Court File No. CV-24-00086229-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

SMART SUPER MART LTD.

Respondent

BOOK OF ADDITIONAL AUTHORITIES

(Receiver's Motion for Approval and Vesting Order and Approval, Distribution and Discharge Order)

January 12, 2026

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as of December 23, 2025

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ONTARIO
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TAB 1

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00693494-00CL **DATE: OCTOBER 28, 2025**

NO. ON LIST: 2

TITLE OF PROCEEDING: THE TORONTO-DOMINION BANK v. 1871 BERKELEY EVENTS INC., 1175484 ONTARIO INC., 111 KING STREET EAST, 504 JARVIS INC.

BEFORE: JUSTICE MYERS

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name Of Person Appearing	Name of Party	Contact Info
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David Danielson	Elijah and Hazel Lo Re	david@dklawottawa.ca

ENDORSEMENT OF JUSTICE MYERS:

1) The Receiver moves for approval of the sale of the former church property located at 315-317 King Street East in Toronto.

2) The property was used by the respondent 1871 Berkeley Events Inc. as an event venue for weddings and similar gatherings.

3) The property is owned by a different company – the respondent 1175484 Ontario Inc.

4) Both companies are owned by Douglas Wheler.

5) There is nothing inherently nefarious about owning property through a holding company that is separate from the operating company that deals with the public. In this case, both of the relevant companies agreed to be responsible for around $12 million in debt borrowed from TD Bank.

6) By order of the court dated July 7, 2023, the property, assets, and undertakings of all of the respondents were placed under the control of msi Spergel Inc. as court-appointed receiver.

7) By order of the court dated January 16, 2024, the court approved a process for the Receiver to market and sell the church property.

8) In its First Report dated January 3, 2024, the Receiver gave the following evidence:

> 23. On its appointment, the Business had ceased. In the main, the events hosted by the Business were weddings in addition to certain corporate events.

24. A number of clients of the business had paid to Berkely deposits for weddings and corporate events scheduled following the Receiver's appointment. On its appointment the Receiver determined that no funds representing the deposits paid were available to the Receiver.

25. Upon appointment, the Receiver took possession of the Berkeley bank account which had approximately $4,500 on deposit. No other funds were located by the Receiver for any of the other Debtors.

26. In discussions with parties that had booked the Berkeley Church for weddings together with a review of information provided to the Receiver by the management of Berkley, it was evident that a large number of deposits had been paid to Berkeley for weddings and corporate events scheduled in the future. While the Receiver has been unable to ascertain the timing of these deposits, it appeared from a review of bank statements that approximately $193,000 was paid to Berkeley and $90,000 to 111 King during the month of July in the face of these proceedings.

27. On the Receiver's review of the Business, taking into account the cash needed to operate the business, the losses that the estate would incur to continue to operate the Business and the costs to continue to insurance for the Business, the Receiver concluded that continued operations were not feasible.

28. From records provided to the Receiver, it was determined that 98 individuals and/or businesses had booked events for future dates. These parties were notified of the receivership on or about August 3, 2023. Individuals and/or businesses with weddings or events scheduled to and including October 31, 2023, were immediately contacted by telephone, and advised of the receivership and the fact that the recovery of their deposits would be based on the net realization from the assets of the Business. In the event that the Receiver determines that there are sufficient proceeds available to warrant a distribution to unsecured creditors, the Receiver will contact all customers to file a claim in the relevant estate.

9) Mr. Danielson acts for a couple whose deposit was lost when the business closed. I do not know the timing or whether they gave the deposit at a time when management knew that the bank was seeking the appointment of a receiver for example. The facts behind each deposit may provide retail customers with causes of action i.e. the right to sue. Claims against Berkeley Events are unlikely to yield recovery. Whether any claim might lie against the church property owner 1175484 Ontario Inc. and would have priority to the bank’s secured claims is not yet known or discernable. There may also be claims against others if money was knowingly taken improperly or by misrepresentation for example.

10) None of this is really on the table today. If any retail customers have a right to claim against the proceeds of the church property ahead of the bank will await a later review once the property is sold and the proceeds are in the Receiver's hands.

11) Mr. Danielson gently complains that his clients are interested parties and should have had a right to receive the confidential exhibits to the Receiver's Second Report so as to have a better say in the sale motion. I agree with the Receiver's counsel that this is premature. Even if the customers are able to make a claim against the holding company that owns the land, to have any interest in the proceeds the claim will need to be for a constructive trust that might stand in priority to the bank's secured claims. Otherwise, as the bank is deeply under water on its claims, there will be nothing for anyone else.

12) But a constructive trust does not exist as a property right until it is ordered by the court. Unlike express trusts, implied trusts, and resulting trusts, constructive trusts do not arise from dealings between the parties. A constructive trust is a remedy available in court if appropriate on equitable considerations. Until ordered, arguably a claimant has little if any actual interest in property.

13) That is not to say that a person who claims in a constructive trust in an insolvency proceeding never has standing until he or she obtains judgment. Here there is no claim yet. There is no way to assess the likelihood of the retail customers having any real claim to the property or its proceeds at this stage. As I said in court, every insolvency includes real harm suffered to real people. Everyone can be sympathetic with the distress suffered by people approaching their weddings who lose their venue and their deposits. But, while less personal, a bank suffering a loss near $10 million is also a significant concern. There are people whose jobs may be affected. Shareholders' investments can be affected by an aggregate of cases. It is less easy to see peoples' suffering with a corporate creditor perhaps. But the law recognizes and sorts out all the legal and equitable rights of all interested parties.

14) Here, for better or worse, Mr. Danielson's clients have the fundamental deal terms that should have been kept confidential. Mr. Wheler has improperly made public information provided to him on his undertaking to keep it confidential. Mr. Wheler says the court needed the information to decide the issues today. But I had the information. It was provided to me in a sealed form to keep it out of the public eye. Instead of asking the Receiver or its counsel how the court was going to see the information, he decided to ignore the obligation of confidentiality to which he agreed.

15) There is another downside to what Mr. Wheler has done. He asks for six months to allow a possible competing bidder to explore making a bid for the church property. Due to Mr. Wheler's misconduct, that bidder now has the ability to know what the appraisals say and what bid the Receiver was prepared to accept (and TD to support). Were there to be another opportunity for bidders to make offers, no one would be expected to offer even $1 more now that they know this.

16) Mr. Wheler has made the ability to hold a fair future bidding process practically if not legally impossible.

17) In any event, this property has been on the market for two years. It was offered for sale by the owner before the Receiver was appointed. It was then marketed by the Receiver in the spring of 2024 in conjunction with the neighbouring property to try to harvest synergistic development potential. When that failed, it has been marketed on its own.

18) Four bids were received last August – all relatively close to each other.

19) Mr. Wheler now proposes that the process wait until next March to allow a possible buyer to conduct due diligence, seek partnerships, and funding for a possible bid. He does not offer to hold the Receiver or TD Bank harmless from continued costs and interest that will accrue while this person kicks the tires and thinks about the possibility of considering whether it is potentially interested in maybe making a bid for the property. There is no suggestion that in the past two years it has expressed any interest in doing so.

20) It is not in the interests of justice to adjourn the motion to await either an improvement in the condominium market or an offer from a possible suitor six months hence. Senior creditors are not obliged to wait to hope to do better for those behind it in priority. If Mr. Wheler thinks there is a profit to be made, despite his inability to sell the property in 2023, he could have made an offer and, if he won the bidding, he would taken the property and its potential profit for himself.

21) Mr. Wheler is very critical of the Receiver for shutting down the business when it took over in July, 2023. Mr. Wheler advises that there is a reserve fund available to the bank and the Receiver with as much as $400,000 in it. But he does not refer to this account in his evidence. He did not provide an account number this morning. This is contrary to the Receiver's evidence and it is concerning that this information suddenly appeared today.

22) In addition, Mr. Wheler says that his staff had concluded that there was sufficient cash flow coming into the business to have allowed it to complete the weddings that had been sold prior to the receivership. But that assumes that the bank was willing to sit back and incur further losses on its debt while the debtor tried to finish projects – some of which were allegedly sold right before the receivership with knowledge that the business would cease. So exploration and critical examination is required before accepting this new version of history.

23) In any event, none of this is germane to the motion before me today. Mr. Wheler says he will be suing TD Bank, Equitable Bank, his former lawyers, and no doubt, others, arising from the failure of the business. If he has a right to sue and a basis to

do so, then that would give him a platform to try to set straight the injury to his reputation due to sudden shutdown of the business.

24) There are two appraisals obtained for the property in which valuators express opinions that the property is worth far more than the proposed sale price. But those are just opinions. The true test of value is in the marketplace. Despite the appraisals, with he downturn in the market discussed by Colliers and the Receiver, no bids have been received anywhere near the value in the appraisals.

25) Colliers' summary of its marketing efforts show that the property was exposed to the relevant marketplace for an extended period of time. Nothing emerged that was better than what is brought forward. I have no issue accepting the Receiver's judgment that the clean offer accepted was the better offer rather than an offer subject to due diligence for a little more. The party with the biggest stake in an improved offer would be TD Bank as any more proceeds would first appear to belong to it (subject to others proving priority claims). The Bank support the sale and says it is unwilling to fund the process any further.

26) The best test of fair market value in a receivership is a robust marketing process. Exposure to a broad market of potentially willing buyers is a proxy for fair market value. Mr. Wheler shows pictures showing the receiver has left the property in less than a pristine, broom-swept state. This is not a residential dwelling however. Buyers are looking at development and/or operating a business from a site bought out of insolvency. There is no evidence that superficial messiness affects the value to a buyer of land bought for commercial redevelopment.

27) In its factum counsel or the Receiver summarizes the Receiver's evidence about the sales process:

> 22. Leading up to the Sale Agreement, the Real Property was marketed by Colliers for over 18 months. The Receiver is of the view that the Sales Process:
>
> a. Resulted in the best sale price for the Real Property under the circumstances;
>
> b. Considered the interests of all parties;
>
> c. Accounted for the declining market;
>
> d. Was a fair and public process; and
>
> e. Was conducted in a commercially reasonable manner in line with Soundair.
>
> **Second Report**, para 41

> 23. The Receiver is of the view that the market for the Real Property was extensively canvassed pursuant to Colliers' marketing efforts, in accordance with professional and industry standard.
>
> **Second Report**, para 42

28) The evidence supports each of these conclusions. I am satisfied that the Receiver in over 18 months has made a reasonsbale effort to sell the property in the interests of all stakeholders. The property has been widely marketed. The four offers show that the offer proposed is within a narrow range of the others and represents value maximization considering the fact that it is unconditional and therefore likely to close.

29) There is no evidence that the Receiver has acted in bad faith in the marketing of the property.

30) Mr. Danielson's client provides a speculative view that there is overlap in the conduct of Colliers and the Receiver. He therefore submits that the Receiver's fees are too high. I disagree. The Receiver and counsel have provided docket-level disclosure. The rates and time charged are reasonable. TD Bank supports the assessment of costs as sought despite the fact that payment comes first from its recovery.

31) There is no point trying to seal Mr. Wheler's affidavit as the proverbial horse is out of the barn. As a result there is no point sealing the confidential exhibits. Given the confidence that this unconditional sale will close, hopefully there will not be any downside form this outcome. If recovery is harmed by the release of confidential information, others have their rights.

32) I understand that Mr. Wheler is upset by the way things have played out. As noted above, he says he may be suing as a result. But that is not a basis to refuse to take the best offer that the free market has been able to produce form the property. Under the *Soundair* principle, absent very strong cause, I am required to give effect to the Receiver's judgment. I agree with it as well.

Date: Oct 28, 2025

Frederick L. Myers

TAB 2

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 PARTNERSHIP, by its general partner, CHOICE PROPERTIES GP INC.	*Michael De Lellis* and *Shawn Irving*, for the Applicant
Applicant	
– and –	
PENADY (BARRIE) LTD., PRC BARRIE CORP. and MADY (BARRIE) INC.	*Tim Duncan* and *Michael Citak*, for the 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.

<u>The Stalking Horse Agreement</u>

[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.

McEwen J.

Released: June 10, 2020

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 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

TAB 3

CITATION: Stanbarr Services Limited et al v. Reichert et al, 2014 ONSC 6435
COURT FILE NO.: CV-12-4823-00
DATE: 2014 11 04

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: STANBARR SERVICES LIMITED, KEMPSTON GROVE CORP., 617695 ONTARIO INC. & EDDY GOLDBERG

Plaintiffs

and

HANS JORG REICHERT & MARIANNE REICHERT

Defendants

BEFORE: TZIMAS J.

COUNSEL: Martin Greenglass, for the Court Appointed Receiver, Schwartz Levitsky Feldman Inc.

Defendants, self-represented

HEARD: October 31, 2014

E N D O R S E M E N T

[1] The Receiver, Schwartz, Levitsky Feldman Inc. has brought a motion seeking the court's approval of the sale of the sale of the property municipally known as 13610 -11th Concession, Schomberg, Ontario, to Dr. Lubinka Kazovski and Walter Zigan, for the sum of $1,850,000, in accordance with the terms of the Agreement of Purchase and Sale dated September 3, 2014.

[2] Hans Jorg Reichert and Marianne Reichert oppose the approval of the sale, essentially on the view that the proposed price falls far short of the property's true value and that the price obtained amounts to nothing more than a fire sale. They also submit to the court that the mortgagees owe them fiduciary obligations in light of their unique circumstances, which the mortgagees knew about and took into account when they advanced the mortgages to them. To be clear, the overriding concerns were directed to the mortgagees and only indirectly to the Receiver.

[3] The motion before me comes at the end of a very unfortunate history that dates back to at least November 27, 2012 when the second mortgagees commenced an action against the Reicherts for judgment in accordance with the Mortgage covenant and for possession of the mortgaged premises. What followed was a series of motions, requests for adjournments, the commencement of a parallel proceeding in Newmarket by the Jorg Trust, motions for stays, and appeals of the various court orders. Eventually the mortgagee sought the appointment of a Receiver and obtained such a court order on August 19, 2013.

[4] In accordance with the terms of the court order, the Receiver proceeded to sell the subject property. It entered into an Agreement of Purchase and Sale on September 3, 2014. The transaction is set to close at the end of this month.

[5] In the court's review of the proposed sale, the law is clear that the court must consider the following questions before it can approve the sale:

1. Did the Receiver make a sufficient effort to get the best price and did it act providentially?
2. Did it consider the interests of all the parties?

3. Was the process by which the offer was obtained done with efficacy and with integrity? and
4. Was there unfairness in the process?

See *RBC* v. *Soundair Corp.* 4 O.R. (3d)1 at para. 16

[6] My consideration of each of these questions is outlined below:

1. Did the Receiver make a sufficient effort to get the best price and did it act providentially?

[7] I note immediately the Ontario Court of Appeal's caution in *Soundair* that when a court appoints a receiver to use its commercial expertise, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. The court should assume that the receiver is acting properly unless the contrary is clearly shown. The court should also be reluctant to second-guess the receiver's business decisions. Finally, the receiver's conduct should be reviewed in light of the receiver's specific mandate.

[8] With these cautions in mind, I note that in its First Report, the Receiver outlined in very substantial detail its efforts to sell the subject property.

[9] The Receiver used an MLS listing with a recognized real estate agent being Re/MAX. The property lies in the Green Belt and is zoned only for residential purposes. The listing on MLS would be the normal method for the sale of a residential property.

[10] The Receiver agreed to list the property at the price of $2,999,000.00 so as to attempt to sell the property in accordance with the value perceived by both the mortgagees and the Reicherts. No offers were forthcoming at that price. The Receiver even agreed to entertain the prospect that the Reicherts would

complete the sale when they indicated that they had identified a buyer was would be willing to pay in the range of $3 million. Regrettably for all involved, the Reicherts were unable to conclude that deal.

[11] It is also noted that the Receiver obtained an updated appraisal from York Simcoe Appraisal Corp. under the name Marie Garbens. That appraisal was obtained shortly after the Receiver entered into the Agreement of Purchase and Sale with the proposed purchasers, Kozovski and Zigan. In previous years the Reicherts used the same appraiser to obtain their own appraisals. In the most current appraisal report, Ms. Garbens identified the value of the mortgaged premises to be between $1,963,900.00 at the low end and $2,478,150.00 at the high end. This range was substantially lower than her appraisals in 2010 when she set the value at $3.4 and almost $4 million. Ms. Garbens justified her most recent assessment and indeed favoured the low end value for the property on account of condition of the premises and because of its extensive listing history, that being over five years without a sale.

[12] The proposed sale that is the subject of this motion is not the first offer that the Receiver has considered. In the First Report to the court, the Receiver identified offers that were not entertained. In December 2013, an offer was presented by West Coast Property Investments Inc. but it included several conditions that could not be satisfied. The most difficult obstacle was the condition that they be able to change the zoning from residential to commercial to enable the development of the property for use as a rehabilitation centre. The conditions could not be satisfied and the purchaser was not prepared to waive them. Other offers, one for $700,00.00 and another for $800,000.00 were rejected as being too low. Similarly, offers for $1,200,00.00 and $1,490,00.00 were also rejected.

[13] The Receiver outlined for the court the sign-back negotiations with the proposed purchasers to come to the ultimate agreement of $1,850,000.00. Having regard for the various difficulties with the marketing of this property, its history on the market, as well as the fact that the property is a wasting asset, with winter around the corner and concerns that there will be no other offer, the Receiver has concluded that the proposed is provident and should be approved.

[14] In the face of this evidence and in consideration of the first legal question, there is no evidence before this court to question or doubt the sufficiency of the Receiver's efforts to sell this property. The Reicherts challenge Ms. Garbens appraisal and suggest that she was asked to downgrade her appraisal in light of the proposed Agreement of Purchase and Sale. In other words, they question the *bona fides* of the appraisal.

[15] With respect, I am obliged to reject that suggestion as there is no evidence before this court that Ms. Garbens acted in bad faith or that she merely produced a report to placate the Receiver. While I am prepared to acknowledge that it would have been preferable to have received an appraisal report prior to the signing of the Agreement of Purchase and Sale, the real proof in the pudding lies with actual offers, it does not lie with the appraisals; they are just estimates. The reality here is that the Receiver's attempt to sell the property initially at $2.9 million and then at levels in the range of $2 -2.5 million were unsuccessful. Neither the Receiver nor the Reicherts have been able to identify a buyer willing to buy the property at these proposed prices.

[16] It is noted that at the hearing of the motion the Reicherts filed with the court what they purported to be two appraisals with higher appraisal values for the subject property. Regrettably, the reports are fundamentally flawed and

cannot be considered. The first, purporting to be by either Michael Carlone and / or Steven Racco was unsigned and included a disclaimer that the assessment given was on the understanding that the author would not be "required to give testimony or attendance in court by reason of this opinion of value with reference to the property in question." The second report in a letter format was written by Ms. Louise Auge of Harvey Kalles Real Estate Ltd. That was no more than a letter of complaint laying fault at the feet of the mortgagee for its failure to maintain the property and to preserve its value. Ms. Auge did not provide an appraisal. Somewhat ironically, she confirmed that the property, in its present condition and given its history, could not attract a higher price. If anything, that assessment underscored the Receiver's concern and the recommendation that the Agreement of Purchase and Sale be approved by the court.

2. Did the Receiver consider the interests of all the parties?

[17] Insofar as this question is concerned, the Receiver did just that. He consulted with the mortgagees on the identification of a particular listing agent, he listed the price above the appraised value to reflect the wishes of the mortgagees and the Reicherts, and he gave the Reicherts the opportunity to bring forward their own buyer. Even as recently as the submissions to this court, counsel for the Receiver indicated that he would still be prepared to entertain a higher offer if the Reicherts could produce such a buyer. The sad reality was that the Reicherts do not have such a buyer. They made reference to an individual who might be willing to lease their premises but even that was vague and without foundation. In any event, the leasing of the premises is outside of the Receiver's mandate.

3. Was the process by which the offer was obtained done with efficacy and with integrity?

[18] There was no evidence before this court to suggest that the Receiver's process was lacking in either efficacy or integrity. The steps outlined above in my consideration of the first question offer a complete answer to this consideration.

4. Was there unfairness in the process?

[19] As with the previous question, as far as fairness is concerned, there is no evidence before the court of any unfair conduct by the Receiver. Even the Reicherts could not point to any evidence of unfair conduct by the Receiver. Their lengthy submissions, which I considered very carefully and with much concern, were directed at the mortgagees. Their complaint in many respects was summed up in the following statement contained in Mr. Reichert's written submissions, which Ms. Reichert was given permission to read into the record given Mr. Reichert's medical condition:

> Para.29 "The Mortgagee took control and made the Mortgagor dependent when they advanced the mortgage and created a control and dependency at highest order and created such very special circumstances.
>
> …
>
> They knew about the dire circumstances and that the mortgagor was very vulnerable and dependent. Under normal circumstances there are no obligations but not in this instance. They did not show an accountability, they did not care, but they had a greater responsibility to care not to create a fire sale and create a shortfall of any magnitude. They essentially violated their duty."

[20] Separate and apart from the observation that the Reicherts did not provide the court with any legal authority for the alleged obligation of the mortgagee, that submission has nothing to do with the conduct of the Receiver, who was appointed by this court to conduct a sale of the property. In other words, the submissions by the Reicherts did not address the legal questions that the

court has to consider to determine whether the sale should be approved or disapproved.

[21] Difficult as it may be for the Reicherts to accept, the reality is that the handling of this property is at a crossroads. There has been no other credible offer on the table. The sale price of $1,850,000 is the result of the Receiver's efforts to obtain the best price in this market and given the difficulties of this property. The sale price will not satisfy Mr. Reichert's indebtedness to the mortgagees. But if it is approved, it will at least place a cap on the accumulating debt. In this regard, if the court were to disapprove of the sale, the damages as against Mr. Reichert would continue to increase. Moreover, given the downward trajectory in the value of the property, there would be a serious risk that its value would drop even further. The prospect that there would be no other buyer would be an even worse outcome. I appreciate that this is not the outcome or the situation that anyone would want to find themselves in, especially given the Reicherts' numerous other financial and medical difficulties. However, the disapproval of the sale runs the risk of making matters that much more difficult.

[22] Having regard to all the evidence and the submissions before this court, I conclude that the Receiver's proposal is reasonable and legally sound, that the Receiver has acted in a provident manner, it has considered all of the parties interests, and it has down so with integrity and with fairness.

[23] The proposed sale is approved. An Order is to issue in accordance with the draft Order filed with the Court.

_____

TZIMAS J

DATE: November 4, 2014

CITATION: Stanbarr Services Limited et al v. Hans Jorg Reichert et al, 2014 ONSC 6435
COURT FILE NO.: CV-12-4823-00
DATE: 2014 11 04

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: STANBARR SERVICES LIMITED, KEMPSTON GROVE CORP., 617695 ONTARIO INC. & EDDY GOLDBERG

And

HANS JORG REICHERT & MARIANNE REICHERT

BEFORE: TZIMAS J.

COUNSEL: Martin Greenglass, for the Court Appointed Receiver Schwartz Levitsky Feldman Inc.

Defendants, self-represented

ENDORSEMENT

TZIMAS J

DATE: November 4, 2014

Court File No. CV-24-00086229-0000

ROYAL BANK OF CANADA	- and -	SMART SUPER MART LTD.
Applicant		Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
HAMILTON

BOOK OF ADDITIONAL AUTHORITIES
(Receiver's Motion for Approval and Vesting Order and Approval, Distribution and Discharge Order)

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