

**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***

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

**June 28, 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 FIFTEENTH REPORT

4. The purpose of this Fifteenth Report of the Trustee (the “**Fifteenth Report**”) is to:
- (a) provide the Court with an update with respect to the status of realizations from the Property and the claims of creditors to the net sale proceeds being held by the Trustee;
  - (b) request that the Court grant:
    - (i) an order approving the sale by the Trustee of Phase I commercial unit 348 on level 2 (“**Unit 348**”), to Albert Sun Keung Mak (the “**Unit 348 Purchaser**”), and vesting such property in the Unit 348 Purchaser free and clear of all claims and encumbrances (other than permitted encumbrances) upon delivery of a certificate by the Trustee to the Unit 348 Purchaser;
    - (ii) an order authorizing the Trustee to distribute \$1.2 million from the net sale proceeds from the Vacant Lands (as defined below) to Am-Stat Corporation (“**Am-Stat**”), as mortgagee; and
    - (iii) an order authorizing the Trustee to distribute \$107,820.88 from the net sale proceeds from the Phase I Commercial Units (as defined below) to a construction lien claimant, Guest Tile Inc. (“**Guest Tile**”).

## TERMS OF REFERENCE

5. In preparing this Fifteenth 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 Fifteenth 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).
8. The SUSQ Project was to be developed and constructed by JKDC in phases, as described below.

### **Phase I**

9. 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.
10. 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**").
11. 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 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**

- 12. 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.
- 13. 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.
- 14. 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**”).

15. The second stage of the Phase II development and construction was the twenty-one commercial units (collectively, the “**Phase II Commercial Units**”).
16. 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.
17. 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.
18. 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. The Trustee was able to close the sale transactions for 16 of the 18 Phase II Commercial Units. The remaining two sale transactions did not close due to purchaser defaults, and accordingly the sale transactions were terminated by the Trustee and the deposits were not returned to the prospective purchasers. These two units were subsequently re-listed and sold by the Trustee on January 31, 2017.

### **Phase III / Vacant Lands**

19. 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 and situated south of the SUSQ Project lands (the “**Vacant Lands**”).

20. 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 lands 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.
21. 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**") on November 24, 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.
22. Following its appointment, the Trustee was able to negotiate a sale of the Vacant Lands to Primont, which resulted in an increase of approximately \$1.1 million in the purchase price paid by Primont as compared to the last offer Primont made to JKDC to purchase the Vacant Lands on an "as is, where is" basis.
23. The sale of the Vacant Lands by the Trustee to Primont was approved by the Court pursuant to the Approval and Vesting Order of Justice Pattillo dated May 29, 2015. The sale to Primont closed on June 12, 2015.



## CREDITORS

### Mortgagees

24. 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;
- (c) MarshallZehr Group Inc. (“**MarshallZehr**”); and
- (d) Aviva Insurance Company of Canada (“**Aviva**”).

25. 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:

<b>Mortgagee</b>	<b>Mortgage</b>	<b>Mortgaged Property</b>
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; Vacant Lands
	\$3.6 million charge	Phase I Commercial Units (except for three Phase I Kiosk Units)
	\$2.4 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, Phase II Residential Suites; Vacant Lands

**Construction Lien Claims**

26. Construction liens totalling approximately \$3.7 million were registered against the Property by eighteen (18) parties (collectively, the “**Construction Lien Claimants**”).
27. Pursuant to the Order (re Lien Claims Process) of Justice Pattillo dated May 1, 2015, the Trustee was ordered to implement and administer a lien claims process with respect to condominium liens and with respect to construction liens (the “**Construction Lien Claims Process**”).
28. As at the date of the Trustee’s appointment, no funds were being held by JKDC with respect to the ten per cent (10%) basic holdback established under section 22 of the *CLA* (the “**Basic Holdback**”).
29. As previously reported to the Court, and pursuant to the Order of The Honourable Mr. Justice Wilton-Siegel dated June 30, 2016, the Order of The Honourable Mr. Justice Newbould dated August 2, 2016, and the Order of The Honourable Mr. Justice Hainey dated November 14, 2016, the Trustee has made distributions in the aggregate sum of \$1,354,672.72 to all but two of the Construction Lien Claimants on account of the deficiency in the Basic Holdback.
30. Two claimants, Sreen Painting Ltd. and 2050491 Ontario Inc. o/a The Downsview Group, have not received distributions on account of the deficiency in the Basic Holdback to date. The Trustee continues to hold amounts in reserve with respect to such holdback claims, which are still being discussed by the parties.

## **PRIORITY RESOLUTION PROCESS**

31. As has been previously reported to the Court, it was necessary to establish a procedure to adjudicate the priority dispute between the Construction Lien Claimants and Am-Stat, LBC and MarshallZehr as mortgagees of the Property with respect to the entitlement of the Construction Lien Claimants to amounts in excess of the Basic Holdback. Such a procedure was established pursuant to the Order of Justice Wilton-Siegel dated June 30, 2016.
32. A hearing was held before Justice Wilton-Siegel on October 7 and 11, 2016. Pursuant to the Order of Justice Wilton-Siegel dated December 7, 2016, the Court held that:
- (a) the professional fees associated with the LBC \$45.0 million charge has priority over the claims of the Construction Lien Claimants with respect to the net sale proceeds of the Property subject to such charge;
  - (b) the claim of Guest Tile with respect to the Phase I Commercial Units for amounts in excess of the Basic Holdback has priority over the LBC \$3.6 million charge that had been assigned by LBC to MarshallZehr; and
  - (c) the Am-Stat \$10.0 million charge has priority over the claims of Construction Lien Claimants for amounts in excess of the Basic Holdback with respect to the net sale proceeds of the Property subject to such charge.

33. The Construction Lien Claimants sought and obtained leave to appeal to the Divisional Court with respect to the Court's determination with respect to the priorities dispute.
34. The appeal was heard by the Divisional Court on May 29, 2017. The Divisional Court dismissed the appeal, as set out in its Decision dated June 2, 2017.
35. The Trustee understands that the period for the Construction Lien Claimants to commence a motion for leave to appeal to the Court of Appeal has expired and no such motion has been brought by the parties.

#### **PROPERTY REALIZATIONS**

36. The Trustee has prepared the chart attached hereto and marked as **Appendix "A"** (collectively, the "**Estimated Property Realizations Charts**") that sets out the estimated net sale proceeds realized by the Trustee for the sold Property. The amounts set out in the charts take into account real estate commissions, HST, and certain common expense amounts paid by the Trustee. The amounts set out in the chart do not include an allocation of the costs of the proceeding and in certain instances do not account for payment of certain common expense arrears owed to YRSCC 1228. As a result, the amounts are strictly estimated and are subject to further review and revision by the Trustee.
37. As of the date hereof, the Trustee has completed sales with respect to the following Property:

- (a) Unit 60, 4 of the 11 Phase I Mall Units, and 8 of the 10 Phase I Kiosk Units;
  - (b) all 6 of the Phase II Residential Suites, 6 of the 8 Phase II Parking Units, and all 6 of the Phase II Locker Units;
  - (c) 18 of the 21 Phase II Commercial Units; and
  - (d) the Vacant Lands.
38. In the event that the Court approves the sale transaction for Unit 348 detailed herein, and the sale closes, the following Property will remain to be realized by the Trustee:
- (a) 6 Phase I Mall Units, 2 Phase I Kiosk Units, and the 4 Phase I Parking Units;
  - (b) 2 Phase II Parking Units; and
  - (c) 3 Phase II Commercial Units.

### **SALE OF UNIT 348**

39. 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.

40. 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.
41. 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.
42. After several extensions, the Trustee allowed this agreement to expire on January 15, 2017.
43. During its over 20 month retainer as real estate listing agent, TradeWorld was able to sell Unit 60 and 3 of the Phase I Kiosk Units.
44. Additionally, during its retainer period, TradeWorld listed Unit 348 for \$109,900.
45. In its over 20 month period as real estate listing agent for Unit 348, TradeWorld did not receive any offers to purchase this unit.
46. 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.

47. The Trustee retained Century 21 as its real estate listing agent for all unsold Property (excluding the Phase I Parking Units) on February 3, 2017. A festival event was held on site on February 25<sup>th</sup> and 26<sup>th</sup> to coincide with Chinese New Year celebrations. Another sales campaign was held from May 15 to 21, 2017. These marketing events have led to six offers approved by the Court on March 23, 2017, three offers approved by the Court on April 27, 2017, the offer described herein, and interest in other units.
48. Unit 348 is 177 gross square feet and is located on level 2 of The Mall at Langham Square (previously known as The Mall at South Unionville Square). Century 21 listed this unit for sale at a price of \$78,000.
49. After some negotiation, the offer received from the Unit 348 Purchaser is for \$76,500, as set out in the agreement of purchase and sale executed by the Unit 348 Purchaser on May 24, 2017 and accepted by the Trustee on May 25, 2017 a copy of which is attached hereto and marked as **Appendix "B"**. As part of this transaction, the Trustee was also able to negotiate a \$1,500 reduction in the realtor's commission and as a result, the net offer price is equivalent to the net listing price. A copy of the parcel register for Unit 348 is attached hereto and marked as **Appendix "C"**.
50. Unit 348 is subject to the following encumbrances:
- (a) a condominium lien in favour of YRSCC No. 1228;
  - (b) a \$30.0 million charge in favour of Aviva;

- (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; and
- (f) construction liens in favour of Guest Tile and Draglam.<sup>1</sup>

51. The Trustee believes that Unit 348 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.

52. On this basis, the Trustee recommends that the sale transaction be approved by the Court, as:

- (a) the Trustee received an offer of \$70,000 on Feb. 26, 2017, however the offeror was unwilling to increase the offer price. No other offers have been received other than the offer from the Unit 348 Purchaser;
- (b) the purchase price for Unit 348 is \$1,500 below the current listing price, however the Trustee was able to negotiate a \$1,500 reduction in the commission payable to the realtor with the result that it receives the net listing price;
- (c) the offer is recommended by Century 21 based on current market conditions;

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1. Draglam has been repaid in full with respect to its construction lien.



- (d) the unit is being sold to one purchaser to operate a business in a visible area; and
  - (e) the offer for Unit 348 is unconditional other than with respect to the Trustee obtaining Court approval of the sale transaction and a vesting order.
53. If the Court approves the sale transaction, the sale of Unit 348 is scheduled to close on July 5, 2017.
54. 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.

#### **DISTRIBUTION OF VACANT LANDS PROCEEDS TO AM-STAT**

55. As set out in the Estimated Property Realizations Charts, the Trustee received gross sale proceeds of \$1,750,489 with respect to the sale of the Vacant Lands to Primont.
56. As at the closing of the sale of the Vacant Lands, the property was subject to the LBC \$45.0 million charge, the Am-Stat \$10.0 million charge, and a number of construction liens.
57. JKDC and related companies obtained financing from Am-Stat in the amount of \$10.0 million pursuant to a commitment letter dated August 6, 2013.
58. As security for the financing, JKDC granted a charge/mortgage in the principal amount of \$10.0 million in favour of Am-Stat, which charge/mortgage was

registered on title to, among others, the Vacant Lands as Instrument No. YR2029025.

59. Am-Stat has provided a mortgage statement that indicates that it is owed \$6,770,731.37 by JKDC as at June 30, 2017. A copy of the mortgage statement provided by Am-Stat to the Trustee is attached hereto and marked as **Appendix "D"**.
60. As previously reported to the Court, Chaitons LLP, insolvency lawyers for the Trustee, has reviewed the Am-Stat charge and is of the opinion that, subject to usual assumptions and qualifications, the charge is valid and enforceable against the Vacant Lands and its proceeds.
61. As a result, and given the determination made by this Court, which was upheld by the Divisional Court, that the Am-Stat charge has priority over the claims of Construction Lien Claimants, the Trustee requests that the Court authorize the Trustee to distribute \$1.2 million from the net sale proceeds of the Vacant Lands. The Trustee will continue to hold funds in reserve from the net sale proceeds of the Vacant Lands on account of the holdback claim of Sereen Painting, as it only registered its lien claim against the Vacant Lands, and as there has yet to be a determination as to the allocation of the costs of these proceedings over all of the Property.

## DISTRIBUTION TO GUEST TILE

62. Guest Tile filed a construction lien claim during the Construction Lien Claims Process in the amount of \$249,916.12. The Trustee has reviewed and accepted Guest Tile's lien claim as filed.
63. Pursuant to the Order dated June 30, 2016, the Trustee distributed \$142,095.24 to Guest Tile on account of its entitlement to the deficiency in the Basic Holdback in priority to the claims of mortgagees in accordance with the *CLA*.
64. As a result, Guest Tile is still owed \$107,820.88 with respect to its construction lien, and such costs that may be ordered by the Court or agreed to by the parties with an economic interest in the net sale proceeds.
65. Guest Tile is unlike the rest of the Construction Lien Claimants, as it registered its construction lien against most of the Property, including the Phase I Commercial Units.<sup>2</sup>
66. As set out in the Estimated Property Realizations Charts, the Trustee is holding net sale proceeds totalling \$1,127,683.20 from the sale of Phase I Commercial Units. As noted above, the Phase I Commercial Units were subject to the Aviva \$30.0 million charge, the LBC \$3.6 million charge, the LBC \$2.4 million charge and the MarshallZehr \$8.0 million charge.
67. As a result of the Order dated December 7, 2016, the Court held that Guest Tile has priority over the claims of LBC and MarshallZehr to the net sale proceeds of

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<sup>2</sup> There was only one other Construction Lien Claimant, Draglam, that registered against most of the Property, and it has been repaid in full during this process

the Phase I Commercial Units for amounts in excess of the Basic Holdback. With respect to Aviva, its \$30.0 million charge is registered against a large portion of the Property, and the Trustee believes that there are sufficient net sale proceeds and cash collateral being held as security for Aviva's obligations that it will not be prejudiced by the proposed distribution to Guest Tile.<sup>3</sup>

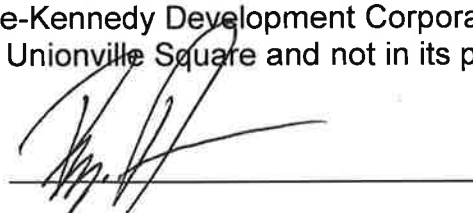
68. As a result, the Trustee is requesting that it be authorized to distribute \$107,820.88 to Guest Tile from the net sale proceeds of the Phase I Commercial Units. The Trustee understands that Guest Tile intends to seek payment of costs in connection with its construction lien, payment of which may be opposed by the mortgagees over the Phase I Commercial Units. The Trustee proposes that this matter can be addressed at the next hearing in this proceeding, which the Trustee expects to take place later this summer.

All of which is respectfully submitted to this Court as of this 28<sup>th</sup> day of June, 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

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<sup>3</sup> JKDC's obligation to Aviva is limited to a Tarion Warranty bond currently in the amount of \$1.5 million.