

COURT OF APPEAL FOR ONTARIO

BETWEEN:

**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 LLP 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)

**RESPONDING FACTUM OF THE RESPONDENTS GR (CAN) INVESTMENT CO. LTD. AND MONEST
FINANCIAL INC.**

25 July 2022

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COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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INC. (formerly known as BRYTON CREEK RESIDENCES INC.)**

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CREEK INC., BAYVIEW CREEK (CIM) LP, 10502715 CANADA INC.,
MNP LLP 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,
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THE CITY OF RICHMOND HILL**

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PART I – OVERVIEW

1. Bryton Capital Corp. GP Ltd. (“**Bryton Capital**”) and Bryton Creek Residence Inc. (“**Bryton Creek**” and, together with Bryton Capital, the “**Bryton Group**”) has appealed only part of Justice Cavanagh’s Order of 2 March 2022. This Appeal relates only to His Honour dismissal of the Bryton Group’s request for declaratory relief denying the creditors of CIM Bayview Creek Inc. (“**CIM Bayview**”) their right to pursue statutory remedies against The Bryton Group in advance of the limitation period for the creditors to initiate proceedings expiring.
2. The Appeal should be dismissed. Justice Cavanagh made no appealable error in denying the declaratory relief requested by The Bryton Group.

PART II – SUMMARY OF FACTS

3. GR (CAN) Investment Co. Ltd. (“**GR**”) and Monest Financial Inc. (“**Monest**”) adopt the summary of the facts set out in Part II of the Responding Factum of the Debenture-holders dated 22 July 2022.

PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES

4. GR and Monest adopt the submissions of the Debenture-holders in Part III of the Factum of their Factum dated 22 July 2022.
5. To obtain declaratory relief, an applicant must raise a legal or justiciable issue to be determined by the Court. [See [The Corporation of the Town of Oakville v. Clublink Corporation ULC, 2020 ONSC 887 \(CanLII\)](#), paras 29-31. See also [T.T.K.O., S.P.O. G.D.K., 2011 ONSC 6601 \(CanLII\)](#), para 43]
6. In this case, the only legal or justiciable issue—the legal right—that Justice Cavanagh was asked by the Bryton Group to determine related to whether, as a result of His Honour’s own Order made on 12 January

2021, claims by creditors of CIM Bayview challenging the option granted to Bryton Creek (the “**Option**”) relying on ss. 38 and. 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”), s. 248 of the *Business Corporations Act*, RSO 1990, c B.16 *Assignment and Preferences Act*, RSO 1990, c A.33 and the *Fraudulent Conveyances Act*, RSO 1990, c F.29 (the “**Creditor Remedies**”) are barred by the principle of *res judicata* or issue estoppel. **[Bryton Group Factum, para 57(b)]**

7. His Honour refused to make the declaration requested by the Bryton Group because he found that, on 12 January 2021, he had not made any finding(s) that would preclude the creditors of CIM Bayview from pursuing the Creditor Remedies—the doctrine of issue estoppel was not applicable. **[2 Mar 22 Endorsement, paras 49, 68, 69 and 74]** His Honour found:

In my January 21, 2021 endorsement, at para. 105, I wrote that “if CIM Bayview is deemed to have made an assignment of all its property for the general benefit of its creditors, ... the trustee in bankruptcy would then have statutory authority to seek orders under s. 95 and s. 96 of the BIA”. Any other causes of action to be acquired from Grant Thornton and M[MNP] under s. 38 of the BIA could not have been pursued until after the debtors became bankrupt. With respect to direct claims by the Third Mortgagees, these claims involve inter-creditor matters that relate to the claims to be obtained by assignment under s. 38 of the BIA....[2 Mar 22 Endorsement, para 69]

8. His Honour also recognized that, on 12 January 2021, he had made a declaration that ran directly contrary to the declaration sought by the Bryton Group:

THIS COURT DECLARES that the Proposal Trustee lacks statutory authority to seek orders under s. 95 and 96 of the BIA prior to the filing of a proposal or a bankruptcy and that the Proposal Trustee Request may not be pursued until the Debtor 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.** These claims are properly brought by way of an application or action. In the circumstances, I do not agree that it was incumbent on the Third Mortgagees to seek relief by way of a motion in December 2020, particularly in circumstances where the debtors were not bankrupt. (emphasis added) **[2 Mar 22 Endorsement, para 49]**

9. As noted by the Debenture-holders in their Factum dated 22 July 2022, Justice Cavanagh’s decision is entitled to a high degree of deference. His Honour understood what he was being asked to do by the

Bryton Group and understood what determination(s) he had made on 12 January 2021 *vis-à-vis* the Option and whether those determinations precluded CIM Bayview's creditors from pursuing the Creditor Remedies based on issues estoppel or *res judicata*.

10. His Honour's Orders of 3 December 2020 and 12 January 2021 cannot be interpreted as impacting the rights of CIM Bayview's creditors to pursue the Creditor Remedies.

11. With the exception of the right under section 96 of the BIA that is to be assigned to the creditors by the trustee of the bankruptcy estate of CIM Bayview (the "Trustee"), the Creditor Remedies had had not been asserted as at 12 January 2021 and involve claims as between creditors. **[2 Mar 22 Endorsement, para 69]** The CIM Bayview proposal proceeding dealt with claims and rights as between CIM Bayview and its creditors and not inter-creditor claims or rights—the proposal proceedings did not give rise to a *lis* between the creditors of CIM Bayview and Bryton Creek. **[See, for ex, [Stelco Inc., Re, 2006 CanLII 27117 \(ON SC\)](#), para 47 *aff'd*, 2007 ONCA 483 (CanLII)].**

12. The right of the Trustee to challenge the Option pursuant to s. 96 of the BIA had not yet arisen on 12 January 2021. **[2 Mar 22 Endorsement, para 69]**

13. Justice Cavanaugh determined only that the Option was valid and enforceable as between CIM Bayview and Bryton Creek. There has been no determination of the Trustee's rights under s. 96 of the BIA or the other Creditor Remedies.

14. The Bryton Group argues that Justice Cavanaugh should have made a declaration as to the substantive merits of the Creditor Remedies and find against the creditors of CIM Bayview based on the fact that they did not file fact evidence and seek to establish the substantive merits of the Creditor Remedies. **[Bryton Group Factum, para 81]** What Bryton Group argues it was requesting *vis-à-vis* the Creditor Remedies is not the proper subject of a declaration under s. 97 of the *Courts of Justice Act* and Justice

Cavanaugh was correct in finding that the Bryton Group's attempt to pre-emptively bar the claims of CIM Bayview's creditors was misconceived. **[2 Mar 22 Endorsement, para 61]**

15. While s. 97 of the *Courts of Justice Act* provides the Superior Court with the jurisdiction to make binding declarations whether or not any consequential relief is or could be claimed, a (potential) defendant or respondent cannot force a person with a claim to establish its factual and legal case prior to originating process being issued by simply seeking a declaration that the plaintiff/applicant has no cause of action. The *Rules of Civil Procedure* contemplate the summary determination of matters only after originating process has been issued. **[See *Rules of Civil Procedure*, RRO 1990, Reg 194, Rules 19-22]** As noted by this Court in *Maynes v. Allen-Vanguard Technologies Inc.*, s. 97 does not exist to permit a party to do an "end run" around the *Rules of Civil Procedure* let alone the prevent creditors from exercising their rights under the BIA, the FCA and the APA. **[[Maynes v. Allen-Vanguard Technologies Inc., 2011 ONCA 125 \(CanLII\)](#), para 44]**

PART IV – ORDER SOUGHT

16. GR and Monest respectfully request an Order dismissing the Appeal and awarding them costs in this Court and the Court below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of July, 2022.



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Financial Inc.

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CERTIFICATE

I estimate that 10 minutes will be needed for my 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 25th day of July 2022.



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SCHEDULE A
LIST OF AUTHORITIES

The Corporation of the Town of Oakville v. Clublink Corporation ULC, [2020 ONSC 887](#) (CanLII)

T.T.K.O., S.P.O. G.D.K., [2011 ONSC 6601](#) (CanLII)

Stelco Inc., Re, [2006 CanLII 27117](#) (ON SC)

Maynes v. Allen-Vanguard Technologies Inc., [2011 ONCA 125](#) (CanLII)

SCHEDULE B
TEXT OF STATUTES & REGULATIONS

Business Corporations Act, RSO 1990, c B.16

245 In this Part,

...

“complainant” means,

- (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
- (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
- (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

248 (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

Courts of Justice Act, RSO 1990, c C.43

97 The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

Rules of Civil Procedure, RRO 1990, Reg 194

19.01 (1) Where a defendant fails to deliver a statement of defence within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim, or of deemed service under subrule 16.01 (2), require the registrar to note the defendant in default.

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

21.01 (1) A party may move before a judge,

- (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
- (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

22.01 (1) Where the parties to a proceeding concur in stating a question of law in the form of a special case for the opinion of the court, any party may move before a judge to have the special case determined.

Fraudulent Conveyances Act, RSO 1990, c F.29

Amendments (0)2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

Assignments and Preferences Act, RSO 1990, c A.3

4 (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.

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

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.

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

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