

Court File No.

**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  
JADE-KENNEDY DEVELOPMENT CORPORATION  
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 February 11, 2015)

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**FACTUM OF THE APPLICANT**

(appointment of a trustee)  
(returnable February 11, 2015)

**PART I – NATURE OF THE APPLICATION AND OVERVIEW**

1. The Applicant, Jade-Kennedy Development Corporation (“**JKDC**”), 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**”).

2. JKDC is the developer and registered owner of the South Unionville Square project, which is comprised of residential and retail/commercial condominium units and vacant lands for development. Eighteen of twenty-one retail/commercial condominium units, which will generate estimated net sale proceeds of approximately \$4.65 million, are scheduled to close on February 17, 2015,. On closing JKDC is required to deliver clear title to the purchasers, but is unable to do so because of mortgages, numerous claims for liens, and other encumbrances which JKDC is unable to pay. It is in the interest of all stakeholders, including mortgagees, lien claimants and

purchasers, that a trustee be appointed by the Court under section 68 of the CLA to close the sale transactions and market and sell the unsold condominium units and vacant lands, with the sale proceeds to be distributed pursuant to Court order in accordance with creditor entitlement. Vesting orders will be required to facilitate completion of the sale transactions.

## **PART II – FACTS**

### **South Unionville Square Project**

3. JKDC is the developer and registered owner of the South Unionville Square condominium project located in Markham, Ontario, which is comprised of:

- (a) 23 commercial/retail units and 4 parking units located in Phase I of the project (collectively, the “**Phase I Commercial Units**”);
- (b) 21 commercial/retail units located in Phase II of the project (collectively, the “**Phase II Commercial Units**”);
- (c) 6 residential units, 8 parking units, and 6 locker units located in Phase II of the project (collectively, the “**Unsold Residential Units**”); and
- (d) vacant lands originally intended to be used for the construction of 13 freehold townhomes and 2 single detached homes in Phase III of the project (the “**Vacant Lands**”) (collectively, the “**Property**”).

Application Record of the Applicant, Tab 2, Affidavit of Charles Mady sworn February 5, 2015 (“**Mady Affidavit**”), paras. 2, 12, 14, 17 and 22, Exhibits “B”, “C”, “E” and “F” – Parcel Registers

4. JKDC is an Ontario corporation with its registered office located in Markham, Ontario.

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

**Mortgagees**

5. 144 is indebted to, or may have obligations outstanding to, the following parties:

- (a) Laurentian Bank of Canada (“**Laurentian**”);
- (b) MarshallZehr Group Inc. (“**MarshallZehr**”)
- (c) Aviva Insurance Company of Canada (“**Aviva**”); and
- (d) Am-Stat Corporation (“**Am-Stat**”).

Mady Affidavit, paras. 25-26

6. JKDC has repaid Laurentian in full in connection with the construction credit facilities made available to JKDC. The remaining charges/mortgages against certain parts of the Property in favour of Laurentian are collateral charges/mortgages with respect to amounts owed to Laurentian by 144 Park Ltd. (“**144**”), a company that is related to JKDC. JKDC expects that Laurentian will receive payment of all indebtedness owed to it by 144.

Mady Affidavit, paras. 29-32

7. The charge/mortgage granted by JKDC in favour of MarshallZehr is a collateral charge for payment of 144’s indebtedness to MarshallZehr.

Mady Affidavit, para. 36

8. JKDC obtained certain insurance facilities and a Tarion Warranty Corporation Bond from Aviva. JKDC granted charges/mortgages over certain parts of the Property as security for the

obligations it owes to Aviva. As of February 4, 2015, JKDC was not aware of any claims having been made to Aviva.

Mady Affidavit, paras. 25-27

9. JKDC granted a charge/mortgage to Am-Stat over certain parts of the Property as security for financing provided by Am-Stat in 2013. Am-Stat has demanded immediate payment of JKDC's obligations and has delivered a notice of intention to enforce its security. As of January 19, 2015, JKDC was indebted to Am-Stat in the principal and interest amount of \$5,005,399.89.

Mady Affidavit, paras. 34-35 and 42-43

### **Status of South Unionville Square Project**

10. JKDC has sold 18 of the 21 Phase II Commercial Units, which are scheduled to close on February 17, 2015. The sale transactions are expected to generate net sale proceeds of approximately \$4.65 million.

Mady Affidavit, paras. 37-39

### **Financial Difficulties**

11. In 2014, JKDC began to experience financial difficulties in connection with South Unionville Square as a result of, among other things, significant delays and cost overruns.

Mady Affidavit, para. 40

12. As a result of such difficulties, JKDC is in default of its obligations to Am-Stat. The only source of revenue to repay the Am-Stat loan and other amounts owing by JKDC is the sale proceeds of the South Unionville Square commercial and residential units and the Vacant Lands.

Mady Affidavit, paras. 41 and 44

**Construction Lien Claimants**

13. Since November 27, 2014, eighteen (18) construction liens, with an aggregate value of approximately \$3.92 million, have been registered against title to all or parts of the Property.

Mady Affidavit, para. 45-46

**Urgent Need for the Appointment of a Trustee**

14. As a result of the registration of the construction liens against the Property, JKDC cannot close the sales of the Phase II Commercial Units that are scheduled to close on February 17, 2015. Additionally, JKDC does not have funds available to market and sell the unsold commercial and residential units and the Vacant Lands.

Mady Affidavit, para. 49

15. The appointment of Collins Barrow as trustee will be for the benefit of all parties that have an interest in the Property, including mortgagees, lien claimants, and purchasers, as it will:

- (a) allow for the trustee close the sale of the 18 Phase II Commercial Units scheduled to close on February 17, 2015, which will generate net sale proceeds of approximately \$4.65 million;
- (b) permit the trustee to market and sell the unsold Phase I Commercial Units, the unsold Phase II Commercial Units, the Unsold Residential Units and the Vacant Lands;

- (c) provide for the proceeds of sale of the Property to be paid into the trustee's trust account, for distribution to creditors in accordance with their entitlements; and
- (d) provide a single forum to determine and resolve any disputes concerning the amount, validity and priority of claims against the Property and its sale proceeds.

Mady Affidavit, para. 54

16. JKDC is also requesting that the Court grant vesting orders with respect to the sale of the 18 Phase II Commercial Units, so that the purchasers may obtain title to the units free and clear of all mortgages, construction liens and other encumbrances upon delivery of a trustee's certificate on each closing.

Mady Affidavit, para. 51

### **PART III – ISSUE**

- (a) Should the Court appoint Collins Barrow as trustee of the Property?
- (b) Should the Court grant vesting orders with respect to the sale of 18 Phase II Commercial Units?

### **PART IV – LAW AND ARGUMENT**

#### **Appointment of a Trustee**

17. 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)

18. 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

19. 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, JKDC 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”

20. 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)

21. 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.

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

22. 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

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

24. 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

25. 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

26. 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

27. In a recent decision of this Court, 144 sought the appointment of Collins Barrow as trustee under the CLA. Justice Penny was of the view that the appointment of a trustee was necessary to avoid chaos and that “[a]n orderly completion holds out the best hope for maximizing the value and therefore, return to creditors, of the project.”

Endorsement of The Honourable Mr. Justice Penny dated January 22, 2015,  
*Application of 144 Park Ltd. For the Appointment of a Trustee Under Section 68(1) of the Construction Lien Act*, CV-15-10843-00CL

28. JKDC respectfully submits that in the circumstances it is necessary and appropriate to appoint a trustee in order close the sale of the 18 Phase II Commercial Units so as to generate sale proceeds that will be distributed to creditors pursuant to Court order.

### **Vesting Orders**

29. Pursuant to section 100 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended:

“A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed”

*Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 100

30. Pursuant to section 68(5) of the CLA:

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

*Construction Lien Act, s. 68(5)*

31. The form of vesting order being sought by JKDC is substantially similar to the language in the draft Approval and Vesting Order that has been approved by the Commercial List Users' Committee and is regularly used by this Court in connection with sale transactions.

32. The sale of 18 Phase II Commercial Units are scheduled to close on February 17, 2015. The purchasers are expecting to receive title to their units free and clear of all encumbrances. As a result of the mortgages, construction liens, and other encumbrances registered against title to the 18 Phase II Commercial Units, it is necessary for the claims to be removed from title.

33. The vesting of title to the units in the purchasers free and clear of all encumbrances will prejudice no party, as their claims to the units will be transferred to the net sale proceeds to be held by the trustee and eventually distributed pursuant to Court order.

34. JKDC respectfully submits that in the circumstances it is necessary and appropriate to grant vesting orders so that the trustee may close the sale of the 18 Phase II Commercial Units.

**PART V – RELIEF REQUESTED**

35. JKDC respectfully requests that the Court grant an order appointing Collins Barrow as trustee under section 68 of the CLA, and grant vesting orders with respect to the sales of the 18 Phase II Commercial Units that are scheduled to close on February 17, 2015.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED,**



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## SCHEDULE “A”

### STATUTORY 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.

*Courts of Justice Act, R.S.O. 1990, c. C.43, as amended*

### **Vesting orders**

**100.** A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

## **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. Endorsement of The Honourable Mr. Justice Penny, *Application of 144 Park Ltd. For the Appointment of a Trustee Under Section 68(1) of the Construction Lien Act*, January 22, 2015, CV-15-10843-00CL
5. *Royledge Industries Inc. v. Perma-Roof Ontario Ltd.*, 1991 CarswellOnt 776 (Ct. J. (Gen. Div.))

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