Court File No. CV-17-11773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

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

Applicant

and

THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED

Respondents

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

RESPONDING FACTUM OF BRIDGING FINANCE INC.

November 24, 2017

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FACTUM OF BRIDGING FINANCE INC.

PART I – NATURE OF THE MOTION

1. This Factum is filed in response to the motion (the "**Motion**") brought by William Thomas for, among other things: an order granting the Respondents, Thomas Canning (Maidstone) Limited ("**Thomas Canning**") and 692194 Ontario Limited ("**6921**" and, together with Thomas Canning, the "**Debtors**") leave to bring a motion seeking payment of certain fees of their counsel, Blaney McMurtry LLP ("**Blaney**"); and (b) an order authorizing Richter Advisory Group Inc. ("**Richter**"), in its capacity as court-appointed receiver of Thomas Canning and 6921 (in such capacity, the

"**Receiver**") to pay the reasonable outstanding fees and expenses of Blaney incurred on or before June 21, 2017.

Background to Motion

2. The origin of the Motion lies in the application for the appointment of the Receiver by Bridging Finance Inc. ("**Bridging**"), whereby Bridging sought, among other things, a form of receivership Order that included approval of a distribution to Bridging, by the Receiver, of the net proceeds (the "**Net Sale Proceeds**") of the sale transaction approved by the Approval and Vesting Order made in these proceedings on June 21, 2017 (the "**Approval and Vesting Order**").

3. On June 21, 2017, this Court made the Order appointing the Receiver (the "**Receivership Order**"), which authorized the Receiver to distribute the Net Sale Proceeds to Bridging subject only to a $1,200,000 reserve (the "**Reserve**")[1]. The Receivership Order specified that the entitlements and priority of claims to the Reserve would be subject to further determination by this Court.

4. Richter had previously been appointed:

(a) by Order of this Court made April 20, 2017 (the "**IR Order**") pursuant to subsection 47(1) of the *Bankruptcy and Insolvency Act*[2], on an *ex parte* basis, as interim receiver of the Debtors (in such capacity, the "**Interim Receiver**")[3]; and

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[1] *First Report of Richter Advisory Group Inc., in its Capacity as Receiver of Thomas Canning (Maidstone) Limited and 692194 Ontario Limited,* at Appendix B, paragraph 24. **[Receiver's Report]**
[2] *Bankruptcy and Insolvency Act*, R.S.C., 1985, C. B-3
[3] *Report of Richter Advisory Group Inc., in its Capacities as Interim Receiver and Monitor of Thomas Canning (Maidstone) Limited and 692194 Ontario Limited,* at Appendix A. **[Monitor's Report]**

(b) by Order of this Court made May 1, 2017 (the "**Monitor Order**") pursuant to section 101 of the *Courts of Justice Act*[4], as "monitor" of the Debtors (in such capacity, the "**Monitor**")[5].

5. The Reserve was established because, addition to Bridging, three unsecured creditors (or creditor groups) asserted claims to the Net Sale Proceeds:

(a) a group of tomato growers (the "**2016 Growers**") who had commenced an action against, among others, William Thomas, Robert Thomas, John Thomas (collectively, the "**Thomas Brothers**") and Thomas Canning prior to the appointment of the Interim Receiver, seeking payment on 2016 growing contracts;

(b) Rol-land Farms and Greenhouses Inc. ("**Rol-land Farms**") for amounts due under a growing contract made prior to the appointment of the Interim Receiver; and

(c) Blaney for $90,324.63 in professional fees and expenses it incurred prior to the date of the Receivership Order as counsel to the Debtors ("**Blaney's Claim**").

6. Bridging argued at the September 21, 2017 hearing that, although Blaney purported to be acting for the Debtors in seeking payment of Blaney's Claim from the Reserve, Blaney had no such authority to act because the Receivership Order placed exclusive authority with the Receiver.

7. In a decision dated October 13, 2017, Justice McEwen dismissed the claims to the Reserve of the 2016 Growers and Rol-land Farms and held that leave would have to be sought to pursue

[4] *Courts of Justice Act*, R.S.O. 1990, c. C.43
[5] Monitor's Report, at Appendix F.

Blaney's Claim and that he would require full record and argument on the issue of Bridging's contractual obligations to fund payment of Blaney's Claim.

Summary of Bridging's Position

8. It is Bridging's position that the Motion should be dismissed in its entirety because:

(a) Blaney's Claim is an unsecured claim that has no legal or equitable priority over the secured claim of Bridging or the other claims of the general body of creditors of the Debtors and payment thereof would be an unjust preference;

(b) Blaney has no contractual or equitable claim against Bridging and has conceded that Blaney's Claim can only be pursued by the Debtors;

(c) William Thomas has no remaining directorial or official authority to cause the Debtors to pursue Blaney's Claim because the Receivership Order gave the Receiver exclusive authority regarding any claim by the Debtors;

(d) William Thomas ought not be granted leave to exercise directorial and/or official powers to cause the Debtors to pursue Blaney's Claim because the claim would not be pursued for the benefit of the Debtors and payment of the claims would be detrimental to the interests of other stakeholders including Bridging and 258150 Ontario Inc. (the "**Purchaser**");

(e) even if William Thomas were to be authorized to cause the Debtors to pursue Blaney's Claim, any claim that the Debtors may have once had against Bridging for funding to pay Blaney's fees was sold to the Purchaser pursuant to the Asset

Purchase Agreement dated June 15, 2017 (the "**Asset Purchase Agreement**") and vested in the Purchaser pursuant to the Approval and Vesting Order, and thus no longer the Debtors' claim to pursue;

(f) even if (i) William Thomas was to be given authority to cause the Debtors to pursue Blaney's Claim and (ii) Thomas Canning did still own a corresponding claim against Bridging, the Debtors, pursuant to the terms of the general security agreement they made in favour of Bridging, each waived any right to set-off such a claim against Bridging's secured claim, and thus cannot now oppose the distribution of the Reserve to Bridging;

(g) even if:

(i) William Thomas is granted authority to cause the Debtors to pursue Blaney's Claim;

(ii) the Debtors do still own the corresponding claim against Bridging; and

(iii) the Debtors could set off a claim against Bridging's secured claim,

the Debtors have no equitable grounds to receive the payment because they have suffered and will suffer no harm as a result of non-payment since the entire benefit of the payment would flow only to their creditor, Blaney; and

(h) the Debtors never had a claim for funding of Blaney's fees under the Accommodation Agreement dated April 29, 2017 (the "**Accommodation Agreement**") because the Accommodation Agreement was automatically

terminated as of the moment of its inception by termination events, undisclosed by the Debtors, the Thomas brothers or their counsel, David Ullmann, that occurred prior to the execution of the Accommodation Agreement;

PART II – FACTS

Receiver's Exclusive Authority

9. The Receivership Order gave the Receiver exclusive authority with respect to the exercise of claims or rights of the Debtors:

> "**RECEIVER'S POWERS**
>
> **3. THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Debtors and the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> . . .
>
> (j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;
>
> . . .
>
> (r) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have;
>
> . . .
>
> (t) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,
>
> and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other

> Persons (as defined below), including the Debtors, and without interference from any other Person."

Purchaser's Vested Ownership of Claims

10. Pursuant to the section 2.1 of the Asset Purchase Agreement, the Receiver sold to the Purchaser all of the property, assets and undertaking of the Debtors (the "**Purchased Assets**"), excluding only the specific assets listed on Schedule 1.3 (the "**Excluded Assets**")[6]. The Excluded Assets are comprised of 13 executory contracts, none of which in any way relate to Bridging.

11. The Approval and Vesting Order approved the Asset Purchase Agreement and the transaction contemplated thereby (the "**Sale**") and vested all of the Debtors' right, title and interest in and to the Purchased Assets, , effective on closing of the Sale[7]. The Sale closed on July 7, 2017[8].

No Debtor Right of Set-off

12. Section 8.11 of the General Security Agreement made as of July 3, 2015 by Thomas Canning in favour of Bridging (the "**Thomas Canning GSA**"), reads as follows:

> "8.11 Set-off
>
> The Secured Obligations will be paid by the Debtor without regard to any equities between the Debtor and the Agent or any right of set-off or cross-claim. If an Event of Default exists, any indebtedness owing by the Agent to the Debtor may be set-off and applied by the Agent against the Secured Obligations either before or after maturity, without demand upon or notice to anyone and regardless of the currency in which the indebtedness is denominated."[9]

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[6] Affidavit of Ken Rosenstein sworn November 10, 2017, at Exhibit "N"; in the Responding Motion Record of Bridging Finance Inc. dated November 10, 2017, at Tab 1. **[Rosenstein Affidavit]**
[7] Rosenstein Affidavit, at Exhibit "O".
[8] Receiver's Report, at paragraph 28.
[9] Rosenstein Affidavit, at Exhibit "B".

13. The same provisions are found in the general security agreement dated as of July 3, 2015 granted by 6921 in respect of its obligations to Bridging under its guarantee (together with the Thomas Canning GSA, the "**GSAs**")[10].

14. At Section 2.1(i) of the Accommodation Agreement, the Debtors and the Thomas Brothers (collectively, the "**Obligors**") all irrevocably and unconditionally acknowledged, agreed, represented, warranted and confirmed, among other things, that all terms of the Bridging credit agreement, the GSAs and all other loan documents would continue in full force and effect and constituted legal, valid and binding obligations of the Obligors.

Accommodation Agreement – Mechanics of Termination

15. Under the terms of the Accommodation Agreement, no notice is required to be delivered in order for termination of Bridging's forbearance and funding obligations or termination of the Accommodation Agreement as a whole to be effective.

16. Pursuant to section 3.1 of the Accommodation Agreement, Bridging agreed to forbear from enforcing its security during the period running from the date of the Accommodation Agreement to the earliest to occur of June 30, 2017, the occurrence of a Forbearance Termination Event (as defined in paragraph 18 below) and the completion of any acceptable sale or refinancing transaction (the "**Forbearance Period**"). Upon the expiration or termination of the Forbearance Period, Bridging's obligation to forbear would "automatically and without further action terminate and be of no further force and effect".

[10] Rosenstein Affidavit, at Exhibit "D".

17. Pursuant to section 5.1 of the Accommodation Agreement, Bridging's funding obligations during the Forbearance Period were also subject to the occurrence of a Forbearance Termination Event.

18. Pursuant to section 6.1 thereof, the Accommodation Agreement as a whole would forthwith terminate upon the happening of any "Forbearance Termination Event", which term was defined to include, among other things:

(a) the occurrence of any event of default under the Credit Agreement or other loan documents other than the existing defaults listed on Schedule "B" to the Accommodation Agreement (the "**Existing Defaults**"); and

(b) any default by the Obligors in the performance or observance of any covenant, term, agreement or condition of the Accommodation Agreement;

19. Again pursuant to section 6.1 of the Accommodation Agreement, upon the occurrence of a Forbearance Termination Event, Bridging would be entitled, but not required, to exercise all of its rights and remedies under the Accommodation Agreement, the Credit Agreement, the GSA and the other loan documents and the Obligors consented to the immediate appointment of a receiver over the Debtors.

Forbearance Termination Events

20. Pursuant to the Credit Agreement and the Blocked Account Agreement dated as of June 29, 2015 between Thomas Canning, Bridging and the Bank of Montreal (the "**Blocked Account Agreement**"), all of Thomas Canning's receipts were to be deposited into a blocked account, with advances under the Credit Facilities being deposited in the disbursement account for Thomas

Canning to spend. Both the Credit Agreement and the Blocked Account Agreement clearly state that the cash management arrangements contemplated thereby (the "**Cash Management**") survived any non-renewal of the Credit Agreement[11].

21. The Existing Default listed on Schedule "B" to the Accommodation Agreement included specific instances of diversion of funds from Cash Management:

> "(5) The failures detailed in the Affidavit of Graham Marr, sworn April 20, 2017 (in the Receivership Proceedings) to deposit receipts into the Blocked Account and the related misdirections of funds of the Borrower to other accounts.
>
> (6) Breaches of trust by the Borrower and related persons in failing to deposit the receipts referenced in (5) above into the Blocked Account or otherwise remit the same to the Lender, and the commingling of the same trust funds."

22. The specific diversions of funds detailed in the Affidavit of Graham Marr, sworn April 20, 2017 (the "**Marr Affidavit**") were:

(a) a total of US$215,000 and CDN$178,000 that had been collected from customers in or about May and June 2016 and deposited into accounts had been opened in Thomas Canning's name at Royal Bank of Canada, without any update to the Borrower's accounts receivable ledger, which diversions were not discovered by Bridging until October, 2016[12]; and

(b) a $10,434.05 deposit to Thomas Canning's BMO disbursement account, instead of to the Blocked Account, on April 18, 2017 (two days after David Ullmann had

[11] Rosenstein Affidavit, at Exhibit "I": Marr Affidavit at pages 8 to 10, paragraphs 29 and 30.
[12] Rosenstein Affidavit, at paragraph 14.

advised Bridging that he had counseled the Obligors that they were legally entitled to divert funds from Cash Management)[13].

23. It was the April 18, 2017 diversion of funds, along with David Ullmann's prior written blessing thereof, that provided Justice Newbould with the grounds to issue the IR Order[14].

24. In section 2.1 of the Accommodation Agreement, the forgoing diversions of funds were irrevocably and unconditionally acknowledged to be Events of Default under the Credit Agreement. Pursuant to the terms of the Accommodation Agreement these were the only instances of diversion of funds from Cash Management to constitute Existing Defaults[15].

25. Information recently provided to the Receiver by Thomas Canning's customs broker, Western Union, shows that, prior to the date of the Accommodation Agreement, funds were diverted from Cash Management on numerous occasions in addition to those described in the Marr Affidavit. More specifically, funds were diverted to Robert Thomas or to John Thomas and his spouse on the following occasions[16]:

(a) On April 3, 2017, Western Union received a wire for US$10,661.46 from Unipro Food Services, Inc. ("**Unipro**") for the account of Thomas Canning, and made an electronic funds transfer from the Thomas Canning account the same day in the same amount and currency to a personal account of Robert Thomas at Canadian Imperial Bank of Commerce ("**CIBC**").

[13] Rosenstein Affidavit, at paragraphs 19 and 20.
[14] Rosenstein Affidavit, at paragraph 22.
[15] Rosenstein Affidavit, at Exhibit "L": Accommodation Agreement, at Schedule "B".
[16] Rosenstein Affidavit, at paragraph 43.

(b) On March 13, 2017, Western Union received a wire for US$25,704 from Garden Fresh Salsa, Ltd. ("**Garden Fresh**") for the account of Thomas Canning, and made an electronic funds transfer from the Thomas Canning account the same day in the same amount and currency to Robert Thomas's CIBC account. Robert Thomas was asked directly about this missing Garden Fresh payment by the Monitor and gave no answer other than to direct the inquiry to Mr. Ullmann.

(c) On March 2, 2017, Western Union received a wire for US$21,815.92 from Unipro for the account of Thomas Canning, and made an electronic funds transfer from the Thomas Canning account the same day in the same amount and currency to Robert Thomas's CIBC account.

(d) On February 23, 2017, Western Union received a wire for US$50,646.96 from Garden Fresh for the account of Thomas Canning, and issued a cheque on the Thomas Canning account the same day in the same amount and currency to Robert Thomas. Robert Thomas was asked directly about this missing Garden Fresh payment by the Monitor and gave no answer other than to direct the inquiry to Mr. Ullmann.

(e) On July 19, 2016, Western Union received a wire for US$77,000 for the account of Thomas Canning, and issued a cheque from the Thomas Canning account the same day in the amount of CAD$100,030.70 to John and Shirley Thomas. At the Bank of Canada's closing USD exchange rate of 1.3028 on that date, US$77,000 would have been worth CAD$100,315.60, before any cost of conversion by Western Union.

26. The above are the most glaring instances of diversions of funds from Cash Management (and, indeed, from the Debtors' estates entirely) revealed by the information provided by Western Union. The Monitor's Report identifies at least five other cases where customers made invoice payments prior to the date of the Accommodation Agreement that did not then flow through Cash Management[17]. Those additional instances, in respect of which the Thomas Brothers and David Ullmann failed to give any satisfactory explanation, despite being given ample opportunity, are further Events of Default under the Credit Agreement. None of the above formed part of the Existing Defaults under the Accommodation Agreement and thus were each a Forbearance Termination Event.

27. Upon discovery of the diversions of funds detailed in the Monitor's Report, the Monitor's counsel wrote to David Ullmann in a series of emails from June 3, 2017 to June 7, 2017, seeking an explanation[18]. When it became clear that Mr. Ullmann was not going to provide such an explanation, Bridging's counsel advised Mr. Ullmann in writing that it considered the diversions to be Forbearance Termination Events[19].

28. In addition to the above instances of diversion of funds form Cash Management being Events of Default in and of themselves, the Obligors' failures to disclose them at any time, including during negotiation of the Accommodation Agreement, were further Events of Default under the Credit Agreement as breaches of the Obligors' covenants to, among other things:

> "provide the Lender with prompt written notice of any event which constitutes, or which, with notice, lapse of time, or both, would constitute an Event of Default, a

[17] Monitor's Report, at subparagraph 71(d).
[18] Monitor's Report, at Appendix K.
[19] Rosenstein Affidavit, at paragraph 46.

> breach of any covenant or any other term or condition of this Agreement or of any of the Security given in connection therewith;"[20]

29. The above breaches of Cash Management and disclosure covenants were not the only Events of Default that were present as at the date of the Accommodation Agreement but not disclosed to Bridging and thus not forming part of the Existing Defaults. Thomas Canning operated under a vegetable processing license (the "**License**") from the Ontario Farm Marketing Commission (the "**Commission**"). On April 13, 2017 the Commission made an order with respect to the License requiring, among other things, that Thomas Canning post a letter of credit in the amount of $2.6 million to protect growers contracting with Thomas Canning for the 2017 crop. If the condition of the Commission Order were not met by May 1, 2017, the Commission would revoke the License[21].

30. Neither Thomas Canning nor David Ullmann disclosed the existence of the Commission Order to Bridging during the course of negotiating the Accommodation Agreement. Bridging did not become aware of the Commission Order until counsel to the Commission contacted A&B on May 1, 2017 seeking information about the IR Order (the existence of which Mr. Ullmann had failed to disclose to them)[22].

31. The Credit Agreement is explicit that any material adverse change including, without limitation, any order of any applicable government agency or body, is an Event of Default thereunder[23]. The fact that Thomas Canning was going to have to post a $2.6 million line of credit to stay in business, when it had been in an uninterrupted default due to overadvances for over a

[20] Rosenstein Affidavit, at Exhibit "A"; Credit Agreement, at page 12 and 14; Covenants (ii) and (xiii).
[21] Rosenstein Affidavit, at paragraph 35.
[22] Rosenstein Affidavit, at paragraph 36.
[23] Rosenstein Affidavit, at Exhibit "A"; Credit Agreement, at page 18; Event of Default (x).

year-and-a-half[24], had just received demand from Bridging on April 5, 2017[25], and thus had no access to credit, was a material adverse change by any definition. Again, the failure to disclose the breach caused by the Commission Order was, in itself, an Event of Default. Neither of these Events of Default formed part of the Existing Defaults under the Accommodation Agreement and thus they were further Forbearance Termination Events that pre-dated the Accommodation Agreement.

32. On May 8, 2017, counsel to Bridging informed David Ullmann that the Commission Order was an Event of Default not captured by the term Existing Defaults and thus a default under the Accommodation Agreement[26].

33. There was also another case of failure to disclose material actions by a government body prior to the date of the Accommodation Agreement. In 2014, Thomas Canning received a $3 million grant under the Ontario Rural Development Program administered by the Ontario Ministry of Agriculture, Food and Rural Affairs ("**OMAFRA**"). On May 9, 2017, David Ullmann provided Bridging's counsel with copies of correspondence from OMAFRA concerning Thomas Canning's non-compliance with the conditions of the grant. The most recent of the correspondences was an April 21, 2017 letter wherein OMAFRA threatened to claw-back some or all of the grant if compliance was not achieved. OMAFRA would likely not have been stayed in such claw-back effort by the terms of the Monitor Order[27]. Bridging had not been advised of the problem before May 9, 2017.

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[24] Rosenstein Affidavit, at paragraph 12.
[25] Rosenstein Affidavit, at paragraph 17.
[26] Rosenstein Affidavit, at paragraph 37.
[27] Rosenstein Affidavit, at Exhibit "M"; Monitor Order, at paragraph 15.

34. Bridging's counsel advised David Ullmann on May 9, 2017 that the failure to disclose the April 21, 2017 correspondence from OMAFRA in a timely manner was a further breach of Thomas Canning's obligations of continuous disclosure and thus an additional breach of the Accommodation Agreement.

35. The fact that the actions taken by the Commission and OMAFRA and/or Thomas Canning's failure to report such action to Bridging in a timely fashion (if at all) were Forbearance Termination Events under the Accommodation Agreement was reiterated to David Ullmann by Bridging's counsel on May 15, 2017[28].

36. Another Forbearance Termination Event that pre-dated the Accommodation Agreement was the instruction given by Thomas Canning management to an employee to mislead the Interim Receiver as to the categorization of certain inventory items during the initial inventory count, which mis-categorization resulted in a $1.5 to $2.0 million inventory overstatement[29]. This action was, among other things, a breach of the IR Order and thus a breach of Credit Agreement covenant to comply with all applicable laws[30].

37. In addition to the numerous, serious Forbearance Termination Events that pre-dated the Accommodation Agreement, as detailed above, the Thomas Brothers were also in constant breach of their Accommodation Agreement obligation to fully cooperate with the Monitor. The Monitor's Report states:

> "Management has hindered and frustrated the Monitor's ability to effectively and efficiently perform its duties including: misleading the Interim Receiver and its consultant as to the proper categorization of inventory when the Interim Receiver

[28] Rosenstein Affidavit, at paragraph 40.
[29] Monitor's Report, at subparagraph 71(b).
[30] Monitor's Report, at Appendix "B"; Rosenstein Affidavit, at Exhibit "A", Credit Agreement page 16, Covenant (xxi).

> and certain employee of TCL performed a full physical count; mislabelling of product with regards to product expiry dates; not updating TCL's accounts receivable balance to allow for an effective and timely reconciliation; providing not meaningful response to the Monitor's requests regarding potential diversion of funds; and providing no active management with regards to the finances of the business."[31]

William Thomas Reply Motion Record

38. William Thomas served its Reply Motion Record on Bridging on November 22, 2017, after having, apparently, unsuccessfully attempted service on November 17, 2017. The agreed-to timetable for the Motion set out in the Order of Justice McEwen dated October 19, 2017 did not contemplate service of such a reply motion record by William Thomas and the week allotted for cross-examinations ended on November 17, 2017. Bridging received no warning that the Reply Motion Record would be served and was never asked to consent to its service. Bridging therefore objects to the filing of Reply Motion Record.

PART III – ISSUES

39. The Following are the issues that Bridging respectfully submits must be considered by this court on the Motion:

(a) whether payment of Blaney's Claim would be an unjust preference;

(b) whether Blaney itself has any contractual or legal claim against Bridging for payment of Blaney's Claim;

[31] Monitor's Report, at subparagraph 71(a).

(c) whether William Thomas' directorial and/or official authority to cause the Debtors to pursue the Blaney's Claim has been displaced by the authority of the Receiver under the Receivership Order;

(d) whether the Receiver should continue to retain all authority to exercise claims of the Debtors, to the exclusion of William Thomas;

(e) whether the Debtors sold all their claims to the Purchaser, retaining no claim against Bridging for funding of Blaney's Claim;

(f) whether the Debtors waived all rights to assert equities, set-offs or cross claims against Bridging;

(g) whether the Debtors have any equitable claim for funding of Blaney's Claim; and

(h) whether the Debtors have any contractual claim for funding of Blaney's Claim.

PART IV – LAW AND ARGUMENT

Payment of Blaney's Claim would be an unjust preference

40. Thomas Canning owes approximately $4.9 million to its unsecured creditors for obligations incurred both prior to and after the commencement of these proceedings[32]. Blaney's Claim is nothing more than an unsecured claim which has no legal or equitable priority over the

[32] Rosenstein Affidavit, at Exhibit "H".

rest of the unsecured claims. In that regard, Blaney's Claim is no different that the claim of Roland Farms that this Court already ordered not be paid from the Reserve.

Blaney has no contractual or equitable claim against Bridging

41. Blaney was not a party to the Accommodation Agreement and has no privity of contract with Bridging to require that Bridging pay its fees. This point is conceded by William Thomas[33].

42. The promissory estoppel argument raised in Blaney's September 15, 2017 factum is not available to Blaney, because Blaney was not a party to the Accommodation Agreement in which the alleged promise was made, and no legal relationship existed between Blaney and Bridging. The authority for promissory estoppel cited by Blaney is *H.S.C. Aggregates Ltd. v. McCallum*[34], which states:

> "105 Promissory estoppel exists where one party has, explicitly or otherwise, made a promise to another with the intention of affecting their legal relationship by the other party's reliance on it.53 Three requirements must be met in order for a legal obligation to arise in this manner:
>
> a) A promise was made by one party to another while a legal relationship existed between them;
>
> b) The other party, to the promisor's knowledge, relied on the promise;
>
> c) The other party altered its position to its detriment as a result of its reliance on the promise made to it.
>
> 106 The first element of promissory estoppel is the making of a promise or assurance that is intended to affect the legal relations between the parties. Thus, some legal relations between the parties must exist at the time the promise is made. . . ." [Emphasis Added]

[33] Notice of Motion of Williams Thomas, dated November 1, 2017, at paragraph 2.
[34] *H.S.C. Aggregates Ltd. v. McCallum,* 2014 ONSC 6214 (Ont. S.C.J.); **Brief of Authorities of Blaney McMurtry LLP, dated September 15, 2017, at Tab 4**. **[*H.S.C. Aggregates*]**

43. Blaney therefore needs the Debtors to pursue Blaney's Claim and has enlisted William Thomas to effectively act as its agent to attempt to cause the Debtors to do so.

Receiver has and should continue to have exclusive authority

44. William Thomas has no remaining directorial or official authority to cause the Debtors to pursue Blaney's Claim because the Receivership Order gave the Receiver exclusive authority regarding any claim by the Debtors.

45. William Thomas ought not be granted leave to exercise directorial and/or official powers to cause the Debtors to pursue Blaney's Claim because the claim would not be pursued for the benefit of the Debtors and payment of the claims would be detrimental to the interests of other stakeholders including Bridging and the Purchaser.

46. The prior instance where William Thomas obtained an unopposed Order permitting him to reach a settlement with the Canadian Food Inspection Agency, on behalf of Thomas Canning, in order to limit his personal liability for fines and jail time, is not a precedent for what Mr. Thomas is now attempting to do. In that prior instance, no stakeholder of the estate of Thomas Canning was impacted.

47. For the above reasons, and because, for the reason detailed below, the Debtors cannot themselves succeed in pursuing Blaney's Claim, the Court should not set a potentially dangerous precedent and allow a director of a debtor in receivership, who has to this point been entirely non-cooperative and adversarial to the Receiver and other Court officers, to act on behalf of the debtor to pursue a claim against another stakeholder.

Debtors sold all claims against Bridging

48. Even if William Thomas were to be authorized to cause the Debtors to pursue Blaney's Claim, any claim that the Debtors may have once had against Bridging for funding to pay Blaney's fees was sold to the Purchaser pursuant to the Asset Purchase Agreement dated and vested in the Purchaser pursuant to the Approval and Vesting Order, and thus no longer the Debtors' claim to pursue.

49. Any attempt by the Debtors to now pursue Bridging for payment of Blaney's Claim would amount to conversion of the Purchaser's property. Such conversion would be to the direct detriment of the Purchaser since payment of Blaney's Claim from the Reserve would reduce Bridging's recovery and increase the indebtedness that the Purchaser will eventually assume.

Debtors waived all right of set-off against Bridging

50. In the GSAs, the Debtors waived all rights to assert equities, set-offs or cross claims against Bridging or Bridging's secured claim[35]. So, even, if William Thomas was to be given authority to cause the Debtors to pursue Blaney's Claim and the Debtors did still own a corresponding claim against Bridging, the Debtors could not assert that claim against Bridging so as to oppose the distribution of the Reserve to Bridging.

Debtors have no equitable claim against Bridging

51. William Thomas relies on the equitable doctrine of promissory estoppel as previously relied upon by Blaney (as discussed in paragraph 42 above). The Debtors cannot, however, satisfy

[35] Rosenstein Affidavit, at Exhibit "B": Thomas Canning GSA at section 8.11.

the test for application of such doctrine. Once again, the tripartite test for application of the doctrine of promissory estoppel set out by the SCC in *H.S.C. Aggregates* requires that:

(a) a promise was made by one party to another while a legal relationship existed between them;

(b) the other party, to the promisor's knowledge, relied on the promise;

(c) the other party altered its position to its detriment as a result of its reliance on the promise made to it.

52. The Debtors fail to satisfy the third criteria because they did not alter their position to their detriment as a result of reliance on the alleged promise by Bridging to pay Blaney's Claim. Since the entire benefit of any payment of Blaney's Claim would flow to solely to Blaney and not to the estates, the Debtors will not suffer any harm as a result of non-payment of Blaney's Claim. Put another way, while there may have been reliance by the Debtors (reasonable or not), there was no detrimental reliance.

53. Thus, even if:

(a) William Thomas is granted authority to cause the Debtors to pursue Blaney's Claim;

(b) the Debtors did not sell the corresponding claim against Bridging; and

(c) the Debtors could set off their claim against Bridging's secured claim,

the Debtors still could not succeed because the equitable doctrine they rely on is not available to them.

Bridging not contractually obligated to fund payment of Blaney's Claim

54. The Accommodation Agreement is structured so as to terminate automatically upon the occurrence of a Forbearance Termination Event. The Accommodation Agreement requires no recognition, declaration or notice of such a Forbearance Termination Event for termination of the agreement to occur. The Accommodation Agreement certainly does not require agreement between the parties in order for a Forbearance Termination Event to exist as such.

55. The Debtors never had a claim against Bridging for funding of Blaney's fees under the Accommodation Agreement because the Accommodation Agreement was automatically terminated as of the moment of its inception by termination events, undisclosed by the Debtors, the Thomas brothers or their counsel, David Ullmann, that occurred prior to the execution of the Accommodation Agreement. As detailed in paragraphs 25 to 36 above, these Forbearance Termination Events were numerous and egregious.

56. The most significant of Thomas Canning's obligations under the Accommodation Agreement, such as continuation of cash management, conduct of the Refinancing, Investment and Sale Process (the "**RISP**"), and cooperation with, and devolution of powers to, the Monitor, were all enshrined in the Monitor Order. Termination of the Accommodation Agreement had not impact on those obligations under the Monitor Order.

57. William Thomas argues that the Accommodation Agreement could not have been terminated because Bridging did not immediately enforce its security and appoint a receiver. This logic is contradicted by the terms of both the Accommodation Agreement and the GSAs. Section 6.1 of the Accommodation Agreement is clear that, upon the occurrence of a Forbearance Termination Event, Bridging was entitled, *but not required*, to exercise all of its rights and

remedies under the Accommodation Agreement, the Credit Agreement, the GSAs and the other loan documents. Section 10.3 of the GSAs states:

> "**No Waiver; Cumulative Remedies**
>
> No failure on the part of the Agent to exercise, and no delay in exercising, any right, remedy, power or privilege under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, remedy, power or privilege preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. The rights and remedies under this Agreement are cumulative and not exclusive of any rights, remedies, powers and privileges that may otherwise be available to the Agent."

58. With the RISP being conducted by the Monitor, and adequate controls imposed on the Debtors by the Monitor Order, Bridging also had no practical reason to immediately pursue rights and remedies in response to the Forbearance Termination Events.

59. Although it has no bearing on whether the Forbearance Termination Events in question occurred, or the impact of such Forbearance Termination Events on the survival of the Accommodation Agreement, timely notice was given to David Ullmann each time Bridging was notified of a Forbearance Termination Event, identifying them as such. Blaney, as the sole beneficiary of Blaney's Claim, therefore had fair warning that Bridging would not be funding the claim. Although that point has no legal or equitable significance (since Blaney itself has no direct legal or equitable claim against Bridging), it should moderate the amount of sympathy Blaney might otherwise elicit.

PART V – RELIEF REQUESTED

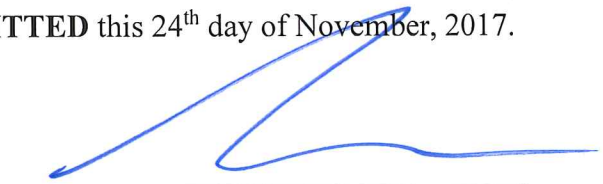
60. Bridging respectfully requests that this Honourable Court:

(a) dismiss William Thomas' motion for leave to cause the Debtors to pursue Blaney's Claim;

(b) make an Order authorizing the Receiver to Distribute the Reserve to Bridging; and

(c) grant such further and other relief as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of November, 2017.



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SCHEDULE "A"

LIST OF AUTHORITIES

Jurisprudence

1. *H.S.C. Aggregates Ltd. v. McCallum*, 2014 ONSC 6214 (Ont. S.C.J.); **Brief of Authorities of Blaney McMurtry LLP, dated September 15, 2017, at Tab 4**.

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

Applicant

and

THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED

Respondents

Court File No. CV-17-11773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

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