CITATION: *Constantine Enterprises Inc. v. Mizrahi (128 Hazelton) Inc. et al.*, 2025 ONSC 2073
COURT FILE NO.: CV-24-00715321-00CL
DATE: 20250506

ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION UNDER SECTION 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

B E T W E E N:	)	
	)	
		Jennifer Stam and James Renihan, for KSV Restructuring Inc., in its capacity as Receiver
CONSTANTINE ENTERPRISES INC.	)	*John Picone*, for the Applicant
	)	
Applicant	)	*Jason A. Wadden, Michael O'Brien and Nick Morrow* for David Berry, Respondent
	)	
– and –	)	
	)	*David Trafford*, for Sam Mizrahi
MIZRAHI (128 HAZELTON) INC. AND MIZRAHI 128 HAZELTON RETAIL INC.	)	
	)	
	)	
	)	
Respondents	)	
	)	
	)	**HEARD:** February 21, 2025
	)	
	)	
	)	

OSBORNE J.

REASONS FOR DECISION

[1] The Court-appointed Receiver seeks an order authorizing it to disclaim the Agreement of Purchase and Sale (together with related agreements) between Mr. David Berry ("Berry") and

Mizrahi (128 Hazelton) Inc. ("Hazelton") in respect of Unit 901 of the condominium project at 126 Hazelton Ave. and 128 Hazelton Ave., Toronto.

[2] Unit 901 is not finished. The cost to complete is estimated to be approximately $3,215,000. The Receiver does not have the necessary funds to complete the work. The Receiver wishes to list and sell Unit 901 in the market, which it estimates would generate funds for creditors in the estate of between $7.7 million and $9 million.

[3] Berry opposes the proposed disclaimer. It is his position that equity entitles him to specific performance, that he is entitled to have the Agreement of Purchase and Sale completed, that he is entitled to receive title to Unit 901 without any further payment, and that he would rank as an unsecured creditor of Hazelton with respect to any deficiencies.

[4] The Receiver submits that the effect of simply transferring title to Unit 901 to Berry, an unsecured creditor, would be to rewrite the APS to give Berry's claim priority over all secured and unsecured creditors, a course of action to which the Receiver (on behalf of the creditors of the estate) is opposed.

[5] The relief sought by the Receiver is supported by the Applicant in this receivership proceeding, Constantine Enterprises Inc. ("CEI"), which submits that the Receiver has the duty to maximize recovery of Hazelton's assets for creditors. CEI is the senior secured creditor of Hazelton. It rejects the submission of Berry that equity should operate so as to elevate his priority ranking.

[6] Hazelton has more than $50 million in secured debt in addition to millions of dollars in unsecured debt.

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

[8] For the reasons set out below, the motion is granted.

Hazelton, the Project, the Ownership and the Debt

[9] Hazelton is the registered owner of certain remaining real property at 126 and 128 Hazelton Ave. in Toronto, the site of a nine storey, 20-unit luxury condominium development. The Receiver was appointed on June 4, 2024, when the project was not quite complete. Three residential units were unfinished, including Unit 901. Multiple additional units remained unsold.

[10] Hazelton is co-owned equally by Mizrahi Developments Inc. and the Applicant, CEI. Prior to the receivership, Mizrahi Inc. was managing the development and construction of the Hazelton project. Both Mizrahi Developments Inc. and Mizrahi Inc. were at all relevant times controlled by Mr. Sam Mizrahi ("Mizrahi"). Mizrahi was also the President of Hazelton and one of its two directors. The other director was the nominee of CEI, Mr. Robert Hiscox ("Hiscox"). Mizrahi

resigned as President and director of Hazelton on May 13, 2024, approximately three weeks before the Receiver was appointed.

[11] CEI was and remains the major secured creditor of Hazelton. It originally advanced $21 million in 2015 by way of a non-revolving loan facility secured by the real property and other assets of Hazelton. In 2017, CEI subordinated its revolving loan facility to DUCA Financial Services Credit Union which had advanced credit facilities to Hazelton of approximately $33.5 million.

[12] DUCA commenced a receivership application against Hazelton, following which CEI took an assignment of DUCA's debt in February 2024. At that time, Hazelton owed CEI approximately $31 million under the original 2015 loan facility, together with an additional amount of approximately $13 million under the facility assigned to CEI by DUCA. That latter amount has been reduced during the receivership proceeding through the application of funds generated by the sale of condominium units.

The Agreements Relating to Unit 901/802

[13] Berry originally agreed to purchase Units 901 and 802 together as a single unit for a purchase price of $13,250,000. He entered into an Agreement of Purchase and Sale on April 21, 2016 (the "Unit 901/802 APS") and paid a deposit of $2,650,000.

[14] Just over a year later, on May 15, 2017, Berry and Hazelton signed an amendment to the Unit 801/902 APS pursuant to which Berry agreed to transfer shares in Yappn Corp. to Hazelton as an advance against the purchase price. The parties agreed to ascribe a value of $2 million to the shares, subject to changes if the trading value of the shares increased or decreased by a certain threshold as of October 31, 2018.

[15] The Yappn shares were to vest on or before that date, at which time Hazelton would become the owner of record and they would be held in escrow pending closing or termination of the APS. Depending on the value of the Yappn shares as of the vesting date, the purchase price of the APS could be increased (by a maximum of $1,000,000) or decreased (by a maximum of $2,000,000).

[16] A further two years later still, on August 16, 2019, Berry and Hazelton agreed to terminate the original APS and replace it with two separate agreements of purchase and sale, one for Unit 901 and another for Unit 802.

[17] Berry then assigned the 802 APS to the purchaser of the adjacent unit, Unit 801. He remained the purchaser under the Unit 901 APS.

[18] Pursuant to the Unit 901 APS, the purchase price was agreed to be $6,250,000. $1,250,000 from Berry's original deposit of $2,650,000 was credited against the purchase price. The Yappn

share amendment continued to apply to the 901 APS (but not to the 802 APS). The Unit 901 APS included an entire agreement clause (section 33).

[19] The parties entered into a Mutual Release and Termination Agreement on the same date.

[20] The following year, on April 13, 2020, Berry and Hazelton entered into an amending agreement to increase the purchase price of Unit 901 to $7,142,244.

[21] On October 2, 2022, Hazelton sent an invoice to Berry in respect of extras and finishes for Unit 901 in the amount of $707,964.60 plus HST, for a total amount of $800,000 inclusive of HST (the "Invoice"). Berry paid the Invoice in two instalments of $450,000 and $350,000, respectively. As further discussed below, this Invoice is an issue on this motion.

[22] On November 7, 2022, Hazelton and Berry signed a new Statement of Critical Dates and Tarion Addendum, which changed the Outside Occupancy Date for Unit 901 to December 29, 2023.

The Undisclosed Side Agreements

[23] The agreements and amendments referred to above were not, as it turned out, the only agreements relevant to the purchase and sale of Unit 901. Certain other agreements were only recently disclosed. On September 19, 2024, Berry provided to the Receiver additional documents of which neither the Receiver nor CEI (the other 50% shareholder of Hazelton) had been previously aware.

[24] On June 6, 2016, just over six weeks after entering into the original Unit 901/802 APS in April 2016, Berry agreed to loan $10 million to Mizrahi Developments for an unrelated project pursuant to two loan agreements for $6 million and $4 million respectively. The funds were to be used in connection with the construction of a condominium project on Wellington St. in Ottawa. Berry and Mizrahi Developments signed a Term Sheet. Mizrahi personally and Mizrahi Development Group (1451 Wellington) Inc. ("Wellington") also signed as guarantors. That condominium project is now insolvent and is the subject of ongoing *CCAA* proceedings.

[25] The Term Sheet provided at section 19 that if the closing of the Unit 901/802 APS occurred before Mizrahi Developments had repaid the $6 million loan from Berry, then Mizrahi would pay the balance owing under the Unit 901/802 APS to a maximum of the principal and interest outstanding on the $6 million loan.

[26] Three weeks later, on June 28, 2016, Berry, Mizrahi and Hazelton entered into a Supplementary Agreement pursuant to which Mizrahi agreed "as a director and officer of Hazelton" that for such period as any amounts remained owing to Berry under either of the two Ottawa project loans, Hazelton would look to Mizrahi to pay any amounts that were owing by Berry for the closing of the Unit 901/802 APS. Hazelton would complete the sale to Berry even if Mizrahi failed to pay those amounts.

[27] On the signing page of the Supplementary Agreement, a handwritten note states: "As representative of Mizrahi Developments I acknowledge this is the only copy of supplementary agreement". It is the position of the Receiver (not challenged by any party) that the handwriting is that of Mr. Josh Lax, the Vice President, Development of Mizrahi Developments.

[28] On the same day (June 28, 2016), Berry and Mizrahi signed a Confidentiality Agreement in respect of the Supplementary Agreement confirming that it was intended to be confidential and that, among other things, if Berry were found by a court to have disclosed the agreement to a third party, he would forfeit the right to repayment of any amounts still owing under the two Ottawa project loans with the aggregate principal amount of $10 million.

[29] The next day, on June 29, 2016, Mizrahi Developments Inc., Wellington, Berry and Mizrahi entered into another loan agreement, setting out the terms of Berry's $10 million loans in respect of the Ottawa condominium project. However, the borrower was changed from Mizrahi Inc. to Mizrahi Developments Inc. In addition, Mizrahi (personally) agreed to give Berry an additional parking spot at the Hazelton Project, such that Berry would have four parking spots in total.

[30] It is in large part as a result of the undisclosed Supplementary Agreement that Berry submits he is entitled to Unit 901 without further payment.

Current Status of Unit 901 and Amounts Owing by Berry

[31] The Receiver commissioned a third-party estimate of the cost to complete Unit 901 in accordance with the contractual specifications, which is approximately $3,215,000 excluding HST, and certain other expenses. The Receiver does not have the funding to complete the Unit.

[32] The Receiver also commissioned a third-party appraisal of the value of Unit 901, both as is, and as finished per contractual specifications. The "as is" value of Unit 901 is $7,685,000, and the value is $12,165,000 if completed to Berry's specifications.

[33] The final purchase price that Berry agreed to pay for Unit 901 is $7,142,244. If the Unit 901 APS to which Berry is a party were completed, and net of his deposit ($1,250,000) and other amounts credited towards the purchase price (the deemed value of the Yappn Shares at $2 million), he would still owe a balance of $3,892,244 to complete the purchase.

[34] If, as Berry submits, the undisclosed Supplementary Agreement entitles him to close the Unit 901 APS without paying anything further (leaving the obligation to pay any balance owing for the Unit to Mizrahi personally), then Berry would be entitled to receive title to Unit 901 without paying any further consideration.

[35] I pause to observe that in either case, Berry would be receiving full credit for the agreed value of the Yappn shares at $2 million, notwithstanding that they currently have nominal value. In other words, even though the shares are not worth anything today, the Receiver is prepared to

credit Berry for the full $2 million, being the agreed-upon deemed value of the shares at the time of transfer.

[36] As a result of all of the above, the Receiver submits that Berry has not performed all obligations under the Unit 901 APS since he still owes a balance of $3,892,244. Berry disputes that for three principal reasons. He submits that:

a. the APS, as amended by the Supplementary Agreement, and as further amended by an "as is, where is" offer in respect of the Unit that was accepted, entitles him to Unit 901 without any further payment since he is the beneficiary of an institutional constructive trust giving Berry an equitable interest in Unit 901 that predates the receivership and cannot at law be disclaimed by the Receiver;

b. equity favours his position, based in part on representations made to him by CEI that a receivership would result in the completion of Unit 901 and transfer of title to him; and

c. in any event, he is entitled to an additional credit against the balance of the purchase price owing of $800,000 which he paid pursuant to the additional Invoice.

[37] I will address each of these issues within the framework of the applicable test for the disclaimer of pre-sale contracts by a receiver.

The Duty of a Receiver to Maximize Recovery and the Power to Disclaim an Agreement

[38] A Court-appointed Receiver has the duty to maximize the recovery of assets under its jurisdiction. While doing so, it may affirm or disclaim contracts, including pre-sale purchase contracts. The criteria to be considered in determining whether such disclaimer should be authorized are:

a. the respective legal priorities of the competing interests;

b. whether the disclaimer would enhance the value of the assets, and if so, would a failure to disclaim amount to a preference in favour of a particular party; and

c. whether, if a preference would arise, the party seeking to avoid the disclaimer has established that the equities support such a preference.

See: *KingSett Mortgage Corporation et al. v. Vandyk-Uptowns Limited et al.*, 2024 ONSC 6205, at paras. 24 – 26, quoting with approval from *Forjay Management Ltd. v. 0981478 B.C. Ltd*., 2018 BCSC 527, at para. 44, aff'd 2018 BCCA 25; and *2039882 Ontario Ltd. (Re),* 2024 ONSC 5541, at para. 19.

[39] The parties are agreed that this is the applicable test. They disagree on whether it has been met in the circumstances of this case. Berry submits that the first and third factors favour denying the motion. He (at least by inference) concedes that the second factor is met.

The Respective Legal Priorities

[40] The Receiver submits that Berry is an unsecured creditor in the Hazelton receivership. Unquestionably, he has an unsecured claim given the amounts he has paid towards the purchase price of Unit 901. He may also have recourse to deposit insurance in respect of those amounts, or a portion thereof, but there is unlikely to be sufficient assets in the receivership for a distribution to unsecured creditors.

[41] In any event, Hazelton owes in excess of $50 million to secured creditors which do not include Berry. The Receiver submits that Berry has no greater a claim to receivership assets than does any other unsecured creditor, of which there are many. Performance of the Unit 901 APS would require the Receiver to complete construction at an estimated cost of approximately $3,215,000, and it does not have those funds.

[42] As noted, Berry's position is that equity entitles him to receive a transfer of title to Unit 901 without further payment. He submits that this flows from the fact that title to Unit 901 is not receivership property at all since the Receiver has no better rights to the asset than did Hazelton, and that a constructive trust arises in his favour because the APS constituted a specifically enforceable contract for the purchase and sale of land entered into prior to the date of the receivership.

[43] Specific performance of the APS (as amended) according to its terms, however, would not entitle Berry to Unit 901 without further payment as is his demand. Subject to his submission that he is entitled to an additional credit of $800,000, even if he were entitled to specific performance, the Receiver submits that he would still owe the balance of $3,892,244.

[44] Berry's answer to that lies in two agreements on which he relies. The first is the Supplementary Agreement referred to above. The second is a further agreement that Berry submits was entered into and pursuant to which he would take Unit 901 "as is, where is", and have an unsecured creditor claim equal to the cost of any remaining deficiencies.

The Supplementary Agreement

[45] In my view, the Supplementary Agreement is not enforceable. It is said to have been entered into in secret on June 28, 2016. As at that date, the original Unit 901/802 APS was still in force. As noted above, that was not terminated until August 16, 2019, when it was, on Berry's own evidence, replaced and superseded by the Unit 901 APS.

[46] The Unit 901 APS includes an entire agreement clause at article 33 that provides that the "Vendor and Purchaser agree that there is no representation, warranty, collateral agreement or

condition affecting this Agreement or the Property or supported here by other than as expressed herein in writing". It follows from the plain meaning of that term that the Supplementary Agreement, even if otherwise enforceable, was at an end when the Unit 901/802 APS was formally and intentionally terminated by the parties.

[47] If the entire agreement clause is effective, it is fatal to Berry's argument that the Supplementary Agreement continues to apply so as to entitle him to title to Unit 901 but also relieve him from any obligation to pay the balance of the purchase price.

[48] Berry argues that the effect of this entire agreement clause is avoided entirely by operation of section 6.8 of the Supplementary Agreement. That provision in the undisclosed and secret Supplementary Agreement, entitled "Notwithstanding", provides in full, that: "[T]his Agreement shall be interpreted and enforced in accordance with its terms, notwithstanding any "entire agreement" or similar clause which may be contained in any Loan Transaction document".

[49] However, in my view, this provision does not assist Berry either.

[50] "Loan Transaction" is defined in the first recital of the Supplementary Agreement to refer to the Ottawa Loan transaction "whereby David [Berry] has agreed to loan MDI the aggregate amount of $10 million".

[51] Accordingly, even if section 6.8 of the Supplementary Agreement were held to be enforceable and to override and supersede the clear and unequivocal entire agreement clause in the Unit 901 APS (which I pause to observe was entered into by the parties subsequently), it applies only to Loan Transaction documents relating to the Ottawa Loan, and those do not include the Unit 901 APS.

[52] The entire agreement clause in the Unit 901 APS is fatal to Berry's reliance on the Supplementary Agreement which came to an end when the Unit 802/901 APS was terminated by the parties.

[53] Finally with respect to these Ottawa Loan agreements, I observe that Mizrahi (the counterparty) takes no position on this disclaimer motion, but submits that the Ottawa project Loans are not, as Berry submits, outstanding, but have (to the knowledge of Berry) been repaid. In any event, and while Mizrahi recognizes that he and Berry disagree on that fundamental point, that dispute is to be addressed in the context of the pending *CCAA* application in respect of the Ottawa project. Mizrahi references an affidavit from him filed in that proceeding sworn October 22, 2024 particularizing the repayment of the loans.

[54] Given my findings above, I do not need to make, and I do not make, any findings as to whether or not the Ottawa Loans have in fact been repaid.

The "As is, Where is" Agreement

[55] Next, I will address Berry's second submission, concerning the enforceability of the "as is, where is" agreement.

[56] According to his affidavit filed on this motion, Berry's evidence is that on or about January 11, 2024, he had a telephone call with Hiscox in which Hiscox offered (on behalf of CEI) to simply close the Unit 901 APS on an "as is, where is" basis with the estimated cost to complete the Unit to be deducted from the purchase price. Berry relies on a text message of that same date from Mizrahi where Mizrahi purports to confirm the CEI offer.

[57] Berry submits that he accepted this offer through a January 11, 2024 text message to Mizrahi, such that there was an enforceable contract.

[58] In my view, a review of the Record does not support the position of Berry that there was an accepted agreement to take Unit 901 on an "as is, where is" basis. I reach this conclusion for several reasons.

[59] First, the parties never reached agreement on all essential terms. Even on Berry's evidence, the offer was to reduce the purchase price by an amount equal to the cost to complete the Unit. However, the parties never agreed on what that cost and therefore the value of the abatement to the purchase price was to be.

[60] In fact, Berry's evidence is to the opposite effect: his acceptance was conditional on an accurate estimate of the cost to complete. Berry says that he memorialized his acceptance of the offer by sending Mizrahi a text message on January 11, 2024 in which he said (in relevant part): "Sam, subject to an accurate estimation on completion and other incurred costs I accept. Do I need to email Robert [Hiscox] as well? He made the offer over the phone."

[61] That the acceptance was conditional, and subject to terms still to be agreed, is clear from the very language of the text message on which he relies, and which is set out above: "*subject to an accurate estimation on completion and other incurred costs* I accept". [Emphasis added]. That never occurred. No such estimate was prepared, exchanged or agreed upon. No such schedule of other incurred costs (or even what those might include) was exchanged or agreed on.

[62] I accept the position of the Receiver that without a meeting of minds on that essential term, there can be no enforceable agreement, even if Berry had unconditionally accepted the offer. Even today, the terms of the agreement that Berry seeks to enforce are unknown. In such circumstances, and where a significant term of the alleged agreement is deferred, the contract is incomplete, there is no certainty as to terms and therefore there is no enforceable agreement: *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 DLR (4th) 97 (Ont. C.A.), at pp. 104-105.

[63] That alone is sufficient to dispose of this argument.

[64] Second, I accept the position of the Receiver that on the facts of this case, Berry rejected the offer, which was therefore no longer open for acceptance months later.

[65] The chronology of events set out in Berry's affidavit filed on this motion is slightly inconsistent with the chronology that Berry himself set out in an email dated February 7, 2024. There, Berry stated that it was Mizrahi who first made the proposal and that he originally refused the offer, following which Hiscox called him to discuss.

[66] Either way, it is Berry's position that there was an accepted offer for him to take Unit 901 on an "as is, where is" basis with the estimated cost to complete deducted from the purchase price.

[67] It is the position of the Receiver that no agreement was reached since Berry rejected the offer immediately after it was made. Berry himself concedes that it was not immediately accepted. However, he maintains that in a subsequent telephone conversation with Mizrahi on May 30, 2024, Mizrahi told Berry that CEI planned to terminate the Unit 901 APS after the Receiver was appointed. Berry says that he responded to that by accepting the proposal that had been made by Mizrahi (on behalf of CEI) on January 11, 2024.

[68] Berry says that he memorialized this acceptance by sending Mizrahi the text message on January 11, 2024 referred to above.

[69] Berry's evidence is that Mizrahi responded by advising that he (Berry) would have to speak with Hiscox, since by this time Mizrahi no longer had authority to transact for Hazelton. When Berry called Hiscox, Hiscox responded, according to Berry, that Berry could not close the transaction on Unit 901 and would now have to wait for the Receiver to be appointed before taking any further steps relating to closing on the unit.

[70] Accordingly, I find that even if the contract were not enforceable due to a lack of agreement on essential terms, the offer was not accepted by Berry. Again, even accepting Berry's version of events, the response from Hiscox was not to confirm acceptance of the offer and a resulting binding agreement, but rather that Berry would have to wait for a receiver to be appointed (which was then anticipated imminently) and address the issue within this receivership. It follows that there cannot have been (and I find that there was not), an agreement reached prior to the receivership.

[71] When an offer is rejected, it is no longer open for acceptance: *Smith v. Smith*, 2007 CanLII 17205 (ON SC), at para. 2. An offer may be accepted only within a reasonable period of time, determined by reference to surrounding circumstances (i.e., the factual matrix): *Gillevet v. Crawford and Co. Insurance Adjusters Ltd. (Ont. Dist. Ct.)* (1988), 66 O.R. (2d) 665.

[72] The court should examine the surrounding circumstances to better understand the mutual and objective intentions of the parties, as expressed in the text of the contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 57.

[73] By the time Berry submits that he accepted the offer, months later, he knew that CEI was seeking to appoint a receiver over the assets of Hazelton. In fact, Berry's acceptance of the offer was sent 17 days *after* the application to appoint the Receiver, and only four days before the Receivership Order was granted. Circumstances had clearly and materially changed since January 2024.

[74] I pause to observe that Berry appears to rely on these alleged representations of Hiscox made on behalf of CEI as part of his argument that equity ought to entitle him to the relief he seeks. In my view, such reliance does not assist Berry on this motion. First, and as I have concluded above, I find there was no enforceable agreement reached prior to the receivership, even if I accept that the representations were made: Hiscox confirmed that the issue would have to be dealt with in the receivership and that he was powerless to act (i.e., to confirm that an agreement had been reached). Second, the issue of whether or not the alleged representations are actionable is an issue between CEI and Berry beyond the scope of this motion and about which I make no determination.

[75] Finally in this regard, I accept the submission of the Receiver that even if I had found that the "as is, where is" agreement were enforceable, it would be subject to the clear authority of the Receiver to disclaim it. The same factors that apply to the disclaimer of the Unit 901 APS apply to the disclaimer of the "as is, where is" agreement.

Constructive Trust

[76] Next, I address Berry's argument that the agreement cannot be disclaimed because the interest is beneficially owned by Berry and not Hazelton as a result of the imposition of a constructive trust.

[77] Berry submits that the common law or recognizes equitable conversion in that a specifically enforceable contract for the purchase and sale of land gives rise to a constructive trust in favour of the purchaser. See, for example: *Simcoe Vacant Land Condominium Corporation No. 272 v. Blue Shores Developments Ltd.*, 2015 ONCA 378, 126 O.R. (3d) 39, at paras. 46 – 49 ("*Blue Shores*").

[78] Berry further submits that 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: Robert Chambers, "Constructive Trusts in Canada" (1999) 37:1, Alta LR, pp. 186-189; *Buchanan v. Oliver Plumbing & Heating Ltd*., [1959] O.R. 238 (C.A.); and *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.*, 2001 CanLII 28461 (ON SC), at paras. 11-12.

[79] Berry submits that such constructive trusts apply to condominiums (see *Blue Shores*, at para. 49) and that once a unit purchaser enters into an agreement of purchase and sale, he becomes an equitable owner of the unit even though the agreement cannot be closed until the condominium is registered (and registration occurred here in 2023): *York Condominium Corp. No. 167 et al v. Newrey Holdings Ltd., et al* (1981), 32 OR (2d) 458 (C.A.).

[80] In short, Berry submits that he was already the beneficial owner of Unit 901 when the Receivership Order was granted and that: "Berry is a *bona fide* purchaser for value of Unit 901 as he is not required to pay any further amounts … for either of the following reasons: a) Article 5 of the Supplementary Agreement provides Berry does not have to pay any further amounts … (given the amounts owing on the Ottawa Loan); or b) he has paid more than he is required to having regard to payments made in adjustments to the purchase price. As such, he has fully performed his contractual obligations, and … his interest cannot be converted into an unsecured claim as the Receiver argues."

[81] In my view, the fundamental issue here is whether Berry has in fact paid all amounts owing under the Unit 901 APS, as amended. All of the authorities on which he relies stand for the proposition, in relevant part, that a purchaser has a beneficial and equitable interest in title to a property (including a condominium unit) only where that purchaser has fully performed the agreement and, among other things, paid the purchase price in full.

[82] I find that Berry has not done that here for the reasons above, and also below in respect of the Invoice.

Proposed Additional Credit Against Purchase Price: The Invoice

[83] Finally in this regard, I address the Invoice and the proposed credit against the Purchase Price.

[84] As noted above, Berry submits that in any event of all the above, he is entitled to an additional credit against any balance of the purchase price owing as a result of his having paid the $800,000 Invoice referred to above.

[85] There is no dispute that the Invoice was rendered and was paid. The disagreement is about what the Invoice and payment were for. The Receiver's position is that the Invoice related to additional upgrades and finishes not included in the APS, with the result that the Invoice and the fact that it was paid does not change the balance owing for the purchase of Unit 901 (i.e., Berry requested and paid for an additional $800,000 of upgrades that were not previously included in the specifications for unit 901 or the purchase price).

[86] Berry, on the other hand, takes the position that the Invoice was in effect an invoice for a further progress payment on the purchase of Unit 901, that the upgrades and finishes were already included in the APS, and therefore the payment of the Invoice constitutes an advance against the purchase price and must be credited in his favour.

[87] I find that the Invoice was for exactly what it states on its face it was for: "Upgrades and Extras". The Invoice is dated October 2, 2022 in respect of "Suite 901". Under the heading "Description of Change", it states: "Suite to be completed with extras and finishes installed in accordance with revised and final plans (and accompanying information) submitted by Hudson

Kruse on September 21, 2022 … while incorporating and installing materials provided by the purchaser … for a price of $800,000 inclusive of HST."

[88] The Invoice goes on to describe the materials provided by the Purchaser, the fact that the Plans and the Purchaser's Materials are attached to "this amending agreement" and provides that 25% of the total cost ($200,000) is due within five business days, with the remaining amounts to be paid in five equal monthly instalments of $120,000 commencing on November 1, 2022.

[89] In my view, the plain language of the Invoice is entirely consistent with its title "Upgrades and Extras" and not with the interpretation suggested by Berry that it is simply a progress draw invoice by which Hazelton requested, and Berry agreed (apparently for no consideration), to accelerate the payment of a portion of the purchase price previously agreed to. The Invoice does not contain any such language at all.

[90] Moreover, if Berry's interpretation were to be accepted, all of the lengthy particulars referred to in the Invoice about the new materials, the selection thereof, the right of the vendor to substitute different materials of an equivalent quality and value, and all of the other terms, would have been unnecessary.

[91] So too would be the provision that provides that: "the vendor warrants that the work required to complete the purchaser suite as outlined herein (including the purchase of all necessary materials) shall commence immediately upon the execution of this agreement". If all of the enumerated items were already included in the agreement and in the purchase price, there would be no need for a provision confirming that the work would commence immediately.

[92] The interpretation submitted by Berry would require me to "write out" of the Invoice and render meaningless all of that language.

[93] Finally in this regard, if the Invoice was simply a progress draw invoice on the agreement, there is no explanation for why the Invoice would purport to ascribe a value to all of the enumerated items (separately from the balance of the cost of the Unit) of $707,964.60, an amount to which HST was then also separately applied in the amount of $92,035.40.

[94] Such an interpretation would also be inconsistent with the express terms of the Invoice that provide that the rooftop to the suite would be completed in accordance with [specified] construction drawings and "shall be completed at no additional cost to the purchaser". Such a term makes no sense in the context of an interpretation that all of the other work referred to in the Invoice was to be completed at no additional cost to the purchaser.

[95] On its face, the Invoice makes an exception for the completion of the rooftop in that, unlike all of the other items referred to in the Invoice, it shall be completed at no additional cost to the purchaser. No reasonable interpretation of the Invoice can reconcile that language with the submission of Berry that all of the items included in the additional work were to be completed at

no additional cost. The Invoice says just the opposite: the additional work will be completed, at a cost of $800,000 inclusive of HST.

For all of these reasons, I find that payment of the $800,000 Invoice does not operate as an additional credit against the balance of the purchase price owing.

Is Berry Otherwise Entitled to an Equitable Interest?

[96] Berry submits that the present case is more analogous to the facts in *Armadale* than to those in *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.*, 2020 ONSC 5071, 82 CBR (6th) 289, ("*C&K*") on which the Receiver relies. I cannot accept this submission.

[97] In *C&K*, B. Dietrich J. considered a situation where, as here, the Court-appointed Receiver disclaimed a pre-receivership agreement of purchase and sale pursuant to which the purchaser had paid a significant deposit to the vendor which was the party subsequently put into receivership. However, the property was subject to a pre-existing first mortgage granted as security for loans advanced to the vendor. The loan had not been repaid, and the mortgage had not been discharged.

[98] When the receiver was appointed, the vendor could not complete the purchase and sale agreement, and the receiver sought to disclaim it. The purchaser opposed the disclaimer and sought an order compelling the receiver to complete the agreement of purchase and sale and a finding that he had an equitable or proprietary interest in the property equal to the full amount of the deposit paid. The Court declined, and found that the receiver was entitled to disclaim the contract in furtherance of its fiduciary duty to act in the best interest of all stakeholders in the debtor's estate.

[99] In that case, the purchaser relied on *Armadale*, as does Berry here. The court distinguished *Armadale* on the same basis as I do in the present case: there, the Court found that the equitable interest in the property had passed to the purchaser because he had paid the full purchase price and the property had been validly conveyed to him but for the delivery of the deed. As noted by B. Dietrich J., the purchaser in *Armadale* could have enforced the transfer of title by way of specific performance at any time prior to the receivership. The court in *C&K* stated:

> [45] I find that Mr. Tan has not met his burden to prove that the Receiver should prefer Mr. Tan over the secured creditor. The equities do not justify the subordination of the Applicant's legal priority. Such subordination is contrary to the terms of the APS and the Receivership Order.
>
> [46] I accept that Mr. Tan is a victim of the improper use of the $400,000 deposit he paid directly to Elite Homes in the belief that this payment would expedite the construction of the Mateo Property. However, the Applicant in no way participated in Mr. Tan's decision to make the improvident payment and was unaware that such payment had been made until Elite Homes requested a

partial discharge of the mortgage to permit a conveyance of the Mateo Property to Mr. Tan. I find that there is no basis in equity or in law that would permit this court to visit the consequences of Mr. Tan's unfortunate decision on the Applicant secured lender.

[47] This conclusion is consistent with leading jurisprudence. See, for example, *Forjay Management Ltd. v. 0981478 B.C. Ltd*., 2018 BCSC 527. In *Forjay*, Justice Fitzpatrick ordered the receiver to disclaim agreements of purchase and sale and to remarket the subject residential units free of the buyers' interests. Justice Fitzpatrick found that the mortgagee had legal priority over the position of the buyers by virtue of a contractual provision in each buyer's agreement, similar to the provision found in Mr. Tan's APS, negating any interest in land. Justice Fitzpatrick also found that the buyers' interests were grounded in contract and that no equitable interests arose in any of the units.

[48] In *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, the Court of Appeal for Ontario held, at para. 109, that in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency. The Court of Appeal also held that if these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case.

[49] In *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, Justice Morawetz (as he then was) gave effect to a subordination clause in an agreement very similar to clause 41 of Schedule "A" to the APS. In that case, five buyers of condominium units paid the balance of the purchase price owing under their agreements directly to the debtor. The receiver moved for authorization to market and sell the condominium property and terminate the existing agreements. Justice Morawetz held that the mortgagee had legal priority over the interests of the buyers. His Honour then considered the equities and found that they did not justify overriding the first mortgagee's legal priority. His Honour observed that those purchasers whose deposits were not held in trust may have some remedy against the debtors or its advisors. Regarding those purchasers who paid the balance of their purchase price, notwithstanding the subordination clauses of their agreements, and the fact that they would not be receiving title at that time, Justice Morawetz observed that these purchasers ran the risk of losing those

> payments but may have recourse against other parties: paras. 27 and 31-38.
>
> [50] Mr. Tan too ran a risk when he paid $400,000 directly to Elite Homes. It appears that he may have recourse against Tarion Corporation, and he may also have recourse against others as well.
>
> [51] On the evidence, I am satisfied that the Receiver did not breach its fiduciary duty to take into account the interests of the various stakeholders in the Respondents' estate in its decision to disclaim the APS. In assessing whether a disclaimer of an agreement is appropriate, the priority of a secured interest registered under the Land Titles Act, while not determinative, weighs heavily.

[100] I agree with and adopt the same approach and analysis here. For the reasons set out above, Berry has not paid the purchase price in full for Unit 901, and was not remotely in the position of a purchaser to whom the property had been validly conveyed but for the transfer of a deed. It follows that the authorities on which Berry relies do not assist him.

Whether a Disclaimer Would Enhance Asset Value and/or amount to a Preference

[101] As noted above, Berry does not seriously contest the Receiver's position that this second factor in the disclaimer test has been met. Based on the uncontradicted evidence in the form of the appraisal obtained by the Receiver, a disclaimer will enhance the assets of the estate since the sale of Unit 901 on the open market, even on an "as is basis", is estimated to generate proceeds of approximately $7,685,000.

[102] In contrast, Barry seeks an order that title be conveyed to him without making any further payment, with the necessary corollary result that the asset value to the estate and its creditors would be decreased by the same amount - $7,685,000.

[103] Accordingly, the second factor is satisfied.

[104] Moreover, I accept the submission of the Receiver that even if the Unit 901 APS was performed according to its terms (which is not what Berry seeks), asset recovery for creditors would still be reduced and not enhanced. Under that hypothetical scenario, Berry would pay the balance of the amount owing under the Unit 901 APS of $3,892,244 which is still less than the anticipated proceeds to be realized if Unit 901 was marketed for sale to the public.

[105] Accordingly, performance of the Unit 901 APS, or the "as is, where is" offer, would decrease and not enhance asset value for creditors and would amount to a preference in favour of Berry.

Whether the Equities Support a Preference if Such Arises

[106] As to the third factor, in my view, the equities do not support the completion of the Unit 901 APS and the transfer of title to Berry without further payment.

[107] A consideration of the equities is necessarily fact-specific to each case. In my view, such a consideration here overwhelmingly favours the position of the Receiver that it is entitled to disclaim the Unit 901 APS to maximize asset value for creditors.

[108] The secured creditor, CEI, is owed millions of dollars in secured debt from Hazelton. That security, and its first priority ranking, is not challenged (other than, in the indirect sense that Berry says that title to Unit 901 does not form part of the receivership property).

[109] The practical reality is that it is highly unlikely that CEI will recover its principal, let alone any interest and will suffer a shortfall. Unsecured creditors are unlikely to recover anything. It is therefore important for the Receiver to fulfil its duties to maximize the value of all receivership assets and therefore maximize recoveries and minimize shortfalls.

[110] Berry's entire position rests on the Supplementary Agreement, which was intentionally undisclosed to, and kept secret from, both CEI and the Receiver, neither of which was aware of the Supplementary Agreement until it was produced well into the receivership proceeding.

[111] None of Berry's various complaints and allegations can be visited upon the Receiver. Put differently, nothing in the conduct of the Receiver rebalances the equities against it.

[112] The same is true with respect to CEI, the first ranking secured creditor, subject to one additional argument advanced by Berry. His evidence is to the effect that CEI represented to him that a receivership would lead to the completion of unit 901 and the transfer to him, with the result that a disclaimer is inappropriate.

[113] I cannot give effect to this argument for number of reasons.

[114] Even if CEI did make such a representation and Berry were entitled to place reliance on it, the Receivership Order does not obligate the Receiver to complete any units or close any sale agreements. Nor did any party (i.e., Berry) argue at the time the Receivership Order was made that it should. One might have expected Berry to challenge the proposed scope of the receivership at that time, based on the arguments he now advances. Instead, the Supplementary Agreement was kept secret.

[115] The Receivership Order was not appealed and nor did Berry seek to subsequently vary or amend it. It follows that the powers and duties of the Receiver are clear. The Receiver, as a Court officer, is not bound by any representations made prior to the receivership by a secured creditor or any other party. The Receiver is not the agent of CEI.

[116] To the extent that Berry has a claim based on the alleged representations, that is an issue between Berry and CEI on which the Receiver takes no position. I note that CEI also submits that such an allegation is a matter between those two parties, and concedes that Berry is at liberty to pursue such relief in a separate proceeding should he decide to do so.

[117] I pause to observe here that Berry places reliance upon the endorsement of Cavanagh J. setting out the reasons for granting the Receivership Order in which the Court noted that the "appointment of a receiver will allow for the completion of the sale of units already subject to agreements of purchase and sale". Berry argues, if I understand the submission, that in making that observation, Cavanagh J. was expressing a view that the Unit 901 APS should be completed, and title should be transferred to Berry.

[118] In my view, such a conclusion is untenable for two reasons. First, the Receiver was permitted to complete the sale of units already subject to agreements, not required to do so. Second, the conclusion has no merit considered in the context within which the Receivership Order was made - the secret Supplementary Agreement and Confidentiality Agreement had (intentionally) still not been disclosed to the Receiver or CEI.

[119] CEI strongly supports the position of the Receiver. I accept its submission also with respect to the relative equities here. CEI has incurred significant costs and has suffered significant losses in connection with the Hazleton project. The priority scheme in a receivership proceeding applies for good reason, and there is no basis in equity to further prejudice the position of CEI here.

[120] I reject the submission of Berry that CEI purchased the debt of DUCA specifically (and, as Berry argues, improperly) to improve its position as against Berry. The receivership application was already pending, and had been commenced by DUCA when CEI bought out its debt so as to rank in first position. There is nothing improper about that, and it is routinely done in receivership scenarios.

[121] Moreover, it is overwhelmingly likely that the very same disclaimer motion now before the Court would have been brought in the receivership proceeding had DUCA remained as the first ranking secured creditor, so the situation is no different in any event.

[122] In any event, and even prior to purchasing the DUCA debt, CEI was already a secured creditor (and by far the largest secured creditor) with priority over Barry's interest.

[123] Finally, CEI denies making the representations as alleged by Berry. While Berry (secretly) recorded the telephone conversations with the representative of CEI, none of the recordings in the record include such representations. As noted above, Berry can pursue a claim related to the alleged representations if he wishes to do so, but the record on this motion does not reflect equities that favour Berry here.

[124] In balancing the equities, I fully recognize the unfortunate effect of the result on Berry. Without question, he has paid a substantial sum towards the purchase of Unit 901. However, his

position is no different from that of other unsecured creditors who advance money, goods or services to a debtor who subsequently becomes insolvent and is put into receivership. The ordinary hierarchy of creditor interests applies, and there is nothing in the evidence here to justify a departure from that hierarchy.

[125] This is precisely the same result reached by B. Dietrich J. in *C&K*, in which the Court observed that while the outcome was unfortunate for the purchaser, it was consistent with the priority scheme and there was no legal basis to prefer the interests of the purchasers over those of the creditors for whose benefit the Receiver sought to disclaim the agreement.

Result and Disposition

[126] For all of these reasons, the motion of the Receiver is granted, and it is authorized to disclaim any and all sale are related agreements between Hazelton and Berry for Unit 901.