

CITATION: Choice Properties Limited Partnership v. Penady (Barrie) Ltd., 2020 ONSC 3517
COURT FILE NO.: CV-20-00637682-00CL
DATE: 20200610

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
CHOICE PROPERTIES LIMITED) *Michael De Lellis and Shawn Irving, for the*
PARTNERSHIP, by its general partner,) Applicant
CHOICE PROPERTIES GP INC.)
)
Applicant)
)
– and –)
)
PENADY (BARRIE) LTD., PRC BARRIE) *Tim Duncan and Michael Citak, for the*
CORP. and MADY (BARRIE) INC.) Respondents
)
Respondents) *Eric Golden and Chad Kopach, for RSM*
) *Canada Limited, in its capacity as Court-*
) *appointed Receiver*
)
)
) **HEARD:** June 2, 2020

**APPLICATION UNDER SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C., 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE*
ACT, R.S.O. 1990, C. C.43, AS AMENDED**

ENDORSEMENT

MCEWEN J.

[1] This motion is brought by RSM Canada Limited (the “Receiver”), in its capacity as the Court-appointed Receiver of all of the rights, title and interest of Penady (Barrie) Ltd. (“Penady”), PRC Barrie Corp. (“PRC”) and Mady (Barrie) Inc. (“MBI”) (collectively, the “Respondents”) for an order, amongst other things, approving the Sale Procedure outlined in the First Report of the Receiver which features an asset purchase agreement by way of a credit bid (the “Stalking Horse Agreement”) with the Applicant.

[2] The Applicant, Choice Properties Limited Partnership (“CHP”), by its general partner, Choice Properties GP Inc. (“Choice GP”), supports the Receiver’s motion. The Respondents oppose.

[3] The asset in question primarily consists of commercial rental property known as the North Barrie Crossing Shopping Centre (the “Barrie Property”). Penady is the registered owner of the Barrie Property. PRC and MBI are the beneficial owners. The Barrie Property essentially consists of a shopping centre with 27 tenants.

[4] Due to the COVID-19 crisis, the motion proceeded by way of Zoom video conference. It was held in accordance with the Notices to Profession issued by Morawetz C.J. and the Commercial List Advisory.

INTRODUCTION

[5] Choice GP is the general partner of CHP. CHP is the senior secured lender to Penady. PRC and MBI provided a limited recourse guarantee, limited to their beneficial interest in the Barrie Property.

[6] CHP advanced funding to Penady to assist with the development of the Barrie Property. It subsequently assumed Penady’s indebtedness to the Equitable Bank, which previously held a first mortgage over the Barrie Property.

[7] Currently, Penady is indebted to CHP in the amount of approximately \$70 million with interest accruing monthly at the rate of approximately \$550,000.

[8] As a result of the foregoing, as noted, the Receiver brings this motion seeking approval of the Stalking Horse Agreement and Sale Procedure along with other related relief.

[9] I heard the motion on June 2, 2020 and granted, primarily, the relief sought by the Receiver. I incorporated some changes into the Order, with respect to the Sale Procedure, and approved a Sale Procedure, Stalking Horse Agreement, Receiver’s Reports and inserted a Sealing Order. At that time, I indicated that reasons would follow. I am now providing those reasons.

PRELIMINARY ISSUES

[10] I begin by noting that I granted the Sealing Order sought by the Receiver, on an unopposed basis, with respect to the Unredacted Receiver’s Factum dated May 29, 2020 and Respondents’ Factum dated June 1, 2020, as well as the Respondents’ Confidential Application Record dated March 20, 2020 and the Supplemental Evaluation Information of Cameron Lewis dated March 23, 2020. The test for a sealing order is set out in the well-known decision of *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53. The test is met in this case since the Sealing Order relates to appraisals concerning the Barrie Property and thus it is important that they remain confidential during the Sale Procedure.

[11] I also wish to deal with the issue of the affidavit filed by the Respondents that was prepared by Mr. Josh Thiessen. Mr. Thiessen is a Vice-President, in client management, at MarshallZehr Mortgage Brokerage. As I noted at the motion, the Respondents, in my view, were putting forward Mr. Thiessen as an expert witness to provide evidence on the issue of the Sale Procedure. The Respondents failed, however, to provide a curriculum vitae so that I could determine whether Mr. Thiessen had any experience in sale procedures in distress situations or insolvency proceedings. Further, no attempt was made to comply with the requirements of r. 53 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, concerning experts' reports. Mr. Thiessen was also involved in a previous attempt to sell the Barrie Property and had a financial interest in that potential transaction. The Applicant submits that Mr. Thiessen's involvement makes him a partial witness.

[12] In all of the circumstances I advised the parties that while I had reviewed Mr. Thiessen's affidavit, I was giving it very limited weight. In short, however, I do not believe that much turns on Mr. Thiessen's affidavit since I granted relief to the Respondents with respect to most of Mr. Thiessen's concerns, for my own reasons.

[13] Last, the Respondents, in support of their position, sought to draw comparisons between the Barrie Property and a Brampton Property in which CHP has a 70 percent controlling interest. I accept the Receiver's argument that such a comparison is of little, if any, use given that the Brampton Property is vacant land, currently zoned as commercial, but being marketed with a potential to rezone for residential use. Further, it bears noting, that CHP has a sales process well underway with respect to the Brampton Property, which refutes the Respondents' submission that CHP has meaningfully delayed that sale.

THE LAW

[14] The issue on this motion is whether the Sale Procedure is fair and reasonable.

[15] The parties agree that the criteria to be applied are set out in the well-known case of *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), as follows:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) whether the interests of all parties have been considered;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been an unfairness in the working out of the process.

[16] As further explained by D. Brown J. (as he then was) in *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750, 90 C.B.R. (5th) 74, the approval of a particular form of Sale Procedure must keep the *Soundair* principles in mind and assess:

- (a) the fairness, transparency and integrity of the proposed process;

- (b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
- (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

ANALYSIS

Introduction

[17] Before I begin my review of the Sale Procedure, it bears noting that the Sale Procedure is being contemplated during the COVID-19 crisis. In this regard, however, it further bears noting that the financial difficulties encountered by Penady pre-date the COVID-19 pandemic. Prior to the Receivership Order being granted, Penady had been attempting to sell or refinance the Barrie Property for approximately 16 months. It was in default on its indebtedness to CHP. There were also substantial unpaid realty taxes on the Barrie Property from late 2018 up until the time of the Receivership.

[18] At the time the COVID-19 crisis hit, there were 27 tenants at the Barrie Property. Since COVID-19, 16 tenants have temporarily suspended operations, with another 6 tenants offering limited services. The major Barrie Property tenants include TD, Tim Hortons, McDonalds, Dollarama, Cineplex, LA Fitness, and State & Main.

[19] It also bears noting that Penady had previously retained Mr. Cameron Lewis of Avison Young Commercial Real Estate (Ontario) Inc. (“AY”) to market and sell the Barrie Property. The Receiver agreed to retain Mr. Lewis to continue to market the Barrie Property. Mr. Lewis is well experienced in the area and his previous involvement will allow him to utilize the information he has gathered, including potential bidders. Similarly, the Receiver has retained the existing property manager, Penn Equity, to continue to manage the Barrie Property during the Receivership.

The Disputes Between the Parties

[20] I will now deal with the various disputes between the parties, first dealing with the objections that the Respondents have with respect to the Stalking Horse Agreement and then with the Respondents’ complaints concerning the Sale Procedure.

The Stalking Horse Agreement

[21] The first complaint of the Respondents concerns the credit bid contained in the Stalking Horse Agreement as being significantly below appraisals obtained for the Barrie Property by the Respondents (all amounts are subject to the Sealing Order).

[22] I do not accept this argument. The Receiver has obtained an estimate on the Barrie Property from a reputable commercial real estate company, Cushman & Wakefield ULC (“CW”). The valuation was prepared by CW on March 25, 2020. It is comprehensive and expressly factors into the valuation difficulties in collecting rental income due to the COVID-19 crisis, which rent

collection issues have now materialized. Further, the credit bid contained in the Stalking Horse Agreement will be paid during the Sale Procedure while the valuation placed upon the Barrie Property by CW anticipates a marketing process which will culminate in a sale in approximately 12-18 months. Thus, there is the obvious benefit of having the quicker Sale Procedure undertaken, without the continued, approximately \$550,000 per month interest being incurred for another 12-18 months.

[23] The Respondents rely upon the two appraisals that they have received which place higher valuations on the Barrie Property. The difficulty with those appraisals is that neither deals with the ramifications of the COVID-19 crisis. Furthermore, it bears noting that Penady was unable to sell the Barrie Property over a protracted period of time leading up to the Receivership, which suggests, partially at least, that the price it was asking was too high.

[24] It also strikes me that if CW's valuation is, in fact, on the low-side, it could generate an auction in which the Applicant and others can bid, thus, driving up the price.

[25] The second issue that the Respondents have with the Stalking Horse Agreement is the \$400,000 Expense Reimbursement payable to the Applicant if it is unsuccessful, while an unsuccessful third-party bidder will receive no reimbursement for participating in the process.

[26] In my view, the Expense Reimbursement is very reasonable. It constitutes just 0.8 percent of the purchase price, which is well within the range that is typically accepted by this court. The Respondents submit that they require a breakdown of exactly what the Expense Reimbursement would cover. In light of the modest amount of the Expense Reimbursement and the opinion of the Receiver, it is my view that such an accounting is not required in this case. Expense reimbursement payments compensate Stalking Horse Agreement purchasers for the time, resources and risk taken in developing a Stalking Horse Agreement. In addition to the time spent, the payments also represent the price of stability and thus some premium over simply providing for expenses may be expected. Thus, the Expense Reimbursement claim of 0.8 percent is, in my view, justifiable.

[27] Third, the Respondents object to the required deposits of 3 percent and 7 percent at Phase I and II, respectively. They also object to a requirement that potential bidders secure financing at the end of Phase I. In my view, these are entirely reasonable requirements so that only legitimate would-be purchasers are engaged.

[28] Fourth, the Respondents object to the Minimum Overbid of \$250,000. In my view, the \$250,000 Minimum Overbid is reasonable and within the range that is typically allowed by this court concerning properties of significant value. I can see no detriment of having a modest overbid amount in place given the amount of the Applicant's credit bid. It is supported by the Receiver and will generate a sensible bidding process.

[29] Last, the Respondents object to the Applicant being involved in the proposed auction if a superior bid is obtained. Again, I disagree. Such auctions are commonplace and ensure a robust bidding process. In this regard, the Respondents also make vague complaints about the auction process. I do not accept these arguments. The auction process proposed is in keeping with those generally put before this court.

The Sale Procedure

[30] First, the Respondents complain that the Receiver is prepared to undertake the Sale Procedure without obtaining a valid environmental report, a valid building condition assessment report or any tenant estoppel certificates.

[31] The Receiver responds by submitting that there is an existing environmental report that is approximately one and one-half years old, the Barrie Property was recently constructed (2016), and that tenant estoppel certificates will be very difficult to obtain, given the current economic climate and the fact that some tenants are not operating and are seeking rent abatements. The Receiver further points out that Penady had neither an environmental report or building condition assessment when it attempted to sell the Barrie Property.

[32] While there is some merit in the submissions of the Receiver, it is my view that it would be preferable to obtain an environmental report, valid building condition assessment and tenant estoppel certificates from the seven major tenants. The Receiver, in an alternative submission, agreed to obtain the environmental report and building condition assessment report. It has recently determined that the environmental assessment report can be obtained in three to four weeks and the building condition assessment report in two to three weeks. Both can be obtained at a very modest cost. Normally such reports may not be necessary, given what I have outlined above. It is my view, however, that given the current economic condition, it is best to err on the side of caution and ensure that this information, which may enhance the Sale Procedure, is available to bidders. These reports can be obtained for a modest price, in short order.

[33] Similarly, it is reasonable to obtain tenant estoppel certificates from the seven major tenants. Bidders would likely be interested in this information. I accept that it would be more difficult to obtain the certificates from the minor tenants, many of whom are not fully operating at this time. The Receiver shall therefore use best efforts to obtain the tenant estoppel certificates from the seven major tenants as soon as reasonably possible.

[34] Second, the Respondents submit that a Sale Procedure should not be undertaken at this time given the COVID-19 crisis. While I have sympathy with the situation the Respondents now face, I do not agree.

[35] As noted above, this insolvency was not generated by the COVID-19 crisis. Penady was in financial difficulty for several months preceding the pandemic and had been unsuccessfully attempting to sell the Barrie Property for some time. I do not accept the argument that we should adopt a “wait and see” approach to determine if and when the economic crisis abates. The Applicant continues to see interest accrue, as noted, at approximately \$550,000 per month. There is no certainty that the economic situation will improve in any given period of time and it may continue to ebb and flow before it gets better. The Respondents did not adduce any evidence to suggest when the economy may improve, nor likely could they, given the uncertainty surrounding the COVID-19 crisis.

[36] In fairness, the Respondents did not propose an indefinite period, but perhaps a 2-3 month pause. Without some certainty, however, I do not agree that this is reasonable given the accruing interest and the risk that the economy may not improve and could worsen.

[37] Alternatively, the Respondents seek to extend the timeline in the Sale Procedure. In my view, the timeline proposed by the Receiver for the Sale Procedure is a reasonable one and superior to the timeline Penady had in place when it attempted to sell the Barrie Property before the Receivership. The Receiver Sale Procedure includes a quicker ramp-up, a robust process, including the creation of a data room (which has been done), and overall provides for a longer marketing period than was included in the previous Penady sales process.

[38] In light of the fact, however, that I have ordered production of the aforementioned environmental and building condition assessment reports, as well as the tenant estoppel certificates, and in order to ensure that a fair timeline is put in place so as to maximize the chances of competitive bids being obtained (including bidders having an opportunity to secure financing), I am extending the Sale Procedure by two weeks. It is my view, though, that obtaining the aforementioned documentation will result in little, if any, delay in implementing the marketing process.

[39] It also bears repeating that the Receiver has acted reasonably in retaining Mr. Lewis of AY. Mr. Lewis has been in contact with prospective bidders given his previous retainer by Penady. The Receiver's retainer of Mr. Lewis allows him to continue on with his work as opposed to having a new commercial real estate agent embark on a learning process with respect to the Barrie Property. Further, Mr. Lewis's commission structure is designed so that he earns a larger commission if a buyer, other than the Applicant, is successful, thus incentivizing Mr. Lewis to ensure that a robust Sale Procedure is undertaken.

[40] The extension of the Phase I Bid Deadline to August 12, 2020 and the extension of the Phase II Bid Deadline to August 26, 2020, constitutes a fair and reasonable timetable which is longer than those usually sought and granted by this court. Further, and in any event, the Receiver can and should reappear before the court, if necessary.

DISPOSITION

[41] It is my view that the above Sale Procedure complies with the principles set out in both *Soundair* and *CCM Master*. The Stalking Horse Agreement and Sale Procedure strike the necessary balance to move quickly and to address the deterioration of the value of the business, while at the same time setting a realistic timetable that will support the process.

[42] Based on the foregoing, at the conclusion of the hearing, with the above noted amendments, I granted the Receiver's Order authorizing the Stalking Horse Agreement and the Sale Procedure, and authorizing the Receiver to enter into the proposed listing agreement. Furthermore, I approved the First Report and the Supplementary First Report, the Receiver's conduct and activities described, as well as granted the Sealing Order.

[43] The parties approved the form and content of the Order which I signed on June 3, 2020.

A handwritten signature in black ink, appearing to read "McEwen J.", positioned above a horizontal line.

McEwen J.

Released: June 10, 2020

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SUPERIOR COURT OF JUSTICE

BETWEEN:

CHOICE PROPERTIES LIMITED PARTNERSHIP, by
its general partner, CHOICE PROPERTIES GP INC.

Applicant

– and –

PENADY (BARRIE) LTD., PRC BARRIE CORP. and
MADY (BARRIE) INC.

Respondents

**APPLICATION UNDER SECTION 243 OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C.,
1985, C. B-3, AS AMENDED, AND SECTION 101 OF
THE COURTS OF JUSTICE ACT, R.S.O. 1990, C.
C.43, AS AMENDED**

ENDORSEMENT

McEwen J.

Released: June 10, 2020