

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

PEACE BRIDGE DUTY FREE INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY
ACT, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE
ACT, R.S.O. 1990, c. C.43, AS AMENDED

AIDE MEMOIRE

(6 September 2023 Attendance)

1. On 6 September 2023—less than that two weeks before its Cross-Motion is scheduled to be heard—PBDF is asking for:

- (a) permission to file two expert reports; and
- (b) another adjournment.

I. Expert Reports

2. The expert reports were not delivered on 20 August 2023 as is asserted in PBDF's Aide Memoire. They were delivered on 21 August 2023.

3. The assertion by PBDF that the Schedule from 4 April 2023 contemplated that expert reports were to be exchange by 26 May 2023 is not accurate. At the attendance on 4 April 2023, PBDF asserted that had engaged experts and the issue was raised as to whether the evidence of the experts was relevant to the issues to be determined on the Cross-Motion. Your Honour directed:

If the Tenant intends to deliver an expert report on issues relevant to the aspects of its Cross-Motion that are being adjudicated on July 25-27, 2023 (notice of Cross-Motion paragraphs 1-6 and 11, Lease interpretation issues) counsel shall

agree by April 10, 2023 on a timetable for the exchange of expert reports that is completed by no later than May 30, 2023 so that the experts can be examined immediately after the completion of the other witness examinations. (emphasis in original)

4. At no time prior to 10 April 2023, or after, did PBDF reached out to the Authority to discuss a timetable for the exchange of expert reports and the possibility of expert reports was not raised by PBDF at the Case Conference on 14 June 2023. PBDF simply delivered two experts reports on 21 August 2023—two days before the scheduled examination of Mr. Rienas.

5. The excuse that the Authority's Motion requesting leave to deliver a notice or notices of default in respect of non-monetary defaults makes the expert reports necessary has no merit. The Authority's Motion has been adjourned *sine die* and the materials submitted for the purpose of that Motion are not before the Court on PBDF's Cross-Motion.

6. The JC Williams Group ("JCWG") report cannot assist the Court to determine any of the issues on the Cross-Motion. In its report JCWG opines on :

- (a) the range of the typical leasing rates in retail locations in the greater Niagara area;
- (b) the range of typical gross sales-to-rent ratios in the Canadian Duty Free sector;
- (c) the range of typical minimum rent payable in duty free locations in Canada; and
- (d) what is the reasonable range of outcomes expected of the Authority undertakes a new RFP.

7. JCWG was also asked to:

- (a) provide "commentary" on whether PBDF's "Capture Rates" are lower than pre-pandemic levels; and
- (b) compare the how much profit the Authority could make from PBDF assuming PBDF pays the Base Rent as required by the Lease.

8. The Matson Driscoll & Damico Ltd. ("MDD") report similarly cannot assist the Court to determine any of the issues on the Cross-Motion. The MDD report appears to be aimed mainly at introducing financial evidence that should have been introduced by PBDF through affidavit evidence¹ and making argument in support of PBDF's position that should be made by PBDF in a Factum. The only opinion offered by MDD appears based on a mathematical equation—what rent would PBDF have to pay in order to achieve an identified industry-average return—although there is an opinion that:

There is no standard or definitive metric that can be applied to determine what a reasonable level of rent would be for the period that was affected by COVID.

9. The fact that Mr. Pearce is not an expert and did not retain an expert in connection with preparing for the consultation between PBDF and the Authority in 2020 and 2021 does not justify

¹ The financial information that appears to have been provided to MDD by PBDF for the purpose of preparing the report appears to be financial information that the Court has directed cannot be shared with or provided to the Authority and that PBDF has refused to provide to the Authority in these proceedings.

PBDF now submitting expert reports on the issues that may have been relevant during those consultations. How does the fact that PBDF has, in 2023, commissioned expert evidence on matters that might have been relevant to consultations that took place and decisions that were made in 2020 and 2021 make that evidence relevant on a Cross-Motion involving whether the Authority properly considered the information that was actually provided by PBDF in 2020 and 2021?

10. The assertion by PBDF that the two expert reports were provided "as soon as they could be completed" does not explain why the fact that they had been commissioned was not disclosed. Moreover, this explanation is, with respect, suspect. Based on the text of the JCWG report, it was commissioned sometime prior to June of 2023. Attached as Appendix C to the report are minutes from a meeting that took place on 6 June 2023 and there are references in the report to other meetings in June of 2023.

11. MDD refers in its report to a 21 March 2023 offer by the Authority that was provided to PBDF on a without prejudice basis in the lead-up to the mediation the Court directed take place on 26 and 27 March 2023. That offer was delivered by the Authority in response to a without prejudice offer delivered by PBDF on 13 March 2023. The fact that this offer has been disclosed by PBDF and described in a document that has been provided to the Court and uploaded to CaseLines by PBDF causes some fairness concerns for the Authority, particularly given that PBDF has chosen to disclose the Authority's offer without disclosing its own offer.

Adjournment

12. Either: (a) Mr. Wolf scheduled a vacation knowing the Cross-Motion was scheduled; or (b) the Cross-Motion was scheduled knowing Mr. Wolf had a vacation scheduled.

13. In an e-mail on 28 August 2021, PBDF's lawyers asserted:

*Third, unfortunately we miscalculated the date of the hearing with John Wolf's availability. He will be in Europe until the week **after** our hearing is scheduled. Given that your client is receiving the so called "full rent" in the interim anyway, and given that I understand from Mr. Jones that Mr. Stanek said he is in a multi week hearing in September which may render him unable to attend the dates we currently have, I wonder if you would consent to a short adjournment?*

14. In its Aide Memoire dated 1 September 2023, PBDF asserts:

32. In addition, due to inadvertence on the part of the Tenant, the 18.07 Motion was scheduled to be heard on September 19th without referencing the availability of my partner, Mr. John Wolf, who was not in attendance at the June 16th hearing.

33. It has been brought to our attention that Mr. Wolf will be in Europe from September 5th to September 29th. As such he cannot attend or assist with the 18.07 Motion. This is a material prejudice to our client as Mr. Wolf is lead counsel as it relates to issues of leasing and interpretation of the Lease.

15. With respect, PBDF appears to be mistaken in suggesting that the fact that Mr. Wolf would be out of the country in September had come to its lawyer's attention after the Cross-Motion was scheduled on 14 June 2023. PBDF's Aide Memoire for the purpose of the Case Conference on 14 June 2023, says:

47. Given this court has already set aside September 22nd, 2023 as the prospective receivership motion return date (if required), that date could possibly be used as a hearing date. Mr. Wolf is out of the country overseas from the 5th of September and for the balance of the month and therefore dates in mid-October would be preferable to the Peace Bridge.

16. The fact that Mr. Stanek might not be available is of no concern to the Authority. That fact was known on 14 June 2023.

17. The fact that Mr. Rienas was examined on 23 August 2023 and Mr. Pearce was examined on 31 August 2023 is as a result of the schedules of PBDF's lawyers.

18. The Authority wrote to PBDF on 19 July 2023 and suggested that a schedule for the remaining examinations be put in place to ensure there would be no need for a further adjournment. In response, PBDF's lawyers indicated they were not available during the first two weeks of August and the only dates that were ultimately offered by PBDF's lawyers for the examination of Mr. Rienas were 23 and 25 August 2023, and for Mr. Pearce were 28 and 31 August 2023.

19. The transcripts from the examinations of Mr. Clutterbuck, Ms Costa and Mr Mills have been produced. The transcript from the examination of Mr. Pearce has been ordered by the Authority on an expedited basis and should be available by 7 September 2023. It is unclear why, given the tight schedule, PBDF did not order the transcript from the examination of Mr. Rienas on an expedited basis, but the responses by Mr. Rienas to his undertakings and refusals will be delivered by the end of the day on **[5 or 6]** September 2023.

20. The fact that the time for the delivery of Factums would be tight if the required examinations were not completed by early-August was (or ought to have been) known on 14 June 2023. While the fact that the examinations were scheduled late in August is entirely the responsibility of PBDF, the Authority does not object to PBDF delivering its Factum by the end of the day on 13 September 2023. The Authority's Factum can be delivered by 18 September 2023. If *viva voce* evidence is not going to be required, the attendance on 19 September 2023 can be vacated—a Motion involving the interpretation of a single clause in a lease should not take two full days to argue.

21. The Authority agrees that *viva voce* evidence is not required, but this is a Motion not an Action and Factums should be filed in advance of the hearing. It will be the Authority's position that much of the evidence on which PBDF appears to want to rely is not admissible, not relevant to the issues that are before the Court or is argument.

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PROCEEDING COMMENCED AT
TORONTO

AIDE MEMOIRE

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

Christopher Stanek (LSO# 45127K)

Tel: 416-862-4369

Fax: 416-862-7661

E. Patrick Shea (LSO# 39655K)

Tel: 416-369-7399

Fax: 416-862-7661

Lawyers for Buffalo and Fort Erie Public Bridge Authority