



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-21-00673084-00CL

DATE: 4 April 2023

NO. ON LIST: 3

TITLE OF PROCEEDING: RBC v. Peace Bridge Duty Free Inc.

BEFORE JUSTICE: KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Sanjeev Mitra	For RBC	smitra@airdberlis.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
David Ullmann/ J. Wolf	For the Tenant Peace Bridge Duty Free	dullmann@blaney.com jwolf@blaney.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Patrick Shea	For the Landlord, the Peace Bridge Authority	patrick.shea@gowlingwlg.com
Leanne Williams	For msi Spergel Inc., the court appointed Monitor	williams@tgf.ca
Mukul Manchanda	Monitor's representative	mmanchanda@spergel.ca

ENDORSEMENT OF JUSTICE KIMMEL:

1. This case conference was scheduled pursuant to the court's January 19, 2023 endorsement, which specified the following agenda of matters to be considered and addressed, post-mediation:
 - a. A report from the parties about any aspects of their disputes that have been resolved.
 - b. The costs of the Landlord's stay motion (decided by the court's January 16, 2023 endorsement) and whether those costs should be decided now or deferred to be decided in connection with the Tenant's cross-motion.
 - c. Directions regarding the stay and restrictions contained in, and "normal rent" payable under, the Appointment Order, including with respect to: i) the lifting of the stay of proceedings in paragraph 9 of the Appointment Order and/or relieving the Landlord of the restrictions under paragraph 11, ii) vacating or terminating the Appointment Order, and/or iii) the amount of "normal rent" that the Tenant should be paying to the Landlord pursuant to paragraph 11 of the Appointment Order if it is to remain in place pending the decision of the court on the Tenant's cross-motion.
 - d. Directions regarding any proposed 39.03 examinations that are objected to in connection with the Tenant's cross-motion.
 - e. Directions regarding the timetabling of the cross examinations the exchange of expert reports (if any), the need for any viva voce evidence, the exchange of written submissions and the eventual hearing of the Tenant's cross-motion.
 - f. Directions regarding the timetabling of the receivership application and any other matters arising in connection with the receivership application and/or the continuing role of the Monitor.
2. The Landlord and Tenant each filed Aide Memoires in advance of this case conference which assisted framing the issues for the court's consideration. Each of these agenda items were addressed in the Aide Memoires, as well as some additional items. The court heard from counsel present and the provides herein a summary of the points addressed and the orders and directions arising therefrom.

Report on Mediation

3. It was reported in the Aide Memoires that no settlement was reached at the mediation, with respect to any issues. The Tenant has said that it intends to make a further proposal to the Landlord. The mediator is available to continue the mediation if the parties consider that it would be productive. That shall not interfere with the timetable now set for the Tenant's Cross-Motion, unless both the Landlord and Tenant request a consent adjournment of same.

Costs of the Landlord's Stay Motion

4. The Tenant wants the court to decide the issue of the costs of the Landlord's Stay Motion decided by endorsement dated January 16, 2023 (*Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 327).
5. The Landlord suggests that the court's decision regarding the entitlement/quantum/scale of costs of that motion should be deferred and decided in conjunction with the costs of the Tenant's Cross-Motion. The Landlord's request is reasonable, in the circumstances, for the reasons outlined in its Aide Memoire.
6. The issue of the costs of the Landlord's Stay Motion shall be decided at the same time as the costs of the Tenant's Cross-Motion (now scheduled), or at such further and other time as the court may direct.

Further Directions With Respect to Paragraphs 9 and 11 of the Appointment Order

7. The Landlord continues to argue that it should not be required to effectively finance the Tenant pending the determination of the Tenant's Cross-Motion, by virtue of the stay of proceedings and other restrictions imposed when the Receiver was appointed, which prevent the Landlord from exercising its remedies in respect of the Tenant's failure to pay Base Rent under the Lease, and other alleged breaches of the Lease by the Tenant. The Landlord's concerns are exacerbated the longer the process takes to a decision on the interpretation of section 18.07 of the Lease.
8. The court has to balance the Landlord's position against the Tenant's assertion that it cannot afford to pay the prescribed Base Rent and its contention that it is paying "normal" rent, which is all that it is required to pay by virtue of section 18.07 of the Lease and the events that transpired from and after March of 2020. This issue is raised squarely by the Tenant's Cross-Motion.
9. To alleviate the Landlord's concerns, the court has now scheduled the earliest available date to hear the declaratory relief sought by the Tenant's Cross-Motion (Lease interpretation issues, contained in paragraphs 1-6 and paragraph 11 of the Tenant's Cross-Motion), for three days July 25, 26 and 27, 2023.
10. The Landlord remains concerned about unrecoverable rent arrears that continue to accumulate and interest on past arrears (the interest alone it calculates to be approximately \$170,000 per month. This concern is of course dependent upon the Landlord's interpretation of the Lease prevailing. The Landlord is not satisfied that the Tenant is paying enough on an interim without prejudice basis, even with the Tenant's latest projections (which only approximates the level of Base Rent that the Landlord claims for a couple of months in the summer).
11. The court's January 16, 2023 Stay Motion Endorsement and January 19, 2023 case conference endorsement left open the question of what amount of rent the Tenant should be paying to the Landlord if the stay is to remain in place pending the decision of the court on the Tenant's Cross-motion. The court has previously indicated that it has jurisdiction to set the amount of rent to be paid by the Tenant during the stay period. While the Landlord does not accept that the Tenant's ability to pay should dictate the amount that the court determines is appropriate, as a practical matter, the court considers that to be a relevant data point and had anticipated that there might be evidence available at this case conference about the Tenant's ability to pay.
12. The Tenant has offered to pay for the cost of the Monitor to independently review and verify the Tenant's confidential cash flows (that have not been shared with the Landlord) and verify whether the Tenant is able to pay the Base Rent that the Landlord is requesting be paid, or any amount beyond 20% of its gross sales (which is what it has been paying and proposes to continue to pay until its Cross-Motion has been decided).
13. The Monitor has agreed to undertake this exercise and will provide its report to counsel for the Tenant and counsel RBC on or before May 5, 2023. The Tenant will review and advise within a week whether it accepts the Monitor's review and analysis. However, the Tenant has agreed that it will abide by any direction from the court regarding any increased amount of rent to be paid pending the court's determination of the Lease interpretation point on its Cross-Motion, based on the Monitor's report.
14. The parties shall attend a 30-minute case conference on May 17, 2023 at 9:15 a.m. at which time the court will consider and provide any further directions arising out of the Monitor's report (including any issues associated with the disclosure of that report to the Landlord, if the parties have not been able to come to terms upon which the report will be shared with the Landlord before then).

Rule 39.03 Examinations

15. After some back and forth, it has been agreed that Mr. O'Hara will be examined by the Landlord. The Tenant will examine Ms. Costa and one other person to be designated from the Landlord's Board of Directors. Preferably, someone who was on the board at the time of the Lease negotiations in 2016 and during the March 2020 to December 2021 time frame. But if no such individual exists, or if the Tenant

prefers to examine the current Chairman of the Landlord it may do so, in lieu of this other board representative.

16. These Rule 39.03 examinations (3 in total) shall be completed by May 26, 2023. These should be scheduled as soon as possible to avoid conflicts for witnesses and counsel.

Timetabling Directions: Tenant's Cross-Motion

17. The Tenant requested an order for discovery-like production to be made by both sides. Given that this is a contract interpretation case in which context/factual matrix has some limited relevance but must be considered on an objective standard, the court has provided the following directions regarding limited-scope production to be made by the Landlord and the Tenant by May 5, 2023 (in advance of any examinations):
- a. Documents exchanged between the parties and between their respective counsel, unless exchanged on a without prejudice/settlement basis (to be produced to each other to the extent not already appended as exhibits to affidavits already filed on the Cross-Motion):
 - i. In the time frame in which the Lease was being negotiated (circa 2016) that relate to s. 18.07 of the Lease or its subject matter; and
 - ii. In the time frame in which the boarder restrictions came into effect and thereafter (March 2020-December 2021) with respect to the effect and implementation of s. 18.07 of the Lease.
 - b. Non-privileged internal documents of the Tenant and the Landlord relating to approval and authorization:
 - i. Regarding s. 18.07 of the Lease or its subject matter when the Lease was being negotiated and signed (circa 2016). On the Landlord's side, this will also include communications between the Landlord and its external fairness advisor in the Lease RFP process; and
 - ii. Regarding the requests made and responses given with respect to concessions to be provided/given under s. 18.07 of the Lease from and after the border restrictions came into effect (in the period from March 2020 to December 2021).
18. The court has not at this time made any ruling as to the admissibility or relevance of such documents, only that they shall be produced and available to be questioned upon. Redactions made be made on the face of any such produced documents for privilege.
19. The cross-examinations of all affiants shall be completed after the Rule 39.03 examinations (above) and on or before June 7, 2023. These should be scheduled as soon as possible to avoid conflicts for witnesses and counsel.
20. 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.
21. The parties shall not refuse to answer questions on the cross-examinations or Rule 39.03 examinations on grounds of relevance. The objecting party may state the objection but the question shall be answered.
22. The parties shall attend a case conference on June 14, 2023 commencing at 9:00 a.m. (scheduled for no more than 45 minutes), which shall be primarily to address evidentiary considerations for the hearing of the Cross-Motion, including whether any party considers that it might be necessary for the court to hear *viva voce* evidence from any of the witnesses. The parties should come to this case conference prepared to discuss any other logistics for the hearing, including any sealing orders that might be requested.
23. Undertakings (and questions taken under advisement or refused that the objecting party is prepared to answer) shall be answered in writing by June 30, 2023.

24. The Tenant's factum (maximum 25 pages double spaced, including appendices) shall be delivered by July 7, 2023.
25. The Landlord's responding factum (maximum 30 pages double spaced, including appendices) shall be delivered by July 14, 2023.
26. The Tenant may deliver a reply factum (maximum 5 pages double spaced, including appendices) if there are matters of proper reply not anticipated and addressed in its initial factum, by July 21, 2023.
27. All materials is to be uploaded into the CaseLines bundle for this hearing by 4:30 p.m. on July 21, 2023. All materials must be hyperlinked (factums and indices to any records).

Timetabling Directions: Receivership Application

28. The Receivership application is now returnable on September 22, 2023. It may have to be adjourned if the court's decision on the Tenant's Cross-Motion has not yet been rendered. In the meantime, RBC's counsel does not intend to participate in the cross-examinations on the Tenant's Cross-Motion but RBC and the Tenant agree that the evidence from the Cross-Motion may be used on the Receivership application if and when it proceeds, to be supplemented by further evidence as either party may deem necessary, to be exchanged (and cross-examinations to be conducted) on a timetable to be agreed upon shortly after the Tenant's Cross-Motion has been heard so that the parties are ready to proceed with that application on September 22, 2023.
29. While the Landlord does not expect to directly participate in the Receivership application, it does have an interest in when it is heard, so counsel for the Landlord shall be kept apprised of any timetabling agreements regarding the Receivership application.

Conclusion

30. The parties shall abide by the above directions and orders and timetable. This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out.

A handwritten signature in dark ink, appearing to read "Kimmel J.", with a stylized, cursive script.

KIMMEL J.