the use of the present indicative form of the relevant verb, and occasionally by other verbs or expressions that convey that meaning; the conferring of a power, right, authorization or permission is usually expressed by the use of the verb “pouvoir”, and occasionally by other expressions that convey those meanings. R.S.O. 1990, c. I.11, s. 29 (2).

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

Court of Appeal File No. COA-24-CV-0468
Court File No. B-21-02734090-0031

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

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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