COURT OF APPEAL FOR ONTARIO

CITATION: Royal Bank of Canada v. Peace Bridge Duty Free Inc., 2025 ONCA 54
DATE: 20250127
DOCKET: COA-23-CV-1355

Lauwers, Paciocco and Harvison Young JJ.A.

BETWEEN

Royal Bank of Canada

Applicant

and

Peace Bridge Duty Free Inc.

Respondent (Appellant)

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 *Court of Justice Act*, R.S.O. 1990, c. C.43, as amended

David T. Ullmann and Brendan Jones, for the appellant

Patrick Shea and Shuang Ren, for the respondent Buffalo and Fort Erie Public Bridge Authority

Christian Delfino, for the applicant Royal Bank of Canada[1]

Heard: September 5, 2024

On appeal from the order of Justice Jessica Kimmel of the Superior Court of Justice, dated December 15, 2023, with reasons reported at 2023 ONSC 7096.

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[1] Mr. Delfino appeared but made no written or oral submissions on behalf of the applicant.

Lauwers J.A.:

A. OVERVIEW

[1] Peace Bridge Duty Free Inc. (“Peace Bridge” or the “Tenant”) is the tenant of a duty-free shop on the Ontario side of the Peace Bridge at the border between Fort Erie, Ontario and Buffalo, New York. The landlord is the Buffalo and Fort Erie Public Bridge Authority (the “Authority” or the “Landlord”). Peace Bridge has operated the retail duty-free store for more than three decades. In normal times, the store was open 24 hours a day, every day, and employed about 90 staff.

[2] The current lease, dated July 28, 2016, ends in October 2031. It requires Peace Bridge to pay rent, which is comprised of base rent and percentage rent, and to pay any applicable sales taxes, property taxes, operating costs, and utilities. The minimum annual base rent is $4 million or $333,333 per month.

[3] The dispute turns on the interpretation of s. 18.07 of the lease and its application in the context of the store’s closure and reduced business during the COVID-19 pandemic. Section 18.07 of the lease states:

> Regulatory Changes – In the event an unanticipated introduction of or a change in any Applicable Laws causes a material adverse effect on the business operations of the Tenant at the Leased Premises, the Landlord agrees to consult with the Tenant to discuss the impact of such introduction of or change in Applicable Laws to the Lease.

[4] The parties agree that the COVID-19 pandemic and resulting border restrictions had a material adverse effect on Peace Bridge's business. Peace Bridge invoked s. 18.07 of the lease in April 2020. The parties initially focused negotiations on two rent deferral agreements. After Peace Bridge's duty-free store re-opened in September 2021, the parties focused negotiations on the rent to be paid by Peace Bridge during the store's closure and going forward.

[5] By the time of the merits hearing before the motion judge in November 2023, the parties reached an agreement in principle about the rent payable during the period from November 2021 until October 31, 2026. Peace Bridge would pay the greater of a set amount for the year or 20 percent of sales with an increase to $4 million in 2026.

[6] However, this agreement in principle was subject to the parties reaching an agreement about the rent payable during the closure period. The parties negotiated but were unable to agree on that rent payable. Peace Bridge sought relief in the form of a court-imposed rent adjustment or abatement.

[7] The motion judge found, at para. 159, that: "The Border Restrictions did result in adverse effects on the Tenant's business, both during the Closure Period and during the Ramp Up Period, that warranted some adjustment to the Base Rent payable by the Tenant."

[8] However, the motion judge declined to grant Peace Bridge any relief for three main reasons: s. 18.07 did not mandate the judicial imposition of a rent adjustment; the Authority had not breached s. 18.07; and the Authority had not failed in its duty of good faith performance in negotiating.

[9] For the reasons that follow, I would affirm the motion judge's decision and dismiss Peace Bridge's appeal.

B. THE ISSUES ON APPEAL

[10] The overarching issue is whether the motion judge properly interpreted and applied s. 18.07 of the lease. Peace Bridge argues that she did not and raises issues on appeal that I would reframe as follows:

1. Whether the motion judge erred in failing to consider, as part of the factual matrix, discussions between the parties around the time s.18.07 was added to the lease in 2016, including the Landlord's representations as to how 18.07 was to be applied.
2. Whether she erred in failing to give effect to her finding that s. 18.07 of the lease gives rise to a substantive right or obligation to make an adjustment to base rent.
3. Whether she erred in finding that the Landlord did not breach its duty of honest performance in negotiating a rent adjustment under s. 18.07.

[11] I describe the factual and procedural context before attending to the analysis.

C. THE FACTUAL AND PROCEDURAL HISTORY

[12] The motion judge's lengthy reasons are supplemented by her reasons in the stay application reported at *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 327. Together, the two sets of reasons explain the factual background, the complications in the negotiations between the parties, and the involvement of the Royal Bank of Canada ("RBC") as Peace Bridge's primary lender. I set out only those facts that are pertinent to this appeal.[2]

[13] The COVID-19 pandemic caused the closure of the bridge and border to non-essential traffic from March 21, 2020 until November 8, 2021. During this period, only essential travelers, mostly day-crossing workers who were ineligible to purchase any duty-free products, were permitted to cross the border at the Canadian side. Peace Bridge lost virtually all its customers.

[14] Peace Bridge's retail store re-opened on September 19, 2021, in the expectation that restrictions on non-essential travelers into the United States would ease. The last border restriction, which required persons travelling from Canada into the United States to be fully vaccinated, was lifted on May 11, 2023.

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[2] A detailed chronology is appended.

[15] Peace Bridge invoked s. 18.07 of the lease on April 3, 2020, within the first month of the bridge closure. After many failed attempts at negotiating, the Authority issued a notice of default under the lease agreement on September 8, 2021. Peace Bridge then entered into a forbearance agreement with RBC, contingent on it reaching an agreement with the Authority by November 15, 2021. When the parties did not reach an agreement, RBC instituted receivership proceedings, which were ultimately stayed.

[16] On January 16, 2023, the motion judge ordered the parties to participate in mediation by March 31, 2023, but the effort failed. She was then required to address the merits of Peace Bridge's cross-motion for a continuation of the lease with judicially imposed terms.

[17] In all, the parties negotiated from time to time from April 11, 2020 until October 13, 2023, without success. The motion judge heard Peace Bridge's cross-motion for relief by way of judicially prescribed rent abatement from November 1-3, 2023, leading to the order that is the subject of this appeal.

D. THE POSITIONS OF THE PARTIES

[18] Peace Bridge takes the position that s. 18.07 of the lease, properly interpreted, requires a rent adjustment, if not abatement, to be judicially imposed because the parties were unable to agree on the amount of the abatement; the

motion judge also erred in her approach to the Authority's duty of good faith in the performance of its obligations under the lease.

[19] More particularly, Peace Bridge asserts on appeal that s. 18.07 of the lease entitles it to an abatement of rent during the "Closure Period" between March 21, 2020 and November 8, 2021 and during a "Ramp Up Period" between November 2021 and October 2026, as follows:

> That the application of subsection 18.07 of the Lease results in rent payable under the Lease for the period of April 2020 to October 2021 ("Closure Period") equal to either:
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> (a) full Additional Rent and the greater of all COVID-related rent assistance it was eligible for and received or 20% of its monthly Gross Sales ("Normal Rent"); or
>
> (b) an amount that the Court shall order be determined by way of a reference to be held before the Superior Court of Justice.

[20] For the Ramp Up Period, Peace Bridge asserts that the motion judge should have imposed terms that the parties agreed-upon in principle, as summarized in para. 12 of her decision:

> [D]uring the period commencing in November of 2021 and continuing until October 31, 2026, during which the Tenant would "Ramp Up" to paying $4 million per annum in Base Rent as required under the Lease (the "Ramp Up Period"), as follows:
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> - From and after the Lease Year ending 31 Oct 2022 -- Base Rent of $2M or 20% of sales, whichever is greater.

- From and after the Lease Year ending 31 Oct 2023 -- Base Rent of $2.5M or 20% of sales, whichever is greater.
- From and after the Lease Year ending 31 Oct 2024 -- Base Rent of $3M or 20% of sales, whichever is greater.
- From and after the Lease Year ending 31 Oct 2025 -- Base Rent of $3.5M or 20% of sales, whichever is greater.
- From and after the Lease Year ending 31 Oct 2026, Base Rent will be payable in accordance with the Lease.

[21] The Authority takes the position that the appeal should be dismissed and asserts that the motion judge's interpretation of the lease and her approach to the duty of good faith performance were correct; Peace Bridge has not established that she made a palpable and overriding error.

E. ANALYSIS

[22] I address each issue in turn.

(1) Did the motion judge err by failing to consider, as part of the factual matrix, discussions between the parties around the time s.18.07 was added to the lease in 2016, including the Landlord's representations as to how 18.07 was to be applied?

[23] Peace Bridge argues that the motion judge relied on an "outdated technical rule of construction" to exclude the evidence of pre-contractual representations that should dictate how the parties would interpret and apply s. 18.07.

(a) The Governing Principles

[24] The purpose of contractual interpretation is to determine the objective intentions of the parties; it is a fact-specific exercise: *JPM Trade Capital Inc. v. Blanchard*, 2024 ONCA 876, at para. 11, citing *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 492 D.L.R. (4th) 389, at para. 28.

[25] The Supreme Court laid out the principles of contract interpretation in relation to the "factual matrix" in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633. This court in *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, 77 B.L.R. (5th) 175, at para. 65, *per* Brown J.A., rev'd on other grounds, *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, [2019] 4 S.C.R. 394, summarized the principles guiding the approach to interpreting commercial contracts as follows:

> When interpreting a contract, an adjudicator should:
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> (i) determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they have intended what they have said;
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> (ii) read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
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> (iii) read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, include facts that were

> known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and
>
> (iv) read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed. [Emphasis added.]

[26] There are therefore limits to the effect that can be given to the factual matrix surrounding the formation of a contract: *Sattva*, at para. 58. The Supreme Court noted:

1. The surrounding circumstances must never overwhelm the words of an agreement. The interpretation of a contract is necessarily grounded in its text and read in light of the whole contract: *Sattva*, at para. 57.
2. Courts may never use the surrounding circumstances to deviate from the text of the contract such that it creates a new agreement: *Sattva*, at para. 57.
3. The surrounding circumstances must only consist of evidence that is objective of the background facts at the time of the contract's execution: *Sattva*, at para. 58.

(b) Application

[27] The motion judge reviewed the disputed evidence, considered it, and found, at para. 60, that Peace Bridge was seeking the admission of evidence of subjective intention to colour the interpretation of the lease agreement. She concluded that doing so would be problematic and the evidence should be given little or no weight.

[28] According to Peace Bridge, the parties met on July 18th, 2016 to discuss renewing the lease. They spoke about s. 18.07. The motion judge recognized, at para. 50, that s. 18.07 was added to the draft lease agreement by the Authority at the request of Peace Bridge. She summarized the evidence at para. 51:

> Notes were made and emails were exchanged, about which the Tenant's affiants have given evidence regarding their understandings at the time. They thought that the Landlord had agreed that there would be a Rent abatement if the changes in Applicable Laws affected the Tenant's business in such a way as to warrant it. While the Landlord has not always supported this interpretation of s. 18.07 and does not agree that this Lease provision requires a full Rent abatement, by the time of the hearing it had accepted that a reasonable application of this Lease provision in the circumstances of this case could entail a partial Rent abatement.

[29] Peace Bridge's proposed evidence was that at the time of renewing the lease in 2016, the Authority rejected the inclusion of a formulaic rent abatement as proposed by Peace Bridge out of concern that such a formula might hinder the Authority's ability to make a business interruption claim. Peace Bridge also asserted the parties agreed that changes in government regulations that would

materially impact Peace Bridge's business would give rise to the need for a rent abatement in order to pay the minimum base rent. Peace Bridge suggested the following wording at the July 18, 2016 meeting:

> In the event that during the Term, there are issues that arise beyond the Tenant's control (including but not limited to vehicle traffic volume declines, bridge construction, changes in government regulations, etc.) that materially impact the Tenant's duty free sales, then the Landlord and the Tenant, both acting reasonably and in good faith, agree to amend this lease (including but not limited to the rent terms, term, etc.) as appropriate in a fair and equitable manner. As a guideline, a material impact would be one in which duty free sales decline over a comparable three month period by 5% or more.

[30] However, the Authority insisted on the current wording of s. 18.07.

[31] Peace Bridge also sought to rely on an email between the parties' representatives who negotiated the lease. Essentially, the Authority's representative confirmed that s. 18.07 protected Peace Bridge from changes in government regulations that could materially impact the business. Therefore, the understanding that s. 18.07 would be applied to provide a rent abatement was objective information that formed part of the factual matrix. The Authority objected to the admission of much of this evidence during the motion.

[32] In dealing with this issue, the motion judge noted, at para. 49, that much of this evidence strikes the core of s. 18.07's purpose. Since the parties agreed on the purpose of s. 18.07 by the time of the hearing, Peace Bridge's evidence on the pre-contractual negotiations was not material to the outcome of the case. The

dispute no longer hinged on whether providing a partial adjustment was reasonable on the facts. Rather, it hinged on precisely how the court was to determine such a reasonable adjustment given the lack of guidance in the text of s. 18.07 itself. Put differently, the surrounding circumstances did not assist the court in determining the appropriate calculation of a rent abatement.

[33] As a corollary, Peace Bridge attempted to tender evidence to support the notion that the flat base rent figure was tied to its actual sales. In making this submission, Peace Bridge argued that the impact on the lease resulting from the change in government regulations is ascertainable with reference to its reduction in sales. By drawing on evidence about its own rationale for offering the $4 million base rent figure in its Request for Proposal, Peace Bridge noted that this amount was tied to its annual projections. Accordingly, $4 million in base rent represents 20 percent of Peace Bridge's annual sales projections. Despite acknowledging that it did not discuss such calculations with the Authority, thereby creating a one-sided narrative on how base rent was determined, Peace Bridge asserted that it should not pay any base rent during the Closure Period. In other words, since Peace Bridge used a percentage-based calculation to determine the base rent based on sales, and there were no sales during the Closure Period, the base rent figure should be zero.

[34] The motion judge noted, at para. 54, that this proposed evidence would not be helpful to the resolution of the dispute for two reasons. First, "one party's

subjective understandings and intentions do not assist the ultimate goal of ascertaining the objective commercial purpose and intent" of a contract. Second, the motion judge highlighted that the evidence Peace Bridge wanted to rely on did not support the outcome Peace Bridge "urges upon the court."

[35] The motion judge dismissed Peace Bridge's argument, noting, at para. 55: "The court must give commercial meaning and effect to the entire Lease that includes express and unambiguous provisions of the Lease requiring the payment of a specified amount of minimum Base Rent that, unlike Percentage Rent, was not tied to any particular revenues or sales levels."

[36] Though the parties might have incorporated intentional uncertainty in s. 18.07 as a matter of practical necessity, using Peace Bridge's subjective understandings as a proxy for determining a rent adjustment is improper. Without more guidance in the text of s. 18.07, the impact on Peace Bridge's sales alone cannot inform the judicial imposition of a rent adjustment.

[37] The motion judge also observed, at para. 56, that Peace Bridge's argument would contradict other provisions in the lease, pointing to the "entire agreement" clause and to the "no rent abatement" clause. I do not read the motion judge's references to these clauses as dictating the outcome. The decision went on to discuss at length, from paras. 136 to 155, the central issue raised by s.18.07 on Peace Bridge's interpretation: whether the provision mandated the judicial

imposition of the rent abatement. I address this argument in the next section of these reasons. The bulk of the motion judge's decision was devoted to the issue of the Authority's good faith in negotiating a rent adjustment.

[38] In all, the motion judge conducted a thorough examination of the relevant jurisprudence and the applicable facts to find that the evidence was irrelevant to the resolution of the dispute. Further, the proposed evidence of bargaining tended to support the Authority's interpretation, not Peace Bridge's. The motion judge refused to admit the evidence, noting, at para. 59:

> This is pure evidence of the Tenant's subjective intention and understanding, which it admits was not directly shared with or communicated to the Landlord. All of the authorities cited by both sides consistently reinforce the basic tenet of contract interpretation that: the court may have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. There is good reason for this. When a dispute arises the parties inevitably will have differing accounts of this and will have been motivated by different goals and objectives. The court's role once the dispute has arisen is to determine it objectively and reasonably, not what was subjectively understood or intended.

[39] I see no error in the motion judge's decision that the proposed evidence was not admissible. Peace Bridge's evidence of its subjective intention has no place in determining the interpretation of the lease. Concomitantly, the motion judge correctly noted that the admission of the evidence could provide no assistance in determining what Peace Bridge should pay in base rent during the Closure Period.

Peace Bridge's argument to admit the proposed evidence would have been of no assistance because the parties had already agreed that s. 18.07 could give rise to a rent adjustment in this case. Therefore, I would dismiss this ground of appeal.

(2) Did the motion judge err in failing to give effect to her finding that s. 18.07 of the lease gives rise to a substantive right or obligation to make an adjustment to base rent?

[40] The motion judge noted, at para. 65 of her decision, the parties' concurrence that s. 18.07 "gives rise to a substantive right/obligation to make adjustments to the Rent payable by the Tenant in the circumstances of this case, taking into consideration the extent of the Adverse Effect on the Tenant's business." Having accepted this "agreement," Peace Bridge asserts that the motion judge effectively rendered s. 18.07 meaningless by failing to determine and impose the base rent adjustment or abatement.

[41] In my view, the motion judge did not err in refusing to determine and impose a base rent adjustment despite recognizing that one was warranted on the facts. The construction of s. 18.07 does not mandate the judicial imposition of a base rent adjustment and imposing one would not be consistent with the applicable law.

(a) The Governing Principles

[42] The leading case on implying contractual terms is *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619. Iacobucci J. cited the following test at paras. 27-29:

> The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p. 775).
>
> …
>
> A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. [Emphasis added.]

[43] Where parties use an objective standard or formula that adds detail to a provision in an agreement, courts will maintain the commercial bargain that the parties intended provided that there is an ascertainable meaning, as was the case in *Empress Towers Ltd. v. Bank of Nova Scotia* (1990), 50 B.C.L.R. (2d) 126 (C.A.), leave to appeal refused, [1990] S.C.C.A. No. 472, *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc. (Mr. Sub)*, 2016 ONCA 93, 393 D.L.R. (4th) 690, and more recently, *1284225 Ontario Limited v. Don Valley Business Park Corporation*, 2024 ONCA 247.

[44] While it is true that "courts will try, wherever possible, to give the proper legal effect to any clause that the parties understood and intended was to have legal

effect," this does not mean that courts will impose terms: *Empress Towers*, at p. 403; *Mapleview*, at para. 29. In fact, "It is trite law that the courts will not enforce 'an agreement to agree' and that there must be reasonable certainty as to the length of the term of a lease or of a renewal option, as well as to the amount of rent to be paid": *Mapleview*, at para. 27.

(b) Application

[45] Section 18.07 is plainly an agreement to agree or an agreement to negotiate on a rent adjustment on the happening of an event that has a material adverse effect on the Tenant's ability to conduct business, as the motion judge found at para. 150 of her reasons. The parties were free to negotiate such a provision.

[46] However, the motion judge pointed out, at para. 153, that there is no guidance in the words of s. 18.07 providing a roadmap for a court to impose a reasonable rent adjustment for the Closure Period. The parties never agreed on a mechanism for establishing a rent adjustment. The parties agreed only that they would *consult* and *discuss* whether and how to adjust the rent. As the motion judge noted, at para. 159:

> The Landlord did not breach s. 18.07 of the Lease by refusing to agree to abate all Base Rent otherwise payable during the Closure Period. Section 18.07 does not require that the Base Rent be adjusted based on a fixed percentage of the Tenant's sales or revenues or that it be reduced to a level that guarantees a minimum level of profitability to the Tenant.

[47] The motion judge explained her holding, at para. 159, in these terms:

> Without the parties having agreed at the time of contracting as to how such determination could be made, and in the absence of any established benchmarks, the court cannot determine and impose upon the parties an amount of Base Rent to be paid by the Tenant during the Closure Period, or terms upon which it is to be paid, that are different from what the Lease requires. The court cannot re-write or amend the Lease for the parties, nor can it force the parties to do so. Nor is that level of intervention by the court necessary in order to implement and give commercial meaning and effect to s. 18.07 of the Lease. Section 18.07 was implemented over the course of the three years of consultations and negotiations; it is not rendered meaningless just because the parties have not been able to reach an agreement.

[48] Although the motion judge recognized that a rent adjustment was warranted on the facts, she did not err in concluding that a specific adjustment should not be judicially imposed. Recognizing a substantive right to a base rent adjustment alone is a necessary, but not a sufficient, condition for the court to impose one on the parties. It is not the court's function to arbitrarily set rent, and doing so would go far beyond the law on implying contractual terms.

[49] Such a conclusion does not render s. 18.07 nugatory, as Peace Bridge argues. The motion judge noted, at para. 85, the parties did not bargain for Peace Bridge to maintain a minimum guaranteed threshold of profitability. They bargained for the reasonable expectation of good faith in consultations about rent relief, which the parties undertook. The point that deserves emphasis is that Peace Bridge's insistence on a full rent abatement for the Closure Period would allocate all risk of

loss to the Authority, an outcome to which the Authority did not agree and for which there is simply no warrant in the record.

[50] I acknowledge that the Authority and the motion judge described s. 18.07 as creating a substantive right to a rent adjustment, but I understand this characterization to be a short-form way of describing a provision that does no more than impose an obligation on the Authority to "consult with the Tenant to discuss the impact" of an event that "causes a material adverse effect on the business operations of the Tenant". It seems obvious that one possible outcome could be a rent adjustment. The motion judge's analysis, and the plain language of the contract, reinforce this more modest reading. The motion judge arrived at the correct interpretation of s. 18.07 and did not impose a rent adjustment. This shows that her characterization of the obligation to consult and discuss as a substantive right to a rent adjustment was not what she intended. She did not find a right to a rent abatement under s 18.07 and did not err in refusing to impose that as a remedy.

[51] I would dismiss this ground of appeal.

[52] Notably, Peace Bridge argues that the motion judge's decision creates a commercially absurd result by finding that if the parties cannot agree on the quantum of a rent adjustment, then the outcome is to provide no adjustment. Resultantly, there would be no reason for the Authority to ever agree to a change

in rent. I disagree. For reasons I outline below, the doctrine of good faith in contractual performance imposes precisely such a reason on both parties. The fact that they might not reach agreement is not commercially absurd, but follows naturally from the language of the contract.

(3) Did the motion judge err in finding that the Landlord did not breach its duty of honest performance in negotiating a rent adjustment under s. 18.07?

[53] The parties acknowledge that they were required to fulfill their obligations under s. 18.07 of the lease and negotiate a rent adjustment in good faith. However, they disagree as to what constitutes compliance with that obligation.

(a) The Governing Principles

[54] In *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, the Supreme Court recognized that good faith in contractual performance is "a general organizing principle of the common law of contract" in Canada and requires parties to act "honestly and reasonably and not capriciously or arbitrarily" in the performance of their contractual duties: *Bhasin*, at paras. 33, 63.

[55] Generally, good faith obliges each party to a contract: to co-operate in order to achieve the objects of the contract; to exercise discretionary power in good faith; not to evade contractual duties; and to perform contractual obligations honestly and reasonably: *2161907 Alberta Ltd. v. 11180673 Canada Inc.*, 2021 ONCA 590, 462 D.L.R. (4th) 291, at para. 44; *Bhasin*, at paras. 33, 47.

[56] This case focuses on good faith performance in the negotiations required by s. 18.07 of the lease, which engages the discretionary power of each party. A party exercising contractual discretion must do so reasonably and "in a manner consistent with the purposes for which it was granted in the contract": *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, [2021] 1 S.C.R. 32, at para. 63.

[57] The cases recognize and reconcile competing tensions: a party's duty of good faith performance, on the one hand, and the party's achievement of its legitimate economic self-interest, on the other hand. The duty of good faith in contractual performance must be balanced with other bedrock principles of contract law, such as a party's freedom to act in its own self-interest in accordance with commercial realities. The Supreme Court noted in *Bhasin*, at para. 70:

> In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 31.

[58] The *Bhasin* court added an important caution, at para. 70:

> The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

[59] In other words, good faith performance "does not require that contracting parties serve each other's interests": *2161907 Alberta Ltd.*, at para. 43; see also *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, [2020] 3 S.C.R. 908, at para. 82. Put differently, "A contracting party can act in its own best interests, but it must not seek to undermine the legitimate interests of the other party in bad faith": *Lafarge Canada Inc v. Bilozir*, 2018 ABCA 416, at para. 5, citing *Bhasin*, at para. 65.

[60] The duty of good faith in contractual performance will not produce mutually agreeable results in every fact situation. The duty's purpose is to ensure a "standard that underpins" contractual performance and is afforded "different weight in different situations": *Bhasin*, at para. 64. Accordingly, "The duty's animating principle is focused on good faith performance of contracts, not the creation of a generalized duty of good behaviour": *Potash Corporation of Saskatchewan Inc. v. HB Construction Company Ltd.*, 2022 NBCA 39, at para. 163.

[61] Finally, I note that in examining whether a party has breached its duty to exercise contractual discretionary power in good faith, the court must determine whether the party exercised its discretion for an improper purpose, that is, one unconnected to the purpose for which the contract granted the discretion; if so, the party has not exercised the power in good faith: *Wastech*, at para. 69.

(b) Application

[62] There is no evidence in the record that supports the conclusion that during negotiations after Peace Bridge invoked s. 18.07, the Authority was dishonest, was not cooperative, or exercised its discretion for an improper purpose. That the Authority was assertive, even “aggressive,” in its own interests does not necessarily manifest bad faith because, as noted, the duty of good faith does not compel a party to give up the legitimate pursuit of its own economic self-interest. Had the Authority simply refused to negotiate, as required by s.18.07 of the lease, it plainly would have failed in its good faith duty to negotiate. But that is not what happened.

[63] In short, the deep issue that drove the outcome was whether the Authority did, in fact, negotiate in good faith. The motion judge’s focus on this issue shows that it was her central concern. She framed the issue properly: “Did the Landlord fail in its duty to act in good faith in its dealings with the Tenant after s. 18.07 was triggered?” The motion judge’s assessment occupied more than half of the text of her lengthy decision. Her assessment is essentially a factual finding that attracts appellate deference.

[64] The motion judge described the ‘to and fro’ of the negotiations in detail from paras. 109 to 127, before reaching the conclusion, in para. 128, that Peace Bridge had not established, on a balance of probabilities, that the Authority “was not acting

in good faith with a view to trying to preserve the tenancy in the course of the consultations and negotiations". She added a detailed and lengthy Appendix entitled "Chronology of Dealings Between the Parties". The motion judge had engaged with the parties on several occasions over a lengthy period of time. There can be no doubt that she was deeply immersed in the facts.

[65] Peace Bridge has pointed to no errors in the motion judge's self-instructions on the applicable law, nor in her interpretation of the cases she cited. Peace Bridge points to no error in principle, no factual misapprehensions on the motion judge's part, and no merely conclusory language. What Peace Bridge identifies as palpable and overriding errors are restatements of factors that the motion judge took into account, but which Peace Bridge urges this court to characterize differently.

[66] Peace Bridge disagrees with the motion judge's assessment, asks this court to reverse it and to reach a factual finding to the contrary, and to judicially impose rent terms. It is not our role to retry the case, and more is required before appellate intervention is warranted.

[67] While there is no need to repeat in other words the motion judge's careful analysis, I pick out a few higher-level notes.

[68] The parties agree that the purpose of s. 18.07 is "to preserve the tenancy in the event of an unanticipated change in the Applicable Laws that has a temporary

impact on the Tenant's ability to pay rent": at para. 48. There is significant evidence in the record that shows the Authority's desire to preserve the tenancy as the parties navigated the COVID-19 pandemic. For example, the Authority allowed Peace Bridge to operate under the terms of the second deferral agreement despite the expiry of the deferral period, offered to split the burden of the base rent, and continued negotiations even after RBC sought the appointment of a receiver. Each of these actions aligns with the general purpose of s. 18.07.

[69] The Authority was entitled to fiercely protect its interests without breaching its good faith obligations. The evidence is that the Authority was under significant financial pressure, in which Peace Bridge's rental income was a factor. If anything, as the motion judge noted at para. 99, it was financially more worthwhile for the Authority to maintain the lease terms with Peace Bridge than to contract with another tenant.

[70] The exercise of discretion in negotiations under s. 18.07 of the lease did not oblige the Authority to capitulate to Peace Bridge's demands. The parties spent nearly three years negotiating the contours of a solution in response to Peace Bridge invoking s. 18.07 of the lease agreement. During this time, the parties explored many different methods of resolving the rent dispute, including two rent deferral agreements, providing financial assurances, partial repayment plans paired with rent repayment schedules, providing business plans and sales

projections, and mediation. Despite the prolonged efforts to reach a resolution, the parties were unable to come to an agreement on how to handle the rent abatement.

[71] It is true that the motion judge found, at para. 113, that the Authority made "unrealistic demands for immediate payment of Deferred Rent accruing during the Closure Period, in amounts that the Landlord knew the Tenant did not itself have the resources to fund" at the beginning of the negotiation period. However, the motion judge also noted that the Authority was still demanding less than full performance of the lease agreement.

[72] In negotiating the second rent deferral agreement in late 2020, Peace Bridge suggested deferring rent to March 2021, which the Authority tentatively approved so long as certain financial assurances were given. On December 9, 2020, after receiving Peace Bridge's financial information, the Authority explicitly communicated that it was not prepared to defer all rental payments until March 2021, and suggested paying one-third of the outstanding 2020 rent upfront with the balance to be deferred to March 31, 2021. In response, on December 23, 2020, Peace Bridge asked for the opportunity to discuss an extension of the rent deferral and expected payment schedule. On January 15, 2021, nearly a month after this proposal, Peace Bridge provided the Authority with a business plan that eliminated the payment of base rent and only incorporated paying a percentage-based rent. The Authority rejected this plan on January 19, 2021, expressly noting that eliminating base rent entirely was unacceptable. At this point in the negotiation

process, it was abundantly clear that the Authority was not amenable to a total rent abatement nor solely to a percentage-based rental repayment scheme.

[73] On May 13, 2021, the parties met and Peace Bridge said it needed time to discuss its next business proposal with RBC. The Authority asked for the proposal by June 1, 2021. On August 21, 2021, nearly two months after the date the Authority requested, Peace Bridge sent a formal proposal for rental repayment that sought an abatement of all rent from March 2020 until the store's re-opening and a switch to a percentage-based rent only after the store opened. A notice of default followed shortly after this proposal.

[74] Although the Authority took a strong position on refusing to accept total rent abatement, a full shift to percentage-based rent, and a lease extension, the motion judge did not perceive this as bargaining in bad faith. Nor do I. On the contrary, it is difficult for Peace Bridge to mount such an argument because it was the party putting forward terms that it knew were not amenable to the Authority. I agree with the motion judge's conclusion, at para. 85 of her reasons, that "[t]he Tenant's insistence upon a complete abatement of Base Rent during the Closure Period and continued requests to eliminate the minimum Base Rent from its Lease created a significant obstacle to reaching an agreement." It bears repeating that Peace Bridge's insistence on a full rent abatement for the Closure Period would allocate all risk of loss to the Authority, an outcome to which the Authority did not agree in the lease and for which there is simply no warrant in the record.

[75] Peace Bridge takes issue with the Authority's "threats" to enforce its remedial options, but surely those form part of the legal context and the bargaining calculus for both sides. As the motion judge noted, the Authority made many good faith efforts to resolve its dispute with Peace Bridge.

[76] The motion judge held, at para. 159, that:

> The Landlord did not breach its duty to act in good faith in the performance of its obligations and the exercise of its discretion in its dealings and negotiations with the Tenant after s. 18.07 was triggered. The Landlord has not been found to have been acting with the ulterior motive of terminating the Lease. Nor were the Landlord's demands, proposals and other dealings with the Tenant unreasonable having regard to the acknowledged objective of attempting to preserve the tenancy and when considered in the context of the dealings between the parties and the evolution of their positions over time.

[77] These factual findings are well-supported by the motion judge and the record. I would defer to them. In fact, I agree with them. I would dismiss this ground of appeal.

F. DISPOSITION

[78] For the foregoing reasons, I would dismiss Peace Bridge's appeal with costs, as agreed, in the amount of $20,000, all-inclusive.

Released: January 27, 2025 PDL

P Lauwers J.A.

I agree. JA.

I agree. A. Harman Young J.A.

Appendix: Chronology of Events

Date	Event
April 3, 2020	Peace Bridge invoked s. 18.07 of the lease in a letter and requested a meeting with the Authority.
September 8, 2021	The Authority issued notices of default. These notices resulted in Peace Bridge's default under its facilities with RBC.
October 8, 2021	Peace Bridge and RBC entered into a Credit Amending and Forbearance Agreement. The Authority was not a signatory. In this agreement, Peace Bridge agreed to deliver evidence satisfactory to RBC that an agreement had been entered into with the Authority to ensure they would not terminate the lease. This evidence was due by November 15, 2021.
November 16, 2021	The parties did not reach an agreement, which triggered default under the Credit Amending and Forbearance Agreement with RBC.
Early December 2021	RBC commenced its application seeking to appoint a receiver.
December 13, 2021	Peace Bridge issued a notice of motion seeking to adjourn RBC's application.
December 14, 2021	RBC's application for the appointment of a receiver was stayed on terms that included the appointment of a monitor. The purpose of the stay was to afford Peace Bridge more time to reach a commercial resolution with the Authority. RBC's application was adjourned until January 17, 2022.
October 5, 2022	The Authority brought a motion to lift the stay.
November 13, 2022	Peace Bridge issued a notice of cross-motion in response to the Authority's motion.
January 5, 2023	The motion judge heard the Authority's motion to lift the stay restrictions under the appointment order.
January 16, 2023	The motion judge dismissed the Authority's motion to lift the stay put in place by the appointment order.
November 1-3, 2023	The motion judge heard the lease dispute on the merits.
December 15, 2023	The motion judge dismissed Peace Bridge's cross-motion for relief by way of judicially prescribed rent abatement.
December 27, 2023	Peace Bridge appealed the motion judge's December 15, 2023 order.

January 17, 2024	The motion judge issued the cost endorsement for the stay motion and the cross-motion.
January 29, 2024	RBC's receivership application was adjourned to April 26, 2024.
September 5, 2024	The Court of Appeal for Ontario heard the appeal of the motion judge's December 15, 2023 order.