

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

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

**AND IN THE MATTER OF THE 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**

**EIGHTEENTH REPORT TO THE COURT OF COLLINS BARROW TORONTO
LIMITED AS CONSTRUCTION LIEN TRUSTEE OF SOUTH UNIONVILLE SQUARE**

October 12, 2017

INTRODUCTION

1. By Order of The Honourable Mr. Justice Pattillo of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated February 11, 2015 (the "**Appointment Order**"), Collins Barrow Toronto Limited was appointed trustee (the "**Trustee**") pursuant to section 68(1) of the *Construction Lien Act* (Ontario) (the "**CLA**"), of the lands and premises legally described in Schedule "A" of the Appointment Order comprised of commercial and residential condominium units, parking and locker units, and vacant lands owned by Jade-Kennedy Development Corporation ("**JKDC**") (the "**Property**").
2. The Appointment Order authorized the Trustee to, among other things, act as receiver and manager of the Property, take possession and control of the Property and any and all proceeds, receipts and disbursements arising out of or from the Property, market any or all of the Property, and sell, convey, transfer, lease or assign the Property or any part or parts thereof with the approval of the Court.
3. All Court documents referred to herein, and other publicly available information relating to this proceeding, has been posted on the Trustee's website, which can be found at:

<http://www.collinsbarrow.com/en/cbn/jade-kennedy-development-corporation>

PURPOSE OF EIGHTEENTH REPORT

4. The purpose of this Eighteenth Report of the Trustee (the "**Eighteenth Report**")

is to:

(a) request that the Court grant orders:

- (i) approving the sale by the Trustee of Phase I Mall Unit 316 to 2599406 Ontario Inc. (the "**Purchaser**") and vesting such property in the Purchaser free and clear of all claims and encumbrances (other than permitted encumbrances) upon delivery of a certificate by the Trustee to the Purchaser;
- (ii) approving the sale by the Trustee of Phase I Mall Unit 360 to the Purchaser and vesting such property in the Purchaser free and clear of all claims and encumbrances (other than permitted encumbrances) upon delivery of a certificate by the Trustee to the Purchaser;
- (iii) authorizing the Trustee, following the closings of the sale transactions detailed above, to distribute amounts to York Region Standard Condominium Corporation No. 1228 ("**YRSCC 1228**") from the net sale proceeds of Phase I Mall Unit 316 and Phase I Mall Unit 360 on account of its registered and valid condominium liens;

- (iv) authorizing the Trustee to distribute \$23,500 to Guest Tile Inc. ("**Guest Tile**"), a construction lien claimant, from the net sale proceeds of the Kiosks (as defined below), on account of Guest Tile's legal costs with respect to its construction lien claim; and
- (b) report to the Court with respect to matters related to payment of the legal fees and disbursements of Laurentian Bank of Canada ("**LBC**" or the "**Bank**") from the net sale proceeds of certain of the Property.

TERMS OF REFERENCE

5. In preparing this Eighteenth Report and making the comments herein, the Trustee has relied upon unaudited financial information, the books and records of JKDC, discussions with management and employees of JKDC and other companies within the MADY group of companies, and information received from other third-party sources (collectively, the "**Information**"). Certain of the information contained in this Eighteenth Report may refer to, or is based on, the Information. As the Information has been provided by JKDC or other parties, the Trustee has relied on the Information and, to the extent possible, reviewed the Information for reasonableness. However, the Trustee has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards pursuant to the CPA Canada Handbook and, accordingly, the Trustee expresses no opinion or other form of assurance in respect of the Information.

SALE OF UNITS 316 and 360

Phase I Commercial Units at the SUSQ Project

6. JKDC is an Ontario corporation that was incorporated on January 30, 2008 and has its registered office located in Markham, Ontario. JKDC was incorporated for the purpose of being the registered owner of the Property and developer of the South Unionville Square condominium project (the "**SUSQ Project**") to be constructed on certain portions of the Property, which is located in Markham, Ontario.
7. Phase I of the SUSQ Project was the development and construction of 28 residential townhomes, a T&T Supermarket, and a commercial condominium project with units for retail, restaurant, office and medical services.
8. Construction of Phase I was substantially completed on March 5, 2013 and the condominium declaration was registered on April 17, 2013, which established YRSCC 1228.
9. As of the date of the Appointment Order, JKDC was still the registered owner of the following Phase I properties, among others:
 - (a) eleven mall units located on level 2 of The Mall at Langham Square (previously known as The Mall at South Unionville Square) (the "**Mall**") (collectively, the "**Phase I Mall Units**"); and
 - (b) three kiosks located on level 1 of Langham Square (the "**Kiosk Units**").

10. As noted above, pursuant to paragraphs 3(k) through (m) of the Appointment Order, the Trustee was authorized by the Court to market the Property, sell the Property with the approval of the Court, and to apply for vesting orders necessary to convey the Property free and clear of all claims and encumbrances affecting the Property.
11. The Trustee has completed the sale of the Kiosk Units in accordance with the Approval and Vesting Order (Kiosk Units) of The Honourable Mr. Justice Pattillo dated October 16, 2015. As previously reported to the Court, the Trustee realized net sale proceeds of approximately \$89,000 with respect to the Kiosk Units.

Real Estate Agents

12. Pursuant to paragraph 3(d) of the Appointment Order, the Trustee was authorized by the Court to engage agents to assist with the exercise of the Trustee's powers and duties.
13. As previously reported to the Court, the Trustee had retained TradeWorld Realty Inc. ("**TradeWorld**") to list certain unsold Property for sale, pursuant to a listing agreement dated May 4, 2015.
14. After several extensions, the Trustee allowed this agreement to expire on January 15, 2017.

15. During its over 20 month retainer as real estate listing agent, TradeWorld was able to sell the Kiosk Units and one commercial/retail unit legally known as unit 60 on level 1.
16. During its retainer period, TradeWorld was unable to locate a buyer for any of the Phase I Mall Units, including Unit 316 and Unit 360. TradeWorld had listed Unit 316 for \$109,900 and Unit 360 for \$149,900.
17. In its over 20 month period as real estate listing agent for Unit 316 and Unit 360, TradeWorld did not receive any offers to purchase these units.
18. Given the number of units still available for sale and the ongoing carrying costs for these units, the Trustee requested a proposal from Century 21, who had recently sold similar units in the same market. Century 21 proposed a targeted, comprehensive three phase marketing campaign with supportable price reductions in order to profile and sell the remaining units. This campaign includes: a full time sales representative on site seven days a week, two sales events, three festival events, targeted radio/magazine advertising and detailed monthly reports, all at Century 21's expense.
19. The Trustee retained Century 21 as its real estate listing agent for all unsold Property (excluding certain parking units) on February 3, 2017. A festival event was held on site on February 25th and 26th to coincide with Chinese New Year celebrations. Further marketing campaigns have been held resulting in thirteen offers being approved to date, the offers described herein, and interest in other units.

Unit 316

20. Unit 316 is 176 gross square feet and is located on level 2 of the Mall. Century 21 listed this unit for sale at a price of \$78,000.
21. After some negotiation, Yuan Li agreed to an offer price of \$70,000, as set out in the agreement of purchase and sale executed by Yuan Li on September 24, 2017 and accepted by the Trustee on September 28, 2017 a copy of which, as amended to change the purchaser to the Purchaser, is attached hereto and marked as **Appendix "A"**. This price is 10% below the listing price. A copy of the parcel register for Unit 316 is attached hereto and marked as **Appendix "B"**.
22. Unit 316 is subject to the following encumbrances:
 - (a) a \$30.0 million charge in favour of Aviva Insurance Company of Canada ("**Aviva**");
 - (b) a condominium lien in favour of YRSCC No. 1228 in the amount of \$1,615;
 - (c) a \$3.6 million charge in favour of LBC;
 - (d) a \$2.4 million charge in favour of LBC;
 - (e) an \$8.0 million charge in favour of MarshallZehr Group Inc. ("**MZG**"); and
 - (f) construction liens in favour of Guest Tile and Draglam.

23. The Trustee believes that Unit 316 has been fairly and sufficiently exposed to the market through the listing with TradeWorld and the recent targeted marketing campaign completed by Century 21, and that all reasonable steps have been taken to obtain the best price possible for the unit.
24. On this basis, the Trustee recommends that the sale transaction be approved by the Court, as:
- (a) it is the only offer the Trustee has received for this unit;
 - (b) the Purchaser has advised the Trustee that the price was negotiated on the basis that they were buying both Unit 316 and Unit 360;
 - (c) the Trustee was able to move the closing date up;
 - (d) the offer is recommended by Century 21 based on current market conditions;
 - (e) the owner will operate a business; and
 - (f) the offer is unconditional other than with respect to the Trustee obtaining Court approval of the sale transaction and a vesting order.
25. If the Court approves the sale transaction, the sale of Unit 316 is scheduled to close on October 25, 2017.
26. In the event that this transaction is approved by the Court and closes, the Trustee will hold the net sale proceeds subject to further order of the Court, other than taking steps to distribute to YRSCC 1228 the amount it is entitled to in

connection with its registered condominium lien, as to be confirmed by the Trustee.

Unit 360

27. Unit 360 is 251 gross square feet and is located on level 2 of the Mall. Century 21 listed this unit for sale at a price of \$100,000.
28. After some negotiation, Yuan Li agreed to a price of \$89,000, as set out in the agreement of purchase and sale executed by the Units 316/360 Purchaser on September 24, 2017 and accepted by the Trustee on September 28, 2017 a copy of which, as amended to change the purchaser to the Purchaser, is attached hereto and marked as **Appendix "C"**. This price is 11% below the net listing price. A copy of the parcel register for Unit 360 is attached hereto and marked as **Appendix "D"**.
29. Units 360 is subject to the same encumbrances listed in paragraph 22 for Unit 316, although the condominium lien is in the amount of \$2,218.
30. The Trustee believes that Unit 360 has been fairly and sufficiently exposed to the market through the listing with TradeWorld and the recent targeted marketing campaign completed by Century 21, and that all reasonable steps have been taken to obtain the best price possible for the unit.
31. On this basis, the Trustee recommends that the sale transaction be approved by the Court, as:
 - (a) it is the only offer the Trustee has received for this unit;

- (b) the Purchaser advises that the price was negotiated on the basis that they were buying both Unit 316 and Unit 360;
 - (c) the Trustee was able to move the closing date up;
 - (d) the offer is recommended by Century 21 based on current market conditions;
 - (e) the owner will operate a business; and
 - (f) the offer for Unit 360 is unconditional other than with respect to the Trustee obtaining Court approval of the sale transaction and a vesting order.
32. If the Court approves the sale transaction, the sale of Unit 360 is scheduled to close on October 25, 2017.
33. In the event that this transaction is approved by the Court and closes, the Trustee will hold the net sale proceeds subject to further order of the Court, than taking steps to distribute to YRSCC 1228 the amount it is entitled to in connection with its registered condominium lien, as to be confirmed by the Trustee.

GUEST TILE

34. As set out in detail in the Trustee's Seventeenth Report to the Court dated September 25, 2017 (the "**Seventeenth Report**"), Guest Tile is a construction lien claimant that has received distributions from the Trustee from the net sale

proceeds of the SUSQ Property in the principal amount of its construction lien claim pursuant to Court orders, as it registered its lien against SUSQ Property that was otherwise not subject to encumbrances that were to still be relied upon by creditors. A copy of the Seventeenth Report, without appendices, is attached hereto and marked as **Appendix "E"**.

35. Guest Tile sought payment of its legal fees and disbursements related to its involvement in this proceeding in the partial indemnity amount of \$27,000. Guest Tile had also taken the position that it is entitled to payment of interest with respect to its construction lien claim.
36. Following numerous discussions, the Trustee and Guest Tile have agreed to a resolution that will result in, subject to this Court's approval, Guest Tile receiving a distribution in the amount of \$23,500 from the net sale proceeds of the otherwise unencumbered Kiosks on account of its legal costs claim, and Guest Tile will not pursue any interest claim in this proceeding.
37. The Trustee is of the view that this resolution is reasonable in the circumstances, as it resolves the issue of Guest Tiles costs and interest claim without any additional professional expenses to be incurred by the Trustee. As a result, the Trustee requests that the Court authorize it to distribute \$23,500 to Guest Tile from the net sale proceeds of the otherwise unencumbered Kiosks.

LBC

38. As has been previously reported to the Court, the development and construction of part of the SUSQ Project was financed by credit facilities made available to

JKDC by Laurentian pursuant to a commitment letter dated August 4, 2011, a copy of which is attached hereto and marked as **Appendix “F”**.

39. In connection with the credit facilities, Laurentian was granted, among other things, the following security:
- (a) a charge/mortgage in the principal amount of \$45,000,000, a copy of which is attached hereto and marked as **Appendix “G”** (the “LBC Charge”);
 - (b) a general security agreement, a copy of which is attached hereto and marked as **Appendix “H”**;¹ and
 - (c) a deposit trust agreement, a copy of which is attached hereto and marked as **Appendix “I”**.
40. The LBC Charge was registered against title to certain of the residential units in Phase II of the SUSQ Project, the commercial units in Phase II, and property realized upon by the Trustee that has been referred to as the “Vacant Lands” through this proceeding. The Property subject to the LBC Charge is also subject to a subsequent charge registered in favour of Am-Stat Corporation (“**Am-Stat**”).
41. The Bank has confirmed that, prior to the commencement of this proceeding, JKDC had repaid all amounts owing to the Bank under the credit facilities, other than certain contingent liabilities under the letters of credit facility.

¹ At the time of the commencement of this proceeding, the Bank had registered a financing statement against the personal property of JKDC in accordance with the *Personal Property Security Act*.

42. As set out in the Seventeenth Report, LBC had issued letters of credit (“LCs”) in connection with JKDC’s obligations to complete certain works pursuant to site plan, construction and other agreements. JKDC posted cash collateral with Laurentian in support of the LCs. The cash collateral was advanced to JKDC by Laurentian under its letters of credit facility.
43. As at the date of the Trustee’s appointment, there were eleven (11) irrevocable standby LCs outstanding with a total aggregate value of \$3,038,273.54.
44. At the request of the Bank, the Trustee took steps to replace LBC as the LC provider with TD Bank. The Trustee sought this Court’s approval of the arrangements it had entered into with TD Bank, which was granted pursuant to the Order of The Honourable Madam Justice Conway dated March 22, 2016.
45. The Trustee completed the transaction with LBC and TD Bank, and the LCs that had been issued by Laurentian were terminated and replaced by TD Bank issued LCs in early April 2016. Additionally, the cash collateral held by Laurentian, after payment of Laurentian’s fees and costs, was transferred to TD Bank to secure the replacement letters of credit.
46. As a result of the work completed by the Trustee and its third party professional consultants and trades, the Trustee received \$1,758,457.84 in net LC proceeds from Laurentian in connection with released LCs.

47. Prior to releasing funds to the Trustee, Laurentian retained an aggregate amount of \$231,742.62 on account of fees, which included \$62,704.84 used by LBC to pay the invoices of its legal and other advisors.
48. As has been previously reported to the Court, a dispute arose between LBC and certain construction lien claimants as to whether the Bank was entitled to payment of its professional fees from the net sale proceeds of the Property subject to the LBC Charge in priority to the claims of construction lien claimants.
49. The parties agreed to a priority resolution process, which was approved by the Court pursuant to the Order of The Honourable Mr. Justice Wilton-Siegel dated June 30, 2016. The motion with respect to the priority issues was heard by Justice Wilton-Siegel on October 7 and 11, 2016.
50. On December 6, 2016, Justice Wilton-Siegel released an Endorsement, which provided at paragraphs 63 through 66 that the Bank's professional fees were secured by the LBC Charge in priority to the claims of the construction lien claimants. Attached hereto and respectively marked as **Appendices "J"** and **"K"** are copies of the Endorsement and the Order dated December 6, 2016.
51. The Bank's counsel, ThortontoGroutFinnigan LLP ("**TGF**"), has provided copies of its outstanding invoices in the aggregate amount of \$96,595.30 and has requested that the Trustee distribute this amount to the Bank from the net sale proceeds of the Property subject to the LBC Charge. As noted in the Seventeenth Report, the Trustee is maintaining a reserve in this amount from the net sale proceeds.

52. As noted above, Am-Stat has a charge against the same Property that is encumbered by the LBC Charge. The Trustee understands that Am-Stat is effectively the next-in-line creditor to receive payment of the net sale proceeds of the Property subject to the LBC Charge. As a result, the Trustee, through its counsel, contacted Am-Stat's counsel and requested confirmation whether Am-Stat would be taking any position in connection with the requested payment of the Bank's legal fees owing to TGF.
53. The Trustee understands that counsel to Am-Stat has raised concerns about whether the Endorsement and Order of Justice Wilton-Siegel addresses a potential priority issue between LBC and Am-Stat with respect to the net sale proceeds of the Property subject to their charges.
54. The Trustee further understands that, although the parties have exchanged correspondence, no resolution has been reached. As a result, it may be necessary for the Trustee to bring a motion for advice and direction of the Court in the event that a resolution cannot be agreed to by the Bank and Am-Stat.

All of which is respectfully submitted to this Court as of this 12th day of October, 2017.

COLLINS BARROW TORONTO LIMITED

In its capacity as Trustee under the Construction Lien Act of Jade-Kennedy Development Corporation as owner of South Unionville Square and not in its personal capacity

Per:



Bryan A. Tannenbaum, FCPA, FCA, FCIRP, LIT
President