

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BRIDGING FINANCE INC., as agent for
SPROTT BRIDGING INCOME FUND LP

Applicant

– and –

THOMAS CANNING (MAIDSTONE)
LIMITED and 692194 ONTARIO
LIMITED

Respondents

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)
) *S. Babe*, for the Applicant
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)
) *D. Ullmann* and *A. Teodorescu* for the
) Respondents
)

) *S. Flaherty*, for Rol-land Farms Ltd. and
) Greenhouses Inc.
)

) *J. Goudy*, for 2016 Growers
)

) *S. Rappos*, for the Receiver
)

) *V. Glasser*, for Ontario Farm Products
) Marketing Commission
)

) *R. Reynolds*, for 959699 Ontario Ltd.
)

) HEARD: September 27, 2017

IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTIONS 47(1) AND
243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS
AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c.
C.43, AS AMENDED

ENDORSEMENT

MR. JUSTICE T. MCEWEN

[1] This motion involves the distribution of the remaining Net Sale Proceeds (the “Reserve”) with respect to the sales transaction which was approved by way of an Approval and Vesting

Order made in this proceeding on June 21, 2017 concerning the sale of Thomas Canning (Maidstone) Ltd. and 692194 Ontario Limited ("Thomas Canning"). Thomas Canning, for several years, operated a business processing tomatoes. At that time the court also made an order appointing Richter Advisory Group Inc. as the Receiver ("Richter") and authorizing Richter to distribute the Net Sale Proceeds to the applicant Bridging Finance Inc. ("Bridging") subject to the Reserve which totals \$1.2 million. The court further ordered that the entitlements and priority claims with respect to the Reserve be subject to further determination.

[2] It is on that basis that this matter has returned to the court.

[3] Four entities contest the distribution of the Reserve as follows:

- Bridging
- Thomas Canning
- Rol-land Farms and Greenhouses Inc. ("Rol-land Farms")
- 2016 Growers

[4] Bridging, as the senior secured lender, claims that it is entitled to the entire amount of the Reserve. The other three companies submit that they are entitled to a portion of the Reserve in priority to Bridging.

[5] I will first provide a general overview of the history of this matter and then deal with each of the contested claims.

Background

[6] On April 20, 2017, Bridging moved on an *ex parte* basis to have Richter appointed as Interim Receiver, pursuant to section 47(1) of the *Bankruptcy and Insolvency Act*, with respect to Thomas Canning. Subsequent to the order being made Bridging and Thomas Canning entered into an Accommodation Agreement, which provided, amongst other things, that Bridging would continue to provide funding to Thomas Canning and forebear from enforcing its security.

[7] A portion of the Accommodation Agreement provided that Bridging, subject to Richter's review and recommendation, would fund the reasonable fees and disbursements of Thomas Canning's counsel Blaney McMurty LLP ("Blaney"), in connection with the Accommodation Agreement or the Monitor Order, subject to certain terms and conditions.

[8] On May 1, 2017, a Monitor Order was made pursuant to section 101 of the *Courts of Justice Act*. Richter was also appointed Monitor. The relationship between Richter and Thomas Canning was a difficult one, with Richter stating in its June 15, 2017 report that Thomas Canning had "hindered and frustrated" Richter's ability to efficiently perform its duties. Richter cited a number of problems it encountered including Thomas Canning providing misleading comments, mischaracterizing inventory, tampering with expiration dates on products and failing to generally cooperate in reconciling accounting records and cash balances.

[9] On June 14, 2017, Bridging refused payment of Blaney's accounts taking the position that the Accommodation Agreement had been breached by Thomas Canning.

[10] Ultimately, on June 21, 2017, a sale of Thomas Canning was approved by the court and Richter was appointed as Receiver.

[11] As noted, Bridging claims entitlement to the entire amount of the \$1.2 million Reserve, while Rol-land Farms, 2016 Growers, and Thomas Canning make competing claims for portions of that amount.

[12] Rol-land Farms, 2016 Growers and Thomas Canning concede that Bridging, as the senior secured creditor, has not been made whole and is otherwise entitled to the Reserve. Each, however, presents various theories as to why they should share in the distribution of the Reserve in priority to Bridging.

[13] I will deal with each of these claims in turn.

Rol-land Farms

[14] Rol-land Farms is a grower of tomato seedling plants and had a contract with Thomas Canning, prior to the interim receivership, to supply plants to Thomas Canning. It issued invoices on May 1, 2017, and June 19, 2017, totaling \$85,414.94.

[15] Rol-land Farms takes the position that it is entitled to payment of its invoices from the Reserve in priority to Bridging.

[16] Rol-land Farms makes two submissions in this regard:

- i. Bridging and Richter undertook obligations to pay Rol-land Farms through the order obtained by Bridging on April 20, 2017, which, it says, compelled Rol-land Farms to supply the seedlings to the benefit of Bridging and Richter; and
- ii. Richter failed in its duty as an officer of the court by preferring the interest of Bridging over the interests of the creditors, particularly Rol-land Farms.

[17] I disagree with the submissions of Rol-land Farms in both instances.

[18] First, I disagree that Bridging or Richter undertook any form of separate and distinct obligation to pay Rol-land Farms.

[19] Rol-land Farms, in this regard, primarily relies upon on paragraph 11 of the Interim Receiver Order, which reads as follows:

CONTINUATION OF SERVICES

THIS COURT ORDERS that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates

for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Interim Receiver, and that the Interim Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Interim Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Interim Receiver, or as may be ordered by this Court (emphasis added).

[20] The problem with Rol-land Farms' submission is that Rol-land Farms concedes that neither Richter nor Bridging ever required Rol-land Farms to continue its services. Rol-land Farms nonetheless submits that, even though neither Bridging nor Richter required delivery, they "indirectly" took on an obligation as a result of Rol-land Farms honouring its contract with Thomas Canning. In my view, this is unsupportable in law. Paragraph 11, clearly sets out that written agreements cannot be discontinued when "such goods and services as may be required by the Interim Receiver". As neither Richter, nor Bridging, compelled any delivery, Rol-land Farms' argument is unsustainable. Also, nothing in the order speaks to any type of "indirect" obligation, nor is there any evidence of such obligation being undertaken.

[21] In support of its position Rol-land Farms relies upon the decision of the Ontario Court of Appeal in *Re St. Marys Paper Inc.* 1994 CanLII 1232 (ON CA). In my view, however, the *St. Marys* case is entirely distinguishable since in that case the trustee in bankruptcy specifically required certain services which did not occur here.

[22] Furthermore, the contract between Rol-land Farms and Thomas Canning was entered into prior to Richter's appointment as Interim Receiver. The unfortunate reality is that Rol-land Farms did not protect itself by requiring any form of prepayment of the contract. As an unsecured creditor its interests are therefore subordinate to those of Bridging.

[23] Second, there is no support for the argument that Richter unfairly preferred the interests of Bridging. It should be noted that Rol-land Farms does not take the position that Richter somehow acted maliciously, but rather that it simply and unfairly preferred the interests of Bridging over Rol-land Farms.

[24] In this regard, Rol-land Farms relies upon the Asset Purchasing Agreement ("APA"), dated June 15, 2017, in which the contract Rol-land Farms had with Thomas Canning was excluded when the business was sold.

[25] There are a number of difficulties with Rol-land Farms' submission. The APA was approved by the court in the June 21, 2017 sale approval; Richter was not in contact with suppliers; and the Monitor Order did not compel Richter to take steps with respect to creditors. Richter simply conducted a sales process. I am comfortable that Richter upheld its duty in this regard.

[26] Further, it was solely in the discretion of the purchaser, as per APA, to decide what contracts to purchase.

[27] Last, in any event, Rol-land Farms' claim, as an unsecured creditor, would still rank behind Bridging's claim.

2016 Growers

[28] The 2016 Growers, like Rol-land Farms, also had contracts with Thomas Canning. In their case, with respect to the sale of tomatoes. Thomas Canning failed to honour the contracts and the 2016 Growers claim that they sustained damages in excess of \$2.8 million.

[29] At the hearing of the motion, unlike Rol-land Farms, the 2016 Growers did not take the position that either Bridging or Richter acted unfairly or inequitably. They concede that the law of equitable subordination does not apply and are not pursuing any claims concerning the contracts. Rather, the 2016 Growers submit that they should be compensated for the legal costs thrown away with respect to the Commission hearings, which were not stayed during the receivership but, ultimately, terminated once the sales process was completed.

[30] The 2016 Growers submit that they participated in the Commission hearings in good faith and therefore suffered prejudice by incurring legal fees to participate before the Commission which hearings ultimately became redundant. They therefore seek the costs thrown away in appearing before the Commission in the amount of \$7,235.35.

[31] I have some sympathy for the 2016 Growers in that they participated, in good faith, in the Commission hearings, which were ultimately not completed once the sale transpired. I do not find, however, that an unfairness resulted that would permit its claim for legal fees to rank in priority to Bridging. The order of Justice Conway specifically did not stay the Commission hearings. As both this matter and the Commission hearings moved forward there was always a risk that the Commission hearings would not be completed and that a sale would take place.

Thomas Canning

[32] Thomas Canning seeks to enforce the provisions of the Accommodation Agreement which stipulates, generally speaking, that Bridging is to pay for the reasonable fees of Blaney.

[33] The difficulty with this submission is that the provisions of paragraph 3 of the Receivership Order provides the Receiver with the authority to exercise all of the rights of Thomas Canning.

[34] Where Thomas Canning is trying to enforce the provisions of the Accommodation Agreement it is my view that Thomas Canning should first bring a motion for leave as to whether the relief sought can be pursued. Thereafter, I will require a full record and argument as to whether the Accommodation Agreement was breached and whether Bridging has an obligation to pay the Blaney accounts.

[35] The Accommodation Agreement stipulates that the Blaney accounts are subject to a test of reasonableness. The parties submit that I should perform that examination, as opposed to Richter, given the history of this matter. I have agreed to do so.

Disposition

[36] The claims of Rol-land Farms and the 2016 Growers are dismissed.

[37] Insofar as to the claim of Thomas Canning is concerned, a subsequent motion will have to be brought. I will meet with counsel at a 9:30 am appointment with respect to scheduling the motion. I am also prepared to hear submissions about what should now be done with respect to the Reserve, if anything.

[38] If the parties cannot agree on costs, this can also be discussed at the 9:30 am appointment, and a timetable for written submissions will be set.

A handwritten signature in black ink, appearing to read 'McEwen', is written over a horizontal line.

Mr. Justice T. McEwen

CITATION: Bridging Finance Inc. v. Thomas Canning, 2017 ONSC 6048
COURT FILE NO.: CV-17-11773-00CL
DATE: 20171013

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SUPERIOR COURT OF JUSTICE

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BRIDGING INCOME FUND LP

Applicant

– and –

THOMAS CANNING (MAIDSTONE) LIMITED and
692194 ONTARIO LIMITED

Respondents

ENDORSEMENT

Mr. Justice T. McEwen

Released: October 13, 2017