ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

ENDORSEMENT

COURT FILE NO.: **CV-24-00713783-00CL** **DATE** **November 28, 2024**

NO. ON LIST: **1**

TITLE OF PROCEEDING: **Peoples Trust Company, *et al.* v. Vandyk-Backyard Queensview Limited, *et al.***

BEFORE: JUSTICE P.J. OSBORNE

PARTICIPANT INFORMATION

APPLICANT:

Name of Person Appearing	Name of Party	Contact Info
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RESPONDENT:

Name of Person Appearing	Name of Party	Contact Info
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OTHERS:

Name of Person Appearing	Name of Party	Contact Info
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Elizabeth Lellimo	Foremont Drywall (Highrise/ICI Division) Ltd.	elellimo@bianchipresta.com

ENDORSEMENT OF JUSTICE OSBORNE:

[1] This motion raises the issue of when, and in what circumstances, a registered mortgage takes priority over unregistered construction liens.

[2] The Applicants (collectively, the "First Mortgagee" or "the Applicants") seek an order:

a. declaring that the maximum aggregate potential priority of the claims for liens registered against the Unsold Units ahead of the First Mortgagee's First Mortgage is limited to the maximum statutory holdback of $1,979,540.34 as set out in the Order of Cavanagh, J. dated March 6, 2024 (the "March 6 Ancillary Order"); and

b. if the relief described in subparagraph 2(a) above is granted, authorizing and directing the Receiver to distribute the net proceeds from the sale of any of the Unsold Units to the First Mortgagee, net of commissions, amounts payable on closing and related closing costs (the "Net Proceeds"), together with any previous holdbacks held by the Receiver, subject to the Receiver holding back certain Unsold Units from sale with an aggregate valuation of not less than the Maximum Lien Holdback amount to stand as security for the benefit of lien claims that may be subsequently determined to be valid and in priority to the First Mortgage, pending resolution or determination of the entitlement of any such lien claim or further order of this Court.

[3] The Motion is opposed by two lien holders, Classic Tile Contractors Limited ("Classic Tile") and Urban Mechanical Contracting Ltd. ("Urban Mechanical") (together, the "Lien Claimants").

[4] Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.

[5] For the reasons that follow, the motion is granted.

The Facts

[6] Vandyk-Backyard Queensview Limited (the "Borrower", and together with Vandyk-Backyard Humberside Limited, the "Debtors"), were incorporated to develop a condominium project at 25 Neighbourhood Lane (the "Project"), near the Humber River in Toronto. Construction began in 2021. The Project comprised 134 residential units, five underground parking levels and storage lockers.

[7] The Borrower obtained construction mortgage financing from Kingsett Mortgage Capital Corporation. In April and May 2023, the City of Toronto issued occupancy certificates for all of the units. The condominium plan was registered in July 2023.

[8] Almost all of the units were sold before construction was complete. The sales for those 115 Sold Units closed later in July 2023. The condominium building is fully constructed and is also fully occupied with the exception of the Unsold Units consisting of 21 units, 33 parking stalls and 30 storage lockers.

[9] The First Mortgagee agreed to provide the Debtors with a condominium inventory term loan in the principal amount of $12,700,000, available upon completion of the Project and closing of the sale of approximately 115 Sold Units. That Loan was fully advanced to the Debtors on August 24, 2023. The Loan is secured by the First Mortgage and other security.

[10] Following completion of the Loan and registration of the corresponding First Mortgage, various claims for liens were registered against the Unsold Units:

Lien Claimant	Lien Registration Date / Instrument No.	Certificate of Action	Lien Claim Amount
Dircam Electric Limited	2023-08-25 AT6407058	AT6439785 registered on October 12, 2023	$384,182.90
Foremont Drywall Highrise	2023-08-28 AT6407909	AT6445432 registered on October 23, 2023	$1,845,369.24
Brunco Insulation Ltd.	2023-09-07 AT6416262	None	$30,203.77
Classic Tile Contractors Limited	2023-10-30 AT6450100	AT6496982 registered on January 16, 2024	$1,142,744.43
Torre D.C.C. Carpentry Ltd.	2023-11-01 AT6452324	AT6481040 registered on December 15, 2023	$702,998.75
Summit Concrete & Drain Ltd.	2023-11-10 AT6457807	AT6460839 registered on November 15, 2023	$16,952.26
Urban Mechanical Contracting Ltd.	2023-11-10 AT6458231	AT6469954 registered on November 30, 2023	$2,282,408.34
Urban Mechanical Contracting Ltd.	2023-11-10 AT6458352	AT6469955 registered on November 30, 2023	$658,839.90
2164705 Ontario Inc.	2023-11-15 AT6459779	AT6480459 registered on December 14 2023	$127,350.04
Venice Construction Inc.	2023-11-15 AT6460827	None	$122,337.11
Live Patrol Inc. (NB: since discharged)	2023-11-22 AT6464044	None	$1,130.00
KC Structural Ltd.	2023-12-04 AT6472516	None	$462,217.91
PermaCorp Group of Companies	2023-12-15 AT6481578	None	$323,750.00
Next Plumbing & Hydronics Supply Inc.	2023-10-06 A6436267	AT6445723 registered on October 23, 2023; Application to Delete AT6465065 registered on November 23, 2023 against certain units.	$213,401.51

[11] The Borrower had entered into labour and materials contracts with the Lien Claimants in 2021. Urban Mechanical was initially paid for its work on the Project until February 2023. The Borrower failed to pay its progress draw invoices thereafter. Classic Tile commenced work in December 2022, and was not paid for progress draw invoices rendered in March, April, or May 2023.

[12] As reflected in the above chart, the Lien Claimants registered their respective liens well after the First Mortgage had been registered and their funds were advanced.

[13] The registration of those Lien Claims constituted an event of default under the First Mortgage. When the Borrower failed to cure that default, the Lender brought this Application for the appointment of a receiver.

[14] On February 6, 2024, the Receiver was appointed in respect of the Unsold Units and the proceeds from the sale thereof, pursuant to section 243 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[15] The Receiver then brought a motion for an order establishing the Maximum Lien Holdback amount that may be applicable in respect of those Lien Claims that may be subsequently determined to be valid and rank in priority to the First Mortgage.

Positions of the Parties

[16] The First Mortgagee submits that the Lien Claims at issue here were not preserved or perfected at the time that the First Mortgage was registered on title, and that no written notice of the unregistered lien claims was provided to the First Mortgagee in advance of its registration of the First Mortgage. In addition, it submits that the Loan is an advance in respect of the mortgage.

[17] The Receiver supports the position of the First Mortgagee and submits that the claims of Classic Tile and Urban Mechanical for full priority over the First Mortgage cannot succeed. It further submits that the maximum aggregate potential priority of the Lien Claims over the First Mortgage is limited to the Maximum Lien Holdback, as Cavanagh, J. previously directed in the March 6 Ancillary Order.

[18] The First Mortgagee wants the Net Proceeds of the sale of each Unsold Unit applied to reduce the indebtedness under the Loan. The proposed interim distributions to the First Mortgagee are, in the opinion and recommendation of the Receiver, to the benefit of all stakeholders, as they will serve to reduce accrued and accruing interest on the Loan.

[19] The First Mortgagee further submits that the position of the Lien Claimants is additionally protected by two factors.

[20] First, the estimated value of the remaining Unsold Units exceeds $15,500,000. If the Receiver is successful on this motion, there is more than sufficient security available to allow for the Net Proceeds of the Unsold Units to be distributed to the First Mortgagee, subject to the Unsold Unit Holdback Reserve, without any prejudice to any stakeholders.

[21] Second, the title insurer of the Lender, Chicago Title Insurance Company ("CTIC"), has provided a confirmation to the Receiver to the effect that it confirms and acknowledges an obligation to pay amounts in respect of construction liens registered against the Property that are determined by the Court to be valid and in priority to the First Mortgage, to the extent that such determination of priority in favour of the Lien Claimants results in any loss or deficiency in the repayment in full of the Mortgage (in accordance with the terms of the commercial loan policy granted in favour of the Lender) (the "CTIC Confirmation").

[22] Accordingly, the position of the First Mortgagee is that the Unsold Unit Holdback Reserve, together with the CTIC Confirmation, provides appropriate and sufficient security for those Lien Claims which may ultimately be found to rank in priority to the First Mortgage.

[23] The first responding Lien Claimant, Urban Mechanical, submits that what the Applicant proposes (that the Receiver hold back from sale certain Unsold Units with the valuation of an amount up to the Maximum Lien Holdback as "security" for the Lien Claimants and provide further protection in the form of the CTIC Commitment) is inadequate and provides no basis for the relief being sought by the Applicant in the form of an order giving it priority to be paid in full ahead of all lien claims.

[24] The second responding Lien Claimant, Classic Tile, submits that the First Mortgage is void as against it pursuant to the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, and/or the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33, on the basis that it was allegedly made with the intent to defeat and defraud creditors.

[25] Specifically, Classic Tile submits that the Mortgage was obtained by the Debtors through fraud, to evade creditors by moving cash to other affiliated projects within the Vandyk Group when it was insolvent or nearly so. Classic Tile takes the position that the Applicant either had notice or knowledge of this and/or was wilfully blind and cannot succeed on the statutory defences available under either of the above-noted two statutes. In either case, the result being that its lien claim is entitled to full priority over the First Mortgage pursuant to section 78 of the *Construction Act*, R.S.O. 1990, c. C.30.

[26] Since the March 6 Ancillary Order did not address claims to full priority over the First Mortgage, these priority issues must be determined.

[27] The Lien Claimants assert that their claims are entitled to complete priority over the First Mortgage, notwithstanding the fact that they were not registered prior to that First Mortgage. They also take the position that the Loan is not "an advance in respect of the mortgage" that is excepted from the general priority of their liens established by section 78 of the *Construction Act*.

Analysis

The *Construction Act*

[28] The analysis must begin with the relevant provisions of the *Construction Act*, found in section 78:

> **Priority over mortgages, etc.**
>
> **78** (1) 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. R.S.O. 1990, c. C.30, s. 78 (1); 2017, c. 24, s. 70.
>
> […]
>
> **Special priority against subsequent mortgages**
>
> (5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, 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. R.S.O. 1990, c. C.30, s. 78 (5); 2017, c. 24, s. 70.

General priority against subsequent mortgages

(6) 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. R.S.O. 1990, c. C.30, s. 78 (6); 2017, c. 24, s. 53 (1), 70.

[29] The priorities regime created by section 78 of the *Construction Act* is a complete code for the determination of lien priority disputes with mortgagees. The concept is that liens in respect of labour and materials contributing to the improvement of a property have priority over mortgages unless the enumerated exceptions apply.

[30] There is no issue that section 78(1) applies to the liens of Urban Mechanical and Classic Tile, as "liens arising from an improvement". Pursuant to that subsection, such liens have priority over all mortgages affecting the owner's interest in the premises, except as provided in section 78.

[31] Subsection 78(5) is clear that where a mortgage affecting the owner's interest is registered after the time when the first lien arose, the liens have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner.

[32] Subsection 78(6) provides, in relevant part, that subject to subsection (5), a mortgage registered after the time when the first lien arose has priority over the liens, to the extent of any advance made in respect of that mortgage, unless, at the time the advance was made, there was a preserved or perfected lien or prior to the advance, the mortgagee making the advance had received written notice of a lien.

[33] In my view, these statutory provisions are largely dispositive of this motion when informed by the relevant facts.

[34] There is no issue that for the purposes of subsection 78(5), each of the liens here arose before the Mortgage was registered. A lien arises when labour and materials are first supplied to an improvement of a property by a lien claimant: section 15.

[35] There is also no issue that for the purposes of subsection 78(6)(a) that at the time the advance under the Mortgage was made, neither lien was preserved or perfected. The Lien Claimants concede this.

[36] Finally, there is also no issue for the purposes of subsection 78(6)(b) as to whether the Mortgagee making the advance had received written notice of either lien. The Lien Claimants conceded that the Mortgagee had not.

[37] I accept the submission of the First Mortgagee that by seeking complete priority over the First Mortgage for their liens, the Lien Claimants are in effect arguing that a mortgagee has a duty to go beyond the priority regime established by the *Construction Act* described above.

[38] In my view, additional inquiries are not required on a plain reading of the above provisions, and imposing such a duty runs contrary to the legislative intent behind the statutory provisions. They provide a complete, fundamental, yet easily understandable code: where a lien has arisen before an advance under the mortgage, but the lien has not been perfected or preserved and the mortgagee has no notice of the lien, the mortgage has priority over the lien.

[39] The appropriate balancing of interests is achieved and maintained. The unpaid contractor can protect its interest by preserving or perfecting the lien it clearly has. Further, the unpaid contractor can enjoy priority over a subsequently registered mortgage if the mortgagee has knowledge of the lien (even if not preserved or perfected). Absent that, however, the mortgagee is entitled to rely on the statutory regime and the land register, and the lien claimant risks losing priority. The mortgagee then has a corresponding duty to register its mortgage promptly or face the risk of losing its own priority.

[40] Both the lien claimant and the mortgagee have the opportunity and ability to fully protect their position, but they need to actively do that.

[41] Given my conclusion that there was no obligation on the First Mortgagee to make further inquiries, that is the end of this part of the analysis. However, and if I am in error in this regard, I have nonetheless considered the submissions of the Lien Claimants that the circumstances of this case were such that the First Mortgagee had a duty to make further inquiries and conduct due diligence, and it was either reckless or wilfully blind in electing to make the advance under the First Mortgage in the circumstances.

Duty to Make Further Inquiries

[42] The Lien Claimants submit that, notwithstanding the absence of any registered liens or written notice of liens, the failure on the part of the First Mortgagee to conduct appropriate due diligence is illustrated by two principal facts which, when considered in context, support a finding of recklessness or wilful blindness:

a. two liens had been registered against title on June 22 and July 13, 2023 respectively, by two contractors doing work for the Borrower on the Project: Roni Excavating Limited (“Roni”) Future Kitchen & Bath Ltd. (“FKB”); and

b. there was ongoing construction at the Project.

[43] In my view, the Lien Claimants cannot succeed even if there was an obligation on the First Mortgagee who had not received notice of the liens to make further inquiries since the First Mortgagee was not reckless or wilfully blind.

[44] The First Mortgagee performed a title search immediately before making the advance under the First Mortgage. No liens were registered. To be clear, the title search reflected that the Roni lien was deleted on July 14, 2023 and the FKB lien was deleted on July 19, 2023, well before the advance and the registration pursuant to the First Mortgage. In each case, the lien was on title for a relatively short period of time: approximately one month.

[45] In my view, it is unreasonable to conclude that either the First Mortgagee had constructive knowledge of unpaid liens or ought to have conducted any further inquiries about the probability of unpaid liens - and in particular, the liens of Urban Mechanical and Classic Tile. The fact that in a very significant multiunit residential project involving multiple trades, two liens had been previously registered and almost immediately thereafter discharged could equally have supported the opposite conclusion or inference: the Borrower was dealing with its trades in the ordinary course and where disputes arose, it was settling them promptly.

[46] I reach the same conclusion in respect of the second fact relied upon by the Lien Claimants: ongoing work on site by other trades. That is to be expected in a project of this scale and complexity, and it would be

entirely inconsistent with the clear statutory regime to impose a duty of inquiry on a lender arising from the simple observation of a trade on the building site.

[47] In my view, the circumstances here with respect to ongoing construction are analogous to those considered by this Court in *Jade-Kennedy Development Corporation (Re)*, 2016 ONSC 7125, 72 CLR (4th) 236 ("*Jade-Kennedy*"). There, like here, a lien claimant asserted priority over the registration of a subsequent mortgage submitting that the mortgagees had been aware of the fact that construction was underway when the funds were advanced. The Court rejected this argument at paras. 32 - 35:

> The Alleged Due Diligence Obligation
>
> [32] As mentioned, there is no dispute that there were no registered or perfected liens against the lands secured by the Mortgages at the time that the advances at issue were made thereunder.
>
> [33] However, Guest argues that, notwithstanding the language of section 78(6) of the *CLA*, the mortgagees, to protect their priority, had an obligation to do more than sub-search title to the premises prior to making an advance. Guest argues that the mortgagees were aware of the fact that construction was underway on the Project at the time of such advances and therefore the mortgagees had an obligation to make inquiries to determine if any work was unpaid at that time.
>
> [34] There is no basis for such an obligation in the provisions of section 78(6). It provides for the very situation presented in this case – the registration of a mortgage after construction has commenced on a property. In such circumstances, there is a high likelihood of knowledge of any construction on the property on the part of the mortgagee. Section 78(6) provides for priority of a mortgage provided the conditions in paragraphs 78(6)(a) and (b) are satisfied. There is no basis for implying a further condition, particularly a condition which would render paragraphs (a) and (b) redundant.
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> [35] Accordingly, this submission is dismissed.

[48] Widespread uncertainty for lenders and contractors alike would inevitably arise from the imposition of a duty to conduct additional due diligence beyond the title search simply as a result of having observed any construction on the site. In my view, preventing that uncertainty is precisely why the current statutory regime was enacted in the first place.

[49] In any event, the First Mortgagee here in fact undertook further due diligence. It obtained a formal declaration from the Borrower confirming that there were no unregistered liens. It received Occupancy Certificates and the Condominium Declaration. It conducted a physical site visit and inspection of the Unsold Units, and it did all of this before making the advance under the Mortgage.

[50] Everything the First Mortgagee learned from undertaking the additional due diligence was consistent with what in fact had occurred with respect to each of the two Lien Claimants here: their work on the Project had been performed much earlier and was substantially complete.

[51] The Borrower did not pay the progress draw invoices rendered by Classic Tile for February, March, April and May 2023. By the time the last invoice was delivered in May, Classic Tile had substantially completed all of the base contract work. Not only was the First Mortgagee not aware that the Borrower had any issues with Classic Tile as a basis for the non-payment, but the Borrower also had in fact not raised any such issues. This was confirmed by Ehab Shaheen, the principal of Classic Tile on examination.

[52] Urban Mechanical had initially been paid and kept current by the Borrower, but payment stopped in February 2023 when the Borrower failed to pay its progress draw invoices. On May 25, 2023, Urban Mechanical's Chief Financial Officer corresponded with the Borrower by email, demanding to know when the company would be paid for its overdue February and March draw requests, and threatened to "escalate the situation.".

[53] In addition, the evidence here satisfies me that each of the Lien Claimants was actively considering whether to exercise their rights, and consciously elected not to do so.

[54] This is as one would reasonably expect of very experienced commercial contractors, which each of the Lien Claimants clearly was. The senior representatives of both confirmed on examination that:

a. they were generally aware of their right to register a lien to protect their priority to a claim;

b. they were aware that this right arose upon the supply of labour and materials;

c. they had legal counsel advising them after their liens arose, and when they were aware of the intention of the Borrower to close the sale of the Sold Units and refinance on the Unsold Units;

d. they did not require the Borrower to disclose or identify the refinancing lender;

e. while the Borrower seemingly represented to them that they were the only significant unpaid contractor, they did not investigate that representation further; and

f. most importantly, they neither took any steps to register a lien in advance of the closing of the Sold Units or provided written notice of their unregistered lien claims to anyone other than the Borrower.

[55] Each Lien Claimant did that for its own commercial reasons. In particular, Classic Tile agreed that in lieu of registering its lien as security, it would accept a partial payment of $200,000 from the Borrower on May 26, 2023 as against the February 2023 invoice. In addition, it received an irrevocable direction from the Borrower (to its counsel dated June 28, 2023 delivered July 10, 2023) to pay Classic Tile first out of the net sale proceeds from the sale of the Sold Units. It did this, notwithstanding that by June 28, 2023, the date of the irrevocable direction, the Borrower was indebted to Classic Tile for at least 92% of the base contract price ($1,142,270.29 as against $1,239,723).

[56] By May 19, 2023, Classic Tile had already engaged its counsel to address the delinquent payments and it was actively considering whether to exercise its rights to lien the Project. It elected not to do so.

[57] Urban Mechanical similarly had substantially completed the work required by its contracts by the summer of 2023. It also similarly accepted assurances from the Borrower and elected not to lien the Project. The evidence of Paul Di Lucia, President of Urban Mechanical, was that the Borrower warned him that registering a lien would prejudice Urban Mechanical, since it would prevent the Borrower from obtaining the financing that would in turn allow the Borrower to pay the arrears owing.

[58] The Borrower advised both Classic Tile and Urban Mechanical that it was trying to acquire new financing secured by the remaining inventory of Unsold Units, which would be used for the benefit of unpaid construction trades.

[59] Both Lien Claimants, in the above circumstances, elected not to register their lien claims at any time through May, June or July 2023, precisely because they were concerned that doing so would prevent or at least

inhibit the flow of any payments and cause even further delay. Their hope was that they would be paid out of the sale proceeds, or the refinancing, and based on that hope they elected to continue working without registering their respective liens or putting the mortgagee (or anyone else) on notice of their unregistered lien claims.

[60] The Commitment Letter was entered into between the First Mortgagee and the Borrower on June 28, 2023. The Lender conducted an in-person site visit on July 19, 2023, that confirmed that the Unsold Units were complete with only minor deficiencies to be addressed. The Borrower obtained a professional appraisal as to the value of the Unsold Units (which reflected an estimated market value of $19,855,000).

[61] Approximately one month later, on August 10, 2023, before the Loan was advanced, the Chief Financial Officer of the Borrower executed a Certificate of Advance and a Statutory Declaration as to title for the Unsold Units expressly confirming that:

a. there were no title reservations or unregistered liens, and no improvements to the Unsold Units that would give rise to a lien; and

b. no part of the Loan would be utilized for the purposes of financing any improvements, or to repay any indebtedness that arose from financing any improvements.

[62] Immediately prior to the registration of the First Mortgage and the Loan advance, the Lender's counsel conducted a title search as against the Unsold Units, again confirming the absence of liens or other encumbrances registered on title. It was that title search that confirmed the discharge of the previously registered liens in favour of Roni and FKB.

[63] On August 24, 2023, the funds in the principal amount of $12,700,000 were advanced in a single payment.

[64] One day later, on August 25, 2024, lien claimants began registering lien claims against title to the Unsold Units as reflected above at para. 10. Of those 14 lien claims, the claims of the Lien Claimants opposing the relief here were registered much later: Classic Tile registered its lien claim on October 30, 2023 and Urban Mechanical registered its two lien claims on November 10, 2023.

[65] In my view, this situation is analogous to that considered by the Court of Appeal for Ontario in *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589, 163 OR (3d) 652, where the Court was clear that the *Construction Act* occupies the field and does not allow for the imposition of an equitable lien that in turn opposes additional obligations, in order to avoid the result of the clear application of the statutory provisions. The Court stated at para. 46:

> [46] The *Construction Lien Act* clearly ousts certain equitable rights. For instance, it precludes a subcontractor who was entitled to, but did not register a construction lien for unpaid work as provided by the *Construction Lien Act*, from claiming the amount of the lien in unjust enrichment. This is the "precise sort of situation that the *Construction Lien Act* was designed to address and augmenting the scope of claims available would undercut the balance established by the *Act*": *Tremblar Building Supplies Ltd. v. 1839563 Ontario Limited*, 2020 ONSC 6302, 454 D.L.R. (4th) 546, at para. 18.

[66] That approach is consistent with the observation of this Court that it is not proper for the court to create an equitable lien "when a statute has occupied the field of when a lien will be created". *Talbot v. Pawelzik*, 2005 CanLII 4844 (ON SC), at para. 20 ("*Talbot*").

[67] At paras. 32-33 of *Trez v. Wynford*, 2015 ONSC 2794 ("*Trez*"), this Court quoted with approval from *Talbot*, at para. 20 (as well as *Rafat General Contractor Inc. v. 1015734 Ontario Ltd.,* 2005 CanLII 47733 (ON SC)), where Pattillo, J. stated in the course of concluding that the court ought not to create an equitable lien in the place of statutory liens available to condominium corporations for common area expense arrears:

> The principle is analogous to case law under similar statutes, such as the *Construction Lien Act*, which have held the court cannot create an equitable lien where a statute has occupied the field by creating a lien for the same purpose.
>
> …
>
> To interfere with that balance by granting an equitable lien in circumstances where the statutory lien has expired, regardless of the reason, would be contrary to the purpose of [the] Act.

[68] Simply, but inescapably, each of the Lien Claimants here elected to wait for many months to exercise the rights they had and which they had had long before the First Mortgage was registered and before the funds were advanced. The Lien Claimants did so, notwithstanding that they were the empowered parties here relative to the First Mortgagee. They were empowered with the knowledge of their unpaid invoices in respect of completed work, and the fact that their lien claims were not registered on title. Yet they are critical of the due diligence undertaken by the First Mortgagee, notwithstanding its absence of knowledge of the same facts. That is not the circumstance the statutory regime is designed to protect.

Equitable Lien Considerations

[69] Even if the Lien Claimants were entitled to an equitable lien, it would not have priority over the First Mortgage in any event. I accept the submission of the First Mortgagee that the lien priority regime established by section 78 of the *Construction Act* is itself an exception to the general priority scheme established by subsection 93(3) of the *Land Titles Act*, R.S.O. 1990 c. L5.

[70] That subsection provides that, when registered, a mortgage takes priority over all unregistered interest in the land (which would include an equitable lien). It follows that, at its highest, the claim to an equitable lien of the Lien Claimants here would be a claim to an unregistered interest in the Unsold Units which would arise only subsequent to the First Mortgage (i.e., when it was imposed by the Court).

[71] In *Trez*, at para. 36, this Court expressly rejected the proposition that an equitable lien, even if established, would have priority over a prior registered mortgage. Such a result would be inconsistent with section 93(3) of the *LTA,* which operates to oust the doctrine of actual notice in Ontario in respect of a registered charge. This is so even if the chargee has actual notice of an unregistered interest, including an equitable lien. The Court stated:

> [36] If the equitable lien arises as of the date of the court order, the Mortgage has priority, having been registered long before. Even if the equitable lien attaches as of the date of the arrears, I agree with Wilton-Siegel J. in *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648 at para. 185 (reversed on other grounds, 2011 ONCA 817) that there is nothing in the language of s. 93(3) that permits an unregistered equitable lien to override its provisions.

[72] Finally, and even if (contrary to the statutory provisions) the doctrine of actual notice applied, I have already concluded that the First Mortgagee did not have actual notice, and also that it was not reckless or wilfully blind as to the lien claims in any event.

Fraudulent Conveyances and Fraudulent Preferences

[73] Classic Tile submits that even if the Court ought not to impose an equitable lien in order to change the priority scheme set out in section 78, the *Construction Act* does not oust the application of other statutes, in this case, the *Fraudulent Conveyances Act* and the *Assignments and Preferences Act*.

[74] It submits that the First Mortgage is void as against it under either or both of those statutes because the Mortgage transaction was an attempt to defraud creditors, and that several badges of fraud were present here. It submits that the First Mortgagee has the burden of defending the transaction by adducing evidence to show the absence of fraudulent intent. To the extent that is correct, in my view, the First Mortgagee met any burden it had by undertaking the due diligence as described above.

[75] Even if there were fraudulent intent on the part of the Borrower (i.e., an intent to enter into the Mortgage transaction to remove equity from the Project to the detriment of trade contractors and use the proceeds to support other Vandyk projects), there is no evidence of wilful blindness, let alone active intent on the part of the First Mortgagee to be part of any such scheme. Intent must be based on something beyond mere suspicion, and the fraudulent intent shown must be of both parties (i.e., the grantor and the grantee) to defeat, delay, or defraud creditors: *Bank of Montreal v. Smith*, 2008 CanLII 28435 (ON SC), at para. 66; *Cybernetic Exchange Inc. v. J.C.N. Equities Ltd.,* 2003 CanLII 17041 (ON SC), at paras. 218-221; *Solomon v. Solomon* (1977), 1977 CanLII 1164 (ON SC), 16 O.R. (2s) 769 (H.C.) at pp. 774 -775, quoting *Shephard v. Shephard* (1925), 1925 CanLII 409 (ON CA), 56 O.L.R. 555 at p. 558.

[76] The evidence here does not support such a finding in my view.

[77] Classic Tile submits that the Declaration sought and obtained by the First Mortgagee was false because indeed there was significant construction still ongoing. I have already rejected that argument for the reasons above.

[78] As to the other alleged badges of fraud here, I find they also are insufficient to support the result sought by the Lien Claimants: see, for example, Applicants' Reply Factum at para. 15.

Do the Funds Advanced Constitute an "Advance Made in Respect of the Mortgage"?

[79] Finally, the Lien Claimants submit on this motion that their claims have priority over the First Mortgage since the funds advanced under the Loan and secured by the First Mortgage do not constitute an "advance made in respect of that … mortgage" as required by section 78(6) of the *Construction Act*.

[80] The Court in *Jade-Kennedy* came to three relevant conclusions on this issue. First, at para. 49, the Court concluded that the concept of an "advance" is not limited to the principal amount advanced under a mortgage. It includes all amounts which the mortgagor was contractually obligated to pay in respect of any such principal amount advanced, including interest and the costs of registration, etc.

[81] Second, at paras. 50-51, the Court concluded that, the phrase "in respect of" is intended to be broader than "under" insofar as "under" refers to advances made directly by a mortgagee.

[82] Third, at para. 52, the Court observed that *XDG Ltd. v. 1099606 Ontario Ltd*., 2002 CanLII 22043 (ON SC) ("*XDG*") establishes that a collateral mortgage given to secure a guarantee of an underlying loan to another party does not give rise to "an advance made in respect of that mortgage," at least to the extent that no further advance is made after delivery of the collateral mortgage. Section 78(6) refers to amounts "advanced", not amounts "secured". A purely collateral mortgage under which no advance was made will not have priority over construction liens, but that is not the case here.

[83] Put simply, the First Mortgage here is not a collateral mortgage. None of the complications courts in other cases have wrestled with when trying to determine the applicability of section78(6) to a collateral mortgage arise in this case. For example, in *XDG*, the mortgage at issue was a collateral mortgage, no funds were advanced, and instead, the mortgage was used to secure a prior loan, advance to a third party.

[84] In particular, the Loan here was advanced to the Borrower in a single transaction, at the same time the First Mortgage was registered. Nothing in the language of section 78(6) requires the First Mortgagee to establish not only that the loan monies were advanced to the mortgagor (as it has done), but also that they were applied to the improvement of the land.

[85] There is no issue that the funds were advanced to the Borrower. The fact that the Borrower then dispersed those funds, or at least some of them, to creditors in respect of other Vandyk projects does not invalidate the priority of the mortgage: *Jade Kennedy* at paras. 44 and 80 (affirmed by the Divisional Court in *Dircam Electric v. Am-Stat Corp*., 2017 ONSC 3421 at para. 18).

<u>Position of the Receiver</u>

[86] Finally, I observe that the Receiver supports the proposed relief for the reasons set out in its Fourth Report. As a neutral Court-appointed officer, the Receiver submits that the proposed order is fair and reasonable in the circumstances and will operate to the benefit of the stakeholders. It does this for three principal reasons, each of which I have addressed above.

[87] First, the proposed relief recognizes the Maximum Lien Holdback at $1,979,540.34, being the amount already confirmed by this Court as the Maximum Lien Holdback in the March 6 Ancillary Order.

[88] Second, the proposed relief reflects a determination that no Lien Claimant has complete priority over the First Mortgage and therefore eliminates any uncertainty as to whether the quantum of the Maximum Lien Holdback set out above is the full and final statement of such amount.

[89] Third, the relief will authorize the Receiver to make distributions from the Net Proceeds of the sale of the Unsold Units to the Applicants, including Net Proceeds already held by the Receiver. The Receiver will of course hold back certain Unsold Units from sale with an aggregate valuation of not less than the Maximum Lien Holdback as security for the benefit of the Lien Claimants' Claims to be subsequently determined.

[90] The current market value of the Unsold Units is between approximately $900 and $950 per square foot, and there are 18 such Unsold Units. Given this, the Receiver will conduct an analysis upon the sale of each additional Unsold Unit of the approximate aggregate value of the remaining Unsold Units comprising the security at that time, and report to the Court with respect thereto. Once the estimated value of the Unsold Unit Holdback Reserve is calculated to be less than $2,500,000, the Net Proceeds of sale will no longer be paid out in full by the Receiver to the Applicants and will instead be held by the Receiver pending a final determination by the Court with respect to the priority of the Claims.

<u>Result on Lien Priority Issue</u>

[91] For all of these reasons, I find that that the maximum aggregate potential priority of the claims for liens registered against the Unsold Units ahead of the First Mortgagee's First Mortgage is limited to the maximum statutory holdback of $1,979,540.34 as set out in the March 6 Ancillary Order and in para. 2(a) above.

<u>Should the Proposed Distributions be Authorized?</u>

[92] It follows that I must now consider whether the Receiver should be authorized to make the distributions on the terms described at para. 2(b) above.

[93] In my view, that relief is appropriate. It is, as noted by the Receiver, subject to the Receiver holding back certain Unsold Units from sales, with an aggregate valuation of not less than an amount (to be confirmed and agreed upon at the recommendation of the Receiver), but which would not be less than the Unsold Unit Holdback Reserve.

[94] The Unsold Unit Holdback Reserve will be maintained and stand as security for the claims of the Lien Claimants for priority over the statutory holdback required to be retained by the Borrower, to the extent of any deficiency as submitted by the Applicants. This will also provide security additional to the Confirmation provided by title insurer to the Lender as to its obligation to pay amounts in respect of construction liens held by the Court to be valid and stand in priority to the First Mortgage.

[95] In my view, this strikes a balance between the interests of the competing parties that is appropriate in the circumstances of this case. The practical reality is that it will likely take some time for the Receiver to sell all of the Unsold Units. The interest that continues to accrue on the First Mortgage increases at a rate of approximately $90,000 per month. Paying down the indebtedness from the net proceeds of sales as they are completed will reduce the interest accruing, while preserving remaining proceeds from the sale of the Unsold Units for the benefit of the Lien Claimants.

Result and Disposition

[96] For all of these reasons, the motion is granted.

[97] The Applicants have been successful on the motion. They are presumptively entitled to their costs.

[98] They have submitted a Bill of Costs reflecting partial indemnity costs of $57,716.56 and substantial indemnity costs of $86,348.16. Urban Mechanical has submitted a Costs Outline reflecting partial indemnity costs of $14,406.09 and substantial indemnity costs in the amount of $21,403.05. Classic Tile has submitted a Costs Outline reflecting partial indemnity costs of $33,225.11 and substantial indemnity costs of $49,402.19. All amounts are inclusive of fees, disbursements and HST.

[99] Pursuant to section 131 of the *Courts of Justice Act*, costs are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[100] Rule 57.01 provides that in exercising its discretion under section 131, the court may consider, in addition to the result in the proceeding (and any offer to settle or contribute), the factors set out in that Rule.

[101] The overarching objective is to fix an amount that is fair, reasonable, proportionate and within the reasonable expectations of the parties in the circumstances: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at paras. 24-26.

[102] In my view, there is no basis here to award costs on an elevated scale and they should be awarded on a partial indemnity basis. Taking into account the factors set out in Rule 57 in considering them in the particular circumstances of this case, in my view an appropriate award of costs is $75,000 inclusive of fees, disbursements and HST.

[103] Rule 57.03 provides that, on the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall fix the costs of the motion and order them to be paid within 30 days.

[104] Accordingly, 50% or $37,500 is payable by each of the Lien Claimants, to the Applicants, within 30 days.

Osborne J.