COURT OF APPEAL FOR ONTARIO

CITATION: Bryton Capital Corp. GP Ltd. v.
CIM Bayview Creek Inc., 2023 ONCA 363
DATE: 20230519
DOCKET: C70436

van Rensburg, Sossin and Copeland JJ.A.

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 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)

Robert Choi, Hayden Trbizan, and Jonathan Gross, for the appellants

Adam M. Slavens, Jonathan Silver, Mike Noel, and Jonathan J. Barr, for the respondents Tracy Hui and Jojo Hui (The Enforcement Committee of the Debentureholders)

John N. Birch, for the respondent Grant Thornton Limited in its capacity as former Proposal Trustee and current Bankruptcy Trustee of CIM Bayview Creek Inc.

E. Patrick Shea, for the respondents GR (CAN) Investment Co. Ltd. and Monest Financial Inc.

Heard: November 25, 2022

On appeal from the order of Justice Peter J. Cavanagh of the Superior Court of Justice, dated March 2, 2022.

van Rensburg J.A.:

OVERVIEW

[1] This is an appeal of an order made by a judge of the Commercial List (the "application judge") during proceedings respecting the insolvency of CIM Bayview Creek Inc. ("CIM Bayview"), the registered owner of a residential development property in Richmond Hill, Ontario (the "Property"), and Bayview Creek (CIM) LP and 10502715 Canada Inc. (together, the "CIM Group").

[2] The dispute concerns an option to purchase the Property (the "Option") that was granted by CIM Bayview to Bayview Creek Residences Inc. (formerly Bryton Creek Residences Inc.), as part of a transaction with its second mortgagee Bryton Capital Corp. GP Ltd. (together, "Bryton"). Bryton seeks to exercise the Option and is opposed by other creditors of CIM Bayview, who stand to recover nothing if Bryton acquires the Property under the Option. A sale under the Option is also opposed by Grant Thornton Limited, CIM Bayview's trustee in bankruptcy.

[3] In earlier proceedings, while CIM Bayview was seeking to make a bankruptcy proposal, the application judge dismissed certain challenges to the Option, refused an order vesting the Option from title to the Property, and declared that Bryton was entitled to exercise the Option.

[4] Bryton subsequently brought an application in CIM Bayview's bankruptcy proceedings for an order: (1) directing and approving the sale of the Property by its private receiver; (2) vesting title to the Property free and clear of all encumbrances; (3) declaring that any proceedings related to the validity of the Option were *res judicata*; (4) in the alternative, declaring that the Option could not be challenged in proceedings under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "*FCA*"), the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33 (the "*APA*"), s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA* oppression remedy"), and ss. 95 and 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), together with an order dismissing those claims.

[5] The application judge dismissed Bryton's application on the basis that the requested vesting order and declaration could not extinguish other claims or insulate the Option from challenge, and that such claims were not barred by his earlier orders. Bryton appeals the application judge's order.

[6] Bryton contends that the application judge erred in dismissing its application: first, by rejecting its arguments that any proceedings to challenge the Option were *res judicata*; and second, by refusing to determine the challenges to the Option in the context of Bryton's application for a declaration. Bryton does not appeal the application judge's refusal to grant a vesting order in its favour.

[7] For the reasons that follow, I would dismiss the appeal. Briefly, I am not persuaded that the application judge erred in concluding that the validity of the Option was not *res judicata*. Nor is there any basis to interfere with the application judge's exercise of discretion not to grant a declaration foreclosing and dismissing challenges to the Option under the *FCA*, the *APA*, the *CBCA* oppression remedy, and ss. 95 and 96 of the *BIA*.

FACTS

[8] To understand the issues in this appeal, it is helpful to set out a chronology of what has transpired in the CIM Group insolvency proceedings, particularly in relation to the Option.

The Parties and the Option Agreement

[9] The registered owner of the Property is CIM Bayview. DUCA Financial Services Credit Union Ltd. ("DUCA") is first mortgagee, Bryton holds a second mortgage, and there is a third mortgage in favour of GR (CAN) Investment Co. Ltd. and Monest Financial Inc. (the "Third Mortgagees").

[10] In May 2019, Bryton and the CIM Group entered into a loan agreement for the principal amount of $20 million for a 12-month term, secured by a second mortgage on the Property. Completion of the mortgage transaction was subject to the execution of an agreement of purchase and sale ("APS") for the western parcel of the Property and the execution of an Option Agreement. The Option Agreement

granted Bryton an irrevocable option to purchase the entire property for $40,720,000 in the event the CIM Group defaulted on the APS and failed to transfer title to the western parcel by July 30, 2020.

[11] On June 10, 2020, DUCA demanded payment of its mortgage and issued a notice of intention ("NOI") to enforce its security. DUCA later issued a notice of sale under its mortgage.

[12] On July 1, 2020, Bryton's mortgage was amended to increase the principal amount to $22.3 million and to extend the maturity date to November 1, 2020. The amendment included a fee of $1 million plus HST for terminating the APS and amending the Option Agreement (the "Break Fee"). The Option Agreement was amended so that, if the mortgage was not repaid by October 31, 2020, Bryton would have the right to exercise the Option between November 1 and December 31, 2020. The purchase price to exercise the Option was increased to $41,720,000.

The Proceedings

[13] Action No. CV-20-647366-000 (the "Hui Action") was commenced against the CIM Group and affiliated parties in September 2020 by Tracy Hui and Jojo Hui, representing the interests of "The Enforcement Committee of the Debentureholders". The Debentureholders hold secured redeemable debentures under which they advanced funds to develop the Property. In their Notice of Action,

the Debentureholders claimed damages for breach of a debenture agreement by the CIM Group and affiliates in failing to pay interest payments and fraudulently or negligently misrepresenting the nature of the debentures. They obtained leave to file a certificate of pending litigation against the Property and a *Mareva* injunction, which, among other things, prohibited the sale or disposition of the Property. The matter was transferred to the Commercial List, and continued as Action No. CV-20-00648875-CL.

[14] On October 29, 2020, CIM Bayview filed an NOI to make a proposal under the *BIA*. On November 5, 2020, Bryton delivered to CIM Group an NOI to enforce its security.

[15] On November 23, 2020, CIM Bayview delivered a notice of motion in Court File No. 31-2684629 (the “NOI proposal proceedings”), seeking an order to approve a sale process for the Property and other relief, including the approval of the first report of Grant Thornton in its capacity as proposal trustee (the “NOI Trustee”), and an order to extend the time for filing a proposal to January 12, 2021.

[16] On November 24, 2020, Bryton delivered a notice of motion in the NOI proposal proceedings seeking an order, among other things, declaring that its Option was not to be disclaimed or resiliated by the NOI Trustee, and various orders that would permit it to exercise the Option and complete the purchase of the Property (the “Bryton Option Motion”).

[17] On November 27, 2020, Cavanagh J. (who had charge of the CIM Group insolvency proceedings on the Commercial List) issued an order in the Hui Action and the NOI proposal Proceedings that: scheduled Bryton's Option Motion for a full day hearing on December 21, 2020; extended the time for the exercise of the Option to January 19, 2021 and the closing date to February 19, 2021; approved debtor-in-possession ("DIP") financing secured by a first-ranked charge on CIM Bayview's assets; and, extended to December 22, 2020 the time for CIM Bayview to make a proposal to its creditors. Cavanagh J. identified in his endorsement what he regarded as a threshold question, whether Bryton had a legally valid option to purchase the Property. He refused to approve the sale process proposed by the NOI Trustee in part because the Bryton Option Motion was pending.

[18] On December 3, 2020, Cavanagh J. made a further order (the "Scheduling Order") that, among other things, directed that any motions regarding the validity of the Bryton Option and the lifting of the stay in CIM Bayview's insolvency proceedings to allow for the enforcement of the Option were to be heard at the Bryton Option Motion hearing. He also scheduled CIM Bayview's motion to extend the time to file a proposal for December 21, 2020. In the order, he included a detailed timetable for the delivery of materials and cross-examinations.

[19] On December 7, 2020, CIM Bayview issued a notice to disclaim the Option with the approval of the NOI Trustee, pursuant to s. 65.11 of the *BIA*. On December

11, 2020, Bryton delivered a notice to the CIM Group indicating its election to exercise the Option.

[20] On December 17, 2020, the NOI Trustee provided its third report which, among other things, offered an assessment of whether certain transactions between CIM Bayview and Bryton constituted a transfer at undervalue or a preference under ss. 95 and 96 of the *BIA*. The NOI Trustee concluded that the Break Fee constituted a preference: it occurred during the look-back period, while the company was insolvent, and had the effect of preferring Bryton over other creditors, which was presumed to be a preference in the absence of evidence to the contrary. The NOI Trustee also concluded that the Option constituted a transfer at undervalue: it was agreed to while the company was insolvent; it was purchased below fair market value; and, there was evidence to suggest the company intended to defeat or delay its creditors.

[21] Two motions regarding the validity of the Option were heard on December 21, 2020 in the NOI proposal proceedings. CIM Bayview moved for an order: (i) declaring that its notice to disclaim the Option was valid; (ii) declaring that the Option be vested out in furtherance of a sales process in the NOI insolvency proceeding; and (iii) declaring the Option violated various federal laws. The Bryton Option Motion was also heard, where Bryton requested: (i) an order that the Option not be disclaimed or resiliated; (ii) a declaration that Bryton not be restrained from exercising the Option; and (iii) an order directing CIM Group to comply with the

terms of the Option Agreement. Although the NOI Trustee did not bring a motion, it requested an order that: (i) declared the Option Agreement void as a transfer at undervalue; and (ii) declared the Break Fee void as a preference.

[22] On January 12, 2021, Cavanagh J. released his endorsement: see *In the Matter of the Notice of Intention to make a Proposal of CIM Bayview Creek Inc.*, 2021 ONSC 220, 86 C.B.R. (6th) 273. He concluded that: (a) CIM Bayview's disclaimer of the Option was not valid and effective; (b) it would not be appropriate to vest out Bryton's interest in the Property; (c) the Option Agreement did not include a criminal rate of interest or violate s. 8(1) of the *Interest Act*, R.S.C. 1985, c. I-15; (d) the NOI Trustee lacked statutory authority to seek orders under ss. 95 and 96 of the *BIA*, and therefore it was unnecessary to address the substantive merits of the submissions; and (e) Bryton's notice to exercise the Option on December 11 was subject to a stay of proceedings, but it was equitable to lift the stay against Bryton.

[23] Bryton exercised the Option on January 14, 2021 and requested that the CIM Group complete the APS. CIM Bayview subsequently declined to close, citing its appeal from the January 2021 decision. That appeal was ultimately dismissed for delay.

[24] On February 8, 2021, CIM Bayview, not having filed a *BIA* proposal, was deemed to have made an assignment in bankruptcy. Grant Thornton became bankruptcy trustee.

[25] On April 20, 2021, counsel for the Third Mortgagees wrote to Grant Thornton asking that it take proceedings against Bryton to challenge the transactions referenced in the NOI Trustee's third report, failing which they would obtain an order under s. 38 of the *BIA* permitting them to take such proceedings in their own names and at their own expense and risk.

[26] On May 4, 2021, Bayview Creek (CIM) LP and 10502715 Canada Inc. made assignments in bankruptcy. MNP Limited was named the bankruptcy trustee.

[27] On May 11, 2021, Bryton commenced the application that led to the order now under appeal (CV-21-00662099-00CL). The notice of application indicated that Bryton was requesting an order directing and approving the sale of the Property to it by its privately-appointed receiver and an order vesting title to the Property free and clear of all encumbrances. Grant Thornton advised the following day that it would not be seeking relief under ss. 95 and 96 of the *BIA* because it lacked funding, and that such relief would be pursued by creditors who required an order under s. 38 of the *BIA*.

[28] On June 1, 2021, Bryton took possession of the Property through its privately-appointed receiver.

[29] On June 2, 2021, one of the Third Mortgagees, on its own behalf and on behalf of other creditors of the CIM Group, commenced application proceedings (CV-21-00663238-0000) against Bryton, seeking to invalidate the Option under the *CBCA* oppression remedy, the *APA* and/or the *FCA* (the "Creditor Claims"). The notice stated that the application was "commenced to preserve the interests of the [a]pplicant and the other creditors of the [d]ebtors as a result of the pending expiry of the limitation period".

[30] The Debentureholders brought a s. 38 motion seeking to have the rights of Grant Thornton as bankruptcy trustee assigned to them to pursue, at their own expense and risk, claims against Bryton under ss. 95 and 96 of the *BIA*. At the oral hearing of this appeal, the Third Mortgagees indicated they had also brought a s. 38 motion to pursue *BIA* claims, which was "on hold" pending the determination of Bryton's application and the within appeal.

[31] On June 22, 2021, Bryton delivered an amended notice of application seeking the following additional grounds of relief: (i) an order declaring any proceedings commenced after December 21, 2020 relating to the validity of the Option barred by the principles of *res judicata* and abuse of process; (ii) in the alternative, an order declaring that no relief be granted to set aside the Option pursuant to the *FCA*, the *ACA*, or the *CBCA* oppression remedy; and (iii) an order declaring that any claims under ss. 95 and 96 of the *BIA* relating to the Option

would have no effect on the validity or enforceability of the Option, together with an order dismissing those claims.

THE DECISION UNDER APPEAL

[32] Bryton's application was opposed by the Third Mortgagees and the Debentureholders. The application judge dismissed Bryton's application. There were three issues raised by Bryton: first, whether Bryton was entitled to a vesting order so that it could receive title to the Property under the Option free and clear of all creditors' claims; second, whether Bryton was entitled to a declaratory order that proceedings relating to the validity of the Option were barred; and third, whether the creditors' application to challenge the Option was barred by the principle of *res judicata*.

[33] The application judge rejected Bryton's request for a vesting order. He reasoned that the Option is a private contract that does not provide for other claims to be extinguished upon its exercise, and that the rights of Bryton's private receiver did not extend beyond Bryton's contractual rights or include the ability to convey the Property "free and clear" of third-party interests. He also concluded that it would not be equitable at this stage of the bankruptcy proceedings to vest out the claims of the Debentureholders and Third Mortgagees, who had not been given a fair opportunity to pursue their claims under the *FCA*, the *APA*, and the *CBCA* oppression remedy. Further, he noted that extinguishing the *BIA* claims without

adjudication would conflict with his January 2021 order and the principles respecting vesting orders set out in the case law.

[34] The application judge rejected Bryton's request for declaratory relief for similar reasons. The Third Mortgagees and the Debentureholders had not yet commenced proceedings under ss. 95 and 96 of the *BIA*. There were no pleadings or evidence before the court with respect to the merits of such claims. The application judge observed that the jurisdiction conferred on the court by s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*"), to make binding declarations of right is not a free-standing provision that allows a judge to do whatever seems fair; rather, it allows the court to confirm legal rights that already exist. He concluded that Bryton's attempt to pre-emptively bar creditors' claims that had not yet been made was misconceived.

[35] The application judge also rejected Bryton's argument that claims challenging the validity of the Option were barred by cause of action or issue estoppel. With respect to cause of action estoppel, the application judge concluded that the December 2020 Scheduling Order did not bar subsequent claims from being brought. Additionally, at that time, the debtors were not bankrupt and so the creditors could not have acquired the causes of action that became vested in the bankruptcy trustee. With respect to issue estoppel, the application judge held that it would not be proper to decide whether subsequent claims were precluded by findings in his January 2021 endorsement until such claims were actually made.

[36] The application judge granted an application by DUCA (in Court File CV-21-00665128-00CL) that was heard together with Bryton's application, and opposed by Bryton, for a court-appointed receiver over the properties, assets and undertakings of the CIM Group, including the Property. This order is not appealed.

ISSUES ON APPEAL

[37] Bryton raises the following issues on appeal:

1. Did the application judge err in his approach to the principle of *res judicata*?
2. Did the application judge err by refusing to grant the declaration sought by Bryton?

ANALYSIS

Issue One: Did the application judge err in his approach to the principle of *res judicata*?

1. Positions of the Parties

[38] Bryton asserts that the application judge erred when he refused to find that challenges to the Option through the Creditor Claims and under ss. 95 and 96 of the *BIA* were *res judicata* – that they were precluded by both cause of action and issue estoppel. Bryton contends that there was no basis to refuse the relief, where the elements of both doctrines were met. The same parties were before the court at the December 21, 2020 hearing that resulted in the January 2021 decision where the application judge held the Option was valid. The parties were required

by the Scheduling Order to bring forward for determination at the December 2020 hearing any challenges to the validity of the Option. The parties' failure to do so precludes them from bringing such challenges in subsequent proceedings.

[39] Bryton also contends that the application judge erred in failing to find that issue estoppel applies to preclude the Creditor Claims and the ss. 95 and 96 *BIA* claims. Bryton relies on the application judge's determination in his January 2021 decision that Bryton did "not act unfairly, oppressively, or unconscionably in negotiating the Option", as a finding that bars any further challenge to the Option.

[40] The respondents contend that there was no error in the application judge's dismissal of Bryton's arguments respecting cause of action and issue estoppel. First, the preconditions for the doctrine were not met. The claims and issues before the application judge in the earlier proceeding were not the same as those raised by the Creditor Claims. In addition, the claims under ss. 95 and 96 of the *BIA* could only be pursued after CIM Bayview's bankruptcy, as Bryton itself had expressly argued at the earlier hearing. Second, the application judge's January 2021 decision did not substantively determine the merits of the Creditor Claims or the ss. 95 and 96 *BIA* claims, and expressly left these claims to be pursued. Finally, the application judge's finding that Bryton did not act unfairly, oppressively, or unconscionably was made in the context of an *Interest Act* argument; he did not determine whether the Option was a *bona fide* transaction for all purposes.

2. The Relevant Legal Principles

[41] The doctrine of *res judicata* is based on the principle that "[a]n issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner", and that "[d]uplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided": *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18.

[42] *Res judicata* has two main branches: cause of action estoppel and issue estoppel. Cause of action estoppel prohibits a litigant from bringing an action against another party when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction, and also prevents a party from re-litigating a claim that could have been raised in an earlier proceeding: *Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company)*, 2021 ONCA 141, 457 D.L.R. (4th) 530, at para. 31. For cause of action estoppel to operate "it is not enough that the cause of action could have been argued in the prior proceeding. It is also necessary that the cause of action properly belonged to the subject of the prior action and should have been brought forward in that action": *Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759, at para. 50, leave to appeal refused, [2019] S.C.C.A. No. 284.

[43] Issue estoppel is narrower than cause of action estoppel as "[i]t applies to prohibit the re-litigation of an issue that has already been decided in an earlier proceeding, even where the cause of action is different in the two proceedings": *Dosen*, at para. 32. For issue estoppel to operate, there are three conditions: (1) the same issue has been decided in an earlier proceeding; (2) the prior judicial decision was final; and (3) the parties to the earlier and subsequent proceedings are the same: *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115, 160 O.R. (3d) 173, at para. 79. Even where the three requirements for issue estoppel are met, the courts retain a residual discretion to refuse to apply the doctrine: *Fresco*, at para. 81.

[44] An appellate court owes deference to a judge's application of the tests for cause of action and issue estoppel. Intervention is only warranted if the judge "misdirected himself, came to a decision that is so clearly wrong as to be an injustice, or gave no or insufficient weight to relevant considerations": *Catalyst Capital*, at para. 24.

3. Discussion

(1) Cause of Action Estoppel

[45] On appeal, Bryton repeats the same arguments about cause of action estoppel that it advanced at first instance. In its view, the application judge determined that the Option was valid in his January 2021 decision. In addition,

pursuant to the Scheduling Order, the respondents were required to make any claims challenging the Option at the December 21, 2020 hearing.

[46] In rejecting Bryton's argument, the application judge noted that, at the time of the December 21, 2020 hearing, the Creditor Claims that the Third Mortgagees and other supporting creditors sought to acquire through a s. 38 motion could not have been asserted until the debtors were bankrupt. As for the ss. 95 and 96 *BIA* claims, the application judge referred to his January 2021 decision, in which he stated that there was no statutory authority to pursue such claims until CIM Bayview was deemed to have made an assignment in bankruptcy. Similarly, the Third Mortgagees' direct claims related to the claims to be obtained by way of a s. 38 motion, and such claims were to be properly brought by way of an application or action. The Scheduling Order had only required "all motions" relating to the validity of the Option to be heard at the hearing. He therefore concluded, at para. 69, that "it was [not] incumbent on the Third Mortgagees to seek relief by way of a motion in December 2020".

[47] As for Bryton's argument that the Creditor Claims should have been before the court in compliance with the Scheduling Order, the application judge referred to the fact that, at the hearing of Bryton's Option Motion on December 21, 2020, the NOI Trustee had attempted to bring forward a challenge under ss. 95 and 96 of the *BIA*, and he had given effect to Bryton's arguments. In his January 2021 decision, he concluded that, given that no proposal had been filed, the NOI Trustee

did not have statutory authority to commence ss. 95 and 96 *BIA* claims and had, in any event, only asked for relief in its factum "at a time when [Bryton] was not able to effectively respond": at para. 104. Indeed, because of his conclusion that the NOI Trustee lacked authority to bring the challenges at the time, and that no motion or application was properly brought, it was "neither necessary nor appropriate for [him] to address the NOI Trustee's substantive submissions": at paras. 105-106.

[48] I see no error in the application judge's approach to cause of action estoppel and to his conclusions.

[49] First, there can be no question that the application judge's January 2021 decision made no determination of the merits of any ss. 95 and 96 *BIA* claims. The application judge accepted Bryton's argument in his January 2021 decision that the NOI Trustee lacked the statutory authority to bring such claims. He also expressly refused to make any substantive determination regarding the claims. Moreover, his January 2021 order explicitly preserved these causes of action, stating that ss. 95 and 96 *BIA* claims "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*".

[50] Second, Bryton's arguments about the application of cause of action estoppel to the Creditor Claims that the Third Mortgagees seek to bring on behalf of other creditors fail for a similar reason. The application judge noted that the creditors could not have acquired the right to bring these causes of action via a s. 38 motion until the debtors were bankrupt. Given that the December 21, 2020 hearing preceded the CIM Group's bankruptcies, these claims would have been premature in the prior proceeding.

[51] Third, with respect to the Third Mortgagees' direct claims, the application judge was entitled to reject the meaning that Bryton attributed to his Scheduling Order. The application judge noted that the direct claims were related to the claims requiring a s. 38 motion and would be properly brought by way of an application or an action. The Scheduling Order specified that "any motions or cross-motions" were to be heard at the December 21, 2020 hearing. The intention was not to require all challenges to the Option to be brought forward at that time. This interpretation was supported by the fact that, as noted above, some claims could only be brought after the debtors were bankrupt. To the extent the application judge was interpreting his own orders, his determinations are entitled to deference: see e.g., *Nortel Networks Corporation (Re)*, 2013 ONCA 518, at para. 4.

[52] In sum, the application judge was entitled to conclude that cause of action estoppel did not apply. The causes of action asserted did not "properly [belong] to

the subject of the prior [proceeding]" and were not causes of action that "should have been brought forward in that [proceeding]": *Catalyst Capital*, at para. 50.

(2) Issue Estoppel

[53] Bryton's argument with respect to issue estoppel is that the application judge erred in failing to give effect to specific findings that he made in his January 2021 decision. At para. 82 of that decision, he stated that Bryton did "not act unfairly, oppressively, or unconscionably in negotiating the Option Agreement or the Amended Option Agreement". These findings, according to Bryton, bar any contrary finding about the Option in subsequent proceedings, including the Creditor Claims and the ss. 95 and 96 *BIA* claims.

[54] Again, the application judge made no error. His findings did not determine that the Option was valid in every context. The application judge made this statement in his response to CIM Bayview's argument that the Option violated s. 8 of the *Interest Act*. In the same decision, he specifically provided for the ss. 95 and 96 *BIA* claims to be made in the future, and he did not say anything that would suggest that these findings would affect the merits of any future challenge to the Option. The application judge concluded that, until such claims were made, it would not be proper to determine whether issue estoppel applied to preclude the re-litigation of any issues decided in his January 2021 decision. This was an appropriate approach. Whether issue estoppel applies is a contextual

determination. It would be premature to attempt to decide whether and in what respect such findings might have a role to play in proceedings which had only recently been commenced and where the issues had not yet been joined.

(3) Conclusion on *Res Judicata*

[55] In conclusion, I disagree with Bryton that the application judge's January 2021 order permitting it to exercise the Option "blessed the transaction". While the application judge authorized Bryton to exercise the Option – an order that was required because Bryton's rights were stayed by the NOI proceedings – this simply meant that there was no legal impediment to Bryton proceeding. It did not determine that the Option was insulated from future claims, and it did not have the effect of invalidating or precluding such claims. In fact, the application judge explicitly contemplated future *BIA* claims being brought. The application judge, interpreting his own orders and with regard to the insolvency proceedings that he was supervising, fairly observed that it would have been premature to have brought forward the Creditor Claims and *BIA* claims at the December 21, 2020 hearing, and that this was not required by the Scheduling Order. There was no error in the application judge's approach to the principles of *res judicata*, and there is nothing to suggest that the assertion of these claims in the normal course of the insolvency proceedings, while under the supervision of the Commercial List, would be an abuse of process.

Issue Two: Did the application judge err in refusing to grant the declaration sought by Bryton?

1. Positions of the Parties

[56] Bryton contends that the application judge erred in refusing to grant a declaration in its favour to preclude or to dismiss the Creditor Claims and the ss. 95 and 96 *BIA* claims. Specifically, it asserts that the application judge erred in failing to assess the full test for declaratory relief set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 831, which requires: (a) that the question be real and not theoretical; (b) that the person raising it has a real interest in raising it; and (c) that there is an opposing party. Bryton contends that the test is satisfied in this case. There is a real dispute with the other parties about its exercise of the Option, and it has a genuine interest in resolving whether the Option is valid as it would provide finality and allow for the purchase and development of the Property. Bryton submits that the motion judge ultimately relied on an irrelevant consideration: whether there were other proceedings that were underway or could be brought to determine the Creditor Claims and ss. 95 and 96 *BIA* claims.

[57] Bryton also contends that the application judge erred in refusing to grant declaratory relief because the respondents failed to advance any evidence on the merits of such challenges. The application judge was compelled to issue a declaration because there were no substantive grounds to contest – the

responding parties were obliged to “put their best foot forward”, and they failed to file any evidence on the merits of their challenges.

[58] The respondents submit that, in seeking declaratory relief, Bryton was attempting by different means to obtain a vesting order, which was refused by the application judge because it would have been inequitable to vest out third-party claims before the creditors had a fair chance to advance them on their merits, and where the claims were being diligently advanced by the respondents. Bryton has not appealed the refusal of a vesting order. The respondents also argue that a declaration only allows the court to confirm legal rights that already exist. Because the third-party claims have not yet been adjudicated on their merits, Bryton has no “free and clear” rights for the court to recognize through a declaration.

[59] The respondents also submit that, in refusing declaratory relief, the application judge properly considered the relevant factor of whether there was a more appropriate process for determining the Creditor Claims and the ss. 95 and 96 *BIA* challenges. As the judge supervising the CIM Group’s insolvency proceedings, he was best placed to make this assessment, and his discretionary decision is entitled to deference.

2. The Relevant Legal Principles

[60] Bryton’s application was issued under r. 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the “*Rules*”). As indicated by r. 14.02, the

commencement of proceedings by way of an application is an exception to the general rule that proceedings are commenced as actions. Under r. 14.05(2) a proceeding may be commenced by application to the Superior Court if a statute so authorizes, and r. 14.05(3) authorizes a proceeding by application where authorized by the *Rules* or where the relief claimed falls within r. 14.05(3)(a)-(g.1). Under r. 14.05(3)(h), a proceeding may be brought by application in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial.

[61] Rule 14.05 is procedural in nature. It does not create jurisdiction, but assumes it, and provides a means by which to engage that jurisdiction: *Grain Farmers of Ontario v. Ontario (Ministry of the Environment and Climate Change)*, 2016 ONCA 283, 130 O.R. (3d) 675, at paras. 17-18. A court must have jurisdiction independent of r. 14.05 before it can consider the appropriate vehicle for bringing the matter forward, whether by application or action: *J.N. v. Durham Regional Police Service*, 2012 ONCA 428, 294 O.A.C. 56, at para. 16.

[62] A declaratory judgment is “a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs”: Harry Woolf & Jeremy Woolf, *Zamir & Woolf: The Declaratory Judgment*, 3rd ed. (London: Sweet & Maxwell, 2002), at p. 1. Declaratory relief, being restricted to a declaration of the parties’ rights, “is mainly sought in commercial matters to help parties define their rights” and contains no provision ordering any party to do anything or any form of

sanction: *Harrison v. Antonopoulos* (2002), 62 O.R. (3d) 463 (S.C.), at paras. 27-28.

[63] The Supreme Court recently described the criteria for declaratory relief in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99, at para. 60:

> Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought. [Citations omitted.]

This summary largely re-iterates the relevant criteria for declaratory relief outlined in *Solosky*.

[64] As indicated in *S.A.*, declaratory relief is discretionary. A non-exhaustive list of reasons why a court may deny declaratory relief includes “standing, delay, mootness, the availability of more appropriate procedures, the absence of affected parties, the theoretical or hypothetical nature of the issue, the inadequacy of the arguments presented, or the fact that the declaration sought is of merely academic importance and has no utility”: *Gook Country Estates Ltd. v. Quesnel (City of)*, 2008 BCCA 407, 73 R.P.R. (4th) 241, at para. 10. Delineating whether a specific procedure is amenable to declaratory relief is important, as the burden of proof, determination of urgency, and limitation of actions may differ in favour of the litigant who chooses the declaration over other routes to relief: Lazar Sarna, *The Law of*

Declaratory Judgments, 4th ed. (Toronto: Thomson Reuters, 2016), at pp. 52-53. There is a real risk that, "to permit the issuance of a declaration where another suitable remedy exists is to effectively erode the divisions between recourses and subsume all relevant writs and motions under the umbrella of the declaratory proceeding": Sarna, at p. 53.

3. Discussion

[65] In seeking declaratory relief before the application judge, Bryton made essentially the same arguments that it advances on appeal. Bryton submitted that it met all the requirements for a declaration under *Solosky*, that it had properly brought the application under r. 14.05(3)(e) because the relief claimed was the settling of the priority of interests or charges, and it relied on the court's jurisdiction under s. 97 of the *CJA* to "make binding declarations of right, whether or not any consequential relief is or could be claimed". Bryton argued that, in the absence of evidence by the respondents to support their claims, the application for declaratory relief should be granted.

[66] The application judge denied Bryton's request. He noted that the Third Mortgagees and the Debentureholders had not yet commenced proceedings under ss. 95 or 96 of the *BIA* and that there were no pleadings or evidence before him with respect to the merits of such claims: at para. 59. He stated that the court's jurisdiction under s. 97 of the *CJA* to make binding declarations of right was not a

"free-standing provision that allows a judge to do whatever seems fair", rather "[i]t allows the court to confirm legal rights that already exist": at para. 60. The application judge concluded that it was not open to Bryton to obtain an order barring claims that had not been made from being adjudicated on their merits simply because they sought declaratory relief in their application, and that Bryton's attempt to pre-emptively bar creditors' claims was "misconceived": at para. 61.

[67] I see no merit to this ground of appeal. Bryton's attempt to obtain declaratory relief dismissing and barring the Creditor Claims and the ss. 95 and 96 *BIA* claims through the vehicle of an application was defective on two bases: (1) it was not a proper use of the application procedure, and (2) it went beyond the proper scope of declaratory relief. Further, and in any event, the application judge did not consider an irrelevant factor and his exercise of discretion in refusing declaratory relief is entitled to deference.

[68] First, Bryton erred in its reliance on r. 14.05(3)(e) to initiate its application for declaratory relief. The rule provides that a proceeding can be brought by application where the relief claimed is "the declaration of an interest in or charge on land, including the nature and extent of the interest or charge … or the settling of the priority of interests or charges". In my view, the relief Bryton was seeking went beyond the scope of r. 14.05(3)(e). Bryton was not simply seeking a declaration of its rights; it was seeking a dismissal of the Creditor Claims and ss. 95 and 96 *BIA* claims, whether on their merits or on default of the respondents

bringing forward evidence to support the claims. Bryton could not simply rely on the failure of the respondents to join issue on the substance of the challenges it pre-emptively brought before the court. There had to be a basis for seeking the relief by way of application, and, in this case, there was none.

[69] Second, Bryton's requested declaration went beyond the normal scope of declaratory relief. It is obvious from the scope of relief sought by Bryton that it was seeking relief that extended far beyond a declaration of its rights: it sought to dismiss proceedings that were already underway and to bar any further proceedings to challenge the Option. In essence, it sought to use its application as a vehicle to require the respondents' claims to be brought forward for determination. As noted in Woolf & Woolf, at p. 196: "The usual justification for granting negative declarations, namely, the removal of uncertainty from legal relations, cannot apply to a case where the other party has already instituted proceedings for the determination of the matter in dispute, or to a case where such proceedings are imminent".

[70] Finally, and contrary to Bryton's submissions, the application judge did not consider an irrelevant factor when he referred to the existence of other proceedings to challenge the Option. The preconditions for granting declaratory relief set out in *Solosky* are necessary, but not sufficient. As previously indicated, declaratory relief is discretionary and can be refused based on a variety of considerations, including whether other available recourse is appropriate.

Declaratory relief should not be entertained if it results in “an abuse of process, an unwarranted side-stepping of delays and costs attached to other recourses, or a procedural or evidentiary prejudice against the other parties to the action”: Sarna, at p. 52.

[71] Bryton points to *T1T2 Limited Partnership v. Canada* (1995), 23 O.R. (3d) 81 (Gen. Div.), aff’d (1995), 24 O.R. (3d) 546 (C.A.), as authority that it may not always be appropriate to consider if there is an “alternative, more appropriate process or remedy” available. In that case, a judge granted declaratory relief to determine a liability issue and to expedite the determination of the case.

[72] Bryton’s reliance on *T1T2* is misplaced. First, significant factual and procedural differences exist between this case and *T1T2*. *T1T2* involved an action for breach of contract, where the plaintiffs sought declaratory relief and a reference to arbitration to determine damages. The plaintiffs brought a motion for summary judgment for a declaration that the defendant was in breach of contract. The motion judge accepted that, where the defendant had put forward no evidence in response, there was no genuine issue for trial with respect to this claim. In granting the declaration, the motion judge rejected the defendant’s argument that such relief should be denied because a “more appropriate” process or remedy was available – the commencement of a common law action for breach of contract and damages. Counsel had agreed that a reference to arbitration was not appropriate.

Accordingly, the court declared that the defendant was in breach, with an order that the issue of damages proceed to trial.

[73] In the present case, as the application judge observed, there was already a proceeding underway that had been commenced by a Third Mortgagee on behalf of CIM Bayview's creditors to challenge the Option under the *FCA*, the *ACA*, and the *CBCA* oppression remedy. And, motions under s. 38 of the *BIA* to obtain an assignment of the trustee's rights to assert claims under ss. 95 and 96 had been initiated. The application judge properly concluded that it was not appropriate for Bryton to bring these matters forward for determination on their merits prematurely and by way of an application for declaratory relief. Indeed, Bryton itself had successfully challenged the timing and propriety of the NOI Trustee's attempt to bring challenges to the Option under ss. 95 and 96 of the *BIA* before the court in December 2020, when the Bryton Option Motion was heard.

[74] Additionally, *T1T2* did not hold that the availability of an alternative, more appropriate process or remedy was an irrelevant factor when considering whether to grant declaratory relief. The motion judge simply concluded that, in the circumstances of that case, the plaintiff's summary judgment motion and a declaration that the defendant was in breach of contract were the appropriate process and remedy.

[75] I accept that Bryton had an interest in expediting the determination of the Creditor Claims and the ss. 95 and 96 *BIA* challenges. As its counsel forcefully asserted at the hearing of the appeal, any delay in its ability to exercise the Option would only increase Bryton's costs in relation to the exercise of the Option. This concern, however, was not sufficient to justify Bryton's use of the application procedure to bar or dismiss the creditors' claims. There were other methods available to Bryton to expedite the adjudication of the creditors' claims, such as by seeking a further scheduling order or directions from the application judge who had charge of the CIM Group insolvency proceedings, to set a timetable for the delivery of materials and the determination of the issues, or otherwise to keep the proceedings on track.

[76] As a final comment, I note that the decision under appeal was made by a judge who was seized with particular insolvency proceedings. His decision not to exercise his discretion to permit the matter to be determined in the context of Bryton's standalone application proceeding was informed by his knowledge and understanding of the parties' positions, their objectives, and the history of the matter. Moreover, it was appropriate for the application judge to consider whether it would be fair to determine the issues in the context of Bryton's declaratory relief application.

DISPOSITION

[77] For these reasons, I would dismiss the appeal. I would award costs to the respondents in the agreed amount of $55,000, inclusive of HST and disbursements, which the respondents have undertaken to allocate between themselves.

Released: May 19, 2023 “KMvR”

“K. van Rensburg J.A.”
“I agree. Sossin J.A.”
“I agree. J. Copeland J.A.”