

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

THE HONOURABLE Mr.)
)
JUSTICE W. Hon - Siegel)

THURSDAY, THE 30th DAY



OF JUNE, 2016

**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**

**ORDER
(Priority Resolution Process)**

THIS MOTION made by Collins Barrow Toronto Limited, in its capacity as Court-appointed trustee (the "Trustee") over the lands and premises owned by Jade-Kennedy Development Corporation ("JKDC"), appointed pursuant to section 68(1) of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Trustee's Amended Notice of Motion, the Sixth Report of the Trustee dated March 15, 2016 (the "**Sixth Report**"), the Supplement to the Sixth Report of the Trustee dated March 31, 2016, and the Second Supplement to the Sixth Report of the Trustee dated June 28, 2016, and on hearing the submissions of counsel to the Trustee and those other parties listed on the Counsel Slip, no one else appearing for any other person on the service list, although properly served as appears from the affidavit of service of Lynn Lee sworn June 29, 2016, filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Trustee's Amended Notice of Motion and the Supplementary Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

PRIORITY RESOLUTION PROCESS

2. **THIS COURT ORDERS** that the priority of the claims of the construction lien claimants (the "**Lien Claimants**"), Laurentian Bank of Canada (the "**Bank**") and Am-Stat Corporation ("**Am-Stat**") against the lands and premises owned by JKDC and all proceeds thereof, including, without limitation, all funds already paid to the Bank in respect of the indebtedness owing by JKDC to the Bank (collectively, the "**Property**"), shall be determined pursuant to the following procedure and timetable:

- (a) on or before July 11, 2016, the Bank shall serve an affidavit (the "**Bank Affidavit**") from a representative of the Bank (the "**Bank Representative**") addressing, among others, whether the Bank advanced any funds to JKDC after the Bank had received a written notice of lien;

- (b) any Lien Claimant claiming entitlement to the Property by asserting priority over the Bank's mortgage and/or the Am-Stat mortgage (a "**Disputing Lien Claimant**") for an amount in excess of the basic ten per cent (10%) holdback (the "**Basic Holdback**") shall, on or before August 3, 2016 (the "**Bar Date**"), serve a responding affidavit describing with sufficient particularity and supporting documentation, the factual and legal basis upon which the lien claimant asserts such priority over the Bank's mortgage and/or Am-Stat's mortgage (the "**Responding Affidavit**");

- (c) the Bank, Am-Stat, the Disputing Lien Claimants and the Trustee will attempt to consensually resolve the Disputing Lien Claimants' claim for priority over the Bank's mortgage and/or Am-Stat's mortgage for an amount in excess of the Basic Holdback, failing which, the priority dispute shall be determined by a judge presiding over the Commercial List according to the following timetable:
 - (i) if necessary, cross-examinations on the Bank Affidavit, the Affidavit of Philip H. Meretsky ("**Meretsky**") sworn June 13, 2016 (the "**Meretsky Affidavit**"), and Responding Affidavits shall be completed on or before August 17, 2016;

 - (ii) the Bank and/or Am-Stat shall serve its factum on or before August 31, 2016;

 - (iii) the Disputing Lien Claimants shall serve facta on or before September 8, 2016; and

(iv) the hearing shall be heard during the week of September 11, 2016.

3. **THIS COURT ORDERS** that if a Lien Claimant does not deliver a Responding Affidavit on or before the Bar Date, it shall be forever barred from asserting a claim against the Property in priority to the Bank's mortgage and Am-Stat's mortgage in these proceedings or any other proceedings for an amount in excess of the Basic Holdback in respect of such Lien Claimant's construction lien.

CROSS EXAMINATION OF BANK REPRESENTATIVE AND MERETSKY

4. **THIS COURT ORDERS** that any cross-examination of the Bank Representative and/or Meretsky shall be subject to the following procedure:

- (a) each Disputing Lien Claimant wishing to cross-examine the Bank Representative and/or Meretsky shall serve a Notice of Examination by email on the Bank's counsel and/or Meretsky's counsel, with a copy to the Trustee and its counsel, on or before the Bar Date;
- (b) if two (2) or more Disputing Lien Claimants serve a Notice of Examination, the Disputing Lien Claimants shall appoint one (1) representative counsel (the "**Examining Counsel**") to conduct the cross-examination on behalf of all of the Disputing Lien Claimants. The Disputing Lien Claimants who served a Notice of Examination shall advise the Bank, Am-Stat and the Trustee of the Examining Counsel selected as soon as practical after selection. For greater certainty, all counsel for Disputing Lien Claimants are entitled to attend the cross-examination;

- (c) the cross-examination of the Bank Representative and Meretsky shall be held in Toronto on a date to be agreed upon by the Bank, Am-Stat, the Trustee and Examining Counsel, but shall be held by no later than August 17, 2016; and
- (d) if no Disputing Lien Claimant serves a Notice of Examination on or before the Bar Date, no Disputing Lien Claimant shall be entitled to cross-examine the Bank Representative and/or Meretsky.

DISTRIBUTION TO AM-STAT

5. **THIS COURT ORDERS** that, in the event that no Lien Claimant delivers a Responding Affidavit on or before the Bar Date, the Trustee is authorized to distribute \$1.25 million to Am-Stat from the net sale proceeds of the Vacant Lands (as defined in the Sixth Report) being held by the Trustee.



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Court File No. CV15-10843-00CL

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

Proceedings commenced at Toronto

ORDER

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