

**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***

**TWENTY-SECOND REPORT TO THE COURT OF RSM CANADA LIMITED AS
CONSTRUCTION LIEN TRUSTEE OF SOUTH UNIONVILLE SQUARE**

March 14, 2018

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 (“**Collins Barrow**”) was appointed trustee (the “**Trustee**”) pursuant to section 68(1) of the *Construction Lien Act* (Ontario), 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. Pursuant to the Order of The Mr. Honourable Justice Hainey dated December 5, 2017 (“**December 5, 2017 Order**”), RSM Canada Limited has been appointed by the Court to substitute Collins Barrow as Trustee of JKDC. A copy of the December 5, 2017 Order is attached as **Appendix “A”**.
3. 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.
4. 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://rsmcanada.com/what-wedo/services/consulting/financialadvisory/restructuring-recovery/current-restructuring-recovery-engagements/jade-kennedy-development-corporation.html>

PURPOSE OF TWENTY-SECOND REPORT

5. The purpose of this Twenty-Second Report of the Trustee (the “**Twenty-Second Report**”) is to request that the Court grant an order:
- (a) declaring that the discharge of the Instruments (as defined below) against title to the Units (as defined below) was registered in error, and that the Instruments are in full force and effect with respect to the Units;
 - (b) amending the Approval and Vesting Orders (as defined below) to remove the Instruments from Schedule “C” to the Approval and Vesting Orders and inserting them on Schedule “D” to the Approval and Vesting Orders; and
 - (c) authorizing and directing the Land Registrar for the Land Registry Office for the Land Titles Division of York Region (No. 65) to expunge and delete the discharge of the Instruments from the parcel registers for the Units and reinstate the Instruments as at the date of their original registrations.

TERMS OF REFERENCE

6. In preparing this Twenty-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 Twenty-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.

SUSQ PROJECT, T & T SUPERMARKET, AND THE INSTRUMENTS

7. 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.
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 (the “**Declaration**”),

which established York Region Standard Condominium Corporation No. 1228 (“**YRSCC 1228**”). A copy of the Declaration is attached hereto as **Appendix “B”**.

10. In connection with the construction of the T & T supermarket, the following instruments were registered on title to the SUSQ Project Property (collectively, the “**Instruments**”):

Reg. No.	Date	Instrument Type	Amount	Parties From	Parties To
YR1445332	2010/02/25	Notice of Lease	\$2	Jade-Kennedy Development Corporation	T. & T. Supermarket Inc.
YR1699150	2011/08/22	APL (General)		T. & T. Supermarket Inc.	Jade-Kennedy Development Corporation

11. Attached hereto and collectively marked as **Appendix “C”** are copies of the Instruments.
12. The Instruments provide that a notice of the lease entered into by JKDC and T & T Supermarket Inc. (“**T & T**”) was registered on title to the SUSQ Project, and that the lease had been amended to provide that JKDC would not permit or allow any occupant of the commercial development of the SUSQ Project to occupy premises for the purpose of the sale of groceries, produce, meats or seafood.

PHASE II COMMERCIAL UNITS AND DELETION OF THE INSTRUMENTS

13. 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 (collectively, the "**Phase II Commercial Units**").

14. On January 5, 2015, the Declaration was amended to include the Phase II Commercial Units as part of YRSCC 1228. As of January 16, 2015, the registered owner of the lands where the Phase II Commercial Units were located was transferred from JKDC to YRSCC 1228.
15. As at that time, eighteen (18) of the 21 Phase II Commercial Units were subject to existing agreements of purchase and sale ("**Sale Agreements**") and were scheduled to close on February 17, 2015.
16. In bringing its application for the appointment of the Trustee, JKDC requested that the Trustee be authorized by the Court to complete the existing Sale Agreements for the 18 pre-sold Phase II Commercial Units.
17. Pursuant to the Appointment Order, the Court authorized the Trustee to complete the existing Sale Agreements for the 18 pre-sold Phase II Commercial Units. Additionally, the Court issued an approval and vesting order with respect to each of the sale transactions.
18. 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.

19. Attached hereto and marked as **Appendix "D"** is a chart that provides information with respect to the sale transactions for the 18 Phase II Commercial Units (collectively, the "**Units**") that were completed by the Trustee as of January 1, 2018. Attached hereto and collectively marked as **Appendix "E"** are copies of the approval and vesting orders issued by the Court with respect to the Units (collectively, the "**Approval and Vesting Orders**").

20. Each of the Approval and Vesting Orders provided that, on closing, the respective purchaser would receive title to the Units free and clear of the instruments listed on Schedule "C" to the Approval and Vesting Orders, and the instruments listed on Schedule "D" would remain on title to the Units following closing.

REQUEST TO REINSTATE INSTRUMENTS ON TITLE TO THE UNITS

21. In February 2018, counsel to the Trustee was contacted by counsel to T & T and was informed that the Instruments had been included on Schedule "C" to the Approval and Vesting Orders and had been deleted from title to the Units on closing. T & T took the position that the Instruments should never have been included on Schedule "C" and deleted on closing, as the Instruments are restrictive covenants that run with the land.

22. The Trustee reviewed the matter with its counsel, which included a review of the Sale Agreements. Pursuant to section 8(a)(i) of each Sale Agreement, each respective purchaser agreed to accept title to the Units subject to restrictions or covenants that run with the land. Additionally, section 8(b) of each Sale Agreement provided that JKDC or the Trustee as vendor was not required to deliver title to the

Units free of such restrictions or covenants. Attached hereto and marked as **Appendix "F"** is a sample copy of an Sale Agreement.

23. As a result, the Trustee is of the view that the Instruments were deleted from title to the Units in error and should be reinstated, and that there is no material prejudice to the purchasers of the Units, as the Sale Agreements did not provide for the removal of the Instruments from title to the Units. T & T has requested that such relief be sought by the Trustee.
24. On March 2 and 5, 2018, counsel to the Trustee sent a letter to the respective solicitors of the purchasers of the Units to inform them of the situation and that the Trustee would be bringing a motion with respect to this matter on March 22, 2018. Attached hereto and marked as **Appendix "G"** is a sample copy of a letter sent to a solicitor for a purchaser of one of the Units.
25. The Trustee has been informed by its counsel that it has received no response to the letters as of the date of this Twenty-Second Report. In connection with its motion, the Trustee will be serving a copy of its motion record to each of the purchasers of the Units, and to each of the solicitors that represented the purchasers in closing the sale transactions for the Units.
26. The Trustee is of the view that the relief sought is appropriate and requests that the Court issue an order granting the relief itemized in paragraph 5 above.

All of which is respectfully submitted to this Court as of this 14th day of March, 2018.

RSM CANADA 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