

CITATION: Ontario Securities Commission v. Bridging Finance Inc., 2023 ONSC 715
COURT FILE NO.: CV-21-661458-00CL
DATE: 2023-04-12

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, Kevin Zych and Thomas Gray*, Representative Counsel to the Bridging Unitholders

Robb English, Hansen Wong and Mark Van Zandvoort, for the Redemption Claimants for the Unitholder Priority Motion

Steven Weisz, for University of Minnesota Foundation

Asim Iqbal, Gavin Finlayson and Matthew Smith for Misrepresentation Claimants

Grant Moffatt, John Finnigan and Adam Driedger, for the Receiver

Ryan Taylor, for David Sharpe

Claudia Giroux, for the Receiver's Québec Counsel

Sylvain Rigaud, Eric Bedard, Émile St-Pierre and Simon-Alexandre Poitras, in their capacity as Québec Representative Counsel

HEARD: November 16 and 17, 2022

ADDITIONAL SUBMISSIONS: February 24, 2023

ENDORSEMENT

[1] PricewaterhouseCoopers Inc. (“PwC”) in its capacity as Receiver and Manager of all of the assets, undertakings, and properties (collectively, the “Property”) of each of the Respondents (in such capacity, the “Receiver”) brings this motion for an order declaring that:

- (a) Neither the Potential Statutory Rescission Claims nor the Potential Redemption Claims (collectively, the “Potential Priority Claims”) are entitled to any priority over General Unitholder Claims with respect to the distribution of proceeds of the Bridging Funds; and
- (b) All Unitholder Claims, including, without limitation, the Potential Priority Claims and the General Unitholder Claims, shall rank *pari passu* with respect to the distribution of proceeds of the Bridging Funds.

[2] The issue to be decided is whether the holders of valid Potential Statutory Rescission Claims and/or Potential Redemption Claims are entitled to any priority over General Unitholder Claims with respect to the distribution of proceeds of the Bridging Funds.

[3] The purpose of the motion is not to determine which Unitholders have Potential Priority Claims, the validity of such claims, or to determine the quantum of any claims, including General Unitholder Claims. The determination of such claims will be made at a later date and will depend on, among other things, factual circumstances that may be unique to each Unitholder as well as the determination of this motion. Further, the purpose of this motion is not to determine whether the holders of Potential Statutory Rescission Claims and/or Potential Redemption Claims are entitled to any priority *inter se*.

[4] The evidence for this motion is set out in the Thirteenth Report of the Receiver, to which is attached the Agreed Statement of Facts dated October 12, 2022. The Agreed Statement of Facts is attached as Schedule “A” to this endorsement (without appendices).

[5] Capitalized terms in this endorsement have the meaning ascribed to them in the Agreed Statement of Facts unless defined otherwise.

[6] Factums were filed by the Receiver, Court-appointed Representative Counsel, Court-appointed Redemption Representative Counsel, Court-appointed Representative Counsel for Misrepresentation Claimants and Court-appointed Québec Representative Counsel.

[7] These proceedings were commenced on April 30, 2021, when the Ontario Securities Commission (“OSC”) issued an Application requesting an order pursuant to section 129 of the Ontario *Securities Act* (“OSA”) seeking to place the Respondents into receivership.

[8] Section 129 of the OSA provides:

129(1) The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company.

(2) No order shall be made under subsection (1) unless the court is satisfied that,

(a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders or subscribers to the person or company; or

(b) it is appropriate for the due administration of Ontario securities law.

...

Powers of Receiver,

(5) A receiver, receiver and manager, trustee or liquidator of the property of a person or company appointed under this section shall be the receiver, receiver and manager, trustee or liquidator of all or any part of the property belonging to the person or company or held by the person or company on behalf of or in trust for any other person or company, and, if so directed by the court, the receiver, receiver and manager, trustee or liquidator has the authority to wind up or manage the business and affairs of the person or company and has all powers necessary or incidental to that authority.

[9] Justice Hainey heard the application and released this endorsement on April 30, 2021:

[1] I am satisfied that the order sought on this application is in the best interests of the investors and will further the due administration of Ontario securities law. The motion is therefore granted on the terms of the attached orders.

Position of the Receiver and Representative Counsel to the Bridging Unitholders

[10] The Receiver and Representative Counsel to the Bridging Unitholders take a common position regardless of whether the claim is for redemption or rescission, that:

(a) there is no provision for priority in the Limited Partnership Agreement or Trust Agreements;

(b) there is no provision for priority under the *Limited Partnership Act*, R.S.O. 1990, c. L 16 ("*LPAO*")

- (c) there is no provision for priority under securities legislation, common law or equity;
- (d) it would not be an equitable result to find priority status for the two groups; and
- (e) the *pari passu* principle applies and there is no express or constructive trust, such that investors must share *pro rata*.

[11] This position is based on the following.

[12] First, each Bridging Fund that is structured as a Limited Partnership is governed by a Limited Partnership Agreement (each, a "Limited Partnership Agreement"), which sets out the rights and obligations of the Unitholders and their Units. Unitholders who subscribe for Units become Limited Partners and agree to be bound by the applicable Limited Partnership Agreement.

[13] Each Bridging Fund that is structured as an unincorporated investment trust is governed by Trust Agreement (each, a "Trust Agreement"). Each Trust Agreement is an agreement among BFI (as fund manager) and the applicable trustee governing the operation of the trust and it sets out the rights and obligations of each Unitholder. The rights and obligations of Unitholders are governed by the laws of Ontario and Unitholders who subscribe for Units in the Bridging Funds structured as trusts are bound by the terms of the applicable Trust Agreement.

[14] Each Trust Agreement substantially provides for equal treatment among all Unitholders for all distributions.

[15] The Receiver submits that the Unitholders with Potential Statutory Rescission Claims and Potential Redemption Claims remain Unitholders in the Bridging Funds notwithstanding any rights or remedies available to them (or any steps taken to try to redeem Units prior to the receivership proceeding) and therefore remain bound by the applicable Limited Partnership Agreements and/or Trust Agreements.

[16] Second, the Receiver submits that the terms of the Limited Partnership Agreements in the Trust Agreements, as well as the Offering Memoranda, are consistent with the provisions of the *LPAO*. The *LPAO* governs Limited Partnerships in Ontario and sets out certain rights and obligations of Limited Partners, subject to the provisions of any applicable Limited Partnership Agreement. Reference was made to both section 14 and section 24 of the *LPAO* and regardless of whether the *LPAO* or the Limited Partnership Agreements apply, the Receiver submits that there is no language that expressly or implicitly provides that the Potential Statutory Rescission Claims or the Potential Redemption Claims are intended to have any priority in any circumstance. To the contrary, all applicable agreements and the governing statute expressly provide that all Unitholders are to participate equally, on a *pro rata* basis, with respect to any distributions.

[17] Third, with respect to any Potential argument stemming from common law or equity, the Receiver submits that there is nothing at common law or equity that would override the clear terms of the Limited Partnership Agreements or the Trust Agreements, or otherwise suggest that the

Potential Statutory Rescission Claims or Potential Redemption Claims are entitled to priority over the General Unitholder Claims.

[18] The Limited Partnership Agreements and the Trust Agreements expressly provide that all Unitholders participate equally, on a *pro rata* basis, with respect to any distributions from the Bridging Funds, whether in the ordinary course or in the context of a dissolution.

[19] Fourth, the Receiver further submits that there is no equitable jurisdiction to depart from the contractual documents or the requirements of the governing legislation. In essence, all Unitholders are innocent victims of the failed investment strategy and business practices of Bridging. The Receiver has reported that Unitholders will suffer a significant shortfall on their advances to Bridging with realizations projected at 34% to 41%, which could decrease to 17% to 26% if priority is granted to the Potential Redemption Claims and the Potential Statutory Rescission Claims. The Receiver also submits that if priority is granted to the Potential Redemption Claims and the Potential Statutory Rescission Claims, this would give rise to an inequitable result where Unitholders who purchased within 180 days of the Receiver's appointment, or who happened to fortuitously submit a timely request to redeem would receive 100% recovery on their investment, while the vast majority of investors, who were equally misled and disadvantaged by Bridging, would receive 17% to 26%.

[20] Certain Unitholders provided notice of intention to redeem Units in the Bridging Funds prior to the date of appointment in the Temporary Order. The Receiver points out, however, due to, among other things, the Temporary Order and the Appointment Orders, such redemptions were not completed.

[21] Fifth, Representative Counsel to the General Unitholders submits that pursuant to the Agreed Statement of Facts, it is assumed "that the proceeds of the sale of the Bridging Funds will be less than the aggregate of Potential Statutory Rescission Claims, Potential Redemption Claims, General Unsecured Unitholder Claims and any additional claims determined in accordance with the Claims and Unitholders Identification Procedure or otherwise." From this, Representative Counsel concludes that the Bridging Funds are insolvent.

[22] Representative Counsel contends that although no proceedings in respect of the Bridging Funds under the *Bankruptcy and Insolvency Act* ("BIA") are currently extant, this does not change the fact that they are insolvent, the legal consequences resulting therefrom for the purposes of this motion, or the application of the *pari passu* rule.

[23] Representative Counsel notes that there are two Potential exceptions to equal and rateable distribution.

1. A priority conferred by statute; or
2. A situation in which the assets are not the property of the applicable Bridging Fund, i.e., a trust.

Representative Counsel concludes that neither exception applies in this case.

[24] The Potential Statutory Rescission Claims have a right of rescission under subsection 130.1(1) of the *OSA*, or the equivalent statutory provision in other jurisdictions or by contract as the case may be.

[25] Representative Counsel submits that the legislative right of rescission provides these claimants with a cause of action but none of the applicable statutes give any priority to any such cause of action, let alone includes the clear express language that would be required to create such a novel statutory priority. The holders of Potential Statutory Rescission Claims still have to satisfy the court that a statutory right of rescission creates a priority in circumstances that a common law or equitable right of rescission does not. Representative Counsel submits that as there is nothing in the statutes to provide for such a priority, it is difficult to understand on what basis the Potential Statutory Rescission Claims could have a priority over all other Unitholders.

[26] Representative Counsel also points out that the residency of a Unitholder, and a potential cause of action under a different provincial statute does not and cannot change the application of the *pari passu* principle. The rights of Unitholders between each other can only be governed by the documents and law applicable to the Units that they hold.

[27] In this case, each Unitholder signed up and agreed to be part of, and subject to, the rules and operating regulations of Ontario Limited Partnerships or Ontario Investment Trusts, depending on the applicable Bridging Fund. The residency of a Unitholder cannot provide new substantive of rights and priorities that override the rights of Unitholders in the same Bridging Fund simply on the basis that they reside in another province.

[28] Representative Counsel also submits that situations in which methods other than a *pro rata* distribution have been considered are generally those in which a determination is made as to whether certain funds should form part of a trust. Representative Counsel goes on to submit that the notion that a constructive trust may be found for some Unitholders and not others is not supported by legal or equitable principles.

[29] In summarizing its position, Representative Counsel submits that the Agreements governing the Unitholders in the Bridging Funds, the applicable statutes and the *pari passu* principle all demonstrate that there is no priority intended or existing for a select group of noteholders.

Position of Representative Counsel for Redemption Claimants

[30] Counsel on behalf of the Redemption Claimants takes the position that the distinct legal rights following a valid exercise of a contractual right of redemption must be enforced. Counsel submits that the Redemption Date for many of the Unfulfilled Redemption Requests arrived on or before April 30, 2021, before the appointment of the Receiver and the Temporary Order being issued and thus should have priority and be paid in their entirety before a *pari passu* distribution.

[31] The redemption process under Limited Partner Agreements can be summarized as follows:

- (a) the limited partner submits the request for redemption (section 5.1(a)).

- (b) the applicable “Redemption Date” is the first Valuation Date at least 30 days (or 90 days where such period was amended) after the request for redemption is submitted (sections 1.1 and 5.1(a)).
- (c) the Redemption proceeds are valued as of the Redemption Date (section 5.1(a)). and
- (d) the redemption proceeds must be paid not later than 30 days following the Redemption Date (section 5.1(c)).

[32] The BIIF, FERN, MMF RSP, and BPDI RSP trusts are governed by the same master trust agreement (the “Master Trust Agreement”). The Master Trust Agreement contains a near identical process for redeeming a unitholder’s units to the BIF RSP Trust Agreement.

[33] Counsel on behalf of the Redemption Claimants takes the position that the Agreements for the Limited Partnerships and Trusts created an enforceable liability pursuant to which Redemption Claimants are required to be paid within 30 days of the Redemption Date as specified by the contract. The BIF RSP Trust Agreement provides that a unit is only outstanding until the valuation date on which the redemption price is calculated, after which time the redemption price “of such unit shall be deemed to be a liability of the fund...”. Similar language is found in the Offering Memorandum to the LP Agreements. Consistent with the foregoing, the Funds’ Financial Statements reflected redemption payments owing as liabilities of the Funds.

[34] Counsel further submits that both the Limited Partnerships and the Investment Trusts, pursuant to the terms of the *LPAO* and the constating documents governing these Funds, indicate that those who submit a redemption request are to be paid in priority to nonpriority Claimants.

[35] Once a Limited Partner submits a redemption request to redeem a specified number of Units (the “Redemption Units”), a Limited Partner is not required to take any further steps, and the request is subject only to the specified discretion of the general partner to refuse the redemption prior to the redemption date in circumstances where, in the view of the general partner, it would be prejudicial to the partnership (section 5.1(g)).

[36] Counsel submits that certain of the LP Agreement Offering Memorandum also provide that “redemption price of the unit being received, until paid, shall be deemed to be a liability of the partnership.”

[37] Counsel also notes that Bridging purported to amend the Limited Partnership Agreement so as to extend the redemption notice periods from 30 days to 90 days in December 2020, thereby potentially affecting the calculation of the applicable redemption dates of such Redemption Claimants. Counsel submits that for two of the Funds (BIF and MMF), the meetings where this amendment was made did not achieve the quorum, such that the amendments were never duly passed, resulting in additional matured redemptions at the time of the Receiver’s appointment on April 30, 2021.

[38] Counsel to the Redemption Claimants states that notwithstanding the clear process for the Unitholder to redeem its Units pursuant to the constating agreements and offering memoranda, SS & C, the administrator appointed by Bridging, followed its own internal process when recording and administering redemption requests. While the effective date of a duly requested and accepted redemption would be the applicable Valuation Date, the redemption would not be priced or considered by the Fund Administrator to be “contracted” until the NAV was calculated for such Valuation Date, which typically occurred approximately 3 to 4 weeks following such Valuation Date.

[39] Counsel goes on to submit that absent Bridging taking a positive step to reject a redemption request, the Bridging Funds were obligated to make payment to the redeeming Unitholders and the payment would become an enforceable liability of the Fund as at the redemption date until such payment was made.

[40] On April 30, 2021, the OSC issued a cease trade order suspending all trading and securities of the Bridging Funds with the exception of BPDI RSP and FERN and (the “Temporary Order”).

[41] At approximately 4:00 p.m. on April 30, 2021, the court ordered, pursuant to section 129 of the *OSA*, that PwC be appointed as receiver and manager over the affairs of Bridging and for each of the Bridging Funds except for BPDI RSP. The Receiver’s appointment was extended to BPDI RSP on May 3, 2021.

[42] Also on April 30, 2021, redemptions having a Valuation Date of March 31, 2021 were processed and paid earlier in the day prior to the Appointment Order being granted. It is the position of the Redemption Claimants that redemption requests having an April 30, 2021 Valuation Date had been similarly vested prior to the issuance of the Appointment Order and the Temporary Order.

[43] Counsel submits that the Bridging Funds have not been formally dissolved or terminated. The LP Agreements provide for dissolution to occur should the general partner be placed into receivership and provided that a receiver performs its functions for 60 consecutive days. The Funds were not dissolved at the time the redemption requests were made and no order has been made declaring them dissolved. Consequently, the Trusts are different in that there is no provision for their dissolution on a Receivership, but only on a notice of termination, which has never been given.

[44] Finally, even if the Limited Partnerships were dissolved, that would not alter the outcome, as section 10.1(c)(ii) of the LP Agreement and section 24 of the *LPAO* permit Redemption Claimants to be paid a liability owing to them prior to a distribution to nonpriority Claimants.

[45] Counsel further submits that in arguing that the *pari passu* rule ought to be applied to trump the contractual entitlement of Redemption Claimants, the Receiver and Representative Counsel have incorrectly assumed that the Bridging Funds are insolvent.

[46] In summary, Counsel submits that all parties to the motion agree that the effective date of a duly requested and accepted redemption would be the applicable Valuation Date. The

Redemption Claimants' position is that for many of the unfulfilled redemption requests, the redemption date arrived on or before April 30, 2021, prior to the issuance of the Appointment Order and the Temporary Order. The Redemption Claimants' position is that the amendments to the BIF and MMF LP Agreements were not valid. If the amendments to the Redemption Notice Period are not valid, the notice period for BIF and MMF remains 30 days (instead of 90 days).

[47] As a result, all Limited Partners who submitted a redemption request in those two Funds from January through March 2021 would have vested redemption dates as of February 28, 2021, March 31, 2021, or April 30, 2021, being earlier than as recorded by Bridging or currently recognized by the Receiver.

Position of Representative Counsel on behalf of the Potential Statutory Rescission Claimants

[48] Representative Counsel on behalf of the Potential Statutory Rescission Claimants (also described as Counsel for the Misrepresentation Claimants) submits that the Potential Statutory Rescission Claimants are entitled to a priority over General Unitholder Claims and should not be subject to *pari passu* distribution.

[49] Misrepresentation Claimants have statutory remedies, or a contractual equivalent.

[50] Counsel submits that while all Unitholders are similarly situated in many respects, Unitholders who invested within 180 days of the appointment of the Receiver: (i) did not share potentially years of returns on their invested funds like other Unitholders; and (ii) have a Statutory Right of Rescission (or contractual equivalent) of which all Unitholders had notice. The nature of a rescission as a remedy creates a *de facto* priority. Misrepresentation claimants may annul their contracts, they are not bound by their terms, and have rights to a return of their Funds. Since the contract is annulled, its terms do not govern distributions. Finally, such Misrepresentation Claimants who elect to rescind are no longer Unitholders, and the provisions of the LPAO do not apply.

[51] Section 130.1 of the *OSA* provides that when an Offering Memorandum contains misrepresentation, a purchaser has (a) certain rights to pursue damages; or (b) a right of rescission. This right to choose a remedy exists regardless of whether a purchaser relied on the misrepresentation.

Liability for misrepresentation in offering memorandum

130.1(1) Where an offering memorandum contains a misrepresentation, a purchaser who purchases a security offered by the offering memorandum during the period of distribution has, without regard to whether the purchaser relied on the misrepresentation, the following rights:

1. The purchaser has a right of action for damages against the issuer and a selling security holder on whose behalf the distribution is made.

2. If the purchaser purchased the security from a person or company referred to in paragraph 1, the purchaser may elect to exercise a right of rescission against the person or company. If the purchaser exercises this right, the purchaser ceases to have a right of action for damages against the person or company. 2004 c. 31, Sched. 34 s. 7

[52] Further, those Unitholders who otherwise may not have had access to the statutory rescission rights were granted contractual rights under the Offering Memorandum of the Bridging Funds, which rights are equivalent to the rights conferred by the *OSA*. These Misrepresentation Claimants are identically situated to those Misrepresentation Claimants with purely statutory rights.

[53] Counsel submits that the Potential Statutory Rescission Claims are entitled to a priority over General Unitholder Claims for the following reasons.

[54] First, the nature of rescission as a remedy creates the factual priority:

- (a) rescission is a statutory proprietary remedy for a wrong done creating a resulting trust on those facts and requiring the imposition of a constructive trust over the Misrepresentation Claimants' monies in the hands of Bridging;
- (b) the introduction of the *pari passu* principle or solvency requirement conflates damages in section 130.1(1)1., and rescission in s. 130.1(1)2. Damages and rescission are mutually exclusive;
- (c) statutory rescission is a remedy conferred by the Legislature. Its application is nondiscretionary; and
- (d) there are no bars to rescission on these facts.

[55] Counsel submits that once the statutory rescission remedy is exercised, the contracts are considered void *ab initio*. The parties are to be returned to the same position they were in before they entered into the contract. In this case, this means a return of investment principal, minus any benefit obtained by the rescinded contract.

[56] Second, given their remedy, it is unfair for Misrepresentation Claimants to share *pro rata* in the Bridging Funds, especially where:

- (a) relatively new investors minimally benefited from distribution;
- (b) they will forgo the benefits they did receive and further damage claims; and
- (c) General Unitholders had express notice of the rescission rights.

[57] Misrepresentation Claimants who elect the remedy of rescission cease to be Unitholders and are no longer bound by the contractual and statutory provisions which otherwise limit Unitholders to a *pro rata* distribution. They have an absolute right to the return of their investment principal, less any distributions received, regardless of whether they each relied on the misrepresentation.

[58] Counsel submits that rescission may be either proprietary or personal in nature and when setting aside of the transaction involves the reinvesting of property in another party, the relief granted is proprietary in nature. Upon rescission, the Misrepresentation Claimants' Units will revest in Bridging.

[59] A constructive trust arises by operation of law where – on account of fraud, breach of fiduciary duty, or unjust enrichment – it would be against good conscience to allow the legal owner to retain the beneficial interest, such that equity converts the owner into a trustee.

[60] A resulting trust arises by operation of law to recognize beneficial entitlements – that is, “to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it”, such that the property results to the true owner. (See: *Kerr v. Baranow*, 1 S.C.R. 269, 2011 SCC 10).

[61] Counsel further submits that the relevant Trust Agreements provide that legal title to the Bridging Funds properties are held in trust for the Unitholders, which have the beneficial interest. This express trust fails once it is rescinded, having been vitiated by misrepresentation. Similarly, under the Limited Partnership Agreement, the general partner holds legal title to the partnership assets, but the beneficial interest lies with the Limited Partners (i.e., Unitholders).

[62] In both cases, a Resulting Trust arises by operation of law to return the property to the Misrepresentation Claimants upon failure of the express trust.

[63] Third, the moving party's arguments do not foreclose *de facto* priority for Misrepresentation Claimants. The alleged insolvency of the Bridging Funds is no bar as rescission rights can be enforced against insolvent entities. This is an *OSA* Receivership, not a BIA proceeding and there is no paramountcy issue. The nature of the remedy creates the priority and section 130.1 of the *OSA* is a complete code governing the rights for security holders. Further, the contractual and statutory provisions which stipulate equal treatment for Unitholders do not bind Misrepresentation Claimants, as once they elect rescission they cease to be Unitholders.

[64] With respect to the argument, namely there is no residual discretion to refuse to enforce Statutory Rescission Rights, counsel submits that there is no judicial discretion embedded in section 130.1(1). Once the factual statutory criteria are met, the entitlement to rescission crystallizes.

Court-appointed Québec Representative Counsel

[65] Counsel poses the question as follows:

Should the Receiver honour the rights of Unitholders resident in Québec at the time of their subscription for Units, Potential Priority Claims (“Québec Claimants”) or should it instead ignore specific contractual rights granted to all Unitholders (but only exercised by certain) and imperative statutory protection aimed at protecting the Québec investing public and treat same as subordinated rights?

[66] For the purposes of this motion, which assumes that the applicable Offering Memorandum contains a misrepresentation, no obstacle to allowing Potential Québec Statutory Rescission Claims can be found. Indeed, the Québec legislation granted the Québec investor a right to rescind the subscription of securities and claim the restitution of the purchase price and presence of misrepresentations.

[67] Simply put, Potential Québec Rescission Claimants, as a result of rescission, are entitled to the return of their Property – their investment principal (less distributions received) – which no longer forms part of the estate of the Bridging Funds to be distributed amongst its creditors.

[68] Counsel submits that Québec Claimants’ right to assert priority over the General Unitholders stems from the fact that they have exercised or are entitled to exercise rights made available to Unitholders. As a result, certain Québec Claimants hold distinct and different legal rights and should be treated accordingly.

i. Redemption Rights

[69] Counsel submits that investors subscribed for their Units offered in the Bridging Funds pursuant to Offering Memoranda, investing in either Limited Partnership or Trust Agreements, which are all governed by Ontario law. Counsel goes on to explain that Potential Québec Redemption Claims are contractual in nature and as such are also governed by Ontario law, which is not supplanted or supplemented by mandatory provisions of Québec law.

[70] The equal treatment of creditors requires that the court direct the Receiver to honour Vested Redemption Rights (as defined below) given that Redemption Rights were granted to all Unitholders, who could opt to exercise same by providing a redemption request in accordance with the applicable Limited Partnership or Trust Agreements. Counsel submits that it would be unfair to disregard the valid exercise of a contractual right generally made available to all Unitholders and impose the same treatment to all Unitholders under the guise of fairness irrespective of the vesting in their favour of Redemption Rights.

[71] Counsel notes that the Receiver and Representative Counsel did not take the view that the exercise of Redemption Rights by Unitholders is governed by section 15 of the OLPA. Québec Representatives are of the same view in that the exercise of Redemption Rights does not provide for the repayment of the Redeeming Unitholder’s Contributions, but rather payment of the applicable net asset value per unit as defined and calculated pursuant to the applicable constating documents, is further evidenced by sections 10.1(f) of the applicable Limited Partnership Agreements, which provide that the Limited Partners have no right to request a return of the contribution except upon dissolution. (emphasis added)

[72] Counsel submits that the fallacy in the equal rights argument developed by the Receiver and the *pari passu* argument developed by Representative Counsel is twofold. First, contractual Redemption Rights are granted to all Unitholders pursuant to the applicable Limited Partnership and Trust Agreements, whereas Statutory Rescission Rights are also granted to all Unitholders in accordance with the applicable legislation or as provided by the Offering Memorandum. Second, the equal rights/*pari passu* argument ignores the fact that Potential Redemption Claimants, having validly exercised their contractual Redemption Rights, and Potential Statutory Rescission Claims both hold different and distinct legal rights from those of the other Unitholders with no such Potential Priority Claims.

[73] In this motion, the equal treatment of Unitholders is not engaged as they hold the same Redemption Rights under the applicable Agreements. The fact that only certain Unitholders elected to exercise their contractual rights and that only certain Unitholders are eligible to exercise their Statutory Rescission Rights sets them apart from the other Unitholders with General Unitholder Claims who have not elected to exercise the Redemption Rights or can no longer exercise their Statutory Rescission Rights.

[74] Counsel submits that honouring Vested Redemption Rights is not in breach of equal treatment of Unitholders as the right to redeem Units is available to every Unitholder, independent of the class or series of Units. The different and distinct legal rights of Potential Redemption Claimants are derived from a valid exercise of a contractual right to all Unitholders of the Bridging Funds and forms part of the bargain entered into by all Unitholders.

[75] The terms of the applicable Limited Partnership and Trust Agreements indicate that Units may be redeemed "on a Valuation Date".

[76] Counsel points out that the Valuation Date and the valuation time, under the applicable Limited Partnership or Trust Agreements, are distinct. The redemption request crystallizes at 12:01 a.m. of the Valuation Date, notwithstanding that the value of same is established at 4:00 p.m. on the valuation date, at which time the Potential Redemption Claimants hold a Vested Redemption Right (the "Vested Redemption Right").

[77] Counsel adds that the Fund Administrator's internal practice with regards to the redemption is irrelevant for the purpose of this motion as it does not displace the Unitholders' contractual rights.

[78] It is the position of Québec Representative Counsel that many of the Potential Québec Redemption Claimants hold Vested Matured Redemption Rights at the redemption date of April 30, 2021, at 12:01 a.m. or opening business or market hours which was in either case prior to the Appointment Order being issued later that day.

[79] Simply put, on redemption date, the applicable Trust Agreements provided that the Unitholder ceased to have any further rights with respect to such Units except to payment. Once a Unitholder's redemption request matured, the value of the Redemption Claim became a vested and enforceable liability of the Limited Partnership. Consistent with the foregoing, Vested Redemption

Rights were recorded as specific liabilities owed by the Bridging Funds in their unaudited internal financial statements, as distinct from the Unitholder's contributions.

[80] Counsel concludes that the Receiver should be directed to honour Potential Redemption Claims who hold Vested Redemption Rights, meaning a redemption request that is crystallized on the Valuation Date, but prior to the Appointment Order issued at 4:00 p.m. on April 30, 2021.

ii. Rescission Rights

[81] By contrast, the *QSA* governs the distribution of securities by Québec residents and is a law of the necessary application. Therefore, Potential Québec Statutory Rescission Claims are governed by the *QSA*. Two objectives underlie all provisions of the *QSA*: the protection of investors and the proper functioning of the market.

[82] To further its objective of maximizing the protection of Québec Securities Holders, the Québec Legislature dictated that the application of the *QSA* cannot be avoided. Section 236.1 mandates the application of the *QSA* in matters pertaining to the distribution of securities where the subscriber resides in Québec.

[83] The court should therefore only refuse to recognize or enforce the *QSA* if it is contrary to the fundamental public policy of Ontario or mandated by Ontario law. Nothing of the sort prevents the court from recognizing or enforcing the *QSA*.

[84] As a result of the immediate application of the *QSA*, the rights of Québec Unitholders "pertaining to the distribution of" Units by the Bridging Funds are governed by the *QSA*.

[85] Accordingly, the assessment of the Potential Statutory Rescission Claims by Québec Unitholders should therefore proceed with great consideration for this intent. It is also noted that the exercise of Québec Rescission Rights is "prescribed by the lapse of three years from the date of the transaction", at least twice as long as in other Canadian jurisdictions.

[86] Counsel then addresses the issue of whether the Receiver should be directed to honour Potential Québec Statutory Rescission Claims.

[87] Section 217 of the *QSA* grants Québec investors the right to have their subscription of securities on the primary market rescinded in case a misrepresentation is contained in an Offering Memorandum (the "*QSA* Rescission Right"). In addition to the *QSA* Rescission Right, the *QSA* provides other distinct rights and remedies including the right of rescission of subscribers or acquirers of security without the required prospectus, the right to demand the revision of the price for securities subscribed or acquired in the same circumstances or in case of a misrepresentation made on the primary market, and the right to demand damages for misrepresentations for securities acquired on the secondary market.

[88] Counsel submits that it is assumed that the Potential Québec Statutory Rescission Claimants are entitled to obtain the rescission of the Units to which they subscribe, and the

restitution of the price paid. Once the threshold conditions are met, the court has no jurisdiction to deny this remedy or to force the aggrieved Québec investors to accept damages instead.

[89] The practical consequence of rescission is to restore the parties to their previous state by restitution in their respective presentation. This conclusion follows from the application of article 1422 CCQ. The Civil Code is explicit in explaining that the restitution of pre-stations consists in returning to another person the Property received. This is in line with the consequences of rescission under Ontario law and is as automatic.

[90] In order for Potential Québec Statutory Rescission Claimants to be restored to their previous state, the Bridging Funds must return the money they received for the subscription of the Units subject to the exercise of *QSA* Rescission Rights and to which they have no more right. This should take place before the Funds from other Units are paid out in the context of the Receivership.

[91] In conclusion, counsel submits that Potential Québec Rescission Claimants are entitled to recover their investment principal (less distributions received) as the return of their property resulting from the exercise of the rescission remedy. The Property no longer forms part of the estate of the Bridging Funds to be distributed amongst its creditors, granting Potential Québec Rescission Claimants a *de facto* or functional priority that the court should direct the Receiver to respect.

Responses of the Receiver and Representative Counsel to the Bridging Unitholders

[92] The Receiver responded to the following arguments raised by the Unitholders:

- (a) The Misrepresentation Claimants have a right of rescission and therefore such Claimants are no longer Unitholders, are no longer bound by the applicable constating documents, and the amounts invested by such Claimants do not form part of the Bridging Estate;
- (b) The Potential Redemption Claims constitute “enforceable liabilities” that rank in priority to General Unitholder Claims; and
- (c) The *QSA* applies to the issues on the motion.

[93] The Receiver argues that there is no priority or trust for Statutory Rescission Claimants. The Misrepresentation Claimants attempt to overcome the unequivocal language in the constating documents that no Unitholder shall be entitled to any preference, priority or right in any circumstance over any other Unitholder.

[94] The Receiver contends that the arguments raised by Misrepresentation Claimants is contrary to the leading case law which provides that:

- (i) rescission rights on the basis of misrepresentation cannot be exercised once a company is insolvent or winding up; and

- (ii) regardless of whether rescission rights can be exercised, the claims derived from such rights are not afforded any priority.

[95] The Receiver argues that rescission rights cannot be exercised in a Receivership, citing well-established case law that rescission rights cannot be exercised in respect of an insolvent entity. The Receiver contends that rights that a stakeholder may have been entitled to prior to an insolvency can be lost or limited. (See: *Blue Range Resource Corp. (Re)*, 76 Alta L.R. (3d) 338, 2000 ABQB 4 at para. 39 (“*Blue Range*”).)

[96] In *McCaskill v. Northwestern Trust Co.*, [1926] S.C.R. 412, the Supreme Court of Canada recognized that a claim of rescission for fraud or misrepresentation may be lost in the context of a winding up or to a change in circumstances, which makes it unjust to exercise such a right.

[97] In *Blue Range*, Romaine J. noted: “it is clear that, both in Canada and in the United Kingdom, once a company is insolvent, shareholders are not allowed to rescind their shares on the basis of misrepresentation.”

[98] The Receiver submits that the Rescission Claimants have not satisfied the requirements for a trust.

[99] Second, case law supports the conclusion that investors with statutory rescission rights are not entitled to any priority: See, for example, *National Bank of Canada v. Merit Energy Ltd.*, 2001 ABQB 583, 294 Alta L.R. (3d) 166, at paras. 1 and 48 – 55. In the context of a receivership or a bankruptcy, the Alberta Court of King’s Bench held that the statutory rescission claims of investors under the *Alberta Securities Act* do not rank in priority to the claims of other investors. Rescission claims are fundamentally a right to recover investments and are not materially different from misrepresentation claims for damages.

[100] The Receiver also contends that there is no priority for its Redemption Claims.

[101] The core argument of the Redemption Claimants is that the applicable agreements created an “enforceable liability” pursuant to which Potential Redemption Claimants are required to be paid within 30 days of the applicable Valuation Date (i.e., the last business day of each calendar month as of which the NAV is calculated for the purposes of quantifying and paying out redemptions accepted by Bridging). This argument ignores the fact that the unfilled redemption requests were never completed or accepted and is not supported by the applicable agreements and leading case law.

[102] In this case, the Receiver argues that the unfilled redemption requests were never accepted or binding. The Receiver was appointed before any unfilled redemption requests were accepted, priced, contracted, and paid out.

[103] At paragraph 21 of the responding factum, the Receiver points out that the Trust Agreements provide that “notwithstanding any other provision herein ... the manager has the sole discretion to accept or reject redemption requests and the manager intends to accept redemption request in circumstances where, in the view of the manager, it would not be prejudicial to the

applicable fund to do so.” There are no circumstances under the applicable constating documents in which the manager is required to accept redemption requests with respect to the Bridging Funds that are structured as trusts. There is an identical provision in the Limited Partnership Agreement for MMF LP.

[104] Accordingly, even if the Appointment Order and the Temporary Order were not granted, the unfilled redemption requests were not required to be accepted or completed.

[105] As of April 30, 2021, net contracted but unpaid redemptions are listed at zero dollars. This reflects the reality that no redemption requests were accepted or completed at that time and therefore no corresponding adjustment to the “liabilities” side of the balance sheet was required to account for future cash outflows for completed redemptions.

[106] The fact that a cash adjustment for “redemptions payable” appears in Bridging’s financial statements is of little relevance to the question of priority.

[107] More importantly even if the unfilled redemption request could have been accepted (or were accepted in fact), this does not create any priority or differentiate the Potential Redemption Claims from any other Unitholder claim.

[108] Any request or demand for payment (such as a redemption request) even if accepted or binding, does not have the effect of transforming the legal rights of the parties and creating a priority when none otherwise exists.

[109] The Receiver also argues that the *QSA* does not apply. Québec claimants assert that the *QSA* applies to the priority issue as it relates to the Potential Statutory Rescission Claims. This is incorrect; the Receiver submits that the *QSA* does not apply in the circumstances and the applicability of the *QSA* has no impact on the question of priority in any event.

[110] The Receiver points out that the Unitholders resident in Québec were granted contractual rescission rights because the rescission rights available under the *QSA* are limited to investors who purchased pursuant to a prospectus, an offering memorandum prescribed by regulation, and the other document authorized by the Québec securities regulatory authority in lieu of a prospectus. The offering memorandum prescribed by regulation contemplated by the *QSA* must meet specific disclosure and other requirements under “offering memorandum” prospectus exemption pursuant to *National Instrument 45-106 Prospectus Exemptions*. The *QSA* does not provide rescission rights to Québec investors who purchased securities under a non-prescribed form of offering memorandum, pursuant to other prospectus exemptions under *National Instrument 45-106*, including the “accredited investor” or “minimum amount investment” exemptions (such as the offering memorandum for Bridging Funds).

[111] Accordingly, the submissions of the Québec Claimants are built upon the incorrect premise that the *QSA* applies and should be disregarded.

[112] Even if the *QSA* is applied, the analysis with respect to priority does not change. The rights available under the *QSA* are substantially similar to those provided for under the *OSA*.

[113] The reply factum of Representative Counsel for the Bridging Unitholders addresses the following issues:

- (a) No party has a response to the fact that the Agreed Statement of Facts provides that the Bridging Funds are insolvent and therefore the application of the *pari passu* principle is required.
- (b) The holders of Potential Priority Claims have confused the validity or enforcement of their claims with the issue of whether such a claim would have a priority. No basis for a priority has been demonstrated.
- (c) Contrary to the position of the holders of Potential Redemption Claims, a valid contractual claim does not have priority over all other valid claims.
- (d) The statutory right to rescission does not equate to statutory priority.
- (e) There is no trust created as a result of the statutory right to rescission.
- (f) Contrary to the position of the Rescission Claimants, they are still Unitholders subject to the applicable Agreements. In any event, *pari passu* would govern even if they did not.
- (g) Contrary to the position of Québec Representative Counsel, it is the law of Ontario that determines priorities of claims against Bridging regardless of the province of residence of such claimants.

[114] Representative Counsel submits that having a valid and enforceable claim does not mean that there is somehow a “*de facto* priority” over other valid and enforceable claims. Being enforceable is not necessarily the equivalent to being secured or the equivalent of being subject to a trust.

[115] Counsel also submits a statutory right of rescission is not the same as a statutory priority. This confuses the validity of a right with the statutory priority for that right. Counsel does not suggest that the statutory right of rescission will not be respected, or that it is not valid or enforceable, in the sense that the quantum of such claims will be taken into account in distribution on a *pro rata* basis. Rather, the question is whether the statutory right enjoys a statutory priority. There is no indication in any of the relevant legislation that such priority exists, nor can the holders of Potential Statutory Rescission Claims point to any such language. There is no indication that the provincial *Securities Acts* oust any of the applicable legal principles, including the application of the *pari passu* rule, let alone clear language that effect.

[116] Representative Counsel also argue that a right to statutory rescission does not create a trust. The holders of Statutory Rescission Claims baldly assert that recession is a remedy requiring the imposition of a constructive trust. However, they have not satisfied the requisite elements for constructive trust, nor demonstrated how a statutory right can create a trust with any language in the statute suggesting one exists.

[117] Representative Counsel also submits that the fact that rights have become vested and enforceable – such as the statutory right to rescission – does not mean that they become tantamount to a trust. There must be some special reason to grant the holders of Potential Statutory Rescission Claims a constructive trust which essentially makes these claimants a secured creditor (which is wholly not established on the Agreed Statement of Facts).

[118] Notably, the consideration analysis of whether a constructive trust is the appropriate remedy is whether the claimant reasonably expected to obtain an actual proprietary interest as opposed to monetary relief. Given that none of the documentation or applicable legislation indicates that a proprietary interest would result if a Unitholder has a Potential Statutory Rescission Claim, the Receiver submits there is no basis on which such a trust would be consistent with their reasonable expectations.

[119] Finally, the applicability of Quebec law is irrelevant to the issue at hand, as the law applicable to the issue of proving is distinct from that applicable to the issue of validity to the claim. Counsel submits that the issue of priority can only be governed by (i) *lex fori* – Ontario and (ii) the law of the Agreements – Ontario – as these Agreements set out the agreed upon rights and entitlements *vis-à-vis* each other. As such, Quebec law is not relevant to the issue before the court to determine priority. Further, the consideration of Quebec law would not change the outcome.

[120] Counsel stresses that with respect to Potential Quebec Redemption Claims, Quebec Representative Counsel concedes that such claims are governed by Ontario law.

[121] With respect to Potential Quebec Statutory Rescission Claims, Quebec Representative Counsel confuses the enforcement or validity of such claims with whether or not such claims have a priority. Representative Counsel stresses that no one is suggesting that the claims of Quebec Unitholders will be disregarded; the issue is whether those claims should be granted priority. Issues of distribution and allocation are not before the court at this time. Even if Quebec law were to apply on this motion, no priority has been demonstrated. It does not create a priority

Analysis

[122] These proceedings were commenced and to this date remain under the *OSA*.

[123] The initial endorsement of Hainey J. states that the Appointment Order is in the best interests of the investors and will further the due administration of Ontario securities law.

[124] Unlike the *BIA*, and the *Companies' Creditors Arrangement Act* (“*CCAA*”), receivership proceedings under the *OSA* do not have a recognized or defined scheme of distribution.

[125] The issues to be determined on this motion relate to the relative priority positions of Unitholders, specifically whether the claims of Redemption Claimants and Rescission Claimants have priority over General Unitholders.

[126] Redemption Claimants are of the view that they are contractually entitled to receive a cash payment for their units based on the NAV as of the applicable Valuation Date.

[127] Misrepresentation Claimants are of the view that they are to receive a refund of the amount of their investment less any distributions made to them.

[128] The claims of both the Redemption Claimants and the Misrepresentation Claimants are connected to their respective investments.

[129] There is scant jurisprudence on receiverships under securities legislation.

[130] There is case law addressing the issue as to whether investors are creditors or equity holders – but that is not an issue on the motion, and the application of such caselaw on this motion must be closely scrutinized.

Redemption Claimants

[131] At the time of the Appointment Order, certain Unitholders had provided Notice of Intention to Redeem Units.

[132] These Unitholders are separated into two groups.

[133] The first group is referenced at paragraphs 55 and 56 of the Agreed Statement of Facts. This group had accepted redemptions with a Valuation Date of March 31, 2021, and a corresponding settlement date of no later than April 30, 2021, as a result of a waived notice period, or redemption requests from BPDI or FERN, which were processed and paid in full to those Unitholders on April 30, 2021. Those redemptions for the Bridging Funds were settled prior to the Appointment Order being granted.

[134] These redemptions were paid based on a NAV calculation made prior to the Appointment Order.

[135] The second group is made up of Unitholders who, at the time the Appointment Order was granted, had provided Notice of Intention to Redeem, but redemption payments had not been issued by Bridging. There is no evidence that funds had been set aside for these Unitholders.

[136] The core argument of this group of Redemption Claimants is that the applicable agreements created an “enforceable liability” pursuant to which Potential Redemption Claimants are required to be paid within 30 days of the applicable Valuation Date.

[137] The fatal problem with this argument is that the redemption requests of these Redemption Claimants had not been completed.

[138] The Receiver argues that the unfiled redemption requests were never accepted nor binding. The Appointment Order was granted before any of these redemption requests were accepted, priced, or contracted, or paid out.

[139] I also note that the Trust Agreements provide, as noted in para. 21 of the Responding Factum of the Receiver:

“ ... the Manager has the sole discretion to accept or reject redemption requests”

[140] With respect to Limited Partnerships, the response of the Receiver is set out at para. 22 of the Responding Factum. The Limited Partnership Agreement for MMF LP contains the identical provisions to those contained in the Trust Agreements. The Limited Partnership Agreements for BIF LP and BPDI LP are similar and give the Manager broad discretion to accept or reject redemption requests.

[141] Accordingly, there are no circumstances under the applicable documents in which the Manager is required to accept redemption requests with respect to the Bridging Funds.

[142] Thus, on April 30, 2021, net contracted but unpaid redemption requests are listed at zero dollars. As noted by the Receiver, this reflects the reality that no redemption requests were accepted or completed at the time the Appointment Order was granted. Furthermore, there was no corresponding adjustment to the “liabilities” side of the balance sheet to account for future cashflows for completed transactions.

[143] The foregoing reflects the reality of the situation as it existed at the time the Appointment Order was granted. The Unitholders may have thought otherwise, but that does not impact the legal analysis. In administering the affairs of Bridging, the Receiver has to take into account the manner in which the Bridging business operations were actually conducted (See: *Cash Store Financial Services (Re)*, 2014 ONSC 4326 at paras. 3 – 6, 122, aff'd 2014 ONCA 834).

[144] In arguing for priority status over General Unitholders, the Potential Redemption Claimants seek an outcome that in essence requires the Receiver to make a retroactive adjustment to the records of Bridging, so as to complete redemption requests after the fact.

[145] The Unitholders may have claims against Bridging based on breach of contract, but that does not impact on the question before the court, namely whether they are entitled to priority over the General Unitholders. In my view, in order to achieve priority status, the redemption process must have been fully completed. In this case, it was not.

[146] I have concluded that the Redemption Claimants are not entitled to priority treatment based on incomplete redemption requests. I recognize that this result may be perceived as providing a windfall to Unitholders where redemption requests were completed shortly before the granting of the Appointment Order. The timing of these requests turned out to be most fortunate for these Unitholders as their return was based on a NAV calculation shortly before the receivership proceedings. It goes without saying that this NAV calculation is substantially different from the estimated realization provided by the Receiver.

Misrepresentation Claimants

[147] The position of Misrepresentation Claimants fundamentally differs from Redemption Claimants and from General Unitholders.

[148] Paragraph 4 of the factum submitted by Misrepresentation Claimants reads as follows:

The nature of rescission as a remedy creates a *de facto* priority. Misrepresentation Claimants may annul their contracts, are not bound by their terms, and have a proprietary right to a return of their funds. Since the contract is annulled, its terms do not govern distributions. Since Misrepresentation Claimants who elect to rescind are no longer unitholders, the provisions of Ontario's *Limited Partnership Act* do not apply.

[149] Counsel to the Misrepresentation Claimants submits that in a receivership under the *Securities Act*, the Court should recognize and give effect to the statutory rights of unitholders under securities legislation. In the circumstances of this case, and in particular in the context of the question posed on this motion, I agree with this submission and have concluded that the rights of Misrepresentation Claimants have priority over the claims of General Unitholders.

[150] The Misrepresentation Claimants have statutory remedies, and in some provinces a contractual right.

[151] The statutory remedy is set out in s. 130.1(1) of the *OSA*, where an offering memorandum contains a misrepresentation, a purchaser has (a) certain rights to pursue damages; or (b) a right of rescission. Reliance on the misrepresentation does not have to be shown.

[152] Certain Unitholders who otherwise may have access to these statutory rescission rights were granted contractual rights under the offering memorandum of the Bridging Funds, which rights are equivalent to the rights conferred by the *OSA*. Counsel submits that these Misrepresentation Claimants are identically situated to those claimants who have purely statutory rights. I agree.

[153] The claim of the Misrepresentation Claimants is for the amount of their investments less amounts distributed.

[154] It has been established that the nature of rescission as a remedy creates a *de facto* priority.

[155] In arriving at this conclusion, I have taken into account that statutory rescission is a remedy conferred by the *OSA* and its application is non-discretionary.

[156] I have not been persuaded by the arguments presented by the Receiver and Representative Counsel.

[157] The Receiver takes the position that rescission rights cannot be exercised in a receivership, and that leading case law recognizes that, in the context of an insolvency or winding-up, a corporation may or may not be able to satisfy the claims of all stakeholders, thus changing the entire complexion of a corporation. Counsel cites *Northwestern*. *Northwestern* arose in the liquidation of the Northwestern Trust Co., which was being wound-up under the provisions of the federal insolvency *Winding-up Act*. The Supreme Court recognized that a claim for rescission for misrepresentation may be lost in the context of a winding-up. The decision in *Northwestern* was followed by Romaine J. in *Blue Range*. *Blue Range* had commenced proceedings under the federal

insolvency statute, the *CCAA*. At issue in *Blue Range* was an application brought by Big Bear Exploration Ltd. ("Big Bear") against Blue Range Resource Corporation. Big Bear was the sole shareholder of Blue Range and submitted that its claim should rank equally with claims of unsecured creditors.

[158] Counsel for the Receiver references the statement of Romaine J. at para. 37:

It is clear, both in Canada and in the United Kingdom, once a company is insolvent, shareholders are not allowed to rescind their shares on the basis of misrepresentation.

[159] The *Northwestern* and *Blue Range* cases are both distinguishable from the case at bar.

[160] Firstly, both *Northwestern* and *Blue Range* were being administered under federal insolvency law.

[161] The Bridging receivership is being administered under the *OSA*. The federal insolvency regimes have not been engaged. This is an important distinction.

[162] Insolvency proceedings under the *BIA* or *CCAA* provide for treatment of equity claims in a specified code. Equity claimants are subordinated to debtor/creditor claims.

[163] In *Northwestern*, the winding-up order altered relations, not only between the creditors and the shareholders, but also among the shareholders *inter se*. The issue before the court on this motion does not address creditor issues. It asks for a determination on priority issues affecting Unitholders.

[164] In *Blue Range*, the issue involved the status of rescission claimants who unsuccessfully sought to be recognized as creditors. It should be noted that the decision in *Blue Range* predated the statutory amendment that subordinated equity claims to creditor claims. This is not the issue being determined on this motion.

[165] Here, the issue for determination is that of priority as between investors, specifically, whether Redemption Claimants and/or Rescission Claimants have priority over General Unitholders with respect to the distribution of proceeds of the Bridging Funds.

[166] This issue has to be determined on the documentary evidence and the governing statutes.

[167] The relevant provision of the *OSA* is s. 130.1(1). It provides the remedy of rescission for certain unitholders. The Offering Memorandum provides for the same relief for certain unitholders in British Columbia, Alberta and Quebec.

[168] The Misrepresentation Claimants are entitled to pursue this remedy and there is no aspect of these receivership proceedings that extinguishes the rights of Misrepresentation Claimants. As stated by counsel to the Potential Rescission Claimants, the nature of rescission creates a *de facto* priority. Further, unlike the Potential Redemption Claimants, neither the Misrepresentation

Claimants nor Bridging need to take any post-receivership steps to finalize the claims of the Misrepresentation Claimants. The claims are established through limitation time periods. The factual matrix is complete.

[169] The Misrepresentation Claimants, upon exercising their statutory or contractual rescission rights, cease to be Unitholders. They have different legal rights than Unitholders. They have a different relationship to the assets.

[170] The remedy for the Misrepresentation Claimants must be meaningful. The projections of realization provided by the Receiver states that, in time, there will be sufficient funds to satisfy the claims of the Potential Rescission Claimants.

[171] In these circumstances, I am satisfied that it is appropriate to impose a constructive trust.

[172] The purpose of a constructive trust is to prevent unjust enrichment in whatever circumstances it occurs.

[173] Representative Counsel to the Bridging Unitholders set out the four conditions that must be satisfied for the imposition of a constructive trust:

- (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in its hands;
- (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual ongoing activities of the defendant in breach of its equitable obligation to the plaintiff;
- (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
- (4) There must be no factors which would render the imposition of a constructive trust unjust in all of the circumstances of the case.

(See: *Soulos v. Korkontzilas*, [1997] 2 SCR 217 at para. 45)

[174] Representative Counsel to the Bridging Unitholders submits that if a constructive trust is justified, it applies to all Unitholders, not just the Potential Priority Claims, and there is no equitable or legal basis to suggest otherwise.

[175] I disagree. In my view, the imposition of a constructive trust only applies to the Misrepresentation Claimants.

[176] The legal rights of the Misrepresentation Claimants are different than Potential Redemption Claimants and from General Unitholders.

[177] The rights of the Misrepresentation Claimants flow directly from s. 130.1(1) of the *OSA* or from contract. The Potential Redemption Claimants and General Unitholders do not have such rights.

[178] As for the *Soulos* conditions, in my view, they have been satisfied.

- (1) Bridging has an obligation not to make a misrepresentation.
- (2) The assets provided by the Misrepresentation Claimants to Bridging resulted from the activities of Bridging.
- (3) The Misrepresentation Claimants can show a legitimate reason for seeking the remedy. The remedy is provided either by statute or contract.
- (4) As noted above, the remedy for the Misrepresentation Claimants must be meaningful. It is both just and equitable to impose a constructive trust.

[179] In view of the fungible nature of the investments made by all investors, there is no meaningful alternative to the imposition of a constructive trust.

Quebec Claimants

[180] A factum was also filed by Court-Appointed Representative Counsel.

[181] At paragraph 3 of this factum, counsel acknowledges that Potential Quebec Redemption Claims are contractual in nature and, as such, are also governed by Ontario law, which is not supplanted or supplemented by mandatory provisions of Quebec law. I have determined that Potential Redemption Claimants do not have priority over General Unitholders and the result is unchanged for Quebec Claimants.

[182] With respect to Potential Quebec Statutory Rescission Claims, counsel submits at paragraph 5 of their factum that there is no obstacle to allowing Potential Quebec Statutory Rescission Claims. I have determined that the Misrepresentation Claimants outside of Quebec have priority over General Unitholders. The same outcome should be afforded to Quebec Claimants either under Quebec law or under Ontario law. Given the identical outcome, it is not necessary to determine which law applies. The question of individual claims is not addressed in this motion. This can be addressed, if necessary, in a claims process.

Disposition

[183] The Potential Redemption Claims are not entitled to any priority over General Unitholder Claims with respect to the distribution of proceeds of the Bridging Funds.

[184] The Potential Statutory Rescission Claims are entitled to priority over General Unitholder Claims with respect to the distribution of proceeds of the Bridging Funds.

[185] The Potential Redemption Claimants and the General Unitholder Claims shall rank *pari passu* with respect to the distribution of proceeds of the Bridging Funds.

[186] I thank all counsel for their detailed and excellent submissions.


Chief Justice G.B. Morawetz

Date: April 12, 2023