

RECEIVERSHIPS AND COVID-19 – IS THE COVID-19 PANDEMIC SUFFICIENT CAUSE FOR POSTPONEMENT OF AN ASSET SALE?

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Choice Properties Limited Partnership v Penady (Barrie) Ltd., 2020 ONSC 3517

In *Choice Properties Limited Partnership v Penady (Barrie) Ltd.*, 2020 ONSC 3517, the Ontario Superior Court of Justice weighed in on what constitutes a fair and reasonable sale procedure during the ongoing Covid-19 pandemic.

Background

The initial motion was brought by RSM Canada Limited in its capacity as Court-appointed Receiver in support by the Applicant Choice Properties Limited Partnership. Among other things, the motion sought an order which would grant the sale procedure for an asset purchase of a commercial shopping centre owned by the debtor, Penady (Barrie) Ltd. As the senior secured lender, the Applicant was owed approximately \$70 million by the debtor with interest accruing monthly at a rate of \$550,000. Nonetheless, the debtor challenged the motion on grounds that the Stalking Horse Agreement and Sale Procedure, as outlined by the Receiver, were unreasonable given the current impact of COVID-19.

Decision

Ultimately, the issue to be decided by the Court, was whether the sale procedure was fair and reasonable. Relying on the well-known case *Royal Bank of Canada v. Soundair Corp.* (1991), 1991 CanLII 2727 (ON CA), 4 O.R. (3d) 1 (C.A.), the parties agreed that the correct criteria to decide the issue was:

- (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.[1]

Additionally, the court stated that the Soundair principles must be kept in mind when approving a particular form of Sale Procedure, as reiterated in *CCM Master Qualified Fund v. Blutip Power Technologies*, 2012 ONSC 1750, 90 C.B.R. (5th) 74:

- (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.

In the Court's analysis, a conscious effort was made in recognizing the timing of the sale and the ongoing COVID-19 crisis. For instance, when the pandemic hit, 16 of the 27 tenants of the shopping center had suspended operations, with 6 others offering limited services. While this created further economic hardship for the debtor, the Court noted that the debtor was already in financial trouble before the pandemic and had been attempting to sell the property for almost 16 months.

In terms of the Stalking Horse Agreement, the debtor argued that the Receiver had obtained a valuation and corresponding credit bid that was far below the real appraisal value of the property. The Court swiftly discarded this argument, stating that the Receiver's estimation was from a reputable real estate company which, unlike the debtor's source, had considered pertinent COVID-19 factors, such as rent collection difficulties. Furthermore, the Court deemed that the inability for the debtor to successfully sell the property before receivership, was a valid indication that their appraisal value was too high to begin with. Moreover, the debtor's claims that required deposits, expense reimbursements, and minimum overbid amounts as they pertain to the auction process were also squashed, as the Court declared these were reasonable in the present circumstances.

Additionally, the debtors objected against the Sale Procedure as the Receiver was planning to proceed without first obtaining a valid environmental report, valid building condition assessment report or any tenant estoppel certificates. In response, the Receiver argued that the existing environmental reports were only 1.5 years old and due to the current pandemic and economic climate, obtaining estoppel certificates would be an extremely difficult task. Sympathetic to the Receiver's reasoning, the Court deemed that a valid environmental report would be required before sale; however, it would be sufficiently reasonable for the Receiver to only obtain tenant estoppel certificates from the seven major tenants.

The most intriguing argument presented by the debtors was the defense of COVID-19 itself. The debtor felt that given the uncertainty and economic climate, a sale of such size should not be taken. This argument failed to hold any weight as the Court once again noted that the debtor's insolvency existed before the crisis. While, the debtor pleaded in the very least a 2-3 month pause in the process, the Court deemed that the debtor had presented no substantive evidence on the point and it was unreasonable to grant such a request. Without any concrete knowledge of when the economic fallout of COVID-19 would subside, no weight could be given to the debtor's assertions.

Going Forward and Take Away

In the end, the Court granted the Receiver's order as the proposed Stalking Horse Agreement and Sale Procedure allowed realization on the debtor's property in a fair and reasonable fashion. While the debtor's ongoing financial troubles were impacted by COVID-19, it was not the originating cause. In upholding the principles outlined in Soundair and CCM Master Qualified Fund, the Court demonstrated exactly what to expect when determining the reasonableness of a sale procedure in the post COVID-19 era.

The case is interesting in that it highlights that for a debtor to adequately present a reply to a motion for a Receiver or other process on the basis of Covid-19, it is incumbent on the debtor to present sufficient evidence that Covid-19 was the cause of the financial problems. If the debtor was in financial difficulty prior to Covid-19, then the Covid-19 crisis, notwithstanding the fact it may have exacerbated the debtors financial issues, cannot be used as a stand alone basis for a postponement.



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