Court File No.: CV-24-00715321-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

CONSTANTINE ENTERPRISES INC.

Applicant

– and –

MIZRAHI (128 HAZELTON) INC. AND
MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF *THE COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED

FACTUM OF DAVID BERRY RE DISCLAIMER MOTION

February 18, 2025

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AND TO: **THE SERVICE LIST**

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PART I - OVERVIEW

1. On this motion, the Receiver seeks to disclaim an agreement of purchase and sale ("**APS**") and related agreements between David Berry and Mizrahi (128 Hazelton) Inc. ("**Hazelton**"). The sought disclaimer would extinguish Berry's equitable and proprietary interest that arose prior to these receivership proceedings in the penthouse unit of a luxury condominium in Yorkville, towards which Berry owes no further funds. It would do so in favour of the project's co-owner, the Applicant, who is (in part) responsible for years of project delays and financial mismanagement, but who, by virtue of purchasing the first secured creditor's debt of its own 50%-owned company, now seeks to recoup funds at Berry's loss as the project's first secured creditor.

2. Shortly after entering into the APS, Berry provided a $10 million loan to a related development project in Ottawa. The terms of that loan provide, in part, that if principal or interest under that loan remain due and owing, Berry is not required to make any additional payments on account of Unit 901, and the final closing of the unit will nevertheless be completed. Hazelton is a party to the operative agreement and over $9.8 million remains due and owing to Berry. Accordingly, Berry is the beneficiary of an institutional constructive trust and he has an equitable interest in Unit 901 that—at law—cannot be disclaimed by a Receiver.

3. Moreover, Berry has paid in excess of $4.05 million towards the purchase price of the unit, which, accounting for the uncontroverted cost to complete the unit, being approximately $3,215,500, means he has more than fully paid the cost of the currently unfinished unit.

4. Further still, prior to the appointment of the Receiver, Hazelton offered to close on Berry's APS on an As-is Where-is basis, with Hazelton deducting the amount to finish the unit from his closing price and Berry finishing the unit himself. When Berry accepted the offer, he was told he would have to wait for the appointment of the Receiver.

5. These facts all give Berry a specifically enforceable right to Unit 901 and make disclaimer legally unavailable to the Receiver. Further, the equities of this case also require the disclaimer to not be authorized.

6. The Applicant, Constantine Enterprises Inc. ("**CEI**") is also a 50% owner of the debtor. CEI failed to properly oversee its partner Sam Mizrahi and Mizrahi Developments Inc. during the project's near decade-long development leading to these proceedings and Berry's losses. CEI stands to foremost/solely benefit from any disclaimer of Berry's unit.

7. In the months leading up to the appointment of the Receiver, the Applicant blamed Mizrahi for the state of the project and positioned itself as a trusted partner to Berry. It made repeated assurances to Berry that upon the appointment of the Receiver, he could close on his unit. CEI made similar representations to this Court in seeking the appointment of the Receiver, upon which the Court relied in granting the motion. Like the Court, Berry relied on CEI's representations, including by waiting to accept an offer to close on his unit, and by holding back on asserting his rights under the above-described loan. Now, the Receiver reports that CEI is unwilling to take steps to effect the very results it promised Berry. Instead, CEI is hiding behind the Receiver in seeking to recoup losses through the disclaimer of Berry's APS (and no other APS) for Hazelton's marquee condominium unit.

PART II - FACTS

A. The Developer and the Applicant Are One and the Same

8. 128 Hazelton Ave. is a nine-storey, 20-unit luxury condominium development project (the "**Hazelton Project**"). The developer Hazelton. Importantly, 50% of Hazelton's shares are owned

by the Applicant, Constantine Enterprises Inc. ("**CEI**"). The other 50% are owned by Mizrahi Developments Inc. ("**MDI**") for which Sam Mizrahi ("**Mizrahi**") is the principal.[1]

9. The Hazelton Project was one of a number of projects that Mizrahi and MDI were developing and marketing in Ontario and elsewhere. These projects were all marketed under the "Mizrahi" brand, and Mizrahi was the public face and key executive of these projects, including 1451 Wellington project in Ottawa, discussed herein.

10. Mizrahi remained the public face and key executive of the Hazelton Project until shortly before the appointment of the Receiver. Prior to his resignation, Hazelton had two directors and officers: Mizrahi, as President, and Robert Hiscox ("**Hiscox**"), as Vice-President. Importantly, Hiscox was also the CEO of CEI, which is not only the Applicant in these proceedings, but is also the 50% owner of Hazelton. While it was a creditor to Hazelton as of 2020, CEI only became the senior secured creditor after it purchased the debt owed to DUCA Financial Services Credit Union ("**DUCA**") in early 2024 shortly before the commencement of these proceedings.[2]

11. Hiscox was CEI's nominee director at Hazelton. Thus, Hiscox (and by extension CEI) had the full ability and obligation to oversee both Mizrahi's management of Hazelton and the Hazelton Project.[3] Now that Mizrahi has resigned, CEI remains in full control of Hazelton.

12. Throughout the course of the project, Berry dealt directly with Mizrahi, and beginning in early 2024, Hiscox.

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[1] Third Report of the Receiver, paras 2.1 – 2.2, Receiver's Motion Record ("**MR**"), Tab 2, p. 12.
[2] First Report of the Receiver, s. 3.0, pp. 4-5, Appendix C to the Third Report of the Receiver**,** MR, Tab 2C, pp. 56-57.
[3] Attached to the Affidavit of Robert Hiscox, dated February 23, 2024, as appendix A, found in the Application Record of CEI dated February 23, 2024, Tab 1A, is the Unanimous Shareholders Agreement of Hazelton. Article 3, "Management of the Corporation" provides the powers to manage and supervise the corporation of Hazelton to both CEI and Mizrahi.

B. The Original APS

13. On April 21, 2016, David Berry ("**Berry**") entered into an agreement of purchase and sale ("**APS**") with Hazelton for two units in the Hazelton Project, namely, units 901 and 802 (the "**Original APS**") for $13,250,000 (the "**Purchase Price**"). He intended to combine the two units into a single residential unit. Berry provided an initial deposit of $2,650,000 to Hazelton.[4]

14. Berry intended for the unit he purchased at Hazelton to be his principal residence. Based on Hazelton's repeated assurances as to when the Unit would be ready and given that the primary construction for the building was complete in 2020,[5] with only the interior finishings to be completed for Unit 901, Berry sold his Toronto home in January 2022. As a result of the on-going delays in completing his unit, Berry has incurred over $1,000,000 in various expenditures, including for temporary housing, moving, storage, and for finishings included in his APS.[6]

C. Berry Does Not Owe Any Further Amounts in Respect of Unit 901

15. As of the date of the Receivership Order, Berry was not required to pay any additional amounts on account of Unit 901 due to six (6) events impacting what he was required to pay.

16. These various events are as follows: **(a)** Mr. Berry provided a $2,000,000 advance against the Purchase Price by way of a transfer of shares in Yappn Corp. ("**Yappn**") (the "**Yappn Shares**") ("***Event 1***"); **(b)** Mr. Berry assigned his interest in Unit 802 to a third party with the result that the Unit 901 Purchase Price was adjusted to $7,142,244.00, the Unit 901 deposit was adjusted to $1,250,000 and the Yappn Share payment was unaffected and applied to Unit 901 ("***Event 2***"); **(c)**

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[4] Original APS dated April 21, 2016, Affidavit of David Berry ("**Berry Affidavit**"), Exhibit A, Responding Motion Record of David Berry ("**RMR**"), Tab 1A, p. 51.
[5] Berry Affidavit, para 37, RMR Tab 1, p. 20; Further, the Hazelton Project was registered in February 2023.
[6] These expenses include: (a) $475,000 in rental accommodation (Berry Affidavit, para 38, RMR, Tab 1, pp. 21-22; see also: Exhibits M-P, RMR Tabs 1M-1P, pp. 186-231); (b) $273,000 in additional moving and storage (Berry Affidavit, para 39, RMR, Tab 1, pp. 22-23; see also: Exhibit YY, RMR Tab YY, p. 600); and (c) hundreds of thousands in other related expenses, Berry Affidavit, footnote 18, RMR Tab 1, p. 22.

Berry agreed to (and did) advance $800,000 owed towards the purchase price to allow Hazelton to purchase finishings included in the Unit 901 APS that Hazelton was unable to purchase due to its financial position ("***Event 3***"); **(d)** Berry made additional payments in excess of $265,000 directly to suppliers for the purchase of finishings included in the Unit 901 APS ("***Event 4"***); and **(e)** Berry agreed to close on Unit 901 As-is Where-is whereby the costs of finishing the unit would be deducted from the Revised Purchase Price (***Event 5***). The effect of these Events is that by the time the Receivership Order was granted, Berry had paid all that he was required to pay for Unit 901.

17. Furthermore, and separate from Events 1-5, Hazelton, Mizrahi and Berry entered into a "Supplementary Agreement" dated June 28, 2016, in respect of a related project in Ottawa, to which Berry loaned $10,000,000. As a result of that agreement, by April 2023 at the latest, Berry did not have to make any further payments to Hazelton on account of Unit 901 and he was entitled to close on Unit 901 as the beneficial owner and have title transferred to him (***Event 6***).

i. Event 1 – The Yappn Shares

18. On April 28, 2016, Berry and Hazelton agreed that Berry would make a further payment on the Purchase Price by transfer of the Yappn Shares to Hazelton. This agreement was first memorialized on April 28, 2016,[7] and ultimately reflected in an amendment to the Original APS dated May 15, 2017 (the "**First Amended APS**").[8] The value of this advance was $2 million regardless of share value at the time the APS was to (or does) close.[9]

ii. Event 2 – Assignment of Unit 802 and Purchase Price Adjustment

[7] Berry Affidavit, para 17, RMR Tab 17, pp. 14-15.
[8] First Amended APS, dated May 15, 2017, Berry Affidavit, Exhibit B, RMR Tab 1B, p. 100.
[9] First Amended APS, dated May 15, 2017, Article 2, Berry Affidavit, paras 17-24, Exhibit B, RMR Tab 1B, p. 102. See paragraph 19 of Berry's affidavit which discusses a potential purchase price adjustment based on a prescribed share value calculation prior to October 31, 2018, which adjustment did not take effect.

19. In mid-2019, Berry assigned his interest in Unit 802 to David Beswick ("**Beswick**"), the owner of Unit 801. To effect the assignment, the Original APS was replaced by the Unit 901 APS to reflect that Berry was only buying Unit 901 from Hazelton, and Hazelton entered into a new agreement with Beswick with respect to Unit 802.[10]

20. By that time, the market value of Berry's interest in Unit 802 had increased. Accordingly, the price that Berry was to pay Hazelton for Unit 901 had to reflect the price at which Berry sold Unit 802. The result of those negotiations and technical steps was that the Unit 901 APS Purchase Price was set to $7,142,244 (the "**Revised Purchase Price**") (before accounting for any payments already made but after considering changes to the finishings agreed to at that time).[11]

iii. Events 3 and 4 – Finishings Agreement and Additional Payments

21. In mid-2022, for the first time, Hazelton advised Berry that it was short on funds to complete the build out of Unit 901. In order to facilitate the build-out of Unit 901, Berry entered into the Finishings Agreement dated October 2, 2022 whereby Berry paid an additional $800,000 towards the Revised Purchase Price to allow Hazelton to complete the finishings (the "***Finishings Agreement***").[12] In addition, to further facilitate the completion of Unit 901, Berry paid approximately $267,000 directly to suppliers for materials that Hazelton was required to provide under the Unit 901 APS (many of which continue to sit in Unit 901).[13]

22. The Receiver argues that the payments Berry made under the Finishings Agreement were not intended to be applied against the Purchase Price. The Receiver has no first-hand knowledge of these events, has led no evidence on this point despite its ability to obtain or compel evidence

[10] Unit 901 APS, Appendix G to Third Report of the Receiver, MR, Tab 2G, pp. 130, 140.
[11] Berry Affidavit, paras 25-35, Exhibit H, RMR, Tab 1H, p. 160.
[12] Berry Affidavit, paras 40-41, RMR Tab 1, p. 23; Appendix J, Third Report of the Receiver, MR, Tab 2J, pp. 181-182.
[13] Berry Affidavit, paras 42-43, Exhibits T-V, RMR Tabs 1T-1V, pp. 267-274.

from Mizrahi or Hazelton, and Berry's evidence is uncontested. It would be commercially absurd for Berry to have made such payments gratuitously without application toward the purchase price.

iv. Event 5 – Purchase Price Reductions Due to Deficiencies

23. As explained further below, at about the time CEI commenced these proceedings, Hazelton, by Hiscox, offered to close on Unit 901 on an "As-is, Where-Is" basis (to which Berry ultimately agreed) where the costs to complete Unit 901 would be deducted from the purchase price. Regardless of that offer, the Purchase Price must be set-off by the value of deficiencies, being the cost to complete the unit. The Receiver's cost estimate to complete the unit is $3,215,000.[14]

24. As a result of Events 1-5, by the time the Receivership Order was granted, Berry had already paid the full amount that he was required to pay for Unit 901 (and more):

Item	Amount	Balance to Revised Purchase Price
Revised Purchase Price	$7,142,244	-
Less: Deposit	$1,250,000	$5,892,244
Less: Yappn Shares	$2,000,000	$3,892,244
Less: Direct Payments for Furnishings, etc.	$800,000 (Finishings) $267,000 (Direct Payments)	$2,825,244
Less: Cost to Finish	$3,215,000	($389,756)

v. Event 6 - The Ottawa Loan Agreements

25. Shortly after Berry entered into the Original APS, Mizrahi sought financing from Berry for another development being done by MDI on Wellington Avenue in Ottawa, Ontario (the "**Ottawa Project**"). Ultimately, Berry agreed to provide two financing facilities totalling $10,000,000 – one for $4,000,000 ("**Loan Facility #1**") and another for $6,000,000 ("**Loan Facility #2**) – pursuant

[14] Appendix R to the Third Report of the Receiver, MR, Tab 2R, pp. 318-319.

to a Term Sheet dated June 6, 2016 (the "**Term Sheet**")[15] and a Loan Agreement dated June 29, 2016 ("**Loan Agreement**")[16] (the "**Ottawa Loan**").

26. The Ottawa Loan was directly and expressly tied to Berry's purchase of Unit 901. First, the Loan Agreement provided Mr. Berry with an additional parking space at 128 Hazelton (as referenced in a letter dated April 16, 2020).[17] Second, the Ottawa Loan provided for a bridge payment whereby Mizrahi agreed that if the closing of the Unit 901/802 APS occurred before MDI had repaid Loan Facility #2, then Mr. Mizrahi would pay the balance owing under the Unit 901/802 APS to a maximum of what was outstanding on Loan Facility #2.[18]

27. Third, and most importantly, Hazelton, Berry and Mizrahi entered into the "**Supplementary Agreement**"[19], which by reference incorporated the Ottawa Loan[20], as part of the conditions and consideration for Berry providing the Ottawa Loan. The Supplementary Agreement provides at Article 5 that if the closing of Unit 901 occurs prior to the Ottawa Loan being repaid in full, Berry is entitled to receive Unit 901 without any further payment.[21] The key provision of the Supplementary Agreement reads as follows:

> "In the event that Sam fails to provide the Mizrahi Bridge Payment and/or provide payment pursuant to the Sam Personal Guarantee, or if any amounts remain due and owing to David on account of Loan Facility and/or Loan Facility #2 (including all interest accrued thereon), Sam, as a director and officer of Hazelton Inc., confirms and agrees that David shall not be required make any additional payments to Hazelton Inc. (including its successors and/or assignees) for the purchase of the Lender's Unit, whether on account of the final closing of the purchase of the Lender's Unit or otherwise. Sam agrees that (a) Hazelton Inc (or any successor or assignee) shall seek any and all amounts due and owing to Hazelton Inc. (or any

[15] Term Sheet, Berry Affidavit, Exhibit JJ, RMR, Tab 1JJ, p. 452.
[16] Loan Agreement, Berry Affidavit, Exhibit II, RMR, Tab 1II, p. 358.
[17] Loan Agreement, page 30, section 15.1, Berry Affidavit, Exhibit II, RMR, Tab 1II, p. 387.
[18] Loan Agreement, page 9, section 3.6, Berry Affidavit, Exhibit II, RMR, Tab 1II, p. 366.
[19] Supplementary Agreement, Berry Affidavit, Exhibit LL, RMR, Tab 1LL, p. 463.
[20] See for example, Supplementary Agreement, Recitals, and Article 1, Berry Affidavit, Exhibit LL, RMR, Tab 1LL, pp. 463-464.
[21] Supplementary Agreement, Article 5, Berry Affidavit, Exhibit LL, RMR, Tab 1LL, p. 465. A discussion of the details of the Supplementary Agreement, and certain amendments effecting it are set out at paras 87-92 of the Berry Affidavit, RMR, Tab 1, pp. 36-38.

> successor or assignee) for the final closing of the Lender's Unit from Sam, (b) David's rights under the APS shall not be affected in any way, and (c) the final closing of the Lender's Unit will be completed notwithstanding that funds for said closing may not have been provided by Sam." [emphases added]

28. The Supplementary Agreement provides that it remains in effect, despite any notwithstanding clause in another Loan Agreement, and would *only* terminate upon repayment to Mr. Berry of all amounts due and owing pursuant to Ottawa Loan.[22] However, the Ottawa Loan has not been repaid and will not be repaid in full. At present, approximately $9,813,728.92 is owing on the Ottawa Loan and that project is now the subject of CCAA proceedings in Ottawa.[23] The Ottawa Loan originally matured in 2018, and despite an amending agreement, the repayment conditions were not satisfied as required such that the Ottawa Loan remained outstanding, due, and owing per the terms of the Supplementary Agreement, as of April 2023[24], and to this day.

29. Accordingly, leaving aside the fact that Berry has paid everything that he is required to pay for Unit 901, by April 2023 at the latest, Berry was the beneficial owner of Unit 901 and had an institutional construction trust over and equitable interest in Unit 901 in his favour.

D. CEI and Hiscox Repeatedly Assured Berry His Purchase of Unit 901 Would Close Notwithstanding the Receivership

30. On or about January 11, 2024, both Mizrahi and Hiscox reached out to Berry and offered to close Unit 901 on an as-is, where-is basis (the "**As-is Where-is Offer**").[25]

31. Mizrahi and Hiscox conveyed the offer to Berry during a phone call and after initially saying no, Mizrahi followed-up by text message re-making the offer, clarifying that "what CEI is

[22] Supplementary Agreement, Articles 6.7 and 6.8, Berry Affidavit, Exhibit LL, RMR, Tab 1LL, p. 467.
[23] A discussion of this point is set out at paras 108-109 of the Berry Affidavit, RMR, Tab 1, pp. 42-44 and in the Loan Calculation at Exhibit RR, RMR, Tab 1RR, p. 574.
[24] See a discussion of this point as set out at paras 100-102 of the Berry Affidavit, RMR, Tab 1, pp. 40-41; and Amending Agreement, section 2(c)(iii), Berry Affidavit, Exhibit NN, RMR, Tab NN, pp. 478-479.
[25] A discussion of the events surrounding the As-is Where-Is Offer is found at paras 40-50 of the Berry Affidavit, RMR, Tab 1, pp. 23-26.

suggesting is that we deduct the amount to finish from your closing and you keep the money and finish it yourself…You are not paying the project to finish it…Let me know if this works for you, so I can advise".[26] Berry did not initially respond, and the As-is Where-is Offer did not expire and was not revoked.

32. In February 2024, Mizrahi reached out to Berry, advising him that CEI had acquired the senior secured debt from DUCA, and that CEI was going to seek the appointment of a Receiver over the Hazelton Project.[27] Around this time, Berry reached out to Edward Rogers, the Chairman of CEI, through intermediaries, and was told through these intermediaries to wait for three weeks.[28]

33. On or about February 23, 2024, CEI commenced the within Receivership Application. Berry followed up with CEI and was told that Hiscox would be in touch.

34. On or about March 8, 2024, Berry and Hiscox spoke by phone, and Hiscox confirmed that CEI had commenced an application to appoint a Receiver in respect of the Hazelton Project. He provided repeated assurances that Berry should be patient, not disrupt the Receivership Application, that the Unit 901 APS would be honoured, and that the Receivership would be beneficial to Berry. Specifically, over a series of phone calls between March and May 2024, Hiscox advised Berry that: (a) "I [Hiscox] am on the side of the suckers who believed in the guy [Mizrahi]"; (b) once the Receiver was appointed the Receiver would "close things out"; (c) the plan was to finish off the units, specifically stating the plan was to finish "all the units"; (d) the Receiver would do everything "with the owners" [being those with APSs]; and (e) Berry's unit was on the list to be finished off and closed.[29]

35. Between the time Hiscox and Mizrahi communicated the As-is Where-is Offer to Berry in

[26] Text Message to Mizrahi, Berry Affidavit, Exhibit W, RMR, Tab 1W, p. 276.
[27] Berry Affidavit, paras 50 and 56, RMR, Tab 1, pp. 26, 27.
[28] Berry Affidavit, paras 52-58, RMR, Tab 1, pp. 26-28; See also; Berry Affidavit, Exhibit X, RMR, Tab 1X, p. 278.
[29] Berry Affidavit, para 60 and 68-74, RMR, Tab 1, pp. 28-29, 31-32.

January 2024 and June 2024, Hazelton closed a number of other units, including units 304 and 402, on an as-is where-is basis.[30]

36. On May 30, 2025, before the Receivership Order was granted, Berry advised both Mizrahi and Hiscox in discussions and in writing by text message to Mizrahi that he accepted the As-Is Where-Is Offer.

37. Despite this, and after communicating acceptance, Hiscox told Berry that he could not at that time close on Unit 901 because of the pending receivership proceedings, and that Berry would have to wait until the Receiver's appointment to close on Unit 901.

38. On several occasions between then and early June 2024, Berry spoke with Hiscox and repeatedly reiterated his demand that the Hazelton close on Unit 901,[31] while Hiscox repeatedly reiterated that Berry should not take any steps to oppose or meddle with the Receivership Proceedings, and that his APS would be honoured in due course once the Receiver was appointed.

39. Hiscox's repeated statements to Berry during these phone calls, which occurred while the Receivership Proceedings were pending, matched Hiscox's statements in his affidavit that he filed on behalf of CEI in support of the Receivership Application ("**Hiscox Affidavit**"). The Hiscox Affidavit provided: "CEI's intention is for the receiver to take steps to complete the sale of units already subject to agreements of purchase and sale".[32] CEI's factum in arguing in favour of the Receiver stated that the Receiver will: "(a) allow for the completion of the sale of units already subject to agreements of purchase and sale".[33]

[30] Berry Affidavit, para 69, RMR, Tab 1, p. 24.
[31] Berry Affidavit, paras 68-72, RMR, Tab 1, pp. 31-32.
[32] Hiscox Affidavit, para 57, Berry Affidavit, Exhibit FF, RMR, Tab 1FF, pp. 316-317.
[33] Factum of CEI, dated April 26, 2024, para 59(a), Berry Affidavit, Exhibit GG, RMR, Tab GG, p. 339.

40. On June 4, 2024, Justice Cavanagh granted the CEI's Application for the appointment of the Receiver.[34] In his endorsement, Justice Cavanagh referred to CEI's representation that the Receiver was to honour and close the APSs, writing: "CEI's intention is for the Receiver to take steps to complete the sale of units already subject to agreements of purchase and sale".[35] Justice Cavanagh relied upon CEI's representation as a basis for determining that it was "just and convenient" to appoint the Receiver, noting near the conclusion of his reasons that "[t]he appointment of a receiver will (a) allow for the completion of the sale of units already subject to agreements of purchase and sale…"[36]

41. Despite all of the foregoing, on June 21, 2024, just weeks after the Court granted the Receivership Order on the basis that the APSs would be honoured, Berry met with Hiscox in his office at the Hazelton Project and for the first time Hiscox rejected outright the possibility of closing on the basis of the As-is Where-is Offer.

PART III - ISSUES

42. The sole issue to be decided is whether the Receiver should be permitted to disclaim the Unit 901 APS. In order to determine this issue, three sub-issues arise: (a) Was Berry the beneficiary of an institutional constructive trust or did he otherwise have an equitable interest in Unit 901 at the time of the Receivership Order? ***Yes.***; (b) Did Berry have a legal interest in Unit 901 by way of accepting Hazelton's As-Is Where-Is Offer prior to the Receivership Order? ***Yes.***; and (c) If the answer to (a) and (b) is "No", do the equities support completing the contract on an "As-Is Where-Is" basis? ***Yes.***

[34] Endorsement of Justice Cavanagh, dated June 4, 2024, Berry Affidavit, Exhibit HH, RMR, Tab HH, p. 347.
[35] Endorsement of Justice Cavanagh dated June 4, 2024, para 23, Berry Affidavit, Exhibit HH, RMR, Tab HH, p. 350.
[36] Endorsement of Justice Cavanagh, dated June 4, 2024, para 44, Berry Affidavit, Exhibit HH, RMR, Tab HH, p. 353.

PART IV - LAW AND ARGUMENT

A. The Test to Permit a Receiver to Disclaim a Contract

43. The three factors the Courts consider in determining whether a disclaimer for a *pre sale* APS is appropriate are as follows: (1) what are the respective legal priority positions as between the competing interests; (2) would a disclaimer enhance the value of the assets, and if so, would a failure to disclaim amount to a preference in favour of one party; and (3) whether, if a preference would arise, the party seeking to avoid the disclaimer has established that the equities support such a preference.[37]

44. For the various reasons set out below, the first and third factors favour denying the motion for each of these reasons: (a) Berry is the beneficial owner (not an unsecured creditor) of Unit 901 pursuant to an equitable interest and institutional constructive trust that arose prior to the Receivership Order, and his beneficial title cannot be disclaimed; (b) Berry is entitled to close on the As-Is Where-Is Offer he accepted prior to the appointment of the Receiver; and (c) the equities do not favour CEI given that CEI is a co-owner of the Project, it repeatedly advised Berry and then this Court that the Unit 901 APS was to be honoured by the Receiver, and Berry is a uniquely affected APS holder. Berry has bought and paid for finishings with purchase price advances that are sitting in the unit, and CEI or Hazelton should recover any of their losses from Mizrahi.

B. Unit 901 Cannot Be Resold as Berry is the Beneficiary Under an Institutional Constructive Trust Over Unit 901 or Otherwise has a Clear Equitable Interest

i. Institutional Constructive Trusts Arise Automatically by Operation of Law

45. It is a fundamental principle that the Receiver has no better rights to Unit 901 than Hazelton itself. In this regard, provincial law governs Hazelton's rights with respect to Unit 901 as of the

[37] *KingSett Mortgage Corporation et al. v. Vandyk-Uptowns Limited et al.*, 2024 ONSC 6205, at paras 24-26.

date of the Receivership Order,[38] and neither the Receiver nor CEI have any better rights to Unit 901 as a result of the Receivership Order.[39] A necessary corollary to this principle is that any pre-existing rights to the property, or any impairment on the title to property, continues to apply after the Receivership Order.

46. A receiver cannot terminate any legal and equitable property rights that have passed under an agreement of purchase and sale prior to the receivership, such as an equitable interest or trust rights which have fully crystallized.[40] Indeed, the Court has held that a contract cannot be disclaimed where there is a sale to a *bona fide* purchaser prior to the receivership that is valid and effectual but for title passing.[41]

47. The common law has long recognized that a specifically enforceable contract for the purchase and sale of land automatically gives rise to a constructive trust in favour of the purchaser, thereby giving the purchaser a beneficial interest in the property.[42] The constructive trust becomes enforceable at the point whereby all obligations (save for routine closing adjustments) under the contract have been discharged by the purchaser.[43] The institutional constructive trust arises automatically by operation of law, and is not a "remedial constructive trust". [44]

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[38] Unless stated contrary in the relevant legislation, provincial property laws govern the rights of the parties in the proceeding, whether it be bankruptcy or receivership: See: *Re Jackson*, 1987 CanLII 4053 (ONSC); *Giffen (Re),* 1998 CanLII 844 (SCC), [1998] 1 SCR 91, at para 64; *Waygar Capital Inc. v Quality Rugs of Canada Limited*, 2024 ONSC 2486, at para 21.

[39] *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.*, 2001 Can LII 28461 (ON SC) at paras 11-12 (*"**Armadale**"*); *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.*, 2020 ONSC 5071, at para 32 - 3 3 ("***C & K Mortgage***").

[40] *Armadale* at paras 11-12; *C & K Mortgage*, at para 32; aff'd 2020 ONCA 817 at para 18; *1565397 Ontario Inc. (Re),* 2009 CanLII 32257 (ON SC), at paras 60-61; See also, in the bankruptcy context, *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3), ss. 67(1)(a).

[41] *Armadale* at paras 11-12; *C & K Mortgage*, aff'd 2020 ONCA 817 at para 18; *Centurion Mortgage Capital Corp. et al. v. Brightstar Newcastle Corp et al*., 2022 ONSC 1059 at paras 41 and 75 ("***Centurion***").

[42] See: Robert Chambers, Constructive Trusts in Canada, 1999 37-1 *Alberta Law Review*, pp. 186-189, 1999 CanLiiDocs 188 ("***Chambers***"), *Buchanan v. Oliver Plumbing & Heating Ltd.,* 1959 CanLII 141 (ON CA) (*"**Buchanan**"*); *Simcoe Vacant Land Condominium Corporation No. 272 v. Blue Shores Developments Ltd.*, 2015 ONCA 378 at paras 46 - 49 (*"**Blue Shores**"*).

[43] *Chambers*, pp. 186-189, 1999 CanLiiDocs 188; *Buchanan*; *Armadale* at paras 11-12 (in the context of an 'equitable interest').

[44] *Buchanan*; *Blue Shores* at paras 46 - 49.

48. The Ontario Court of Appeal has confirmed that the institutional constructive trust also applies to condominiums.[45] The Ontario Court of Appeal has also held that: (a) once a unit purchaser enters into an agreement of purchase of sale, he becomes an equitable owner of the unit even though the agreement cannot be closed until the condominium is registered[46]; (b) the owner is in a fiduciary relationship with unit purchasers and actually holds the property in trust for them; and (c) the owner has a duty to protect the interests of the unit owners and cannot put its own interests in conflict with theirs.[47]

ii. Berry Has Beneficial Ownership of Unit 901 Pursuant to An Institutional Constructive Trust or Other Equitable Interest

49. In this case, at the time the Receivership Order was granted, Berry was already the beneficial owner of Unit 901 pursuant to an institutional constructive trust and had an equitable interest in the property. Berry is a *bona fide* purchaser for value of Unit 901 as he is not required to pay any further amounts on account of Unit 901 for either of the following reasons: (a) Article 5 of the Supplementary Agreement provides Berry does not have to pay any further amounts on account of Unit 901 (given the amounts owing on the Ottawa Loan); or (b) he has paid more than he is required to having regard to payments made and adjustments to the purchase price.[48] As such he has fully performed his contractual obligations, and at this time, his interest cannot be converted into an unsecured claim as the Receiver argues in its factum.[49]

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[45] *Blue Shores* at para 49.
[46] The Hazelton Project was registered in 2023.
[47] *York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al*. (1981), 1981 CanLII 1932 (ON CA); see also in the Receivership context: *Centurion* at para 38.
[48] For greater certainty, (a) and (b) are not contingent on each other, they both stand as their independent submissions, and both on their own result in the conclusion that Berry has fully paid up for Unit 901.
[49] *1565397 Ontario Inc. (Re),* 2009 CanLII 32257 (ON SC), at paras 60-61.

iii. Case Law Supports Berry's Beneficial Ownership

50. The jurisprudence supports Berry's position that he has a beneficial and equitable interest in Unit 901 which should not be disclaimed. The Receiver's reliance on the decision in *C & K Mortgage* is misplaced. That case dealt with whether or not a mere deposit payment, rather than full payment gives rise to an equitable interest.[50] Justice Dietrich distinguished the facts of *C & K Mortgage* from the case of *Armadale*,[51] in which the Court held that there could not be disclaimer because the purchaser "had paid the full purchase price and could have enforced the transfer of title".[52] That is precisely the case here – Berry does not have to pay any further amounts on account of Unit 901. Accordingly, the *Armadale* case, rather than *C & K Mortgage*, is applicable.

51. More analogous factually is the more recent decision in *Centurion Mortgage Capital Corp. et al. v. Brightstar Newcastle Corp et al*.[53] In that case, the purchaser advanced funds to the developer pursuant to a loan agreement between the developer and the purchaser to help finance the project, which was unknown to the secured creditor. The loan contemplated that the funds would count towards the final payment of the purchaser's unit. After the project was registered, title was not transferred to the purchaser as a result of a dispute as to how the balance was paid. On a motion for directions brought by the Receiver, Justice Penny ruled in favour of the purchaser, finding that the loan counted towards the final payment for the unit and accordingly ordered the transfer of title to the purchaser.

52. Here, the express wording of Article 5 of the Supplementary Agreement provides that if the Ottawa Loan is outstanding, Mr. Berry does not have to make any more payments to Hazelton for the purchase of Unit 901 and the final closing of the unit will nonetheless be completed. The

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[50] *C & K Mortgage*, at paras 31-47.
[51] *Armadale*, 2001 Can LII 28461 (ON SC).
[52] *Armadale*; *C & K Mortgage*, at para 33.
[53] *Centurion Mortgage Capital Corp. et al. v. Brightstar Newcastle Corp et al*., 2022 ONSC 1059

building is registered and Berry has paid all of the amounts that he needs to pay towards Unit 901. The Ottawa Loan is owing, and the APS can close, subject to permissible adjustments. He like the purchaser in *Centurian*, is entitled to have title transferred.

iv. Receiver's Arguments Regarding the Supplementary Agreement Are Incorrect

53. The Receiver argues that the Supplementary Agreement should not be enforced because: (a) it predates the termination of the Original APS; (b) the Unit 901 APS does not refer to the Supplementary Agreement; and (c) it contains an entire agreement clause. None of these arguments have merit.

54. As a general matter, the Receiver's argument misconstrues entire agreement clauses. An entire agreement clause is construed narrowly in the same manner as an exclusionary clause,[54] and can be held to be unenforceable under the *Tercon* framework: (a) Did the parties intend for the exclusion clause to apply to the circumstances of the particular case?; (b) If the parties did intend the clause to apply, was it unconscionable?; and (c) If the clause is applied and was not unconscionable, was it contrary to overriding policy?[55] In this case, it is apparent that the parties did not intend for the generic entire agreement clause to render the Supplementary Agreement of no effect, and there are overriding public policy reasons not to enforce the clause.

55. Contrary to the Receiver's argument that the entire agreement clauses preclude *all* prior agreements, courts have specifically held that parties can, by their conduct, demonstrate that they do not intend to be bound to an entire agreement clause.[56] This includes subsequent verbal agreements[57], *and* prior agreements between the parties.[58] This is particularly so when the entire

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[54] *Highclass v Ansari*, 2023 ONSC 4138 at para 75 ("***Highclass***").
[55] *Highclass* at para 75; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, at paras. 121-123.
[56] *Highclass* at paras 77-78.
[57] *Clarke v. Mathews v. Gondosch and 1394536 Ontario Ltd.,* 2025 ONSC 1 at paras 99-100.
[58] *Highclass* at paras 77-78; *Graham v Sable Developments Inc*., 2019 BCSC 1157 at paras 45-48 ("***Graham***").

agreement clause is in a standard form contract, is buried in fine print, and the parties did not bring their mind to it.[59]

56. Here, the entire agreement clause in the Unit 901 APS is merely a standard form clause, evidenced by the fact that it was identically written in the Original APS.[60] The parties did not turn their minds to this provision nor was it brought to Berry's attention as excluding the operation of the Supplementary Agreement. There is no evidence of intention by the parties to terminate the Supplementary Agreement by entering into the Unit 901 APS. The Unit 901 APS was necessitated by the assignment of Unit 802 to a third party, and nothing more. In any event, the Unit 901 APS is an agreement between Berry and Hazelton, who alone do not have authority to vary the Supplementary Agreement. By its terms, had the three parties to the Supplementary Agreement intended to terminate, amend, modify or supplement the Supplementary Agreement, they all would have signed a written agreement to that effect.[61]

57. The subsequent acts of the parties confirm that they did not intend to extinguish the rights contemplated by the Loan Agreement and its related Supplementary Agreement, despite the Unit 901 APS being silent on those agreements. For example, the 2016 Loan Agreement provided, in part, for Berry to receive an additional parking spot at 128 Hazelton – a right specifically impacting Unit 901, which by the Receiver's position, would have fallen away by virtue of the entire agreement clause. However, eight months after entering into the Unit 901 APS, by way of letter with specific reference to section 15.1 of the Loan Agreement, Hazelton confirmed that it would provide Berry with a fourth parking spot.[62]

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[59] *Graham* at paras 41-44; *Campbell River Common Shopping Centre v. Nuszdorfer*, 2013 BCSC 141 at para 34.
[60] See: Original APS, section 33, Berry Affidavit, Exhibit A, RMR, Tab 1A, p. 61.
[61] Supplementary Agreement, Article 6.1, Berry Affidavit Exhibit LL, RMR Tab LL, p. 465.
[62] Loan Agreement section 15.1, Berry Affidavit Exhibit II, RMR Tab 1II, p. 387; Parking Spot letter April 16, 2020, Berry Affidavit Exhibit KK, RMR Tab 1KK, p. 461.

58. Further, in October 2021, over two years after the Unit 901 APS, certain aspects of the Loan Agreement that related to Unit 901 were amended by the the Amending Agreement, but the Supplementary Agreement was left unamended.[63] Moreover, the Amending Agreement in writing confirms that the Loan Agreement is ratified and remaining in full force and effect "unamended".[64]

59. There are also overriding policy considerations which render the entire agreement clause unenforceable. Specifically, enforcing the entire agreement clause will result in the affiliated Mizrahi parties (including Hazelton) retaining all benefits under both the Unit 901 APS and the Loan Agreement (with the related Supplementary Agreement), and it will leave Mr. Berry retaining no benefits despite having performed all of his obligations. Courts have found that in such circumstances, where one party is able to shelter under an entire agreement clause to avoid its previous contractual obligations and realize a windfall as Hazelton will by (a) avoiding any obligations under the Supplementary Agreement, and (b) disclaiming the Unit 901 APS, policy considerations militate against enforcing an entire agreement clause.[65]

C. Berry Accepted Hazelton's As-is Where-is Offer

60. The Receiver makes three arguments as to why the As-is Where-is Offer should not be seen as binding: (a) the parties failed to agree on price; (b) Mr. Berry rejected the As-is Where-is Offer; and (c) the offer lapsed. There is no merit to these Receiver's arguments.

i. There Was No Uncertainty Regarding Price

61. The Receiver argues that the parties failed to agree to essential terms of the As-is Where-is Offer because Berry's offer was conditional on an accurate estimate of the cost to complete.

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[63] The Amending Agreement deleted provision 3.6 of the Loan Agreement related to the Mizrahi Bridge Payment, Berry Affidavit, Exhibit NN, RMR Tab 1NN, p. 480.
[64] Amending Agreement section 3, Berry Affidavit, Exhibit NN, RMR Tab 1NN, p. 480.
[65] *Galt Machine and Plating Inc. v. MLS Group Ltd.*, 2021 ONSC 8156 at paras 31; *Highclass v Ansari*, 2023 ONSC 4138 at paras 77-78.

62. There was no uncertainty of terms related to price – the Unit 901 APS set out the price and the As-is Where-is Agreement provided for an abatement in the purchase price having regard to the work required to complete the unit. Parties may to agree to a formula or an objective standard to establish a price, whereby the formula or objective standard for establishing price will determine the price at a later date than when the contract is entered into.[66] The agreement creates the certainty of terms and there is no ambiguity in terms rendering the contract unenforceable.

63. The Receiver's argument that Mr. Berry's acceptance was "conditional" on an appraisal is inconsistent with Berry's uncontested evidence. As affirmed by Berry, he informed Mizrahi and Hiscox on phone calls of his acceptance of the As-is Where-is Offer. His use of the phrase "subject to an accurate estimate on completion" merely confirms his agreement to "deduct the amount to finish from your closing and you keep that money and finish it yourself with Denbosh."[67] In any event, the Receiver has obtained and provided an accurate estimate to complete the unit, which only underscores the certainty of the provision.

ii. The Offer Remained Outstanding at The Time of Acceptance

64. The Receiver incorrectly argues that Berry "rejected" the offer made by text message dated January 11, 2024, by confusing it with an email Berry sent to a third party describing phone calls he had with Mizrahi and Hiscox prior to the January 11 text message offer. Berry's uncontested affidavit evidence provides that these discussions with Mizrahi and Hiscox occurred *prior* to the text message offer Berry received from Mizrahi. The text exchange with Mizrahi corrected a misapprehension Berry had about who was responsible for completing the unit and clarified that Hazelton would deduct the finishing amount from the closing price, and close. If Berry did, in fact,

[66] *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc. (Mr. Sub)*, 2016 ONCA 93 at para 28.
[67] Berry Affidavit, Exhibit W, RMR Tab 1W, p. 276.

"reject" the verbal offer he described in his email, Mizrahi's text message following that rejection amounts to a re-offer, with a clarification in terms regarding the deductions on finishing costs.[68] In any event, the Receiver concedes Berry's uncontradicted evidence does not disclose rejection.[69]

65. The Receiver's further argument that Berry was out of time fails because in this case, the offer was accepted within a reasonable time, given the surrounding circumstances. The authority relied upon by the Receiver considered the acceptability of an offer 24 months after it was made.[70]

66. The facts of this case demonstrate that the time that has passed is certainly reasonable. First, the passage of time was just over four months. Similar and longer passages of time have been found reasonable in the case law.[71] Second, no progress had been made on the unit in the intervening period, such that the circumstances had remained the same (from offer to acceptance). Third, neither Mr. Hiscox nor Mizrahi withdrew the offer despite Berry's active discussions with Hazelton/CEI about the completion of his unit after the appointment of the Receiver.

D. The Equities Support Completing the Contract on an As-is Where-is Basis

67. If this Honourable Court finds that Berry is not the beneficial owner of and does not have an equitable interest in Unit 901, the equities support not approving a disclaimer.

68. First, this is not a mere contractual interest that can be terminated in respect of future obligations. The requested relief instead would be to transfer Berry's interest which arose under the Supplementary Agreement (which Hazelton was bound to) for no compensation. This is not an

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[68] See: *Bryce v. Golam,* 1996 CanLII 3300 (BC CA) at para 5: an offer that is first rejected or declined, if reoffered can be accepted.
[69] Factum of the Receiver, at para 30.
[70] *Gillevet v. Crawford and Co. Insurance Adjusters Ltd. (Ont. Dist. Ct.),* 1988 CanLII 4765 (ON SC).
[71] See: *Earn v. Kohut*, 2002 MBQB 84 where 2.5 years was seen to be reasonable to accept the offer, this time period was aff'd 2005 MBCA 15 at para 17; and *Mondino v. Mondino*, 2004 CanLII 19873 (ON SC) where the period of over a month before an offer was accepted was determined to be reasonable.

instance of a termination of an executory APS in which both parties have remaining obligations to be performed. This militates against a disclaimer.[72]

69. Second, a disclaimer departs from this Court's reasons for granting the Receivership Application in the first place, namely that, *inter alia*, "[t]he appointment of a receiver will (a) allow for the completion of the sale of units already subject to agreements of purchase and sale […]".[73] As one of the driving reasons behind the Receivership Order, the Receiver ought to go to all lengths to act in accordance with these reasons and should not seek to disclaim Berry's APS until it has demonstrated to this Court that it has exhausted all options to give effect to the Court's intention.

70. Third, CEI stands in the unique position as the developer, debtor and first secured creditor as opposed to an arms'-length lender. CEI's years of failed oversight of the Project is what led to the losses that it now seeks to recoup through the Receiver's disclaimer of Berry's APS. By virtue of its dual role, CEI's conduct leading up to the appointment of the Receiver informs the equities of this case. CEI, through Hiscox, repeatedly assured Berry that his unit would be completed and closed once the Receiver was appointed, that the As-is Where-is offer could be completed upon the Receiver's appointment and urged Berry not to take any action to disrupt the appointment. As developer, debtor and senior creditor, CEI, like all other interested persons, has a duty to act in good faith with respect to these proceedings.[74] CEI has failed to meet its duty.

71. Fourth, Hiscox testified to this court that CEI's intention in appointing a receiver was to, *inter alia*, "(a) allow for the completion of the sale of units already subject to agreements of purchase and sale..."[75] Yet, the Receiver in its Third Report advises the Court that CEI has advised

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[72] 1*565397 Ontario Inc. (Re),* 2009 CanLII 32257 (ON SC), at paras 80-81.
[73] Endorsement of Justice Cavanagh, at para. 44, Berry Affidavit, Exhibit HH, RMR Tab 1HH, p. 353.
[74] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 4.2(1).
[75] Hiscox Affidavit, para 57, Berry Affidavit, Exhibit FF, RMR, Tab 1FF, p. 316; Factum of CEI, dated April 26, 2024, Berry Affidavit, Exhibit GG, RMR, Tab, GG, para 58, pp. 339-340.

that *it is not willing* to fund the completion of Unit 901 as per the specifications set out in the 901 APS and accompanying documents, and *not willing* to fund completion if the Receiver's intention is to transfer Unit 901 to Berry, as there is effectively no benefit to the estate.[76] Chief Justice Morawetz, in *Re Target*, articulated that someone seeking to use the insolvency processes of the Court cannot resile from the commitments made at the beginning of an insolvency proceeding which sets out the ground-rules for how a process is going to unfold.[77] CEI's about-face from its representations to Berry and this Court should not be rewarded by the granting of the sought-after disclaimer, particularly given Berry's detrimental reliance on Hiscox's representations.

72. Fifth, Berry has forwarded $4,317,000 directly against the purchase price of the Unit. He has sourced and paid hundreds of thousands of dollars for finishings that currently sit in Unit 901, paid $800,000 earmarked specifically for the completion of his unit that was, by all accounts, not used for that purpose, and has spend hundreds of thousands of dollars on rental accommodations, moving and storage expenses while awaiting completion. This amount far exceeds cases like the one cited by the Receiver where purchasers lose their deposits and suffer minor financial losses.[78]

73. Sixth, Berry extended a loan of $10 million to Mizrahi, contingent on entering into the Supplementary Agreement. Ordering a disclaimer may mean that Mr. Berry has no opportunity to recover on the Loan, which explicitly contemplates him closing on Unit 901, and rendering the Supplementary Agreement which was entered on good and valid consideration meaningless.[79]

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[76] Third Report of the Receiver, dated January 10, 2025, pp. 7, para 3.2, MR Tab 2.
[77] *Target Canada Co. (Re),* 2016 ONSC 316 at para 81; see also: *Pride Group Holdings Inc. et al*., 2024 ONSC 5902 at paras 33-34 affirming the "building block" principle from *Re Target*, and refusing to give effect to an Order that would depart from orders made previously in the proceeding.
[78] See: *C & K Mortgage*, 2020 ONSC 5071 cited in paragraph 53 of the Receiver's factum, where a couple only lost their $500,000 deposit, and no other funds were advanced beyond the deposit.
[79] Which as explained above, all parties have acted as if was still in full force and effect, and in fact the Amending Agreement confirms that all provisions of the Ottawa Loan are still in full force and effect: see section 3, Amending Agreement, Berry Affidavit, Exhibit NN, RMR, Tab NN, p. 480.

74. Berry ought not be punished for being caught in the middle of a private dispute between Hazelton's co-owners. In entering the Supplementary Agreement and all other agreements Berry transacted with Hazelton and Mizrahi on the basis that Mizrahi had authority to act on behalf of and bind Hazelton and all other Mizrahi parties.[80] To the extent that Mizrahi's actions have caused harm to CEI, CEI can seek recourse against Mizrahi directly without affecting Berry's rights.

75. Each of these factors on their own, and particularly in their the totality results in the equities supporting Berry's position on this motion.

E. Receiver Misconstrues "Specific Performance" – The Receiver Does Not Have to Do Any Further Work

76. The Receiver also argues that specific performance of the Unit 901 APS is unavailable based on case law that suggests that specific performance should not be ordered when it requires the receiver to perform further work.[81] This misconstrues Berry's position on the motion.

77. First, Berry is not seeking "specific performance" as a remedy requiring the Receiver to finish Unit 901. Rather, since Berry has discharged all of his obligations under the Unit 901 APS, the Unit 901 APS is specifically enforceable, and Berry has become the beneficial owner of Unit 901 pursuant to the institutional constructive trust. Berry's request for an order transferring the unit to him is simply to give effect to the fact that he already has beneficial title as a matter of law. It is not the case where Berry has requested specific performance in the place of an award of damages, which is an entirely different situation.

78. Second, and as made expressly clear in his affidavit, Berry is not asking the Court to order the Receiver to complete the build out of Unit 901 pursuant to the terms of the Unit 901 APS,

[80] *Centurion,* at paras 47-49; See also: *AOD Corporation v. Miramare Investment Incorporated*, 2021 ONSC 4280 at paras 28-32 for an application of the indoor management rule which would be applicable here to Mizrahi's authority to bind Hazelton as a director and operating mind.
[81] Factum of the Receiver RE Disclaimer Motion, paras 37-38.

whether by borrowing money or otherwise. Rather, Berry is simply asking that the Court to direct the Receiver to close on the Unit as-is, where-is, and transfer title to Berry. The simple transfer of title to a unit is precisely the type of performance that Courts order in the case law.[82] This will require no financial obligations to the Receiver.

79. The Receiver is wrong that the APS would have to be amended. Berry has done all that he needs to have done. The Court can simply grant an Order to transfer title of Unit 901.[83]

80. In any event, Courts have applied the equitable maxim "looks on that as done which ought to be done" in order to address technicalities to order the completion of APS in such cases[84], and can craft equitable remedies giving effect to the spirit of an agreement even if changing the letter.[85]

PART V - RELIEF REQUESTED

81. Mr. Berry respectfully requests this Court dismiss the Receiver's motion to disclaim the Unti 901 APS with costs and grant an Order directing the Receiver to transfer title of Unit 901 to him on an as-is, where-is basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of February, 2025.

Tyr LLP
Lawyers for David Berry

[82] *Centurion*, 2022 ONSC 1059.
[82] *Armadale*; *Centurion,* 2022 ONSC 1059 at para 76.
[83] *Centurion*, 2022 ONSC 1059 at para 53. See also Order Appointing Receiver dated June 4, 2024, at para 3(m).
[84] *Grant Forest Products Inc. (Re)*, 2010 ONCA 355, 101 O.R. (3d) 383, at paras. 13-18; *Centurion* at para 33.
[85] *AK (007) GP Management Ltd. v Wang Dong*, 2023 BCSC 363 at para 32.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *1565397 Ontario Inc. (Re),* 2009 CanLII 32257 (ON SC)
2. *AK (007) GP Management Ltd. v Wang Dong,* 2023 BCSC 363
3. *AOD Corporation v. Miramare Investment Incorporated*, 2021 ONSC 4280
4. *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.*, 2001 Can LII 28461 (ON SC)
5. *Bryce v. Golam,* 1996 CanLII 3300 (BC CA)
6. *Buchanan v. Oliver Plumbing & Heating Ltd.,* 1959 CanLII 141 (ON CA)
7. *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.*, 2020 ONSC 5071
8. *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.*, 2020 ONCA 817
9. *Campbell River Common Shopping Centre v. Nuszdorfer*, 2013 BCSC 141
10. *Centurion Mortgage Capital Corp. et al. v. Brightstar Newcastle Corp et al.*, 2022 ONSC 1059
11. *Clarke v. Mathews v. Gondosch and 1394536 Ontario Ltd.,* 2025 ONSC 1
12. *Earn v. Kohut*, 2002 MBQB 84
13. *Galt Machine and Plating Inc. v. MLS Group Ltd.*, 2021 ONSC 8156
14. *Giffen (Re),* 1998 CanLII 844 (SCC), [1998] 1 SCR 91
15. *Gillevet v. Crawford and Co. Insurance Adjusters Ltd. (Ont. Dist. Ct.),* 1988 CanLII 4765 (ON SC)
16. *Graham v Sable Developments Inc.*, 2019 BCSC 1157
17. *Grant Forest Products Inc. (Re)*, 2010 ONCA 355
18. *Highclass v Ansari*, 2023 ONSC 4138
19. *KingSett Mortgage Corporation et al. v. Vandyk-Uptowns Limited et al.*, 2024 ONSC 6205
20. *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc. (Mr. Sub)*, 2016 ONCA 93
21. *Mondino v. Mondino*, 2004 CanLII 19873 (ON SC)
22. *Pride Group Holdings Inc. et al.*, 2024 ONSC 5902
23. *Re Jackson*, 1987 CanLII 4053 (ONSC)
24. Robert Chambers, Constructive Trusts in Canada, 1999 37-1 *Alberta Law Review* 1999 CanLiiDocs 188
25. *Simcoe Vacant Land Condominium Corporation No. 272 v. Blue Shores Developments Ltd.*, 2015 ONCA 378
26. *Target Canada Co. (Re),* 2016 ONSC 316
27. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4
28. *Waygar Capital Inc. v Quality Rugs of Canada Limited*, 2024 ONSC 2486
29. *York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al.* (1981), 1981 CanLII 1932 (ON CA)

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

Duty of Good Faith
Good faith

4.2 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

PART IV
Property of the Bankrupt
Property of bankrupt

67 (1) The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person;

Court File No. CV-24-00715321-00CL

CONSTANTINE ENTERPRISES INC.	-and-	MIZRAHI (128 HAZELTON) INC. AND MIZRAHI 128 HAZELTON RETAIL INC.
Applicant		Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

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