

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

**BRYTON CAPITAL CORP. GP LTD. and BAYVIEW CREEK
RESIDENCES INC. (formerly known as BRYTON CREEK
RESIDENCES INC.)**

Applicants (Appellants)

– and –

**CIM BAYVIEW CREEK INC., GRANT THORNTON LIMITED IN ITS CAPACITY AS
THE BANKRUPTCY TRUSTEE OF CIM BAYVIEW CREEK INC., BAYVIEW CREEK
(CIM) LP, 10502715 CANADA INC., MNP LTD. IN ITS CAPACITY AS THE
BANKRUPTCY TRUSTEE OF BAYVIEW CREEK (CIM) LP AND 10502715 CANADA
INC., GR (CAN) INVESTMENT CO. LTD., MONEST FINANCIAL INC., TRACY HUI,
JOJO HUI, CARDINAL ADVISORY LTD., and THE CORPORATION OF THE CITY
OF RICHMOND HILL**

Respondents (Respondents)

FACTUM OF THE RESPONDENTS

**(GRANT THORNTON LIMITED IN ITS CAPACITY AS FORMER PROPOSAL TRUSTEE AND
CURRENT BANKRUPTCY TRUSTEE OF CIM BAYVIEW CREEK INC.)**

August 10, 2022

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TO THE SERVICE LIST

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PART I - OVERVIEW

1. This Factum is filed on behalf of Grant Thornton Limited (“**GTL**”), in its former capacity as Proposal Trustee (in such capacity, the “**Proposal Trustee**”) and current capacity as Trustee in Bankruptcy (the “**Trustee**”) of CIM Bayview Creek Inc. (“**CIM Bayview**”). GTL only files this factum out of an abundance of caution given that the narrow scope of this appeal does not appear to practically affect the interests of GTL, except to the extent that the Appellants, Bryton Capital Corp. GP Ltd. (“**Bryton Capital**”) and Bayview Creek Residences Inc. (formerly known as Bryton Creek Residences Inc.) (“**Bryton Creek**”), are attempting to block any recourse by GTL (as Trustee) or creditors to sections 95 and 96 of the *Bankruptcy and Insolvency Act* (“**BIA**”) in relation to an option (the “**Option**”) that CIM Bayview granted to the Appellants to purchase a property known municipally as 10747 Bayview Avenue, Richmond Hill, Ontario (the “**Property**”).

2. This appeal only concerns several narrow aspects of one of two applications that Mr. Justice Cavanaugh heard on August 11, 2021. At that time, Justice Cavanaugh heard and granted a receivership application brought by DUCA Financial Services Credit Union Ltd. The receivership order has not been appealed. Justice Cavanaugh also heard an application brought by the Appellants for wide-ranging relief, including an order approving the sale of, and vesting title to the Property in, Bryton Creek free and clear of all other claims (the “**Vesting Order Request**”). Justice Cavanaugh dismissed the Vesting Order Request, but that portion of his decision has not been appealed to this court.

3. If the Vesting Order Request had been granted and title to the Property had been transferred to Bryton Creek free and clear of all charges and claims, GTL’s right to receive

payment of its fees (and the fees of its counsel), which were to have been paid out of interim funding (the “**DIP Loan**”) approved in the BIA proposal proceedings of CIM Bayview (the “**Proposal Proceedings**”) secured by a debtor-in-possession funding charge (the “**DIP Charge**”), would have been frustrated. However, the Appellants did not appeal the portion of Justice Cavanaugh’s order that denied the Appellants’ request to vest all claims (including the DIP Charge) out of the Property.

4. The actual, narrower scope of this appeal does not appear to materially affect GTL’s interests. On appeal, the Appellants are (among other things) seeking to preclude the Respondents in Appeal from challenging the validity of the Option or from setting aside the Option pursuant to sections 95 and 96 of the BIA. Although GTL as bankruptcy trustee of CIM Bayview has the right to pursue relief under sections 95 and 96 of the BIA relating to the Option, it does not intend to pursue such relief itself. Instead, GTL has advised that it will assign its rights (pursuant to section 38 of the BIA) to pursue such relief to interested creditors, some of whom are co-Respondents in Appeal (such as GR (CAN) Investment Co. Ltd.). The factum of the Debentureholders (who are also Respondents in Appeal) addresses the Appellants’ request to pre-emptively block any ability of creditors to seek relief under sections 95 and 96 of the BIA, and GTL simply relies on such submissions.

PART II - FACTS

5. GTL repeats and relies on the facts outlined in the Debentureholders’ Responding Factum, as supplemented by the following. In their application on the Commercial List, the Appellants sought to vest the Property in Bryton Creek free and clear of all debts and

charges, which would have caused the discharge of the DIP Charge, which secured a \$200,000 DIP Loan to CIM Bayview that was approved by order of Justice Cavanagh dated November 27, 2020 (the “**November 27 Order**”) in the Proposal Proceedings, in respect of which GTL was appointed Proposal Trustee.

6. In the court below, GTL only opposed the granting of any order that would interfere with the right of GTL and its counsel to obtain the benefit of the DIP Loan and DIP Charge, so that they could receive payment of their professional fees.

7. The DIP Loan has been fully committed by the Respondent in Appeal, Cardinal Advisory Ltd. in its capacity as provider of interim financing (the “**DIP Lender**”), to CIM Bayview. The November 27 Order that approved the DIP Loan and DIP Charge remains in effect and has not been stayed or overturned.

8. The purpose of the DIP Loan was, among other things, to fund the fees of the Proposal Trustee and its counsel for work done in the Proposal Proceedings up to a motion that was heard on December 21, 2020 (the “**December 21 Motion**”).¹

9. On December 22, 2020, the court extended the time for CIM Bayview to make a proposal to February 5, 2021. CIM Bayview did not file a proposal or seek an extension of time on or before February 5, 2021 and was accordingly deemed bankrupt as of February 8, 2021.² Upon the occurrence of the bankruptcy, GTL became Trustee of CIM Bayview.

¹ Affidavit of Jeremy Bornstein sworn July 12, 2021 (“**Bornstein Affidavit**”), para 3, Trustee’s Respondents’ Compendium (“**TRC**”), Tab 1 at 2.

² Bornstein Affidavit, paras 6-7, TRC, Tab 1 at 3.

10. The Proposal Trustee and its counsel relied on the availability of the DIP Loan and DIP Charge when they incurred fees to prepare for and attend the December 21 Motion and perform other necessary work in the NOI Proceeding.³ It is obvious from the terms of the November 27 Order that the intention behind the DIP Charge was for it to be used for purposes of funding the Administrative Professionals' (as defined in the November 27 Order) fees and disbursements, which would permit GTL and its counsel to be paid in full, to the extent such fees and disbursements did not exceed the DIP Charge.⁴

11. The Proposal Trustee brought a motion to seek approval of its fees and the fees of its counsel in respect of the entire period of the NOI Proceeding (the "**Fee Approval Motion**"), which Justice Cavanaugh heard on May 25, 2021. On December 21, 2021, Justice Cavanaugh released his decision from the Fee Approval Motion, which approved the fees and disbursements of the Proposal Trustee and its counsel in an aggregate amount that exceeds the authorized DIP Loan amount of \$200,000. The court approved

- (a) fees of the Proposal Trustee in the amount of \$56,500 (inclusive of HST) and its disbursements in the amount of \$96.39 and
- (b) fees of counsel to the Proposal Trustee in the amount of \$158,200 (inclusive of HST) and its disbursements in the amount of \$4,475.03.⁵

³ Bornstein Affidavit, para 8, TRC, Tab 1 at 3.

⁴ November 27, 2020 Endorsement, para 5, Appellants' Appeal Book and Compendium, Tab 6 at 68.

⁵ Order (Approval of Proposal Trustee's Fees) dated December 21, 2021, paras 1-2, TRC, Tab 2 at 68.

12. The November 27 Order is not subject to an extant appeal, nor has it been stayed. Although Bryton initially served a Notice of Appeal and Notice of Motion for Leave to Appeal in respect of the November 27 Order, it has taken no steps to proceed with either an appeal or a motion for leave to appeal and the deadline for perfecting the appeal or filing the leave motion materials has long passed.⁶ Further, no parties have ever agreed to any extensions of time to proceed with an appeal or motion for leave to appeal.

13. The DIP Lender and CIM Bayview agree that the DIP Loan is committed and outstanding and the proceeds from it remain available to pay the fees of the Proposal Trustee and its counsel.

14. However, since the Appellants do not appear to be appealing the portion of Justice Cavanaugh's decision that denied a vesting order in respect of the Property, there is no need to make submissions about GTL's entitlement to access the DIP Loan, secured by the DIP Charge.

PART III - ISSUE AND ARGUMENT

15. GTL relies on the statement of issues, law and authorities set out in the Responding Facta of the Debentureholders and GR (Can) Investment Co. Ltd. and

⁶ For example, Rule 61.09 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 specifies that an appeal shall be perfected within certain time periods, which in the case of an appeal of the November 27 Order expired on January 6, 2020 (30 days after Bryton filed the notice of appeal). The same period is provided for under Rule 61.03(2), which requires that the moving party on a motion for leave to appeal file a motion record, factum and transcripts "within 30 days after filing of the notice of motion for leave to appeal."

Monest Financial Inc., as supplemented by the following.

16. The sole issue that affects GTL on this appeal is whether the Respondents should be precluded from challenging the validity of the Option or setting it aside pursuant to sections 95 and 96 of the BIA.

17. Upon CIM Bayview's deemed bankruptcy on February 8, 2021 and the appointment of GTL as Trustee, the Trustee obtained the rights provided for under sections 95 and 96 of the BIA. Justice Cavanagh's Order of January 12, 2021 expressly stated that such relief "may not be pursued until [CIM Bayview] makes a proposal or becomes bankrupt, and, accordingly, this order does not preclude the bankruptcy trustee or any other person from pursuing relief under s. 95 or 96 of the BIA."⁷

18. Sections 95 and 96 of the BIA allow a trustee, following a proposal or bankruptcy, to challenge preferential transfers and transactions at undervalue made by a debtor during the applicable lookback periods for the benefit of the debtor's estate ("**Section 95 and 96 Claims**"). For example, under section 96 of the BIA, the Trustee could bring an application to seek a determination that the Option is void as against GTL as Trustee.

19. Although the Trustee does not intend to pursue the Section 95 and 96 Claims, it is willing to assign such claims to other interested creditors pursuant to the mechanism for such transfers provided for in section 38 of the BIA. Since the creditors most likely to seek to obtain an assignment of any Section 95 and 96 Claims are before the Court on this appeal, the Trustee does not intend to make any submissions on such assignment or the

⁷ Order dated January 12, 2021, para 4, Debentureholders' Respondents' Compendium, Tab 4 at 129.

validity of the Section 95 and 96 Claims. Instead, GTL as Trustee relies on the submissions of those Respondents in Appeal that wish to obtain an assignment of the Section 95 and 96 Claims pursuant to section 38 of the BIA.

PART IV - RELIEF REQUESTED

20. GTL respectfully requests that the appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of August, 2022.



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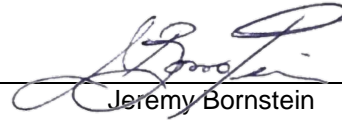
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CERTIFICATE

I estimate that 10 minutes will be needed to by oral argument of the Appeal. An Order under Sub-Rule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 10th day of August, 2022.



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Schedule “A”**TEXT OF STATUTES & REGULATIONS****Bankruptcy and Insolvency Act, RSC 1985, c B-3****Proceeding by creditor when trustee refuses to act**

38 (1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

Transfer to creditor

(2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.

...

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

...

Transfer at undervalue

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Meaning of *person who is privy*

(3) In this section, a *person who is privy* means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

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Court of Appeal File No. C70436

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