

**CITATION:** Kingsett Mortgage Corporation v. Mapleview Developments Ltd., 2024 ONSC 6477

**COURT FILE NO.:** CV-24-716511-00CL

**DATE:** 20241121

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Kingsett Mortgage Corporation, Applicant

**AND:**

Mapleview Developments Ltd., Pace Mapleview Ltd and 2552741 Ontario Inc.,  
Respondents

**BEFORE:** Cavanagh J.

**COUNSEL:** *Sean Zweig, Aiden Nelms and Milan Singh*, for the Applicant

*Marc Wasserman, Roger Gillott, Dave Rosenblat and Sierra Farr*, for KSV in its  
capacity as receiver

*Alexander Soutter*, for Dunsire Homes Inc.

*Eric O. Gionet and Andrew Wood*, for Sunbelt Rentals of Canada Inc., Barrie Trim  
& Mouldings Inc. and Mykon Electric North Ltd.

*Kenneth Kraft and Fraser Mackinnon Blair* for Fuller Landau Group Inc., Receiver  
of Quality Sterling Group

*Harvey Chaiton*, for Marshall Zehr Group Inc.

*Kenneth W. Movat*, for Home Lumbar, Alpa Stairs and Newman Window

*Stewart Thom*, for Rivervalley Masonry Group Ltd.

*Nicole Maragna*, for Behalf of Foremont Drywall Inc.

**HEARD:** September 17, 2024

**ENDORSEMENT**

**Introduction**

[1] KSV Restructuring Inc. is the Court-appointed receiver and manager (the "Receiver") of certain real property (the "Lands") and other property of Mapleview Developments Ltd. ("Mapleview"), Pace Mapleview Ltd. ("Pace") and 2552741 Ontario Inc. (together with Mapleview and Pace, the "Debtors").

[2] KingSett Mortgage Corporation ("KingSett"), the applicant in the within application, is the principal secured creditor of the Debtors. KingSett holds a mortgage that was registered against title to the Lands on December 8, 2022 (the "2022 KingSett Mortgage") in respect of which, as of July 26, 2024, it was owed approximately \$50.3 million.

[3] The Receiver is the moving party on this motion.

[4] A number of entities registered construction liens against the Lands in the total amount of \$19,704,333.28. The first lien on the Lands arose on December 5, 2016. Certain lien claimants contend that their liens have full priority over the 2022 KingSett Mortgage and, therefore, must be paid. These lien claimants are responding parties on this motion. At the hearing, submissions were made by two sets of counsel for lien claimants upon which other lien claimants relied.

[5] The issue on this motion is whether (i) the construction liens have priority over the 2022 KingSett Mortgage for their full amounts and constitute "Priority Payables" under a Sale Agreement for the Lands that was approved by this Court by Order dated May 30, 2024, or (ii) the 2022 KingSett Mortgage has priority over the construction liens except to the extent of any deficiency in the holdbacks required to be retained by Mapleview under the *Construction Act*.

[6] For the following reasons, I conclude that the 2022 KingSett Mortgage has priority over the construction liens except to the extent of any deficiency in the holdbacks required to be retained by Mapleview under the *Construction Act*.

### **Background Facts**

[7] Prior to the commencement of these receivership proceedings, the Debtors were collectively engaged in developing a residential townhome project on the Lands.

[8] KingSett and Mapleview entered into several commitment letters under which KingSett agreed to provide financing for land servicing, land development and construction on the Lands to be secured by two mortgages. On October 17, 2019, KingSett registered a first mortgage on title to the Lands securing the amount of \$87,000,000 and a second mortgage securing the amount of \$19,000,000. These two mortgages were later discharged.

[9] All advances made under these mortgages were between October 17, 2019 and February 17, 2022. All of the funds advanced by KingSett were used for improvements to the Lands.

[10] On December 8, 2022, pursuant to an amended and restated commitment letter dated September 23, 2022, KingSett registered the 2022 KingSett Mortgage against title to the Lands. The original KingSett mortgages were discharged from title on December 9, 2022.

[11] At the time of and following registration of the 2022 KingSett Mortgage, no advances were made by KingSett to Mapleview.

[12] The Receiver's motion is supported by the affidavit of Daniel Pollack, an Executive Director, Portfolio Management, of KingSett. Mr. Pollack's evidence is that KingSett had taken the original mortgages with the intention to secure financing of an improvement to the lands, which financing was then made available to the Debtors through advances and used for such purposes.

[13] Mr. Pollack's evidence is that the purpose of the amended and restated commitment letter was to consolidate the prior commitment letters and to include certain additional charged lands as security (to be used for Part VI of the Project) for which a new mortgage was required to be registered. Mr. Pollack's evidence is that the original mortgages were deleted (after registration of the 2022 KingSett Mortgage) due to a desire by all parties for the updated debt stack to be clearly reflected on title to avoid multiple mortgages on title securing the same indebtedness which would have complicated certain subordination agreements agreed to among the parties.

### **The Receivership**

[14] On March 21, 2024, the Receiver was appointed over the Lands, among other property of the Debtors. This Court approved a sale agreement (the "Sale Agreement") and a sale process for the Lands and other property by order dated May 30, 2024. The Sale Agreement was deemed to be the successful bid in that sale process.

[15] Under the terms of the Sale Agreement, a portion of the purchase price is equal to the sum of the "Priority Payables", which is defined as:

any payables that have priority over the Assumed Mortgages, excluding any Harmonized Sales Tax owing by the Debtors, but including amounts that have priority pursuant to s. 78(2) of the *Construction Act*, RSO 1990, c C30, as determined by the Receiver in consultation with the Purchaser, both acting reasonably, or as determined by the Court, after application of any amount of cash on hand of the Debtors, excluding the Deposit, immediately prior to Closing.

[16] The "Assumed Mortgages" are mortgages held on behalf of, or directly by, Aggregated Investments Inc. The 2022 KingSett Mortgage has priority over the Assumed Mortgages on the Lands.

[17] The purchase price under the Sale Agreement includes the amount secured under the 2022 KingSett Mortgage and the amount outstanding in respect of any Priority Payables on the closing date.

[18] The Receiver previously proposed to retain a reserve in respect of any claims in relation to the statutory holdback deficiency. The holdback reserve was to be held by the Receiver from the cash proceeds of the transaction, pending a determination of the amounts that may be owed to lien claimants. The Receiver calculated the maximum potential holdback claim owing to each lien claimant which was used to determine the amount of the holdback reserve.

[19] On July 26, 2024, the Receiver served motion materials for (i) an approval and vesting order approving the sale transaction which contemplated the holdback reserve; and (ii) a distribution order approving a distribution of the proceeds of the sale transaction to KingSett as secured creditor.

[20] On August 1, 2024 one of the objecting lien claimants filed materials objecting to the proposed distribution to KingSett on the basis that the lien claimants have priority under the *Construction Act* for the full extent of their liens. This lien claimant asserted that the holdback reserve was insufficient and the Receiver should retain the full amount of the lien claims

(approximately \$19.7 million) as a potential Priority Payable. Several other lien claimants also indicated that they would be objecting on the same basis.

[21] On August 2, 2024, the Court adjourned the relief sought, and determined that the portion of the motion pertaining to the distribution and priorities issue should be heard and determined at a separate hearing.

[22] KingSett has been paid in full from the proceeds of the sale transaction contemplated by the Sale Agreement. At this hearing, the Receiver seeks determination of the priority between the 2022 KingSett Mortgage and the liens which determination is relevant to calculation of the purchase price with the purchaser, Dunsire Homes Inc., under the Sale Agreement.

[23] The Receiver submits that the 2022 KingSett Mortgage has priority over liens, except to the extent of deficiencies in the holdbacks required to be retained by Mapleview under s. 78(2) and s. 78(6) of the *Construction Act*.

### **Analysis**

[24] The issue on this part of the Receiver's motion is whether (i) as the lien claims contend, the full amounts of the liens of the lien claimants, including amounts in excess of the deficiency in the holdback required to be withheld by Mapleview under the *Construction Act*, have priority over the 2022 KingSett Mortgage and constitute Priority Payables under the Sale Agreement, or (ii) as the Receiver contends, the 2022 KingSett Mortgage has priority over liens except to the extent of a deficiency in the holdbacks.

[25] Section 78(1) of the *Construction Act* provides:

Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

[26] Section 78(1) of the *Construction Act* establishes the general rule that all liens arising from an improvement have priority over all mortgages affecting the owner's interest in the premises. This rule is subject to any applicable exception otherwise provided under s. 78. See *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256, at para. 77.

[27] The Receiver relies on s. 78(2) and s. 78(6) of the *Construction Act* which, it submits, apply as exceptions to the general rule in s. 78(1).

### ***Does the 2022 KingSett Mortgage have priority over construction liens under s. 78(2)?***

[28] Section 78(2) of the *Construction Act* provides:

#### **Building Mortgage**

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the

extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

[29] The lien claimants submit that s. 78(2) is not an exception to the general rule in s. 78(1) and it does not grant priority to a building mortgage ahead of liens arising from an improvement. They submit that, instead, s. 78(1) applies generally to give liens arising from an improvement priority, and s. 78(2) and s. 78(5) grant a special priority (or what might be thought of as a "super priority") to lienholders with respect to holdbacks. The lien claimants rely on the wording of s. 78 and point to subsections 78(1), (2), and (5) which, they submit, use consistent and affirmative wording to grant priority to liens while subsections 78(3), (4) and (5) use consistent and affirmative wording to grant priority to mortgages. They submit that an interpretation of s. 78(2) as providing for a mortgage to acquire priority over liens, or to restrict the priority to be given to liens under s. 78(1), would lead to anomalous results and would make the words "[s]ubject to subsection (2)" as they are found in subsections 78(3), (4), and (6) unnecessary and redundant.

[30] Alternatively, the lien claimants submit that the 2022 KingSett Mortgage does not qualify as a "building mortgage" because the advances were made prior to registration of that mortgage and, therefore, s. 78(2) has no application.

[31] I first address the main submission of the lien claimants.

[32] In *Bianco v. Deem Management Services Limited*, 2021 ONCA 859, the Court of Appeal for Ontario heard an appeal from the order of the motion judge who determined that the liens of lien claimants had priority over a registered mortgage. The decision of the motion judge is reported at *Dal Bianco v. Deem Management Services et al.*, 2020 ONSC 1500.

[33] The motion judge in *Dal Bianco* found that all funds secured by the mortgagee's mortgage were advanced without security having been registered. The funds advanced were intended to be used, and were used, to finance an improvement to the real property. The motion judge held that the general intention of s. 78 of the *Construction Act* is to give priority to lien claimants over mortgages, subject to certain defined exceptions. The mortgagee relied on s. 78(2) and s. 78(6) as exceptions to the general priority given in s. 78(1) of the *Construction Act*. The motion judge, at para. 39, in addressing s. 78(2), held that s. 78(2) "denotes a future intention on the part of a mortgagee; an intention to secure financing". The motion judge held that the required intention was not shown because the funds were advanced without security and the mortgage was registered afterwards. The motion judge decided that the mortgagee had failed to prove that its mortgage fell within the exception in s. 78(2) of the *Construction Act*.

[34] On appeal, the Court of Appeal considered the motion judge's decision in respect of both s. 78(6) and s. 78(2) of the *Construction Act*. With respect to s. 78(2), Nordheimer J.A., writing for the Court, at paras. 29-31, held:

[29] I now turn to s. 78(2) where the wording is, I accept, less plain. However, notwithstanding the lack of clarity, I reach the same conclusion on the facts of this case. I accept that the thrust of s. 78(2), and the wording "[w]here a mortgagee takes a mortgage with the intention to secure the financing of an improvement", is to

restrict the priority of the lien claims relating to that improvement solely to any deficiency in the holdback amount, and not over the mortgage generally.

[30] In this case, though, the appellant cannot bring itself within that exception for the same reason that undercuts the appellant's reliance on s. 78(6), and that is that the wording of s. 78(2) suggests that the intention to secure the financing operates prospectively. In other words, to fit within s. 78(2), the mortgagee must take the mortgage with the intention to secure financing of an improvement, which financing is then made. It does not operate retrospectively, that is, with respect to an intention to secure financing of an improvement that has already been made.

[31] That conclusion with respect to the intention of s. 78(2) is consistent with the intention of s. 78 generally, which is to give priority to lien claimants. If a secured party wishes to propel its claim past the general priority given to lien claimants, then it bears the onus of bringing itself clearly within one of the exceptions set out in s. 78. In this case, the appellant has failed to discharge that onus, both with respect to s. 78(6) and s. 78(2).

[35] In *Bianco*, as these paragraphs show, Nordheimer J.A. held that s. 78(2) is a statutory exception to the general rule in s. 78(1) of the *Construction Act*. He held that where the statutory requirement in s. 78(2) ("a mortgagee takes a mortgage with the intention to secure the financing of an improvement") is satisfied, the effect is "to restrict the priority of the lien claims relating to that improvement solely to any deficiency in the holdback amount, and not over the mortgage generally".

[36] This decision of the Court of Appeal in *Bianco* directly conflicts with the submission made by the lien claimants that s. 78(2) of the *Construction Act* is not an exception to the general rule in s. 78(1) and does not restrict the priority of liens arising from the improvement over a mortgage taken by a mortgagee with the intention to secure the financing of an improvement, but grants a special priority to such liens to the extent of a deficiency in the holdbacks.

[37] The lien claimants submit that the statements made by Nordheimer J.A., at para. 29, describing the thrust of s. 78(2), are *obiter dicta* because, in the result, he held that the mortgage was not a building mortgage to which s. 78(2) applied. They submit that this part of the Court of Appeal's decision is incorrect and I should decline to follow *Bianco* in this respect.

[38] I disagree that the decision of the Court of Appeal in *Bianco*, at para. 29, is *obiter dicta*. This paragraph is an integral part of the reasoning of Nordheimer J.A. by which he (i) held that s. 78(2) provides for an exception to the general rule in s. 78(1) of the *Construction Act*, (ii) decided the statutory effect of this exception if it applies, and (iii) having done so, went on to address and decide whether the appellant had brought itself within that exception.

[39] I am bound by the decision of the Court of Appeal in *Bianco*. I follow this decision and conclude that s. 78(2) of the *Construction Act* provides for a statutory exception to the general rule in s. 78(1) and, where it applies, the effect is to grant priority to the mortgage over liens except to

the extent of any deficiency in the holdbacks required to be retained by the owner under the *Construction Act*.<sup>1</sup>

[40] I now turn to the alternative submission made by the lien claimants.

[41] Section 78(2) of the *Construction Act* requires for this subsection to apply that a mortgagee must take a mortgage "with the intention to secure the financing of an improvement".

[42] The lien claimants submit that s. 78(2) does not apply to the 2022 KingSett Mortgage because KingSett has failed to establish that it took the 2022 KingSett Mortgage with the intention to secure the financing of an improvement. The lien claimants submit that because the advances secured by the 2022 KingSett Mortgage were made prior to registration of that mortgage, s. 78(2) *has no application*.

[43] In support of this submission, the lien claimants rely on *Bianco* which, they submit, stands for the proposition that the mortgage for which priority is being sought under s. 78(2) must be registered before the funds secured by the mortgage are advanced.

[44] In *Bianco*, there was a priority contest between a third mortgagee and lien claimants. The third mortgagee had advanced funds between 2012 and 2015 without security having been registered. The third mortgage was registered in 2018 to secure previously unsecured advances. Nordheimer J.A. considered whether the mortgagee had brought itself within the exception in s. 78(2) and, at para. 30, held:

In this case, though, the appellant cannot bring itself within that exception for the same reason that undercuts the appellant's reliance on s. 78(6), and that is that the wording of s. 78(2) suggests that the intention to secure the financing operates prospectively. In other words, to fit within s. 78(2), the mortgagee must take the mortgage with the intention to secure financing of an improvement, which financing is then made. It does not operate retrospectively, that is, with respect to an intention to secure financing of an improvement that has already been made.

[45] When Nordheimer J.A. held that the mortgagee's intention "does not operate retrospectively, that is, to secure financing of an improvement that has already been made", he did

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<sup>1</sup> Other cases support this conclusion. In *BCIMC Construction Fund Corp. et al. v. 33 Yorkville Residences Inc. et al.*, 2022 ONSC 2326, Penny J., at paras. 9-10, held that s. 78(2) is an exception dealing with building mortgages to the basic rule in s. 78(1) where "the lien has priority to the extent of any deficiency in the holdbacks required to be retained ..." [emphasis added by Penny J.]. In *Basic Drywall Inc. 1539304 Ontario Inc.*, 2012 ONSC 1155, aff'd 2012 ONSC 6391, a lien claimant claimed that where the mortgagee had paid money into court and vacated the lien, the mortgagee lost the priority it would otherwise have had under s. 78(2) of the *Construction Lien Act*. The motion judge rejected this argument and held, at para. 13, that "it is clear that the priority of the lien claimants over the lender under the building mortgage does not extend beyond the deficiency in the amounts required to be withheld under Part IV of the *Construction Lien Act*". On appeal, the Divisional Court held, at para. 29, that "[t]he motion judge did not err in characterizing the issue as a priority dispute and finding that under s. 78(2) of the Act, ICICI, as mortgagee, has priority over all but the 10% holdback ...".

so in the context of an evidentiary record where the mortgage was registered to secure previously unsecured financing of an improvement that had already been made through prior advances.

[46] In contrast to the factual circumstances in *Bianco* when advances were made, KingSett took the original mortgages with the intention to secure the financing of an improvement, which financing would then be made through advances secured by registered mortgages. All advances were made by KingSett with this intention, which operated prospectively when the original mortgages were taken and, I find, continued to the time when the 2022 KingSett Mortgage was registered.

[47] The lien claimants submit that when KingSett took and registered the 2022 KingSett Mortgage, new mortgage terms were made including an increase in the amount secured, a change in the method of calculation of interest, and a charge over new land (Phase VI of the Project) which was not charged by the original KingSett mortgages. KingSett submits that at least in respect of the charge over the Phase VI lands, the factual situation is the same as that in *Bianco*. The lien claimants submit that given these new terms, s. 78(2) does not apply for the same reasons that it was held not to apply in *Bianco*.

[48] Mr. Pollack deposes that in respect of Phase VI (described in the amended and restated commitment letter as being raw land zoned for 81 town houses) neither servicing nor construction has yet begun.

[49] Section 78(2) provides that where it applies, the liens have priority over that mortgage, "and any mortgage taken out to repay that mortgage", to the extent of any deficiency in the holdbacks. There is no statutory requirement that the terms of the mortgage taken out to repay the mortgage (one taken with the intention to secure the financing of an improvement) must be the same as the terms of the mortgage which is repaid. If a new mortgage had been taken out to repay the original KingSett mortgages, and the take-out mortgage had different terms, and even charged additional lands, s. 78(2), by its plain wording, would still apply.

[50] Unlike in *Bianco*, when KingSett registered the 2022 KingSett Mortgage, even though this mortgage charged additional raw land, KingSett did not take security for previously unsecured advances. KingSett intended that its advances, that had previously been secured by its original mortgages, would continue to be secured by the 2022 KingSett Mortgage. KingSett's intention did not operate retrospectively with respect to previously unsecured advances, as did the mortgagee's intention in *Bianco*. This is a key distinction between the factual situation in *Bianco* and the factual situation shown by the evidence before me.

[51] I conclude that KingSett has established that it took the 2022 KingSett Mortgage with the intention to continue to secure the financing of an improvement, an intention that KingSett maintained from the time of registration of the original KingSett mortgages. The exception in s. 78(2) of the *Construction Act* applies with the result that the 2022 KingSett Mortgage has priority over the liens, except to the extent of any deficiency in the holdbacks required to be retained by Maplevue under the *Construction Act*.



***Does the 2022 KingSett Mortgage have priority over liens pursuant to s. 78(6)?***

[52] KingSett also submits that the 2022 KingSett Mortgage has priority over the liens pursuant to s. 78(6) of the *Construction Act*.

[53] Section 78(6) of the *Construction Act* provides:

**General priority against subsequent mortgages**

Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

[54] The 2022 KingSett Mortgage was registered after the date when the first lien arose and is, therefore, a subsequent mortgage.

[55] Section 78(6) provides for priority of a subsequent mortgage where the requirements in s. 78(6) are met. The priority of a subsequent mortgage under s. 78(6) of the *Construction Act* is subject to s. 78(5) which provides that where a subsequent mortgage is registered, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

[56] The lien claimants submit that KingSett does not have priority over liens under s. 78(6) of the *Construction Act* because there was no advance made in respect of the 2022 KingSett Mortgage.

[57] In support of this submission, the lien claimants cite several authorities.

[58] In *XDG Ltd. v. 1099606 Ontario Inc.*, 2004 CanLII 15997, a mortgage was given by the owner of property as collateral security with respect to its guarantee of prior indebtedness owed to the mortgagee by an entity related to the mortgagor. A trial was held to determine the priority as between the lien claimants and the mortgagee. The trial judge held that no advance was made to the mortgagor nor did it benefit from the prior advances in any manner whatsoever. The trial judge noted that the statutory provisions refer to amounts advanced, not amounts secured. The trial judge found that there was no advance under the mortgage and, therefore, the lien claimants have priority under s. 78 of the *Construction Act*. The trial judge's decision was upheld by the Divisional Court: *XDG Ltd. v. 1099606 Ontario Ltd.*, 2004 CanLII 15997. The Divisional Court, at para. 33,

concluded that there was no demonstrable error shown in the factual findings of the trial judge and he applied the correct legal principles to those facts.<sup>2</sup>

[59] In *Jade-Kennedy Development Corporation (Re)*, 2016 ONSC 7125, the application judge was called on to determine the relative priorities of the lien claimants and mortgagees asserting interests in the lands of the owner. The mortgagee took a collateral mortgage which secured a guarantee of a loan to another entity. The application judge held, at para. 52, citing *XDG*, that a collateral mortgage given to secure a guarantee of a loan to another party does not give rise to "an advance made in respect of that mortgage" within the meaning of s. 78(6) of the *Construction Act*.

[60] The application judge in *Jade-Kennedy* also addressed the question of whether the phrase "in respect of" provides a priority to a collateral mortgagee where an advance is made pursuant to the underlying loan, rather than the collateral mortgage, after delivery of the collateral mortgage. The application judge, at para. 55, held that he was not persuaded that, absent special circumstances, an advance under a mortgage loan or a secured loan facility constitutes an advance made in respect of a collateral mortgage given to secure a guarantee of a third party of a borrower's obligations under the mortgage loan or secured loan facility.

[61] The decision of the application judge in *Jade-Kennedy* was upheld on appeal to the Divisional Court which held, at para. 15, that s. 78(6) refers to amounts "advanced" not amounts "secured" and a purely collateral mortgage under which no advance has been made will not have priority over construction liens. See *Dircam Electric v. Am-Stat Corp.*, 2017 ONSC 3421, at para. 16.

[62] The lien claimants also rely on *561861 Ontario Ltd. v. 1085043 Ontario Inc.*, 1998 CarswellOnt 2935. In that case, the motion judge was called on to determine the priority position of a mortgagee in relation to construction lien claimants in the context of a bankruptcy proposal. The mortgagee loaned her brother money to purchase his estranged wife's interest in the matrimonial home. The brother gave his sister a mortgage on that property which she registered. As a result of the transfer of title following the brother's purchase of his estranged wife's interest, there was a merger of the titles of the matrimonial home with the adjacent land owned by the brother. The brother negotiated for the sale of his lands to 1085403. On closing of this sale, the land was conveyed to 1085403 and the mortgage held by the sister as mortgagee was discharged. The purchaser, 1085403, gave a second mortgage to the sister. After this, construction liens were registered against title to the property. The motion judge considered the *Construction Lien Act* provisions and held that he was satisfied on the evidence that the sister did not advance any funds

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<sup>2</sup> The Fuller Landau Group Inc. as court-appointed receiver of a lien claimant, quotes in its factum, at para. 36, from the Divisional Court decision in *XDG*, at para. 30, including the following sentence which it emphasizes: "The courts have held that where a mortgage was registered to secure a pre-existing debt for the purposes of the CLA, no monies were advanced". This part of the decision appears under the heading "POSITIONS OF THE PARTIES" and the sub-headings "XDG's Submissions" and "GECC failed to meet the onus under the CLA", and para. 30 cites *XDG*'s factum. I read this paragraph of the Divisional Court decision as recording the position of *XDG* rather than stating a conclusion of the panel on this point. The panel's conclusion appears under the heading "CONCLUSION".

to 1085403 (all monies were advanced to her brother on the prior mortgage, which was discharged) and, as such, her mortgage would not be entitled to priority over the liens of lien claimants.

[63] In *Bianco*, the Court of Appeal addressed s. 78(6) of the *Construction Act* and held:

With respect to subsection 78(6), I agree with the motion judge that, in its plain meaning, the subsection does not apply to the third mortgage. In particular, the subsection refers to "any advance made in respect of" the mortgage. In this case, the advances were made well before the third mortgage was given and registered. Indeed, the third mortgage was given and registered more than three years after the last advance and almost 6 years after the first advance. I do not see how, in those circumstances, it could be said that the advances were "made in respect of" the third mortgage.

[64] In *Bianco*, the Court of Appeal, at paras. 24-27, addressed the decisions in *Jade-Kennedy* and *XDG* and concluded that these decisions are consistent with the effect of the plain wording of s. 78(6), that is, that a mortgage will only be given priority to the extent that any advances are made "in respect of" the mortgage. The Court of Appeal held that the factual situations in those cases, and the factual situation in *Bianco*, were such that the advances were not made "in respect of" the mortgage.

[65] The lien claimants submit based on these authorities that the KingSett advances under its original mortgages were not made "in respect of" the 2022 KingSett Mortgage and, therefore, KingSett cannot establish that it has priority to the liens under s. 78(6) of the *Construction Act*.

[66] KingSett relies on Mr. Pollack's evidence that the 2022 KingSett Mortgage is fundamentally a continuation of the original KingSett mortgages which secures and consolidates the loan facilities that were secured under the original KingSett mortgages. KingSett submits that the evidence shows that registration of the 2022 KingSett Mortgage and the deletion of the original mortgages was a purely procedural step which was taken to reflect the consolidation of the prior commitment letters, to reflect on title the updated debt stack and avoid complicated subordination agreements, to avoid multiple mortgages securing the same indebtedness, and to facilitate the adding of additional lands to the security which required a new mortgage.

[67] *XDG* and *Jade-Kennedy*, which involve collateral mortgages, are distinguishable in that the mortgage in each of those cases secured a guarantee given by the mortgagor to the mortgagee of indebtedness owed by a separate entity. In those cases, no advance was made to the mortgagor/guarantor at any time. In *Jade-Kennedy*, the application judge, at para. 52, noted that his conclusion that a collateral mortgage given to secure a guarantee of a loan to another party does not give rise to "an advance made in respect of that mortgage" within the meaning of s. 78(6) of the *Construction Act* follows from the absence of any advance, rather than an interpretation of the meaning of the phrase "in respect of".

[68] In *561861*, the mortgage in respect of which priority was sought was not given by the brother, who received the sister's loan advance, but by a different mortgagor, the purchaser of the brother's lands. There was no advance made by the sister in respect of the mortgage given by the purchaser. *561861* is distinguishable on the same basis as are *XDG* and *Jade-Kennedy*.

[69] In *Bianco*, Nordheimer J.A. relied on the factual circumstance that the advances secured by the mortgage were made on an unsecured basis, without mortgage security, long before the mortgage for which priority was sought was registered. In this factual situation, he held that it could not be said that the advances were made "in respect of" that mortgage.

[70] Unlike in *Jade-Kennedy* and *XDG*, the 2022 KingSett Mortgage is not a collateral mortgage securing a guarantee obligation in respect of which no advance was made. Unlike in *Bianco*, the advances secured by the 2022 KingSett Mortgage were made with the intention that they were secured by registered mortgages.

[71] In *R. v. Nowegijick*, 1983 CanLII 18 (SCC), the Supreme Court of Canada, at para. 39, addressed the meaning of the words "in respect of" as they were used in a federal statute providing for exemption from taxation. The Court held that these words are "words of the widest possible scope" which "import such meanings as 'in relation to', 'with reference to' or 'in connection with'". The Court held that this phrase "is probably the widest of any expression intended to convey some connection between two related subject matters". In *Sino-Forest Corporation (Re)*, 2012 ONCA 816, the Court of Appeal, at para. 41, considered the meaning of the words "in respect of" as they are used in the *Bankruptcy and Insolvency Act* and cited *Nowegijick* and other jurisprudence from the Supreme Court of Canada as authority for the conclusion that these words are "words of the broadest scope that convey some link between two subject matters".

[72] The evidence shows that there is a close connection and link between the advances made by KingSett to Mapview that were secured by the original KingSett mortgages and the 2022 KingSett Mortgage that was taken from the same mortgagor and secured repayment of the same advances to the same debtor. The factual situation shown by the evidence before me is unlike factual situations where the mortgage does not secure any indebtedness created by an advance to the mortgagor, such as a collateral mortgage.

[73] I conclude that in this factual situation, the advances secured by the 2022 KingSett Mortgage were made in respect of the 2022 KingSett Mortgage, within the meaning of s. 78(6) of the *Construction Act*.

[74] At the times of the advances secured by the 2022 KingSett Mortgage, there were no preserved or perfected liens against the Lands. There is no evidence that prior to the times when advances were made, KingSett had received written notice of a lien.

[75] The exception in s. 78(6) of the *Construction Act* applies such that, subject to subsections (2) and (5), the 2022 KingSett Mortgage has priority over the liens of the lien claimants.

[76] The Fuller Landau Group Inc. its capacity as court-appointed receiver for a lien claimant operating as Quality Sterling Group (the "QSG Receiver") submits that the Receiver, a court-appointed officer with a fiduciary duty to all interested parties, has acted inappropriately by taking up the cause of one secured creditor, KingSett (and the purchaser of the Lands) on this motion, to the detriment of other secured creditors. QSG submits that in so acting, the Receiver has disregarded its neutrality and its obligations to the lien claimants. As a result, the QSG Receiver submits that I should give no weight to the submissions of the Receiver.

[77] I do not accept the submission by the QSG Receiver that the Receiver acted inappropriately by taking up the cause of one secured creditor, KingSett, to the detriment of other secured creditors, the lien claimants. KingSett has been paid and does not have an interest in the outcome of this motion. This motion is brought for determination by the Court of a legal question of priority, which is relevant to determination of the purchase price under the court-approved Sale Agreement. The Receiver is required by the March 21, 2024 appointment order to "deal with any lien claims ... which arise in respect of the Property", and to make any required distribution(s) to any contractor or subcontractor of the Debtors ...". The Receiver brings this motion in discharge of its duties under the appointment order.

[78] A receiver may be required to take a position on a motion to discharge its duties to stakeholders and to assist the court. See, for example, *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 1531 where a court-appointed receiver moved for approval of a proposed distribution of net sale proceeds from the sale of the debtor's assets to two secured creditors based on an allocation of the net sale proceeds. One secured creditor supported the receiver's motion and one opposed. The motion was decided by D.M. Brown J., as he then was, and there was no suggestion that the receiver had acted inappropriately by taking a position on the motion. As noted in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONSC 199, at para. 102, "the fact that a receiver recommends a course of action does not mean that it has lost its neutrality".

[79] I am satisfied that the Receiver has not acted inappropriately by taking a position on this motion.

[80] As a result of my decision on the priority issue, it is not necessary for me to address the Receiver's submissions with respect to the doctrine of equitable subrogation.

### **Disposition**

[81] For these reasons, I declare that the 2022 KingSett Mortgage has priority over the liens claimed by the lien claimants and that the lien claims are not Priority Payables under the Sale Agreement except with respect to any deficiencies in the holdbacks required to be retained by the owner under Part IV of the *Construction Act*.

[82] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable to be agreed upon by counsel and approved by me (with reasonable page limits).

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Cavanagh J.

**Date:** November 21, 2024