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.

FACTUM OF 9615334 CANADA INC.

Date: June 18, 2021

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FACTUM OF 9615334 CANADA INC.

PART I – INTRODUCTION

1. This is the Factum of 9615334 Canada Inc. (the "**GP**"), in its capacity as general partner of YG Limited Partnership ("**YG LP**") the beneficial owner of an intended mixed-use office, retail and residential condominium project located at 363-385 Yonge Street, Toronto (the "**YSL Project**"), legal title to which is held by YSL Residences Inc. ("**YSL Inc.**" together with YG LP, "**YSL**") pertaining to certain relief set out in the Applications brought by 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc. (collectively, the "**Chi Long LPs**", represented by Lax O'Sullivan Lisus Gottlieb LLP), and YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corp., TaiHe International Group Inc (collectively the "**YongeSL LPs**", represented by Thornton Grout Finnegan LLP, and together with the Chi Long LPs, the "**LPs**"). This factum should be read in conjunction with the factum of YSL also filed today seeking approval of the Amended Proposal #2 dated June 15, 2021 (the "**Proposal**", and such factum the "**Proposal Approval Factum**"), all filed in connection with YSL's proposal proceedings pursuant to the *Bankruptcy and Insolvency Act* ("***BIA***").

2. The LPs ask this Court to exercise its discretion in their favour in order to: (a) refuse to approve the Proposal; and (b) nullify the Proposal proceedings *ab initio*. The LPs argue that they are entitled to this relief because they say that they have been treated unfairly by the GP, and that the equities dictate that the punishment for the alleged bad behaviour must be that all actions taken by the GP must be nullified.

3. However the LPs have fundamentally misconstrued the equitable considerations at play in the Proposal proceedings and the relief they request serves no purpose but to punish YSL's unsecured creditors and potentially those secured creditors ranking junior to Timbercreek (as defined below).

4. In presenting their argument, the LPs commit a series of unsupported logical leaps, summarized as follows:

(a) They misconstrue the limited partnership agreement of YG LP (the "**YG Partnership Agreement**") to argue that they are entitled to an investment return, ignoring the fact that the YSL Project (as defined below) is insolvent;

(b) They conflate the law applicable to limited partnerships to that applicable to general partnerships in an attempt to garner additional rights for themselves not available under the YG Partnership Agreement or *The Partnership Act* (Manitoba) (the "**Manitoba *PA***");

(c) They erroneously elevate their rights under the YG Partnership Agreement to afford themselves a veto of all transfers of YG LP's assets, when they clearly would have no such veto right in the case of a receivership sale and do not have one under the *BIA*;

(d) They give themselves primacy within YSL's stakeholder community to the exclusion of all other stakeholders, ignoring the fact that YSL has been insolvent for more than one year, with its creditors remaining largely entirely unpaid; and

(e) Having rejected prior offers that would have provided a meaningful recovery to themselves, the LPs now ask this Court to condone their ongoing "gambling" for a return, and they do so not with their own money but rather at the expense of YSL's unsecured creditors who will forgo their best opportunity for a recovery if the Proposal is not approved.

5. These arguments are dealt with in turn below. The GP submits that the Proposal should be approved and the LPs' applications should be dismissed, and that this result is consistent with modern creditor-debtor and corporate law, and is required by the equities in this case.

PART II - SUMMARY OF FACTS

6. The facts underlying this motion are more fully set out in the Proposal Approval Factum as well as the affidavit of David Mann sworn June 4, 2021 (the "**June 4 Affidavit**").[1] What follows is a brief summary of the facts that are most pertinent to the relief set out in the LPs' Applications that the Court directed be considered on the approval hearing.

[1] Affidavit of David Mann, sworn June 4, 2021 [**June 4 Affidavit**].

7. YSL is the owner and developer of the YSL Project. At this time, the YSL Project is only partially constructed, consisting of a partially excavated hole with a shoring system only partially installed.

8. The eight LPs are investors in YG LP and hold Class A Preferred Units of YG LP (the "**Units**"). The LPs assert that, as Unit holders, they are "entitled" to a full return of their capital contributions plus the greater of (a) an amount equal to their capital contributions (i.e. a 100% investment return) or (b) an annual return of 12.25%.

9. However, a proper interpretation of the YG Partnership Agreement reveals that the LPs are only entitled to their portion of "Distributable Cash", and only when there is cash available for distribution (per section 6.3). In the case of insolvency, section 6.4 of the YG Partnership Agreement is clear that the General Partner's first priority is to "pay all liabilities of the Partnership, all in the manner required by law."

10. This provision under the YG Partnership Agreement is consistent with the Manitoba *PA*, which provides at section 60(3) and 65:

> "A limited partner is not entitled to receive any part of its contribution out of the limited partnership assets or from a general partner until:
>
> (a) all liabilities of the limited partnership, except liabilities to the general partners and to limited partners on account of their contributions, have been repaid or there remain sufficient limited partnership assets to pay them."

11. The Manitoba PA further provides at section 65:

> "In case of the insolvency or bankruptcy of a limited partnership, no partner shall, under any circumstances, be allowed to claim as a creditor until the claims of all the other creditors of the limited partnership have been satisfied." [2]

12. In light of YSL's insolvency, there is no "Distributable Cash" available for distribution to the LPs, and YSL has extensive outstanding liabilities at this time which it cannot satisfy in full. As such, the LPs' current "entitlement" is $0.

The LPs Rejected Meaningful Opportunities for a Return on Investment

13. In response to YSL's financial difficulties the GP has undertaken extensive efforts to find a value-maximizing transaction for the sale of the YSL Project. These efforts commenced with

negotiating a forbearance arrangement with YSL's senior secured creditor, Timbercreek Mortgage Services Inc. ("**Timbercreek**"), which avoided the immediate appointment of a receiver over YSL and its assets. Multiple subsequent forbearance extensions were negotiated in order to provide the GP with the opportunity to pursue discussions with potentially interested parties.

14. During the forbearance period, the GP met with twelve large developers, only three of which expressed any interest in the YSL Project.[3]

15. The first, GFL, undertook preliminary diligence but quickly lost interest.

16. The second, Empire (Water Wave) Inc. ("**Empire**"), showed a genuine interest in pursuing the YSL Project, provided that it could come to reasonable terms with the LPs, and conditional upon its completion of further due diligence as to the feasibility of the YSL Project.

17. The third was Concord Adex, an affiliate of Concord Properties Developments Corp. ("**Concord**"), the sponsor of the Proposal.

18. Empire proposed two transactions, both of which were rejected by the LPs. The first offer from Empire was an Agreement of Purchase and Sale dated June 22, 2020.[4] Under the terms of that arrangement, the LPs would have 50% of their investment contribution repaid in full, but with no profit. The other half of the LPs' Units would receive a 100% return. Each of the LPs either refused this offer or did not respond to it.[5]

19. The GP subsequently learned that the LPs wanted to have all of their units redeemed. To accommodate this, another offer was made by Empire whereby the LPs would receive a return of their principal and a profit of 12.25% annual accrued interest on all of their Units.[6]

20. The LPs refused this offer as well.[7] The position of the LPs, as expressed in an August 30, 2020 email of Mr. Laubman, was that they were unwilling to accept this offer because it was

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[2] *The Partnership Act*, C.C.S.M., c. P30 at ss 60(3)(a) and 65 [**Manitoba *PA***].
[3] June 4 Affidavit, at para 5.
[4] June 4 Affidavit, at para 8.
[5] June 4 Affidavit, at paras 10-12.
[6] Reply Affidavit of Anthony Szeto, sworn June 9, 2021, at Exhibit E [**Szeto Reply Affidavit**].
[7] June 4 Affidavit, at paras 12-13.

a "shortfall" on their expected return (i.e. a 100% return on their investment).[8] In light of this, the fact that Empire had refused to permit the disclosure of the proposed agreement was "unacceptable" to the LPs.[9]

21. As a result of this rejection, Empire withdrew from that deal and did not pursue any further discussions.[10]

22. The GP then entered into discussions with Concord.[11] Concord initially proposed a transaction where it would provide project management and mezzanine financing, leaving the LPs rights intact if there was "distributable cash" at a later time. It ultimately emerged that Concord's construction financier, Otera Capital Inc. ("**Otera**"), insisted that Concord obtain complete ownership of the YSL Project, without any further involvement from Cresford-related entities. As a result, in late April 2021 Concord proposed that it would sponsor a proposal under the *BIA*, whereby all secured creditors and registered construction lien claimants would be paid in full and the unsecured creditors would receive a return 58 cents on the dollar.[12] Because creditor claims would not be repaid in full, the proposal did not (and does not) contemplate any return to the LPs or the other limited partners of YG LP.

PART IV - LAW AND ARGUMENT

A. <u>The LPs are Only Entitled to a Return if the YSL Project Makes a Profit</u>

23. Although the LPs have characterized their rights under the YG Partnership Agreement as an "entitlement" to a return, this argument fundamentally misconstrues the investment risk the LPs took on when joining YG LP. The LPs are investors in a real estate development project – they hold the equity in YSL and took on an investment risk in participating in this project.

24. As indicated above, no "Distributable Cash" exists within YSL to make a return of capital – let alone profit – to the LPs. Both the YG Partnership Agreement at sections 6.3 and 6.4, as well as sections 60(3)(a) and 65 of the Manitoba *PA* are clear in these circumstances that no funds are to be returned to the LPs. All of YSL's expenditures at this point in time, including with respect to the costs of Timbercreek's ongoing forbearance, maintaining the YSL Project's

[8] Szeto Reply Affidavit, at Exhibit E.
[9] Szeto Reply Affidavit, at Exhibit E.
[10] June 4 Affidavit, at paras 16-17.
[11] June 4 Affidavit, at para 20.
[12] June 4 Affidavit, at paras 27 and 30.

deposit insurance in good standing, ongoing site maintenance work for the benefit of the YSL Project, and the costs of these proceedings are borne by Concord.

25. While the Proposal does not, strictly speaking, result in the dissolution of YG LP, nevertheless, the LPs' expectations as to what would happen in an insolvency scenario are clearly set out in the YG Partnership Agreement. Characterizing a scheme of profit distribution as an "entitlement" does not entitle the LPs to profits that do not exist.

26. In economic terms, the LPs are in no different position than subscribers for preferred shares in a business corporation.

27. The LPs are equity holders and their opposition to the Proposal must be viewed through this lens. Their disappointment when faced with the prospect of a nil return on their investment is understandable, but their grievances do not entitle them to anything other than as set out in the YG Partnership Agreement or as otherwise provided at law. Both are clear: there can be no return to equity until all debts have been satisfied.

B. The LPs Conflate the Law of General Versus Limited Partnerships

28. The LPs take the position that because the LPs did not consent to the filing of the notice of intention to make a proposal, the notice of intention is *de facto* invalid. They rely on *Aquaculture Component Plant V Limited Partnership* ("***Aquaculture***")[13], for the proposition that all limited partners must consent to the filing of a notice of intention. *Aquaculture*, which has never subsequently been cited in support of this position, is wrongly decided because it conflates the law applicable to general partnerships with that applicable to limited partnerships, and should not be followed.

29. In *Aquaculture*, two limited partnerships were assigned into bankruptcy by the general partner. The Nova Scotia Supreme Court ruled that these assignments were invalid, because they had not been executed by each of the limited partners, reasoning as follows:

> I find that the assignments in bankruptcy of the two limited partnerships are invalid because of the provisions of s.85 of the *Bankruptcy and Insolvency Act*. That section provides that the Act will apply to limited partnerships in like

[13] *Aquaculture Component Plant V Limited Partnership)*, 1995 CanLII 9324 (NS SC) (reasons delivered orally) [***Aquaculture***].

> manner as if the limited partnership was an ordinary partnership. In order for an ordinary partnership to make an assignment in bankruptcy, the assignment must be executed by each of the partners. In this case, the assignments in bankruptcy of the two limited partnerships were only signed by their general partners, not by each of the limited partners, and, hence, the assignments are invalid. This is in accordance with the decision *In re Squires Brothers* (1922), 3 C.B.R. 191. Accordingly, I order, pursuant to s.181 of the *Bankruptcy and Insolvency Act*, that the assignments in bankruptcy of the two limited partnerships are annulled.[14]

30. *Aquaculture*'s reliance on the combined effect of *Squires* and section 85 of the *BIA* is flawed.

31. *In re Squires* ("***Squires***") concerned a general partnership carried on by two partners. When one of the partners was out of town, the other filed an assignment in bankruptcy. Counsel for the trustee argued that one partner was able to bind the partnership, relying on section 85 of *The Bankruptcy Act*, which stated:

> For all or any of the purposes of this Act, an incorporated company may act by any of its officers or employees authorized in that behalf, a firm may act by any of its members, and a lunatic may act by his committee or curator or by the guardian or curator of his property.[15]

32. The court rejected this proposition, ruling that it did not change "the substantive law affecting partnerships". Under partnership law, the court explained, "a member of a partnership may bind himself and his partners upon all contracts made in the course of the ordinary scope of the partnership business. An assignment such as the one in question is not within the ordinary scope of the partnership business, but practically amounts to a suspension of business and a dissolution of the partnership itself".[16] In a general partnership, the making of an assignment by a plurality of partners would only bring those assenting partners' separate assets into the estate plus their interests in the partnership, not the assets of the partnership as a firm.

33. In other words, *Squires* turned on basic partnership law principles, not the *Bankruptcy Act*. As a result, *Aquaculture* errs in relying on section 85 of the *BIA*, which reads as follows:

> 85 (1) This Act applies to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general partners of a

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[14] *Aquaculture*, at 2.
[15] *In re Squires*, 1922 CanLII 82 (SK QB) at para 2 **[*Squires*]**.
[16] *Squires*, at para 3.

> limited partnership becoming bankrupt, the property of the limited partnership vests in the trustee.

34. Nothing in section 85 operates as a requirement that when courts are dealing with an issue under the *BIA*, they should disregard the distinctions between general partnerships and limited partnerships– in other words, to disregard the substantive principles of partnership law. The court in *Squires* is explicit that its decision turns on partnership law, and the principle that a partner can bind the partnership only in the ordinary course of business.

35. The LPs further argue that the Manitoba *PA* provides a basis for the requirement that each of the LPs were entitled to veto the filing of a notice of intention, citing section 27(h), which reads as follows:

> 27 The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement, express or implied, between the partners, by the following rules: […]
>
> (h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

36. As is apparent from its wording, section 27(h) is not in the limited partnership section of the Manitoba *PA* (Part II), but in the section applicable to general partnerships (Part I). Provisions in the general partnership section only apply to limited partnerships when they are "not inconsistent" with the provisions of Part II.[17]

37. That is clearly not the case with section 27(h). Part II of the Manitoba PA only permits limited partners to "inspect the books of the firm and examine into the state and progress of the partnership business, and [to] advise as to its management".[18] It explicitly states that "only" the GP can "transact business".[19] Whereas section 27(h) calls for majority votes on matters of ordinary business, Part II restricts that right to a majority of general partners.[20]

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[17] Manitoba *PA*, at s. 2(1).
[18] Manitoba *PA*, at s 62.
[19] Manitoba *PA*, at s 54(1).
[20] Manitoba *PA*, at s 63(5).

38. Moreover, the rationale underlying the principle in *Squires* is not present in respect of limited partnerships. That rationale flows from the lack of separate legal personality of a general partnership and the unlimited liability of the partners of a general partnership. Thus, the effect of an assignment in bankruptcy executed by all members of a general partnership carries with it not only all the assets of the partnership as a firm, but also the separate assets of each of the partners.[21] Given this, it makes perfect sense that a partner of a general partnership must consent to an assignment by the partnership for the assignment to be effective. Otherwise his/her non-partnership assets could be brought into the estate without consent.

39. Not so in the case of limited partnerships. Because of statutory limited liability, a limited partner is only at risk to the extent of his/her contribution of capital to the firm. As such, a limited partner has no different risk if the firm is assigned into bankruptcy than does a shareholder of a business corporation who bought shares in the primary market. The price of a limited partner's statutorily limited liability is the delegation of the power to "transact business" to the general partners, who remain unlimited in liability. Unanimity is not required to protect the interests of limited partners as it is with general partnerships, rather requiring unanimity would be at odds with the basis upon which they enjoy the protections of statutorily limited liability.

40. The scheme of the Manitoba *PA*, the nature of limited partners as equity holders and the principles discussed above regarding the need to have regard for the interests of creditors pursuant to the common law, the Manitoba *PA*, and the YG Partnership Agreement, all lead inexorably to the same conclusion: it is for the general partner alone, acting with regard to its duties, that decides whether to seek relief under Canada's insolvency regime.

C. The LPs Do Not Possess a Veto

41. The LPs' assertion that they have a right to approve a sale of YSL's assets under all circumstances fails to consider what would happen in the case of a receivership.

42. If the LPs' position were correct, it would mean that each and every limited partner has a veto on whether a limited partnership enters insolvency proceedings. A general partner of a limited partnership in the zone of insolvency would be incapable of taking any steps to secure some recovery for the limited partnerships creditors, and the result would be creditor-driven

[21] *Taylor v Leveys* (1992), 2 C.B.R. 390 (Ont SC); *Cohen v Mahlin*, [1927] 1 D.L.R. 577 (Alta CA)

recovery process in all cases, where only the creditors would have the ability to initiate proceedings because the general partner would be restrained by its limited partners. Such a result would be inconsistent with modern corporate law principles and the nature of limited partnerships, and the result would be that debtor-in-possession proceedings may become an impossibility for limited partnerships.

43. A limited partnership "is a specialized vehicle designed to fulfil the needs of particular investors who want to be able to share in partnership profits but limited their liability for partnership losses."[22] In this way, a general partner of a limited partnership fulfils a similar role to that of the directors and officers of a corporation, and the limited partners to that of a corporation's shareholders. In contrast to a general partnership, where all partners are jointly and severally liable for the partnership's liabilities and share proportionately in the partnership's profits, in a limited partnership, the limited partners elect to limit their downside exposure to the extent of their contributions to the partnership in exchange for a risk-mitigated return. This follows because an investment in a limited partnership is passive in nature, and limited partners are not involved in the management of the limited partnership.[23] Instead, the general partner is responsible for making business decisions on behalf of the limited partnership.

44. The LP's assertion that they have a veto over a sale of partnership assets that occurs through a debtor-driven insolvency proceeding similarly and fails to consider the nature of an arrangement under the *Companies' Creditors Arrangement Act* ("***CCAA***") or a proposal under the *BIA* and the legal mechanisms by which the terms of arrangements and proposals become binding upon stakeholders. These exist outside the ordinary civil law governing the rights and obligations of debtors and creditors, but are rather an incident of insolvency law and exist pursuant to federal paramountcy. As has long been recognized by the Supreme Court of Canada, "… Parliament may legislate in a way as to make the terms of a compromise … where the composition has received judicial sanction, binding upon a secured creditor who is not a party to the composition and who has not given his assent to it. The principle of the legislation, in a

[22] J. Anthony VanDuzer, *The Law of Partnerships and Corporations*, 4th ed (Toronto: Irwin Law, 2018) at 84 [**VanDuzer**]
[23] VanDuzer, at 84.

word, is that a secured creditor under the conditions mentioned may be required by law to accept a composition to which he has not given his assent."[24]

45. Limited partners whose contractual rights may be overridden in an arrangement or proposal can be in no more privileged a position than secured creditors whose rights are overridden without their consent in a compromise or exchange of debt sanctioned under an arrangement or proposal, or for that matter a contractual counterparty whose consent to assignment is overridden by court order under s. 84.1 of the *BIA* or s. 11.3 of the *CCAA*. The relevant question is whether the transaction is properly authorized by insolvency legislation, not whether it is properly authorized by private contract under civil law.

D. The GP Has Not Ceased its Function

46. The LPs' argument that the GP has already ceased its function as general partner of YG LP is based on a misinterpretation of section 11.2 of the YG Partnership Agreement. Section 11.2(a) is explicit that the GP may be removed by "a court of competent jurisdiction [if it] determines that the General Partner has engaged in fraud, wilful misconduct or gross negligence in the operations of the Partnership and that such fraud, wilful misconduct or gross negligence has had a material adverse effect on the business or properties of the Partnership." The LPs do not allege fraud, wilful misconduct or gross negligence on the part of the GP in their proceedings because such allegations are entirely unsupported by the facts in this case.

47. The LPs therefore ask this Court to provide them with a remedy not available to them under the YG Partnership Agreement, and without any basis at law, whether in the *BIA*, the Manitoba PA or otherwise. The Court must refuse to exercise its discretion in the LPs favour on this basis.

48. The LPs' argument that the GP was been automatically removed by operation of section 11.2(b) of the YG Partnership Agreement is equally flawed and also unsupported by the facts. At paragraph 31 of their joint factum, the LPs point to subsections 11.2(b)(vii) and (viii), which read:

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[24] *Reference re constitutional validity of the Companies' Creditors Arrangement Act*, [1934] SCR 659; *Reference re legislative jurisdiction of Parliament of Canada to enact the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935*, [1936] SCR 384.

> (b) The General Partner shall cease to be the general partner of the Partnership if:
>
> (vii) the General Partner seeks, consents to, or acquiesces to the appointment of a trustee, receiver or liquidator of the General Partner or of all or any substantial part of the General Partner's properties,
>
> (viii) within 60 days after the commencement of any proceeding against the General Partner commenced by any third Person seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any status, law or regulation, the proceeding has not been dismissed

49. YSL submits that subsection (vii) has no application in the present case because of the "debtor-in-possession" nature of these proceedings. The Proposal Trustee in this case is not vested with the assets of YG Partnership, and, consistent with section 50(10), the Proposal Trustee's role relates to "monitoring the insolvent person's business and financial affairs."[25] Further, this section of the YG Partnership Agreement is clear on its face that it only operates where the GP undertakes these steps in respect of itself. The GP has not done so in this case, and is not an applicant within the Proposal proceedings. Put differently, this section does not prohibit the GP from taking steps in respect of the "Partnership" (as YG LP is defined in the YG Partnership Agreement)

50. The LPs argument on the operation of subsection (viii) is also illogical. On one hand, they argue that the GP should have exerted more efforts than generating the three potential transactions presented to them, and its failure to do so is sanctionable conduct. On the other hand, by raising 11.2(b)(viii), they argue that the GP's function ceased 60 days after the commencement of Timbercreek's receivership application, notwithstanding the fact that the GP negotiated the forbearance arrangement which afforded it the breathing room needed to seek alternative investments in the YSL Project. If the LPs were correct, then Timbercreek's receivership application would have moved forward, and in that scenario the LPs would have no ability to veto a receiver's sale or otherwise insert themselves in the process.

51. Further, the LPS' argument that the GP was automatically removed upon the commencement of Timbercreek's receivership application actually operates to their detriment and is not supportable under the Manitoba *PA*. Specifically, section 52 of the Manitoba PA

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[25] *BIA*., s. 50(10).

requires that a limited partnership have a general partner at all times. If the LPs are correct that the GP was automatically removed as general partner of YG LP by operation of section 11.2 of the YG Partnership Agreement, the result is that, in the absence of a replacement general partner, the LPs themselves must be the directing minds of the limited partnership. In accordance with section 63 of the Manitoba PA, if the LPs assume an active role in the operations of the limited partnership, the take on "liability as if they were the general partner."[26]

52. In summary, the LPs ask this Court to impose rights in their favour that simply do not exist under the YG Partnership Agreement, and they make this request at the expense of YSL's unsecured creditors.

E. It is Appropriate for a General Partner to have Regard to Other Stakeholders in the 'Vicinity of Insolvency'

53. The LPs argument that a general partner of a limited partnership is constrained to solely consider the best interests of the limited partners in all scenarios should be rejected for sound policy reasons, and if it were to be accepted it would lead to significant real-world consequences for any creditor of a limited partnership.

54. In corporate law, it is well recognized that the directors of the corporation owe a fiduciary duty to act in the best interests of the corporation.[27] However, some circumstances, such as insolvency, present scenarios where directors must resolve a conflict between what is best for a corporation's shareholders, on one hand, and other stakeholder groups (including creditors) on the other. In these circumstances of conflict, "there is no principle that one set of interests – for example the interests of shareholders – should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way."[28]

55. As stated, in the case of a limited partnership, the general partner is the directing mind, equivalent to the directors and officers of a corporation, and the limited partners are equivalent to the shareholders of a corporation. The policy reason that the interests of other stakeholders may be considered "in the vicinity of insolvency" stands to prevent equity holders from pursuing low-probability transactions at the expense of creditors.

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[26] Manitoba PA at section 63(1).

56. In the seminal decision of *Peoples Departments Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 ("***Peoples***"), in the context of a corporation, the Supreme Court of Canada held that directors of a corporation owe a fiduciary duty to the corporation as a whole, and accordingly must heed the interests of all the stakeholders of the corporation. The Court recognized that:

> Short of bankruptcy, as the corporation approaches what has been described as the 'vicinity of insolvency', the residual claims of shareholders will be nearly exhausted. While shareholders might well prefer that the directors pursue high-risk alternatives with a high potential payoff to maximize the shareholders; expected residual claim, creditors in the same circumstances might prefer that the directors steer a safer court so as to maximize the value of their claims against the assets of the corporation.[29]

57. If the LP's theory were correct, then the creditors of a limited partnership face an extremely different risk profile than creditors of a corporation, with troubling results. On their theory, the limited partners can insist on the GP making high-risk decisions with no regard for the interests of creditors whatsoever. Where a limited partnership is insolvent or approaching insolvency, the purported veto rights of the limited partners would allow them to force the GP to take any action, no matter how wasteful or risky, on the slim hopes of making some sort of recovery – as is the intended result the LPs push forward here. Indeed, a profit-maximizing limited partner would be compelled to do so: any chance of a return, no matter how small, is preferable to a guaranteed return of nothing, given that the limited partner has no liability beyond its investment. They would get to gamble with the creditor's money no matter how long the odds.

58. Accordingly, the principle first identified in *Peoples* and expanded in *BCE* should be extended in the case of limited partnerships, and in this case, the actions of the GP must be considered having regard to the situation it faced, including these facts:

(a) YSL has been insolvent since early 2020;

(b) A project of the magnitude and complexity of the YSL Project is executable by only a limited subset of real property developers;

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[27] *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 at para 24 [***BCE***].
[28] *BCE*, at para 84.
[29] *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 at para 45.

(c) The GP engaged with 12 potential replacement developers. Of these, only two had any material interest;

(d) Of the two interested potential developers, the LPs rejected the terms put forward by one (Empire), and the terms of the other required the removal of YSL from the project; so

(e) There being no alternatives, and a viable Proposal in-hand, the GP pursued the transaction that would result in the best outcome in the circumstances, being the Proposal; and

(f) Industry experts have opined that the Proposal indeed represents the likely best possible outcome in the circumstances, and that there are no circumstances under which the LPs should expect to receive any return.

59. On this basis, it is clear that the GP took the steps necessary in the circumstances to pursue the most advantageous transaction available: the Proposal.

F. No Justification for Nullifying the Proposal

60. Nullifying the Proposal would only serve to punish YSL's creditors. Much of the LPs' joint factum is devoted to their various grievances with the conduct of the GP, Cresford, and Mr. Casey. They spend virtually no time explaining why any of these grievances justify the nullification of the Proposal.

61. At best, if the LPs succeed in their argument that the GP should not have commenced proposal proceedings, the result is that the Court has the discretion to decide what happens next. The LPs do not point to any principle in law – because there is none – that they are entitled to a remedy of nullification *ab initio* if their factual arguments were sustained.

62. The LPs' concept of nullification *ab initio* is inconsistent with the general scheme of the *BIA*. Under s. 181(1) of the *BIA*, the court has the discretionary power to annul a bankruptcy, but in the exercise of that power, the court does not act retroactively, only prospectively. All payments made and acts done by the trustee in the interim are valid and the effect of annulment

is simply to return what remains in the estate to the person whose bankruptcy is annulled.[30] By analogy, the filing of a notice of intention may be voidable at the court's discretion, but that does not mean it is avoided *ab initio*. The proposal trustee and the broader stakeholder community whose rights and interests may have been affected in the meantime should be entitled to rely on the acceptance of filing of the notice of intention by the Official Receiver unless and until the court exercises its discretion.

63. In exercising its discretion in this case, the Court should bear in mind the only two possible outcomes in this proceeding: (a) the Proposal is successful, or (b) Timbercreek's Receivership Application is heard and granted. The Proposal provides a full recovery to secured creditors, and a meaningful recovery deemed acceptable by its unsecured creditors. What happens if the Proposal is not implemented is shrouded in uncertainty. Based on the experience in Cresford's other insolvent projects, including 33 Yorkville and Halo, the LPs' intended result of a receivership sale process will occasion significant delays, significantly higher professional fees and other expenses, and no certainty that a better outcome is achievable – indeed, according to the Proposal Trustee and its consultants, the Proposal is likely the best outcome possible.

64. The Proposal Trustee recommended that the creditors of YSL vote in favour of the Amended Proposal and is of the view that there is greater value to YSL's creditors in the Amended Proposal than under the Timbercreek Receivership.[31] The Creditors must be taken to agree, having unanimously accepted the Proposal.[32]

65. The LPs resist the Proposal because, in their words, "In the proposal, the limited partners lose all of their investments and get nothing."[33] Of course, the undisputed evidence is that under the Timbercreek application the LPs will almost certainly get nothing as well.

66. The fundamental issue in this application is whether it is in the interests of justice for this Court to deny the creditors their certain recovery now in order to keep alive the slim hope of the LPs to avoid a total loss. The GP submits that the "bird in the hand" represented by the Proposal should not be allowed to fly away.

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[30] *Bailey v. Johnson* (1872), LR 7 Ex 263.
[31] Report to Creditors, at section 7.0 at paras 1-5.
[32] Third Report of the Proposal Trustee.
[33] Moving Parties Factum (Lift-Stay Motion) at para 5.

67. The LPs are equity investors. They elected to be equity investors knowing that they ranked behind creditors in the event of insolvency. Moreover, they elected to be equity investors in a fundamentally risky asset class: condominium development. The LPs made a significant bet in the hopes of a massive return, and it is unfortunate that their investment has not resulted in a return. However, this is the risk of investment, and it is different than the risks taken on by creditors, who have reasonable expectations to a recovery in an insolvency scenario.

68. In June 2020, in the midst of a global pandemic, Empire offered the LPs a chance to hedge their bets: take back 50% of their capital in order to facilitate a new injection of funds into the project, and maintain 50% of their units with an improved chance at doubling their remaining investment. The LPs declined – they kept all their money in, continuing to press for a 100% lift on investment.

69. In August of 2020, the LPs were offered an immediate and certain return of 12.25% annual on their investment – in-line with their profit expectations under the YG Partnership Agreement, and an outstanding investment return by all reasonable measures. They kept their money in again, despite the risk that denying the YSL Project a buyer would threaten the project's feasibility.

70. The LPs' bet has not paid off. Now, on the verge of the resolution of YSL's solvency crisis, the LPs demand the right to make another bet – a true longshot – this time by putting funds offered to YSL's creditors at risk. The LPs try to justify their entitlement to make this further gamble by saying they have been treated unfairly. But they do not allege that they have been treated unfairly by the creditors whose money they wish to risk.

71. Moreover, and crucially, the LPs have another forum where they can pursue those they take issue with. In response to the concern of the LPs that they could be denied their day in court, the Proposal was amended on June 15, 2021 to preserve their claims against the current and former directors and officers of YSL, the GP and its affiliates.[34] Put simply, the collateral damage to the creditors, and the slim chances of recovery in any event, make challenging the Proposal the wrong forum for the LPs to litigate their grievances with the Cresford Entities.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of June, 2021.

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[34] Report to Creditors, at section 4.11 at para 1(a).

SCHEDULE "A"
LIST OF AUTHORITIES

Jurisprudence

1. *Aquaculture Component Plant V Limited Partnership)*, 1995 CanLII 9324 (NS SC)

2. *Bailey v. Johnson* (1872), LR 7 Ex 263

3. *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69

4. *Cohen v Mahlin*, [1927] 1 D.L.R. 577 (Alta CA)

5. *In re Squires*, 1922 CanLII 82 (SK QB)

6. *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68

7. *Taylor v Leveys* (1992), 2 C.B.R. 390 (Ont SC)

Secondary Sources

1. *Reference re constitutional validity of the Companies' Creditors Arrangement Act*, [1934] SCR 659

2. *Reference re legislative jurisdiction of Parliament of Canada to enact the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935*, [1936] SCR 384

3. J. Anthony VanDuzer, *The Law of Partnerships and Corporations*, 4th ed (Toronto: Irwin Law, 2018)

SCHEDULE "B"
TEXTS OF STATUTES

SECTION 54(1) of C.C.S.M. c. P30 MANITOBA THE PARTNERSHIP ACT
General partners only to transact business, etc.

54(1) The general partners only are authorized to bind the partnership; but where a limited partner, to the knowledge of the general partners, takes part in the management of the partnership business, he has power to bind the partnership.

SECTION 60(3) of C.C.S.M. c. P30 MANITOBA THE PARTNERSHIP ACT
Restrictions on return of contribution

60(3) Notwithstanding subsection (2), a limited partner is not entitled to receive any part of his contribution out of the limited partnership assets or from a general partner until

(a)all liabilities of the limited partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remain sufficient limited partnership assets to pay them;

(b) the partnership agreement is terminated or so amended, if necessary, to set forth the Withdrawal or reduction of the contribution; and

(c) a declaration has been made and registered as required under *The Business Names Registration Act*.

SECTION 65 of C.C.S.M. c. P30 MANITOBA THE PARTNERSHIP ACT
Creditors preferred to limited partners

(65) In case of the insolvency or bankruptcy of a limited partnership, no partner shall, under any circumstances, be allowed to claim as a creditor until the claims of all the other creditors of the limited partnership have been satisfied.

SECTION 50(10) of *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3

(10) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a proposal in respect of an insolvent person shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the proposal until the proposal is approved by the court or the insolvent person becomes bankrupt, and shall

(a) file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at any time that the court may order;

(a.1) send a report about the material adverse change to the creditors without delay after ascertaining the change; and

(b) send, in the prescribed manner, a report on the state of the insolvent person's business and financial affairs — containing the trustee's opinion as to the reasonableness of a decision, if any, to include in a proposal a provision that sections 95 to 101 do not apply in respect of the proposal and containing the prescribed information, if any — to the creditors and the official receiver at least 10 days before the day on which the meeting of creditors referred to in subsection 51(1) is to be held.

SECTION 59(1) and (2) of *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3

Court to hear report of trustee, etc.

59(1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

Court may refuse to approve the proposal

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

SECTION 85(1) of *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3

Application to limited partnerships

85(1) This Act applies to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general partners of a limited partnership becoming bankrupt, the property of the limited partnership vests in the trustee.

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

Consolidated Court File No. 31-2734090

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

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