

Superior Court of Justice  
Commercial List

**FILE/DIRECTION/ORDER**

Choice Properties Limited Partnership  
Plaintiff(s)

AND

Penalty (Barrie) Ltd and PRC Barrie Corp  
Defendant(s)

Case Management  Yes  No by Judge: \_\_\_\_\_

Counsel	Telephone No:	Facsimile No:
(as per counsel slip)		

- Order  Direction for Registrar (No formal order need be taken out)  
 Above action transferred to the Commercial List at Toronto (No formal order need be taken out)  
 Adjourned to: \_\_\_\_\_  
 Time Table approved (as follows):

I heard this Application today via teleconference in accordance with the Notice to Profession issued by Chief Justice Morawetz and the resulting Commercial List Advisory created in light of the COVID-19 crisis.

Materials were provided to me via email, although I retained a paper copy of the two volume Application Record.

25 March 20  
Date

McEWT  
Judge's Signature

Additional Pages \_\_\_\_\_

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## Judges Endorsment Continued

The Applicant seeks, primarily, an order appointing RSM Canada Limited (RSM) as receiver over the described Property of the Respondents, along with the usual charges.

The Respondents do not dispute that there is a debt owing (approximately \$68,200,000.00), nor do they dispute the Applicant's legal right to pursue a receivership.

The Respondents do submit, however, that in the facts of this case, it is neither just nor convenient to appoint a receiver.

Insofar as the law is concerned both the Bankruptcy and Insolvency Act and the Courts of Justice Act provide this Court with the authority to appoint a receiver where it is just or convenient to do

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50.

In making this determination the Court should look at all the circumstances of the case including - the nature of the Property, the rights and interests of all parties in relation to the Property and whether the secured creditor has the right under the security agreement to privately appoint a receiver:

Bank of Nova Scotia v Freme Village on Clair Creeb 1996 CarswellOnt 2328 (Gen Div), Callidus Capital Corp vs Concept Inc, 2012 ONSC 163. The Court is

also to consider and balance the competing interests of the various economic stakeholders: Romspen Investment Corp v. 6711162 Canada Inc 2014 ONSC 2781.

A list of the relevant Parties are set out in The Annotated Bankruptcy

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## Judges Endorsment Continued

and Insolvency Act (Toronto: Thomson Reuters, 2019) at p. 1153.

For the reasons that follow, I am granting the relief sought by the Applicant, subject to working out the terms of the proposed order.

I have come to this conclusion, primarily, for the following reasons:

- ① The loan has matured;
- ② PBL has tried unsuccessfully to sell the Property for approximately 18 months;
- ③ The Applicant has granted a number of extensions and PBL has defaulted on several occasions;
- ④ Without advising the Applicant PBL stopped paying its property taxes in late 2018. The Applicant learned of this earlier this year.
- ⑤ Given the valuations prepared by the parties & given the current COVID-19

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## Judges Endorsment Continued

crisis, the Property is worth less than the amount owing.

⑥ PBL has a demonstrated inability, to service its debt

⑦ I accept that there is no evidence that the Applicant has acted in bad faith. As I will outline below while the Respondents complain of certain of the Applicants positions taken pursuant to their agreement they concede that the Applicant had never breached any terms of the agreement entered into between them.

Based on the above, and other lesser arguments raised by the Applicant I accept that it is reasonable for them to have lost faith in PBL and its principals.

In all of these circumstances, it is just and convenient to grant the requested Appointment ordered, subject

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to terms.

The Respondents raised a number of objections and submitted that I ought to adjourn the Application for approximately 2 months and allow the Commercial real estate agent it retained earlier this year, Arsen Young, to continue on with its sales process.

In this regard, the Respondents primarily submit the following:

- ① The relationship between the Applicant and PBI is significant and more in keeping with a partnership than a creditor/debtor given the three properties they were involved in together and the different nature of their relationship in each. Also, the Applicant operates as a competing neighbour to the Property and steps were taken by the Applicant in this

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## Judges Endorsment Continued

regard to the detriment of PBL.

None of this in my view assists the Respondents. As noted, the Applicant (as conceded by the Respondents) never breached any terms of the agreements between them. The fact they participated in three separate properties does also not assist the Respondents.

The three properties were completely separate transactions (except for collateral security) and the one in question in this matter involved a significant loan.

(2) Steps taken by the Applicant to enforce certain terms, although allowed, <sup>in were</sup> ~~are~~ unfair to PBL and ought to militate against a finding that a receiver ought to be appointed.

I disagree. As noted, the enforced terms were allowable and I see

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nothing untoward in the Applicant insisting they be complied with to the benefit of their own unit holders.

③ Respondents also argue that the Applicant could have paid the outstandings, prepaid taxes to prevent the accrual of interest.

I see little merit to this argument, as it is not the Applicant's obligation to do so, and PBL stopped payment without notice to the Applicant.

④ Respondents further submit that based on the Arsen Tury finding there is equity in the Property taking into account the debt to the Applicant. The Applicant's own report disputes this. In my view the report of the Applicant is far more detailed and likely more accurate. Unfortunately, given the COVID-19 crisis, little new time on this dispute given the negative



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impact the crisis will have on the commercial real estate market. Both sides agree that the impact will be negative. In these circumstances I accept that there is a negative equity position, even if all three properties are considered.

(5) The Respondents also take issue with the costs associated with the receivership. Again given the circumstances of this case, I do not find this argument to be persuasive. PBL have been unable to sell the property. Costs will now be incurred but that is inevitable in any receivership and the receiver may be able to leverage savings either through the proposed Stralking lease (if approved) or other Commission savings. There is nothing preventing the receiver from working with Avisan Young and

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## Judges Endorsment Continued

a sales process will have to be approved.  
The Respondents accept that RSM is a suitable and capable receiver.

In all of the above circumstances the Respondents cannot insist that the Applicant continue to finance and take most if not all of the risk in a declining market.

Overall, the Applicant has acted reasonably. None of the arguments above, and other related arguments made by the Respondents are persuasive.

As noted above it is in my view that it is both just and convenient, when reviewing all of the relevant factors, that the Appointment Order be granted.

~~If~~ The parties cannot agree on the terms of the Order another appearance can be scheduled.

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A sealing order shall go over  
the confidential documents as the  
Sierra Club criteria have been met.  
As I advised counsel when the  
materials are ultimately filed with  
the Court it is their obligation to  
ensure this occurs.

I will remain seized of this  
matter.

MET

**Counsel Slip**

Choice Properties Limited Partnership

v.

Penady (Barrie) Ltd. and PRC Barrie Corp.

(Court File No. CV-20-00637682-00CL)

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Also listening by phone:

Jessica Farber (Choice Properties Limited Partnership)  
Sandy Hay (Osler)

Brian Tannenbaum - proposed receiver  
Eric Golden - Blane's proposed receiver  
David Johnston - PRC  
Robert Swartz - Gaudine Roberts  
Neil Miller - Pen Equity