

**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**

**ENDORSEMENT**

January 22, 2015

This is an application for the appointment of a trustee of a condominium property which has run into financial trouble. The appointment is contemplated by s. 68(1) of the *Construction Lien Act* RSO 1990 c. C.30. Such appointments have been made previously in similar circumstances. See *Atlas-Gest Inc. v. Brownstones Building* 1992 CarswellOnt 608 and *WestLB v. Rosseau Resort* May 22, 2009, CV-09-8201-00CL.

After substantial negotiations, the parties, which involve the owner, several mortgagees, and many lien claimants, have agreed that the appointment is necessary to enable an orderly completion of the project, which will benefit all stakeholders.

Most of the terms and conditions of the appointment are agreeable to the parties. There are three discrete issues which I was asked to resolve.

In general, I am satisfied that the appointment of a trustee with, in fact, the authority of a receiver, is necessary and appropriate. Chaos must be avoided. There are many owners who need to close their deals etc. An orderly completion holds out the best hope for maximizing the value and therefore, return to creditors, of the project.

I therefore grant the application for the appointment of the trustee.

The remaining three issues deal with specific terms and conditions. Mr. Scotchmer, for J & L Gaweda Construction Limited, raises three objections:

- 1) to the scope of the immunity sought by the trustee;

- 2) to the owner and the trustee having the same counsel; and
- 3) to the priority for the applicant's legal fees.

J & L argues that the trustee should shoulder the liabilities of any trustee and not have the same immunity available to court appointed receivers, monitors and the like.

I cannot agree. The trustee is appointed as an officer of the court. Its actions will be the subject of court monitoring and approval. If there are issues, they can be addressed when court approval is sought. The trustee's appointment will benefit all parties. It would be hard to find reputable entities to take on this role without standard protections in place.

I do not see any reason why the standard limitations available to court appointed receivers and monitors should not be available to the trustee, which will be performing as a de facto receiver function.

The conflict issue is, at this stage, a solution in search of a problem. There is no evidence of a current conflict. The order contemplates that if one arises, the trustee will retain other counsel.

The joint retainer is done in an effort to reduce fees. This will benefit everyone. Unless and until there is a problem, I see no reason to prevent the joint retainer.

The applicants have taken necessary steps to bring order to what might otherwise be a chaotic situation. Someone had to do it. I see no reason why there should not be priority for those fees which brought about the needed methodology for the benefit of all economic stakeholders. I approve the priority, limited as it is to this application.

I have also been asked to confirm that the order is without prejudice to any lien claimants later seeking relief from the requirements of s. 37 of the CLA, if so advised and I do so confirm.

I approve the order negotiated by counsel and the parties. A clean copy may be delivered to my attention for my fiat.

---

Penny J.