

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

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

Applicants

and

CRESFORD CAPITAL CORPORATION, YSL RESIDENCES INC, 9615334
CANADA INC., YG LIMITED PARTNERSHIP and DANIEL CASEY

Respondents

AND

Court File No.: CV-21-00661530-00CL

B E T W E E N:

2583019 ONTARIO INCORPORATED as general partner of YONGESL INVESTMENT
LIMITED PARTNERSHIP, 2124093 ONTARIO INC., SIXONE INVESTMENT LTD.,
E&B INVESTMENT CORPORATION and TAIHE INTERNATIONAL GROUP INC.

Applicants

-and-

9615334 CANADA INC. as general partner of YG LIMITED PARTNERSHIP and
YSL RESIDENCES INC.

Respondents

JOINT REPLY FACTUM OF THE APPLICANTS

June 21, 2021

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

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

Sapna Thakker LSO#: 68601U
sthakker@lolg.ca
Tel: 416 642 3132

Lawyers for the Applicants, 2504670 Canada Inc.,
8451761 Canada Inc., and Chi Long Inc.

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

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

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

Lawyers for the Applicants, YongeSL Investment
Limited Partnership, 2124093 Ontario Inc., Sixone
Investment Ltd., E&B Investment Corporation and
Taihe International Group Inc.

TO: THE SERVICE LIST

PART I - OVERVIEW

1. The General Partner's responding submissions lack evidentiary and legal support. Instead, it relies on speculation about a receivership and assertions that a general partner should acquire authority not granted to it in the partnership agreement in an insolvency scenario. The responding submissions are another attempt by the General Partner to distract from its misconduct.
2. The General Partner's responding arguments fail to address the evidentiary gaps in its position that the Proposal represents the best available, or even a fair, offer for the Partnership's assets. They also do not answer the fact that the General Partner had no authority to make an agreement with Concord to transfer the assets. Finally, they wrongly contend that there are two alternatives available to choose from when in fact the Proposal should never have been filed because the General Partner had no legal authority to do so. The proper remedy is to declare the Proposal Sponsor Agreement invalid and unenforceable and to annul the *Bankruptcy and Insolvency Act* ("BIA") proceeding.

A. No Evidence that the General Partner Sought Out Fair Value

3. The General Partner's factum is replete with bald assertions with no support in the record. Where it does cite to evidence, it relies almost entirely on Mr. Mann's June 4, 2021 affidavit. However, on cross-examination, it became clear that Mr. Mann had little first-hand knowledge of the statements in his affidavit¹ and there were no documents to corroborate the General Partner's account of efforts it allegedly made to sell or finance the YSL Project.

¹ D. Mann Transcript, QQ. 132-16, 138-140, 143, 147, 152-153, 163-164, 167-169, 191, 207, 273-276, 297-300.282.

4. Mr. Mann's evidence contradicted the General Partner's assertion that "the GP has undertaken extensive efforts to find a value-maximizing transaction for the sale of the YSL Project."² He admitted that the General Partner had no exclusivity agreement with Concord yet, even after Concord allegedly said it may not proceed with a transaction, the General Partner did nothing to explore whether there were alternative transactions available:

304 Q. Do you agree with me, sir, that given the grim outlook for the November 2020 agreement by February 2021, it made sense to be exploring alternatives?

A. Yes.

305 Q. Okay. But you just don't know whether that happened or not?

A. Correct.

306 Q. All right. And similarly, if we go into March 2021, would your evidence be the same; you don't know, in March 2021, whether or not there were alternative transactions being discussed with Concord?

A. I'm not aware of any.

307 Q. Okay. And similarly, are you aware of any efforts by the general partner in March 2021 to solicit or canvas other interests in the YSL project from developers other than Concord?

A. I'm not aware.³

5. The assertions at paragraph 58 of the General Partner's factum that there were only two developers showing "any material interest", that there were no alternatives to Concord and that the Proposal "would result in the best outcome in the circumstances" are all conclusory. It has failed to provide any evidence to support these assertions and has withheld relevant evidence by refusing to produce Dan Casey for examination in response to a summons.

² General Partner's Factum, para. 13.

³ D. Mann Transcript, QQ. 304-307.

6. Contrary to the General Partner's bare assertions in its factum, the evidence shows that it did very little to pursue a market value transaction for the YSL Project. It allowed the Empire offer to expire when it tried to gain a priority for itself over the Limited Partners' interests as a condition of their approval and refused to disclose the agreement to the Limited Partners. It then did nothing further from October 2020 to April 2021 other than accede to Concord's demands and terms for a transaction while keeping the Limited Partners in the dark.

7. The Court should reject the alleged facts underpinning the General Partner's submissions.

B. General Partner Does Not Contest That the Concord Agreement Breaches the LP Agreement

8. The General Partner ignores the plain language in section 10.14(a) of the LP Agreement. It does not dispute that the LP Agreement first requires the unanimous approval of the Limited Partners before any action can be taken to sell or exchange the Partnership's business or assets. It does not contend that s. 10.14(a) was satisfied before it entered into the Proposal Sponsor Agreement with Concord and embarked on the BIA Proposal proceeding. The requirement in s. 10.14(a) and the absence of approval are fatal to the General Partner's position.

9. Instead of addressing s. 10.14(a), the General Partner makes two misleading submissions:

- (a) That the Limited Partners are seeking to obtain a veto over any sale of assets in any circumstance; and
- (b) That insolvency law applies and trumps private contract law because of the BIA proceeding.

10. The General Partner clearly misrepresents the Limited Partners' position. The Limited Partners are only seeking to enforce the rights they have pursuant to the LP Agreement not to acquire additional rights. The parties agreed that no one partner, including the General Partner, could take steps to sell or exchange the Partnerships' business or assets unless all partners consented.

11. Section 10.14(a) prohibited the General Partner from agreeing to the Proposal Sponsor Agreement and then taking steps to implement it by filing the NOIs and Proposal. Ironically, it is the General Partner that is trying to acquire rights it never bargained for by entering into the agreement with Concord and attempting to cram down the Proposal on the Limited Partners.

12. The General Partner's exhortation to ignore the LP Agreement in favour of general insolvency law principles is circular and irrelevant. The General Partner does not cite any case law in support of the submission that it was entitled to ignore the clear rights and obligations in the LP Agreement.

13. The submission is flawed because it requires the Court to simply assume that the BIA proceeding was validly commenced. The Proposal Sponsor Agreement and the transfer to Concord were agreed to outside of any insolvency proceeding. The BIA proceeding only followed as a means to implement the General Partner's agreement with Concord. The General Partner skips over these facts and asks the Court to disregard the LP Agreement and the Limited Partners' rights as though the BIA proceeding is what led to the agreement with Concord and not the other way around.

14. Finally, the General Partner's reliance on *Peoples Departments Stores Inc.* and attempt to equate its duties to those of a director of a corporation has no legal basis. It cites no law for this novel argument. On the contrary, it is well-established that a general partner is a trustee and owes

fiduciary duties to its limited partners.⁴ Courts have unequivocally stated that a limited partnership “is a partnership and should be dealt with as such” and “should not be equated to corporations”.⁵ The General Partner’s efforts to analogize the two to justify its conduct is without merit.

C. General Partner Admits the LP Agreement Applies to an Insolvency Scenario

15. At paragraph 25 and 27, the General Partner acknowledges that the LP Agreement applies and sets out the parties’ rights and obligations in an insolvency scenario. The Limited Partners agree.

16. However, the General Partner then selectively interprets the LP Agreement, ignoring those terms that do not fit its position. The approval rights in s. 10.14(a) apply. Furthermore, the dissolution terms in Article 12, including the orderly sales process designed to maximize value, establish the partners’ expectations of what was to occur in a scenario where the Partnership became insolvent.

D. General Partner Had Automatically Ceased to Have Authority

17. The General Partner’s misconduct, giving rise to its breaches of fiduciary duty also meets the criteria for wilful misconduct and gross negligence. These include:

- (a) Acting in its own self-interest by only pursuing transactions that would result in a payment to Cresford in priority to the Limited Partners;

⁴ *Tridelta Financial Partners Inc. v. Zephyr Abl*, Brief of Authorities (“**BOA**”) Tab 1 at para. 43. *Merklinger v. Jantree No. 3 Limited Partnership & Snapdragon Ltd.*, 2004 CanLII 54553 (ON SC) BOA Tab 8 at paras. 103-109, 113.

⁵ *Kingsberry Properties Ltd. Partnership, Re*, 1997 CarswellOnt 5009 at paras. 4-5, Applicants Reply Book of Authorities (“**RBOA**”), Tab 1.

- (b) Wilfully breaching the Disclosure Order by keeping the earlier sale of Partnership property to Concord and its ongoing discussions leading up to the Proposal Sponsor Agreement hidden from the Limited Partners;
- (c) Failing to take any steps to explore or solicit alternative transactions to a deal with Concord; and
- (d) Deliberately failing to comply with the approval requirements in the LP Agreement and ignoring the Limited Partners' objections.

18. In addition, the General Partner misconceives the basis for its automatic removal pursuant to section 11.2(vii). When it consented to a receiver over the property of its nominee, YSL Residences, and the Partnership, on July 9, 2020,⁶ s. 11.2(b)(vii) was triggered.

19. The fact that the General Partner was not named in Timbercreek's receivership application does not mean that section 11.2(b) does not apply. The provisions only require that the General Partner's properties be subject of a receivership proceeding.

20. Because the status of a general partner is the same as that of a partner in an ordinary partnership, the assets and properties held by the General Partner (which are effectively the Partnership's assets) were subject to the receivership order it consented to. In *Kingsberry Properties Ltd. Partnership, Re*, Justice Farley confirmed that a receiving order against a limited partnership applied against and bound the general partner but not the limited partners.⁷ His decision was affirmed by the Court of Appeal.⁸

⁶ Consent regarding the appointment of a receiver, Li Affidavit, Ex. V.

⁷ *Kingsberry Properties Ltd. Partnership, Re*, 1997 CarswellOnt 5009 at paras. 12 and 15, RBOA, Tab 1.

⁸ *Kingsberry Properties (Bankruptcy of)*, 1998 CanLII 7120 (C.A.), RBOA, Tab 1. See also, *Ornge Global GP Inc. (Re)*, 2013 ONSC 4518, RBOA, Tab 2.

21. Therefore, the General Partner's technical argument that it was not personally named in the receivership order or application is of no moment. The effect of its consent to a receivership over YSL Residences and the Partnership's properties was the same as if it had consented to a receivership over itself.

22. As a result, the General Partner was automatically removed by operation of s. 11.2(b) of the LP Agreement either on July 9, 2020 (when it consented to the receivership order) or by December 27, 2020 (60 days after Timbercreek brought its receivership application).

23. Furthermore, the General Partner's submissions as to the effect of its removal, at paragraphs 51-52 of its factum, are wrong.

24. The LP Agreement addresses what happens in the event the General Partner is removed pursuant to section 11.2. Section 12.1(b)(i) states that the Partnership will be dissolved unless a replacement General Partner is appointed within 90 days. The General Partner's argument that removing it would mean the Limited Partners must be the directing minds of the partnership is another example of it ignoring the terms of the LP Agreement.

25. Article 12 of the LP Agreement sets out the parties' agreement with respect to the dissolution of the Partnership. An administrator is appointed pursuant to section 12.2. Section 12.3 sets out the process for the administrator liquidating the Partnership's assets. It provides:

The administrator of the Partnership shall proceed diligently to wind up the affairs of the Partnership and all assets of the Partnership shall be disposed of in an orderly fashion having regard to prevailing market conditions. In selling the Partnership's assets, the administrator shall take all reasonable steps to locate potential purchasers in order to accomplish the sale at the highest attainable price. A reasonable time shall be allowed

for the orderly liquidation of the assets of the Partnership so as to minimize any losses.⁹

26. This process is consistent with a court supervised sales process led by a receiver. A dissolution process was imposed in *Aquaculture Component Plant V Limited* when the assignment of the partnerships into bankruptcy was annulled. In that case, the limited partnerships were dissolved and the assets of the partnership distributed in accordance with the *Nova Scotia Limited Partnerships Act*.¹⁰

E. Proposal Sponsor Agreement is Unenforceable and Proposal Should be Annulled

27. The appropriate relief for a breach of fiduciary duty is restitutionary. Where a general partner breaches its fiduciary duties and acts without authority, the appropriate relief is to declare any agreement entered into without authority to be unenforceable against the partnership. The beneficiaries, in this case the Limited Partners, are entitled to be placed back in as good a position as they would have been in had the breach not occurred.¹¹

28. In this case, there are several bases for invalidating the General Partner's agreement with Concord that gave rise to the BIA proceeding. Restitution means returning the Partnership to the position it was in in early April, before the Proposal Sponsor Agreement with Concord and subsequent filings of the NOIs and Proposal.

29. Both Cresford and Concord proceeded with full knowledge of the Limited Partners' objections and despite notice that no steps should have been taken to consummate and implement their agreement before the Limited Partners' challenge was heard.¹² They assumed the risk of the

⁹ S. 12.3 of LP Agreement.

¹⁰ *Aquaculture component Plant V Limited Partnership (Re)*, 1995 CanLII 9324 (NS SC), BOA Tab 2 at pp. 2-3.

¹¹ *Hodgkinson v. Simms* (1994), 97 B.C.L.R. (2d) 1 (S.C.C.), RBOA, Tab 3.

¹² Exhibit "KK" and "LL" of the Szeto Affidavit, Tab 2KK and 2LL.

Proposal Sponsor Agreement being unenforceable and cannot complain about any inconvenience they may incur.

30. Courts have declared agreements void and unenforceable in similar situations where a fiduciary entered into them without authority and in breach of their duties.¹³

31. Contrary to paragraph 62 of the General Partner's factum, section 181(1) of the BIA supports the relief sought by the Limited Partner.¹⁴ By virtue of section 66(1) of the BIA, it provides that the Court has the authority to annul the Proposal.¹⁵ While acts taken in the interim, such as the disclaimer of certain condo unit purchaser contracts may remain valid, the Proposal itself is annulled and cannot proceed. The disclaimers arguably increase the value of the YSL Project and will have a positive impact on the ability to generate greater value through a supervised sales process.

32. Annulment of the Proposal is the logical and necessary consequence of the Proposal Sponsor Agreement being declared invalid due to the General Partner's lack of authority to enter into the agreement.

33. The General Partner's speculation about the outcome of a sales process is contradicted by the evidence of prior offers and the greater value for the YSL Project presented in those offers. The significant flaws with the Proposal and the reasons to doubt whether it represents fair value for the YSL Project are set out in the companion factum responding to the Proposal. Those submissions are adopted for purposes of the applications as well.

¹³ *Strata Plan 1261 v. 360204 B.C. Ltd.*, 1996 CarswellBC 1008 at paras. 1, 10 and 44, RBOA, Tab 4. *Rio Tinto Canadian Investments Ltd. v. Bone*, 2001 CarswellOnt 3050 (C.A.) at para. 10, RBOA, Tab 5.


¹⁴ S. 181(1) of the BIA.

¹⁵ S. 66(1) of the BIA.

34. It is unjust for the General Partner to manufacture a BIA proceeding to circumvent the clear and unambiguous terms of the LP Agreement. It would be unfair for Concord to get the benefit of acquiring the YSL Project at a discount without having to bid for it in a competitive sales process. A receiver-led sales process is the only way of ensuring maximum value is realized for the YSL Project and offers the best likelihood of full recovery for the unsecured creditors and a return for the Limited Partners.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of June, 2021.

June 21, 2021


Lax O'Sullivan Lisus Gottlieb LLP
Thornton Grout Finnigan LLP

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

Shaun Laubman LSO#: 51068B

slaubman@lolg.ca

Tel: 416 360 8481

Sapna Thakker LSO#: 68601U

sthakker@lolg.ca

Tel: 416 642 3132

Lawyers for Applicants

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

D.J. Miller LSO# 34393P

Tel: (416) 304-0559

Email: djmiller@tgf.ca

Alexander Soutter LSO# 72403T

Tel: (416) 304-0595

Email: asoutter@tgf.ca

Lawyers for the Applicants

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Tridelta Financial Partners Inc. v Zephyr Abl Ser-A 4.875% Jan 25, 2020* ONSC 5211
2. *Merklinger v. Jantree No. 3 Limited Partnership & Snapdragon Ltd.*, 2004 CanLII 54553
(ON SC)
3. *Kingsberry Properties Ltd. Partnership, Re*, 1997 CarswellOnt 5009
4. *Ornge Global GP Inc. (Re)*, 2013 ONSC 4518
5. *Aquaculture component Plant V Limited Partnership (Re)*, 1995 CanLII 9324 (NS SC)
6. *Hodgkinson v. Simms* (1994), 97 B.C.L.R. (2d) 1 (S.C.C.)
7. *Strata Plan 1261 v. 360204 B.C. Ltd.*, 1996 CarswellBC 1008
8. *Rio Tinto Canadian Investments Ltd. v. Bone*, 2001 CarswellOnt 3050 (C.A.)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Act to apply

- **66 (1)** All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.

Power of court to annul bankruptcy

- **181 (1)** If, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.

2583019 ONTARIO INCORPORATED et al.

2504670 CANADA INC. et al.
Applicants

-and- 9615334 CANADA INC. et al.

-and- CRESFORD CAPITAL CORPORATION et al.
Respondents

Court File No.: CV-21-00661530-00CL

Court File No.21-00661386-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT TORONTO**

JOINT REPLY FACTUM OF THE APPLICANT

LAX O'SULLIVAN LISUS GOTTLIEB LLP

Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Shaun Laubman LSO#: 51068B

slaubman@lolg.ca

Tel: 416 360 8481

Sapna Thakker LSO#: 68601U

sthakker@lolg.ca

Tel: 416 642 3132

THORNTON GROUT FINNIGAN LLP

TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200
Toronto, ON M5K 1K7

D.J. Miller LSO# 34393P

Tel: (416) 304-0559

Email: djmiller@tgf.ca

Alexander Soutter LSO# 72403T

Tel: (416) 304-0595

Email: asoutter@tgf.ca