

CITATION: Terra Bona Developments Ltd. v. Cacoeli Kennedy Steeles LP, 2026 ONSC 585
COURT FILE NO.: CV-23-711966
DATE: 2026 01 29

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF the *Construction Act*, RSO 1990, c C.30, as amended

RE: TERRA BONA DEVELOPMENTS LTD., *Plaintiff*

- and -

CACOELI KENNEDY STEELES LP BY ITS GENERAL PARTNER
2778754 ONTARIO LTD., VALLEYMEDE BUILDING AMA
CORPORATION, QUID PRO CAPITAL INC., and CLIFTON BLAKE
CAPITAL CORP., *Defendants*

BEFORE: Associate Justice Todd Robinson

APPEARING: G. Caplan, *for the defendant, Clifton Blake Capital Corp.*

M.S. Tavakoli, *representative of the plaintiff*

HEARD: October 2, 2025 (by videoconference)

**REASONS FOR DECISION
(Priority under s. 78 of the *Construction Act*)**

[1] There are two motions before me: one by the plaintiff / lien claimant, Terra Bona Developments Ltd. (“Terra Bona”) seeking, among other relief, a declaration that it is entitled to a lien under the *Construction Act*, RSO 1990, c C.30, and another motion by the defendant / mortgagee, Clifton Blake Capital Corp. (“CBCC”), seeking, among other relief, a declaration that its mortgage has full priority over Terra Bona’s lien, regardless of whether the lien is valid. Both motions arise principally from a dispute over the validity of Terra Bona’s lien and steps taken by CBCC based on its position that the lien had expired.

[2] The central issue before me from both motions is the same: priority as between CBCC’s mortgage and Terra Bona’s claimed lien.

[3] CBCC is the first mortgagee against premises liened by Terra Bona in Toronto. CBCC took an assignment of a mortgage held by Vector Financial Services Limited (“Vector”), the original first mortgagee. That assignment was done as part of a transaction to refinance the first mortgage debt. The mortgagor and owner, Cacoeli Kennedy Steeles LP by its general partner, 2778754 Ontario Ltd. (“Cacoeli”), which is now in receivership, ultimately defaulted under the mortgage and CBCC sought to enforce it. After an agreement of purchase and sale was entered

under power of sale, CBCC challenged Terra Bona's lien. Apart from an alleged direct ownership connection between Terra Bona's principal and Cacoeli, CBCC asserted that Terra Bona's lien had expired.

[4] Terra Bona's motion followed CBCC unilaterally registering an Application (General) under the *Land Titles Act*, RSO 1990, c L.5 to delete Terra Bona's claim for lien on the basis that it had expired under the *Construction Act*. That was done without notice to Terra Bona and without any court order declaring the lien expired. CBCC's registration was accepted and certified by the Land Registrar, which resulted in Terra Bona's claim for lien being deleted from title. Terra Bona maintains that the unilateral deletion of its claim for lien by CBCC was invalid and that its lien remains valid and subsisting. CBCC's motion was brought concurrently to resolve the priority dispute between CBCC and Terra Bona. Cacoeli's receivership intervened, but the receiver ultimately consented for the priority dispute to be brought back before me.

[5] My decision has taken much longer than anticipated. Regrettably, various circumstances have seriously impacted my schedule and available writing time since the motion hearing. I appreciate the parties' patience while this decision remained under reserve.

[6] Subject to a determination in the receivership proceedings on the validity and enforceability of CBCC's mortgage, I find that CBCC's mortgage does have full priority over Terra Bona's asserted lien (to the extent that it is proven valid and timely). However, if I am wrong in that, then timeliness and validity of Terra Bona's lien will need to be decided. I find that CBCC's unilateral deletion was improper and invalid, so there will also need to be a separate determination on whether Terra Bona's lien had expired and the impact, if any, of the certified deletion of its claim for lien under the *Land Titles Act*. Those issues must be addressed on notice to the receiver and are beyond the scope of what is before me.

ANALYSIS

[7] Both motions were initially brought prior the receivership of Cacoeli. The motions were scheduled to be heard before me in mid-February 2025, ahead of a proposed sale of the property by CBCC under power of sale. The parties consented to adjourn the motions after the Ontario Securities Commission brought an application to appoint a receiver.

[8] By order of Steele J., Cacoeli and other related entities were placed into receivership under s. 129 of the *Securities Act*, RSO 1990, c S.5: *Ontario Securities Commission v. Cacoeli Asset Management*, 2025 ONSC 3012. The appeal from that order was dismissed: *Ontario Securities Commission v. Cacoeli Asset Management Inc.*, 2025 ONCA 654.

[9] As briefly discussed above, the receiver agreed to have the priority dispute between Terra Bona and CBCC, which affects Cacoeli's residual interest in the property, determined by me. That priority is relevant in dealing with the lien property in the receivership proceedings. Both Terra Bona and CBCC agreed that that the motion and cross-motion would not include any determination on the validity or enforceability of CBCC's mortgage, which is disputed by Terra Bona. That is to be decided in the receivership proceedings. Accordingly, my decision on these motions is premised on CBCC's mortgage being valid, but without making any decision on the validity or

enforceability of the mortgage and without prejudice to Terra Bona's position that the mortgage is invalid and/or unenforceable.

[10] I previously granted leave for Terra Bona to be represented by its principal, Majid Sarkar Tavakoli, for these motions. Mr. Tavakoli, on behalf of Terra Bona, has invited me to address various issues in disposing of these motions, including issues that touch on whether Terra Bona abandoned the project or was terminated, timeliness of Terra Bona's lien, and appropriate security for the lien pending disposition of Terra Bona's claim (given the deletion of the claim for lien from title). These are all issues that will need to be addressed in disposing of Terra Bona's claim. However, I agree with CBCC that there are only two issues properly before me on these motions: priority as between CBCC's mortgage and Terra Bona's lien and, as a secondary issue, whether deletion of Terra Bona's lien by CBCC's (via its prior lawyers) was valid.

Issue #1 – Does CBCC's mortgage have priority over Terra Bona's lien?

Relevant legal framework

[11] The Court of Appeal has confirmed that the purpose of the *Construction Act* is to protect lien claimants by ensuring that they are compensated for the increase in the value of a property to which their work contributed. That purpose, though, is said to be "hedged about with exceptions", which includes the exception for mortgages in s. 78 of the *Construction Act: Scott, Pichelli & Easter Limited v. Dupont Developments Ltd.*, 2022 ONCA 757 at para. 9.

[12] Priority of liens over mortgages is governed by s. 78. It provides, in part, as follows:

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

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.

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement 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
- (ii) advanced or secured in the case of a conveyance or other agreement.

Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, 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.

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.

[13] CBCC's position is that its mortgage is a prior mortgage falling under s. 78(3). Terra Bona's position is that CBCC's mortgage is a building mortgage under s. 78(2). The dispute hinges on whether CBCC's mortgage, as assigned from Vector, was taken with "the intention to secure the financing of an improvement".

[14] The priority of liens over building mortgages under s. 78(2) was the subject matter of judicial interpretation in *BCIMC Construction Fund Corp. et al. v. 33 Yorkville Residences Inc.*, 2022 ONSC 2326. In that case, the focus was proper interpretation and application of s. 78(2) when there is more than one mortgage taken with the intention to secure the financing of an improvement. Penny J. held that the lien claimants' priority over a building mortgage under the *Construction Act* is the same regardless of the number of building mortgages, namely that priority is limited to the extent of the deficiency in the owner's singular holdback obligation. That interpretation was affirmed on appeal: *BCIMC Construction Fund Corporation v. 33 Yorkville Residences Inc.*, 2023 ONCA 1.

[15] That determination is not germane to the issue before me, since "the intention to secure the financing of an improvement" in s. 78(2) was not a disputed issue and was not the language being interpreted. However, Penny J. set out relevant principles of statutory interpretation that are equally applicable in my own analysis on this motion. Penny J., at para. 11, discussed the "legal test" that is applied when interpreting legislation as follows:

The parties agree that the modern approach to statutory interpretation requires that the words of a statute be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature. This approach is consistent with the *Legislation Act, 2006*, S.O. 2006,

c. 21, Sched. F, which provides, in part, that all legislation is to be interpreted as remedial and given such fair, large and liberal interpretation as best ensures the attainment of its objects.

[16] An interpreter's task in statutory interpretation is to discern the legislature's intention to give effect to it. That requires the interpreter to attend to text, context, and purpose: *Scott, Pichelli & Easter Limited v. Dupont Developments Ltd.*, *supra* at para. 8.

[17] The foregoing are the interpretive principles that I have applied in considering what amounts to "the intention to secure the financing of an improvement" in s. 78(2) of the *Construction Act*.

[18] I have also considered the case law put forward by CBCC on the priority of purchase financing mortgages. Notably, in *Royal Bank of Canada v. Lawton Developments Inc.*, 1994 CanLII 7215 (ON SC), Lane J. expressly addressed the lack of priority of a lien claimant over a purchase financing mortgage, stating "in a normal situation where a person takes from a bank a mortgage for the purpose of acquiring land and nothing more, the fact that he subsequently begins a building project does not give the claimants any priority over the bank whose money has enabled the land to be acquired." That statement is consistent with s. 78(3), which affords full priority to prior mortgages that are not taken with the intention to secure the financing of the improvement to the extent of the lesser of the actual value of the premises at the time when the first lien arose and the total amounts advanced under the mortgage.

[19] However, *Royal Bank of Canada v. Lawton Developments Inc.* also held that a lender could have priority for those advances made to finance land acquisition, as opposed to those made to finance the construction. That rationale was accepted in *Ontario Wealth Management Corp. v. 1713515 Ontario Ltd.*, 2013 ONSC 6503, in which O'Connell J. accepted Lane J.'s view that separate and distinct advances made under a single mortgage and intended for different purposes should be afforded separate and distinct priority treatment under the *Construction Act*. O'Connell J. ultimately held that the applicant's payout of only the land purchase portion of a prior mortgage, and not for improvements, had priority over lien claimants under s. 78(3).

Analysis of mortgage priority

[20] The project context is material to my decision, so I am briefly summarizing the purchase, financing, and lien history of the project before turning to my analysis.

[21] There is no dispute that the subject premises were purchased by Cacoeli for the purpose of developing a 30-storey, 315-unit residential building with retail and office space. There is also no dispute that physical construction work never commenced and that pre-existing commercial tenants and tenanted structures remain.

[22] Cacoeli purchased the property for \$17 million on December 9, 2020. Prior to purchasing the property, financing was arranged with Vector in the amount of \$8.5 million, to be secured by a first mortgage. In Vector's loan commitment letter, the stated purpose of the loan was to "finance the acquisition of the real property". There was a separate option under the commitment for Vector

to provide construction financing for the project; however, the record before me supports that the option was never exercised.

[23] In November 2022, Vector's mortgage was assigned to CBCC as part of a refinancing transaction. CBCC advanced the sum of \$8.5 million (the same principal amount of the Vector mortgage) and a transfer of charge was registered on title.

[24] In November 2023, Terra Bona preserved a lien for \$3,434,438.77, inclusive of HST, against the premises for unpaid consulting fees for pre-construction consultant services. The lien is based on services allegedly provided by Terra Bona pursuant to its development management agreement entered with 2778754 Ontario Ltd. entered in December 2020 and amended in April 2022. Terra Bona asserts that it provided a variety of services that were "necessary and essential" to the improvement and re-development of the property, and which directly added value to the property. Terra Bona relies on appraisals from September 2020 and October 2022 in support of its position.

[25] In December 2023, this action was commenced, but not served. Terra Bona's position is that it continued to provide services after the lien was registered until a purported termination by Cacoeli (argued to be contractually invalid by Terra Bona) in February 2024.

[26] The issue before me is whether either Vector's initial mortgage or CBCC's subsequent financing transaction that paid out Vector's mortgage was done with "the intention to secure the financing of an improvement". I deal with those transactions in reverse order.

[27] CBCC acknowledges that it bears the onus of demonstrating that its mortgage is not a building mortgage. Specifically, the onus is on a lender to establish its intention "very clearly upon a balance of probabilities by solid evidence, preferably contemporaneous documentary evidence establishing its intention": *Royal Bank of Canada v. Lawton Developments Inc.*, *supra*.

[28] I have been provided with limited case law on interpreting the intention of a mortgagee in construction financing. CBCC has directed me to the older case of *Salazar v. Bond Towers Ltd.* (1990), 24 ACWS (3d) 140, 44 CLR 207, in which the court considered information and documents tendered by the lender in finding that the disputed mortgage was not a building mortgage. I agree with CBCC that the same type of information and legally binding documentation relied upon in *Salazar v. Bond Towers Ltd.* is properly considered when assessing if a mortgage is a building mortgage captured by s. 78(2).

[29] Consistent with *Ontario Wealth Management Corp. v. 1713515 Ontario Ltd.*, *supra*, it is also relevant to consider whether the mortgage has a dual purposes, namely financing both purchasing the land and financing the services and materials for the construction work.

[30] I find that the following evidence is properly considered when determining whether a mortgage is taken with "the intention to secure the financing of an improvement":

- (a) direct evidence, if available, of the lender's subjective understanding and intention when agreeing to lend and when advancing the mortgage funds;

- (b) the commitment letter;
- (c) the mortgage document(s);
- (d) whether there was a single advance of all funds or multiple advances;
- (e) whether the advance(s) related in any way to the construction progress of the project; and
- (f) how funds received from the mortgage were disbursed, including whether there were payments made to any trades claimants.

[31] CBCC has tendered the affidavit of one of its principals, Gaetano Coscia, who outlines the nature of the project, the prior mortgage from Vector, and the ultimate assignment of that mortgage to CBCC. In his affidavit, Mr. Coscia expressly confirms that the CBCC loan was “a simple refinancing of an existing non-building first mortgage” and that “no funds advanced by CBCC were used for any improvement to the Property or the Project.” As discussed below, Terra Bona has only challenged this direct evidence of CBCC’s intentions with inferences based on documents.

[32] Pursuant to s. 53(1) of the *Conveyancing and Law of Property Act*, RSO 1990, c C.34, the legal right to any debt or other legal chose in action may be passed and transferred to another person on notice to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action. I have no hesitation in finding that CBCC took a legal assignment of Vector’s mortgage.

[33] CBCC’s re-financing was, per the commitment letter, to assist Cacoeli with refinancing the existing debt to Vector and pay for associated financing costs. That is expressly stated in the commitment letter as follows:

The funds to be advanced pursuant to the Loan will be used to assist the Borrower with:
The refinance of existing debt, and pay for associated financing costs. The Loan shall at all times be used for this purpose and no other purpose, without the prior written consent of CBCC.

[34] CBCC relies on the above term, which it submits expressly states the purpose of the loan and the fact that loan funds could only be used to refinance existing debt, unless CBCC agreed otherwise.

[35] Although a new mortgage was initially contemplated with Vector’s mortgage being discharged, the re-financing was changed to an assignment structure. CBCC was to be assigned Vector’s mortgage with amendment of the mortgage terms and transfer of all security to CBCC. An assignment of security agreement was entered between Vector, CBCC, and Cacoeli in November 2022. The agreement is short and directly assigns Vector’s mortgage and security. Cacoeli, as debtor, was aware of the assignment and agreed to it as a party to the assignment agreement. The statement of advance from the refinancing transaction supports Mr. Coscia’s affidavit that all funds advanced by CBCC were paid to Vector.

[36] A transfer of charge was subsequently registered on title, transferring Vector's mortgage to CBCC. Upon registration of the transfer, CBCC was conferred with ownership of Vector's charge free from any unregistered interests: *Land Titles Act*, s. 101(3). Put simply, following the assignment agreement and transfer of charge, CBCC had fully stepped into the shoes of Vector. It follows that if Vector's mortgage was a building mortgage, then so too is CBCC's assigned mortgage.

[37] CBCC argues that Vector's mortgage was not a building mortgage. Specifically, CBCC points to Vector's commitment letter, which describes the purpose of the loan in clause 8, stating as follows:

8. PURPOSE OF LOAN & EXIT:

- (a) The Loan will be used to finance the acquisition of the real property formally described in Schedule "E" (individually and collectively, the "Property"), which includes all related buildings, improvements, leases, rents, equipment, surveys, plans, development plans, agreements, permits, and other personal property of every nature and kind):
- (b) The proposed development of the Property will include the construction of 240 rental condominium units with a Gross Floor Area of approximately 236,000 square feet (the "Project"). The Borrower proposes to rezone the Property to permit the proposed development.

[38] The subsequent clause 8(c) expressly sets out the uses and sources of funds, noting a total of \$21.5 million being required for land acquisition, land transfer tax, interest reserve, lender fee, referral fee, and legals and closing costs. That total amount is stated as being funded by the \$8.5 million from Vector and the balance from other sources. Clause 21 sets out that the loan will be advanced in three parts: \$105,000 for the balancing of a commitment fee, \$398,000 as an interest reserve for the first five months and last month of interest, and the balance of \$7,997,000 remitted for "closing costs (including outstanding realty taxes, and legal costs), acquisition of the Property, and other costs pursuant to the provisions set out herein."

[39] The statement of advance on the Vector financing transaction provides a breakdown of the loan advance: \$7,909,991.94 was paid to KPMG Law LLP, in Trust, with the balance accounted against legal fees, interest, interest reserve, reserve for loan costs, loan charges, and a wire fee. There is no indication of any portion of the funds being used to finance the supply of services and materials to the improvement.

[40] CBCC submits that there is nothing in the commitment letter indicating that the funds were to be used for any construction financing. CBCC submits that the loan was clearly intended to be for a purchase financing mortgage. Clause 25 does provide a separate option for additional construction financing, but that option was never exercised.

[41] There is no evidence supporting that any of the funds from Vector were utilized for anything other than purchasing the property and paying acquisition-related fees and expenses. Mr. Tavakoli's evidence on cross-examination was that "100 percent of the funds, from Terra Bona's perspective, went to the improvement of the project". That evidence is self-serving and no

evidence has been tendered by Terra Bona explaining or supporting why “from Terra Bona’s perspective” the funds from Vector were for a purpose other than acquiring the property.

[42] Mr. Tavakoli was a guarantor of Vector’s mortgage and had direct involvement in operation of Cacoeli, at least at the outset of the project. Notably, as confirmed by Mr. Tavakoli during his cross-examination, he was a director and officer of 2778754 Ontario Ltd., Terra Bona was a 50% shareholder of 2778754 Ontario Ltd., and Mr. Tavakoli’s corporation, Majid Tavakoli Holdings Inc., was one of the shareholders in Cacoeli Kennedy Steeles Inc., which held units in Cacoeli Kennedy Steeles LP. Mr. Tavakoli was also a director and the treasurer of Cacoeli Kennedy Steeles Inc. There is some indication in the record that Mr. Tavakoli resigned as a director of 2778754 Ontario Ltd. and that Terra Bona’s shares were returned. However, that is immaterial for the purposes of this motion.

[43] Despite Mr. Tavakoli’s involvement with Cacoeli at the outset of the project, including guaranteeing Vector’s mortgage, nothing has been put before me supporting that Mr. Tavakoli did not know how the mortgage funds were used, or that they were used for a purpose other than financing the land purchase. To the contrary, Mr. Tavakoli’s own affidavit confirms the use of the \$8.5 million for the land acquisition, stating as follows at paras. 27 and 81 (emphasis added):

27. From my involvement in and around the time of closing, which took place on or about December 9, 2020, Vector Financial Services Limited (“Vector” or “First Lender”) loaned on the security of a first mortgage to the GP the sum of \$8,500,000.

[...]

81. The purchase price of the Property was \$17,000,000. To secure the purchase, a first mortgage was provided by Vector in the amount of \$8,500,000, and Valleymede provided a vendor take back mortgage (“VTB”) in the amount of \$7,000,000, with a second priority. Cacoeli KS provided a downpayment of \$2,900,000 of which \$860,000 was used to pay for the land transfer tax of the transaction. There were also approximately \$450,000 in penalties incurred due to multiple defaults on closing because Cacoeli KS failed to raise the money on time and failed to deal with these shortcomings on a timely basis.

[44] At the time of the mortgage assignment to CBCC, Mr. Tavakoli remained the treasurer of Majid Tavakoli Holdings Ltd., which remained a shareholder in Cacoeli Kennedy Steeles Inc., a unit owner in Cacoeli Kennedy Steeles LP. Because of a restrictive covenant on title in favour of Terra Bona, its consent to the transaction was required. Terra Bona signed an acknowledgement and direction confirming that it had received the CBCC charge documents, acknowledging that the information in the charge documents was correct and accurate and, importantly, making the statement, “We shall be bound by the terms of the Charge Documents and all other documents required to complete the transaction described above.” Terra Bona was very much aware of the transaction with CBCC.

[45] All the foregoing supports that, objectively and on a balance of probabilities, Vector’s mortgage was not a building mortgage, but rather was intended to be solely for purchasing the property. Similarly, CBCC’s advance of funds was, objectively and on a balance of probabilities, solely intended to payout Vector’s mortgage per the assignment agreement.

[46] Terra Bona argues that I should be considering the totality of the circumstances under which funds were advanced by Vector and, subsequently, CBCC. Those circumstances include awareness of the planned construction project and, in the case of CBCC, requiring information and documents about the project as part of its due diligence and as a pre-condition to advancing funds in the first place.

[47] Notably, Terra Bona argues that I should put weight on the specific references to “improvements” being included in clause 8 of Vector’s commitment letter for the acquisition as well as the references to the anticipated construction. With respect to CBCC, Terra Bona specifically points to documents identified in CBCC’s commitment letter as needing to be provided as a condition precedent to any funding. That letter includes the following clause:

The following Conditions Precedent shall be satisfied prior to any advance:

[...]

20. Current meeting minutes with the municipality of Toronto.
21. Submission of the application or approval of any site plan, zoning or subdivision agreements, and any reports or studies in support of same.
22. Confirmation the Official Plan has been amended to allow for the intended development.
23. Detailed pro-forma project budget and sales price list, signed and dated.

[...]

28. Drawings, site plans, floor layouts and building plans showing the gross square footage of the Property, as well as any unit divisions along with the net square footage for each sub-unit.

[48] Terra Bona also points to another condition that was required during the term of CBCC’s loan as being relevant. Specifically, the commitment letter states:

The following Conditions Subsequent to the Advance shall be in force throughout the Term of the Loan:

1. Confirmation of submission of the application to rezone the Property to allow for the intended development (a 26 storey 311-unit residential building with retail at grade and office at the mezzanine over 4 levels of underground parking, totalling ~293,000 sf of gross floor area) to be completed no later than May 1, 2023, along with copies of any reports or studies in support of same.

[...]

Should the above-noted Conditions Subsequent not be fulfilled within the time period identified, then at the sole discretion of CBCC the Loan may be deemed to be in default and CBCC may exercise any and/or all remedies available to it in equity or at law.

[49] Terra Bona submits that the above documents required by CBCC support that the improvement was an integral part of CBCC’s intentions in providing loan financing.

[50] Terra Bona further argues that the project budgets were available to Vector and CBCC, which clearly contemplate acquiring the land, that Cacoeli was required to advance \$11.2 million for the project, and that loans were to be “treated as clear”. Terra Bona submits that advances by the mortgages were in lieu of Cacoeli’s required contribution and, accordingly, ought to be viewed as funds advanced by the lenders knowing that they were ultimately for the purpose of the improvement regardless of what the purpose of funds was stated to be in their commitment letters. There is no direct evidence supporting that anyone at Vector or CBCC had any such discussions. Terra Bona argues that Vector’s and CBCC’s reliance on and acknowledgment of the improvements is reflected in the commitment letters.

[51] I accept Terra Bona’s argument that Cacoeli was obtaining financing to meet its own financial contribution obligation to the project. However, based on the plain language of s. 78(2) of the *Construction Act*, it is the intention of Vector and CBCC, not Cacoeli, that governs. In deciding the issue, I am concerned with whether Vector took the mortgage “with the intention to secure the financing of an improvement” and whether CBCC either stands in the same shoes as Vector by assignment or whether its loan constitutes a “mortgage taken out to repay” a non-building mortgage.

[52] Terra Bona’s argument is, at its core, that the lenders relied upon the fact of the improvement in their decision to lend. In my view, Terra Bona is conflating requirements for information and documents relevant to the security interests of Vector and CBCC with their intentions for use of the loan funds. Seeking additional forms security on a development project for repayment of a loan is not the same as having an intention to finance the improvement. In my view, investigating a project with respect to loan security does not change the intention of a purchase finance lender for use of the loan funds.

[53] In this case, intended and actual use of funds are the core issue, not whether a lender may have examined viability of project before lending as a condition of advance. None of the funds from either Vector or CBCC were used to pay for services and materials on the project or to otherwise finance ongoing work. There is no dispute that Vector’s loan advance was used to pay the vendor. CBCC’s advance was paid to Vector.

[54] Terra Bona submits that the land acquisition should be viewed as part of the improvement. I agree that acquiring the land on which the development and construction would occur was, of course, necessary to proceed with the overall project. However, that does not change my view.

[55] The definition of “improvement” is important here. That term is defined in s. 1(1) of the *Construction Act* as follows:

“improvement” means, in respect of any land,

- (a) any alteration, addition or capital repair to the land,
- (b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or

- (c) the complete or partial demolition or removal of any building, structure or works on the land;

[56] My difficulty with Terra Bona's argument is that it requires me to effectively expand the definition of "improvement" to include land acquisition for the purpose of an intended improvement. An "improvement" is done to or on land, but is not defined to include purchasing the land. The *Construction Act* provides a clear distinction between the land on which an improvement occurs and the land itself. Specifically, Terra Bona's position is inconsistent with the definition of "land" in s. 1(1) of the *Construction Act*, which includes "any building, structure or works affixed to the land, or an appurtenance to any of them, but does not include the improvement" (emphasis added).

[57] Terra Bona argues that Vector's commitment letter expressly contemplates financing the land acquisition, but also includes "all related buildings, improvements, leases, rents, equipment, surveys, plans, development plans, agreements, permits, and other personal property of every nature and kind)." In my view, that does not assist Terra Bona's argument. It is undisputed that the property was commercially tenanted at the time of acquisition by Cacoeli (and continued to be tenanted at the time of CBCC's advance). I am not prepared to infer, as Terra Bona effectively asks me to do, that the acquisition somehow included the proposed development project, as opposed to clarifying that everything on the land was intended to be included in the purchase acquisition, including ongoing commercial leases. In any event, the additional language overlaps with the definition of "land" in the *Construction Act*.

[58] In my view, accepting Terra Bona's view of "improvement" would also lead to inconsistent results and commercially unrealistic outcomes for lenders who advance funds to purchase land with knowledge that the purchaser intends to develop the land or perform construction work on it. Two simple examples outline my concern.

[59] First, based on Terra Bona's argument, every purchase mortgage where the lender knows that the purchaser's intention is to develop the property would be subject to being held a building mortgage. However, another lender for the same property may be unaware of the purchaser's intended use for the property, but its purchase mortgage would not be a building mortgage. Nevertheless, both lenders would have advanced funds solely for use in purchasing the same land to be developed.

[60] Second, a purchase mortgage lender who has fully advanced mortgage funds at the time of purchase is at a disadvantage to other mortgagees. Pursuant to s. 78, lien priority over mortgages is to the extent of any deficiency in the holdbacks required to be retained by the owner. Building mortgages, which are used to directly finance the work on a project, are typically subject to periodic draws. Those allow the lender to confirm that there are no liens before advancing and, if there are, to retain holdback funds to protect their interests. Similarly, a purchase mortgage where a portion of the loan is not immediately advanced allows a lender to verify the status of liens before advancing and, if necessary, retain holdback funds to protect its interests. A lender that has fully advanced loan funds before any liens arose has no safeguard against a subsequent lien claimant's priority for holdback deficiency.

[61] I do not accept that the legislature intended for purchase mortgagees to have indeterminate risk with respect to priority of potential future liens when advancing funds that are used solely for the purchase of land. My view remains the same regardless of whether the lender is aware of the proposed or intended use of that land by the purchaser/mortgagor. To view the requirement in s. 78(2) otherwise would have a chilling effect on lenders advancing funds to developers intending to purchase land.

[62] Here, the commitment letter for Vector's mortgage expressly stated that the funds were for the purchase. Vector's mortgage was registered in connection with purchase. Funds were advanced by Vector in a single transaction and were used for the purchase of the land. CBCC's commitment letter expressly states that the purpose of its loan was to refinance existing debt. An assignment agreement was entered between Vector, CBCC, and Cacoeli on notice to and with consent of Terra Bona. The loan funds were used to pay Vector. A transfer of charge was registered as part of the transaction. There is no evidence of payment from either Vector's advance or CBCC's advance to any trades or use for anything other than purchasing the land in the case of Vector or buying out Vector's mortgage in the case of CBCC.

[63] I accordingly find that Vector's mortgage was for the purpose of financing the land purchase, not the improvement to the land. It was not a building mortgage under s. 78(2) of the *Construction Act*. I further find that CBCC's advance was on account of the assignment of Vector's mortgage, with the funds advanced by CBCC used solely to pay out Vector related to its prior financing of the land purchase. CBCC's mortgage is thereby also not a building mortgage.

[64] For the mortgage to fall within s. 78(3), as CBCC argues, I must be satisfied that Vector's mortgage, as assigned to CBCC, was registered prior to the time when the first lien arose. I am satisfied from the evidence that it was.

[65] Pursuant to s. 15 of the *Construction Act*, a person's lien arises and takes effect when the person first supplies services or materials to the improvement. The property purchase transaction closed and Vector's mortgage was registered on December 9, 2024. Terra Bona entered the development management agreement a few days earlier on December 4, 2024. There is no evidence before me of any lienable services (or any services) being supplied by Terra Bona or others within those five days or at any other point before the land had been acquired. No argument was made for how lienable services could have been or were supplied to the contemplated improvement prior to Cacoeli acquiring the land.

[66] In these circumstances, where there has been no financing of the improvement and CBCC's evidence on its own intentions during the refinance is supported by the contemporaneous documents and evidence before me, I find that CBCC's mortgage is governed by s. 78(3). It accordingly has full priority over the asserted lien of Terra Bona to the extent of the total amount advanced under the mortgage, subject to determination in the receivership of its validity.

Issue #2 – Was CBCC's registered deletion of Terra Bona's lien valid?

[67] If I am wrong in the foregoing, then Terra Bona's lien, if proven, would have partial priority over CBCC's mortgage. That triggers several lien validity issues argued by Terra Bona on these

motions: (a) whether Terra Bona's lien is timely; (b) whether Terra Bona is an "owner" under the *Construction Act* and thereby disentitled from liening; (c) whether CBCC's unilateral registered deletion of Terra Bona's lien was valid; and (d) if not valid, the impact (if any) on enforceability of Terra Bona's lien.

[68] I have been invited by Terra Bona to make findings on all the foregoing issues. However, I agree with CBCC that doing so is generally beyond the scope of what has been referred to me. Terra Bona has advanced cogent arguments on timeliness of its lien and why, at least contractually, it is not an "owner" under the *Construction Act*. However, there is an insufficient evidentiary record before me to fairly decide either timeliness of Terra Bona's lien or whether Terra Bona is an "owner". Also, those are determinations that directly affect Cacoeli and its interest in the liened property, which is now vested in the receiver. Those determinations are, in my view, captured by the stay of proceedings against Cacoeli and, in any event, could only fairly be decided with the receiver first being afforded an opportunity to take a position on them.

[69] I take a different view of Terra Bona's request that I rule on whether deletion of its lien by CBCC was valid. I think it helpful to the parties, the receiver, and more broadly to the public to consider whether a mortgagee has any right under the *Land Titles Act* to apply to delete a lien without notice to the lien claimant, without consent from the lien claimant, or without a court order. If so, and CBCC's deletion was proper, then further determinations on the validity of Terra Bona's lien may be rendered moot in the receivership. CBCC itself conceded during oral submissions that I may well find that, based on the materials before me, that the lien remains a subsisting lien despite its deletion from title, although any remedy would then be an issue in the receivership.

[70] I am accordingly only addressing whether CBCC's registered deletion of Terra Bona's lien was proper. I am not addressing the other issues raised by Terra Bona, which will need to be pursued in the receivership.

Relevant legal framework

[71] CBCC's application to delete the registration of Terra Bona's claim for lien was submitted under s. 75 of the *Land Titles Act*, which provides as follows:

75 Upon the application of the registered owner or the owner of a registered interest in the registered owner's title or a notice, caution, inhibition or restriction in the title that is registered under section 71, the land registrar may amend any entry in the register of the title to reflect the effect of other statutes, orders of a court, a change in the name of owner or other changes that have occurred in fact.

[72] Amending the register pursuant to a court order is expressly contemplated in s. 75. However, no case law was tendered by either party dealing with the land registrar's authority to delete a lien-related registration made in accordance with the *Construction Act* without a court order. I am unaware of any such case law.

Relevant factual background

[73] I think it important to set out the chronology of events surrounding CBCC's deletion of Terra Bona's registered claim for lien. The key facts are outlined below.

[74] Although Terra Bona issued a certificate of action in December 2023, that certificate was not immediately registered on title. The reasons for that are not before me.

[75] On June 12, 2024, CBCC's former lawyers submitted an Application (General) to the land registrar, on behalf of CBCC, to delete Terra Bona's claim for lien, which was ultimately certified by the land registrar. The following law statement was included in the application by CBCC's then-lawyer:

Pursuant to Construction Lien AT6460963 work and materials were supplied to the property herein to November 14, 2023. Accordingly, a Certificate of Action had to be registered no later than April 13, 2024, to be within the prescribed time under the Construction Act.. No such Certificate has been registered, and accordingly the lien has expired..

[76] The date of November 14, 2023 used in the law statement is the stated date of last supply in Terra Bona's claim for lien. CBCC's former lawyer seems to have based his law statement on 90 days from that date of last supply as being the deadline for Terra Bona to have registered a certificate of action against title. As discussed above, Terra Bona asserts that it continued to supply services after November 14, 2023, but that argument is immaterial to my analysis.

[77] On June 26, 2024, Terra Bona registered its certificate of action, which was receipted as instrument no. AT6604350. The land registrar ultimately declined to certify the registration because the claim for lien had been deleted from title.

[78] On July 9, 2024, an *ex parte* motion was brought by CBCC to declare the lien expired. It came before me on one of my appearance motion lists. The motion was heard a month after the Application (General) had been registered. It was based on an affidavit sworn by the same lawyer making the law statement in the application. That affidavit was sworn on June 13, 2024, the day *after* the application was registered, but the parcel abstract included in the affidavit was obtained approx. one hour *prior* to the application being registered. It is unclear why an updated parcel abstract showing the Application (General) was not included in the motion record. The materials were not filed with the court until July 5, 2024.

[79] CBCC's current lawyers do not know why the registered application was not included or referenced in either the affidavit or motion materials and was not disclosed to me at the hearing. It ought to have been. It certainly appears to me that the materials were drafted to intentionally omit the fact of the application.

[80] Regardless, when the motion came before me, I was not satisfied that the materials supported that Terra Bona's lien had expired. Terra Bona's claim for lien asserted a supply of services and materials to the owner, Cacoeli. As a "contractor" under the *Construction Act*, Terra Bona's lien rights are tied to completion, abandonment, or termination of the contract, not last

supply: *Construction Act*, ss. 31(2) and 36(2). I found no evidence supporting that the subject contract was completed, abandoned, or terminated and rejected CBCC's argument that there was an admission in the statement of claim. I declined to grant the relief declaring the lien expired, at least without notice to Terra Bona.

Analysis of validity of deleting a lien under the Land Titles Act

[81] The lien remedy is not a common law right. It is available only by operation of the *Construction Act*. The act and its regulations set out in detail how liens are created, how they are preserved and perfected, procedures for litigation, and when and how they expire and may be discharged. For that reason, the *Construction Act* is commonly referred to in case law as a "complete code" of law regarding liens.

[82] Specifically, Part VII of the *Construction Act* expressly prescribes procedures for discharging preserved or perfected liens. It sets out provisions addressing voluntary discharge of a lien, withdrawal of a written notice of lien, postponing a preserved or perfected lien in favour of the interest of another person, vacating a lien upon payment of security into court, declaring a lien expired, and discharge of a lien by the court: *Construction Act*, ss. 41-47.

[83] Pursuant to s. 75 of the *Land Titles Act*, the land registrar has authority to amend the register to reflect the effect of other statutes or orders of a court. However, there is no provision in the *Construction Act* or its regulations that contemplates removal of a preserved or perfected from title to premises by anyone other than the lien claimant itself or by court order obtained on motion. In my view, the land registrar's seeming authority to amend the register to delete a claim for lien without the lien claimant's consent or a court order is in direct conflict with the scheme of the *Construction Act* for discharging liens.

[84] There is a well-recognized and long-standing principle of legislative interpretation that specific legislation takes precedence over general legislation. The principle was recently discussed by the Court of Appeal in *Ingram v. Kulynych Estate*, 2024 ONCA 678, at para. 55, which describes it as "special or more specific legislation overrides general legislation in the case of a conflict on the same subject so that the two statutes are brought into harmony."

[85] The right to lien flows directly from the provisions of the *Construction Act*. Unquestionably, the *Construction Act* is more specific legislation governing the expiry and discharge of liens than the general legislative authority to amend registrations on title afforded to the land registrar in s. 75 of the *Land Titles Act*.

[86] In this case, the land registrar amended the register to delete Terra Bona's claim for lien based solely on a law statement asserting that the lien had expired. CBCC provided no evidence supporting a legal determination on expiry of Terra Bona's lien. Importantly, when CBCC sought to do so before me by way of motion to declare the lien expired, I did not grant it. The evidence put before me did not support expiry of the lien and I dismissed the motion without prejudice to moving again on notice to Terra Bona.

[87] The conflict between Part VII of the *Construction Act* and s. 75 of the *Land Titles Act* is evident from the differing dispositions of the same request by CBCC. In both the motion before me and in the Application (General) submitted under s. 75 of the *Land Titles Act*, CBCC asserted that the lien had expired pursuant to s. 36 of the *Construction Act*. The land registrar had no evidence supporting the law statement to that effect, yet deleted the claim for lien instrument based solely on that assertion. Conversely, the motion before me seeking a declaration of expiry under s. 36 and vacating registration of the claim for lien was supported by evidence, yet I found that the evidence did not demonstrate that the lien was clearly expired and, as a result, that the claim for lien should not be deleted.

[88] Under the specialized *Construction Act*, relief to declare a lien expired or discharge a lien may only be obtained with consent of the lien claimant or on evidence satisfying the court that a lien has expired or should be discharged. The same relief cannot reasonably be separately obtained from the land registrar under more general legislation, without evidence. However, the two statutes are brought into harmony by restricting operation of *Land Titles Act* to accord with the procedures in Part VII of the *Construction Act* for discharging liens.

[89] For these reasons, I find that s. 75 of the *Land Titles Act* does not permit persons or parties to delete the registration of a claim for lien absent consent of the lien claimant or a court order obtained in accordance with the procedures outlined in Part VII of the *Construction Act*. It follows that CBCC's application deleting Terra Bona's claim for lien as expired under the *Construction Act* was invalid and ought not to have been certified by the land registrar.

Appropriate remedy

[90] Terra Bona argues that it took all necessary steps within the timelines prescribed in the *Construction Act* to preserve and perfect its lien. Due to CBCC's improper actions, its claim for lien was removed from title and registration of its certificate of action was rejected. Terra Bona cites the Supreme Court of Canada's decision in *Lundy v. Lundy* (1895), 24 SCR 650, arguing that it remains entitled to a lien since "no one can take advantage of his own wrong."

[91] It is beyond the scope of the issues before me to decide the impact of the deletion and what remedy may be available to Terra Bona. Although I have found that CBCC's deletion was invalid, I agree with CBCC that any remedy flowing from that finding is properly addressed in the receivership proceedings, including whether title may be rectified to restore Terra Bona's registration of the claim for lien and certificate of action. Any remedy will impact Cacoeli's interests and rights, as vested in the receiver, and thereby must be raised and addressed on notice to the receiver.

[92] I note, though, that I am not convinced that CBCC is correct that an associate judge would lack jurisdiction to rectify title and that a rectification order may only be made by a judge. I am unaware of any case law stating that an associate judge cannot rectify title and, at least on the face of the applicable legislation, we would appear to have jurisdiction.

[93] Rectification of title is relief available under ss. 159-160 of the *Land Titles Act*. Those provisions state as follows:

159 Subject to any estates or rights acquired by registration under this Act, where a court of competent jurisdiction has decided that a person is entitled to an estate, right or interest in or to registered land or a charge and as a consequence of the decision the court is of opinion that a rectification of the register is required, the court may make an order directing the register to be rectified in such manner as is considered just

160 Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by the omission of an entry from the register, or if default is made or unnecessary delay takes place in making an entry in the register, the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of the case, make an order for the rectification of the register.

[94] Pursuant to s. 86.1(6) of the *Courts of Justice Act*, RSO 1990, c C.43, an associate judge has the jurisdiction conferred by the rules of court. “Rules of court” is defined in s. 87 of the *Legislation Act, 2006*, SO 2006, c 21, Sched F for all legislation in Ontario to include “rules made under Part IV of the *Courts of Justice Act*”. That includes the *Rules of Civil Procedure*, RRO 1990, Reg 194. An associate judge has jurisdiction to hear any motion in a proceeding, and has all the jurisdiction of a judge in respect of a motion, except a motion where the power to grant the relief sought is conferred expressly on a judge by a statute or rule: *Rules of Civil Procedure*, subrule 37.02(2)(a).

[95] Both s. 159 and s. 160 of the *Land Titles Act* refer to the “court” as having jurisdiction to make a rectification order. In the *Rules of Civil Procedure*, “court” is defined as “the court in which a proceeding is pending and, in the case of a proceeding in the Superior Court of Justice, includes an associate judge”: *Rules of Civil Procedure*, subrule 1.03(1). Since the *Courts of Justice Act* provides that an associate judge’s jurisdiction is conferred by the *Rules of Civil Procedure*, and there is ample case law seeking relief under ss. 159-160 by way of motion, an associate judge would thereby seem to have jurisdiction to deal with rectification of title by way of motion.

[96] An associate judge unquestionably lacks jurisdiction to hear an application, which must be made to a judge: *Rules of Civil Procedure*, rule 38.02. However, the term “apply” in s. 160 of the *Land Titles Act* does not necessarily mean “by way of application in court”. In its common use, “apply” means “making a formal request.” Applications are the ordinary course under the *Land Titles Act*, which provides throughout that persons may “apply” to the land registrar for various relief. Evidently “apply” under the *Land Titles Act* does not mean by way of an application in court, since the land registrar also cannot hear such applications.

[97] I note also that, with respect to registrations under the *Construction Act*, it seems entirely inconsistent that on the one hand an associate judge has jurisdiction to direct the land registrar to vacate, discharge, or otherwise delete lien-related instruments, but on the other hand the same associate judge lacks jurisdiction to direct the land registrar to rectify title by restoring a lien-

related instrument that was improperly deleted. Although the issue was not ultimately argued before me, I would be interested in the statutory argument that results in such a technical and judicially inefficient outcome.

[98] Regardless, in this case, I am not addressing any remedy that may flow from my finding that CBCC's deletion of Terra Bona's claim for lien was invalid, including the nature of any security for Terra Bona's claim for lien. That will need to be raised first in the receivership proceedings before it is pursued.

DISPOSITION

[99] For the foregoing reasons, I order and declare that CBCC's mortgage has priority over Terra Bona's asserted lien, subject to a determination on the validity and enforceability of the mortgage and to the extent that the lien is proven to be valid and timely. I further find and declare that CBCC's application to delete Terra Bona's lien, registered as instrument no. AT6592471 on June 12, 2024, was invalid.

[100] Issues regarding the validity and enforceability of both CBCC's mortgage and Terra Bona's lien may be raised in the receivership proceedings or, if directed by a Commercial List judge or with consent of the receiver, brought before me for determination.

COSTS

[101] Costs outlines have been exchanged. I encourage the parties to settle costs of the motion. If they cannot agree, then written costs submissions shall be exchanged. CBCC shall serve any costs submissions by February 13, 2026. Terra Bona shall serve its responding costs submissions by February 27, 2026. There shall be no reply submissions absent leave of the court. Any party seeking costs shall clearly indicate the quantum of costs sought, the scale of costs, and against whom a costs award should be made. Costs submissions shall not exceed four (4) pages, excluding any offers to settle and case law.

[102] Once served, all costs submissions shall be submitted by email directly to my Assistant Trial Coordinator, Christine Meditskos, with proof of service. Unless exchanged and submitted in accordance with the above, the parties shall be deemed to have agreed on costs.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: January 29, 2026