Court File No. CV15-10843-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MADAM	)	MONDAY, THE 11th DAY
	)	
JUSTICE MESBUR	)	OF JANUARY, 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 144 PARK LTD. 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 over the lands and premises known municipally as 142, 144 and 148 Park Street and 21 Allen Street West, Waterloo, Ontario pursuant to section 68(1) of the *Construction*

Lien Act, R.S.O. 1990, c. C.30, as amended (the "**Trustee**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON HEARING the submissions of counsel for the Trustee and on being advised that no opposition to the terms of this Order have been received from any Lien Claimants (as defined below),

PRIORITY RESOLUTION PROCESS

1. **THIS COURT ORDERS** that the priority of the claims of the construction lien claimants (the "**Lien Claimants**") and Laurentian Bank of Canada (the "**Bank**") to the funds being held by the Trustee pursuant to the Order of Justice Newbould dated August 5, 2015 (the "**Reserve**") shall be determined pursuant to the following procedure and timetable:

(a) On or before January 13, 2016:

(i) the Bank shall serve an affidavit (the "**Bank Affidavit**") from a representative of the Bank (the "**Bank Representative**") addressing, among others, the following:

(A) whether the Bank advanced any funds to 144 Park Ltd. or its designee ("**144 Park**") after the Bank had received a written notice of lien,

(B) purpose or purposes of the advances made by the Bank to 144 Park on October 8 and 24, 2014, including statutory declarations (if

any), correspondence and other documentation in the Bank's possession, power or control in respect of such advances, and

(C) the total amount of 144 Park's indebtedness owing to the Bank as at the date of the Bank Affidavit; and

(ii) the Trustee shall serve a report (a "**Report on Proceeds**") that, among other things, will include the following information:

(A) a statement of receipts and disbursements as at the date of the Report on Proceeds that includes, among other things, the amount of proceeds held by the Trustee, and

(B) an estimate of the realizable net sale proceeds from the sale and closing of the remaining unsold residential condominium units, parking units and locker units.

(b) Any lien claimant claiming entitlement to part of the Reserve by asserting priority over the Bank's 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 January 29, 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 (the "**Responding Affidavit**");

(c) The Bank, the Disputing Lien Claimants and the Trustee will attempt to consensually resolve the Disputing Lien Claimants' claim for priority over the

Bank'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 and Responding Affidavits shall be completed on or before February 5, 2016;

(ii) the Bank shall serve its factum on or before February 11, 2016;

(iii) the Disputing Lien Claimants shall serve facta on or before February 18, 2016 at 2:00 pm;

(iv) all motion materials, including facta, shall be filed with the Court by February 19, 2016; and

(v) the hearing shall be heard on February 22, 2016.

2. **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 to the Reserve in priority to the Bank'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

3. **THIS COURT ORDERS** that any cross-examination of the Bank Representative shall be subject to the following procedure:

(a) each Disputing Lien Claimant wishing to cross-examine the Bank Representative shall serve a Notice of Examination by email on the Bank'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 and 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 shall be held in Toronto on a date to be agreed upon by the Bank, Trustee and Examining Counsel, but shall be held by no later than February 3, 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.

DISTRIBUTIONS OF RESERVE

4. **THIS COURT ORDERS** that, following the Bar Date and subject to paragraph 5, below, the Trustee is authorized and directed to distribute the Reserve to the Bank up to the amount of the Bank's secured mortgage indebtedness without further order of this Court.

5. **THIS COURT ORDERS** that, notwithstanding paragraph 4 above, the Trustee may not distribute any funds from the Reserve to the Bank without retaining an amount equivalent to the priority amount claimed by the Disputing Lien Claimants.

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ON / BOOK NO:
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Proceedings commenced at Toronto

ORDER

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