

**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***

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

MAY 15, 2015

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) ("**CLA**"), of the lands and premises legally described in Schedule "A" of the Appointment Order comprised of, among other things, commercial and residential condominium units, and vacant land owned by Jade-Kennedy Development Corporation ("**JKDC**") and commonly known as South Unionville Square ("**SUSQ**") (the "**Property**"). A copy of the Appointment Order is attached hereto as **Appendix "A"**.
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. 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 SECOND REPORT

4. The purpose of this second report of the Trustee (the “**Second Report**”) is to request that the Court grant an Order approving the sale of the Vacant Land (as defined below) to Primont (as defined below) pursuant to an asset purchase agreement to be executed by the parties and filed with the Court prior to the hearing of the motion on May 22, 2015 and vesting all of JKDC’s right, title and interest in and to the Vacant Land to Primont, free and clear of all encumbrances and claims.

TERMS OF REFERENCE

5. In preparing this Second 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 Second 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.

VACANT LAND

Background

6. As previously detailed in the First Report of the Trustee dated April 23, 2015, and the Affidavit of Charles Mady sworn in support of JKDC's application, copies of which can be found on the Trustee's website, the SUSQ project and the Property was to be developed in three Phases.

7. Phase III was to be the planned development and construction of thirteen (13) freehold townhomes and two (2) single detached homes on vacant land owned by JKDC. The land is just south of South Unionville Square, bordered by Helen Avenue to the south, South Unionville Avenue to the north, Kennedy Road, to the west and Garden Drive to the east. Copies of the parcel registers for the five (5) parcels that comprise the land are collectively attached hereto and marked as **Appendix "B"** (collectively, the "**Vacant Land**").

8. The 5 parcels that comprise the Vacant Land were acquired by JKDC over a period of a number of years, with three of the parcels being acquired on April 16, 2008, the fourth parcel acquired on May 10, 2012, and the last parcel acquired on June 1, 2012.

Mortgagees

9. The Vacant Land is subject to two registered mortgages:
 - (a) a \$45,000,000 charge granted by JKDC in favour of Laurentian Bank of Canada ("**Laurentian**") and registered against title to the Vacant Land on

June 1, 2012 as Instrument No. YR1832072 (the "**Laurentian Charge**");
and

- (b) a \$10,000,000 charge granted by JKDC in favour of Am-Stat Corporation ("**Am-Stat**") and registered against title to the Vacant Land on September 4, 2013 as Instrument No. YR2029025 (the "**Am-Stat Charge**").

10. The Trustee understands that the \$45 million Laurentian Charge was granted to secure funds advanced by Laurentian to JKDC in connection with the development of the residential condominium tower portion of the SUSQ project. The Trustee understands that such advances have been repaid. The Trustee has been informed by counsel to Laurentian that charge also secures any amounts owing under letters of credit ("**LCs**") issued by Laurentian in respect of the SUSQ project. The LCs issued by Laurentian are cash collateralized; however, Laurentian takes the position that until the LCs expire or the cash collateral is applied against a drawn LC, the potential for a prior claim to be asserted against the cash collateral will not be eliminated, and the Laurentian Charge must remain in place as security.
11. The Trustee notes that the Laurentian Charge is also registered against title to other parts of the Property, namely the remaining Phase II residential units and the Phase II commercial units.
12. With respect to the Am-Stat Charge, Am-Stat was owed \$5,080,957.38 as of February 19, 2015. Based on the *per diem* rate of \$1,670.45, the Trustee estimates a balance owing of approximately \$5,222,945.63 as at May 15, 2015.

13. The Trustee notes that the Am-Stat Charge is also registered against title to the remaining Phase II residential units and the Phase II commercial units.

Lien Claims

14. As set out in the parcel registers for the Vacant Land, a number of construction liens have been registered on title to the Vacant Land. Pursuant to the Order (re Lien Claims Process) of Justice Pattillo dated May 1, 2015, the Trustee is conducting a claims process for construction liens registered against the Property.
15. At this time, the claims process is in its early stages and the parties are in the process of providing their materials to the Trustee. As a result, the Trustee is not in a position to comment on the validity of the lien claims registered against the Vacant Land. However, the Trustee has been informed by JKDC management that the Vacant Land has had no work completed on it, except for residential zoning, and thus no materials or services were provided by construction lien claimants with respect to the Vacant Lands.

Original Sale Transaction with Primont

16. Pursuant to an agreement of purchase and sale dated November 24, 2011 between JKDC as vendor and Primont Homes (Harmony) Inc. ("**Primont**") as purchaser (the "**Primont APS**"), Primont agreed to buy the Vacant Land for a purchase price of \$3,499,986. The Primont APS required JKDC to perform substantial servicing requirements for the Vacant Land, including residential zoning finalization, installation of hydro and gas service, completion of rough

grading, and installation of sufficient water, sanitary and storm services. A copy of the Primont APS is attached hereto as **Appendix "C"**.

17. Pursuant to section 1.4 of the Primont APS, it was a condition that all permit servicing requirements be completed on or before September 30, 2012, with the possibility of three extensions of six months each. This date was extended to September 30, 2013 pursuant to an amending agreement dated June 11, 2013, a copy of which is attached hereto as **Appendix "D"**.
18. The extension periods were exercised by the parties, such that the completion date for the servicing requirements was extended to March 31, 2015, as set out in a letter from Primont's solicitor to JKDC's solicitor dated September 30, 2014, a copy of which is attached hereto as **Appendix "E"**.
19. The Trustee has been informed by JKDC management that, by the end of 2014, due the financial difficulties faced by the MADY group, only the residential zoning requirements had been completed by JKDC, such that the Vacant Land is zoned for the development of 13 freehold townhomes and 2 single detached homes.
20. In late 2014, JKDC approached Primont concerning the possibility of agreeing to a sale of the Vacant Land on an "as is where is" basis. The parties were negotiating the terms of such a transaction from December 2014 to February 2015, but were unable to complete a transaction prior to the appointment of the Trustee on February 11, 2015.

21. On February 18, 2015, the Trustee was informed that Primont had registered a Caution against the Vacant Land in connection with the Primont APS. A copy of the Caution registered against title to the Vacant Land on February 10, 2015 is attached hereto as **Appendix "F"**.
22. Following its appointment, the Trustee reviewed the Primont APS and discussed the state of the Vacant Land with JKDC management. Based on such discussions, it was apparent that the servicing requirements under the Primont APS could not be completed by the Trustee or any other party by March 31, 2015.
23. As a result, the Trustee, through its legal counsel Chaitons LLP ("**Chaitons**"), informed counsel to Primont in an e-mail dated March 4, 2015 that the Trustee was terminating the Primont APS and would arrange for the return of the deposit that had been paid by Primont, in accordance with the terms of the agreement. A copy of the e-mail is attached hereto as **Appendix "G"**.
24. In response to the e-mail, Chaitons received a letter dated March 13, 2015 from litigation counsel to Primont, indicating that Primont would be seeking specific performance of the Primont APS. A copy of the letter is attached hereto as **Appendix "H"**.
25. The Trustee understands that Primont pre-sold the 13 townhomes and 2 dwellings that it intended to build on the Vacant Land following the completion of the Primont APS.

26. In an effort to protect its interests, Primont, through its counsel, revived its offer to purchase the Vacant Lands on an “as is where is basis” for \$650,000.
27. The Trustee obtained an appraisal of the Vacant Land as of March 10, 2015. A copy of the appraisal will be filed with the Court as **Confidential Appendix “A”** to the Second Report. The Trustee will be requesting that the appraisal be sealed until the sale transaction with Primont has closed or further order of the Court. The Trustee is requesting that the appraisal be sealed as it contains commercially sensitive information that could prejudice any future attempt to sell the Vacant Land if the sale transaction with Primont is not approved by the Court or fails to close.
28. Following receipt of Primont’s offer and a review of the appraised value of the Vacant Land, which sets out an appraised value that is materially higher than Primont’s offer amount, the Trustee determined that it would not be in the best interests of the creditors of JKDC for the Vacant Land to be sold to Primont.
29. As a result, the Trustee informed Primont that it intended to bring a motion where it would be seeking a declaration from the Court that the Primont APS was terminated and that the Trustee had the authority to market the Vacant Land for sale. Primont informed the Trustee that it would be opposing such motion and seek an order for specific performance of the Primont APS.

Sale to Primont

30. The Trustee and Primont, through their respective legal counsel, discussed this matter on numerous occasions. During the course of those discussions, Primont

made a further offer to acquire the Vacant Land from the Trustee on an “as is where is” basis. Following negotiations with respect to purchase price, the Trustee has accepted the offer, subject to finalization of an asset purchase agreement (“**APA**”) and the transaction being approved by the Court.

31. The parties are currently finalizing the terms of the APA; however, the Trustee can confirm that the parties have agreed that the sale will be on an “as is where is” basis and will use a form of agreement that contains conditions, representations and warranties that are typically seen in agreements entered into by receivers in insolvency proceedings. The Trustee intends to serve a supplemental report, which will contain a redacted version of the executed APA, as soon as the APA has been executed. An unredacted version of the APA will be filed with the Court on a confidential basis, and the Trustee will be requesting that the agreement be sealed pending completion of the sale transaction or further order of the Court.
32. At this time, the Trustee can report to the Court that, in its view, the purchase price under the APA is reasonable and represents fair market value for the Vacant Land, as it is in the same amount as the appraised value of the land. In addition to the Vacant Land being sold at its appraised value, the proposed sale transaction with Primont is advantageous to the estate as it avoids the necessity of paying any commission to a real estate agent that may have been retained to sell the property, and also avoids the legal costs and risk of litigation had the motion with Primont proceeded.

33. As a result, the Trustee is requesting that the Court grant an order approving the sale of the Vacant Land to Primont pursuant to the APA that is to be filed with the Court, and vesting the Vacant Land in Primont free and clear of all encumbrances.

All of which is respectfully submitted to this Court as of this 15th day of May, 2015.

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
President