

**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 TRUSTEE
(motion returnable June 4, 2015)**

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TO: THE SERVICE LIST

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PART I – NATURE OF THE MOTION

1. Collins Barrow Toronto Limited, the Court-appointed trustee (the “Trustee”) of property owned by Jade-Kennedy Development Corporation (“JKDC”) pursuant to section 68(1) of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended (the “CLA”), seeks an order of the Court authorizing it to terminate or disclaim two residential unit sale agreements entered into prior to the Trustee’s appointment with respect to property that is subject to this proceeding.

PART II – FACTS

2. JKDC is the registered owner of the South Unionville Square condominium project located in Markham, Ontario, which is comprised of, among other things, six residential units located in a 12-storey condominium tower. The residential units include units 117 and 218, which are each approximately 598 square feet in size (collectively, the “Units”).

Motion Record of the Trustee, Tab 2, Third Report of the Trustee dated June 1, 2015 (“**Third Report**”), paras. 1, 6 and 9 and Appendix “D” – Parcel Register for Unit 117 and Appendix “E” – Parcel Register for Unit 218 (collectively, “**Parcel Registers**”)

3. Pursuant to the Order of the Honourable Mr. Justice Pattillo of the Ontario Superior Court of Justice (Commercial List) dated February 11, 2015 (the “**Appointment Order**”), Collins Barrow Toronto Limited was appointed as Trustee.

Third Report, para. 8

4. Pursuant to paragraph 3 of the Appointment Order, the Trustee has been:

“expressly authorized and empowered...to act as receiver and manager of the Property... to receive, preserve and protect the Property...and to take any steps reasonably incidental to the exercise of these powers...”

Third Report, para. 2 and Appendix “A” – Appointment Order dated February 11, 2015

5. The property that is subject to the Appointment Order includes the Units. Mortgages in favour of Laurentian Bank of Canada (“**Laurentian**”), Am-Stat Corporation (“**Am-Stat**”) and Aviva Insurance Company of Canada (“**Aviva**”), along with a number of construction liens, have been registered against title to the Units.

Third Report, paras. 9 and 17 and Parcel Registers

6. On February 23, 2015, the Trustee was informed that Jade-Kennedy Residential Corporation, the vendor under sale agreements for residential units and a party related to JKDC, had entered into the following sale agreements for the Units as of February 9, 2015 (collectively, the “**Sale Agreements**”):

- (a) Agreement of Purchase and Sale dated February 9, 2015 between JKRC and Anna Gayle Andrew for the sale of unit 117 and a parking unit and locker unit, for the purchase price of \$200,000 (inclusive of HST and a deposit of \$5,000); and
- (b) Agreement of Purchase and Sale dated February 9, 2015 between JKRC and Roger James Dol (together with Anna Gayle Andrew, the “Purchasers” and singularly, a “Purchaser”) for the sale of unit 218 and a parking unit and locker unit, for the purchase price of \$200,000 (inclusive of HST and a deposit of \$5,000).

Third Report, paras. 6 and 11 and Appendix “F” – Agreement of Purchase and Sale dated February 9, 2015 for the sale of Unit 117 and Appendix “G” – Agreement of Purchase and Sale dated February 9, 2015 for the sale of Unit 218 (collectively, “Sale Agreements”)

7. The Trustee understands that the net purchase price for the Units, net of HST and applicable federal and provincial rebates, would each be \$190,114.07. No commission is payable under the Sale Agreements.

Third Report, para. 13

8. Pursuant to section 15 of the Sale Agreements, each Purchaser:

“...covenants and agrees that this Agreement is subordinate to and postponed to any mortgages arranged by the Vendor and any advances thereunder from time to time...”

Sale Agreements, s. 15

9. Pursuant to section 16 of the Sale Agreements, each Purchaser:

“... acknowledges that notwithstanding any rule of law to the contrary, that by executing this Agreement, it has not acquired any equitable or legal interest in the Unit or the Property.”

Sale Agreements, s. 16

10. The Trustee is of the view that a sale of the Units to the Purchasers pursuant to the Sale Agreements, if completed, would constitute improvident sales at amounts materially below fair market value and would be prejudicial to the mortgagees, the lien claimants and other creditors of JKDC, as:

- (a) at the time of the Trustee's appointment, unit 117 was listed for sale for \$270,900 and unit 218 was listed for sale for \$271,900;
- (b) JKDC was insolvent at the time the Sale Agreements were executed, and they were entered into on the eve of the appointment of the Trustee;
- (c) the previous listing agent has informed the Trustee that she has received many inquiries for the Units and has indicated that she can bring in an offer for unit 117 at an amount that is materially higher than the net purchase price for unit 117;
- (d) Unit 118 (same size as the Units) sold on June 3, 2014 for a net sale price of \$251,071.76;
- (e) Unit 217 (same size as the Units) sold on April 18, 2013 for a net sale price of \$247,364.54;
- (f) Unit 318 (same size as the Units) sold on April 6, 2014 for a net sale price of \$252,925.38;

- (g) the Trustee has received an offer for one of the remaining residential units, which was listed for sale on May 7, 2015, at a purchase price that is materially higher than the net purchase price to be received under the Sale Agreements; and
- (h) Laurentian and Am-Stat support, and Aviva does not oppose, the Trustee's motion to terminate or disclaim the Sale Agreements.

Third Report, paras. 16, 18, 20 and 23

11. The Purchasers have filed a responding affidavit sworn May 19, 2015 but have not brought a cross-motion seeking a Court order compelling specific performance of the Sale Agreements.

Third Report, para. 24 and Affidavit of Christopher Kit Andrew sworn May 19, 2015

PART III – ISSUE

- (a) Should the Court authorize the Trustee to terminate or disclaim the Sale Agreements?

PART IV – LAW AND ARGUMENT

Power of Receiver to Terminate or Disclaim an Agreement

12. The Trustee was appointed pursuant to section 68 of the *CLA*, which provides, in subparagraph (2), that, “[s]ubject to the supervision and direction of the court, a trustee appointed under subsection (1) may, (a) act as receiver and manager...”

CLA, s. 68(1)

13. Pursuant to paragraph 3 of the Appointment Order, the Trustee has been authorized and empowered to act as receiver and manager of the Property and to take any steps reasonably incidental to the exercise of these powers.

14. There is ample authority for the principle that a Court-appointed receiver has the ability to terminate or disclaim contracts that were entered into by the debtor prior to the receiver's appointment. In *The 2015 Annotated Bankruptcy and Insolvency Act*, the learned authors state that:

“A court-appointed receiver is not bound by existing contracts made by the debtor”

L.W. Houlden, G.B. Morawetz & J.P. Sarra, *The 2015 Annotated Bankruptcy and Insolvency Act*, L§30, p. 1079

15. In *Bennett on Receiverships*, the author states that:

“In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor, nor is the receiver personally liable for the performance of those contracts entered into before the receivership.”

F. Bennett, *Bennett on Receiverships*, 2nd Ed., pp. 341-342

16. The excerpt from *Bennett on Receiverships* was adopted by, *inter alia*, the Court of Queen's Bench of Alberta in *Bank of Montreal v. Scaffold Connection Corp.*, 2002 CarswellAlta 932, the British Columbia Court of Appeal in *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 CarswellBC 578, and the British Columbia Supreme Court in *Pope & Talbot Ltd., Re*, 2008 CarswellBC 1726. All of these cases stand for the principle that a receiver is not bound by existing contracts made by the debtor and may be authorized by a court to terminate or disclaim an agreement entered into by a debtor prior to the receiver's appointment.

Bank of Montreal v. Scaffold Connection Corp., 2002 CarswellAlta 932 (QB), paras. 1-11; *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 CarswellBC 578 (CA), paras. 2, 7, 15-20; *Pope & Talbot Ltd., Re*, 2008 CarswellBC 1726, paras. 1-10, 14-15, 17, 21-22 and 32;

17. As noted above, the Sale Agreements concern the proposed sale of real property (i.e. the Units) to the Purchasers. In *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 CarswellOnt 10743 ("*Firm Capital*"), this Court specifically considered the ability of a court-appointed receiver to terminate pre-existing sale agreements with respect to real property.

18. In *Firm Capital*, a receiver had been appointed by the Court over an unregistered condominium project. A number of units had been pre-sold to purchasers, some of which were occupying the units. The receiver brought a motion seeking authorization to market and sell the property and to terminate the existing sale agreements.

Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd., 2012 CarswellOnt 10743 (SCJ) ("*Firm Capital*"), paras. 1-7

19. All of the sale agreements contained clauses expressly subordinating the purchasers' interests thereunder to the mortgagee. The mortgage had been registered prior to the time when the sale agreements had been entered into and was in default. Additionally, the sale agreements provided that the purchaser did not have an interest in the unit.

Firm Capital, paras. 5, 6 10 and 26

20. Justice Morawetz (as he then was) held that the position of the mortgagee had legal priority over the interests of the purchasers. Justice Morawetz went on to note that it was necessary for the receiver to take into account equitable considerations of all stakeholders before disclaiming or terminating the contracts. The remaining question was whether there were any equities in favour of the purchasers that would justify overriding the first mortgagee's legal

priority rights. The mortgagee argued that the equitable considerations with respect to the purchasers were limited, and cited that certain of the purchasers had only paid deposits that were still being held in trust. With respect to this category of purchasers, Justice Morawetz noted that:

“... it seems to me that these purchasers would be entitled to the return of their deposits held in trust if the Sale Agreements are terminated and they will not incur any significant financial losses.”

Firm Capital, paras. 27 and 31-38

21. Justice Morawetz concluded that the equities did not favour the purchasers, as they had the remedy to receive back their original deposits, and granted the receiver’s motion to terminate or disclaim the contracts.

Firm Capital, para. 38

22. Additionally, in *bcIMC Construction Fund Corp. v. Chandler Home Street Ventures Ltd.*, 2008 CarswellBC 1421, a receiver appointed in two foreclosure actions sought the direction of the Court as to whether it could disclaim certain contracts of purchase and sale for units in a development that was still to be constructed. The receiver was of the view that the pre-sales for many of the units were significantly below the current market value of the units. The British Columbia Supreme Court, citing, *inter alia*, *Bennett on Receiverships*, *New Skeena* and *Pope & Talbot*, held that the receiver had the power to disclaim the contracts.

bcIMC Construction Fund Corp. v. Chandler Home Street Ventures Ltd., 2008
CarswellBC 1421 (SC), paras. 1, 4, and 53-58

23. In the case before the Court, the equities favour the Court granting the Trustee’s request. If the Trustee is authorized to terminate or disclaim the Sale Agreements, it will return the deposits to the Purchasers, which is a satisfactory remedy in the circumstances, and will attempt

to recover greater amounts on the sale of the Units to the benefit of the mortgagees, lien claimants and other stakeholders of JKDC. If the Trustee's request is denied and the Trustee is required to complete the Sale Agreements, it will be to the detriment to the mortgagees, construction lien claimants and other stakeholders of JKDC, as the Court will be compelling the sale of the Units at below fair market value.

24. In addition to the case law setting out the authority of a Court-appointed receiver to terminate or disclaim contracts, the Trustee submits that there is statutory jurisdiction for the granting of such relief under the *CLA*. 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)

25. The primary purpose of the appointment of a trustee is to protect the interest of lien claimants. Section 68(2) goes on to enumerate the powers of an appointed trustee, which include:

- (2) Subject to the supervision and direction of the court, a trustee appointed under subsection (1) may,
 - (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. As a result, the Court has broad statutory jurisdiction to “take such other steps as are appropriate in the circumstances.” The Trustee respectfully submits that it is appropriate in the

circumstances to authorize the Trustee to terminate or disclaim the Sale Agreements, as the sale of the Units under such agreements would be detrimental to construction lien claimants, as it would generate sale proceeds at below market value and reduce the amount of proceeds available to be recovered by the lien claimants.

PART V – RELIEF REQUESTED

27. The Trustee respectfully requests that the Court grant an order authorizing it to terminate or disclaim the Sale Agreements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



for **Harvey Chaiton and Sam Rappos**
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Lawyers for the Trustee

SCHEDULE "A"

STATUTORY AUTHORITIES

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.

...

SCHEDULE "B"

CASE AUTHORITIES

1. *Bank of Montreal v. Scaffold Connection Corp.*, 2002 CarswellAlta 932 (QB)
2. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 CarswellBC 578 (CA)
3. *Pope & Talbot Ltd., Re*, 2008 CarswellBC 1726 (SC)
4. *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 CarswellOnt 10743 (SCJ)
5. *bcIMC Construction Fund Corp. v. Chandler Home Street Ventures Ltd.*, 2008 CarswellBC 1421 (SC)

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