

# KEEPING CURRENT

Sept 13, 2022

## How Do I Lend to LPs & REITs?

By Zev Zlotnick

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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Loan transactions commonly involve non-corporate entities such as limited partnerships and Real Estate Investment Trusts (“**REITs**”). It is important for lenders to understand how they should modify their practices and procedures when dealing with such entities.

Limited partnerships typically consist of a general partner (although there can be multiple general partners) and one or more limited partners. Business is carried on through the general partner who is liable for all of the obligations of the limited partnership. Limited partners, on the other hand, are typically only liable for the amount of money they contributed to the limited partnership. A lender to a limited partnership will therefore have recourse against the assets of the limited partnership, but not against the limited partners themselves. To establish the general partner's authority to bind the limited partnership, the lender should review the limited partnership agreement to confirm that the general partner has the authority to borrow money on behalf of the limited partnership and to

mortgage the limited partnership's assets as security for any such loan. For security purposes, the lender should take security against both the general partner and the limited partnership with perfection of such security through registration under the *Personal Property Securities Act*.

REITs are a special type of real property trust created by a declaration of trust pursuant to which a trustee agrees to hold assets for the benefit of unitholders as the beneficiaries of the trust. A lender to a REIT or a lender that is taking a guarantee from a REIT for a loan will need to be satisfied that: (i) the trust has been validly created and continues to exist; (ii) the trust declaration remains in full force and effect, unamended, and the loan or guarantee is not precluded by the terms of the trust declaration; (iii) the trustees have been duly appointed; and (iv) the loan or the guarantee has been duly authorized by the trustees. The lender should take security against the REIT with perfection of such security through registration under the *Personal Property Securities Act*. REITs will typically

include a provision stating that its unitholders are expressly not liable under the terms of the loan and that recourse is limited to the REIT and its assets.

As an aside, limited partnerships and REITs, often structure their business affairs so that a separate corporation (a “**nominee**”) holds registered title to real property as bare trustee for the limited partnerships or REIT beneficial owner. We have discussed the nominee/registered ownership versus beneficial ownership in real property dynamic previously. Briefly, when dealing with a nominee, a lender should obtain a representation and warranty with respect to the beneficial ownership of the real property being charged as security for its loan and a charge of beneficial interest from the beneficial owner. Additionally, a lender should review the terms of the nominee agreement to determine the exact nature of the relationship and to ascertain which party is entitled to authorize and direct the nominee to execute and deliver the loan documentation.

### **Contact us**

If you are in need of legal advice, please do not hesitate to contact [Zev Zlotnick](mailto:Zev.Zlotnick), at 416.865.6601 or [zzlotnick@grllp.com](mailto:zzlotnick@grllp.com).

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