

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C.C36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PARTICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (COLLECTIVELY, THE "APPLICANTS") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

**REPLY FACTUM OF THE APPELLANT /MOVING PARTY,
THE FOREIGN REPRESENTATIVE OF URBANCORP INC.
(Motion for Leave to Appeal)**

Date: December 10, 2021

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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PARTICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (COLLECTIVELY, THE "APPLICANTS") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

**REPLY FACTUM OF THE APPELLANT /MOVING PARTY,
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(Motion for Leave to Appeal)**

1. The Foreign Representative makes the following submissions in reply to certain arguments made in the responding factum of Doreen Saskin dated November 30, 2021 (the "**Respondent's Factum**"). Capitalized terms used but not otherwise defined herein have the meanings given to them in the Foreign Representative's factum dated November 4, 2021.

The Anti-Deprivation Rule is Effects-Based, Not Purpose-Based

2. At paragraph 49 of the Respondent's Factum, Ms. Saskin argues that "in *Chandos*, the Supreme Court confirmed that the anti-deprivation rule does not apply to provisions triggered by

an event other than insolvency or bankruptcy”. At paragraph 71, Ms. Saskin states that “a contractual provision does not offend the anti-deprivation rule **so long as it can be triggered by an event other than insolvency**. It matters not whether the clause includes the words “bankruptcy” or “insolvency”. [Emphasis added.]

3. The fatal flaw in Ms. Saskin’s interpretation of *Chandos* is that the impugned clause in *Chandos* could be triggered by various events other than insolvency. The clause is excerpted at paragraph 3 of *Chandos* and reads (the “**Chandos Clause**”):

Q Subcontractor Ceases Operation

In the event the Subcontractor commits **any act of insolvency, bankruptcy, winding up or other distribution of assets, or permits a receiver of the Subcontractor's business to be appointed, or ceases to carry on business or closes down its operations**, then in any of such events:

(a) this Subcontract Agreement shall be suspended but may be reinstated and continued if the Contractor, the liquidator or Trustee of the Subcontractor and the surety, if any, so agree. If no agreement is reached, the Subcontractor shall be considered to be in default and the Contractor may give written notice of default to the Subcontractor and immediately proceed to complete the Work by other means as deemed appropriate by the Contractor, and

(b) any cost to the Contractor arising from the suspension of this Subcontract Agreement or the completion of the Work by the Contractor, plus a reasonable allowance for overhead and profit, will be payable by the Subcontractor and or his sureties, and

(c) the Contractor is entitled to withhold up to 20% of the within Subcontract Agreement price until such time as all warranty and or guarantee periods which are the responsibility of the Subcontractor have expired and,

(d) the Subcontractor shall forfeit 10% of the within Subcontract Agreement price to the Contractor as a fee for the inconvenience of completing the work using alternate means and/or for monitoring the work during the warranty period.

[*Chandos Construction Limited v. Deloitte, 2020 SCC 25*](#), at para. 3, MBOA, Tab 2.

4. The opening sentence of the Chandos Clause is disjunctive and therefore the occurrence of any of the listed events, including a “distribution of assets”, was sufficient to trigger the four ensuing consequences. The Contractor in *Chandos* presumably inserted the Chandos Clause to give itself a “leg up” in the event the Subcontractor ceased operations – not only cessation due to insolvency, but **any** cessation of operations. However, the SCC did not focus on the purpose of the clause or whether it had been triggered by other cessation events. To the contrary, the SCC rejected the purpose-based approach and endorsed an effects-based approach pursuant to which it found that (i) the cessation of business was, *in effect*, caused (triggered) by the Subcontractor’s insolvency and (ii) the clause’s *effect* within the insolvency proceeding was to remove value from the insolvent’s estate.

5. To demonstrate the incoherence of Ms. Saskin’s argument, the Foreign Representative rhetorically asks whether the outcome in *Chandos* would have been different if the words “bankruptcy” and “insolvency” were removed from the Chandos Clause, but the balance of the clause remained intact. Under any coherent and effects-based interpretation of the anti-deprivation rule, the answer must be “no” because the clause’s purpose (preferred treatment upon the Subcontractor’s cessation of business) is irrelevant but its effect (preferred treatment in an insolvency proceeding) is what matters. In other words, even if the words “bankruptcy” and “insolvency” were omitted, the cessation of the Subcontractor’s business (the trigger) was caused by its insolvency and the effect of the Chandos Clause was still to remove value from the Subcontractor’s estate.

6. The exact same reasoning applies in this case. The purpose of the Berm Provision was, in the event of a transfer of the Lease, to reserve value that was reasonably attributable to the location of Leased Premises. The Berm Provision does not include the words “bankruptcy” or “insolvency”

but the **cause** (trigger) of the transfer was a court-ordered sale within liquidating CCAA proceedings and the **effect** of the clause is to remove value from the insolvent's estate. Indeed, given that Saskin was the controlling mind behind all three parties to the Lease, insolvency was, for practical purposes, the only possible trigger of the Berm Provision.

7. The SCC in *Chandos* did not need to consider whether the anti-deprivation rule was engaged by a clause that does not expressly refer to bankruptcy or insolvency, but which operates as a result of a bankruptcy or insolvency, meets the first prong of the anti-deprivation test. The present case is the first post-*Chandos* case to consider whether the triggering component of the rule is restrictive and literal, as Ms. Saskin asserts, or whether it captures clauses that do not expressly include the words "bankruptcy" or "insolvency" but are engaged as the direct result of an insolvency.

The Saskin Evidence

8. At paragraphs 66 and 67 of the Respondent's Factum, Ms. Saskin asserts that the Motion Judge considered the Saskin Evidence in relation to the contractual interpretation issue but rejected the Foreign Representative's arguments regarding the application of such evidence. This is incorrect. The only references to the Saskin Evidence in the Decision are found at paragraphs 49-52, which relate solely to Alan Saskin's valuation of the Berm Lands. These paragraphs have nothing to do with the Berm Provision or the contractual interpretation issues.

9. The Motion Judge's discussion of the contractual interpretation issues begins at paragraph 53 of the Decision, wherein he states that, since the Mandell Evidence "is not of assistance, [he is] left with having to make a determination of the issues based on the documentation". There was no consideration of the Saskin Evidence as it related to the Berm Provision.

Ms. Saskin Continues to Ignore an Inextricable Part of the Berm Provision

10. At paragraph 26 of the Respondent's Factum, Ms. Saskin asserts that "...the Berm Lease also contains a separate provision that reserves the "value" of the lease as an asset to King Towns..." At paragraph 27 of the Respondent's Factum, Ms. Saskin asserts that the Berm Provision "...requires payment to King Towns of **any** amount of the Proceeds attributable to the transfer of the Berm Lease". [Emphasis added.]

11. There is a misleading omission in Ms. Saskin's foregoing assertions: the reservation of "value" to KTNI under the Berm Provision is not unqualified. It is also not automatic upon **any** transfer of the Lease. To the contrary, the reservation of value is expressly qualified in the Berm Provision and limited to "...value that is reasonably attributable to the desirability of the location of the Leased Premises or to leasehold improvements..."

12. The "location of the Leased Premises" is mentioned only once in the Respondent's Factum, at paragraph 54, wherein Ms. Saskin frames the "straightforward question" before the Motion Judge. However, Ms. Saskin does not, and cannot, point to a paragraph in the Motion Judge's Decision in which the Motion Judge actually considered whether the Berm Allocation is attributable to the desirability of the location of the Leased Premises. Instead, at paragraph 56 of the Respondent's Factum, Ms. Saskin vaguely shifts her focus to the "factual matrix" considered by the Motion Judge. As set out in paragraph 56 of the Decision, the "factual matrix" that the Motion Judge considered was clearly tied to the under-market rent and not the location of the Leased Premises. The Berm Provision is agnostic as to whether the transfer is related to the market value of the rent. It is **not** agnostic as to whether the transfer value is attributable to the desirability of the location of the Leased Premises.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of December, 2021.



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Schedule “A” – Table of Cases & Authorities

1. [*Chandos Construction Limited v. Deloitte*, 2020 SCC 25](#)

Schedule “B” – Statutory Provisions

N/A

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. c-36, AS AMENDED, AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC. AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS")

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Proceeding commenced at Toronto

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