

**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***

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

SEPTEMBER 30, 2016

INTRODUCTION AND PURPOSE OF THE NINTH REPORT

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. Copies of all documents referred to in this Twelfth Report that are not attached hereto as appendices can be found on the Trustee's website set out below, along with copies of all materials served and filed in this proceeding and Court orders and endorsements.

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

PURPOSE OF THE NINTH REPORT

4. The purpose of this Ninth Report of the Trustee (the “**Ninth Report**”) is to provide information with respect to matters related to the Trustee’s motion for advice and direction returnable on October 7, 2016 and the outstanding priority dispute between mortgagees and construction lien claimants under the Order (Priority Resolution Process) of The Honourable Mr. Justice Wilton-Siegel dated June 30, 2016 (the “**Priority Resolution Process Order**”), a copy of which is attached hereto as **Appendix “A”**.

TERMS OF REFERENCE

5. In preparing this Ninth 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 Ninth 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.

BACKGROUND

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. JKDC sought the appointment of the Trustee as it was insolvent, contractors had registered construction lien claims against title to the Property, and the appointment was necessary to complete the closing of certain pre-sold commercial/retail units, market and sell the unsold Property, and distribute the sale proceeds pursuant to Court order(s).

Phase I

8. 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.
9. Construction of Phase I was substantially completed on March 5, 2013 and the condominium declaration was registered on April 17, 2013, which established York Region Standard Condominium Corporation No. 1228 ("**YRSCC 1228**").
10. As of the date of the Appointment Order, JKDC was still the registered owner of the following Phase I properties:

- (a) one commercial/retail unit (legally known as unit 60, level 1) ("**Unit 60**");
- (b) eleven mall units (located in "The Mall at Langham Square" on level 2) (collectively, the "**Phase I Mall Units**");
- (c) ten kiosks units (three of which are located on level 1 and the remaining eight on level 2) (collectively, the "**Phase I Kiosk Units**", and together with Unit 60 and the Phase I Mall Units, the "**Phase I Commercial Units**"); and
- (d) four (4) unsold parking units that are only accessible to the residents of the Phase I townhomes (collectively, the "**Phase I Parking Units**").

Phase II

11. Phase II of the SUSQ Project involved the two-stage development and construction of a 12-storey condominium-apartment tower, which contains residential, parking and locker units in the tower and twenty-one (21) commercial/retail units located in, adjacent to and/or underneath the tower.
12. The first stage was the development and construction of the residential tower. Construction was substantially completed on June 10, 2014 and the residential condominium declaration was registered on September 11, 2014, which established York Region Standard Condominium Corporation No. 1265.
13. As at the Trustee's appointment, JKDC was still the registered owner of the following Phase II residential properties:

- (a) six residential units (suites 117, 218, 827, 1216, 1521 and 1527)
(collectively, the “**Phase II Residential Suites**”);
 - (b) eight parking units (units 4, 26, 50, 80, 125, 178, 179 and 188 on level B)
(collectively, the “**Phase II Parking Units**”); and
 - (c) six locker units (units 282, 327, 330, 333, 335 and 373 on level B)
(collectively, the “**Phase II Locker Units**”).
14. The second stage of the Phase II development and construction was the twenty-one commercial units (collectively, the “**Phase II Commercial Units**”).¹
15. On January 16, 2015, the registered owner of the land where the Phase II Commercial Units were located was transferred from JKDC to YRSCC 1228. As a result, the Phase II Commercial Units now form part of YRSCC 1228.
16. As of the date of the Appointment Order, eighteen (18) of the 21 Phase II Commercial Units were subject to existing agreements of purchase and sale and were scheduled to close on February 17, 2015.²
17. Pursuant to the Appointment Order, the Trustee was authorized to complete the existing agreements of purchase and sale for the 18 pre-sold Phase II Commercial Units.

¹ The Phase II Commercial Units are units 85 through 98 on level A and units 355 through 361 on level 1.

² The three unsold Phase II Commercial Units were units 85 on level A and 360 and 361 on level 1.

Phase III / Vacant Lands

18. Additionally, there was to be the planned development and construction of thirteen (13) freehold townhomes and two (2) single detached homes on vacant lands owned by JKDC (the "**Vacant Lands**"). The Vacant Lands are just south of the SUSQ Project.
19. Although commonly referred to as Phase III of the SUSQ Project, the Trustee understands that there was to be no connection or common purpose between the SUSQ Project and the freehold townhomes and detached homes to be constructed on the Vacant Lands. A street (South Unionville Avenue) and a roundabout separates the SUSQ Project from the Vacant Lands. There was no intent for the purchasers of the townhomes and houses to be constructed on the Vacant Lands to have any special access to or use of the SUSQ Project.
20. JKDC and the MADY Group did not intend to build the homes to be situated on the Vacant Lands. JKDC had entered into an agreement of purchase and sale for the Vacant Lands with Primont Homes (Harmony) Inc. ("**Primont**") in November 2011 and was to complete the servicing requirements for the Vacant Lands. JKDC did not complete the servicing under the agreement with Primont and, notwithstanding extensions and amendments, a sale of the Vacant Lands was not completed by JKDC prior to the Trustee's appointment.
21. The terms of this agreement were not satisfied and upon the appointment of the Trustee this specific arrangement was terminated. A new arrangement was

subsequently negotiated between the trustee and Primont at a much higher price, increasing the realization by in excess of \$1.0 million.

Construction Lien Claims

22. Construction liens totalling approximately \$3.7 million were registered against the Property. Attached hereto as **Appendix "B"** is a chart that sets out the eighteen (18) parties (collectively, the "**Construction Lien Claimants**") that registered nineteen (19) construction liens against the Property, the face amount of each lien, and the property that is subject to the lien.
23. Pursuant to the Order (re Lien Claims Process) of Justice Pattillo dated May 1, 2015, the Trustee is to implement and administer a lien claims process with respect to condominium liens and with respect to construction liens (the "**Construction Lien Claims Process**").
24. As previously reported to the Court, and pursuant to the Order of Justice Wilton-Siegel dated June 30, 2016 and the Order of The Honourable Mr. Justice Newbould dated August 2, 2016, the Trustee has made distributions in the aggregate sum of \$1,319,543.24 to certain of the Construction Lien Claimants on account of the deficiency in the holdbacks.
25. The Trustee continues to hold the amount of \$458,814.44 in reserve with respect to the holdback claims of certain Construction Lien Claimants pursuant to the Order of Justice Wilton-Siegel dated June 30, 2016.

26. As a result of the distributions made to date, the current outstanding amount up to the lien amounts filed by each Construction Lien Claimant is set out below:

Lien Claimant	Updated Lien Amount
Aluminium Window Design Installations Inc.	\$148,900.59
Brody Wall System Ltd.	\$36,747.10
CRS Contractors Rental Supply General Partner Inc.	\$12,855.27
Dircam Electric Limited (" Dircam ")	\$473,257.85
2050491 Ontario Inc. o/a The Downsview Group	\$501,133.07
Draglam Waste & Recycling Inc.	\$0.00
Frendel Kitchens Limited	\$178,154.49
Global Fire Protection Ltd.	\$0.00
Global Mechanical Ltd.	\$0.00
Global Mechanical Ltd.	\$0.00
Global Precast Inc.	\$49,026.67
Great Pyramid Aluminum Ltd.	\$50,358.46
Guest Tile Inc. (" Guest Tile ")	\$107,820.88
Imperial Trim Supply Ltd.	\$442,422.77
MJC Contracting 2014 Inc. (" MJC ")	\$80,683.14
Procan Inc.	\$10,780.20
Sereen Painting Ltd.	\$200,000
Skyway Canada Limited	\$11,111.93
Triumph Roofing and Sheet Metal Inc.	\$22,504.02
TOTAL	\$2,325,756.44

Mortgages

27. As has been previously reported to the Court, the following parties registered mortgages against portions of the Property:

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

LBC

28. As set out in the Affidavit of Jeff Weller of LBC sworn July 11, 2016, the Bank has registered:

- (a) a \$45.0 million charge over certain of the Property as security for JKDC's obligations under construction loan, letter of credit and line of credit facilities; and
- (b) a \$3.6 million collateral charge over certain of the Property with respect to the indebtedness of 144 Park Ltd. ("**144 Park**") to LBC.

29. Additionally, LBC registered a \$2.4 million charge over certain of the Property; however, LBC has confirmed there is no outstanding indebtedness or obligations that are secured by this charge.

Am-Stat

30. As has been previously reported, the Trustee understands that Am-Stat advanced \$10.0 million to JKDC and a related company, Milliken Development Corporation, in September 2013. As security for its indebtedness to Am-Stat, JKDC granted a \$10.0 million charge, which was registered against certain of the Property in August 2013.
31. The Trustee notes that, notwithstanding the assertions contained in an affidavit filed by Guest Tile, Am-Stat's mortgage was registered against the properties set out below, not just the Vacant Lands.

MarshallZehr

32. As has been previously reported, the Trustee understands that JKDC granted an \$8.0 million collateral charge registered in favour of MarshallZehr over certain of the Property with respect to the indebtedness owed by 144 Park to MarshallZehr.

Aviva

33. Aviva provided Tarion bonds and deposit insurance facilities to JKDC with respect to the Property. JKDC entered into Indemnity Agreements with Aviva, pursuant to which it agreed to indemnify Aviva with respect to the Tarion bonds. JKDC granted security to Aviva with respect to its indemnification obligations, including a \$30.0 million charge and a \$16.5 million charge registered over certain of the Property.

34. The following chart sets out the mortgages registered in favour of the above-noted mortgagees and the portions of the Property that the mortgages were registered against:

Mortgagee	Mortgage	Mortgaged Property
Aviva	\$30.0 million charge	Phase I Commercial Units; Phase I Parking Units; Phase II Commercial Units
	\$16.5 million charge	Phase II Commercial Units; Phase II Residential Suites; Phase II Parking Units; Phase II Locker Units
LBC	\$45.0 million charge	Phase II Commercial Units; Phase II Residential Units; Phase II Parking Units; Phase II Locker Units
	\$3.60 million charge	Phase I Commercial Units (except for three Phase I Kiosk Units)
MarshallZehr	\$8.0 million charge	Phase I Commercial Units (except for three Phase I Kiosk Units)
Am-Stat	\$10.0 million charge	Phase II Commercial Units

PROPERTY REALIZATIONS

35. As previously reported to the Court, the Trustee has retained TradeWorld Realty Inc. to list all unsold Property for sale, other than the Phase I Parking Units and the Vacant Lands, pursuant to a listing agreement dated May 4, 2015. The Trustee is attempting to find purchasers for the Phase I Parking Units.

36. The Trustee has prepared a statement of receipts and disbursements as of September 9, 2016, a copy of which, along with relevant notes, are attached as **Appendix "C"**. Additionally, attached as **Appendix "D"** is a chart that sets out:

- (a) Property sold by the Trustee to date; and

- (b) the net sale proceeds realized by the Trustee for the sold Property, which does not include an allocation of the costs of the proceeding.
37. The Trustee has been asked by counsel to a Construction Lien Claimant to confirm whether there are sufficient net sale proceeds on hand to repay Construction Lien Claimants in full if the Construction Lien Claimants are successful and obtain an Order from the Court directing payment of their claims in full in priority to the claims of mortgagees of the Property.
38. The Trustee cannot provide such a confirmation at this time, as the answer is dependent on whether the claims of the Construction Lien Claimants attach to the net sale proceeds of the Vacant Lands. This issue has been previously discussed in the Trustee's reports and has not been resolved to date. The Trustee understands that Am-Stat has taken the position that the claims of the Construction Lien Claimants do not attach to the net sale proceeds of the Vacant Lands.
39. Additionally, as previously reported to the Court and reflected in the statement of receipts and disbursements and notes, the Trustee has expended significant time and effort to satisfy outstanding matters/agreements, primarily with the City of Markham and the Regional Municipality of York related to letters of credit that were obtained by JKDC to the benefit of certain parties and to recover the funds that were being held as security with respect to the issuance of such letters of credit.

40. As of September 9, 2016, the Trustee had recovered net letter of credit proceeds of \$1,582,259.89. The remaining value of the outstanding letters of credit and related cash collateral held at TD Bank as at September 9, 2016 is \$1,158,685.24. The issue of which creditors of JKDC have a valid and enforceable claim against the recovered net letter of credit proceeds still needs to be determined.

41. The Trustee was also asked to confirm whether there will be sufficient net sale proceeds available for the mortgagees to be paid in full and funds remaining to be distributed to the Construction Lien Claimants in the event an Order is granted that the claims of the mortgagees stand in priority to the claims of the Construction Lien Claimants.

42. The Trustee is not in a position to provide such a confirmation at this time, as all result of the issues noted above and because all of the Property has not been realized upon, no allocation of the costs of the proceeding has been completed, and the amounts owing under certain of the mortgages, such as Aviva's mortgage, currently cannot be determined.

PRIORITY RESOLUTION PROCESS

43. As has been previously reported to the Court, there have been ongoing discussions with respect to a potential priority dispute between the Construction Lien Claimants and the mortgagees of the Property with respect to amounts in excess of the deficiency in the holdback.

44. In the Second Supplement to the Sixth Report of the Trustee dated June 28, 2016, the Trustee requested that the Court establish a procedure for the determination of the priority, if any, of the Construction Lien Claimants over the claims of LBC and Am-Stat to the next sale proceeds of the Property in amounts in excess of the basic ten per cent (10%) holdback (the "**Basic Holdback**").
45. The Court established such a procedure in the Priority Resolution Process Order.
46. Pursuant to paragraph 2(b) of the Priority Resolution Process Order, any Construction Lien Claimant that was asserting priority over the mortgage for an amount in excess of the Basic Holdback was to serve a responding affidavit on or before August 3, 2016 (the "**Bar Date**").
47. Pursuant to paragraph 3 of the Priority Resolution Process Order, if a Construction Lien Claimant did not deliver a responding affidavit by the Bar Date, it would be forever barred from asserting a claim against the Property in priority to the mortgages of the Bank and Am-Stat.
48. A copy of the Priority Resolution Process Order was circulated to the service list for this proceeding by counsel to the Trustee on June 30, 2016.
49. On July 26, 2016, counsel to the Trustee sent an email to the service list, confirming the Bar Date of August 3, 2016, and that Construction Lien Claimants that did not serve a responding affidavit by August 3, 2016 would be barred from asserting a priority claim.

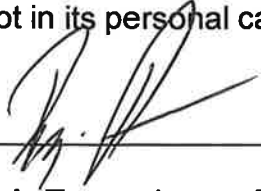
50. Three Construction Lien Claimants, Guest Tile, Dircam and MJC, served responding affidavits by the Bar Date.
51. On August 4, 2016, counsel to the Trustee sent an e-mail to the service list to confirm receipt of the responding affidavits and that all other construction lien claimants were now barred pursuant to the Priority Resolution Process Order.
52. Counsel to the Trustee subsequently was contacted by counsel to certain Construction Lien Claimants that had not served responding affidavit by the Bar Date, and was informed that they took the position that paragraph 3 of the Priority Resolution Process Order was contrary to section 80 of the *Construction Lien Act*.
53. As a result, the Trustee scheduled a chambers appointment before the Court on August 17, 2016 so that the parties could discuss this issue with the Court. Pursuant to the Endorsement of Justice Newbould dated August 17, 2016, the Court set down the hearing of the matter for October 7, 2016 and required the Trustee to bring a motion for advice and direction with respect to the issues raised by the parties with respect to paragraph 3 of the Priority Resolution Process Order and section 80 of the *Construction Lien Act*.
54. The Trustee takes no position with respect to the issue before the Court.

All of which is respectfully submitted to this Court as of this 30th day of September, 2016.

COLLINS BARROW TORONTO LIMITED

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

Per: _____



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

APPENDIX "B"

Lien Claimant	Lien Amount	Liened Property
Aluminium Window Design Installations Inc.	\$333,239.18	Phase II Commercial Units (except unit 94 on level A)
Brody Wall System Ltd.	\$82,529.00	Phase II Residential Suites (except suite 827)
CRS Contractors Rental Supply General Partner Inc.	\$37,604.19	Phase II Commercial Units
Dircam Electric Limited	\$822,796.98	Phase II Commercial Units; Phase II Residential Suites (except suite 827); Vacant Lands
2050491 Ontario Inc. o/a The Downsview Group	\$501,133.07	Phase II Commercial Units; Phase II Residential Suites 117 and 218; Vacant Lands
Draglam Waste & Recycling Inc.	\$10,825.95	Phase I Commercial Units; Phase II Commercial Units; Phase II Residential Suites; Phase II Parking Units; Phase II Locker Units; Vacant Lands
Frendel Kitchens Limited	\$226,447.41	Phase II Commercial Units; Phase II Residential Suites 117 and 218; Vacant Lands
Global Fire Protection Ltd.	\$14,464.88	Phase II Commercial Units; Phase II Residential Suites 117 and 218; Vacant Lands
Global Mechanical Ltd.	\$102,625.69	Phase II Commercial Units; Phase II Residential Suites 117 and 218; Vacant Lands
Global Mechanical Ltd.	\$195,011.90	Phase II Commercial Units; Phase II Residential Suites 117 and 218; Vacant Lands
Global Precast Inc.	\$132,901.63	Phase II Commercial Units; Phase II Residential Suites 117 and 218; Vacant Lands
Great Pyramid Aluminum Ltd.	\$62,154.31	Phase II Commercial Units; Phase II Residential Suites 117, 218, 1216, 1521 and 1527; Vacant Lands
Guest Tile Inc.	\$249,916.12	Phase I Commercial Units; Phase II Commercial Units; Phase II Residential Suites 117 and 218; Vacant Lands

Lien Claimant	Lien Amount	Liened Property
Imperial Trim Supply Ltd.	\$601,565.63	Phase II Commercial Units; Phase II Residential Suites 117 and 218; Vacant Lands
MJC Contracting 2014 Inc.	\$89,647.93	Phase II Commercial Units; Phase II Residential Suites (except 827 and 1216); Vacant Lands
Procan Inc.	\$11,978.00	Phase II Commercial Units; Phase II Residential Suites 117 and 218; Vacant Lands
Sereen Painting Ltd.	\$200,000.00	Two of the five parcels of the Vacant Lands
Skyway Canada Limited	\$11,111.93	Phase II Commercial Units; ³ Phase II Residential Suites (except 827 and 1216); Vacant Lands
Triumph Roofing and Sheet Metal Inc.	\$81,519.39	Phase II Commercial Units; Phase II Residential Suites 117 and 218; Vacant Lands
TOTAL	\$3,767,473.49	

³ Not against units 95, 96 and 356; on units 357, 358, 86, 87, 88, 89, 97 and 98 registered after sale transaction close.

APPENDIX "C"

PROPERTY	NET SALE PROCEEDS
<u>PHASE I COMMERCIAL UNITS</u>	
Unit 60	\$768,190.82 ⁴
Three Phase I Kiosk Units	\$84,833.88 ⁵
<u>PHASE II COMMERCIAL UNITS</u>	
Units 86 & 87	\$339,045.63
Units 88 & 89	\$422,662.65
Units 90 & 91	\$470,040.62
Unit 94	\$264,015.90
Units 95 & 96	\$303,458.86
Units 97 & 98	\$259,082.29
Unit 355	\$224,333.92
Unit 356	\$204,328.99
Unit 357	\$269,400.11
Unit 358	\$375,833.92
Unit 359	\$525,088.29
<u>PHASE II RESIDENTIAL</u>	
Suite 218; Parking Unit 80; Locker Unit 327	\$229,462.35
Suite 827; Parking Unit 188; Locker Unit 282	\$239,008.90
Suite 1216; Parking Unit 125; Locker Unit 373	\$268,200.95

⁴ There were outstanding common expenses arrears of approximately \$34,000 with respect to Unit 60 as at the time of closing. The Trustee is continuing discussions with the condominium corporation to determine whether there was a valid condominium lien.

⁵ *Ibid.*, although the common expense arrears for the three units was approximately \$5,800 as at closing.

PROPERTY	NET SALE PROCEEDS
Suite 1521; Parking Unit 4; Locker Unit 330	\$248,048.32
PHASE III / VACANT LANDS	
Vacant Lands	\$1,750,488.73