

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Choice Properties Limited Partnership
Plaintiff(s)

AND

Penady (Barrie) Ltd. et al
Defendant(s)

Case Management Yes No by Judge: McBew T

Counsel	Telephone No:	Facsimile No:
(see attached 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 conducted a case conference in this matter today. The issue to be dealt with, was whether the Respondents could conduct a sub 39.03 examination of Cam Lewis, the real estate broker that the Receiver has selected for the sales and marketing process.

As I noted at the conclusion of submission on this issue,

25 May 20
Date

McBew T
Judge's Signature

Additional Pages 4

1. The other examination issue regarding the Receiver was resolved, with the Respondents not pursuing an examination.

**Superior Court of Justice
Commercial List**

FILE/DIRECTION/ORDER

Judges Endorsment Continued

I am not granting the Respondents an Order allowing them to conduct the examination.

I have come to this conclusion for the following reasons:

① I agree with the Receiver that this would allow the Respondents to do indirectly what they cannot do directly. Typically a Receiver is not subject to cross-examination - Mortgage Ins. Co v. Innisfil Landfill Corp 1998 CanLII 7366 (ON SC); Re Big Sky Living Inc (Bankrupt) 2007 ABCB 249

② The basis for which the examination of Mr Lewis is necessary is set out in the ~~in~~ⁱⁿ brief affidavit of Neil Miller (in para 9) and is based on double hearsay and provides no basis for the stated "Concerns" allegedly expressed by Mr. Lewis

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

③ Ironically, Mr Lewis earlier swore an affidavit on behalf of the Respondents who opposed the appointment of the Receiver. Nonetheless the Receiver retained Mr. Lewis and his company to act as the broker. The Respondents would they in part at least, be cross-examining Mr Lewis on an affidavit prepared for them. It bears noting that the timeline for the sales process set by the Receiver is actually longer than that which was envisaged by the Respondents when they sought to control the sales process.

④ The Respondents have made no attempt to obtain evidence from Mr Lewis (as they did before) or at least no evidence is before the Court in this regard.

In all of the above

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Circumstances it would be an abuse of process to allow the examination and the Respondents, in this regard, have failed to provide a basis for conducting the examination.

After hearing argument and rendering my oral decision, with reasons to follow, counsel for the Respondents submitted (for the first time) that the material before me today did not deal with the Rule 39.05 examination, including Mr Miller's affidavit. I do not accept this submission. It was not made during submissions and it was well-known to the parties that the case conference today was to deal with the issue of examination - including Mr Lewis's examination. The entire hearing schedule allowed for this issue, a possible examination and the

Court File Number: _____

**Superior Court of Justice
Commercial List**

FILE/DIRECTION/ORDER

Judges Endorsment Continued

hearing date.

mejs

McEwen, Mr. Justice Thomas John (SCJ)

From: JUS-G-MAG-CSD-Toronto-SCJ Commercial List
Sent: May 25, 2020 1:05 PM
To: McEwen, Mr. Justice Thomas John (SCJ)
Subject: FW: Choice v. Penady et al Court File No. CV-20-00637682-00CL - Chambers May 25

From: Eric Golden <egolden@blaney.com>
Sent: May 25, 2020 1:04 PM
To: JUS-G-MAG-CSD-Toronto-SCJ Commercial List <MAG.CSD.To.SCJCom@ontario.ca>
Subject: RE: Choice v. Penady et al Court File No. CV-20-00637682-00CL - Chambers May 25

CAUTION -- EXTERNAL E-MAIL - Do not click links or open attachments unless you recognize the sender.

Hi again Alsou,

Justice McEwen asked for the counsel sheet for today's attendance.

Counsel on the Chambers attendance were:

Eric Golden for the Receiver RSM Canada Limited
Michael De Lellis and Shawn Irving for the Applicant Choice Properties
Michael Citak and Tim Duncan for the Respondents

Daniel Weisz of RSM also attended

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