CITATION: Royal Bank of Canada v. Peace Bridge Duty Free Inc., 2024 ONSC 372
COURT FILE NO.: CV-21-00673084-00CL
DATE: 20240117

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: ROYAL BANK OF CANADA, Applicant

AND:

PEACE BRIDGE DUTY FREE INC., Respondent

BEFORE: Kimmel J.

COUNSEL: *David T. Ullmann, John Wolf and Brendan Jones,* for Peace Bridge Duty Free Inc., the Moving Party

E. Patrick Shea, for Buffalo and Fort Erie Public Bridge Authority, Respondent on Motion

Leanne Williams, for the Monitor

HEARD: November 1, 2 and 3, 2023 (Written Cost Submissions dated November 24 and December 1, 2023)

COSTS ENDORSEMENT (LEASE DISPUTE)

The Lease Dispute: Summary of the Positions and Outcome

[1] This lease dispute between the parties was adjudicated over three days (in the procedural context of a Cross-Motion by the Tenant, Peace Bridge Duty Free Inc.) and decided by reasons of this court released on December 12, 2023 (see *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 7096). Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in those reasons for decision.

[2] A brief overview of the issues in dispute and the court's rulings provides some context for the court's decision on costs.

[3] This lease dispute revolved around the interpretation of s. 18.07 of the subject Lease, which provides that:

> 18.07 Regulatory Changes
>
> In the event an unanticipated introduction of or a change in any Applicable Laws causes a material adverse effect (sic) 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 agreed that section 18.07 was triggered as a result of the COVID-19 pandemic and the resulting Peace Bridge and border closure to non-essential traffic that was implemented by the U.S. and Canadian governments effective March 21, 2020 for 30 days and subsequently extended. They agreed that these Border Restrictions caused material adverse effects on the Tenant's business operations.

[5] The parties were in agreement that s. 18.07 of the Lease:

a. was engaged as a result of the Border Restrictions and the resulting adverse effects on the Tenant's business; and

b. 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.

[6] Prior to the hearing, the parties reached an agreement in principal regarding the Rent to be paid during the Ramp Up Period, subject to reaching an agreement on the Rent to be paid for the Closure Period.

[7] The Tenant argued that the Landlord (the Buffalo and Fort Erie Public Bridge Authority) had not acted reasonably and in good faith in its consultations with the Tenant regarding the Rent (as defined in the Lease) to be paid by the Tenant during the Closure Period. As a result, the Tenant asked the court to make the following orders on its Cross-Motion:

a) An order that, having applied s. 18.07 and considering the adverse effects that the Border Restrictions had on the Tenant's sales, the rent actually payable by the Tenant during the Closure Period was equal to 20% of sales (which were zero), plus all additional rent and government assistance and that nothing further is owing for the Closure Period by the Tenant.

b) An order that having applied s. 18.07 and considering the adverse effects the Border Restrictions had and continue to have on the Tenant's sales, the Ramp Up schedule accepted in paragraphs 41 and 44 of the factums of the Tenant and the Landlord respectively, reflects the reasonable application of s. 18.07 to the circumstances of this case in the Ramp Up period and that the parties are to comply with that schedule for the payment of rent to and until the Lease year commencing Nov 1, 2026, when the schedule has no further impact.

c) An order that having applied a) and b) to the amounts actually paid, any overpayment by the Tenant should be set off by the Tenant against rent next due and any underpayment should be repaid to the Landlord in a reasonable period of time having regard to the ability to pay.

[8] The Landlord disagreed.

[9] The Landlord maintained that there was no reasonable interpretation of s. 18.07 that: (i) required it to waive or suspend the payment of Base Rent; or (ii) automatically amended the Lease to remove or suspend the requirement to pay Base Rent. The suspension of Base Rent during the Closure Period was a cornerstone of the Tenant's position throughout most of the negotiations that the parties engaged in after March 2020 and that was the biggest obstacle to reaching an agreement, from the Landlord's perspective.

[10] The Landlord maintained that its offers were reasonable when made, having regard to the situation, the Tenant's position and the information the Tenant made available to the Landlord at the time. The Landlord disputed the Tenant's premise that the ultimate resolution had to be one that reflected the Tenant only paying the rent that it could "afford" in a given year and that the effect of s. 18.07 of the Lease was to guarantee that the Tenant would be profitable in the aftermath of the COVID-19 pandemic during the Ramp Up Period.

[11] The court found that just because the parties were not able to reach an agreement did not mean that the Landlord breached s. 18.07 of the Lease. The Tenant failed to establish that the Landlord breached s. 18.07 of the Lease in the circumstances of this case. The Landlord did engage in discussions and negotiations with the Tenant with a view to reaching an agreement to amend, or provide temporary relief from, some of the Lease terms to account for the adverse effects that the Border Restrictions had on the Tenant's business.

[12] The Landlord asked that the court dismiss the Tenant's Cross-Motion because there was no basis for any finding of breach or that it did not act reasonably or in good faith. The court ultimately accepted the Landlord's position and dismissed the Tenant's Cross-Motion.

[13] The Tenant requested, in the alternative to the relief it sought as described in paragraph 7(b) above, that the court determine and order the terms upon which Rent was to be paid for the Closure Period based on the offers that had been exchanged between the parties in the course of their negotiations. The Landlord challenged the court's jurisdiction to determine and impose upon the parties the Rent to be paid by the Tenant during the Closure Period in substitution for what the Lease provides, the very issue that the parties had been unable to agree upon.

[14] There were a number of evidentiary objections that the court had to rule upon. Many of them were ultimately not material to the outcome because the Landlord eventually acknowledged much of what the Tenant sought to rely upon as "factual matrix" evidence to interpret and give meaning and effect of s. 18.07 of the Lease. The parties eventually were in agreement that the meaning and effect of s. 18.07 required that:

a. In the event of a change in Applicable Laws that materially and adversely impacted the Tenant's business (e.g., sales), the parties would act reasonably and in good faith to make appropriate changes to the Lease, which may include changes to Base Rent.

b. Section 18.07 be applied to address the Tenant's concerns about the impact on its sales and to adjust the Lease, including by reducing the Base Rent payable in appropriate circumstances in a fair and equitable manner.

[15] However, the positions and arguments advanced by the Tenant complicated certain other evidentiary aspects of the Lease dispute. Its allegations of a lack of good faith on the Landlord's part

led it down a path of attempting to attribute ulterior motives to the Landlord that were never proven. That led to production demands and added time to the cross-examinations. It also led to some disputes over the relevance of expert and factual matrix evidence that the Tenant tendered.

[16] The Tenant proffered expert evidence about the comparative net economic returns for the Landlord, between what the Tenant was proposing and what the Landlord could achieve if it undertook an RFP to find a new tenant. But the court ultimately found that the Landlord had provided a reasonable and credible explanation for its conduct and contingency planning (e.g. considering the prospect that it might need to look for a new Tenant) that rendered the expert evidence to be of little value or weight.

[17] That same expert's evidence in another area, about the comparable rent ratios in the duty free sector, was also challenged by the Landlord. The expert's opinion was predicated in part upon hearsay information from an internal witness of the Tenant (Mr. Pearce, who is not an industry expert) about standard gross sales to rent ratios for duty free stores in Canada. This witness had sworn an affidavit but did not provide the direct evidence himself and then did not make himself available within a reasonable time (as the court had directed) to be cross-examined. In any event, the crux of this expert's evidence, that the Rent that the Tenant agreed to pay under the Lease was too high in the current market, was not particularly helpful to the determination of the issues in question since the Lease did not prescribe a "market rate" adjustment to the Rent payable.

[18] Section 18.07 of the Lease does not expressly indicate objective criteria for evaluating the impact of the Border Restrictions on the Lease. The Tenant asked the court to have regard to what it attempted to characterize as the factual matrix surrounding the formation of the Lease for the standards to determine the Base Rent that should be paid during the Closure Period. In this regard, the Tenant sought to rely upon what was ultimately determined to be inadmissible evidence about the Lease negotiations.

[19] These evidentiary disputes added time and expense to the ultimate determination of the Lease dispute for both sides.

[20] On the specific issues raised on the Cross-Motion, the court eventually ruled as follows:

1. The Border Restrictions did result in adverse effects on the Tenant's business, both during the Closure Period and during the Ramp Up Period, which warranted some adjustment to the Base Rent payable by the Tenant.

2. 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.

3. 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.

4. No Remedy was granted:

    a. Given that there is no finding of breach by the Landlord, there is no need for the court to decide what remedy might have been available to the Tenant if there had been a finding of breach.

    b. 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.

Costs Analysis

[21] Early in 2023 the Landlord brought a motion to lift the stay of proceedings so that it could exercise certain enforcement remedies under the Lease arising out of the non-payment of Rent by the Tenant that was heard on January 5, 2023. That motion was dismissed by an endorsement dated January 16, 2023 (see *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 327). In an April 4, 2023 Scheduling Endorsement, the court directed that the entitlement/quantum/scale of any costs of the Landlord's Lift Stay Motion should be decided in conjunction with and at the same time as the court decides the costs of this Cross-Motion.

[22] The parties completed their exchange of Cost Outlines and originating and reply Cost Submissions for both the Lift Stay Motion and the Cross-Motion and advised the court that no aspects of the costs had been agreed upon and that they were seeking a decision of the court based on their written submissions. Their costs submissions were made without knowing the outcome of the Tenant's Cross-Motion or the court's reasoning for its decision. The parties' Cost Outlines and submissions were reviewed and considered by the court after the decision on the Cross-Motion had been rendered.

The Landlord's Position on Costs

[23] The Landlord, if successful, asked for an award of substantial indemnity costs of $269,178.68 (based on 75% of its full indemnity fees) inclusive of applicable taxes. The Landlord also seeks $20,160.54 in disbursements (inclusive of applicable taxes). This covers its legal fees and disbursements for the Cross-Motion and all interim attendances and steps (including the court ordered mediation and the July 25–26 procedural motion). The court's previous directions indicated that the costs of the mediation be "in the cause" of the Cross-Motion, meaning that the successful party on

the Cross-Motion could claim those costs. The court similarly ordered that the costs of the July 25–26 procedural motion be "in the cause" of the Cross-Motion, or as further directed by the court. Those costs of the Landlord have also been included in the Costs Outline submitted.

[24] There was a last minute adjournment of the Cross-Motion on September 6, 2023, as a result of which the court ordered that the Landlord would be entitled to its costs thrown away in any event of the cause, which have been calculated on a full indemnity basis to be $8,930.00 for the appearance that day plus estimated (re)preparation time of $13,300, which is also included in the Landlord's Bill of Costs. It would appear that these amounts were included in the Landlord's Costs Outline on a substantial indemnity basis although it claims to be entitled to more. The court will be ultimately guided by what is claimed in the Costs Outline as that is where the final amount of costs claimed by the Landlord is derived from. This is noted because it reflects a reduction from what the Landlord might have otherwise claimed.

[25] The Landlord certified its all-inclusive substantial indemnity costs of the Lift Stay Motion to be $18,516.75 (representing 75% of its all-inclusive full indemnity costs of $24,690.00 for that motion). The Landlord submits that there should be no costs of that motion, even though the stay was not lifted pending the determination of this Cross-Motion. Its position is that there was no successful party on that motion and that each party should bear their own costs.

[26] The Landlord argues that its Lift Stay Motion was necessary because of a lack of clarity about what the "normal" Rent that the Tenant was paying, and would therefore be required to continue to pay, at the time of the Initial Order and in the face of the Tenant's continuing refusal to pay the Landlord anything other than what it was receiving under government assistance programs (and eventually HST remittances). Ultimately, as a result of that motion and steps taken and directions provided from the court thereafter, the Tenant did start to pay more than it had been paying, albeit on an interim without prejudice basis.

[27] The Landlord claims to be entitled to substantial indemnity (as opposed to partial indemnity) costs throughout based on s. 17.03 of the Lease, which provides that the Landlord is *prima facie* entitled to recover its costs on a substantial indemnity basis in matters involving: (a) the recovery of rent; or (b) other breach of the Lease where a breach is established.

The Tenant's Position on Costs

[28] The Tenant, if successful on its Cross-Motion, asked to be awarded substantial indemnity costs (on the assumption that its success would be tied to the Landlord's alleged failure to act in good faith), indicated in its Costs Outline to be $653,704.09 (including disbursements of $38,242.38, and all applicable taxes) with fees calculated at 80% of the actual amounts. The Tenant's partial indemnity costs were indicated to be $422,570.13 (with fees calculated at 50% of actual amounts and including the same disbursements and all applicable taxes). The amounts claimed by the Tenant were later

corrected and adjusted downward (partial indemnity at $409,387.33 and substantial indemnity at $640,521.29) to avoid double counting of one of the disbursements for expert fees.[1]

[29] At the time of the Lift Stay Motion, the Tenant delivered a Bill of Costs indicating all-inclusive partial indemnity costs (calculated at 60% of actual costs) totalling $29,342.03 and substantial indemnity costs (calculated at 90% of actual costs) in the amount of $43,243.40, which was the amount it sought for that motion in its cost submissions. However, the Tenant's Costs Outline delivered after the Cross-Motion included all-inclusive total amounts for the Lift Stay Motion of $84,831.92 on a partial indemnity basis and $135,939.45 on a substantial indemnity basis. Although this appears from the description to include some (unspecified) fees for the Cross-Motion that had been backed out of the original Bill of Costs delivered for the Lift Stay Motion, no detailed explanation was provided for this discrepancy.

[30] In addition to the offers that were exchanged between the parties and in evidence for the court's consideration on the Cross-Motion, the Tenant submitted two further without prejudice offers for the court's consideration in the context of the decision on costs which reflect additional compromises that the Tenant was prepared to make as the Cross-Motion hearing date approached and as its financial circumstances improved. However, these were not strictly speaking Rule 49 offers so they do not carry with them the consequences of r. 49.10.

[31] In its cost submissions, the Tenant also requested an order directing the Landlord to reimburse it for additional expenses that it claims the Landlord's actions caused it to incur, because the Tenant blames the Landlord for the Receivership Application. These total more than $285,000 in aggregate for the legal and professional costs of the Monitor (itself and its counsel) and for RBC's counsel. These claimed expenses introduce some more complicated issues into the costs analysis which do not need to be resolved since the Tenant is not being awarded any costs.

Costs Analysis

[32] The Court has discretion to award costs incidental to a proceeding pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Rule 57.01(1) enumerates a list of factors to be taken into consideration in exercising that discretion. Some of the relevant factors in this case include the amount at issue (in excess of $10 million), the importance of the issues to the parties (significant to both sides given the amount at issue and the remaining term of the Lease and renewal options), the complexity and novelty of the issues (given the uniqueness of s. 18.07 of the Lease and the unprecedented COVID-19 pandemic and Border Restrictions that triggered it), and certain complexities previously mentioned arising out of evidence tendered by the Tenant.

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[1] The Landlord complains that it requested, but was denied, access to the dockets to support the costs claimed by the Tenant. The Landlord also complains about disproportionate time spent by the Tenant's counsel on certain examinations. Since the Tenant is not being awarded its costs of the Cross-Motion these complaints do not need to be addressed.

[33] As noted by the Tenant in its cost submissions, modern costs rules are designed to foster three fundamental purposes: (1) to partially indemnify successful litigants for the cost of litigation; (2) to encourage settlement; and (3) to discourage and sanction inappropriate behaviour by litigants: *Fong v. Chan* (1999), 181 DLR (4th) 614 (Ont. C.A.), at para. 22.

[34] In terms of entitlement to costs, both parties' submissions were made on the basis that the successful party would be awarded its costs.

[35] The following is ordered regarding the entitlement to costs on the two motions:

a. As the successful party, the Landlord is entitled to its costs of the Cross-Motion. Based on the court's previous endorsements, the Landlord was entitled to include in the costs sought its costs of July 25–26 procedural motion and of the mediation which the court directed be "in the cause" of this Cross-Motion. Nothing in the issues raised on the Cross-Motion or the cost submissions received give me cause to reconsider those earlier directions.

b. The Landlord was not the successful party on the Lift Stay Motion and does not claim to be. It claims no costs for the Lift Stay Motion. However, the Landlord contends that the Tenant was also not successful on that motion and that neither party should be awarded costs of that motion. In my view, the Tenant was successful in resisting that motion and is entitled to some costs, but limited just to that motion.

[36] The Scale of Costs: The Tenant correctly observes that costs are typically awarded on a partial indemnity scale unless there is an offer to settle under r. 49.10 or a party engages in reprehensible or egregious conduct worthy of sanction by the court in the form of elevated costs on a substantial indemnity basis. *Davies v. Clarington (Municipality) et al*., 2009 ONCA 722, 100 O.R. (3d) 66, at paras. 28–31. Neither of these circumstances arise in this case.

a. The Landlord itself acknowledges that the offers exchanged by the parties involved attempts to reach a "global" resolution that included non-monetary defaults and included provisions beyond the payment of the deferred rent/arrears and the ramp-up of the Base Rent. The Tenant likewise does not suggest that its offers, even the last two, triggered the cost consequences of r. 49.10. The offers were part of the good faith negotiations that s. 18.07 of the Lease obliged the parties to engage in.

b. While the Tenant's positions and the relief sought on the Cross-Motion tended to complicate the issues and resulted in additional evidence that was not considered by the court to be relevant to the ultimate determination of the issues, this does not rise to the level of conduct that is worthy of a sanction by the court of elevated costs.

[37] However, the Landlord claims to have a contractual entitlement to substantial indemnity costs under s. 17.03 of the Lease.

[38] The following is ordered regarding the scale of costs on the two motions:

a. The Landlord has a *prima facie* contractual right under s. 17.03 of the Lease to substantial indemnity costs of the Cross-Motion, which was clearly a proceeding

involving: (a) the recovery of rent. I see no reason to interfere with that contractual right, particularly given that it will not result in an award that the court considers to be unreasonable or disproportionate. As detailed below, the amounts the Landlord claims on a substantial indemnity basis are very reasonable and proportionate (in fact significantly less both in quantum and in percentage) in comparison with the amounts that the Tenant was seeking if it won. The Landlord's claimed substantial indemnity costs for the Cross-Motion are less than the Tenant's claimed partial indemnity costs for the Cross-Motion.

b. The Tenant did try to settle the Lift Stay Motion, on terms that were not significantly different from what happened, namely that an interim arrangement was put in place so that the Cross-Motion could be adjudicated in a timely manner to avoid the court having to deal with concerns about the overlap of certain issues on the two motions, particularly on the question of whether the Tenant was in breach of the Lease during the Closure Period. However, there was technically no r. 49 offer. Partial indemnity is the appropriate scale of costs for the Tenant to be awarded for the Lift Stay Motion.

[39] Quantum of Costs: The Tenant submits that costs awards, at the end of the day, should reflect "what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties": see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 OR (3d) 291 (C.A.), at para. 24. This is now embodied in rr. 57.01(1)(0.a) and (0.b). See also *York Region Condominium Corporation No. 890 v. Market Village Markham Inc.*, 2021 ONSC 753, cited by the Landlord.

[40] The following is ordered regarding the quantum of costs on the two motions:

a. On the Cross-Motion, the amounts at issue were significant and the issues were important, particularly given the alleged failure to act in good faith and the complexities those allegations introduced into the evidence and ensuing objections (described in more detail above). Also as noted above, the amount of substantial indemnity costs claimed by the Landlord is reasonable and proportionate in light of these complexities and having regard to the principle of proportionality and the Tenant's objectively reasonable expectation that the Landlord would be incurring costs as it was. That fact that the Landlord's claimed substantial indemnity costs are less than the Tenant's claimed partial indemnity costs is telling. The Landlord has also applied a lower percentage to calculate its substantial indemnity costs than the Tenant did (75% as opposed to 90%) and did not insist on the full indemnity costs that it might have asked for arising out of the last minute adjournment. The Landlord is awarded its substantial indemnity costs of the Cross-Motion in the claimed amount of $269,178.68 for fees (based on 75% of its full indemnity fees) inclusive of applicable taxes, plus $20,160.54 for disbursements (inclusive of applicable taxes), for a total of $289,339.22.

b. The Tenant's Costs Outline for the Lift Stay Motion (that was stated explicitly not to include any of its costs for the Cross-Motion that were being incurred in and around the same time) sets out the appropriate amount for it to be awarded. The Tenant's claimed partial indemnity costs of the Lift Stay Motion in the all-inclusive amount of

> $29,342.03, although higher than the partial indemnity amount indicated by the Landlord for that motion, are not disproportionate or unreasonable. This amount of costs is awarded to the Tenant and shall be set off against the costs awarded to the Landlord on this Cross-Motion.

[41] This means that the Tenant shall pay to the Landlord net costs of the Cross-Motion and Lift Stay Motion in the total all-inclusive amount of $259,997.19. In accordance with r. 57.03, but subject to the stay that is currently in place pending the return of the Receivership Application and any other relevant considerations which may be raised with the court at a future attendance (if applicable), the Tenant shall pay these costs to the Landlord forthwith (within 30 days of this endorsement).

KIMMEL J.

Date: January 17, 2024