



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-21-00673084-00CL DATE: July 25 and 26, 2023

NO. ON LIST: 3

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
Sanj Mitra	Lawyers for the Applicant	smitra@airdberlis.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Brendan Jones	Counsel for the Respondent	bjones@blaney.com
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For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Leanne Williams	Counsel for the Monitor	lwilliams@tgf.ca
E. Patrick Shea	Lawyers for Buffalo and Fort Erie Public Bridge Authority	patrick.shea@gowlingwlg.com
Mukul Manchanda	Proposed Receiver	mmanchanda@spergel.ca

ENDORSEMENT OF JUSTICE KIMMEL:

1. The parties appeared before the court over the course of two days (July 25-26, 2023) to deal with various production, disclosure and other pre-hearing matters so as to keep this matter on track for the hearing of the Tenant's cross-motion currently scheduled to commence on September 19 and to continue on September 21 and 22, 2023.
2. Upon reviewing the written submissions and materials filed by the parties and hearing the oral submissions of counsel over the course of the past two days, the following orders and directions are provided by the court at this time:
 - a. after having directed that a final notice be provided to the American duty free store tenant at the Peace Bridge (the "US Tenant") on July 25, 2023 (by way of the delivery of the court's preliminary endorsement of that day regarding the orders that the court intended to make for disclosure of certain documents relating to that tenancy in this proceeding) and the US Tenant not having raised any objections or concerns with respect to the intended order, the Landlord (Fort Erie Public Bridge Authority, the "Authority") is ordered to produce to the Tenant (Peace Bridge Duty Free Inc.) the following documents relating to the Authority's arrangements and dealings with its US Tenant:
 - i. The lease and any amendments thereto;
 - ii. Any agreements with the US Tenant to defer and/or abate rent;
 - iii. The April 24, 2020 report of the Authority (A869/20) that discusses arrangements with both the US Tenant and the Tenant.
 - iv. Report #934/21 referred to in the April 30, 2021 redacted minutes produced by the Authority.
 - b. If confidentiality concerns are later raised in respect of the filing of the disclosure of any parts of these (or other) documents that either party may wish to place in the public court file, those can be addressed at the September 6, 2023 case conference (scheduled below).
 - c. The Authority is directed to ask its affiant/representative in this proceeding, Mr. Clutterbuck, to send the attached focused list of production and disclosure requests to current and former members of the board of directors of the Authority during the relevant time period(s) and to ask them to provide their written responses on or before August 4, 2023 (or as soon thereafter as possible). After reviewing and vetting any responses received for privilege considerations, the Authority shall forthwith provide all responses received (redacted for privilege, if appropriate) to the Tenant. The court encourages the parties to take all reasonable steps to have these responses available before the resumption of the examinations of the Authority's representative(s).
 - d. The Tenant shall advise the Authority by Friday July 28, 2023 whether there are any ongoing email searches and reviews with respect to the emails identified in the June 23, 2023 letter from Blaney McMurtry relating to the 6,000 recovered emails of Mr. O'Hara from the back-up server and, if so, when that review is expected to be complete. The Tenant shall also advise the Authority by July 28, 2023 whether any emails have been identified for Mr. Pearce on the back-up server and, if so, the process for their review and when it is expected to be completed. The Tenant shall either provide the Authority with any emails identified from the back-up server as producible or advise the Authority if the result of these searches and reviews did not lead to the discovery of any producible emails.
 - e. The Tenant shall provide its further and supplementary responses to the Gowlings letter of June 26, 2023 seeking additional production and disclosure from the Tenant by this Friday, July 28, 2023. The Tenant is on notice (by this letter) of the information that the Authority will be seeking during the cross-examinations of the Tenant's representatives about the matters identified in this request letter and they should come to the examinations prepared to address

these matters, to the extent they have not done so in the supplementary responses delivered on July 28, 2023, keeping in mind the court's previous observations, expectations and directions regarding production and disclosure.

- f. The court's observations, expectations and directions contained in the previous endorsements dealing with production, disclosure and the witness examinations, and the conduct of any other pre-hearings steps, all still continue to apply except to the extent expressly modified by a subsequent endorsement. In particular, but without limitation, subject to concerns about proportionality and privilege or confidentiality, objections on grounds of relevance may be stated and the parties' positions on relevance may be reserved but, relevance in and of itself should not serve as a basis for refusing to make reasonable production and disclosure or to answer reasonable questions during the examinations.
3. The Authority's Notice of Motion dated July 17, 2023 for leave to issue default notice(s) in respect of alleged non-monetary defaults by the Tenant under the Lease is adjourned *sine die*.
4. The court's June 16, 2023 endorsement reflected the Tenant's without prejudice agreement to extend the Interim Period over which the Tenant will pay 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 to December 31, 2023. The court asked for an updated rent affordability report from the Monitor to be satisfied that this arrangement is sustainable, which the Monitor has now provided.
5. Based on the Monitor's updated rent affordability report dated July 24, 2023, and so long as the minimum Base Rent that the Landlord claims to be entitled to continues to be paid by the Tenant through to the end of the now extended Interim Period, the Authority has advised that it is not seeking any further disclosure at this time about the source documents that were provide by the Tenant and reviewed by the Monitor for purposes of preparing this report.
6. The applicant's motion to appoint a receiver originally returnable on September 22, 2023 has been adjourned and the scheduling of that hearing, if necessary, will be revisited in the fall after the Tenant's cross-motion has been heard, at a case conference to be scheduled by counsel through the commercial list office.
7. The parties costs of the matters addressed on July 25 and 26, 2023 shall be determined in the cause of the Tenant's cross-motion, or as may be further directed by this court.
8. The parties shall attend a one-hour case conference on September 6, 2023 commencing at 9:00 a.m. to consider any logistics for the hearing of the Tenant's cross-motion.
9. 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.
July 26, 2023

Schedule “A” to July 26, 2023 Endorsement

CV-21-00673084-00CL

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Questions for members of Authority Board of Directors

To be sent by Mr. Clutterbuck to the individuals who were members of the Authority Board of Directors during the relevant time periods and answered without input from or consultation Authority staff and without litigation counsel being involved in writing or editing the answers. The responses will be reviewed by litigation counsel and redacted for privilege, if necessary.

A. November 20, 2020 reversal regarding rent deferment

Context

On November 19, 2020, Ron Rienas emailed the board of directors recommending the approval of a second rent deferral agreement that had already been executed by PBDF (the executed agreement was attached to the email). On November 20, 2020, the board of directors approved the deferral agreement without conditions or revisions. On November 20, 2020, Ron Rienas emailed Greg O'Hara of PBDF, advising that the rent deferral was tentatively approved conditional on getting greater assurances as to receiving unpaid rent. Ultimately, the Authority took the position there was no agreement.

Questions

Do you recall having discussions or communications with board members outside of discussions at meetings of the board about any of the following: (1) imposing conditions on the rent deferral agreement that were not reflected in the minutes?; (2) requiring payment from PBDF during the period contemplated by the deferral agreement?; (3) requiring guarantees in respect of the payment obligation under the lease?

During any of the discussions leading to the Authority not proceeding with the rent deferral agreement, did you consider or discuss the Authority's obligations under subsection 18.07 of the Lease?

Production

Please review your records that you have access to (including without limitation emails, texts and faxes) for any written communications that are responsive to these questions and produce copies. If you are unable to access these records please so advise.

B. December 21, 2020 demand for repayment

Context

At the December 17, 2020, the directors initially proposed resolutions that: (1) the Authority demand payment of \$1 million by December 31, 2030; (2) a rent repayment schedule and associated guarantees of full payment be developed with legal counsel; and (3) that in the event of default staff be authorized to negotiate lease terms with the 2nd place bidder in the June 2016 RFP. The resolution passed by the board did not include (3), and the Authority proceeded to make its demands.

Questions

Do you recall having discussions or communications with board members outside of the discussions at meetings of the board about any of the following: (1) discussing the Authority ousting PBDF as a tenant; (2) PBDF's ability to pay \$1 million; and/or (3) contacting a replacement tenant to take over the duty-free store when PBDF could not meet the Authority's payment demands.

During any of the discussions leading to the December 21, 2020 demand, did you consider or discuss the Authority's obligations under subsection 18.07 of the Lease?

Production

Please review your records that you have access to (including without limitation emails, texts and faxes) for any written communications that are responsive to these questions and produce copies. If you are unable to access these records please so advise.

C. Decision to pursue Lease enforcement during eviction moratorium

Context

Under Ontario law there was a “non-enforcement period” from December 17, 2020 to April 22, 2020 that established an eviction moratorium for commercial leases under certain terms.

The Authority’s lawyers attended board meetings when the PBDF lease was discussed on April 30, 2021, May 28, 2021, October 8, 2021 and November 19, 2021, and the Authority has asserted privilege over the minutes of those meetings.

On September 8, 2021, the Authority delivered a notice of monetary default under the Lease and threatened to terminate the Lease.

Questions

Do you recall having discussions or communications with board members outside of the discussions at meetings of the board about any of the following: (1) deciding to act to enforce the lease during the non-enforcement period; (2) wanting to replace PBDF with another operator; (3) a decision not to engage with PBDF further regarding how the Covid-19 restrictions impacted the Lease and/or the rent that would be payable under the lease.

During any of the discussions leading to the December 21, 2020 demand, did you consider or discuss the Authority’s its obligations under subsection 18.07 of the Lease?

Please review your records that you have access to (including without limitation emails, texts and faxes) for any written communications that are responsive to these questions and produce copies. If you are unable to access these records please so advise.

Production

Please review your records that you have access to (including without limitation emails, texts and faxes) for any written communications that are responsive to these questions and produce copies. If you are unable to access these records please so advise.

D. American Duty-Free store tenant rent relief

Context

As you are aware the Authority granted the American duty-free store tenant rent relief on certain terms.

Questions

Do you recall having discussions or communications with board members outside of the discussions at meetings of the board about the rent relief granted to the American duty-free store tenant?

Production

Please review your records that you have access to (including without limitation emails, texts and faxes) for any written communications that are responsive to these questions and produce copies. If you are unable to access these records please so advise.