Consolidated Court File No.: 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

APPLICATION UNDER THE *BANKRUPTY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

MOVING PARTIES' FACTUM

(Motion Returnable June 1, 2021)

May 25, 2021

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TO: **SERVICE LIST**

TABLE OF CONTENTS

PART I - OVERVIEW

1. The limited partners of the YG Limited Partnership seek a declaration that the automatic stay of proceedings imposed by the *Bankruptcy and Insolvency Act (Canada)* (BIA) does not apply to applications to remove the general partner and set aside the BIA proceeding. In the alternative, if the stay does apply, the Moving Parties seek an order lifting the stay of proceedings to allow their application to be heard on June 23rd as scheduled.

2. There is no basis for applying the stay to prevent the applications from being argued. First, they are not captured by section 69(1) of the BIA; they are not claims that are "provable in bankruptcy". They are not creditor claims at all. Instead, the limited partners' applications dispute whether the general partner acted without authority and in breach of its duties when it initiated the proposal process on behalf of the partnership. These are *threshold issues* that are determinative of whether the proposal process is valid at all.

3. Even if the Court finds that the stay applies, there are compelling reasons to lift the stay and allow the applications to be heard. It would be manifestly unfair to the limited partners to invoke the stay as a means to deprive them their right to challenge whether the general partner has started the proposal process improperly and for illegitimate reasons. Maintaining the stay would also cause material prejudice to the limited partners – the proposal will result in them losing all of their guaranteed investments.

4. For at least the past six months, Cresford, the general partner to the YG Limited Partnership, has been negotiating with another developer, Concord, to transfer the partnership's assets. The partnership agreement provides that any "sale or exchange" of the partnership's assets must be approved by all limited partners.

5. Cresford now seeks to circumvent the limited partners' approval rights by making the proposal under the BIA. Despite the fact it has no authority to do so and is acting in breach of its fiduciary duties to the limited partners, Cresford has proceeded to enter into an agreement with Concord to make a sponsored proposal on behalf of the partnership. The proposal will transfer the partnership's property to Concord. In exchange, Cresford is receiving partial payment of the amounts that would otherwise be subordinate to the limited partners' entitlements. In the proposal, the limited partners lose all of their investments and get nothing.

6. Cresford is moving forward with the proposal despite the limited partners' objections and in the face of two applications, brought before any proposal proceeding was filed, seeking Cresford's removal as general partner and an Order preventing it from taking any further steps on behalf of the partnership. Its self-interest is clear.

7. Cresford now seeks to use the stay of proceedings under the BIA as a shield to prevent scrutiny of its misconduct. Using the stay to prevent any challenge to the validity of the proposal process is outside the objectives of the BIA. If the stay applies, it would establish a dangerous precedent where invalid proposal proceedings could continue without being subject to challenge.

PART II - SUMMARY OF FACTS

8. The undisputed and unchallenged facts in this motion are set out in the Affidavit of Anthony Szeto and the Affidavit of Eric Li. The following is a summary of the facts that give rise to the LP Application.

A. The YG Partnership

9. The Moving Parties are a group of limited partners to the YG Limited Partnership (the "**Partnership**"), which is a limited partnership under the laws of the Province of Manitoba. The

Partnership is the direct or indirect owner of YSL Residences Inc., which in turn owns the lands on which the "YSL Project" is located. The YSL Project is a high-rise condominium building on certain lands located near Yonge Street and Gerrard Street in Toronto, Ontario

10. The Partnership is comprised of "Limited Partners", a "General Partner" and Cresford (Yonge) Limited Partnership (a Cresford-related entity). The Moving Parties, together with the other limited partners, YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corp., TaiHe International Group Inc, (the "**Other LPs**"), are the non-Cresford (defined below) "Limited Partners" of the Partnership. These Limited Partners own all of the Partnership's Class A Preferred Units.

11. The General Partner, 9615334 Canada Inc., is affiliated with a group of companies operating under the "Cresford" name, which are controlled and operated by an individual named Daniel Casey.[1] The General Partner and Casey are respondents to the application but neither is a party to the proposal proceeding.

B. Contractual and Statutory Framework

(i) LP Agreement

12. The Partnership is governed by a partnership agreement of August 4, 2017 (the "**LP Agreement**"). The LP Agreement requires the General Partner to "exercise its powers and discharge its duties under [the LP Agreement] honestly, in good faith and in the best interests of the Limited Partners and it shall exercise the care, diligence and skill that a reasonably prudent

[1] Affidavit of Anthony Szeto, sworn April 28, 2021 ("**Szeto Affidavit**"), para. 12, Tab 2 of the Motion Record, p. MR-43; Exhibit "C" of the Szeto Affidavit, LP Agreement, Tab B2C, p. MR-108.

operator of a similar business to that of the Partnership would exercise in comparable circumstances".[2]

13. The LP Agreement further provides that:

(a) all Limited Partners must agree to approve the sale or exchange of all or substantially all of the business or assets of the Partnership[3];

(b) the Limited Partners are entitled to bring proceedings seeking specific performance or other equitable remedies in the event of an "Event of Default".[4] An Event of Default occurs if the General Partner intentionally breaches in any material respect any applicable laws[5], acquiesces to a receivership[6] or if the General Partner defaults under any financial facility.[7]

(c) the General Partner automatically ceases to be the general partner of the Partnership if, it seeks the appointment of a trustee, receiver or liquidator of all its properties, makes a general assignment for the benefit of the creditors, or it makes a voluntary application under the *Bankruptcy and Insolvency Act (Canada)* ("**BIA**").[8]

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[2] Szeto Affidavit, para 13, Tab 2B, p. MR-43; Exhibit "C" of the Szeto Affidavit, LP Agreement, section 3.5(a), Tab B2C, p. MR-43.
[3] Exhibit "C" of the Szeto Affidavit, LP Agreement, section 10.14(a), Tab B2C, p. MR-142.
[4] Exhibit "C" of the Szeto Affidavit, LP Agreement, section 7.1, Tab B2C, p. MR-134.
[5] Exhibit "C" of the Szeto Affidavit, LP Agreement, section 7.1(b), Tab B2C, p. MR-134.
[6] Exhibit "C" of the Szeto Affidavit, LP Agreement, section 7.1(c), Tab B2C, p. MR-134.
[7] Exhibit "C" of the Szeto Affidavit, LP Agreement, section 7.1(h), Tab B2C, p. MR-135.
[8] Exhibit "C" of the Szeto Affidavit, LP Agreement, section 11.2(b), Tab B2C, p. MR-144.

14. The LP Agreement guarantees that the Class A Limited Partners' return on the capital invested would be the greater of (a) an amount equal to their capital contribution, and (b) a compounded and cumulative preferred annual return of 12.25%.[9]

15. Cresford repeatedly represented to the Limited Partners that it would not be paid any amounts by the Partnership until after the Limited Partners received their full capital and interest entitlement.[10]

(ii) The Partnership Act

16. The Partnership is governed by the laws of the Province of Manitoba and is subject to *The Partnership Act*, C.C.S.M. c. P30 (the "**Partnership Act**").[11]

17. The Partnership Act requires that every partner must account to the partnership for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership.[12] It also allows limited partners to inspect the books of the partnership and "examine into the state and progress of the partnership business, and may advise as to its management".[13]

18. Over the last year and, unbeknownst to the Limited Partners at the time, the General Partner has repeatedly acted contrary to its obligations under contract, statute and at common law. The following is a summary of the various breaches alleged by the Moving Parties in their application

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[9] Exhibit "C" of the Szeto Affidavit, LP Agreement, section 4.2, Tab B2C, pp. MR-124-125.
[10] Exhibit "D" of the Szeto Affidavit, Schedule A of the Subscription Agreement, Tab B2D, p. MR-161; Exhibit "L of the Szeto Affidavit, J. Larry Letter of October 29 2020, Tab B2L, p. MR-374 Exhibit "C" of the Szeto Affidavit, LP Agreement, section 6.3(b), Tab B2C, p. MR-132.
[11] Exhibit "C" of the Szeto Affidavit, Tab B2C, p. MR-112.
[12] Partnership Act, s. 32(1).
[13] Partnership Act, s. 61.

proceeding (CV-21-00661386-00CL) (the "**LP Application**") and the application commenced by the Other LPs (CV-21-00661530-00CL) (the "**Other LP Application**").

19. The evidence supporting these allegations is uncontested on this motion.

C. The General Partner Breaches the LP Agreement by Acquiescing to the Appointment of a Receiver

20. While not known at the time by the Limited Partners, the YSL Project encountered financial difficulties by 2020. YSL Project's largest secured creditor, Timbercreek Mortgage Servicing Inc. ("**Timbercreek**")'s, loan matured and the Partnership had not repaid the amounts outstanding.[14]

21. Cresford subsequently entered into a series of forbearance agreements with Timbercreek. One of the forbearance agreements included a condition that required Cresford to consent to the appointment of a receiver. The General Partner consented to the appointment of the receiver[15] over its nominee companies, YSL Residences Inc.and Cresford Capital Corporation.[16] As a result, it immediately ceased to be the General Partner of the Partnership pursuant to section 11.2(b)(vii) of the LP Agreement, which, as described above, provides that the general partner ceases to be the General Partner once it "consents to, or acquiesces in the appointment of a trustee, receiver or liquidator"[17].

22. On October 26, 2020, Timbercreek filed a Notice of Application seeking the appointment of the receiver, which primarily relied upon the General Partner's consent to the appointment of a

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[14] Szeto Affidavit, para 33, Tab 2B, p. MR-50.
[15] Szeto Affidavit, para 34, Tab 2B, p. MR-51; Exhibit "K" of the Szeto Affidavit, Forbearance Agreement #1, Tab B2K, p. MR-228.
[16] Exhibit "C" of the Szeto Affidavit, LP Agreement, section 3.2(b)(xi), Tab B2C, p. MR-119.
[17] Exhibit "C" of the Szeto Affidavit, LP Agreement, section 11.2(b), Tab B2C, p. MR-144.

receiver. The original return date of the Timbercreek application was November 13, 2020, but has been adjourned a number of times as a result of a series of further forbearance agreements. The application is currently scheduled to be heard on the same day as the LP Application, if the Moving Parties are successful on this motion.

D. The General Partner Pursues a Deal in its own Self-Interest

23. The Limited Partners discovered in the spring 2020 that the General Partner was soliciting offers to refinance or purchase the YSL Project.[18]

24. Despite multiple requests for information, the General Partner failed to keep the Limited Partners informed of its attempts to refinance or sell the YSL Project[19]. Meanwhile, the General Partner secretly negotiated proposed transactions with multiple developers that would see it receiving millions of dollars, while compromising the Limited Partners' return on investment. Prior to commencing the proposal proceeding, Cresford made at least *five* separate attempts to pressure the limited partners into accepting deals that put Cresford's own financial interest ahead of the Limited Partners.

(i) GFL Infrastructure Group Transaction

25. On May 22, 2020, the Other LPs became aware that the General Partner had negotiated a potential transaction with GFL Infrastructure Group Inc. The General Partner required that the Limited Partners sign a waiver to forgo the interest earned on their capital contribution, which

[18] Szeto Affidavit, para 21, Tab 2B, p. MR-47.
[19] Szeto Affidavit, para 23, Tab 2B, p. MR-48.

meant that the Limited Partners would be paid *only* their capital contribution, without any return on capital. Meanwhile, Cresford would be paid approximately $44-45 million.[20]

26. This arrangement was contrary to the terms of the LP Agreement[21]. As a result, the Other LPs found this arrangement unacceptable.[22]

(ii) The Empire Transaction

27. Later on that summer, the Limited Partners became aware that the General Partner was negotiating to have Empire Waterwave ("**Empire**") take over the YSL Project. The terms of the offer involved the Limited Partners receiving a return of *only* their capital contributions, without a return on investments. Meanwhile, Cresford would receive $40.2 million.[23]

28. Again, the terms of the offer were not acceptable as it contemplated the Limited Partners taking a significant reduction on their contractually entitled return on investment so that Cresford could receive funds in priority, contrary to the terms of the LP Agreement.

(iii) The Amended Empire Transaction

29. On July 14, 2020, the Limited Partners learned that the General Partner entered into a conditional Agreement of Purchase and Sale ("**APS**") without the approval of the Limited Partners.[24] The amended terms of the transaction involved the YSL Project being transferred to

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[20] Affidavit of Eric Li, sworn May 3, 2021 ("**Li Affidavit**"), para. 29, Motion Record of YongeSL Investment Limited Partnership; 2124093 Ontario Inc.; SixOne Investment Ltd.; E&B Investment Corporation; TaiHe International Group Inc. ("**Other LPs Motion Record**"), Tab 2.
[21] Li Affidavit, para. 29, Other LPs Motion Record, Tab 2.
[22] Li Affidavit, paras. 33-34, Other LPs Motion Record, Tab 2.
[23] Li Affidavit, para. 36, Other LPs Motion Record, Tab 2.
[24] Szeto Affidavit, para 24, Tab 2B, p. MR-48.

Empire, which required unanimous approval by way of special resolution by the Limited Partners.[25]

30. The Limited Partners were not informed of any of the details of the negotiations with Empire. It was only *after* the General Partner entered into the conditional APS that it sought consent from the Limited Partners' to proceed with the new transaction.[26]

31. Instead, the General Partner disclosed a *summary* of the terms; the transaction appeared to anticipate a profit of approximately $99.7 million for the Partnership.[27] However, the transaction also contemplated a significant reduction in what the Limited Partners were entitled to pursuant to the LP Agreement; the Limited Partners would only receive a return of capital plus accrued interest (which was significantly lower than the maximum 100% return under the LP Agreement).

32. Notwithstanding requiring the Limited Partners to accept a return that was less than what they were contractually entitled to, Casey stood to receive **$4.8 million** as an "advisory fee", representing "the amount that Cresford funded to the project to service the Timbercreek Mortgage during the past 8 months."[28]

33. The General Partner refused to provide the APS or details of the proposed transaction with Empire to the Limited Partners. There was no way to ascertain the actual profits to the Partnership or whether there were fees or other payments being directed to the General Partner, Casey or

[25] Szeto Affidavit, para 24, Tab 2B, p. MR-48.
[26] Szeto Affidavit, para 25, Tab 2B, p. MR-49.
[27] Szeto Affidavit, para 27, Tab 2B, p. MR-49.
[28] Li Affidavit, para. 40, Other LPs Motion Record, Tab 2.

Cresford instead of to the Partnership.[29] Therefore, the Limited Partners did not approve the Empire transaction.[30]

(iv) The Concord Offer

34. The General Partner's next proposed transaction was a negotiated offer with Concord Properties Development Corp. ("**Concord**").[31]

35. Again, the Concord offer required the Limited Partners to waive their entitlement to a return on their capital contributions, and instead, accept only a return of 8% per year starting on January 1, 2021. Meanwhile, Cresford would receive approximately $36.8 million at the conclusion of the YSL Project.[32]

(v) The General Partner's Attempts to Turn its Capital Contribution into an Unsecured Loan

36. After presenting the proposed deal with Concord, the General Partner attempted to justify why it was entitled to $36.8 million in priority to the Limited Partners' return. Its explanations were inconsistent and a transparent attempt to extract funds in its own interest.

37. For example:

(a) Previously, Cresford had always treated its advances to the YSL Project as equity and subordinate to the Limited Partners' investments;[33]

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[29] Szeto Affidavit, para 27, Tab 2B, p. MR-49.
[30] Szeto Affidavit, para 28, Tab 2B, p. MR-49.
[31] Szeto Affidavit, para 44, Tab 2B, p. MR-53.
[32] Li Affidavit, para. 62, Other LPs Motion Record, Tab 2; Szeto, Szeto Affidavit, para 44, Tab 2B, p. MR-53.
[33] Li Affidavit, para. 65, Other LPs Motion Record, Tab 2.

(b) However, in explaining the structure of the proposed Concord deal, Cresford stated that it needed to receive some money from Concord to have funds available for Aviva Insurance Company of Canada, a secured creditor to other Casey/Cresford projects in order to give Aviva comfort regarding funds that it had advanced to the 33 Yorkville Project (another Casey/Cresford project)[34]. Cresford represented to Aviva that it would try "to make up some of the shortfall from prospective profits on the YSL Project";[35] and

(c) More recently, Cresford's position has changed and it began to assert that its advances to the YSL Project were actually "unsecured loans", and that it was entitled to be repaid in priority to the Limited Partners.

38. Despite repeated requests by the Limited Partners, Cresford has been unable to provide any agreements between Cresford and the Partnership to establish that its advances were unsecured loans.[36]

(vi) The General Partner's Secretly Sells the Partnership's Assets to Concord

39. Unbeknownst to the Limited Partners, the General Partner sold a portion of the Partnership's lands, municipally known as 357A and 357.5 Yonge Street, to Concord in December 2020. The General Partner did not disclose the sale to the Limited Partners, even after it was ordered to by the court (as further described below).

[34] Szeto Affidavit, para 46, Tab 2B, p. MR-54.
[35] Li Affidavit, para. 74, Other LPs Motion Record, Tab 2; Exhibit "CC" to the Li Affidavit.
[36] Szeto Affidavit, para 47, Tab 2B, p. MR-54.

40. The Limited Partners had to discover on their own that the General Partner had sold the lands to Concord in order to pay off a loan given by Timbercreek. The Limited Partners also leaned that the lands were sold for *less than what they were acquired for* – the Partnership originally acquired the lands for $10.5 million in the summer of 2016, yet they were sold to Concord for $7.6 million.[37] Selling the lands for less than its purchase price (which is highly unlikely in a market like Toronto) was entirely done in secret and concealed from the Limited Partners.

E. The General Partner Breaches a Court Order

41. Despite multiple demands for further information, the General Partner refused to provide information that the Limited Partners were statutorily and contractually entitled to. As a result, the Moving Parties brought an urgent motion for disclosure of information. On January 13, 2021, Justice Cavanagh granted the motion and ordered disclosure (the "**Disclosure Order**"). The Disclosure Order required, among other things:

> (a) any offers, Letters of Intent, term sheets, proposals or agreements regarding the financing, transfer or acquisition of the YSL Project when received (section 2(a));
>
> (b) any proposed agreements relating to the YSL Project before they are entered into, including without limitation any agreements relating to the Timbercreek Mortgage Services Inc.'s mortgage or Concord Property Development Corp.'s proposed financing (section 2(b)); and,
>
> (c) any proposed agreements or terms that may have a material impact on the Limited Partners' interest in the YSL Project and the YG Limited Partnership (section 2(d)).[38]

42. However, since the Disclosure Order was made, the Limited Partners have had to repeatedly chase information from the General Partner[39], including updates about the status of

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[37] Szeto Affidavit, paras. 62-63, Tab 2B, p. MR-58;
[38] Szeto Affidavit, para. 56, Tab 2B, p. MR-56-57; Exhibit "V" of the Szeto Affidavit, Disclosure Order, Tab B2V.
[39] Szeto Affidavit, para. 66, Tab 2B, p. MR-59.

discussions between Concord and the General Partner. In response to questions, the General Partner provided few substantive updates and would simply respond that that discussions were ongoing and conducted over the telephone so no documents were available.[40]

43. Then, on April 14, 2021, the General Partner suddenly advised that Cresford and Concord were entering into a formal agreement under which Concord will sponsor a Proposal by the Partnership under the BIA to be put forward by the General Partner. The terms of the Proposal include Cresford recovering a portion (up to 58%) of its "unsecured claim" for $38.1 million, whereas the Limited Partners would receive nothing.[41] This agreement had been secretly negotiated for weeks without any disclosure to the Limited Partners.

44. The General Partner did not seek the consent of the Limited Partners to enter into the agreement with Concord nor did it seek their approval before filing the Notice of Intent to Make a Proposal for the Partnership. It ignored the Limited Partners' objections. As a result, the agreement with Concord and all steps taken with respect to the proposal are invalid and properly set aside.[42]

F. The Self-Interested Nature of the General Partner's Actions Amount to a Breach of Fiduciary Duties

45. The General Partner's conduct was not only contrary to the LP Agreement and the Partnership Act, its conduct is contrary to the common law. It is well-established that a general partner owes fiduciary duties to limited partners. Those duties have been described as, at a minimum: the duties of loyalty and good faith; the duty to act in the best interests of the fiduciary;

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[40] Szeto Affidavit, paras. 67-68, Tab 2B, p. MR-59.
[41] Szeto Affidavit, para. 78, Tab 2B, p. MR-62.
[42] Exhibit "C" to the Szeto Affidavit, LP Agreement, s. 10.14(a), Tab, 2BL, p. MR-108; W. Houlden and Geoffrey B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th Ed, D§72, Tab 1, Moving Parties Book of Authorities ("**BOA**"). *Aquaculture component Plant V Limited Partnership (Re),* 1995 CanLII 9324 (NS SC), Tab 2, BOA.

the duty to avoid creating a conflict between the best interests of the fiduciary and those of the partnership; and the duty to not put its own interest ahead of those of the limited partners.[43]

46. The General Partner has been acting in its own self-interest since at least 2020 by secretly negotiating a sale of the YSL Project that will result in losses to the Limited Partners so that Cresford can extract value for itself. It has refused to make full disclosure to the Limited Partners. Finally, it has now resorted to acting without authority in an effort to force a deal over the Limited Partners' objections using the BIA proposal process.

47. In these circumstance, where the general partner has acted in its own self-interest and breached its fiduciary duties, the court has inherent jurisdiction to remove the general partner:

> The question that arises is whether the court has the power to remove a general partner in the absence of statutory authority where the general partner acted in bad faith toward one limited partner, breached its obligations under the Partnership Agreement, breached its fiduciary duties at common law and under the Agreement, and breached its covenant and warranty to act with utmost fairness. Is the limited partner, who has done nothing wrong, forced to continue in a partnership arrangement with the general partner for whom there is a *bona fide* lack of confidence? **I find that the Superior Court has the inherent jurisdiction to remove the general partner in the special circumstances of this case**.[44]

48. In this case, the Limited Partners are fully within their rights to seek the removal of the General Partner for breaches of fiduciary duties and are entitled to the relief sought in the LP Application, including setting aside the nascent Proposal proceeding.

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[43] *Merklinger v. Jantree No. 3 Limited Partnership & Snapdragon Ltd.,* 2004 CanLII 54553 (ON SC) [*Merklinger*], para 109, Tab 3, BOA, [Emphasis added]; See also: *Tridelta Financial Partners Inc. v Zephyr Abl Ser-A 4.875% Jan 25,* 2020 ONSC 5211 (CanLII), Tab 4, BOA.
[44] *Merklinger*, *supra* note, para. 204. [Emphasis added], Tab 3, BOA.

G. The Moving Partners File the LP Application

49. Given the numerous breaches by the General Partner and Cresford's sustained efforts to extract value from the YSL Project for itself to the detriment of the Limited Partners, the Moving Parties had no choice but to bring the LP Application.

50. The LP Application seeks:

(a) A declaration that the General Partner breached the LP Agreement, its duty of good faith and fiduciary obligations, and the Disclosure Order;

(b) An Order declaring that the General Partner is terminated as the general partner of the YG Partnership and/or ceased to be the General Partner of the Partnership, and therefore, cannot exercise any powers as General Partner to bind the partnership;

(c) An order declaring that any agreements entered into by the General Partner with Concord are null and void and otherwise unenforceable against the Partnership; and

(d) An Order setting aside the filed Notices of Intention to Make a Proposal pursuant to subsection 50.4(1) of the BIA and any proposal filed subsequently.[45]

51. None of the relief requested involved monetary claims against the respondents.

52. The Other LPs commenced the Other LP Application seeking similar relief, as well as the appointment of a receiver.

53. The LP Application was commenced before Cresford and Concord finalized their agreement regarding the Partnership and its assets and before Cresford initiated the proposal process. However, after being served with the Application Record and put on notice that the Limited Partners challenged the General Partner's authority, the General Partner proceeded to expedite the filing of the Notice of Intention to Make Proposal ("**NOI**"), without authority.

[45] Amended Application Record, Moving Parties Record, Tab B.

PART III - LAW & ARGUMENT

54. The issue on this motion is whether the stay of proceedings imposed by section 69.1 of the BIA applies to the LP Application, and if so, whether the stay should be lifted in order to allow the Moving Parties to advance the LP Application.

A. The Stay Does Not Apply to the LP Application

55. Section 69(1) of the BIA imposes an automatic stay on creditors' claims that are "provable in bankruptcy" on the filing of a 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,
>
> until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

56. A "claim provable in bankruptcy" is defined under section 121(1) of the BIA. The three essential requirements are as follows:

(a) There must be a debt, liability or obligation to a creditor;
(b) The debt, liability or obligation must be incurred before the date of bankruptcy; and,
(c) It must be possible to attach a monetary value to the debt, liability or obligation.[46]

57. The relief being sought in the LP Application is not a creditor claim nor is it seeking any monetary relief or payment of debt. It is not a "claim provable in bankruptcy" as defined by the BIA. Therefore, the BIA statutory stay does not apply to the application.

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[46] *Global Royalties Ltd., v. Brook*, 2015 ONSC 6277, para 6, [*Global Royalties*] citing *Armstrong, Re,* 2015 BCSC 1167 (B.C. S.C.), Tab 5 of the BOA.

58. The types of claims that are stayed upon filing an NOI was considered in *Global Royalties Ltd,* leave to appeal denied 2016 ONCA 50, in which the bankrupt defendants argued that the plaintiffs' application for an injunctive and declaratory order and monetary claims arising from post-bankrupt conduct were stayed under section 69 of the BIA. The allegations included breach of fiduciary duties and fraudulent conduct and involved monetary claims arising from the defendants' pre- and post-bankruptcy conduct.

59. Justice Penny found that the claims for injunctive and declaratory relief were not stayed by operation of the BIA, because they were not "claims provable in bankruptcy"[47]. The Court found that no order lifting the stay was required.

60. In its decision, the Court relied on the Divisional Court's interpretation of the BIA in *Edward v. Niagara Neighbourhood Housing Co-operative Inc*., 2006 CanLII 16485:

> As the Divisional Court said in *Edward v. Niagara Neighbourhood Housing Co-operative Inc.*, 2006 CanLII 16485, "the effect of a stay under ss. 69.3 **should be limited to the words of the provision**; **the stay operates as against *the recovery of a claim provable in bankruptcy*.**[48]

61. The LP Application challenges the validity of the proposal process is valid *at all*. That is not a "claim provable in bankruptcy" subject to the automatic stay. Interpreting the stay to apply to a claim that seeks to prevent or set aside the proposal process as a threshold issue would effectively make proposals and bankruptcy proceedings immune from challenge. There is no support in law for such a broad application of the stay provisions in the BIA.

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[47] *Global Royalties Ltd.,* para 12, Tab 5, BOA.
[48] *Global Royalties Ltd.*, para 8, citing *Niagara Neighbourhood Housing Co-operative Inc. v. Edward* [2006 CarswellOnt 3046 (Ont. Div. Ct.)], Tab 5, BOA. [Emphasis added]

62. The General Partner's position is that section 69(1) of the BIA should be interpreted broadly and relies upon the Court's decision in *Re Emergency Door Services*[49]. However, *Re Emergency Door Services* is distinguishable. The moving party, Rytec Corporation, commenced an action against an insolvent company, Emergency Door Services ("**EDS**"), seeking to enjoin EDS from selling doors manufactured by its competitor and for damages. The claim did not take issue with EDS filing a notice of intention to make a proposal under the BIA, nor was it challenging EDS's authority to do so.

63. Justice Newbould held that the stay of proceedings applied to Rytec Corporation's action. He held that the word "remedy" must be interpreted to include injunctive proceedings to *prevent post-filing conduct of a debtor* that has filed a proposal.[50] His Honour also noted that if "a debtor were to misuse this protection from a stay, an application could be made to lift the stay."[51]

64. The LP Application is not directed at the General Partner's post-filing conduct; the LP Application takes issue with the General Partner's authority to file the NOI in the first place. *Re Emergency Door Services* is not helpful to the current analysis.

B. Alternatively, the Stay Should be Lifted

65. If the Court finds that the stay does apply to the LP Application, the stay should be lifted to allow the LP Application to proceed.

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[49] *Re Emergency Door Services*, 2016 ONSC 5284, Tab 6, BOA.
[50] *Re Emergency Door Services*, para. 37, Tab 6, BOA.
[51] *Re Emergency Door Services*, para. 37, Tab 6, BOA.

66. Section 69.4 of the Act allows the Court to lift the automatic stay of proceedings imposed by section 69.1 of the Act if it is satisfied that the petitioning creditor is likely to be materially prejudiced by the continued operation of the stay or that there are equitable grounds to do so.[52]

67. On such a motion, the role of the Court is not to inquire into the merits of the action sought to be commenced or continued, but rather to ensure that there are sound reasons, consistent with the scheme of the BIA, to relieve against the automatic stay. For sound reasons to exist, the action need only have "more than little prospect" of success.[53]

68. The LP Application satisfies these grounds. Maintaining the stay will result in material prejudice against the Limited Partners and there are equitable grounds to lift the stay. The unchallenged and undisputed record demonstrates that the LP Application has much greater than a "little prospect" of success.

(i) Material Prejudice

69. The Court has found that sound reasons for lifting the stay are "a proxy for the sufferance of material prejudice if the stay is not lifted." In other words, "if the proposed pleading sets out sound reasons for lifting the stay, then material prejudice has been made out."[54]

70. As detailed above and in the LP Application materials, if the stay is not lifted and Cresford is allowed to pursue the proposal on behalf of the Partnership, the Limited Partners stand to lose their entire guaranteed investments. As the General Partner does not hold any assets directly, the Limited Partners will have effectively lost any ability to hold the General Partner accountable for

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[52] BIA, R.S.C. 1985, c. B-3, s. 69.4.
[53] *Ma v. Toronto-Dominion Bank,* 2001 CanLII 24076 (ON CA) at paras. 2-3 (CA) [*Re Ma*], Tab 7, BOA.
[54] *Cynatime (Canada) Inc. (Bankruptcy), Re*, 2005 CanLII 23332 (ON SC) para 5, Tab 8, BOA, citing *Re Catahan*, [2003] O.J. No. 1300.

breaching its fiduciary duties and acting outside of its authority under the LP Agreement. It will have gotten away with its scheme to transfer the Partnership's assets for its own self-benefit and without obtaining the required approval of the Limited Partners.

71. Most importantly, the Limited Partners will lose the opportunity for a transparent, competitive sales process of the YSL Project. If the proposal proceeding is set aside then a receiver will likely be appointed and a sales process will ensue. A competitive sales process will likely result in the Limited Partners recovering at least some of their investment

72. The evidentiary record establishes that the YSL Project will likely generate a higher return through a sales process. Multiple appraisals conducted over the course of the YSL Project have confirmed that the value of the YSL Project far exceeds what Concord is paying under the Proposal. As recently as February 2020, Cresford and Concord were representing that the estimated profit *after repayment of all financing*, including Concord's equity loan, was $182,494,000 and that $90,000,000 would be available for distribution to the Partnership (Concord would receive the balance of the profits).[55] Other recent appraisals and proposed transactions obtained by the General Partner significantly exceed the value of the proposed transaction with Concord:

(a) As of November 1, 2018, the "as is" value was estimated to be [redacted]

[55] Exhibit "RR" of the Szeto Affidavit, Proposal for Settlement of Loan from 2576725 Ontario Limited, Tab 2BRR, MR-970.
[56] Szeto Affidavit, para. 85, Tab 2B, p. MR-65; Exhibit "PP" of the Szeto Affidavit, Tab B2PP, p. MR-781.

(b) As of July 30, 2019, the "as is" value was estimated to be [redacted] CBRE also estimated that if the YSL Project was completed, the market value was [redacted] as at July 30, 2019.[57]

(c) According to GFL, GFL projected a profit of [redacted], after payment of the Limited Partners' capital contributions and a return of $40.2 million to Cresford for its capital contribution[58];

(d) According to Empire's budget, Empire estimated the total land value as [redacted] and estimated total profits of [redacted] of which was marked for the Partnership.[59]

73. Cresford's and Concord's motives for pushing through the proposal over the Limited Partners' objections are clear. Concord seeks to acquire the YSL Project without having to participate in a competitive sales process. Cresford seeks to get paid a portion of its "unsecured claim" without having to respond to the Limited Partners' dispute as to whether those amounts are legitimate or are in fact subordinate to the Limited Partners' investments.

74. The Limited Partners will suffer material prejudice if they are not allowed to challenge the validity of the proposal process.

(ii) Equitable Reasons

75. There are several equitable reasons why the stay of proceedings, if applicable, shall be lifted. For example, it is well-established that sound reasons constituting equitable grounds include

[57] Szeto Affidavit, para. 85, Tab 2B, p. MR-65; Exhibit "QQ" of the Szeto Affidavit, Tab B2QQ, p. MR-779.
[58] Exhibit "I" of the Li Affidavit, Other LPs Motion Record, Tab 2I.
[59] Exhibit "G" to the Szeto Affidavit, Tab 2BG, p. MR-206.

actions against the 'bankrupt' (in this case, the debtors) for debts that cannot be released by discharge or actions in which the bankrupt is a necessary party for the complete adjudication of matters at issue involving other parties.[60]

76. The above reasons are "just examples of cases that may justify lifting a stay, and section 69.4 does not restrict the circumstances in which it is appropriate to do so."[61]

77. The following equitable grounds support lifting the stay.

(1) Cresford's Conduct Must Not Be Permitted

78. Cresford has repeatedly attempted to extract value from the YSL Project for its own benefit to the detriment of the Limited Partners. Since it cannot force a transaction on the Limited Partners, it is not trying to use the bankruptcy process as a back door to achieve its objective. At the same time, Cresford argues that the stay is a shield precluding any challenge to its conduct. There is clear inequity to this argument.

79. Limited partners must have the ability to challenge the misconduct of their general partner, particularly when that misconduct is at the root of the BIA proceeding. If the stay is not lifted, there will be no answer to the question of whether Cresford can validly force the Partnership to make a proposal and transfer its assets to Concord over the Limited Partners' opposition.

(2) All Parties Named in the LP Application are Required for the Adjudication of the Issues

80. Not all of the respondents named in the LP Application are parties to the proposal process. The General Partner is not a debtor. There is no basis for granting a stay in favour of the non-

[60] *Re Koval*, 2003 CarswellOnt 5112 at para. 6, Tab 9, BOA; *Transamerica Life Canada v. Oakwood Associates Advisory Group Ltd*, 2020 ABQB 279 (CanLII) [*Transamerica Life*], para. 14, Tab 10, BOA.
[61] *Transamerica Life*, para 15, Tab 10, BOA.

debtor respondents. However, at the same time, the Partnership and YSL Residences must be bound by the result of the applications. If the Limited Partners succeed then the proposal process will be set aside and a receivership will likely result.

81. For the reasons above, there are equitable reasons for lifting the stay of proceedings.

(iii) The LP Application Has a Strong Prospect of Success

82. The LP Application has a strong prospect of success against the respondents, which is another "sound reason" for lifting the stay of proceedings.

83. Although a creditor is not required to prove the allegations in its claim, the undisputed record strongly supports the allegations against the General Partner and/or Cresford.[62]

84. As detailed above, the Limited Partners have factual (all of which is undisputed) and legal bases for their claim against the General Partner.

85. At the very least, it is undisputed that the General Partner violated section 10.14 of the LP Agreement and had no authority to enter into an agreement to transfer the YSL Project to Concord.

86. Section 10.14 provides that "the sale or exchange of all or substantially all of the business or assets of the Partnership" require the approval of all of the Limited Partners.[63]

87. Cresford, including the General Partner, and Concord entered into a Proposal Sponsor Agreement, whereby "the parties agree[d] to use commercially reasonable efforts to effect a

[62] *Global Royalties*, para. 25; Tab 5, BOA; *Re Ma, supra* note, BOA, Tab 7, BOA
[63] Exhibit "C" of the Szeto Affidavit, LP Agreement, section 10.14, Tab B2C, p. MR-142.

financial restructuring of YSL that will result in the acquisition of the [YSL Project] by" Concord.[64]

88. At no time did the Limited Partners consent to the sale or exchange of the YSL Project. The General Partner had no authority to enter into an agreement with Concord without the Limited Partners' approval.

89. There are "sound reasons" for lifting the stay of proceedings.

PART IV - ORDER REQUESTED

90. The Moving Parties respectfully request that this Court declare that the stay of proceedings imposed by section 69.1 of the BIA does not apply to the LP Application. In the alternative, the Moving Parties request that the Court declare that the stay of proceedings is hereby lifted in order to allow the Moving Parties to advance the LP Application.

91. The LP Application is scheduled to be argued on June 23rd. The Respondents have had the application record since April 28, 2021. The following schedule for the exchange of evidence should be imposed on the parties:

(a) Respondent's Responding Record: 2 days following the decision on this motion;

(b) Reply Records: 4 days following the receipt of the Responding Record;

(c) Cross-Examinations and Rule 39.09 Examinations: To be completed within 4 days following the receipt of the Reply Records; and

(d) Exchange of Factums: To be agreed upon by the parties based on the time between the completion of examinations and the Applications' Return Date.

[64] Exhibit "EE" to the Li Affidavit, Other LPs Motion Record, Tab 2EE.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2021.

Lax O'Sullivan Lisus Gottlieb LLP

May 25, 2021

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SCHEDULE "A"

LIST OF AUTHORITIES

1. W. Houlden and Geoffrey B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th Ed, D§72

2. *Aquaculture component Plant V Limited Partnership (Re),* 1995 CanLII 9324 (NS SC)

3. *Merklinger v. Jantree No. 3 Limited Partnership & Snapdragon Ltd.,* 2004 CanLII 54553

4. *Tridelta Financial Partners Inc. v Zephyr Abl Ser-A 4.875% Jan 25,* 2020 ONSC 5211

5. *Global Royalties Ltd., v. Brook*, 2015 ONSC 6277

6. *Re Emergency Door Services*, 2016 ONSC 5284

7. *Ma v. Toronto-Dominion Bank,* 2001 CanLII 24076 (ON CA)

8. *Cynatime (Canada) Inc. (Bankruptcy), Re*, 2005 CanLII 23332 (ON SC)

9. *Re Koval*, 2003 CarswellOnt 5112

10. *Transamerica Life Canada v Oakwood Associates Advisory Group Ltd*, 2020 ABQB 279 (CanLII)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

The Partnership Act, C.C.S.M. c. P30

Accountability of partners for private profits

32(1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connection.

Privileges of limited partners

62 A limited partner may, by himself or his agent inspect the books of the firm and examine into the state and progress of the partnership business, and may advise as to its management.

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

Section 69(1)(a) – 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,

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

Court may declare that stays, etc., cease

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

Section 121(1) 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.

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.
APPLICATION UNDER THE *BANKRUPTY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

Consolidated Court File No.: 31-2734090

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

PROCEEDING COMMENCED AT TORONTO

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