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Priorities for Liens and Arrears of Prior Mortgages

Key Takeaway

A recent decision of the Ontario Divisional Court clarifies that if a mortgage has priority over a lien, then so too will all arrears in interest, fees, charges, and expenses have priority over the lien, even if the interest, fees, charges, and expenses arise after the lien arises.

Background

The dispute related to a priority contest between lien claimants and mortgagees pursuant to section 78(3) of the *Construction Lien Act* (“**CLA**”).¹ The lenders were the holders of a vendor take back mortgage (“**VTB**”) for the property.²

Master Albert determined that the advances under the VTB including all outstanding interest and charges had priority over the liens and therefore, the lenders were entitled to all monies in Court.³

On a motion to oppose the confirmation of the Report of Master Albert, Justice Sossin⁴ determined that lien claimants had priority over arrears in interest, fees, charges, and expenses, despite the mortgage itself having priority over the liens. In his opinion, the arrears in interest, fees, charges, and expenses that arose after the liens were subordinate in priority to the liens.⁵

The Appeal Decision

The lenders appealed Justice Sossin’s decision. The issue on appeal was whether the arrears in interest, fees, charges, and expense that relate to a prior mortgage would similarly have priority over the liens, pursuant to section 78(3) of the *CLA*.⁶

Section 78(1) of the *CLA* provides priority to lien claimants over mortgages in order secure the lien claimants’ right to payment for their labour and material supplied to an improvement.

However, there are exceptions set out in section 78, including section 78(3) which provides that:

mortgages registered prior to the time when the first lien arose in respect of an improvement have priority over the liens to the extent of the lesser of:

- (a) *the actual value of the premises at the time when the first lien arose; and*
- (b) *the total of all amounts that prior to that time were,*
 - i. *advanced in the case of a mortgage, and*

¹ R.S.O. 1990, c. C.30, as amended. While the *Construction Lien Act*, rather than the *Construction Act*, applied to this dispute, the concepts are equally applicable to the new, *Construction Act*.

² Scott, Pichelli & Easter Limited v. Dupont Developments Ltd., 2021 ONSC 6579, at para 3 (“**Dupont Developments**”).

³ *Ibid* at para 5.

⁴ Justice Sossin has since been appointed to the Court of Appeal.

⁵ *Ibid* at paras 6 and 29-31.

⁶ *Ibid* at para 2.

ii. *advanced or secured in the case of a conveyance or other agreement.*

In this appeal, there was no doubt that the VTB was registered prior to the first lien arising. However, the issue was the interpretation of the word “advanced” and whether it included the subsequent arrears in interest, fees, charges, and expenses such that they could be considered to have been advanced prior to the time that the first lien arose.

In his decision, Justice Sutherland refers to Justice Wilton-Siegel’s decision in *Re: Jade-Kennedy Development Corporation* who in turn relied upon the Supreme Court of Canada’s decision in *M. Sullivan & Son Ltd v. Rideau Carleton Raceway Holdings Ltd.* In the SCC decision, the Court held that the right to interest is an essential, inseparable, constituent part of the advance made on account of the mortgage.⁷ Justice Wilton-Siegel therefore found that the concept of an “advance” is not limited to the principal amounts under the mortgage but rather “includes all amounts which the mortgagor is contractually obligated to pay in respect of any principal amount advanced, including interest and the costs of registration of any principal amount advanced, including interest and the costs of registration, perfection and enforcement of the mortgagee’s security for the advance irrespective of when incurred.”⁸

Justice Sutherland therefore found that once Justice Sossin concluded that the VTB had priority over the lien claims, the “analysis should have ended”, because the “whole of the mortgage has priority.”⁹ In other words, so long as an “advance” of principal under a prior mortgage has priority over the lien, so too will any and all arrears in interest, fees, charges, and expenses that relate to that “advance”, regardless of the fact that the arrears arose after the first lien arose.¹⁰

Justice Sutherland therefore allowed the appeal and confirmed the Report of Master Albert.¹¹



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⁷ *M. Sullivan & Son Ltd. v. Rideau Carleton Raceway Holdings Ltd.*, [1971] S.C.R. 2, at para 6.

⁸ *Jade-Kennedy Development Corporation., Re*, 2016 ONSC 7125, at para 49.

⁹ *Dupont Developments Supra* at paras 54-55.

¹⁰ *Ibid* at paras 54 and 57.

¹¹ *Ibid* at paras 55 and 58.