



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

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

DATE: 17 May 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: ROYAL BANK OF CANADA 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	Lawyer for RBC	smitra@airdberlis.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
David Ullmann	Peace Bridge Duty Free Inc., Tenant	dullmann@blaney.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Leanne M. Williams	Lawyer for msi Spergel Inc. in its capacity as Court-appointed Monitor of Peace Bridge Duty Free Inc.	lwilliams@tgf.ca
Mukul Manchanda	Monitor's representative	mmanchanda@spergel.ca
Patrick Shea	Lawyer for Buffalo and Fort Erie Public Bridge Authority, Landlord	patrick.shea@gowlingwlg.com

ENDORSEMENT OF MADAM JUSTICE KIMMEL:

1. This case conference was scheduled pursuant to the court's last endorsement of April 4, 2023. The primary issue to be addressed was the question of what amount of rent the Tenant could afford to be paying to the Landlord pending the court's decision on the Tenant's Cross-Motion now scheduled to be heard on July 25, 26 and 27, 2023.
2. As provided for in my April 4, 2023 endorsement, the Monitor conducted an independent review and analysis of the Tenant's cash flows and prepared a report that was provided to the Tenant and to RBC on May 5, 2023. The purpose of this report was to ascertain whether the Tenant is able to pay more than 20% of its gross sales in rent pending the determination of its Cross-Motion. As was noted in that endorsement, the Tenant had 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 raised by its Cross-Motion, based on the Monitor's report.
3. The court and the Landlord were provided with the following summary of the Monitor's rent affordability report:

The Report concluded that Peace Bridge is able to increase its monthly rent payments to the base rent of \$333,333 ("**Base Rent**") during the period ending September 19, 2023 (the "**Review Period**"), being the date of the return of RBC's motion to appoint a receiver. Notwithstanding that Peace Bridge is financially able to pay the Base Rent, the payment of same will decrease its cash reserves. The Monitor discussed its report and conclusions with RBC who advised that they do not object to Peace Bridge paying Base Rent during the Review Period.

4. The specified Review Period ends on September 19, 2023 which is actually a few days prior to the hearing date that has been scheduled for the Bank's receivership motion (currently returnable on September 22, 2023). This is the period for which the Monitor had the cash flow information and projections from the Tenant.
5. Based on this report from the Monitor, the Tenant made an on the record offer to the Landlord to pay rent (monthly, in arrears) starting on June 1 (for the month of May) and continuing to September 30, over and above the 20% of gross sales that it has been paying, to top up the monthly amount being paid during this interim period to the minimum Base Rent specified in the Lease of \$333,000 per month plus HST. The Tenant's offer was to pay any such "topped up" amount on a without prejudice basis to the Monitor to hold and release to either the Landlord or the Tenant, depending on the outcome of the Cross-Motion.
6. The Landlord's position is that any interim payments of rent should be paid to the Landlord to avoid the continued accrual of interest (at the rate specified in the Lease of 26% per annum). The Landlord says it is good for the money if it is later determined that the Rent owing under the Lease was less than this and if the Landlord is not found to be entitled to set off any such overpayments against outstanding amounts claimed to be owing to the Landlord by the Tenant.
7. The Landlord also indicated that the amount payable in this interim period should be the greater of 20% of the Tenant's gross sales or the specified minimum Base Rent of \$333,333 per month. While viewed as optimistic, the Tenant advised that it is prepared to pay the greater amount if its gross sales translate into a higher amount to be paid, and RBC expressed no objection or concern about this.

8. The court raised questions about the precise period that would be covered by this interim arrangement, with the result that it was determined that it can and should only apply until the payment of rent by the Tenant for the month of August that would be due on September 1, 2023. The Monitor's cash flows and report do not extend to the end of September and a receiver could be appointed in September. For these and other reasons, all parties agree that it would be advisable to have the Monitor prepare a further report, on the same basis as this last one, that covers the month of September and beyond (the "Monitor's second rent affordability report").
9. After reviewing and considering the letters filed by the Tenant and the Monitor, and hearing the submissions of all counsel appearing, the court directs that the Tenant shall pay monthly rent in arrears directly to the Landlord on an interim basis commencing on June 1, 2023 and continuing until September 1, 2023 (the "Interim Period") of the greater of: (i) 20% of the Tenant's gross sales, and (ii) the specified minimum Base Rent under the Lease of \$333,333 plus HST. I do not see any reason to involve the Monitor in the rental payments given the amounts at issue. Further, while perhaps immaterial in the grand scheme of this dispute, payment directly to the Landlord (on the terms indicated previously, with any overpayments later determined to either be set off or repaid by the Landlord upon the agreement of the parties or, failing agreement, a court order) will avoid the continued accrual of interest if the Landlord's position prevails. The contractual interest rate of 26% is not one that the Monitor could be expected to achieve through the investment of funds paid to it under the Tenant's proposed arrangement.
10. The court's direction regarding these interim payments is without prejudice to any party's position regarding the Rent that is payable under the Lease during this interim period, or during the stay period that preceded it, as may be later determined by the court.
11. The parties reported that they are so far on track in their timetable for pre-hearing steps for the Cross-Motion. Due to a scheduling conflict for one of the lawyers, the June 14, 2023 case conference that was ordered by the court's April 4, 2023 endorsement will now commence at 4:30 p.m. instead of 9:00 a.m.
12. The Monitor's second rent affordability report shall be paid for by the Tenant and shall be prepared on the same terms as the last one, to cover the period to the end of 2023 if possible. The parties shall incorporate the time for delivery of that report into the timetable that they are to agree upon for the Receivership Application.
13. 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.