Court of Appeal File No. COA-24-CV-0550
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

September 30, 2024

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I. OVERVIEW

1. By decision dated March 19, 2024 (the "**Decision**"), the Honourable Justice Kimmel set aside the Trustee's disallowance (the "**Disallowance**") of Maria Athanasoulis' claim in the insolvency proceedings of YSL Residences ("**YSL**") and YG Limited Partnership ("**YSL LP**", and collectively with YSL, "**YSL**"). The Appellants - a group of Class A LPs (the "**LPs**") who are strangers to Ms. Athanasoulis' claim - bring this appeal seeking to set aside the Decision.

2. The motion below was an appeal brought by Ms. Athanasoulis to challenge the Trustee's Disallowance of her claim (The "**Profit Share Claim**"). As strangers to that claim, in the normal course, the LPs would have no standing to participate in Ms. Athanasoulis' appeal at all. In an earlier process decision, Justice Kimmel had granted the LPs limited standing to participate in the determination of Ms. Athanasoulis' claim. They made extensive submissions to the Trustee, but the Trustee did not accept any of these submissions. The Trustee disallowed Ms. Athanasoulis' claim for its own reasons.

3. Ms. Athanasoulis brought a motion to set aside the Disallowance. The LPs did not bring their own motion. The only issue before Justice Kimmel was whether the Disallowance – which did not incorporate any of the LPs' allegations – was correct.

4. The LPs chose to participate in the motion and argued that Ms. Athanasoulis' agreement with YSL to be paid 20% of the profits earned by YSL on the YSL Project (the "**Profit Share Agreement**") was invalid because it was prohibited by agreements between YSL and the LPs. The LPs also argued that the Profit Share Agreement is invalid because Ms. Athanasoulis breached a fiduciary duty to them and/or made misrepresentations to them (the "**LP Claims**").

5. Justice Kimmel considered the agreements relied on by the LPs, and concluded that they did not support the LPs' position or affect the validity of the Profit Share Agreement. This is a finding of mixed fact and law. But the LPs do not even try to identify a palpable and overriding error or an extricable legal error with Justice Kimmel's conclusions. There is none.

6. The LPs also claim that Justice Kimmel erred by not considering the LP Claims. But this is not an error, because the LP Claims were not properly before the motion judge. The issue before

the Trial Judge was whether the *Disallowance* should be set aside. The Disallowance had nothing to do with the LPs' breach of fiduciary duty or misrepresentation claims because the Trustee did not accept those claims.

7. In any event, Justice Kimmel correctly determined that these proceedings are not the correct forum to determine the LPs' claims against Ms. Athanasoulis. The LP Claims sought findings of serious misconduct against Ms. Athanasoulis in the context of her own appeal, without a properly served motion or any of the procedural safeguards afforded by the *Rules of Civil Procedure* to a person alleged to have committed serious torts. Justice Kimmel correctly declined to determine the LP Claims.

8. The LP Claims are, in any event, fatally flawed. The LPs' core allegation is that Ms. Athanasoulis owed them a fiduciary duty and that she breached that duty (and made misrepresentations) by not disclosing her Profit Share Agreement to them before they invested in YSL. Ms. Athanasoulis did not owe the LPs a fiduciary duty or make any representations to them in her personal capacity. She was an officer of a company they contracted with, nothing more. Moreover, the law is clear that even YSL did not owe the LPs a fiduciary duty when it was negotiating an agreement with them.

9. The LPs' misrepresentation claim is similarly flawed. The LPs assert that Ms. Athanasoulis was under a duty to disclose the Profit Share Agreement to them. But there is no evidence at all that Ms. Athanasoulis knew (or ought to have known) that her Profit Share Agreement might be relevant to the LPs. Ms. Athanasoulis is now in conflict with the LPs because YSL terminated her and then embarked on a campaign to enrich its principal instead of maximizing the value of the YSL Project. Ms. Athanasoulis had no control over these events, and could not have predicted them.

10. For the above-noted reasons, the LPs' appeal should be dismissed.

II. FACTS

11. In addition to the below, Ms. Athanasoulis relies on the facts stated in her factum in Appeal No. COA-24-CV-0468, commenced by the Trustee (the "**Trustee Appeal**"). Those facts are not repeated below.

A. Ms. Athanasoulis and the LPs

(i) Ms. Athanasoulis' Work on the YSL Project and the Investor Presentation

12. Before she was terminated, Ms. Athanasoulis worked for more than three years to make the YSL Project a success. As part of her role, she met with various individuals, including the LPs, about investing in the YSL Project. Each of the LPs was a sophisticated and experienced participant in the real estate industry.[1]

13. Ms. Athanasoulis did not own any interest in YSL or any other Cresford entity. The LPs knew that Daniel Casey owned Cresford, and Mr. Casey and others at Cresford were primarily responsible for structuring and negotiating the terms of the LPs' investment into Cresford.[2]

14. Cresford prepared a presentation to communicate information about the YSL Project to potential investors (the "**Investor Presentation**") and Ms. Athanasoulis referenced that presentation in certain meetings with investors. The Investor Presentation included a slide that described, in simple terms, the distribution of profits at the conclusion of the YSL Project (the "**Waterfall**"):[3]

> Revenue proceeds (after payment of project expenses) will be distributed at the end of the project in the following priority:
>
> ➢ First, repayment of all external lenders;

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[1] Decision at para. 17, LP's Appeal Book and Compendium ("**ABCO**"), Tab 3, p. 29; Athanasoulis Affidavit at para. 25, Responding Compendium of Maria Athanasoulis ("**RCOM**"), Tab 1, p. 13.

[2] Athanasoulis Affidavit at paras. 17, 29, RCOM, Tab 1, pp. 11,13.

[3] Athanasoulis Affidavit at paras. 32, 38, RCOM, Tab 1, pp. 14-16.

➢ Second, return of invested capital to the investor;

➢ Third, distribution of the agreed upon return on investment to the investor; and

➢ Fourth, distribution to Cresford.

15. The Investor Presentation also included a high level pro forma for the YSL Project, which listed revenue and cost categories such as "construction costs" and "design, marketing and administration."[4] The information provided to the LPs did not itemize any costs or other line items.

16. The Investor Presentation touted Mr. Casey's experience and leadership, and explained that Mr. Casey would personally guarantee the investment of each LP. It invited prospective investors to contact Mr. Casey personally. It did not reference Ms. Athanasoulis at all.[5]

17. To be clear, and contrary to allegations made, Ms. Athanasoulis never told anyone that no member of the "Cresford Group" would be paid until the LPs were paid in full. She never made any agreement with, or representation to, the LPs with respect to her own relationship with YSL.[6]

(ii) The LPs invested in YSL LP

18. The LPs invested by purchasing Class "A" Units in YSL LP. Cresford Yonge Limited Partnership ("**Cresford LP**"), an entity controlled by Mr. Casey and/or his family trusts, owned all of the Class "B" Units. YSL LP is the beneficial owner of the YSL Project.[7]

19. Each of the LPs executed a Limited Partnership Agreement (The "**LP Agreement**") and a Subscription Agreement. These documents (and not anything that Ms. Athanasoulis is alleged to have said) governed the terms of their investment. Each LP acknowledged and agreed in the Subscription "that it has obtained independent legal accounting, tax and financial advice in

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[4] Investor Presentation Slide-Deck, Exhibit B to the Affidavit of Lue (Eric) Li sworn December 20, 2022 ("**Li Affidavit**"), ABCO, Tab 10, p. 159.

[5] Investor Presentation Slide-deck, Exhibit B to the Li Affidavit, ABCO, Tab 10, p. 149.

[6] Athanasoulis Affidavit at paras. 42-47, RCOM, Tab 1, pp. 16-17.

[7] Decision at para. 1, ABCO, Tab 3, p. 26.

connection with its investment in Units and **has not relied on the advice of the General Partner or any of its affiliates.**"[8]

20. Each LP was entitled to the greater of: an annual interest rate of 12.5% or double its original investment.[9] 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.[10]

21. Ms. Athanasoulis was not a party to the LP Agreement, the Subscription Agreement or any other agreements with the LPs. She had an agreement with YSL and the LPs had agreements with YSL. Ms. Athanasoulis and the LPs did not have any agreement with, or legal relationship to, each other.

(iii) The LPs' agreements with YSL did not affect Ms. Athanasoulis' Agreement with YSL

22. The LP Agreement was a contract between the LPs and the General Partner, YSL Residence Inc. (the "**General Partner**"). It conferred broad and "exclusive authority" to the General Partner to act on behalf of the LPs.[11] The LP Agreement allowed the General Partner to contract with related parties at market rates.[12]

23. The LP Agreement did not affect Ms. Athanasoulis' entitlement under the Profit Share Agreement. The Profit Share Agreement was entered into in 2014, and YSL became bound by it in 2016 when it was founded.[13] The LPs invested in YSL after Ms. Athanasoulis had worked on the YSL Project in accordance with the terms of the Profit Share Agreement. Ms. Athanasoulis

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[8] YG Limited Partnership Subscription Form, Power of Attorney and Acknowledgement ("**Subscription Agreement**") at s. 3.1, ABCO, Tab 17, p. 297 [Emphasis added].

[9] YG Limited Partnership Amended and Restated Limited Partnership Agreement dated August 4, 2017 ("**LP Agreement**") at s. 4.2, ABCO, Tab 16, p. 262-263.

[10] Example of Guarantee of Dan Casey to LPs, RCOM, Tab 2, p. 106; Affidavit of P. Lam dated November 28, 2022 ("**Lam Affidavit**") at para. 8, Tab 13, p. 183; ABCO, See also Investor Presentation Slide-deck, being Exhibit B to the Li Affidavit, ABCO, Tab 10, p. 156.

[11] LP Agreement s. 3.2, ABCO, Tab 16, p. 256-259.

[12] LP Agreement at s. 3.6(b), ABCO, Tab 16, p. 259-260.

[13] Decision at para. 14 and footnote 1, ABCO, Tab 3, p. 28-29.

was not a party to the LP Agreement, and it did not (and could not) change the terms of her agreement with YSL.

(iv) The LPs knew that Cresford would receive payments before them

24. The LPs claim that the LP Agreement included a "requirement that the limited partners be repaid first before the Cresford Group would receive anything from the proceeds of the YSL Project."[14] This is, demonstrably, false.

25. Cresford's involvement in all aspects of the YSL Project was a selling feature: Cresford's in-house resources allowed it to ensure that its quality standards were met. This was part of the value proposition that Cresford offered. YSL emphasized Cresford's involvement in the Investor Presentation, which touted Cresford's integrated approach to development, including its "ability to control its own construction management" and its "winning sales formula."[15]

26. Cresford received millions of dollars in fees relating to the development, marketing and construction of the YSL Project.[16]

27. In addition to these payments, which appear to relate to services rendered by Cresford, YSL made a number of intercompany advances to other Cresford entities. The purpose and legitimacy of these payments are uncertain. These payments are also shown on Cresford's general ledger and bank statements.[17]

28. The LPs have never challenged (or investigated) any of these payments to Cresford.

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[14] Li Affidavit at para. 15, ABCO, Tab 9, p. 146.

[15] Athanasoulis Affidavit at para. 43, RCOM, Tab 1, pp. 16-17; Investor Presentation Slide-deck, Exhibit B to the Li Affidavit, ABCO, Tab 10, p. 149.

[16] Athanasoulis Affidavit at para. 45, RCOM, Tab 1, p. 17; YSL General Ledger dated April 2021 ("**YSL General Ledger**") at pp. 58, 85, RCOM, Tab 3, pp. 165, 192**.**

[17] Athanasoulis Affidavit at para. 46, RCOM, Tab 1, p. 17; See also YG General Ledger, RCOM, Tab 3, starting at p. 108. These appear throughout the YG General Ledger as "Transfer to Cresford", "Transfer to Oakleaf Cnstltng", etc.

(v) The LPs bargained for the right to be paid ahead of Cresford LP, not the "Cresford Group"

29. The LP Agreement required that revenue from the YSL Project would be paid in an order consistent with the Waterfall in the Slide Presentation, with payments of project expenses and external lenders ranking ahead of the LPs and with the LPs ranking ahead of Cresford LP.[18]

30. The LP Agreement provided that the LPs were to be paid before any distribution was made to Cresford LP on account of its Class "B" Units, but it did not otherwise subordinate *an*y payment to the LPs.

31. Thus, the LPs specifically bargained for the right to be paid before any proceeds went to Cresford LP. This has nothing to do with Ms. Athanasoulis. Ms. Athanasoulis had no interest in, or relationship with, Cresford LP. Cresford LP was a vehicle for Mr. Casey and his family to invest in YSL.

B. Procedural History of Ms. Athanasoulis' Claim

(i) Ms. Athanasoulis' Claim

32. YSL served their Notice of Intention to Make a Proposal on April 30, 2021.[19] Ms. Athanasoulis filed a proof of claim against YSL for two unsecured claims (the "**Claim**").

33. The Claim was, by its nature, difficult to assess in a traditional claims process. Accordingly, Ms. Athanasoulis and the Trustee agreed to a bifurcated arbitration process to determine it. Phase One would determine the enforceability of Ms. Athanasoulis' Profit Share Agreement and YSL's liability, while the second would determine damages, if Ms. Athanasoulis won on liability.[20]

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[18] LP Agreement at s. 6.3, ABCO, Tab 16, p. 270.

[19] Decision at para. 7, ABCO, Tab 3, p. 27.

[20] Decision at paras. 14, 21, ABCO, Tab 3, pp. 28-30.

(ii) The Arbitration and its Findings

34. Phase One of the Arbitration occurred over four days in February 2022 (the "**Arbitration**"). On March 22, 2022, the Arbitrator issued a partial award (the "**Arbitral Award**") in which he determined that an oral Profit Share Agreement that entitled Ms. Athanasoulis' to 20% of the profits earned on all current and future Cresford Projects, including the YSL Project, existed as a term of Ms. Athanasoulis' employment (the "**Agreement**").[21]

(iii) The LPs Object to the Arbitration

35. The LPs knew that the Arbitration was proceeding, and did not take any steps to either participate in it or stop it from proceeding until Ms. Athanasoulis won the first phase.[22]

36. Shortly after the Arbitral Award was released, however, the LPs and the Proposal Sponsor (who is responsible for the Trustee's costs) brought a motion objecting 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.[23] The LPs also claimed, for the first time, that they were entitled to be paid in priority to Ms. Athanasoulis and that the Profit Share Agreement was not enforceable. No such claim was made before Ms. Athanasoulis spent substantial sums on the Arbitration.

37. By Endorsement dated November 1, 2022, Justice Kimmel found that the second phase of the arbitration could not proceed, on the basis that phase two of the proposed arbitration improperly delegated to the Arbitrator the responsibility of determining the Athanasoulis Claim (the "**Funding Decision**"). The Funding Decision directed the Trustee to determine and value the Athanasoulis Claim in a timely and principled manner based on the findings in the Arbitral Award and building on them.[24]

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[21] Decision at para. 14, ABCO, Tab 3, pp. 28-29.

[22] *YG Limited Partnership (Re)*, 2022 ONSC 6138 at paras. 11-17 (the "**Funding Decision**").

[23] Decision at para. 23, ABCO, Tab 3, p. 30.

[24] Decision at para. 22, ABCO, Tab 3, p. 30; Funding Decision, *supra*, at para. 67.

(iv) The Process Decision

38. Upon the Trustee's motion, the court provided advice and directions concerning the process for determining of the Athanasoulis Profit Share Claim and any appeal therefrom. This advice was provided by way of endorsement dated February 10, 2023 (the "**Process Decision**").[25]

39. In the Process Decision, Justice Kimmel established a process whereby Ms. Athanasoulis would be to permitted submit further evidence and argument to the Trustee with respect to her claim. In addition, the Process Decision also provided direction with respect to the LPs standing in any future appeal brought by Ms. Athanasoulis of the Trustee's determination of her claim as follows:

> **Subject to the discretion of the appeal judge**, the LPs standing on the appeal shall be limited to submissions in respect of the impact of the prohibition contained in the Limited Partnership Agreement on non-arm's length agreements (such as the Profit Sharing Agreement), on the question of enforceability of the Profit Share Claim and in respect of the priority/subordination of the Profit Share Claim to the LPs recovery of their initial investment based on alleged breaches of contractual and fiduciary duties and alleged misrepresentations.[26]

(v) The LPs Appeal of the Process Decision

40. The LPs appealed Justice Kimmel's holding in the Process Decision regarding their standing in any future appeal. The Court of Appeal dismissed the appeal, finding that it was premature because it was not yet resolved whether an eventual appeal judge would give the LPs any standing:

> Apart from establishing a scheduling order, the motion judge's order addressed the Limited Partners' anticipated participation in an anticipated appeal of the decision the Proposal Trustee was expected to make relating to the Athanasoulis claim. But the motion judge did not determine the standing that the Limited Partners would have during the anticipated appeal. **The directions that the motion judge provided relating to standing were explicitly made** "**subject to the discretion of the judge hearing the appeal**"**. Therefore, until the appeal is undertaken, it is not yet resolved whether the Limited Partners will**

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[25] Decision at para. 25, ABCO, Tab 3, p. 30; *YG Limited Partnership (Re)*, 2023 ONSC 4638 (the "**Process Decision**").

[26] The Process Decision, *supra,* at para. 61(i) [Emphasis added].

be given any standing at the appeal hearing, or if so, whether that standing will be limited. This appeal is therefore premature.[27]

(vi) The Trustee Disallows Ms. Athanasoulis' Claim

41. Pursuant to the Process Decision, both Ms. Athanasoulis and the LPs submitted evidence and argument to the Trustee in advance of its final determination regarding Ms. Athanasoulis' Claim.

42. On August 10, 2023, the Trustee issued its final Notice of Disallowance setting out its determination of the value of Ms. Athanasoulis' Claim (the "**Disallowance**").[28]

43. The Trustee's Disallowance did not adopt or rely upon any of the LPs' arguments. Rather, the Trustee 's stated grounds for disallowing the Profit Share Claim were that:

(a) The Profit Share Claim was not a debt obligation or liability of YSL but rather, in substance, an equity claim, and it was thus not a provable claim under the BIA;

(b) In any event, there was no profit to be shared, because none had been earned by YSL as of the date of either the termination of Ms. Athanasoulis' employment (December 2019) or the date of bankruptcy (April 2021);

(c) To the extent that the Profit Share Claim was based upon projected future profitability, it was a contingent claim for a lost profit share that was too remote to be capable of being considered a provable claim and could not be the subject of any meaningful and reasonable computation, and it is thus valued at zero.

(d) The Profit Share was subordinated to the LPs' entitlements, as Ms. Athanasoulis would only receive profits after the LPs were fully repaid, which had not and will not happen due to lack of funds. [29]

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[27] *YG Limited Partnership and YSL Residences Inc. (Re)*, 2023 ONCA 504 at paras. 3-5.

[28] Decision at para. 4(a), ABCO, Tab 3, p. 27.

[29] Decision at para. 29, ABCO, Tab 3, p. 31-32.

(vii) Ms. Athanasoulis' Appeals the Trustee's Disallowance

44. On September 8, 2023, Ms. Athanasoulis served a Notice of Motion appealing from the Trustee's Disallowance of her Profit Share Claim. The Notice of Motion asserted that the Trustee had erred by, *inter alia*, characterizing Ms. Athanasoulis' Claim as a claim not provable in bankruptcy and by valuing it at zero.[30] Although the Disallowance did not reference the LPs' arguments, the LPs nonetheless filed materials and made submissions at Ms. Athanasoulis' appeal.

45. Ultimately, Ms. Athanasoulis' appeal of the Disallowance was successful. Justice Kimmel determined that the grounds for the Disallowance were 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, rather than a claim for damages for breach of contract that crystallized when Ms. Athanasoulis was constructively dismissed in December 2019.[31]

46. With respect to the LPs' submissions, Justice Kimmel noted that the LPs' submissions to the Trustee had not been adopted or relied upon by the Trustee in the Disallowance, and that there was accordingly no reviewable error by the Trustee in relation to the LPs' submissions.[32] Nonetheless, Justice Kimmel went on to conclude that even if the LPs' arguments were to be considered *de novo*, there was no evidentiary foundation for the LPs' argument that the terms of the LP Agreement and Sales Management Agreement rendered the Profit Share Agreement unenforceable.[33]

47. Justice Kimmel declined to determine whether Ms. Athanasoulis personally owed or had breached an alleged fiduciary duty to the LPs, or whether she had made alleged misrepresentations to the LPs, determining that there was an insufficient evidentiary record to address these issues and that they fell outside of the scope of the standing granted to the LPs.[34]

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[30] Decision at para. 30, ABCO, Tab 3, pp. 32-33.

[31] Decision at para. 42, ABCO, Tab 3, pp. 34-35.

[32] Decision at para 117, ABCO, Tab 3, p. 48.

[33] Decision at para. 118, ABCO, Tab 3, p. 48-49.

[34] Decision at paras. 126-127, ABCO, Tab 3, p. 50.

III. RESPONDENTS' POSITION ON ISSUES RAISED BY APPELLANT

A. Issues Raised on the Appeal

48. This appeal raises three issues:

(a) Did Justice Kimmel properly exercise her discretion in determining the scope of LPs' standing on the Appeal? **Yes.**

(b) Did Justice Kimmel err in rejecting the LPs' argument that Profit Share Agreement was unenforceable? **No.**

(c) Did Justice Kimmel err in finding that her determination as to the enforceability of the Profit Share Agreement *res judicata* against the LPs in future proceedings? **No.**

B. Standard of Review

49. The LPs assert that the applicable standard is correctness because Justice Kimmel made legal errors. This is not correct. The inaugural findings are either findings of fact, findings of mixed fact and law. Where a decision involved the exercise of Justice Kimmel's discretion, it is entitled to deference unless Justice Kimmel failed to take into account relevant factors and reached an unreasonable decision.[35]

50. The LPs have not met the high bar required to warrant appellate intervention.

C. Justice Kimmel Properly Exercised Her Discretion in Limiting the Scope of the LPs' Standing on Appeal

(i) The Process Decision did not confer any standing on the LPs

51. The LPs ague that Justice Kimmel committed a reversible error by "failing to follow [her] own directions" regarding the scope of their standing in Ms. Athanasoulis' appeal of the Disallowance.[36] There is no basis for this assertion.

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[35] *Northstone Power Corp. v. R.J.K Power Systems Ltd.*, 2002 ABCA 201 at para. 4; *Mundo Media Ltd. (Re)*, 2022 ONCA 607 at para. 30.

[36] Factum of the Class A LPs dated May 7, 2024 ("**LP Factum**") at para. 39.

52. Justice Kimmel's determination with respect to the LPs' standing on appeal did not – and could not – contradict the direction provided by the Process Decision with respect to the LPs' standing, because the Process Decision clearly and repeatedly directed that the scope of the LPs' standing on appeal was "subject to the discretion of the appeal judge".[37] Indeed, in the LPs' appeal of the Process Decision, the Court of Appeal confirmed that it was "not yet resolved whether the Limited Partners will be given *any standing* at the appeal hearing, or if so, whether that standing will be limited".[38]

53. As such, the Process Decision did not "grant" the LPs standing to address a fixed set of issues at the appeal. Rather, the Process Decision stated that the LPs could place their arguments before the Trustee to assist with the Trustee's determination, and that Ms. Athanasoulis would be permitted to respond, meaning that the issues raised by the LP may be "in play" on any potential appeal. It was on this basis that Justice Kimmel held that she "would anticipate" that the LPs will have "at least some status" at the appeal to address certain limited points – "subject to the discretion and views of the judge hearing the appeal".[39]

54. As the Process Decision properly noted, the LPs have no inherent right or entitlement to participate in Ms. Athanasoulis' claim proceedings, simply because they – like most creditors - have an economic interest its outcome.[40] The LPs are strangers to Ms. Athanasoulis' Claim. As the Court of Appeal has determined, in the normal course, they would have no standing to participate in these proceedings at all.[41]

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[37] Process Decision, *supra*, at paras. 53, 57, and 61(i).

[38] *YG Limited Partnership and YSL Residences Inc. (Re)*, 2023 ONCA 504 at para. 3 [Emphasis added].

[39] Process Decision, *supra*, at para. 57.

[40] Process Decision, *supra*, at para. 52.

[41] *YG Limited Partnership and YSL Residences Inc. (Re)*, 2023 ONCA 505 at paras. 15-17.

(ii) Most of the LPs' arguments were not relevant to Ms. Athanasoulis' motion

55. In any event, Justice Kimmel's exercise of discretion with respect to the LPs' standing and which of their arguments to consider was entirely reasonable, within her discretion, and should not be disturbed.[42]

56. There was only one motion before Justice Kimmel: Ms. Athanasoulis' motion to set aside the Disallowance. The Trustee did not accept any of the LPs' arguments, and the LPs did not bring any motion to challenge this aspect of the Trustee's Disallowance.

57. In this context, it was well-within Justice Kimmel's discretion to limit the scope of the LPs' standing to what she considered to be the most relevant issue: whether the Profit Share Agreement violated the terms of the LP Agreement in a manner that rendered it unenforceable for the purposes of Ms. Athanasoulis' claim. Justice Kimmel considered this issue, and determined that it did not.

58. Similarly, Justice Kimmel was entirely within her discretion to find that Ms. Athanasoulis' appeal was not the correct forum to determine the LPs' claims of misrepresentation, breach of fiduciary duty and other torts alleged against Ms. Athanasoulis personally. Justice Kimmel's decision to do so was well-founded, particularly given that the LPs sought to advance these claims *de novo* and on an exceptionally thin evidentiary record, despite the fact that some of them had already commenced concurrent civil claims addressing the same issues.

59. Notably, the LPs did not suggest that the Trustee committed any error, let alone a palpable and overriding error, in its failure to adopt their submissions in the Disallowance. They simply sought to turn Ms. Athanasoulis' appeal into a summary judgment motion to determine their claims against her. Justice Kimmel correctly declined to make the factual findings required to determine the LP Claims, and there is no basis to disturb her decision to do so.

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[42] See for example *Bennett Estate v Islamic Republic of Iran*, 2013 ONCA 623 at para. 16; *Authorson (Guardian of) v. Canada (Attorney General)*, 2001 CanLII 4382 (ON CA) at paras. 6-9.

D. Justice Kimmel Did Not Err by Finding that the Agreement was Enforceable

(i) Justice Kimmel correctly held that the Agreement did not breach the LP Agreement or Sales Management Agreement

60. Justice Kimmel considered - and rejected - the LPs' argument that the Agreement was unenforceable because it violated the LP Agreement and Sales Management Agreement entered into between the LPs and the General Partner. Justice Kimmel's conclusions are findings of mixed fact and law grounded in the evidence. The LPs have not alleged – let alone established – any palpable and overriding error. There is none.

61. Specifically, Justice Kimmel rejected the LPs' argument that the Agreement breached:

(a) s. 3.6(b) of the LP Agreement, that prohibits non-arm's length transactions with a "Related Party" (defined to mean the "Affiliates" of the General Partner, in the sense of controlling, or controlled by, or under common control with, YSL and their officers and directors, employees and shareholders) other than on market terms; and

(b) s. 3.2 of the Sales Management Agreement dated February 16, 2016, that prohibits any compensation being paid to the corporation or its Affiliates (defined under the LPA to be the "Affiliates" of the General Partner in the sense of controlling, or controlled by, or under common control with, YSL) that is not specifically provided for in that agreement [43]

62. Justice Kimmel held that there was no evidentiary foundation for the suggestion that Ms. Athanasoulis was an "Affiliate" of YSL or the Cresford Group. [44] This is a finding of fact, and the LPs do not allege any palpable and overriding error. This is a complete answer to the LPs' allegations with respect to the Sales Management Agreement.

63. Justice Kimmel also rejected the LPs' contention that the Agreement violated the LP Agreement.[45] As noted, the LP Agreement specifically *permitted* agreements with related parties

[43] Decision at para. 116, ABCO, Tab 3, p. 48.

[44] Decision at para. 118, ABCO, Tab 3, p. 48-49.

[45] Decision at para. 120, ABCO, Tab 3, p. 49.

on market terms. The LPs sought to set the Agreement aside on the basis that it was *not* on market terms. But they tendered no evidence at all to support this allegation.

64. The LPs assert that they should have succeeded on this point because Ms. Athanasoulis did not tender evidence about whether the Agreement was on market terms. But this ignores the basic rule that the party that raises an allegation bears the burden of proving it.[46] The LPs failed to support their allegation with evidence, and Justice Kimmel was right to reject it.

65. Justice Kimmel also noted, correctly, the Arbitrator's finding that there was "nothing disproportionate, in the realm of executive compensation" about the Agreement based on Ms. Athanasoulis' value and contributions to the YSL Project. She also highlighted that the evidence showed that a third-party marketing company would have charged 1.5% of sales proceeds, and have expected to be paid earlier.[47]

(ii) Justice Kimmel did not err by "dissecting" the LPs' "interconnected" arguments

66. The LPs allege that Justice Kimmel erred by "dissecting" their "interconnected arguments" about the LP Agreement from their other enforceability arguments stemming from their breach of fiduciary duty claim.[48] They assert that these issues "were not divisible because the breach of the LP Agreement was a factor relevant to the related breach of fiduciary duty, knowing assistance, and misrepresentation argument"[49] and that the terms of the LP Agreement are relevant to the "scope of the fiduciary duties owed by Ms. Athanasoulis and the GP."[50]

67. This argument does not withstand serious scrutiny. In light of Justice Kimmel finding that the Agreement did *not* breach the terms of the LP Agreement, there is simply no basis to suggest

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[46] *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161 at para. 55; *2703203 Manitoba Inc. v. Parks*, 2007 NSCA 36 at para. 84.

[47] Decision at para. 120, ABCO, Tab 3, p. 49.

[48] LP Factum at para. 39.

[49] LP Factum at paras. 39.

[50] LP Factum at para. 53.

that any purported "breaches" of the LP Agreement are or could be relevant to the scope of any alleged fiduciary duty owed by Ms. Athanasoulis.[51]

68. The LPs have identified no error in Justice Kimmel's finding that the Agreement did not breach the LP Agreement, other than to assert that this issue needed be determined in tandem with the breach of fiduciary claim. As such, there is no basis to disturb Justice Kimmel's findings.

E. In any Event, the LPs' Allegations Against Ms. Athanasoulis Are Without Merit

69. In any event, the LPs claims against Ms. Athanasoulis for breach of fiduciary duty, knowing assistance and misrepresentation are meritless. Even if this was the proper forum to determine these issues, the LPs' have failed to properly plead – let alone prove – the constituent aspects of their claims, as described below.

(i) No Breach of Fiduciary Duty

(a) Ms. Athanasoulis never owed the LPs a fiduciary duty

70. The LPs' appeal presupposes that Ms. Athanasoulis owed the LPs a fiduciary duty in her personal capacity. But the LPs did not tender evidence – or even make detailed submissions – establishing that this is true. This alone is sufficient to dispose of the LPs' argument on this point.

71. Fiduciary duties are – and are intended to be – rare. Since the fiduciary relationship imposes the "highest duty known to law", it is (and is intended to be) uncommon.[52] Most commercial actors remain free to further their own interests (within the bounds of the law) and fiduciary obligations (which require that the fiduciary subordinate her interests to another party) are not to be imposed lightly.[53]

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[51] Decision at paras. 118-121, ABCO, Tab 3, p. 48-49.

[52] Mark Ellis, *Fiduciary Duties in Canada*, (Toronto: Thomson Reuters Canada, 2020) at ch. 1:32, Online: Westlaw Canada (date accessed December 6, 2023),AOR at Tab 16; See also *Ben-Israel v. Vitacare Medical Products Inc.*, 1997 CanLII 12377 (ON SC) at paras. 42-43.

[53] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at paras. 82, 87.

72. The relationship between Ms. Athanasoulis and the LPs does not fall within any recognized category of fiduciary relationship (i.e., lawyer and client, director and corporation, etc.) and so the LPs must meet the test for an *ad hoc* fiduciary duty laid out by the Supreme Court in *Elder Advocates of Alberta Society v Alberta* (*"**Elder Advocates**"*). This would require proof that (among other things) Ms. Athanasoulis undertook to act in the best interests of the LPs and that she had sufficient direction or control to affect the LPs' interests.[54] The LPs tendered no such evidence.

(b) No Fiduciary Duty to Prospective Investors

73. The LPs' core complaint seems to be that Ms. Athanasoulis failed to disclose the Agreement before they invested in YSL. They therefore allege that Ms. Athanasoulis and the General Partner breached a duty owed to them as *prospective* investors, not as limited partners. But neither corporate executives nor corporations owe fiduciary duties to prospective investors.[55] More broadly, a party negotiating a contract *does not* owe a fiduciary duty to the counterparty.[56] The alleged failure to disclose the Agreement to the LPs when they were prospective investors cannot, as a matter of law, be a breach of fiduciary duty.

(c) No Fiduciary Duty Owed by Ms. Athanasoulis personally to the LPs

74. Once the LPs invested in YSL, YSL Inc. (in its capacity as general partner of YSL LP) owed a fiduciary duty to the LPs. Ms. Athanasoulis did not. The LPs' submissions assume without proving that Ms. Athanasoulis – an *employee* of the entity they contracted with – owed them a fiduciary duty *in her personal capacity*. This is not the law.

75. The LPs rely extensively on the decision in *Extreme Venture Partners Fund I LP v. Varma*,[57] but that case does not support the broad principle that they advance. The Court in *Extreme Ventures* imposed an *ad hoc* fiduciary duty based on the *Elder Advocates* test and the

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[54] *Elder Advocates of Alberta Society v Alberta*, 2011 SCC 24 at para. 36.

[55] See for example *Voegtlin v Paprotka*, 2013 BCSC 1613 at para. 156; aff'd 2014 BCCA 323.

[56] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45at para. 199-201.

[57] *Extreme Venture Partners Fund I LP v. Varma*, 2021 ONCA 853.

facts of *that* case.[58] Those facts are easily distinguished from the facts of this case. The directors in *Extreme Ventures* exercised complete control over the corporate general partner, which they used to effectively misappropriate corporate opportunities. The Court held that *those* facts justified imposing an *ad hoc* fiduciary duty.[59] But the facts here are very different. Ms. Athanasoulis did not control the General Partner – Mr. Casey did. She was not even a director of the General Partner – only Mr. Casey was. The events that triggered the LPs' potential loss, and especially YSL's bankruptcy filing, all occurred *after* Ms. Athanasoulis was terminated. She was a victim of YSL's wrongdoing, not a perpetrator.

(d) Even if Ms. Athanasoulis' and the General Partners Owed the LPs' a fiduciary duty, she did not breach it by entering in the Agreement

76. Even if Ms. Athanasoulis and/or the General Partner did owe the LPs' a fiduciary duty, Ms. Athanasoulis did not breach it – or assist the General Partner in breaching it – by entering into a "secret" agreement and hiding it from the LPs.

77. As described above, the Agreement pre-dates the establishment of the limited partnership, so the act of entering into the Agreement could not have been a breach of any alleged fiduciary duty to the LPs.

78. Ms. Athanasoulis was also not obliged to disclose the Agreement. The LPs invested based on a high-level budget that did not disclose what (if any) payment would be made to parties related to Cresford. Cresford specifically touted an integrated approach, so the LPs must have known that *some* related entities would receive payments.[60] Ms. Athanasoulis reasonably believed that YSL would honour its obligations to both her and the LPs. She can hardly be faulted for not telling the LPs that YSL would one day repudiate its agreement with her, take YSL through a voluntary bankruptcy process and force YSL and the LPs to fight for a limited pool of money.[61]

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[58] *Extreme Venture Partners Fund I LP v. Varma*, 2021 ONCA 853 at para. 103.

[59] *Extreme Venture Partners Fund I LP v. Varma*, 2021 ONCA 853 at para. 103.

[60] Investor Presentation Slide-Deck, Exhibit B to the Li Affidavit, ABCO, Tab 10, p. 159.

[61] Athanasoulis Affidavit at paras. 48-51, RCOM, Tab 1, p. 18.

79. Finally, Justice Kimmel has already determined that the Agreement does not violate the terms of the LP Agreement.[62] As described above, the LPs' have not identified any basis to disturb this finding.

(ii) No Claim for Misrepresentation

80. The LPs also allege that Ms. Athanasoulis is liable for misrepresentation, but they do not reference the test for an actionable misrepresentation. This is because they cannot meet that test.[63] First, Ms. Athanasoulis did not make any misrepresentation to them. Second, and in the alternative, they did not reasonably rely on any representations she made. As noted by Justice Kimmel, the LPs did not put forward any evidence of their reliance on any alleged representations that could enable any ruling to be made in their favour.[64]

(a) Ms. Athanasoulis did not make any misrepresentations

81. The LPs' affiants suggest that they believed that no member of the "Cresford Group" would be paid anything until the LPs were paid in full.[65] But Ms. Athanasoulis never said this. She made a presentation that accurately reflected the payment priorities ultimately accepted by the LPs and incorporated into the LP Agreement.[66]

82. Specifically, Ms. Athanasoulis told the LPs that they would be investing in Class "A" Units that would receive distributions and a return ahead of Class "B" Units held by Cresford LP.[67] This was true.

83. The LPs allege that Ms. Athanasoulis had a legal obligation to disclose her compensation arrangements to them. She did not. Silence can only be a misrepresentation where there is a duty

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[62] Decision at paras. 118-119, ABCO, Tab 3, pp. 48-49.

[63] *Queen v. Cognos Inc.*, [1993] 1 SCR 87 at para. 34; *Mahendran v. 9660143 Canada Inc.*, 2022 ONCA 676 at para. 9.

[64] Decision at para. 127, ABCO, Tab 3, p. 50.

[65] Li Affidavit at paras 19-21, ABCO, Tab 9, pp. 146-147; Chen Affidavit at paras 15-17, ABCO, Tab 11, pp. 165.

[66] Athanasoulis Affidavit at paras. 39-40, RCOM, Tab 1, p. 16.

[67] Athanasoulis Affidavit at paras. 39-40, RCOM, Tab 1, p. 16.

to disclose.[68] In this case, no such duty existed. The LPs invested based on a high level budget that did not disclose what (if any) payments would be made to parties related to Cresford or what payment arrangements were made with any other employees. Cresford specifically touted its integrated approach and the LPs knew that *some* related entities would receive payments.[69]

84. More importantly, the events that ultimately led to this conflict between Ms. Athanasoulis and the LPs were not (and could not reasonably have been) anticipated when the LPs invested in YSL. Ms. Athanasoulis can hardly be faulted for not telling the LPs that YSL might one day repudiate its agreement with her, take YSL through a voluntary bankruptcy process and force YSL and the LPs to fight for a limited pool of money.[70]

(b) The LPs did not rely on any representation from Ms. Athanasoulis.

85. Critically, the LPs' misrepresentation claim could only succeed if they could prove that they *each* reasonably relied on the alleged misrepresentations.

86. The LPs did not reasonably rely on any statement that Ms. Athanasoulis made to them. As noted by Justice Kimmel, the LP Agreement expressly precludes reliance upon extra-contractual representations.[71] Each of them specifically acknowledged and agreed that it "has obtained independent legal accounting, tax and financial advice in connection with its investment in Units and **has not relied on the advice of the General Partner or any of its affiliates**."[72] The LP Agreement contains an entire agreement clause such that it "supersede[s] any prior agreement or understanding among them with respect to such matters".[73] The LPs are each sophisticated investors, and there is no suggestion that any of them did not understand the terms of the LP Agreement.[74]

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[68] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para. 132.

[69] Athanasoulis Affidavit at para. 43, RCOM, Tab 1, p. 16.

[70] Athanasoulis Affidavit at para. 48, RCOM, Tab 1, p. 18.

[71] Decision at para. 128, ABCO, Tab 3, p. 50.

[72] Subscription Agreement at s. 3.1, ABCO, Tab 17, p. 297 [Emphasis added].

[73] LP Agreement at s. 14.9, ABCO, Tab 16, p. 288.

[74] Athanasoulis Affidavit at para. 25, RCOM, Tab 1, p. 13.

87. More fundamentally, Justice Kimmel found as a fact that the LPs had failed to tender evidence that they relied on the alleged misrepresentation. Only three LPs tendered any affidavit at all, and these affidavits fell well short of establishing reasonable reliance in light of the issues described above.

F. The Enforceability of the Profit Share Agreement is *Res Judicata*

88. Ms. Athanasoulis has now been forced to litigate the enforceability of the Profit Share Agreement twice, at great expense. The Arbitrator determined that the Profit Share Agreement was a valid, enforceable contract.

89. The LPs claim that the Arbitration does not affect their rights at all, because they were not parties to the Arbitration.[75] This is not correct. First, the LPs knew that the Arbitration had been convened to determine the existence and enforceability of the Agreement. If they wanted to participate in the arbitration, they ought to have moved immediately to do so. They did not. Second, and in any event, the LPs are not parties to the Agreement. YSL is the party to the Agreement and YSL (represented by the Trustee) participated in a binding arbitration to establish the enforceability of the Agreement.

90. Despite this, the LPs had a further opportunity before Justice Kimmel to advance their allegation that the Agreement is unenforceable. Their claims failed.

91. Ms. Athanasoulis should not be put to the expense of proving – again – that the Profit Share Agreement is valid and enforceable contract in any future proceeding advanced by the LPs. This is exactly the type of mischief that the doctrine of *res judicata* aims to prevent. There is accordingly no basis to disturb Justice Kimmel's finding that any of her determinations on issues raised by the LPs are *res judicata* in respect of future proceedings.

[75] LP Factum at footnote 1.

IV. ORDER REQUESTED

92. For the reasons described above, Ms. Athanasoulis respectfully submits that the LPs' appeal should be dismissed, with costs.

September 30, 2024 **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

GOODMANS LLP

SCHEDULE "A"

AUTHORITIES CITED

Cases

1. *703203 Manitoba Inc. v. Parks*, 2007 NSCA 36
2. *Authorson (Guardian of) v. Canada (Attorney General)*, 2001 CanLII 4382 (ON CA)
3. *Bennett Estate v Islamic Republic of Iran*, 2013 ONCA 623
4. *Ben-Israel v. Vitacare Medical Products Inc.*, 1997 CanLII 12377 (ON SC)
5. *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45
6. *Elder Advocates of Alberta Society v Alberta*, 2011 SCC 24
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11. *Queen v. Cognos Inc.*, [1993] 1 SCR 87
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13. *YG Limited Partnership (Re)*, 2022 ONSC 6138
14. *YG Limited Partnership (Re)*, 2023 ONSC 4638
15. *YG Limited Partnership and YSL Residences Inc. (Re)*, 2023 ONCA 504
16. *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161

Secondary Sources

17. Mark Ellis, *Fiduciary Duties in Canada*, (Toronto: Thomson Reuters Canada, 2020) at ch. 1:32

SCHEDULE “B”

RELEVANT LEGISLATIVE PROVISIONS

N/A

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

COA File No. COA-24-CV-0550
Court File No. BK-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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