

CITATION: Ontario Securities Commission v. Bridging Finance Inc., 2023 ONSC 2140
COURT FILE NO.: CV-21-661458-00CL
DATE: 2023-04-14

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ONTARIO SECURITIES COMMISSION

Applicant

- and -

BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE GP INC., BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, BRIDGING MJ GP INC., BRIDGING INDIGENOUS IMPACT FUND, BRIDGING FERN ALTERNATIVE CREDIT FUND, BRIDGING SMA 2 LP, BRIDGING SMA 2 GP INC., and BRIDGING PRIVATE DEBT INSTITUTIONAL RSP FUND

Respondents

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Robert Staley and Mike Shakra*, Representative Counsel to the Bridging Unitholders

Steve Weisz, for University of Minnesota Foundation

Adam Driedger, for the Receiver, PricewaterhouseCoopers Inc.

Tamie Dolny, for the SMA 2 Investors

Emile St-Pierre, Quebec Representative Counsel

HEARD AND

DETERMINED: April 5, 2023

REASONS: April 14, 2023

ENDORSEMENT

[1] At the conclusion of the hearing, I granted the motion with reasons to follow. These are the reasons.

[2] Bennett Jones LLP, in its capacity as court-appointed representative counsel to the Bridging Unitholders (“Representative Counsel”), brings this motion for an order (the “Unitholder Advisor Claims Tolling Order”) tolling claims that Unitholders may have against investment professionals and/or financial institutions, and other similar entities, relating to the purchase of securities from the funds managed by Bridging Finance Inc. (collectively, “Bridging”).

[3] Counsel submits the court has jurisdiction to make the Unitholder Advisor Claims Tolling Order, and the making of the Unitholder Advisor Claims Tolling Order is appropriate in the circumstances to protect the interests of approximately 26,000 holders of units issued by Bridging.

[4] The facts supporting this motion are set out in the Fourth Report of Representative Counsel (the "Fourth Report").

[5] Representative Counsel has advised Unitholders that its mandate included the analysis of claims that Unitholders may have as a group against those who committed wrongdoing or acted negligently in connection with the management or operations of the Bridging Funds, but that its mandate did not extend to individual claims a Unitholder may have, including claims against certain investment professionals or financial institutions in connection with a Unitholder's purchase of securities of the Respondents.

[6] Representative Counsel has received a number of inquiries from Unitholders with an interest in pursuing individual claims they may have against investment professionals and/or financial institutions who either recommended the purchase of securities of the Bridging Funds or who purchased securities of the Bridging Funds on behalf of or for the benefit of such Unitholders.

[7] Given the nature of the inquiries continued to be received by Unitholders, Representative Counsel is there is concerned that:

- (a) some Unitholders may be under the mistaken impression that Representative Counsel intends to investigate, consider and pursue individual claims Unitholders may have against investment professionals and/or financial institutions;
- (b) some Unitholders may be waiting to pursue such claims until there is additional information regarding their recoveries from Bridging and Unitholders can better quantify any losses they may suffer as a result of purchasing securities of the Bridging Funds; and
- (c) as the second anniversary of the Date of Appointment (April 30, 2023) approaches, some limitation periods applicable to Unitholder Advisor Claims may expire before Unitholders realize they must personally pursue any Unitholder Advisor Claims.

[8] In light of the foregoing, Representative Counsel seeks the proposed Unitholder Advisor Claims Tolling Order.

[9] The proposed Unitholder Advisor Claims Tolling Order provides that as at the Date of Appointment and continuing until the date on which the stay of proceedings imposed against the Respondents and the Property pursuant to the Appointment Orders (or any subsequent order of the Court) is terminated, all prescription, time or limitation periods (collectively, “Limitation Periods”), applicable to any Unitholder Advisor Claims, would be suspended as of the Date of Appointment and would recommence running as of the date on which the stay of proceedings imposed against the Respondents and the Property pursuant to the Appointment Orders (or any subsequent order of the Court) is terminated.

[10] This motion was served on the service list more than two weeks in advance of the hearing. In addition, notice of the motion record, and a summary of the relief sought, was provided to:

- (a) head office contacts for substantially all of the dealers of all of the units issued by the Bridging Funds, based on the records of Bridging's third-party fund administrator; and
- (b) the Email Distribution List, which consists of all Unitholders, investment advisors, and other investment professionals that provided their contact information to Representative Counsel.

[11] Representative Counsel submits it would be just and appropriate for the Court to grant the Unitholder Advisor Claims Tolling Order. The Receiver is supportive of the relief sought and does not believe it will materially prejudice any stakeholder.

[12] There are two questions to consider:

- (a) Does the Court have jurisdiction to grant the Unitholder Advisor Claims Tolling Order?
- (b) If yes, is it just and appropriate in these circumstances to exercise that jurisdiction to grant the Unitholder Advisor Claims Tolling Order?

[13] In these proceedings in June 2021, I determined that the court has jurisdiction to make an order tolling limitation periods applicable to “Misrepresentation Rights” (See: *Ontario Securities Commission v. Bridging Finance Inc.* 2021 ONSC 4347 (“*Bridging Finance*”).

[14] Counsel stated that, unlike the order tolling Misrepresentation Rights, the Unitholder Advisor Claims Tolling Order is not restricted to claims against Bridging. It contemplates the tolling of potential claims against a Unitholder's “investment advisor, broker, financial advisor, financial planner, portfolio manager, securities broker-dealer, securities firm, bank or brokerage or any similar person or entity”. However, this does not impact whether the Court has the jurisdiction to grant the order.

[15] In *Imperial Tobacco Canada Limited, Re*, 2019 ONSC 2222, McEwen J. stated:

I also accept Imperial's submission that I have jurisdiction to extend any prescription, time or limitation period relating to any proceeding for or against the Applicants or related entities that may expire. Such provisions are common in CCAA proceedings and have been granted in Initial Orders in a number of decisions... In my view, this result is sensible and desirable. Since all proceedings and future proceedings, including those brought by or against the Applicants, are stayed, the interests of all stakeholders are protected.

[16] While the *Imperial Tobacco Canada Limited* decision was in the context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), this court has extended its application to this proceeding in *Bridging Finance*.

[17] In *Urbancorp Cumberland 1 GP Inc. (Re)*, 2020 ONSC 7920 at paras. 23-29 ("*Urbancorp*"), this court considered the jurisdiction under s. 243 of the *Bankruptcy and Insolvency Act* ("*BIA*") and s. 100 of the *Courts of Justice Act* ("*CJA*") to grant an assignment order, compelling the assignment of a lease and found it had the statutory jurisdiction to make such an order in the receivership proceedings.

[18] Section 243 of the *BIA*, which provides for the appointment of a receiver, has been given a broad, liberal and purposive interpretation in many cases, such that courts have held it grants implicit jurisdiction to make orders in respect of the receivership not expressly listed in the statute, including vesting orders (See: *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508). As held by the Court of Appeal for Ontario, the court's power to appoint a receiver under s. 243 must also include the power to include essential receivership terms, in that case a leave to sue provision (See: *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269).

[19] Counsel submits that, in granting this court the statutory authority to appoint a receiver, the legislature necessarily implicitly granted the statutory authority to make orders essential to that receivership. I agree.

[20] In the alternative, if the *Securities Act* does not provide the statutory basis for the order, I am of the view that it is appropriate to resort to the inherent jurisdiction of the Superior Court.

[21] Having heard and considered the foregoing submissions, I am satisfied that the court has both statutory jurisdiction and inherent jurisdiction to grant the Unitholder Advisor Claims Tolling Order.

[22] The question remains whether it is just, appropriate and reasonable in these circumstances for the court to exercise its jurisdiction to grant the relief sought.

[23] I accept that there is a risk that Unitholders are awaiting resolution of the Receivership Proceeding, or at a minimum, more clarity on their recoveries, before turning their mind to potential additional claims they may have, and/or that certain Unitholders may not understand that such claims must be commenced personally.

[24] Given the impending potential expiration of the applicable Limitation Periods, there is also a risk that Unitholders may try to quickly file a material number of claims against advisors and other entities, with the corresponding risk of those persons trying to commence third party claims against Bridging and the Bridging Funds. In my view, this would not be the most just and convenient way to preserve the significant number of Unitholder Advisor Claims that may exist.

[25] I am satisfied that the weighing of prejudices resulting from the Unitholder Advisor Claims Tolling Order supports its appropriateness in the circumstances. If Unitholder Advisor Claims are not tolled, Representative Counsel believes that Unitholders could suffer significant prejudice, including the entire loss of any claims against investment professionals and/or financial institutions due to the potential expiry of any Limitation Periods.

[26] Finally, Representative Counsel is of the view that parties against which Unitholder Advisor Claims could be made will not suffer material prejudice. This view is supported by the Receiver.

[27] In these circumstances, I am satisfied that it is both appropriate and necessary at this time, to grant the Unitholder Advisor Claims Tolling Order.

[28] The motion is granted and the Order has been signed in the form submitted.

Chief Justice G.B. Morawetz

Date: April 14, 2023