

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *CONSTRUCTION LIEN ACT*,
R.S.O. 1990, c. C.30, AS AMENDED**

**AND IN THE MATTER OF AN APPLICATION MADE BY 144 PARK LTD.
FOR THE APPOINTMENT OF A TRUSTEE UNDER SECTION 68(1) OF THE
CONSTRUCTION LIEN ACT, R.S.O. 1990, c. C.30, AS AMENDED**

FACTUM OF THE APPLICANT

(appointment of a trustee)
(returnable January 22, 2015)

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TO: THE SERVICE LIST

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PART I – NATURE OF THE APPLICATION

1. The Applicant, 144 Park Ltd. (“**144**”), applies for the appointment of Collins Barrow Toronto Limited (“**Collins Barrow**”) as trustee pursuant to section 68(1) of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended (the “**CLA**”).

PART II – FACTS

144 Park Project and the Property

2. 144 is the registered owner of the lands and premises that comprise a 19 storey residential condominium project known as “144 Park Uptown Waterloo” (the “**144 Park Project**”) and municipally known as 142, 144 and 148 Park Street and 21 Allen Street West, Waterloo, Ontario (the “**Property**”).

Application Record of the Applicant, Tab 2, Affidavit of Greg Puklicz sworn January 16, 2015 (“**Puklicz Affidavit**”), paras. 6 and 9, Exhibit “A” – Parcel Registers

3. 144 is a single purpose entity that was incorporated to develop and construct the 144 Park Project. 144 is an Ontario corporation with its registered office located in Markham, Ontario.

Puklicz Affidavit, para. 7, Exhibit “A” – Corporate Profile Report

4. The 144 Park Project is a residential condominium project with 149 total units, along with, among other things, 150 storage units and 149 parking spaces.

Puklicz Affidavit, para. 10

Mortgagees

5. 144 is indebted to, or may have obligations outstanding to, the following parties (collectively, the “**Mortgagees**”):

- (a) Laurentian Bank of Canada (“**Laurentian**”), which is owed \$39,022,634.38 (principal and interest) as of January 6, 2015 with respect to certain credit facilities and loans made to 144;
- (b) MarshallZehr Group Inc. (“**MarshallZehr**”), which is owed \$2,887,696 plus accrued interest as of January 15, 2015 with respect to a mezzanine loan made to 144;
- (c) Allen Street Holdings Inc. (“**Allen Street**”), which is owed \$3.0 million as of January 15, 2015 with respect to vendor-take-back financing made available to 144; and

- (d) Aviva Insurance Company of Canada (“**Aviva**”), which issued a Tarion Warranty Corporation Bond and entered into a deposit trust agreement and an indemnity agreement with 144. As of January 15, 2015, no claims had been made to Aviva.

Puklicz Affidavit, paras. 13, 16, 17, 20, 21, 24, 25, 26 and 30, Exhibit “D” – Allen Street Promissory Note, Exhibit “I” – MarshallZehr Commitment Letter dated October 24, 2011, Exhibit “K” – Laurentian Offer of Financing dated March 7, 2012, as amended

6. As a result of certain postponements, the Mortgagees are ranked as follows: Laurentian, Aviva, MarshallZehr and Allen Street.

Puklicz Affidavit, paras. 14, 15, 18, 19, 22, 23, 27, 28 and 29, Exhibit “E” – Allen Street Charged registered on September 1, 2011, Exhibit “H” – Aviva Charge registered on September 1, 2011, Exhibit “J” – MarshallZehr Charge registered on December 13, 2011, Exhibit “L” - Laurentian Charge registered on May 25, 2012, Exhibit “P” – Postponements registered on May 25, 2012

Status of the 144 Park Project

7. 144 has sold 129 of the 149 units. The vast majority of the purchasers have assumed interim occupancy of the units. 144 has received monthly occupancy and related amounts from such purchasers. Approximately \$180,000 of occupancy fees and related amounts for January 2015 is currently being held by Laurentian and has not been applied by Laurentian to reduce 144’s indebtedness or used by 144 to date (the “**Occupancy Funds**”).

Puklicz Affidavit, paras. 31-32

8. Additionally, approximately \$3.0 million of the \$6,350,000 of deposits received by 144 from purchasers is being held in trust by the law firm of Harris Sheaffer LLP as escrow agent.

Puklicz Affidavit, para. 34

9. There remain 20 unsold units in the 144 Park Project. All work has been completed, other than installation of interior finishings and upgrades that are typically selected by purchasers. 144 recently obtained a third party appraisal that confirmed that the unsold units have substantial value.

Puklicz Affidavit, paras. 35-37

10. 144 has submitted a draft Plan of Condominium for approval by the City of Waterloo (the “**City**”) and the Regional Municipality of Waterloo (the “**Region**”). The Region granted draft approval on November 14, 2014.

Puklicz Affidavit, para. 39

11. 144, the City and the Region are working on final comments and resolving minor issues in connection with the registration of the Plan and the condominium declaration. The material conditions that remain to be satisfied so that registration may proceed are:

- (a) installation of a silencer and related bracket in the garage, which took place on January 19, 2015;
- (b) registration of an easement in favour of Waterloo North Hydro and postponements of charges/mortgages in favour of the easement;
- (c) registration of certain notices, and postponements of the charges/mortgages in favour of such notices; and
- (d) registration of the consent of the mortgagees to the registration of the condominium.

Puklicz Affidavit, paras. 39-40

12. Such documents cannot be registered on title to the Property until all registered construction liens and certificates have been vacated.

Puklicz Affidavit, para. 41

Financial Difficulties

13. In 2014, 144 began to experience financial difficulties in connection with the 144 Park Project, as a result of, among other things, significant delays and cost overruns.

Puklicz Affidavit, para. 42

14. As a result of such difficulties, 144 is in default of its obligations to Laurentian. Laurentian has demanded immediate payment of 144's indebtedness and obligations, terminated the credit facilities and confirmed that no further credit will be made available to 144. Laurentian also delivered a notice of its intention to enforce security.

Puklicz Affidavit, paras. 43-44

15. 144 has no further availability under its credit facilities with Laurentian.

Puklicz Affidavit, paras. 45

Construction Lien Claimants

16. Since October 24, 2014, seventeen (17) construction liens, with an aggregate value of approximately \$3.0 million, have been registered against title to the Property.

Puklicz Affidavit, para. 46 and 48

Need for the Appointment of a Trustee

17. As a result of the registration of the construction liens against the Property, 144 cannot complete the necessary conditions to have the Plan and condominium declaration registered against title to the Property and to close the sale of the 129 units. Additionally, 144 does not have the funds available to complete the unsold units and market them for sale.

Puklicz Affidavit, para. 50

18. The appointment of Collins Barrow as trustee will be for the benefit of all parties that have an interest in the Property and the 144 Park Project, as it will:

- (a) allow for the trustee to obtain an order vacating the construction liens without posting security so that the necessary steps can be taken to have the Plan and the condominium declaration registered against title to the Property;
- (b) allow the trustee to close the sale of the 129 sold units;
- (c) if necessary, permit the purchasers of all units to obtain vesting orders from the Court, ensuring clear title to their units free from all mortgages, construction lien claims and other encumbrances;
- (d) allow Collins Barrow to access the Occupancy Funds;
- (e) if appropriate, permit Collins Barrow to complete the necessary work for the 20 unsold units and sell the units;

- (f) provide for the proceeds of sale of the units to be paid into the trustee's trust account, for eventual distribution to the Mortgagees, lien claimants and any other person with an economic interest in the Property; and
- (g) provide a single forum for the efficient and speedy determination of the amount and priority of the claims of the Mortgagees and the construction lien claimants.

Puklicz Affidavit, para. 55

19. Once Collins Barrow is appointed as trustee, it intends to borrow a maximum of \$500,000 from MarshallZehr so that the trustee may complete the necessary steps to enable the registration of the Plan and the sale of the 129 units to be completed. Additionally, the trustee intends to take steps, if appropriate, to complete the 20 unsold units, and to market the units for sale. MarshallZehr has agreed to provide the additional funding required by the trustee to take such steps. The trustee will seek the Court's approval prior to obtaining such funding from MarshallZehr.

Puklicz Affidavit, paras. 52 and 53

20. The Mortgagees either support or do not object to 144's application for the appointment of Collins Barrow as trustee.

Puklicz Affidavit, para. 56

21. The 144 Park Project is currently at a standstill. There is outstanding work that cannot be completed, and 144's secured creditors are owed money and cannot be paid. Purchasers have had interim occupancy of their units for some time without obtaining title to their units. These purchasers cannot mortgage, lease or sell their units. 144 cannot convey good title to unit

purchasers under existing circumstances. The appointment of the trustee will provide a mechanism to allow for the completion and registration of the Plan and condominium declaration, permit the pre-sold units to close and allow, if appropriate, the trustee to complete and sell the unsold units. All sale proceeds will be held by the trustee and distributed pursuant to Court order.

Puklicz Affidavit, paras. 57-58

PART III – ISSUE

- (a) Should the Court appoint Collins Barrow as trustee of the Property?

PART IV – LAW AND ARGUMENT

Test for the Appointment of a Trustee

22. Pursuant to section 68(1) of the CLA

“Any person having a lien, or any other person having an interest in the premises, may apply to the court for the appointment of a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate”.

CLA, s. 68(1)

23. Courts have interpreted the phrase “any other person having an interest in the premises” to mean, among others, the owner of the property.

Ru-Ko Inc. v. Croatia (Republic), 1998 CarswellOnt 1865 (S.C.J.), para. 8

24. Additionally, section 1(1) of the CLA defines “interest in the premises” to mean “an estate or interest of any nature”. As the registered “owner” of the Property, 144 has an interest in

the premises and is entitled to bring this application for the appointment of a trustee over the Property.

CLA, s. 1(1) – “owner” and “interest in the premises”

25. Section 68(1) of the CLA provides that the court “may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate.” Section 68(2) goes on to enumerate the powers of an appointed trustee:

- (2) Subject to the supervision and direction of the court, a trustee appointed under subsection (1) may,
 - (a) act as receiver and manager and, subject to the *Planning Act* and the approval of the court, mortgage, sell or lease the premises or any part thereof;
 - (b) complete or partially complete the improvement;
 - (c) take appropriate steps for the preservation of the premises; and
 - (d) subject to the approval of the court, take such other steps as are appropriate in the circumstances.

CLA, s. 68(1) and (2)

26. In *Atlas-Gest Inc. v. Brownstones Building Corp.*, the Court considered an application for the appointment of a trustee of a condominium building under section 68 of the CLA. The application was brought by the first mortgagee. The facts of that case were very similar to the case at hand, as:

- (a) the condominium building was complete but required additional work and funding to permit remaining condominium units to be sold;

- (b) several of the condominium units had already been sold and the purchasers were in occupancy;
- (c) documentation necessary to complete the condominium was completed but not tendered for registration;
- (d) construction liens in excess of \$2.7 million had been registered against the lands;
- (e) units purchasers, who were already occupying their units, could not obtain title to their units because the sales could not close until the condominium was registered.

Atlas-Gest Inc. v. Brownstones Building Corp., 1992 CarswellOnt 608 (Ct. J. (Gen. Div.)) (“*Atlas-Gest*”), paras. 1-5

27. Justice Stach noted that, if existing unit sales were allowed to be completed and prospective sales permitted to go ahead, two separate streams of substantial income flow could be tapped. Justice Stach was satisfied that:

“...the impasse is even now operating to the financial detriment of lien claimants and to the financial detriment of unit purchasers who are otherwise innocent. The impasse, if allowed to continue, will result in a proportionately greater erosion of their respective positions.”

Atlas-Gest, paras. 18-19

28. As a result, Justice Stach granted the application and appointed a trustee and receiver-manager.

29. In the unreported decision of Justice Pepall (as she then was) in *WestLB AG, Toronto Branch v. The Rosseau Resort Developments Inc.*, a first mortgagee sought the appointment of,

among other things, a trustee under section 68 of the CLA. In that case, the owner of the property had no further access to funds and was in a cash crisis. There were no funds available to continue operations or finance construction costs. The project, a hotel resort, had condominium units, of which some had been sold and closed, some were sold and expected to close shortly, and some were unsold. The obligations due to construction trades were approximately \$4.3 million.

Reasons of The Honourable Madam Justice Pepall, *WestLB AG, Toronto Branch v. The Rosseau Resort Developments Inc.*, May 22, 2009, Court File No. CV-09-8201-00CL (“*Rosseau*”), pp. 1-4

30. Justice Pepall cited the decision of Justice Lane in *Royaledge Industries Inc. v. Perma-Roof Ontario Ltd.* and the following three non-exhaustive general areas in which it may be appropriate to appoint a trustee:

“...where the premises is an income earning property, and the lien claim may be satisfied out of the income; **where the owner has become insolvent but the project itself would be a viable one if refinanced and carried to completion**; and where the appointment of a trustee may be of use to obtain management of the premises in order to prevent its deterioration.” **[emphasis added]**

Rosseau, p. 7

31. After considering Justice Lane’s decision, and the decision in *Atlas-Gest*, Justice Pepall was of the view that the applicant had met the requisite test for the appointment of a trustee. Justice Pepall cited the following factors in support of the decision to appoint a trustee:

- (a) the owner was insolvent and had no further access to funds and was in a cash crisis;

- (b) the only source of funding available was the proposed trustee's borrowings;
- (c) funding was needed to complete the project, maintain operations and generate value for stakeholders; and
- (d) stability was required and there was a need for immediate conservation of the debtor's assets and protection of the interests of the mortgagee and other stakeholders.

Rosseau, p. 7

32. The Applicant respectfully submits that in the circumstances it is necessary and appropriate to appoint a trustee in order to complete the work required to register the Plan, close the sales of the 129 pre-sold units so innocent purchasers can obtain title to their units, and generate and distribute sale proceeds to the Mortgagees and lien claimants, pursuant to Court order. The sale proceeds from the closing of the 129 pre-sold units will be more than sufficient to pay the lien claimants (whose claims total approximately \$3.0 million) to the extent of their priority over the Mortgagees.

33. However, the sale proceeds will likely not be sufficient to repay all of the Mortgagees. As a result, any delay in completing the registration of the Plan and the sale of the units will only serve to increase the amount owing to Laurentian (interest accrues at more than \$5,000 per day) and reduce the amount available to the subsequent Mortgagees.

PART V – RELIEF REQUESTED

34. The Applicant respectfully requests that the Court grant an order appointing Collins Barrow as trustee under section 68 of the CLA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



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Lawyers for the Applicant

SCHEDULE “A”

STAUTORY AUTHORITIES

Construction Lien Act, R.S.O. 1990, c. C.30, as amended

1. (1) In this Act,...

“interest in the premises” means an estate or interest of any nature, and includes a statutory right given or reserved to the Crown to enter any lands or premises belonging to any person or public authority for the purpose of doing any work, construction, repair or maintenance in, upon, through, over or under any lands or premises;

“owner” means any person, including the Crown, having an interest in a premises ...

...

Application for appointment of trustee

68. (1) Any person having a lien, or any other person having an interest in the premises, may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate.

Powers of trustee

(2) Subject to the supervision and direction of the court, a trustee appointed under subsection (1) may,

- (a) act as a receiver and manager and, subject to the *Planning Act* and the approval of the court, mortgage, sell or lease the premises or any part thereof;
- (b) complete or partially complete the improvement;
- (c) take appropriate steps for the preservation of the premises; and
- (d) subject to the approval of the court, take such other steps as are appropriate in the circumstances.

Liens a charge on amounts recovered

(3) Subject to subsection 78 (7), all liens shall be a charge upon any amount recovered by the trustee after payment of the reasonable business expenses and management costs incurred by the trustee in the exercise of any power under subsection (2). R.S.O. 1990, c. C.30, s. 68 (3).

Sale subject to encumbrances

(4) Any interest in the premises that is to be sold may be offered for sale subject to any mortgage, charge, interest or other encumbrance that the court directs.

Orders for completion of sale, etc.

(5) The court may make all orders necessary for the completion of any mortgage, lease or sale by a trustee under this section.

...

Advances to trustee under Part IX

78(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

(a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and

(b) the amount received is not subject to any lien existing at the date of the trustee's appointment.

SCHEDULE “B”

CASE AUTHORITIES

1. *Ru-Ko Inc. v. Croatia (Republic)*, 1998 CarswellOnt 1865 (S.C.J.)
2. *Atlas-Gest Inc. v. Brownstones Building Corp.*, 1992 CarswellOnt 608 (Ct. J. (Gen. Div.))
3. Reasons of The Honourable Madam Justice Pepall, *WestLB AG, Toronto Branch v. The Rosseau Resort Developments Inc.*, May 22, 2009, Court File No. CV-09-8201-00CL
4. *Royledge Industries Inc. v. Perma-Roof Ontario Ltd.*, 1991 CarswellOnt 776 (Ct. J. (Gen. Div.))

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