CITATION: Royal Bank of Canada v. Peace Bridge Duty Free Inc., 2023 ONSC 327
COURT FILE NO.: CV-21-00673084-00CL
DATE: 20230116

SUPERIOR COURT OF JUSTICE - ONTARIO

ROYAL BANK OF CANADA, Applicant

AND:

PEACE BRIDGE DUTY FREE INC., Respondent

BEFORE: Kimmel J.

COUNSEL: *Sanjeev Mitra,* for the Applicant

John Wolf and David Ullman, for Peace Bridge Duty Free Inc. (Tenant)

Patrick Shea, for Buffalo and Fort Erie Public Bridge Authority (Landlord)

Mukul Manchanda and Leanne Williams, for The Monitor

HEARD: January 5, 2023

ENDORSEMENT
(LANDLORD'S MOTION TO LIFT STAY/RESTRICTIONS UNDER APPOINTMENT ORDER)

The Landlord's Motion

[1] The Buffalo & Fort Erie Public Bridge Authority (the "Authority" or the "Landlord") is the owner and operator of the Peace Bridge in Fort Erie, Ontario. The Authority entered into a lease with Peace Bridge Duty Free Inc. ("PBDF" or the "Tenant") dated July 28, 2016 (the "Lease"). PBDF used the leased premises to operate a duty-free store at the Peace Bridge border crossing. PBDF had been the Tenant of the premises since 1986 under prior lease agreements.

[2] The Lease requires that PBDF pay Rent (as defined in the Lease). Rent is comprised of Base Rent, Percentage Rent and any applicable sales taxes, property taxes, operating costs and utilities (also sometimes referred to as "Additional Rent"). The minimum annual Base Rent is $4 million, or $333,333 per month. The Base Rent amount under the Lease was proposed by PBDF as part of a Request for Proposal ("RFP") process undertaken by the Authority in 2016. PBDF's response to the RFP, containing its proposal to pay, inter alia, $4 million per annum in minimum annual Base Rent, was attached to and forms part of the Lease.

[3] The Tenant asserts that the proposed (and agreed upon) amount of minimum annual Base Rent was predicated upon an estimate of 20% of the gross sales anticipated when the Lease was entered into. However, the specified minimum annual Base Rent in the Lease and the RFP was not tied to any formula and there was no guarantee given in respect of gross sales or bridge traffic.

[4] The Tenant's business was materially and adversely affected by the COVID-19 travel restrictions introduced by the Canadian and United States governments in March 2020. The land border was closed for over a year to all non-essential travel, until August 9, 2021 (on the Canadian side) and November 8, 2021 (on the American side). The re-opening of the border in August 2021 was gradual. The border restrictions were lessened but not entirely eliminated at that time.

[5] The Tenant closed the duty-free store on March 21, 2020. It partially re-opened on or about September 19, 2021. There were some attempts to negotiate a business resolution to the dispute that arose between the Landlord and Tenant about the Rent payable from and after March 21, 2020. However, no agreement was reached.

[6] The Landlord asserted that the Tenant was in default of its obligations under the Lease. That triggered an event of default under the Tenant's credit facilities and resulted in this application by the Royal Bank of Canada ("RBC"), the largest secured creditor of PBDF, for the appointment of a receiver over PBDF's assets and property. The application was adjourned on terms that included the appointment of a monitor instead of a receiver, by order of this court dated December 14, 2021 (the "Appointment Order").

[7] One of the purposes of the Appointment Order was to afford the Tenant more time to try to reach a commercial resolution of the Lease dispute with the Landlord. With no resolution after almost a year, this motion was brought by the Landlord by a Notice of Motion dated October 5, 2022.

[8] By my endorsement of December 9, 2022, a hearing was scheduled on January 5, 2023 to determine the relief sought by the Landlord's Notice of Motion in sub-paragraphs 1(a) and (b). The Landlord seeks a declaration that it is no longer bound by paragraph 11 of the Appointment Order to continue to allow the Tenant to remain in the leased premises because of the Tenant's failure to pay Base Rent in accordance with the terms of the Lease (which the Landlord asserts the Appointment Order required the Tenant to do) and/or an order lifting the stay of proceedings imposed by paragraph 9 of the Appointment Order to enable the Landlord to exercise its remedies for default, including terminating the Lease and evicting the Tenant.

Factual Background

The COVID-19 Travel Restrictions and Article 18.07 of the Lease

[9] As a result of the global COVID-19 pandemic, the Canadian and United States governments announced travel restrictions that severely curtailed traffic across the Peace Bridge starting in mid-March 2020.

[10] The Lease contains the following provision:

18.07 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.

[11] The Tenant's position in response to the Landlord's motion (and in support of its cross-motion, described later in this endorsement) is heavily dependent upon this provision of the Lease and what the Tenant contends its implications are for the Rent payable under the Lease as a result of the COVID-19 travel restrictions that the Tenant say caused it to close the duty-free store between March 21, 2020 and September 2021.

[12] The Landlord does not agree that the Tenant had to close the duty-free store. The Landlord maintains that the Tenant's decision to close was a business decision. However, whether the store closed or not, the Landlord acknowledges that the travel restrictions imposed by both the Canadian and United States governments in response to the COVID-19 pandemic in March 2020 caused a material adverse effect on the business and operations of the Tenant.

[13] The Landlord disagrees with the Tenant's interpretation of Article 18.07 of the Lease. The Landlord maintains this Article imposes only a duty to consult not a duty to agree to amend the Tenant's obligations under the Lease with respect to the payment of Rent.

Rent Deferral, Forebearance Agreements and the Initial Exchange of Proposals

[14] Shortly after the initial COVID-19 travel restrictions were introduced, the Landlord and Tenant entered into an initial rent deferral agreement dated April 27, 2020. Under this deferral agreement, the Tenant agreed to pay Additional Rent throughout the Rent Deferral Period (as defined in that agreement), including without limitation, all operating costs and property taxes. The "Deferred Rent" was to eventually be repaid, with interest on specified terms. This agreement also obligated the Tenant to apply for and take advantage of all government programs offering financial relief from the effects of the COVID-19 pandemic, including rent assistance etc.

[15] The rent deferral agreement allowed the Tenant to defer paying the Base Rent until the expiry of the Rent Deferral Period on July 3, 2020. Thereafter, the parties attempted to negotiate a new rent deferral agreement, but that was never finalized. The Landlord indicated to the Tenant in November 2020 that it was looking for greater assurances about the unpaid (deferred portion of) Rent dating back to April 2020 and going forward.

[16] In the meantime, the Tenant continued to pay what it had agreed to pay under the April 2020 rent deferral agreement. As a result, very little Rent was paid by the Tenant (aside from basic utilities and taxes) in this time-frame since the Tenant was not earning any revenue and took the position that, despite there being no new rent deferral agreement, the terms of the first rent deferral agreement continued to apply.

[17] The Landlord did not agree to this and reserved its rights (relying upon, *inter-alia*, the non-waiver provisions contained in Article 2.17 of the Lease). However, it was not in a position to enforce its rights due to legislation that had been put in place to protect commercial tenants. The

Landlord was subject to the provincial moratorium on the eviction of commercial tenants that was not lifted in April 2022.

[18] After the Tenant re-opened the duty-free store in September 2021, the Tenant continued to pay the Additional Rent it had been paying (e.g. utilities and taxes) and also began to pay rent equal to 20% of its gross sales.

[19] The Tenant entered into a Credit Amending and Forebearance Agreement made as of October 8, 2021 with the RBC (the "Forebearance Agreement"). The preamble to that agreement stated that the Tenant had requested the bank to forebear "so that the Borrower has the opportunity to remain in business with a view to curing all defaults (including, without limitation, curing all defaults under the Lease, as defined herein)."

[20] The Landlord was not a signatory to the Forebearance Agreement. Under that agreement, the Tenant agreed to deliver, by no later than November 15, 2021, evidence satisfactory to the RBC that an agreement had been entered into with the Landlord concerning the defaults under the Lease to ensure that the Landlord would not terminate the Lease before the end of its current term.

[21] The Landlord and Tenant exchanged proposals in October 2021 in an attempt to reach an agreement about past due and continuing Rent owing. The Landlord rejected the Tenant's request to eliminate Base Rent from the Lease and to eliminate most of the Rent arrears for Base Rent. It offered various alternatives to reduce and/or defer the Base Rent payable. No agreement was reached by November 15, 2021.

[22] The RBC terminated the Forebearance Agreement and commenced this application for the appointment of a receiver.

The Appointment Order

[23] The Tenant and the RBC agreed to adjourn the RBC's receivership application on terms that included the appointment of a monitor (the "Monitor"), more particularly described in the Appointment Order. The Tenant agreed to the appointment of the Monitor to allow it further time to try and reach a commercial resolution with the Landlord. The Tenant represented to RBC and the court at that time that it believed a commercial resolution could be reached with the Landlord and that its ability to make a credible and reasonable proposal to the Landlord would be enhanced over the next few months if it was given some time to do so.

[24] The Appointment Order includes, *inter alia*, the following provisions:

a. Paragraph 9: A stay and suspension of all rights and remedies against PBDF or affecting the Property.
b. Paragraph 11: A restraint on all persons with agreements with PBDF for the supply of goods and/or services from discontinuing, altering, interfering with or terminating same provided that in each case the "normal prices or charges" for all such goods or services received after the date of the Appointment Order are paid by PBDF in accordance with normal practices of PBDF or such other practices as may be agreed upon by the supplier or service provider and PBDF, or as may be ordered by the court.

c. Paragraph 28: A come come-back provision, permitting any interested party, including, without limitation, the RBC and the Debtor, to apply to the court to vary or amend the Appointment Order or discharge the Monitor on not less than seven (7) days' notice to the Monitor, the Debtor, the RBC and any other party likely to be affected by the order sought or upon such other notice, if any, as this court may order.

[25] The Landlord was aware of and did not object to the terms of the Appointment Order. It expected that the Tenant would come forward with a further proposal despite the parties not having reached an agreement up until that time.

After the Appointment Order

[26] After the Appointment Order was made, the Tenant continued to pay the Additional Rent and further rent based on 20% of gross sales by way of direct deposit. The Landlord continued to indicate that this was not sufficient and had not been agreed to.

[27] The Tenant proposed that the parties engage an outside mediator to assist them in reaching a resolution of the Rent dispute. A December 24, 2021 communication from the Tenant about the parameters of the proposed mediation confirmed that the Tenant was still hoping to negotiate new lease terms:

> We plan to write to you with more fulsome information after Christmas and to propose a further meeting with clients to try to address a commercially reasonable LAA having regard to subjective ability to pay, and with objective reference to how the market place is assisting other duty free stores.

[28] The Landlord indicated in its December 30, 2021 correspondence that:

> Any proposal must include a provision for the repayment of the arrears and go-forward rent supported by a detailed business plan and personal guarantees from individual(s) with financial means and/or third-party security. Once we have seen such a proposal with this supporting information, we are prepared to re-visit whether there is room for settlement and whether a mediator may be able to assist with any negotiations.

[29] No such proposal was made by the Tenant, but it continued to pay by direct deposit Additional Rent and rent equal to 20% of its gross sales. In early January 2022, the Landlord notified the Tenant in writing that it had not previously accepted, and did not accept, that the Tenant was paying the correct amount of Rent due. This position was reiterated by the Landlord periodically thereafter and prior to the Tenant and the RBC returning to court to extend the stay under the Appointment Order.

[30] The Appointment Order was amended two times, each of which continued without change to paragraphs 9 and 11. The first amendment (on January 17, 2022) adjourned the receivership application to March 23, 2022. The second amendment (on March 23, 2022) adjourned it to a date to be set by the court on or after June 23, 2022. The Landlord was aware of the proposed terms of each iteration of the Appointment Order and did not raise any objection to those orders being made

or continued, although it did continue to communicate with the Tenant that the correct amount of Rent was not being paid.

The Positions of the Parties

The Landlord's Position

[31] The Landlord claims to be owed in excess of $8.4 million in unpaid rent. This includes over $1.2 million in calculated minimum Base Rent payable under the terms of the Lease since the Appointment Order was made. It is understood that the Landlord has not waived its rights in connection with any claims for Rent owing by the Tenant for the period prior to December 14, 2021. That is an issue for another day, which has not been raised by either the Landlord's or the Tenant's motions.

[32] Sub-paragraphs 1(a) and (b) of the Landlord's Notice of Motion raise threshold questions that require the court to determine whether the amount of Rent that the Tenant has paid since the Appointment Order is in compliance with the Appointment Order, and, if not, whether the Landlord should be relieved of the stay/restrictions imposed by the Appointment Order and permitted to exercise its remedies.

[33] The Landlord insists that the Tenant was obligated by the Appointment Order to pay the minimum annual Base Rent (amortized monthly) in accordance with the terms of the Lease.

The Tenant's Position

[34] The Tenant disputes this. It argues that there is no scenario under which it was obligated by the Appointment Order to pay the specified Base Rent under the Lease. The Tenant contends that the Appointment Order required it to pay exactly what it had been paying prior to that Order: Additional Rent (of approximately $10,800 per month for utilities and taxes) plus the greater of (i) 20% of its gross sales and (ii) the government rental assistance it received. The Tenant maintains that it has paid those amounts (admittedly not the Base Rent specified in the Lease).

[35] Further, the Tenant maintains that if the amount it paid was not the amount it was required to pay under the Appointment Order, the determination of the amount it should have paid requires an adjudication of at least some of the broader issues raised in the Tenant's cross-motion, not presently before the court.

[36] I have directed that the Tenant's cross-motion will be timetabled at a case conference scheduled to proceed on January 19, 2023. The cross-motion seeks the determination of various issues dependent upon the interpretation of Article 18.07 of the Lease. These interpretive issues will likely require the court to engage in an evidentiary assessment. Thus, a more fulsome evidentiary record that considers the factual matrix from which the Lease arose is necessary for the court to decide the cross-motion.

The Competing Interpretations of Article 18.07

[37] The Tenant takes the position that Article 18.07 of the Lease amounts to a contractual obligation on the part of the Landlord to "reasonably reconsider the impacted terms of the Lease, including Article IV of the Lease dealing with Base Rent" in the face of the border restrictions that caused a Material Adverse Effect on the Tenant's business. In its cross-motion, the Tenant asserts the Landlord has breached this obligation by failing to enter into reasonable, or any discussions about the impact of the border restrictions as they evolved, individually and collectively, on Base Rent payable under the Lease. The Tenant further asks the court to make a declaration of whether any, and if so, what amount, of Base Rent is due and payable under the Lease for various different periods before and after the date of the Appointment Order.

[38] The Landlord disputes this interpretation and the allegation that it has breached any of its obligations. The Landlord maintains that Article 18.07 contains only a duty to consult, which it has discharged. Further, the Landlord maintains that even if it breached its duty to consult, the Tenant's remedy is in damages only. There is no scenario under which the Landlord accepts that this Lease provision translates into a duty on the part of the Landlord to re-negotiate the Rent payable under the Lease.

[39] The parties also disagree about whether the progression of changes in laws, regulations or guidelines by the two governments that lessened the travel restrictions were each a new change in the Applicable Laws under Article 18.07. If those changes were captured by Article 18.07 as the Tenant contends, they would each trigger a "new" obligation on the Landlord to discuss the impact of those changes on the Lease with the Tenant. Whereas the Landlord contends that only the initial restrictions triggered the obligation to consult under Article 18.07.

The Positions of the RBC and the Monitor

[40] The RBC supports the Tenant's position that the stay/restrictions should not be lifted, but argues in the alternative that if the stay is lifted that should, in turn, be held in abeyance to allow the RBC to bring back on its receivership application.

[41] The Landlord has agreed that it will not take any enforcement steps even if the stay/restrictions under the Appointment Order are lifted, pending the return of the RBC's receivership application.

[42] The January 19, 2023 case conference has been set aside for the court to provide further directions about whatever remains to be determined in the two motions (the Landlord's motion and Tenant's cross-motion) and the receivership application.

[43] The Monitor takes no position and considers its role to be informational only. It is concerned that all stakeholders be treated equally and that the stay/restrictions not be lifted only in favour of the Landlord and not in favour of other stakeholders. However, the Monitor is content that the "standstill" that the RBC has requested, and that the Landlord has agreed to, will achieve that objective.

Summary of Outcome

[44] For the Landlord to succeed on the threshold issues raised by sub-paragraphs 1(a) and (b) of its Notice of Motion, given the way in which the motions have been structured and timetabled, would require the court to conclude that the Tenant was required by the Appointment Order to pay the minimum Base Rent under the Lease each month commencing in January 2022 (the first month after the Appointment Order was made).

[45] The Appointment Order is not sufficiently clear to allow me to make that determination. The concept of "normal rent" typically payable under orders that include standard language equivalent to paragraph 11 is not readily applied to the circumstances of this case and the manner in which the parties conducted themselves as a result of the unprecedented border restrictions that were imposed at the outset of the COVID-19 pandemic.

[46] While the Landlord did not waive (but rather, expressly reserved) its rights with respect to the eventual payment of minimum annual Base Rent accruing due both before and after the Appointment Order, the Landlord did not insist at the time of the Appointment Order (or at any point when it was amended thereafter) on a specific provision regarding the amount of Rent to be paid during the pendency of that order.

[47] The Tenant had not paid the annual minimum Base Rent since March 2020, more than eighteen months prior to the Appointment Order. On that basis alone, I am unable to conclude at this time that the "normal rent" paid by the Tenant for the use of the leased premises prior to December 14, 2021 was the annual minimum Base Rent payable under the Lease.

[48] That said, it was not intended that the Appointment Order would continue indefinitely. It was predicated on a representation by the Tenant that it wished to engage in negotiations with the Landlord to reach a business resolution. It has now been more than a year since the Appointment Order was made and no business resolution has been reached. In fact, no new proposal has been presented by the Tenant since the Landlord rejected its last proposal prior to the Appointment Order being made.

[49] The Landlord has effectively been subsidizing the Tenant's business and it cannot be required to do so indefinitely. This is effectively putting the Landlord (an unsecured creditor) in the position of supporting the secured creditor in what the Landlord sees as an inevitable receivership situation.

[50] The Tenant argues that if there is no prospect of a business resolution then its cross-motion should be expedited so that the Rent payable under the Lease and any damages payable to the Tenant (which it seeks to offset against any accrued past Rent payable) can be determined. The Landlord's concern that this could entail another year of it having to involuntarily subsidize the Tenant's Rent while the issues raised by the Tenant's cross-motion are litigated is a valid concern.

[51] The Landlord should not be forced to subsidize the Rent payable under the Lease for another year based on a hotly contested interpretation of Article 18.07 of the Lease. This is unfair given that, if the Tenant ultimately loses, the Tenant will very likely not have the ability to pay the significant accumulated Rent arrears (estimated to be more than $8.4 million already). In the

meantime, the RBC's position is protected and is not being (further) compromised by the terms of the Appointment Order.

[52] The Tenant should not continue to benefit from the ambiguity that existed at the time of the Appointment Order about what "normal rent" was. Paragraph 28 of the Appointment Order allows the court to vary (lift) either or both of the stay and other restrictions contained in paragraphs 9 and 11. Paragraph 11 of the Appointment Order expressly gives the court the discretion to order any amount of Rent to be paid (in lieu of "normal rent"). I am prepared to consider these provisions and make appropriate orders after the mediation if necessary. However, the parties first need to make a concerted effort to reach an agreement.

[53] The negotiations to date have been paralyzed by each side's pre-conceptions of what an acceptable business solution would entail. These pre-conceptions have prevented any meaningful negotiation regarding the past Rent payable and Rent to be paid going forward under the Lease. While there is no requirement to mediate, the limited communications between the Landlord and the Tenant have been to some extent at cross-purposes and might have more success if facilitated through a skilled intermediary. While not the Landlord's first choice, when asked, the Landlord indicated it would attend a mediation if the court so ordered.

[54] I am directing the parties to engage a third-party mediator and ordering them to attend a mediation to facilitate their consultation and negotiation to see if there is a business resolution that can be reached. That shall take place by no later than March 31, 2023.

[55] The Landlord has already rejected the Tenant's last proposal. The Tenant is directed to make a new proposal, supported by a business plan and financial information to be disclosed with appropriate confidentiality protections in place. That information can be provided on a confidential basis and compiled with the assistance of the court appointed Monitor who has been in receipt of the monthly financial reporting from the Tenant since the Appointment Order was made. The Tenant's proposal shall be provided at least two weeks prior to the scheduled mediation date.

[56] If the Tenant wants to reach a business solution, it would be well-advised to consider the structure and terms of the Landlord's last proposal and address them (through incorporation or by some explanation for not incorporating them) in its next proposal.

[57] The Landlord shall respond to the Tenant's proposal at least one week prior to the scheduled mediation date.

[58] The proposals (and any others that may follow) shall be included as part of the filed mediation briefs, in addition to any further briefs for the mediation that the mediator may request.

[59] In the meantime, the Tenant's cross-motion shall be scheduled and pre-hearing steps shall be scheduled to proceed in tandem with the mediation. The parties shall attend the January 19, 2023 case conference having previously exchanged their respective concrete proposals for a realistic, but expeditious timetable to complete all necessary pre-hearing steps for the cross-motion.

[60] The parties shall report to the court after the mediation as to its outcome. If unsuccessful, the court will provide further directions, including about : 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 rent that the Tenant should be paying to the Landlord if the Appointment Order is to continue, based on the enhanced financial disclosure that the Tenant will provide to the Landlord in the context of the mediation and to the court (in accordance with the existing sealing order).

Analysis

[61] The Landlord has framed its motion primarily on the question of the interpretation of paragraph 11 of the Appointment Order and whether the Tenant's failure to pay the specified minimum Base Rent under the Lease amounts to a breach of that paragraph, thereby relieving the Landlord of the obligation to continue allowing the Tenant to avail itself of the benefits of the Lease.

[62] Although deferred, the essence of what the Landlord ultimately seeks is to be permitted to terminate the Lease and evict the Tenant. These are enforcement remedies that might require the court to lift the stay imposed under paragraph 9 of the Appointment Order. The Landlord makes the distinction that paragraph 11 of the Appointment Order restrains its contractual remedies while paragraph 9 restrains its creditor enforcement (and statutory) remedies. In any event, the two heads of relief give rise to overlapping considerations as they are both effectively seeking to lift a stay or other restrictions on the exercise of the Landlord's contractual and statutory remedies.

[63] The Tenant recognizes that there are three grounds upon which the court could lift the stay or restrictions under the Appointment Order:

a. If the Tenant is in default of its obligation to pay "normal rent" under the Appointment Order; and/or
b. If the purpose of stay has been exhausted or spent; and/or
c. If the balance of convenience favours doing so, having regard to the relative prejudice that will be suffered by each of the Landlord and the Tenant.

<u>Is the "normal rent" to be Paid by the Tenant the Base Rent Payable under the Lease?</u>

[64] The issues on this motion turn on the interpretation of paragraph 11 of the Appointment Order. Namely, what were the "normal prices or charges" for Rent paid by the Tenant in accordance with the normal practices that existed at the time of the Appointment Order ("normal rent").

[65] The Landlord argues that, absent its agreement in writing to the Tenant paying some other amount of Rent (of which there was only one, that expired in July 2020) normal rent is and can only be the minimum Base Rent under the Lease.

[66] The Landlord argues that it is untenable for the court to conclude that "normal rent" is the amount that the Tenant unilaterally was paying for three months prior to the Appointment Order after it re-opened the duty-free store in September 2021, over the Landlord's objection. This would impose a commercially unreasonable interpretation on this otherwise standard provision of the

Appointment Order, by allowing a debtor to continue to breach a contract that it was in breach of at the time of the order.

[67] The Landlord relies on *Citizens Bank of Rhode Island v. Paramount Holdings Canada Company* (2008), 41 C.B.R. (5th) 131 (Ont. S.C.), at paras. 31 and 33, aff'd, 2008 ONCA 891, 48 C.B.R. (5th) 211. In this case, the court rejected the idea that the identical provision in an order appointing a receiver contemplated the continuation of a pre-order payment practice that had been adopted by the debtor but that was not provided for in the applicable agreements.

[68] The Landlord argues that the purpose and effect of the standard provisions contained in paragraphs 9 and 11 of the Appointment Order is to maintain essential contracts and preserve the value of PBDF's business, notwithstanding prior breaches, as long as payment is made to suppliers in the normal course going forward after the Appointment Order. This, according to the Landlord, requires payment of the minimum Base Rent under the Lease, and entitles the Landlord to terminate the Lease for any failure to do so: see *Cosgrove-Moore Bindery Services Ltd. (Re)* (2000), 48 O.R. (3d) 540 (S.C.); *Canadian Petcetera Limited Partnership v. 2876 R Holdings Ltd*., 2010 BCCA 469, 10 B.C.L.R. (5th) 235; and *Quest University Canada (Re)*, 2020 BCSC 921.

[69] The Landlord asks the court to adopt the approach taken in *101297277 Saskatchewan Ltd. v. Copper Sands Land Corp*., 2022 SKQB 39 in connection with an identical provision contained in an order appointing a receiver. In that case, the court looked for the objectively determinable and contractually agreed price payable for the goods or services, which in the case of a tenancy, was determined to be the rent payable in accordance with the applicable lease: see also *Boutiques San Francisco Inc., Re* (2004), 5 C.B.R. (5th) 174 (QC CS), at paras. 96-105.

[70] The Landlord acknowledges that, if the Lease contained a rent adjustment clause that had been triggered, then the court might be able to conclude that the "normal rent" was something other than the Base Rent prescribed (see *Copper Sands*, at para. 37). However, there is no rent adjustment clause in the Lease. The Landlord disputes the Tenant's assertion that Article 18.07 can or should be read as an obligation to adjust the Rent payable under the Lease. Nor does the Lease allow the Tenant to unilaterally determine the Rent payable even if that article could be construed as a rent adjustment clause.

[71] The words "consult" and "consultation" have been judicially considered to involve "a bilateral interaction by parties informed of each other's position where each has the opportunity to give and receive information": see *Lakeland College Faculty Association and Board of Governors of Lakeland College*, 1998 CanLII 29705 (AB CA), at paras. 37-38. The court must look at the objective meaning of those words: see *Shaun Developments Inc. v. Shamsipour*, 2018 ONSC 440, 94 R.P.R. (5th) 15, aff'd, 2018 ONCA 707, 94 R.P.R. (5th) 44; see also *Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP*, 2022 ONSC 5922, at paras. 28-33.

[72] The Tenant argues that it would not be objectively or commercially reasonable to equate "normal rent" with minimum Base Rent in this case, when, at the time of the Appointment Order, minimum Base Rent had not been paid for over eighteen months (since March 2020), during a period in which there was recognition by the Landlord that the Tenant would be entitled to some Rent relief, even if not yet determined. This is not a situation of a couple of months of default, followed by an appointment order requiring the normal prices to resume.

[73] The Tenant insists that this would not have been a reasonable or viable term for it to have agreed to because it could not afford to pay that amount of Rent. The Landlord challenges this, and points out that the Tenant's limited financial disclosure in the fall of 2022 suggests that the Tenant could afford to pay minimum Base Rent based on its financial projections. The Tenant counters that the Landlord is over-simplifying matters based on incomplete financial information (for example, it was suggested that the previous forecasts included non-recurring income for government incentives and assistance).

[74] The Landlord argues that the incomplete financial disclosure is the Tenant's own doing, by its refusal to make full financial disclosure. The Tenant proffers various excuses for this non-disclosure, but ultimately asks for the opportunity to make that case if the court is going to consider what the Tenant could afford to pay in the determination of what the Tenant should pay.

[75] Given what is at stake, and even though this complication of incomplete financial disclosure is arguably of the Tenant's own making, the court is not prepared to decide the Landlord's motion on the basis of adverse inferences to be drawn from the Tenant's failure to make complete financial disclosure. This situation has arisen in the context of an accelerated hearing of the Landlord's motion where there are other related issues that have been left to be decided on the Tenant's cross-motion, including the very question of what Rent was payable under the Lease after the COVID-19 travel restrictions were imposed in March 2020, if not the Base Rent.

[76] If not Base Rent, then for purposes of this motion, the Tenant maintains that court can either conclude that normal rent was what the Tenant had started to pay when the store re-opened in September 2021 (20% of gross sales), or that it should be some other amount that the court must determine with the benefit of more fulsome financial information.

[77] The Tenant notes that there are often standard provisions included in appointment orders that specify exactly what the debtor is to pay under a lease that is in default (e.g. specify what the "normal rent" to be paid will be going forward), which the Landlord could have insisted upon in this case but did not, thereby leaving the term "normal rent" open to interpretation.

[78] The court observes that this omission is not entirely the Landlord's responsibility, as the whole purpose of the Appointment Order was to address the Tenant's inability to pay the Rent due under the Lease. In these circumstances, the Tenant could (and arguably should) equally have made sure that it was clear what "normal rent" it was to pay going forward.

[79] Having considered the extensive written and oral submissions on both sides, I am concerned about the lack of specificity about the "normal rent" to be paid under paragraph 11 of the Appointment Order, given the history and lengthy period prior to the Appointment Order in which very little, if any, Rent was being paid. The context and circumstances of this case are complex and unique, occurring under the backdrop of unprecedented cross-border travel restrictions, the moratorium on enforcement of remedies under commercial leases, the government subsidiaries offered to commercial tenants, to name a few considerations.

[80] Just because the Landlord did not waive its right to claim Rent arrears accruing due, and even reserved its right to be paid more Rent than what the Tenant was paying after the Appointment

Order was made, that does not necessarily mean that it was reasonably and objectively intended that the minimum Base Rent was to be the normal rent that the Tenant would be required to pay during what was clearly supposed to be a temporary stay to allow for further negotiations. It would be premature for the court to conclude based on the current evidentiary record and submissions that the normal rent was and could only be the minimum Base Rent payable under the Lease.

[81] In these circumstances, no default of paragraph 11 of the Appointment Order has yet established.

[82] I have not addressed the various submissions on the alleged lack of good faith dealings against the Landlord by the Tenant following the imposition of the COVID-19 cross-border travel restrictions. They are raised in the Tenant's cross-motion, and if successful, might form the basis of a damages claim. Insofar as the issues on the present motion, the alleged lack of good faith on the part of the Landlord is only conceivably relevant in support of the Tenant's request for the court to direct the parties to mediate to try to reach a business resolution. I have made that order for other reasons, discussed earlier and in the next section of this endorsement. Therefore, it is not necessary (nor would it likely be possible) to consider these allegations on this motion.

Has the Purpose of the Stay and the Appointment Order Itself Been Exhausted or Spent?

[83] Another ground upon which the court could lift the stay could be because its purpose has been exhausted or spent. The uncontroverted evidence is that the purpose of the Appointment Order (and the stay) was to afford the Tenant a further opportunity to reach a commercial resolution with the Landlord regarding the Rent arrears and ongoing Rent payable. No one suggests that the attempts to reach a commercial resolution were intended to go on indefinitely, nor should they be permitted to.

[84] Each side accuses the other to be at fault for their failure to reach a commercial resolution. Each was waiting for something from the other, with the result that there were only very limited communications since the Appointment Order. Regardless of the reasons, the lapse of more than one year since the Appointment Order was made with little or no meaningful communication towards a resolution is counter-productive.

[85] I am not satisfied that there has (yet) been a meaningful effort by either side to reach a commercial resolution. The purpose of the Appointment Order and stay is not yet exhausted or spent, but the time has come to engage in that meaningful effort, which will also provide an opportunity for the Landlord to (further) consult with the Tenant about the adverse effects on the Tenant's business due to the introduction of or change in cross-border travel laws and regulations and the impact of such to the Lease.

[86] Given the history of dealings between the parties, it is not reasonable to expect the parties will be able to make meaningful efforts on their own, and it is therefore appropriate that they do so with the assistance of a professional mediator.

[87] The Tenant agreed during oral argument that if the court ordered the parties to mediate, it would partially accede to the Landlord's conditions (previously indicated) that the Tenant make a proposal and business plan in advance. The Tenant proposes to enlist the assistance of the Monitor

to prepare and present the financial information that has already been provided to the Monitor by the Tenant.

[88] The mediation is to take place by March 31, 2023 (additional directions have been provided earlier in this endorsement at paragraphs 53-60).

[89] After the mediation, the parties shall report back to the court at a further case conference. A date may be scheduled for that further case conference at the January 19, 2023 case conference when the Tenant's cross-motion is timetabled.

[90] At that post-mediation case conference, the court will provide further directions concerning the continuation of the stay and other restrictions under the Appointment Order and/or the continuation of the Appointment Order itself. The court may also make an order regarding how much rent is to be paid if the Appointment Order is to continue.

The Balance of Convenience and Equities

[91] There is no statutory test for lifting the stay or restrictions on the Landlord imposed by the Appointment Order. In comparable circumstances, courts have considered the totality of the circumstances and the relative prejudice to the debtor and the creditor: see *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, 2018 BCSC 723, at para. 17.

[92] The Landlord claims that its prejudice is greater. The Landlord claims that it is an unsecured creditor effectively forced to finance the Tenant's continued operation for the benefit of its secured creditor, the RBC, by allowing the Tenant to continue to pay less than the Base Rent prescribed by the Lease while preserving the RBC's security.

[93] The Tenant contends that its prejudice will be the loss of its business because it cannot afford to pay the minimum Base Rent if that is what the court determines it was and is required to pay. The insufficiency of the evidence about the Tenant's ability to pay minimum Base Rent since the Appointment Order was made is reviewed earlier in this endorsement. Conceptually, it is difficult to see how requiring the Tenant to pay what it is obligated to pay amounts to unfair prejudice to the Tenant. However, what the Tenant is obligated to pay is a larger question that is, at least in part, to be determined on the Tenant's cross-motion, the timing of which will be better known after the January 19, 2023 case conference.

[94] If the Tenant is going to continue to assert that it will be prejudiced by an order requiring it to pay rent that it cannot afford, the Tenant offered to, and should, be better prepared to address the question of how much Rent it can afford to pay as that too may be relevant to any consideration of the equities going forward.

[95] The Monitor was asked, and confirmed, that while it has received the required financial disclosure from the Tenant in accordance with the Appointment Order, that information is not presently before the court, nor has the Monitor done the analysis to determine whether the Tenant could afford to pay Base Rent from and after December 14, 2021, although such analysis could be undertaken.

[96] Further, the Tenant's financial information provided to the Monitor is subject to a confidentiality and sealing order. All parties agreed at the hearing that an exception could be carved out to allow the Tenant's financial information to be disclosed to the Landlord in the context of the court's adjudication of the disputes between the Landlord and the Tenant. Such a disclosure should include continued protections to avoid public filings or disclosure because of the competitively sensitive nature of that information.

[97] The Landlord accepts that the court would have the jurisdiction to temporarily adjust the amount or timing of Rent payable under the Lease pursuant s. 20 of the *Commercial Tenancies* Act, R.S.O. 1990, c. L.7 when considering a request for relief from forfeiture, if determined to be necessary and a proper balancing of the Landlord's interest in being paid the contractual Rent and the Tenant's interest in preserving its business. However, this is not a relief from forfeiture application: see *Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc*., 2022 ONCA 585, at paras. 43, 45.

[98] Nonetheless, by the conclusion of the oral argument, all parties had agreed that the court has the authority under s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and/or the express terms of paragraph 11 of the Appointment Order to make an interim order as to the amount of Rent payable by the Tenant, which may not be the specific minimum Base Rent prescribed by the Lease.

Exercise of the Landlord's Remedies

[99] The Landlord, at this time, is only seeking a remedy for the Tenant's failure to pay minimum Base Rent from and after December 14, 2021 when the Appointment Order was made in accordance with paragraph 11 of that order.

[100] The Landlord has both contractual and statutory rights to terminate the Lease upon the Tenant's failure to pay rent due: see s. 18(1), *Commercial Tenancies Act*. See also *Hudson's Bay Company*, at para 32.

[101] These remedies can only be exercised if the stay and restrictions under the Appointment Order are lifted. That will not happen until at least the scheduled date for the post-mediation case conference.

[102] In its December 9, 2022 endorsement, the court specified that, even if it has rendered its decision by January 19, 2023 (which is not guaranteed), and if the Landlord is successful on its motion, the stay contained in the Appointment Order will remain in effect until at least the January 19, 2023 case conference and for a reasonable period thereafter to allow the applicant to bring back on its application to appoint a receiver before the Landlord takes any enforcement steps. The court assumes that the RBC will be seeking a similar standstill arrangement in the event that any order is made at the post-mediation case conference or thereafter if the stay or the Appointment Order are in jeopardy of being set aside or terminated.

[103] The Monitor is concerned that the stay not be lifted in favour of one creditor to the exclusion of other creditors as this would create an unfairness. However, the effective standstill and intended receivership application provide a practical solution to these concerns.

Conclusion

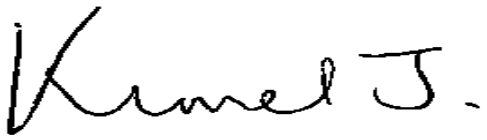
[104] The January 19, 2023 case conference will be used to timetable the Tenant's cross-motion which shall proceed in tandem with the mediation and shall be timetabled on a realistic, but expedited, basis. The parties shall exchange proposed timetables and meet and confer before the case conference with a view to agreeing on as much as possible before attending this case conference.

[105] If at or following the court ordered mediation, the parties are able to resolve their dispute about any one or all of the Rent arrears pre-December 14, 2021, the Rent arrears and post-December 14, 2021 and/or the Rent continuing to be payable by the Tenant as a result of the COVID-19 cross-border travel restrictions, the Tenant's cross-motion may be amended or withdrawn as appropriate to reflect what has been agreed and the timetable can be amended accordingly, thereafter.

[106] Failing agreement, the court may provide further orders and directions at or after the post-mediation case conference.

[107] The parties agreed to exchange their cost outlines for this (the Landlord's) motion by Friday, December 13, 2022 and the court assumes they have done so. If time permits, the parties may address the court at the January 19, 2023 case conference regarding their respective proposals for how the costs of this motion should be determined.

[108] 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.



Kimmel J.

Date: January 16, 2023