

CITATION: Ontario Securities Commission v. Bridging Income Fund LP, 2024 ONSC 4608
COURT FILE NO.: CV-21-00661458-00CL
DATE: 20240820

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

**IN THE MATTER OF AN APPLICATION UNDER SECTION 129 OF THE
SECURITIES ACT (ONTARIO), R.S.O. 1990, c. S. 5, AS AMENDED**

RE: ONTARIO SECURITIES COMMISSION

Applicants

AND:

BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE 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: Justice Kimmel

COUNSEL: *David Ullmann and Alexandra Teodorescu*, for the Thomas Canning Claimants/Appellants

Grant Moffat and Erin Pleet, for PricewaterhouseCoopers Inc., the Receiver of Bridging Finance Inc.

Thomas Gray, Representative Counsel for the Bridging Unitholders

HEARD: July 29, 2024

ENDORSEMENT
(THOMAS CANNING CLAIMANTS' APPEAL OF PROCEDURAL
DECISIONS OF CLAIMS OFFICER)

Procedural History

Overview of the Canning Claim Adjudication and this Appeal

[1] The Thomas Canning Claimants¹ ("Canning") have asserted a claim against Bridging Finance Inc. ("Bridging") arising from a pre-receivership \$51 million fraud action they commenced against Bridging and others (the "Action"). Canning has submitted a proof of claim ("Canning Claim") which mirrors the allegations in the Action. This receivership is governed by s. 129 of the *Securities Act* (Ontario) R.S.O. 1990, c. S. 5 ("*OSA*")

[2] At its core, the Canning Claim is about an alleged fraud and conspiracy committed by Bridging, Skymark Finance Corporation ("Skymark"), and 2581150 Ontario Inc. ("258 Ontario") in the context of the court-supervised process for the refinancing, investment and/or sale of assets ("RISP") in a previous receivership proceeding dating back to 2017 involving Thomas Canning and 692 Ontario. The allegations involve dealings between Canning and Bridging between 2015 to 2017 that culminated in the allegedly corrupt RISP and resulting transaction that was completed in 2017.

[3] The Canning Claim was disallowed by the Bridging Receiver (PricewaterhouseCoopers Inc.). The dispute of the disallowance is currently before the court appointed Claims Officer (The Hon. Douglas Cunningham, KC), with an adjudication hearing scheduled to begin on August 27, 2024 (the "Canning Claim Adjudication").

[4] The January 26, 2024 Claims Officer Appointment Order requires that the claims to be adjudicated by the Claims Officer in this receivership be determined as soon as practicable. The Claims Officer has made two procedural decisions denying certain disclosure requests made by Canning in the lead up to the Canning Claim Adjudication (the "Decisions") that Canning contends are manifestly and disproportionately unfair because they prioritized the timing of the Canning Claim Adjudication over Canning's desire for pre-hearing disclosure of additional Bridging records and pre-hearing disclosure of information and documents to be obtained from third parties. Canning appeals these two Decisions.

The Preliminary Decision Regarding Leave to Appeal

¹ Thomas Canning (Maidstone) Limited ("Thomas Canning"), 692194 Ontario Limited ("692 Ontario"), 2190330 Ontario Ltd., and the principals of Thomas Canning, and William and Robert Thomas.

[5] This appeal follows a preliminary decision of Chief Justice Morawetz that determined there was no requirement for Canning to first seek, and be granted, leave to appeal from the Decisions: see *Ontario Securities Commission v. Bridging Finance Inc.*, 2024 ONSC 3939 (the "Preliminary Decision").

[6] Appeal rights are expressly provided for in the Claims Officer Appointment Order from final determinations of disputed claims, but that order is silent with respect to appeals from interim or interlocutory procedural decisions. The Preliminary Decision considered whether leave to appeal was required by analogy to *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") claims procedures.

[7] The Preliminary Decision first confirmed that the prescribed requirement for leave to appeal from interlocutory procedural decisions of judges and associate judges under Rule 62.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 does not apply to the claims procedures developed under the CCAA. The CCAA claims procedures take into account the provisions of section 20 of the CCAA, which in turn incorporates provisions such as section 135 from the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "BIA"). These claims procedures do not impose a leave requirement for appeals from interim or interlocutory procedural of claims officers.

[8] By analogy, the Preliminary Decision determined that leave is also not required for appeals from interim or interlocutory procedural decisions of the Claims Officer appointed in this OSA receivership.

Summary of Outcome of this Appeal

[9] A brief two-paragraph endorsement was provided on August 9, 2024 indicating the outcome of this appeal, which stated as follows:

[1] This preliminary endorsement is to advise the parties of the outcome of the appeal that I heard in this matter on July 29, 2024 from the two procedural orders of The Honourable Douglas Cunningham KC, Claims Officer. The parties advised at the conclusion of the hearing of the appeal that there were materials due on August 12, 2024. They confirmed that they would continue to prepare for and deliver their materials in respect of the Canning Claims Adjudication that is scheduled to be heard by the Claims Officer on August 27, 2024 while this appeal is under reserve so that they remain ready to proceed.

[2] Although the endorsement with my detailed reasons is not yet ready for release, given the upcoming delivery deadline, this short preliminary endorsement is provided to advise the parties that the appeal is dismissed. The more detailed reasons will follow.

[10] These are the more detailed reasons.

The Interlocutory Procedural Decisions Under Appeal

[11] The Claims Officer Appointment Order:

- a. requires that the Canning Claim (and all other claims) be determined "as soon as practicable" (at paragraph 4); and,
- b. specifically states that the Claims Officer (the Honourable J. Douglas Cunningham, K.C.) is "empowered to determine any and all procedural matters which may arise in respect of his determination of the Disputed Bridging Fund Claims, including, without limitation, the timetable for adjudication, the production of documents and such discovery processes as may be appropriate in the circumstances, and the manner in which any evidence may be adduced" (at paragraph 5).

The First Procedural Decision

[12] After the Claims Officer was appointed, Canning asked the Receiver for extensive documentary discovery and to compel and produce information and documents from certain third party witnesses. The Receiver's letter of May 8, 2024 summarized the requests that it had received since the Claims Officer Appointment Order in respect of the Canning Claim, and its responses to those requests, as follows:

Scope of Discovery. As a starting point, your clients' claims are exclusively based on the purported actions of Bridging Finance Inc. ("BFI") that took place between the date the loans to TCL were first advanced in July 2015 and the date of the Sale Transaction, which was approved by the Court on June 21, 2017 and closed on July 7, 2017 (the "Relevant Period"). As you know, BFI (as agent) and Bridging Income Fund LP ("BIF") (as lender) were the only Bridging entities that were both: (a) in existence during the Relevant Period; and (b) in any way involved in the lending relationship with your clients. Substantially all of the Bridging Funds did not exist during the Relevant Period and none of the Bridging Funds other than BIF had any involvement whatsoever in the lending relationship with your clients. Further, the Sale Transaction was the product of a court supervised sale process conducted by Richter Inc. as the court-appointed Monitor of TCL and 692 Ontario. Your clients did not take any steps to appeal or set aside the order approving the Sale Transaction. In our view, the foregoing facts should significantly narrow the scope of documentary requests you make. We will consider any documentary requests you make but reserve the right to refuse such requests based on scope, relevance and proportionality given the foregoing facts.

Witness Testimony. The Receiver will not produce any former employees or representatives of Bridging as part of the adjudication of your clients' claims. None of Mr. Marr, Ms. Sharpe or Ms. Coco are the Receiver's witnesses. In any event, given the foregoing factual matrix,

credibility and the intentions of the former principals of Bridging are irrelevant to the adjudication of your clients' claims. To the extent you seek to compel the testimony of any former employees or representatives of Bridging, the Receiver reserves its right to object to their participation as witnesses.

[13] On May 10, 2024, the Claims Officer set deadlines for the exchange of pre-filed materials for the Canning Claim Adjudication and ordered that the parties' reports and affidavits be produced by June 11, 2024 (the "First Procedural Decision"). This First Procedural Decision established a procedural timetable that allowed for the exchange of written evidence (including disclosure of documents) in chief and preliminary factums to be completed prior to the Canning Claim Adjudication.

[14] The parties made submissions about the relevance and scope of the requested disclosure and timing implications, among other matters. The Claims Officer declined to order the procedure that Canning had proposed involving documentary discovery and the examination of Third Party Witnesses (Graham Marr from Bridging, Paul Millar from Skymark, and Santokh (a.k.a. Santosh) Mahal from 258 Ontario). The procedure adopted by the Claims Officer for the adjudication of the Canning Claim was largely in line with the procedure proposed by the Receiver.

[15] In the First Procedural Decision, the Claims Officer noted that the Bridging receivership stayed the Action and "changed the landscape." He concluded that "this is a receivership process in which certain compromises are required to be made." He explained that what he meant by "the landscape has changed" was that the adjudicative process must be timely, efficient and cost effective, all the while being as fair to any Claimant as possible, even though it is not the usual litigation process.

[16] The Claims Officer noted in the First Procedural Decision that while "this is not to be characterized as a summary process, it is obvious that the resolution of the Disputed Bridging Fund Claims² must be resolved before any interim distribution can be made. It is the Receiver's intention that such a distribution be made before the end of this year."

[17] The Claims Officer observed: "That [Claims Officer Appointment] Order is clear. First, as the Claims Officer, I am empowered to deal with all procedural matters in respect of the Disputed Bridging Fund Claims. This, of course, includes establishing any timetable for adjudication, the production of documents, and the need for any discoveries."

The Second Procedural Decision

² The Disputed Bridging Fund Claims include, but are not limited to, the Canning Claim. There are other disputed claims.

[18] The first step directed by the First Procedural Decision was the service of affidavit evidence by Canning and the service by the Receiver of its report and/or affidavit(s). Thereafter, a further case conference was held on June 17, 2024. Canning sought the production of records spanning from 2015 to 2017 that it believes are in the Receiver's possession. This list covers approximately ten different categories of documents. Canning also sought orders requiring the Receiver to produce the Third Party Witnesses/representatives of Bridging, Skymark, and 258 Ontario to be examined and to compel them to provide any documents they have.

[19] The Claims Officer declined to order that the Receiver produce the requested records or Third Party Witnesses/representatives, but granted Canning the opportunity to provide further affidavit evidence by June 25, 2024. Additionally, the Claims Officer permitted Canning to call the Third Party Witnesses at the Hearing (the "Second Procedural Decision").

[20] In the Second Procedural Decision, the Claims Officer again noted that "we are now within a claims process within a receivership, a process that everyone recognizes as something close to a summary process and quite unlike normal civil litigation".

Further Directions Sought Regarding Third Party Witnesses and Documents

[21] Following the Second Procedural Decision, Canning sought the court's assistance in issuing summons to the Third Party Witnesses requiring them to attend the Canning Claim Adjudication and bring relevant documents/records in their possession with them. Canning also provided what was described as a narrowed down list of requested documents or records for which production was sought.

[22] On July 8, 2024, Steele J. ordered that the summons requested by Canning be issued to the Third Party Witnesses requiring them to appear at the hearing of the Canning Claim Adjudication scheduled to commence on August 27, 2024 (the "Hearing"). The Receiver did not object to summons being issued to compel the attendance of the Third Party Witnesses and to compel them to bring relevant documents in their possession with them.

[23] Although asked to direct that the summons contain a detailed, enumerated list of documents for each of the witnesses to produce at the Hearing, the court concluded that general language of a civil summons would be sufficiently broad to encompass any relevant materials.

[24] The court directed on July 8, 2024 that: "Any evidentiary or procedural issues in respect of these witnesses' evidence and/or the documents listed in the proposed summonses, if they arise, are within the jurisdiction of the Claims Officer under his powers granted by the Claims Procedure Order of Chief Justice Morawetz dated January 26, 2024."

The Appeal

[25] Canning requests on this appeal that the First Procedural Decision and the Second Procedural Decision (collectively, the "Decisions") of the Claims Officer be deemed incorrect and that:

- a. the Receiver be required to comply with the documentary requests of Canning by letter dated May 6, 2024 (subsequently replaced by a narrowed down email request dated June 20, 2024);
- b. the Third Party Witnesses be presented for discovery or for cross-examination prior to the Hearing and produce relevant documentary evidence in advance; and,
- c. a further case conference be held to determine the process of the Hearing once the above steps have been completed.

[26] Canning suggests that the hearing time currently set aside be used to conduct examinations for discovery of the Third Party Witnesses who have been summonsed and to review additional documents produced. Additionally, Canning suggests that the parties be directed to attend a case conference thereafter with the Claims Officer for any further pre-hearing directions and to set new hearing dates for the Canning Claim Adjudication.

[27] Canning acknowledges that the orders sought on this appeal will necessitate an adjournment of the Canning Claim Adjudication because the contemplated steps, if ordered, could not be completed prior to August 27, 2024. However, Canning contends that, since this is simply the winding down of a business where all parties would like to be paid and is not an insolvency or restructuring proceeding, there is no real urgency other than the Receiver's desire to make a distribution before the end of this year. All parties acknowledge that a distribution cannot happen until after the Canning Claim Adjudication. Canning argues that this timing concern unduly influenced the Decisions of the Claims Officer not to order the disclosure that it sought from the Receiver.

[28] To underscore this, Canning points to the wording of the Claims Officer Appointment Order that requires that claims be determined *as soon as practicable*, not *as soon as possible*, and other references in both the Decisions emphasizing that, while the claims process is not a typical civil proceeding, it is also not a "summary process".

[29] The Receiver's position is that the Canning Claim Adjudication should proceed as scheduled. The Receiver's opposition to the appeal is based on its position regarding the standard of review on this appeal and the absence of any palpable and overriding error in the Decisions.

[30] While the Receiver expressed a desire to receive the court's decision on the appeal as soon as possible so that, if the appeal is dismissed, the Canning Claim Adjudication could proceed as scheduled, it was not suggested that the court's determination of the appeal should be based on a concern about timing. Timing has not influenced the appeal decision; however, once the decision was made, the August 9, 2024 endorsement was released to avoid further delay being caused by the time to complete these reasons, given other timing constraints of the court.

The Standard of Review

[31] Much of the focus of this appeal was on the standard of review to be applied to the Decisions.

[32] The parties agree that the applicable standard of review is the standard applied to ordinary civil appeals (see *Laurentia University of Sudbury*, 2023 ONSC 83, 5 C.B.R. (7th) 319, at para. 8). They disagree about whether the standard should be correctness (according to Canning, to be applied to questions of procedural fairness that are treated as questions of law for appeal purposes) or palpable and overriding error (according to the Receiver, to be applied to interlocutory and discretionary procedural case management decisions of the Claims Officer).

[33] Under either standard of review, the merits of the Action that is the subject of the Canning Claim and the merits of the Receiver's disallowance of the Canning Claim are not directly relevant to the determination of this appeal. Although some of the parties' submissions on this appeal were directed to the merits of the Canning Claim and the Receiver's disallowance, they have not been factored into this appeal decision. The merits will be considered at the Canning Claim Adjudication.

[34] The standard of review to be applied depends upon how the Decisions are characterized.

[35] It is not disputed that questions of procedural fairness are treated as questions of law for appeal purposes: see *Edward Collins Contracting Limited (Re)*, 2024 NLSC 83, at para. 15. That case was not an appeal from an interlocutory procedural order, but involved an appeal from a final disallowance of a claim by a claims officer that had been filed after the claims bar date had passed so the claim was determined to have been procedurally barred. It was not an interlocutory production and discovery decision.

[36] Canning makes the general assertion that procedural fairness generally requires disclosure unless some competing interest prevails, with reference to *1657575 Ontario Inc. v. Hamilton (City)*, 2008 ONCA 570, 239 O.A.C. 114, at para. 25. That case arose in the administrative law context and dealt with a failure to disclose the grounds for revoking a licence. The analogy to this case would be if the Receiver had not provided detailed grounds for the disallowance of the Canning Claim, something the Receiver unquestionably did do.

[37] For the Decisions to constitute questions of procedural fairness it must first be established that basic procedural fairness in this case requires the type of disclosure Canning seeks from the Receiver.

[38] Canning provided no authority to suggest that a decision by a claims officer not to require a receiver to continue to search for documents to assist in proving a claim of fraud and conspiracy or not to require a receiver to obtain information and documents from third party witnesses is a matter of procedural fairness, a failure of natural justice, or a breach of essential rights of disclosure in a claims process. Those would be fact and case specific considerations.

[39] Instead, Canning approaches the foundational question of basic procedural fairness by suggesting that the Claims Officer did not exercise his discretion at all to decide whether or not some level of disclosure or discovery was permitted or whether certain disclosure requests were reasonable or relevant to the matter at hand. Canning asserts that the Claims Officer simply denied the entire idea that discovery or production was required at all, and therefore decided a question

of law: namely, that procedural fairness does not require any production or discovery because of an unjustified emphasis on the need for expediency.

[40] Canning argues that the Receiver's desire to make a distribution before the end of this year (which requires the Canning Claim Adjudication to have occurred), and the need for the Canning Claim to be determined expeditiously for that to happen, are not legitimate prevailing competing interests that should be allowed to override the basic tenants of procedural fairness and natural justice. Canning asserts that the Receiver's distribution goals were allowed by the Claims Officer to prevail over the disclosure requests (for documents and witnesses). As a result, Canning submits that the Claims Officer erred and rendered an incorrect decision that disregarded basic procedural fairness by denying the requests.

[41] The difficulty with Canning's characterization is that it does not consider the full context and circumstances of this case. They are unique because the Receiver is, in essence, being asked to look for evidence of the fraud and conspiracy through a review of Bridging's records that it is being asked to undertake and through its own investigative powers to compel documents and information from the Third Party Witnesses, where Canning believes some evidentiary proof might exist.

[42] Canning acknowledges the Receiver has no first-hand knowledge about the Canning Claim. There is no concern that the Receiver is going to lead surprise evidence at the Hearing that Canning will be unprepared to respond to. The concern is that neither Canning nor the Receiver know what the evidence of the alleged fraudsters and co-conspirators is, and Canning's Claim may depend, at least in part, on what they say and bring to the Hearing in response to the summons that have now been issued at Canning's request.

[43] I pause here to observe that it should come as no surprise to Canning that it might need to obtain documents and information from the Third Party Witnesses to support its Claim. In fact, there is evidence that Canning had obtained some information under oath from Mr. Mahal back in 2018 about the same alleged fraud and conspiracy and that efforts were renewed to obtain information from him after the claims process was underway in this case in the spring of 2024.

[44] Further, and significantly, between June 15, 2021 to present, Canning has been making inquiries to the Receiver and requesting disclosure of necessary information to further particularize the Claim, in addition to the information it sought about how the Claim would be handled, and in what timeframe. Canning has provided a detailed chronology of these requests. It is acknowledged that the Receiver responded to some of these inquiries and requests for documents that pre-dated the Decisions, although Canning complains about the timeliness and sufficiency of the responses. This is important history and context for the broad sweeping discovery requests that were made by Canning in the context of the Canning Claim Adjudication.

[45] With this procedural context, it is not accurate to say that there has been no production from the Receiver in response to Canning's requests or that the Claims Officer ruled that there should be none, in the interests of expediency and efficiency. That then leads back to how the

Decisions of this Claims Officer not to order the requested disclosure ought to be characterized for appeal purposes.

[46] In the context of civil litigation, decisions about production and discovery (documentary and oral discovery) are generally viewed to be discretionary decisions that are subject to deference on appeal: "The decision by the case management judge to order production of the documents constituted a discretionary decision. Absent misdirection or a result that is so clearly wrong that it amounts to an injustice, that decision is subject to review on the standard of deference.": see *Winnipeg (City) v. Caspian Projects Ine et al.*, 2021 MBCA 33, 464 D.L.R. (4th) 669, at para. 20. Appellate courts rarely overturn discretionary case management decisions: see *Louis v. Poitras*, 2021 ONCA 49, 456 D.L.R. (4th) 164, at para. 4.

[47] The Claims Officer Appointment Order empowered the Claims Officer to "determine any and all procedural matters which may arise in respect of his determination of the Disputed Bridging Fund Claims, including, without limitation, the timetable for adjudication, the production of documents and such discovery processes as may be appropriate in the circumstances, and the manner in which any evidence may be adduced." That is what the Claims Officer did in the Decisions.

[48] Canning asserts that the court should not view the Claims Officer's role as analogous to the case management role and the broad discretionary powers of judges and associate judges. In this regard, Canning asserts that:

- a. In general, claims officers are not all retired judges so their decisions should not be afforded deference on appeal.
- b. The draft Claims Officer Appointment Order contained language expressly authorizing the Claims Officer to "determine the validity, amount, and/or status of each Disputed Bridging Fund Claim as soon as practicable, including, without limitation, *determining any questions of law, questions of fact, or mixed questions of law and fact, in each case, subject to the appeal rights set out at paragraph 6 of this Order*", and also specified that there would be no right of appeal from any procedural or interlocutory orders made. This language was deleted from the final draft, suggesting that the scope of the Claims Officer's decision-making power was curtailed and the rights of appeal from those decisions were expanded.
- c. Morawetz J. concluded in the Preliminary Decision that leave to appeal was not required from the Decisions of the Claims Officer, suggesting that they are not interlocutory discretionary orders that would, in the normal course of civil litigation, be afforded deference on appeal.

[49] These points are countered by the following:

- a. No authority was cited by Canning for the point that claims officers should not be afforded deference because they are not judicial officers. It is well established in the administrative law and arbitration context that deference may be afforded to

non-judicial adjudicators. The blanket suggestion that claims officers in receivership proceedings who have been authorized to determine the proceedings before them should not be afforded deference because they are not judges or associate judges is not supported by any authority and appears contrary to accepted practice and precedent in other areas.

- b. It is pure speculation to read into the remove of the language from the draft Claims Officer Appointment Order that it was intended to curtail the otherwise broad language regarding the decision-making powers of the Claims Officer or that his decisions would be afforded less deference. The removal of that language could just as readily have been because it was considered to be redundant and unnecessary. No weight can be attached to the wording of earlier drafts. This is a classic example of why drafts are not generally admissible as interpretive aids. The draft language that was removed (which does not directly deal with discretionary interim procedural decisions) is not relevant to the question of the intended breadth of discretion to be afforded to the Claims Officer in respect of interim procedural orders, or the appropriate standard of review of those decisions on appeal.
- c. The Preliminary Decision that determined that leave to appeal from the Decisions was not required was not based upon any assessment or determination of the nature of the appeal or that the issue under appeal was not a discretionary interim procedural decision. Rather, as outlined earlier in this endorsement, it was based on established practice and precedent in *CCAA* and *BIA* claims proceedings, that do not specify that leave is required for interim procedural decisions (or for any decisions) of court appointed claims officers and thus do not impose a leave requirement. That reasoning was applied by analogy to the claims procedure in this *OSA* receivership. The fact that there is always access to the court (without a requirement for leave) for appeals arising in a claims process does not change the fundamental character of the decision under appeal.

[50] Taking into consideration the full history and context of the requests by Canning for the Receiver to produce documents and witnesses that the Decisions did not order, I find the Decisions to be procedural, discretionary, and interim orders made pursuant to the authority of the Claims Officer Appointment Order. These decisions are akin to the discretionary authority of judicial officers when exercising case management powers to deal with procedural matters regarding discovery, all of which are entitled to a high degree of deference on appeal.

Review of Decisions Under Appeal

[51] Having found the Decisions to be procedural, discretionary, and interim orders of the Claims Officer with the authority to make them under the Claims Officer Appointment Order, akin to case management decisions that are deserving of deference on appeal, Canning must demonstrate that a palpable and overriding error exists to merit court intervention.

[52] Canning alleges, in the alternative, that the Decisions of the Claims Officer were animated by an overriding desire to make a distribution before the end of this year (which requires the Canning Claim Adjudication to have occurred) and the need for expediency, and that he misdirected himself and made a palpable and overriding error not to order the requested disclosure (of documents and witnesses), leading to a failure of natural justice. Canning asserts that the Decisions of the Claims Officers were so clearly wrong that they amounted to an injustice (or failure of natural justice) even if they were discretionary case management decisions subject to a higher standard of review.

[53] I disagree. The Decisions, which decline to order further documentary disclosure or require the Receiver to compel information and documents from the Third Party Witnesses, were not so procedurally unfair as to amount to a failure of natural justice. To say that the disclosure that was denied in this case amounts to a failure of natural justice presupposes an entitlement of something approximating the discovery rights available under the *Rules of Civil Procedure*; however, the Claims Officer quite properly noted that the claims process is "quite unlike normal civil litigation."

[54] While the Claims Officer stated that the Canning Claim Adjudication is not a summary process, he also stated that the claims process is "something close to a summary process and quite unlike normal civil litigation." To make sense of the various comments about the process, I revert to the original, more comprehensive observation of the Claims Officer in the First Procedural Decision, in which he explained that: "the landscape has changed", meaning that "the adjudicative process must be timely, efficient and cost effective, all the while being as fair to any Claimant as possible, even though it is not the usual litigation process." This approach is consistent with the mandate of the Claims Officer to adjudicate all claims as soon as practicable.

[55] As was stated in *Ontario Securities Commission v. Paramount Equity Financial Corporation et al.*, 2018 ONSC 5327, at para. 34, a court-ordered claims process "is intended to establish an expeditious, efficient and summary procedure for the Receiver's resolution of claims...[t]he Claimants' suggestion that the resolution provisions in the Claims Procedure Order require extensive discovery and the formal trial of an issue undermines the integrity and summary nature of the court-approved claims process."

[56] I am not persuaded that the Claims Officer gave improper weight to the Receiver's desire for expediency. It was a relevant consideration that the Receiver was entitled to take into account. Canning's position that the urgency and desire for expediency are not important in a winding-up (as opposed to insolvency) fails to appreciate that this is a complex receivership involving tens of thousands of stakeholders, billions of dollars in claims across numerous jurisdictions, hundreds of millions of dollars in assets, many derivative insolvency and litigation proceedings, and one of the largest distressed loan portfolios in Canada.

[57] A significant unitholder priority motion was adjudicated in 2023 and determined in January 2024, after which the Claims Officer Appointment Order was sought and granted. Canning is critical of the timeliness and order in which the Receiver is proceeding with the adjudication of the Disputed Bridging Fund Claims, suggesting that the Canning Claim was ignored and sidelined and is now being rushed to meet the Receiver's self-imposed goal of

distributions in 2024. In actuality, the Receiver is juggling more than one disputed claim and there needs to be some order to their adjudication. The Receiver takes exception to the suggestion by Canning that the Canning Claim has been ignored and sidelined and is now being unfairly rushed.

[58] Claims need to be ordered and streamlined. That is what the Receiver is doing. It is not manifestly unreasonable for the Receiver to attempt to complete the Canning Claim Adjudication within a year of the Claims Officer Appointment Order to enable some distributions to stakeholders. This is what the Receiver asked the Claims Officer to take into account, among other relevant factors, when making interim procedural orders that have timing implications; and that is what the Claims Officer did.

[59] Taking into consideration the full history and context of the requests by Canning for the Receiver to produce documents and witnesses that the Decisions did not order, the Claims Officer's approach did not overwhelm Canning's procedural rights resulting in a failure of natural justice.

[60] I will address separately the relevant context for the request for productions and the request for information and documents to be obtained from the Third Party Witnesses.

Requested Productions

[61] Canning's discovery requests began with broad, open-ended demands for documents and information that are, at first instance, within the knowledge of the Third Party Witnesses who are implicated in the fraud and conspiracy claims. No third party discovery was sought. Instead, Canning sought to compel the Receiver to seek out and obtain all of this information and documentation from the Third Party Witnesses and produce it and/or look for it in Bridging's records. The requests for production from the Receiver were narrowed as they progressed but remain fairly broad in their time frame and scope.

[62] Canning's answer to this is to say that heightened disclosure is required in a fraud case and where, as here, the Receiver is a custodian of the alleged fraudsters' documents, the Receiver ought to search for such documents because Canning has no other way to access them. However, even in civil fraud cases where the alleged fraudster is a party, if another party is seeking to challenge the sufficiency of the alleged fraudster's production, there is an obligation to demonstrate something has been overlooked or withheld. Here, what Canning is really saying is that there must be more, so go look for it.

[63] The Claims Officer had the evidentiary record (as it stood at the relevant times) before him and was aware of the nature of the Canning Claim when the production requests were considered against the backdrop of the procedural history (above) and timelines to the Hearing. The nature of the claims process (not a civil proceeding) and the orderly sequencing of the adjudication of all remaining claims are relevant considerations. Taking that into account when deciding whether to accede to broad disclosure requests does not amount to a patent, palpable, or overriding error. Declining to order the requested production was a decision that was open to the Claims Officer to make, and he made it. It has not been demonstrated to have resulted in any manifest injustice or

deprived Canning of the ability to fairly litigate the Canning Claim at the Hearing. In other words, no failure of natural justice has been demonstrated.

[64] As noted earlier, this is not a situation of trial by ambush by one party against the other. While the alleged fraudsters and co-conspirators are the ones with the most relevant information and may know where certain documents exist, they are not parties to the Canning Claim Adjudication. The Receiver does not have that information or the ability to readily identify any such documents on its own. The Claims Officer made no palpable or overriding error in determining, on the record before him, that the Receiver should not be ordered to undertake the search for further proof of the fraud and conspiracy that Canning alleges.

The Third Party Witnesses

[65] The summons that have been issued assisted Canning's efforts to compel the information and records that it seeks from the Third Party Witnesses.

[66] As part of the Second Procedural Decision, the Claims Officer held that because the Receiver was adverse to the Third Party Witnesses it was under no obligation to produce them, but allowed Canning to call them at the Hearing. Thereafter, the Receiver did not oppose the request by Canning for the court's assistance in issuing the summons to the Third Party Witnesses.

[67] The Third Party Witnesses have been summonsed to the Hearing and have been asked to bring all relevant documents with them. From a procedural fairness perspective, there is nothing unfair about this process.

[68] Although the Canning list of detailed production requests was not ordered to be included in the summons (e.g., there was no advance determination made regarding the relevance of each listed disclosure sought by Canning), there is nothing to stop Canning from providing guidance ahead of time, by way of example, of what the Third Party Witnesses are being asked to bring with them to the Hearing.

[69] There is also nothing stopping Canning from attempting to speak to the Third Party Witnesses who have been summonsed. There is no property in the Third Party Witnesses. The Receiver has simply asked that, if Canning meets with the Third Party Witnesses ahead of time and obtains information regarding what they are expected to say in their testimony, that Canning provide this information in a witness statement or summary of their evidence prior to the Hearing. The Receiver acknowledges that this could only be provided if the Third Party Witnesses are cooperating with Canning.

[70] The Claims Officer committed no palpable or overriding error by not obligating the Receiver to compel the Third Party Witnesses to a pre-hearing interview and to seek production from them in advance of the Hearing.

Logistics for the Hearing

[71] Canning complains that the Hearing will be inefficient and may be delayed or adjourned to accommodate the Third Party Witnesses and what they bring with them to the Hearing. This is a reality of adversarial proceedings. The idea that an uncooperative witness may have important evidence that the parties to the dispute are not able to pin down in advance of their testimony is not uncommon; that is not a failure of procedural fairness or natural justice.

[72] If issues arise at the Hearing regarding further documents produced, or that may be ordered to be produced, by these Third Party Witnesses or that they may identify in the Bridging records in the possession of the Receiver, the Claims Officer is best situated and has full authority to deal with those issues as they arise, and to manage the process of the Canning Claim Adjudication accordingly. Similarly, the Claims Officer is best situated to decide whether additional time should be allotted for the testimony of the Third Party Witnesses at the Hearing and to decide whether the Hearing needs to be extended or adjourned.

Summary Conclusion

[73] I find no palpable or overriding error, or misdirection amounting to an injustice, in the Decisions or the process by which the Claims Officer reached the Decisions. Therefore, there are no grounds that would warrant intervention from this court in those Decisions. See *Caspian*, at para. 20 and *Louis*, at para. 4.

Final Disposition and Costs

[74] The appeal is dismissed.

[75] The parties agreed at the conclusion of the appeal that there should be no order made at this time regarding the costs of this appeal. They have not to date dealt with the costs of any of the other steps in the Canning Claim Adjudication process and agree that the issue of costs should be deferred until the Canning Claim Adjudication has run its course and they have a decision from the Claims Officer.

KIMMEL J.

Date: August 20, 2024