Court of Appeal File No. COA-25-CV-0659
Court File No. CV-24-00715321-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N

CONSTANTINE ENTERPRISES INC.

Applicant

– and –

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

Respondents

FACTUM OF THE APPELLANT DAVID BERRY

July 23, 2025

Tyr LLP
488 Wellington Street West
Suite 300-302
Toronto, ON M5V 1E3
Fax: 416-987-2370

Jason Wadden (LSO#: 46757M)
Email: jwadden@tyrllp.com
Tel: 416.627.9815

Michael O'Brien (LSO#: 64545P)
Email: mobrien@tyrllp.com
Tel: 416.617.0533

Nick Morrow (LSO#: 87335T)
Email: nmorrow@tyrllp.com
Tel: 416.434.9114

Lawyers for the Appellant, David Berry

TO: **NORTON ROSE FULBRIGHT CANADA LLP**
222 Bay Street, Suite 3000,
P.O. Box 53
Toronto, ON M5K 1E7

Jennifer Stam (LSO#: 46735J)
Tel: 416.202.6707
Email:
jennifer.stam@nortonrosefulbright.com

James Renihan (LSO#: 57553U)
Tel: 416.216.1944
Email:
james.renihan@nortonrosefulbright.com

Lawyers for KSV Restructuring Inc., in its capacity as Receiver
(Respondent in the Appeal)

AND TO: **CASSELS BROCK & BLACKWELL LLP**
Suite 3200, Bay Adelaide Centre - North Tower
40 Temperance Street
Toronto, ON M5H 0B4

Alan Merskey (LSO#: 41377I)
Tel: 416.860.2948
Email: amerskey@cassels.com

John M. Picone (LSO#: 58406N)
Tel: 416.640.6041
Email: jpicone@cassels.com

Lawyers for the Applicant, Constantine Enterprises Inc.
(Respondent in the Appeal)

AND TO: **MORSE SHANNON LLP**
133 Richmond St. W., Suite 501
Toronto, Ontario M5C 2V9

David Trafford (LSO#: 68926E)
Tel: 416.369.5440
Email: DTrafford@morsetrafford.com

Lawyers for Sam Mizrahi

AND TO: **KSV RESTRUCTURING INC.**
220 Bay Street
Toronto, ON M5H 1J9

Bobby Kofman
Tel: 416.932.6228
Email: bkofman@ksvadvisory.com

Jordan Wong
Tel: 416.932.6025
Email: jwong@ksvadvisory.com

Tony Trifunovic
Tel: 647.848.1350
Email: ttrifunovic@ksvadvisory.com

Receiver, KSV Restructuring Inc.

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PART I - IDENTITY OF THE APPELLANT, PRIOR COURT AND RESULT

1. David Berry ("**Berry**"), the purchaser of condominium unit 901 at 128 Hazelton Ave., Toronto ("**Unit 901**"), appeals from the Order of the Superior Court of Justice (Commercial List) granted by Justice Osborne (the "**Motion Judge**") authorizing the court-appointed receiver ("**Receiver**") of Mizrahi (128 Hazelton) Inc. ("**Hazelton**") to disclaim the agreement of purchase and sale for Unit 901 (the "**Unit 901 APS**") (the "**Decision Below**").

PART II - OVERVIEW

2. At the time the Receiver was appointed, Berry had an equitable ownership interest in Unit 901 that arose from Berry's right to close and take legal ownership of Unit 901 due to the payments he made and the Supplementary Agreement between him, Hazelton and related parties (the "**Supplementary Agreement**").

3. Hazelton entered into the Supplementary Agreement as part of a $10 million loan ("**Ottawa Loan**") that Berry made for a related development project located at 1451 Wellington Ave., Ottawa, Ontario ("**Ottawa Project**"). The Supplementary Agreement provides that if the Ottawa Loan remains due and owing, Berry is entitled to have Unit 901 conveyed to him without any further payment by him. At the time of the Receiver's appointment, the Ottawa Loan was not repaid, and Berry was entitled to close and take legal title to Unit 901 without any further payment. Accordingly, the Receiver had/has no transferable ownership right in Unit 901 nor any ability to disclaim the Unit 901 APS – the Receiver must simply deliver Unit 901 to Berry.

4. The Motion Judge acknowledged that if the Supplementary Agreement is enforceable, (and entitles Berry to close without further payment), Berry is entitled to receive Unit 901.[1] However,

[1] Reasons for Decision of J Osborne, dated May 6, 2025 ("**Decision Below**"), para 34, ABCO, Tab 2, p 35.

in authorizing the Receiver to disclaim the Unit 901 APS, the Motion Judge erred in finding that the Supplementary Agreement is not enforceable because the Unit 901 APS contains an entire agreement clause ("**Entire Agreement Clause**").

5. The Motion Judge erred in law in making that decision as he failed to consider and apply the governing test for determining whether an entire agreement clause is enforceable in respect of a particular agreement. When the governing test is applied, the only available decision is that the Entire Agreement Clause did not terminate the Supplementary Agreement and that it remains enforceable.

6. The Motion Judge's error that the Entire Agreement Clause rendered the Supplementary Agreement unenforceable led him to wrongly conclude that Berry did not have equitable or beneficial title and was merely an unsecured creditor.

7. While the Motion Judge should not have considered the test for disclaimer given that the Unit 901 APS was not susceptible to disclaimer, the Motion Judge also erred in his application of the disclaimer test. He did so by considering irrelevant factors and facts in his analysis of the third branch of the applicable test for disclaimer, which required the Motion Judge to consider whether the equities supported allowing the Receiver to disclaim the Unit 901 APS. Namely, (a) the Motion Judge incorrectly treated Berry as an unsecured creditor rather than a party with a crystalized ownership interest in Unit 901; (b) the Motion Judge erred in finding that the Supplementary Agreement was a "secret and undisclosed" agreement, and improperly allowed that finding to influence his consideration of the equities; and (c) these proceedings were commenced by the Applicant, Constantine Enterprises Inc. ("**CEI**"), who is 50% co-owner of the project, on the basis that the existing APSs would be honoured and closed and it is CEI who stands to benefit from the

disclaimer of the Unit 901 APS, leaving Berry, a third party to the project, to unfairly suffer the consequences.

PART III - FACTS

A. The Hazelton Project

8. Unit 901 is part of a 20-unit luxury condominium project being developed by Hazelton in the Yorkville area of Toronto (the "**Hazelton Project**"). Hazelton is owned 50-50% by the Applicant, CEI, and Mizrahi Developments Inc. ("**MDI**"), whose principal is Sam Mizrahi ("**Mizrahi**").[2]

9. Mizrahi resigned from the Hazelton Project shortly before the Receiver was appointed. Prior to his resignation, Hazelton had two directors and officers: Mizrahi, as President, and Vice-President Robert Hiscox ("**Hiscox**"), who was also CEI's CEO. In early 2024, when the project was having financial difficulties, CEI became the senior secured creditor when it acquired the secured debt owed to DUCA Financial Services Credit Union ("**DUCA**"). It commenced these proceedings shortly thereafter.[3]

10. Hiscox was CEI's nominee director and officer at Hazelton, with the ability and obligation to oversee both Mizrahi's management of Hazelton and the Hazelton Project.[4] After Mizrahi resigned in May 2024,[5] CEI assumed full control of the company.

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[2] Third Report of the Receiver, paras 2.1 – 2.2, Appeal Book and Compendium ("**ABCO**"), Tab 5, pp 99-100.
[3] First Report of the Receiver, s. 3.0, pp. 4-5, ABCO, Tab 6, pp 112-113.
[4] Attached to the Affidavit of Robert Hiscox, dated February 23, 2024 ("**Hiscox Affidavit**"), 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, ABCO, Tab 13, p 306.
[5] First Report of the Receiver, paras 2.1 (4), ABCO, Tab 6, p 111.

11. Until May 2024, Mizrahi was the chief executive and public face of the Hazelton Project and the other Mizrahi-branded projects. Berry dealt directly with Mizrahi at all material times, and beginning in early 2024, he also dealt began to deal with Hiscox.[6]

B. The Original APS

12. On April 21, 2016, Berry entered into an agreement of purchase and sale ("**APS**") with Hazelton for two units in the Hazelton Project, namely, Suite PH 901 (i.e., Unit 901) and 802 ("**Original APS**") for $13,250,000 ("**Purchase Price**").[7] Berry intended to combine the two units into a single residential unit to become Unit 901. Berry provided an initial deposit of $2,650,000 to Hazelton ("**Initial Deposit**").[8] The Original APS contained a standard form entire agreement clause.[9]

13. Approximately one year later, Berry made a further payment on the Purchase Price by giving Hazelton shares in a publicly traded company valued at $2,000,000.[10]

C. Assignment of Unit 802 and Purchase Price Adjustment

14. In August 2019, Berry decided to transfer Unit 802 to the owner of Unit 801, David Beswick ("**Beswick**") instead of combining it with Unit 901. To effect that change, Beswick and Berry agreed to a price for Unit 802 that accounted for the increase in value to the unit ("**Unit 802**

[6] Affidavit of David Berry, affirmed January 29, 2025 ("**Berry Affidavit**"), para 46, ABCO, Tab 8, pp 188-189.
[7] Original APS dated April 21, 2016, Berry Affidavit, Exhibit A, ABCO, Tab 9, p 216.
[8] Original APS, Berry Affidavit, Exhibit A, ABCO, Tab 9, p 216.
[9] Original APS, section 33, Berry Affidavit, Exhibit A, ABCO, Tab 9, p 226.
[10] First Amended APS, dated May 15, 2017 ("**First Amended APS**"), Berry Affidavit, Exhibit B, ABCO, Tab 10, p 266.

Price"). The price of PH 901 was adjusted accordingly to $7,142,244, being the difference between the Purchase Price and the Unit 802 Price ("**Revised Purchase Price**").[11]

15. To give effect to the arrangement: (a) the Original APS was replaced with the Unit 901 APS to reflect the modified floor plan which did not include Unit 802; (b) the purchase price for Unit 901 was adjusted to the Revised Purchase Price; [12] and (c) and Hazelton entered into a new APS with Beswick for Unit 802.[13]

16. Other than the change to the price and floor plan, the Unit 901 APS was almost exclusively comprised of the same standard form language as the Original APS, including the exact same standard form entire agreement clause as the Original APS, which read:

> The Vendor and the Purchaser agree that there is no representation, warranty, collateral agreement or condition affecting this Agreement or the Property or supported hereby other than as expressed in writing.[14]

17. While the Unit 901 APS was dated August 16, 2019, the Revised Purchase Price was ultimately settled by way of an amendment to the Unit 901 APS dated April 13, 2020 ("**Unit 901 Purchase Price Amendment**").

D. The Ottawa Loan Agreements

18. Shortly after Berry entered into the Original APS (and before the changes leading to the Unit 901 APS), Mizrahi sought financing from Berry for the Ottawa Project. Ultimately, Berry agreed to provide the Ottawa Loan through two financing facilities totalling $10,000,000—one for $4,000,000 ("**Loan Facility #1**") and another for $6,000,000 ("**Loan Facility #2**). There were a

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[11] Berry Affidavit, paras 25-35, ABCO, Tab 8, p. 181-184; Second Amended APS, dated April 13, 2020 ("**Second Amended APS**"), Exhibit H, ABCO, Tab 11, p. 278.
[12] Berry Affidavit, paras 25-35, ABCO, Tab 8, p. 181-184; Second Amended APS, Exhibit H, ABCO, Tab 11, p 278.
[13] Unit 901 APS, Appendix G to Third Report of the Receiver, ABCO, Tab 7, pp 125, 135.
[14] Original APS, section 33, Berry Affidavit, Exhibit A, ABCO, Tab 9, p 226.

number of agreements that were entered into at about the same time that governed the Ottawa Loan:

(a) a Term Sheet dated June 6, 2016 (the "**Term Sheet**")[15] and a Loan Agreement dated June 29, 2016 (together, the "**Loan Agreement**"), among MDI, Berry, Mizrahi Development Group (1451 Wellington) Inc. ("**Wellington**") and Mizrahi;[16] and

(b) the Supplementary Agreement (dated June 28, 2016) between Berry, Mizrahi and Hazelton.[17]

19. Each of the Term Sheet, Loan Agreement and the Supplementary Agreement are incorporated by reference in the Loan Agreement as a "**Loan Document**" as defined in the Loan Agreement, which together, make up the broader Ottawa Loan.[18]

20. Pursuant to these agreements, the Ottawa Loan was directly and expressly tied to Berry's interest in Unit 901.

21. First, the Loan Agreement provided Berry with an additional parking space at 128 Hazelton.[19]

22. Second, the Ottawa Loan provided that if the Unit 901 APS closed before MDI had repaid the Ottawa Loan, Berry would not have to pay anything further on account of Until 901 and Mizrahi would pay the balance owing under the Unit 901 APS to a maximum of what was outstanding on Loan Facility #2 (the "**Mizrahi Bridge Payment**").[20]

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[15] Term Sheet, Berry Affidavit, Exhibit JJ, ABCO, Tab 16, p 460.
[16] Loan Agreement, Berry Affidavit, Exhibit II, ABCO, Tab 15, p 365.
[17] Supplementary Agreement, Berry Affidavit, Exhibit LL, ABCO, Tab 18, p 473. See for example, Supplementary Agreement, Recitals, and Article 1, Berry Affidavit, Exhibit LL, ABCO, Tab 18, p 473-474.
[18] Loan Agreement, page 3, Berry Affidavit, Exhibit II, ABCO, Tab 15, p 367.
[19] Loan Agreement, page 30, Article 15.1, Berry Affidavit, Exhibit II, ABCO, Tab 15, p 394.
[20] Loan Agreement, page 9, Article 3.6, Berry Affidavit, Exhibit II, ABCO, Tab 15, p 373.

23. Third, and important for this appeal, 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 close on Unit 901 without any further payment.[21] This 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 #1 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 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." [emphasis added]

24. The Supplementary Agreement has specific conditions for termination, amendment or modification: (a) Article 6.1 stipulates that the Supplementary Agreement can only be modified, altered, or varied upon execution of a written document bearing the signature of all three of Mizrahi, Berry, and Hazelton; (b) Article 6.7 provides that the Supplementary Agreement can only terminate upon repayment to Mr. Berry of all amounts due and owing pursuant to the Ottawa Loan and will remain in full force and effect until such time; and (c) Article 6.8 provides that the Supplementary Agreement remains in effect, despite any entire agreement clause in another Loan Document.[22]

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[21] Supplementary Agreement, Article 5, Berry Affidavit, Exhibit LL, ABCO, Tab 18, p 475. 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, ABCO, Tab 8, p 200-202.

[22] Supplementary Agreement, Articles 6.7 and 6.8, Berry Affidavit, Exhibit LL, ABCO, Tab 18, p 477.

25. As a result of the Ottawa Loan, while the Original APS, and later the Unit 901 APS, dealt with what Berry was purchasing in respect of Unit 901, it was the Supplementary Agreement that governed how the purchase price if the conditions prescribed by the Supplementary Agreement were met.

26. On or around October 12, 2021, MDI, Wellington, Mizrahi and Berry entered into an Amending Agreement to the Loan Agreement (the "**Amending Agreement**"), to address the fact that the Ottawa Loan was still outstanding. Under that agreement, the parties set out how the Ottawa Loan would be repaid, including a formula to calculate how the price Berry would pay for two units at the Wellington Project (the "**Wellington Units**") would be off-set against the outstanding loan balance upon the closing of those units, a suspension of accrual of interest, and recommencement of the accrual of interest on all outstanding amounts (including the principal applied to the Wellington Units) if the Wellington Units did not close within 18 months of the execution of the APSs for the Wellington Units (the "**Wellington Deadline**")[23]

27. The Wellington Units did not close by the Wellington Deadline, had not closed as of the appointment of the Receiver, and the Wellington Project remains unregistered and since October 2024 has been the subject of *CCAA* proceedings.[24] Accordingly, interest has continued to accrue since the Wellington Deadline, and more than approximately $9,813,728.92 remains owing on the Ottawa Loan.[25]

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[23] Amending Agreement, October 12, 2021 ("**Oct Amending Agreement**"), Article 2(c), Berry Affidavit, Exhibit NN, ABCO, Tab 19, p 482.
[24] Berry Affidavit, at paras 101, 108-109, ABCO, Tab 8, p 192-195.
[25] See paras 100-102 and 108-109 of the Berry Affidavit, ABCO, Tab 8, pp 205-208; Oct Amending Agreement, section 2(c)(iii), Berry Affidavit, Exhibit NN, ABCO, Tab 19, p 483-484; and the Loan Calculation at Exhibit RR, ABCO, Tab 22, p 575.

E. The Parties Continued to Abide by the Loan Provisions Relating to Unit 901

28. After entering into the Unit 901 APS, the parties continued to abide by all terms of the Ottawa Loan that involved Unit 901. They did not treat those provisions as having been terminated or eliminated because of the Entire Agreement Clause in the Unit 901 APS.

29. First, on April 16, 2020, seven months after the Unit 901 APS, and three days after executing the Unit 901 Purchase Price Amendment, Hazelton, MDI, Mizrahi, and Wellington wrote to Berry by letter, confirming that pursuant to the Loan Agreement, Berry was to receive an additional parking spot for Unit 901.[26]

> "…upon your final closing of Suite 901 at 128 Hazelton Avenue […] as contemplated on Page 30 of the Loan Agreement between yourself and Mizrahi Developments Inc. in relation to 1451 Wellington in Ottawa.
>
> For further clarity, your APS for Suite 901 at 128 Hazelton Avenue currently has 3 parking spaces. In accordance with out separate agreement relating to 1451 Wellington in Ottawa, we agreed that you would receive one (1) additional parking space at 128 Hazelton."[27] [emphasis added] ("**Parking Spot Letter**")

30. Second, on or about October 12, 2021, Berry and Mizrahi amended the Loan Agreement by the Amending Agreement. The Amending Agreement further provided that "the terms of the Loan Agreement are in all other respects ratified and confirmed and remain in full force and effect unamended".[28] As noted above, the Loan Agreement incorporates by reference the Supplementary Agreement as a Loan Document.

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[26] Letter from Mr. Mizrahi Re Parking dated April 16, 2020 ("**Parking Spot Letter**"), Berry Affidavit, Exhibit KK, ABCO, Tab 17, p 470.
[27] Loan Agreement, section 15.1, Berry Affidavit, Exhibit II, ABCO, Tab 15, p 394; Parking Spot Letter, Berry Affidavit, Exhibit KK, ABCO, Tab 17, p 470.
[28] Oct Amending Agreement, Article 3, Berry Affidavit, Exhibit NN, ABCO, Tab 19, p 482.

31. Third, Mizrahi has filed two affidavits in Wellington's CCAA proceedings in which he discusses the Supplementary Agreement as being in force and effect: one dated October 15, 2024 (the "**Mizrahi Affidavit #1**") and one dated October 24, 2024 (the "**Mizrahi Affidavit #2**").

32. In those affidavits, Mizrahi speaks to the Supplementary Agreement as attaching to the "Berry Unit" defined as PH Suite 901, and the "Berry APS" corresponding to the Berry Unit.[29] In particular, in Mizrahi Affidavit #2, Mizrahi speaks to how (1) "[t]he Berry APS for the Berry Unit has not closed"; and (2) that "the Supplementary Agreement provided that the Mizrahi Bridge Payment would be made if, at the time of closing of the Berry Unit, amounts were owing under the Berry Loan".[30]

F. The Receivership and Motion Below

33. On June 4, 2024, the Receiver was appointed over Hazelton and the Hazelton Project.

34. On February 21, 2025, the Receiver's motion to disclaim the Unit 901 APS (the "**Motion**") was heard. CEI supported the Receiver's Motion.

35. Berry opposed the Motion on the basis that, among other things, he had acquired beneficial and equitable title to Unit 901 pursuant to the institutional constructive trust that arose automatically as a matter of law as a result of the Supplementary Agreement.

36. The Motion Judge held that Berry did not have an institutional constructive trust over Unit 901 because the Supplementary Agreement had come to an end as a result of the termination of the Original APS and the Entire Agreement Clause in the Unit 901 APS (and therefore he had not fully performed the agreement nor paid the purchase price in full), and that Berry was merely an unsecured creditor. As a result, the Motion Judge granted the Receiver's Motion in its entirety and

[29] Mizrahi Affidavit #1, at para 55, ABCO, Tab 24, p 600.
[30] Mizrahi Affidavit #2, at para 17, ABCO, Tab 23, pp 581-582.

ordered that any and all sales or related agreements between Berry and Hazelton in respect of Unit 901 be disclaimed.

PART IV - ISSUES, LAW AND ARGUMENT

37. The issues on this Appeal are:

(a) **Error 1**: The Motion Judge erred in law and in principle by failing to apply the correct legal test to interpret the Entire Agreement Clause and failing to consider relevant factors with respect to that test, and as a result erred in concluding the Supplementary Agreement was not enforceable with respect to the Unit 901 APS;

(b) **Error 2**: The Motion Judge in mixed law and fact by failing to consider various relevant factors, and considering incorrect facts, when considering whether the equities favoured the disclaimer.

A. Standard of Review

38. The standard of review on questions of law is correctness. Further, the correctness standard applies to questions of contractual interpretation that involve issues that raise extricable questions of law, such as "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor".[31] When a lower court fails to correctly apply a legal test or legal framework to a question of contractual interpretation, the appellate court may substitute the lower courts reasoning with its own by correctly applying the appropriate test or framework.[32] Other questions of mixed fact and law and questions of fact are reviewed on the

[31] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, para 21 *[Ledcor]*.
[32] *James Bay Resources Limited v. Mak Mera Nigeria Limited*, 2025 ONCA 448 *[James Bay]*; *Housen v. Nikolaisen*, 2002 SCC 33, para 8 *[Housen]*.

palpable and overriding standard basis.[33]Accordingly, on this appeal, the applicable standards of review are:

(a) Error 1: correctness with respect to the Motion Judge's failure to consider and apply the governing legal tests to the analysis of the impact of the Entire Agreement Clause on the Supplementary Agreement; and

(b) Error 2: correctness with respect to the Motion Judge's incorrect consideration of irrelevant factors when considering the equities of the disclaimer test, and palpable and overriding error with respect to the factual findings in that analysis.

B. Error 1 – The Motion Judge Erred in Interpreting the Entire Agreement Clause and its Effect on the Supplementary Agreement

i. The Correct Approach to Interpreting an Entire Agreement Clause

39. This Court has held that an entire agreement clause is construed narrowly in the same manner as an exclusionary clause.[34] Since the Supreme Court of Canada decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* ("***Tercon***"), courts have consistently held that the *Tercon* framework applies to construing entire agreement clauses.[35] The Motion Judge did not consider or apply this governing framework, and thus erred in law in his analysis.

40. In *Tercon*, Justice Binnie described the contemporary analytical approach to exculpatory provisions, explaining the law "requires a series of enquiries" to be address when a party seeks to escape the effect of an exclusion clause, including, (a) whether the clause applies to the

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[33] *Ledcor,* para 21; *James Bay*; *Housen*, para 8; and *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, paras 46 - 50 *[Sattva]*.
[34] *Shelanu Inc. v. Print Three Franchising Corp.*, 2003 ONCA 52151 *[Shelanu]*, paras 30-36.
[35] *Highclass v Ansari*, 2023 ONSC 4138, para 75 *[Highclass]*; *7326246 Canada Inc. v. Ajilon Consulting*, 2014 ONSC 28, paras 55-61; *Kielb v. National Money Mart Co.*, 2015 ONSC 3790, paras 23-24.

circumstances, with regard to the intention of the parties; (b) if the intention of the parties was for the clause to apply, whether the clause is unconscionable; and (c) whether there are otherwise public policy grounds to override the clause.[36]

41. Thus, the binding contemporary approach to the enforcement of an entire agreement clause involves the same three-stage analysis that Justice Binne held to apply to exclusion clauses.[37]

ii. The Motion Judge Erred in Applying the Incorrect Legal Test

42. The Motion Judge erred in law and principle by failing to apply the correct legal test for determining the enforceability of the Entire Agreement Clause.

43. Failing to apply the correct legal standard or failing to consider a required element of a legal test is an error of law[38] for which point the appellate court does not owe deference to the motion judge.[39]

44. The Motion Judge did not consider the *Tercon* test or Berry's arguments thereto. Rather than considering and applying the correct legal framework, the Motion Judge only addressed one argument advanced by Berry regarding the applicability of the Entire Agreement Clause on the Supplementary Agreement:

> [48] Berry argues that the effect of this entire agreement clause is avoided entirely by operation of section 6.8 of the Supplementary Agreement…

45. Nowhere in the Decision Below does the Motion Judge state or apply the relevant *Tercon* test, nor does the Motion Judge implicitly or explicitly address: (a) the intentions of the contracting

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[36] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, paras 121-123 [*Tercon*].
[37] *Highclass,* para 75; *Tercon,* paras 121-123.
[38] *Housen*, para 36; *Sattva,* paras 53-55; *Ledcor,* para 21.
[39] *Ledcor,* para 21; *North v. Metaswitch Networks Corporation*, 2017 ONCA 790, para 17 *[North]*; *Mynerich v. Hampton Inns Inc.*, 2009 ONCA 281, para 3 *[Mynerich]*.

parties (Berry, Mizrahi, Hazelton, and MDI) and other relevant principles of contractual interpretation related to whether the Entire Agreement Clause applied to the Supplementary Agreement; (b) whether the clause is unconscionable; or (c) whether there are overriding public policy grounds that otherwise invalidate the entire agreement clause.

46. The Motion Judge therefore committed a reversable error of law or an error of law that affords no deference to the Motion Judge's interpretation of this point.[40] As a result, the Decision Below must be set aside, and the interpretation of the entire agreement clause with respect to the Supplementary Agreement be considered afresh based on the evidentiary record.[41]

iii. The Entire Agreement Clause Does Not Apply to the Supplementary Agreement

47. Had the Motion Judge properly considered the first branch of the *Tercon* framework, he would have concluded that the Entire Agreement Clause does not apply to the Supplementary Agreement and the Supplementary Agreement is still in full force and effect.

48. In determining the intention of the parties, this Court and other courts have confirmed that the parties' post-contractual conduct can be examined to shed light on what they intended their written agreement to mean and to explain the true meaning and intent of an agreement.[42]

49. The parties' intention that the Supplementary Agreement continued to apply to the Unit 901 APS is supported by: (i) the parties continuing to act on the terms of the Ottawa Loan Agreements impacting Unit 901; (ii) the factual matrix surrounding the formation of the Unit 901 APS and the fact that it was a standard form contract used as a mechanism to facilitate Berry's

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[40] *1284225 Ontario Limited v. Don Valley Business Park Corporation,* 2024 ONCA 247, paras 4-5 *[Don Valley]*; *North,* para 17; *Mynerich,* para 3.
[41] See, for example: *Don Valley*, paras 5 – 8.
[42] *Soboczynski v. Beauchamp*, 2015 ONCA 282 *[Soboczynski]*, paras 60-64; *Whiteside v. Celestica International Inc.*, 2014 ONCA 420, para 58; *Gregor Homes Ltd. v. Woodyer*, 2022 ONSC 4089, para 26; *Sattva,* paras 46 - 50.

change in floorplan and assignment of Unit 802; (iii) the terms of the Supplementary Agreement; and (iv) Berry and Mizrahi's evidence confirming the parties' intentions on the issue.

a. By Their Subsequent Conduct the Parties Demonstrated Their Intention to be Bound by the Supplementary Agreement

50. Parties' intentions regarding the applicability of an entire agreement clause can be determined by a number of factors, including the subsequent conduct of parties, which may show that the parties intended for obligations under another agreement to remain enforceable, that they did not intend for the clause to apply to a particular contract, or that the clause no long represents the intention of the parties.[43] In particular, post-contractual conduct that demonstrates that parties intended to be bound by an agreement made prior (or subsequently) to the agreement will demonstrate the parties' intention not to be bound by the entire agreement clause with respect to that agreement.[44]

51. Here, after the Unit 901 APS was executed, the parties continued to act upon the terms of the Ottawa Loan that related to Unit 901. By their express actions, they demonstrated no intention to extinguish Berry's rights under the Supplementary Agreement when they replaced the Original APS with the Unit 901 APS in order to deal with Berry's transfer of Unit 802 to Beswick. For example:

(a) Hazelton, Mizrahi and others wrote the April 16, 2020 Parking Spot Letter[45] to Berry confirming that he was receiving the additional Parking Spot at the Hazelton

[43] *Shelanu*, para 54; *Soboczynski,* para 60; *Kathryn Farms Ltd v 1572548 Alberta Ltd,* 2021 ABQB 245, para 50; *Turner v. Visscher Holdings Inc*., 1996 BCCA 1436, paras 11-16.
[44] *Shelanu*, para 54; *Soboczynski*, para 60; see also *Highclass,* para 78, and *Colautti Construction Ltd. v. City of Ottawa*, 1984 ONCA 1969 [*Colautti*].
[45] Parking Spot Letter, Berry Affidavit, Exhibit KK, ABCO, Tab 17, p 470.

Project pursuant to the 2016 Loan Agreement that predated the Unit 901 APS.[46] This was a right specifically affecting Unit 901 that would have fallen away had the Entire Agreement Clause applied to the Ottawa Loan Agreements. However, Hazelton confirmed that, pursuant to the earlier Loan Agreement it would provide Berry with the additional parking spot by way of the April 16, 2020 Parking Spot Letter.

(b) Further, the October 2021 Amending Agreement amended the Loan Agreement's Mizrahi Bridge Payment provision related to the Hazelton Project, without amending the Supplementary Agreement.[47] Rather, the Amending Agreement confirmed the Loan Agreement was otherwise ratified and remained in full force and effect "unamended".[48]

52. The jurisprudence is consistent with this conclusion. For example, in *Highclass*,[49] the parties to a real estate contract with an entire agreement clause had come to a previous oral agreement which provided for a one-year interest free period. Evidence that the parties (a) took advantage of and acted on the prior agreement; and (b) did not object to acting on the prior agreement, led the Court to conclude that the intentions of the parties were indeed not to exclude the prior agreement with the entire agreement clause in the later contract. This Court reached a similar conclusion in *Soboczynski v. Beauchamp*,[50] namely, that subsequent conduct demonstrated that the parties took a collateral contract seriously such that it was clearly not intended to be

[46] Loan Agreement section 15.1, Berry Affidavit, Exhibit II, ABCO, Tab 15, p 394.
[47] Amending Agreement, Berry Affidavit, Exhibit NN, ABCO, Tab 19, p 482.
[48] Amending Agreement, section 3, Berry Affidavit, Exhibit NN, ABCO, Tab 19, p 482.
[49] Factum of David Berry, dated February 18, 2025 ("**Berry Factum**"), para 65, ABCO, Tab 25, p 640.
[50] *Soboczynski*, paras 60-64.

excluded by an entire agreement clause. While *Soboczynski* addressed the limitations of the *prospective* operation of an entire agreement clause, "the subsequent actions of parties may be admissible to explain the true meaning and intent of the agreement."[51]

53. Alternatively, the subsequent conduct of the parties in this case amounted to an amendment of the Entire Agreement Clause such that, if it ever applied, it no longer applies to the Ottawa Loan and cannot be enforced to preclude the operation of the Supplementary Agreement.[52]

b. The Factual Matrix Giving Rise to the Unit 901 APS

54. Had the Motion Judge considered the factual matrix leading to the Unit 901 APS, as required, it would have been clear that the parties did not intend for it to apply to the Supplementary Agreement.

55. The evidence below demonstrates that the termination of the Original APS and execution of the Unit 901 APS was a mechanical formality necessitated by the assignment of Unit 802 to a third party, and nothing more. The change of floor plan and square footage required a fresh contract but did not alter any existing obligations relating to the Ottawa Loan.

56. The Entire Agreement Clause in the Unit 901 APS is a standard form clause, identically written in the Original APS, and each of the Wellington APSs.[53] The clause is buried in fine print at Article 33 the Unit 901 APS. There is no evidence to suggest that either party considered the effect of the entire agreement clause, or that Berry was drawn to this clause or its serious effect of rendering a guarantee he had against a significant $10 million dollar loan unenforceable. When

[51] *Soboczynski*, para 60, quoting G.H.L. Fridman in *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at pp. 450-51.
[52] *Shelanu*, para 54, citing *Colautti*.
[53] See: Original APS, section 33, Berry Affidavit, Exhibit A, ABCO, Tab 9, p. 226.

an entire agreement clause of a standard form contract has not properly been drawn to the attention of the signatory it weakens the case that the clause represents the intention of the parties.[54]

57. The termination of the Original APS and execution of the Unit 901 APS occurred in the context of the assignment of the 802 Unit such that the scope of the Entire Agreement Clause may appropriately apply to the negotiations related to the assignment of the unit and price negotiations without extending to loan documents with multiple other parties (some different) regarding a $10 million loan for a different project.[55]

58. The parties' understood that the Supplementary Agreement applied to Unit 901. The only available inference is that the parties did not consider nor intend the standard form Entire Agreement Clause to exclude the Unit 901 APS.

c. The Motion Judge Ignored Express Terms of the Supplementary Agreement

59. In considering the Supplementary Agreement, the Motion Judge only addressed Berry's argument regarding section 6.8 of the Supplementary Agreement, and failed to consider other relevant provisions brought to the Court's attention.[56]

60. The Motion Judge misconstrued Berry's argument as being solely based on section 6.8. When terms of a contract are interpreted, the term must be considered in the context of the entire

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[54] *Graham v Sable Developments Inc.,* 2019 BCSC 1157*,* paras 41-44; *Campbell River Common Shopping Centre v. Nuszdorfer*, 2013 BCSC 141, para 34; *Shelanu,* para 58; *Parkland Industries Ltd. v. Smart Gas and Auto Detailing Ltd*., 2013 BCSC 1046, paras 50-51; *Dolatabadi v. Top/Star Executives Realty*, 2024 ONSC 2742, para 36.

[55] See for example, *Turner,* paras 7-16, where the Court found that an entire agreement clause was not intended to apply to "govern all contractual relations between the parties", particularly where agreements had different parties.

[56] Decision Below, para 48, ABCO, Tab 2, p 38; Berry Factum, Footnote 22, ABCO, Tab 25, p 628.

contract and not read in isolation of other terms.[57] Read together, Sections 6.8, 6.1 and 6.7 demonstrate the intention that future agreements, such as the Unit 901 APS, would not or could not invalidate the Supplementary Agreement, unless they met specific requirements. Sections 6.1 and 6.7 read:

> Section 6.1:[58] This Agreement may be amended, modified, or supplemented only by a written agreement signed by each party hereto; and
>
> Section 6.7:[59] This Agreement shall automatically terminate upon repayment to David of all amounts due and owing pursuant to Loan Facility #1 and Loan Facility $2 but shall remain in full force and effect until such time.

61. Pursuant to Section 6.7, the term of the Supplementary Agreement could not be terminated by the replacement of the Original APS with the Unit 901 APS.

62. In addition, while there could have been, there is no written agreement that validly amended, modified, or supplemented the Supplementary Agreement pursuant to Section 6.1 since all of the parties to the Supplementary Agreement did not sign the Unit 901 APS as was required to amend or terminate the Supplementary Agreement.[60]

63. Thus, the parties could not have intended that the Unit 901 APS (whose parties are different) was ever meant to alter or terminate the Supplementary Agreement.[61]

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[57] *Sattva,* para 57.
[58] Supplementary Agreement, Article 6.1, Berry Affidavit, Exhibit LL, ABCO, Tab 18, p 475.
[59] Supplementary Agreement, Article 6.7, Berry Affidavit, Exhibit LL, ABCO, Tab 18, p 477.
[60] The Supplementary Agreement also required Sam, in his personal capacity to sign such an instrument to vary the Supplementary Agreement. Supplementary Agreement, Article 6.1, Berry Affidavit, Exhibit LL, ABCO, Tab 18, p 475.
[61] See for example, *Turner,* paras 9-16.

d. The Motion Judge Ignored Other Evidence Demonstrating That Parties Intended the Supplementary Agreement to Persist

64. The affidavit evidence before the Motion Judge did not support his conclusion that "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".[62]

65. Berry and Mizrahi (Hazelton's binding authority at the relevant time) led the only evidence with respect to the Supplementary Agreement at the Motion.

66. Berry, as one party to both the Supplementary Agreement and the Unit 901 APS, provided uncontested evidence in his affidavit that he understood the Supplementary Agreement as remaining in full force and effect, only to terminate upon the repayment of the Loan.[63]

67. Mizrahi, a party to the Supplementary Agreement and signatory on behalf of Hazelton to the Supplementary Agreement and the Unit 901 APS, did not contest Berry's evidence on this point. Rather, Mizrahi's evidence, which was appended to his Aide Memoire, indicates that his own (and by extension Hazelton's) understanding and intention was that the Supplementary Agreement remained in effect with respect of the "Berry Unit" (being Unit 901) until such time the Loan was repaid.[64]

68. The Receiver and CEI conceded they had no knowledge of the Supplementary Agreement, and the Motion Judge made a finding to this effect.[65] The uncontested evidence from the parties regarding their own intentions must be favoured over *ex post facto* arguments by the Receiver, a complete stranger to the situation.

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[62] Decision Below, para 52, ABCO, Tab 2, p 38.
[63] Berry Affidavit, paras 89 - 91, 96, ABCO, Tab 8, pp 201, 203.
[64] Mizrahi Affidavit #1, para 55, ABCO, Tab 24, p 600; Mizrahi Affidavit #2, para 17, ABCO, Tab 23, pp 581-582.
[65] Decision Below, para 23, ABCO, Tab 2, p 34.

iv. Public Policy Reasons Not to Enforce the Entire Agreement Clause

69. Under *Tercon*, the Motion Judge was to consider whether any policy considerations render the entire agreement clause unenforceable in the circumstances. He did not do so. Had he, he would have concluded that there were public policy reasons to not enforce the Entire Agreement Clause in the manner urged by the Receiver.

70. Berry was induced into making the $10 million dollar loan on the assurance of the Supplementary Agreement, which provided that his Hazelton unit would act as guarantee for the Ottawa Loan. The Supplementary Agreement was an integral component of the Loan, evidenced by it: (1) predating the actual Loan Agreement; (2) surviving any entire agreement clause in any Loan Agreement; (3) being agreed to by Mizrahi personally; and (4) requiring that, should the Loan be owing at the time of Unit 901's closing, Unit 901 would close without Berry advancing further funds while Hazelton could seek recourse against Mizrahi personally.

71. If the Entire Agreement Clause is enforceable, Berry will lose the guarantee which induced the entirety of the Ottawa Loan, while the Mizrahi parties will retain all benefits, having received the funds, and be able to shield under the Entire Agreement Clause to escape any liability from the Supplementary Agreement, rendering that agreement meaningless.

72. As argued and ignored below[66], Courts have found that in such circumstances, where a party is able to shelter under an entire agreement clause to avoid its previous contractual obligations and realize a windfall, that policy considerations militate against enforcing an entire agreement clause.[67] Yet, this is exactly what CEI *vis* Hazelton and the Receiver will do by (a) avoiding any obligations under the Supplementary Agreement, and (b) disclaiming the Unit 901

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[66] Berry Factum, para 59, ABCO, Tab 25, p 638.
[67] See: *Highclass,* paras 77-80 for example: see also: *Galt Machine and Plating Inc. v. MLS Group Ltd*., 2021 ONSC 8156, paras 31.

APS to realize its increase of value. It would be a commercially absurd and unfair result for Berry, who is left without any enforceable guarantee under the Supplementary Agreement despite providing the Ottawa Loan in full.

73. Further, CEI (*vis-à-vis* Hazelton and the Receiver) is not without recourse, which lies against Mizrahi personally for the remaining balance on Unit 901, pursuant to the Supplementary Agreement.

74. Additionally, given the parties' conduct over years acting on the Loan, it would now be inequitable to permit the Receiver (a stranger to the APS) to rely on the Entire Agreement Clause to defeat Berry's entitlement under the Supplementary Agreement.[68]

v. The Resulting Palpable and Overriding Errors of Facts

75. The Motion Judge's erroneous holding that the Supplementary Agreement no longer applied due to the Entire Agreement Clause infected the rest of his decision, leading him to make a number of palpable and overriding errors in finding that Berry: (a) has amounts owing on Unit 901; (b) is not the beneficiary of a institutional constructive trust/equitable interest; and (c) is not in a position to close on the APS.

a. Berry has no amounts owing on Unit 901

76. If the Loan remains due and owing, Berry is entitled to close on Unit 901 without further payment.[69]

77. The Motion Judge did not to consider whether the Ottawa Loan had been repaid, save for mentioning that Mizrahi and Berry had a dispute over this issue.[70]

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[68] *Turner,* para 13.
[69] Supplementary Agreement, Article 5, Berry Affidavit, Exhibit LL, ABCO, Tab 18, p 475.
[70] Decision Below, para 54, ABCO, Tab 2, p 38.

78. As the Motion Judge made no finding of fact with respect of the repayment of the Ottawa Loan, the appellate Court has a fact-finding power on appeal to draw an inference of fact from the evidence which will not be inconsistent with the Motion Judge.[71] Making this finding will result in the most appropriate result as it is the most proportionate, expeditious and least expensive means to achieve a just result, and can be done exclusively by looking at the evidentiary record.[72]

79. Here, Berry's evidence was that the Ottawa Loan has not been repaid in full.[73] Conversely, Mizrahi argued below in his Aide Memoire that the Loan has been repaid, namely relying on the Amending Agreement. He states in *Mizrahi Affidavit #2* that the balance of the Loan had been repaid by: *inter alia*, "(2) units in the Project", referring to two units in the Wellington Project.

80. However, the loan cannot have been paid off in this manner, due to the express wording of the Amending Agreement relied upon by Mizrahi:[74]

> …if registration of the Project and closing of the purchase of the Units has not occurred within eighteen (18) months of the date of execution of the APS's, all interest and/or principal amounts under Loan Facility No. 1 and Loan Facility No. 2 applied towards the purchase price of the Units shall recommence to accrue interest at rates as set out in the Loan Agreement on the day following eighteen (18) month anniversary of the date of execution of the APS's and until such point as registration of the Project and closing of the purchase of the Units occurs.

81. Since the closing of the purchase of the Units did not occur by April 2023,[75] all amounts under the loan facilities applied to the Units recommenced and are accruing interest, the Wellington Project has not been registered, and the Wellington Units have not closed.[76]

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[71] *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, paras 128-133 *[Carmichael]*.
[72] *Carmichael,* para 133.
[73] A discussion of this point is set out at paras 108-109 of the Berry Affidavit, ABCO, Tab 8, pp 206-208; and in the Loan Calculation at Exhibit RR, ABCO, Tab 22, p 575.
[74] Oct Amending Agreement, section 2(c)(iii), Berry Affidavit, Exhibit NN, ABCO, Tab 19, p 482.
[75] APS – Unit 1102, dated October 27, 2021 ("**APS – Unit 1102**") Exhibit OO, Berry Affidavit, ABCO, Tab 20, p. 489; APS – Unit 1103, dated October 27, 2021 ("**APS – Unit 1103**"), Exhibit PP, Berry Affidavit, ABCO, Tab 21, p. 532.
[76] Berry Affidavit, para 101, ABCO, Tab 8, p 205.

82. Consequently, it is impossible for the Ottawa Loan to have been paid off in accordance with Mizrahi's evidence or otherwise. This Court can make this finding of fact without resorting to findings of credibility. As any amount due and owing trigger Article 5, Berry owes nothing further and Unit 901 can close.

b. An Institutional Constructive Trust and Equitable Interest Arose

83. Berry is the beneficiary of an institutional constructive trust and equitable interest such that there can be no disclaimer, and the Motion Judge erred in finding otherwise.

84. While the Motion Judge was correct in his conclusion on the proposition of the authorities that Berry relied upon, namely that "all of the authorities on which he (Berry) 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 the purchaser has fully performed the agreement, and, among other things, paid the purchase price in full"[77], due to his treatment of the Supplementary Agreement, he wrongly found that Berry had no such constructive trust.

85. As accepted by the Motion Judge, it is a long-held principle that once the agreement is performed by a purchaser and there are no amounts due left and owing, the purchaser has become a beneficial owner of the property at issue. [78]

86. At the time of the Receivership, there were no amounts due and owing, and Berry has no further obligations to perform on the Unit 901 APS. Thus, he has a constructive trust and equitable interest that crystalized when the Loan remained due and owing before/at the time of Receivership, and the unit could have closed in his favour.

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[77] Decision Below, para 81, ABCO, Tab 2, p 42.
[78] See: *Buchanan v. Oliver Plumbing & Heating Ltd.,* 1959 ONCA 141; *Simcoe Vacant Land Condominium Corporation No. 272 v. Blue Shores Developments Ltd.*, 2015 ONCA 378, paras 46 - 49.

87. In this regard, the Motion Judge's reliance on the decision in *C & K Mortgage Services* is misplaced. That case simply dealt with the question of whether or not the paying of a deposit gives rise to an equitable interest.[79] Justice Deitrich distinguished the facts of *C & K Mortgage Services* from the case of *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.*,[80] 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" prior to the insolvency proceedings.[81] That is precisely the case here, as from well before the Receiver was appointed.

c. The Unit can Close and Title Can Pass

88. At paragraph 34, the Motion Judge commented:

> 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.

89. The Supplementary Agreement does, in fact, entitle Berry to close and to receive title without further consideration.

90. In the Decision Below, the Motion Judge made a palpable and overriding error in finding that Berry "was not remotely in the position of a purchaser to whom the property had been validly conveyed but for the transfer of a deed"[82], adopting the approach from the Court in *C & K*. Namely, that when a buyer forwards funds prematurely by way of deposit, before a project is registered and

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[79] *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.,* 2020 ONSC 5071, paras 31-47 *[C & K Mortgage]*.
[80] *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.,* 2001 ONSC 28461.
[81] *Armadale*; *Centurion Mortgage Capital Corp. et al. v. Brightstar Newcastle Corp et al.,* 2022 ONSC 1059, paras 30-41 *[Centurion]*.
[82] Decision Below, para 101, ABCO, Tab 2, p 46.

closing is possible such that title cannot pass, there is no equitable interest that arises, and that the APS is still subject to a disclaimer.

91. This case is different. Unlike in *C & K*, in this case (a) there is nothing left due; (b) due to Article 5 providing "the final closing of the Lender's Unit **will be completed** notwithstanding that funds for said closing may not have been provided by Sam" [emphasis added], all conditions for closing have been met; (c) Berry can take occupancy of the Unit – the project has registered and occupancy is possible[83]; and (d) Berry advanced additional funds beyond the deposit, including $2 million worth of shares in a publicly traded company and hundreds of thousands of dollars for fixtures in keeping with schedules to the APS.[84]

92. Berry was in a position where he had an entitlement to close on account of Unit 901 prior to the Receivership. As such, *C & K* and the authorities it followed is inapposite, and on the authority of case law such as *Armdale* and *Centurion,* Unit 901 title can pass and disclaimer is inappropriate.

93. The most analogous case to the present case is *Centurion Mortgage Capital Corp. et al. v. Brightstar Newcastle Corp et al*.,[85] where the purchaser advanced funds to the developer pursuant to a **loan agreement** that 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 and on a motion for directions, the court ruled in favour of the purchaser, finding that the funds counted towards the final payment for the unit and that the purchaser was entitled to rely on the developer's authority to enter into the loan.

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[83] Evidenced by CEI's earlier offer to have Berry take occupancy: Berry Affidavit, para 45-69, ABCO, Tab 8, p 188-195.
[84] Berry Affidavit, paras 16-24, 42, ABCO, Tab 8, pp 178-181, 187-188.
[85] *Centurion*.

94. Here, the Supplementary Agreement, entered into by the developer, provides that Berry can close on Unit 901 without further payment.

C. Error 2 – The Motion Judge Erred By Failing to Consider or Correctly Apply the Third Branch of the Disclaimer Test – The Equities

95. Berry's primary position is that his interest in Unit 901 is beneficial and proprietary and arose before the Receivership such that the Receiver should not have authority to disclaim his interest.[86] The Motion Judge recognized this argument[87], but erred in his analysis of the equities in finding that Berry was in the position of an unsecured creditor, which was below the priority ranking of CEI, such that the preferences and equities worked against him.

96. The Motion Judge correctly set out the applicable test for considering a receiver's request to disclaim an APS for a real estate project: (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.[88] In determining the equities on a disclaimer motion, the Court is empowered to look at the hierarchy of priority and consider whether the party seeking to avoid a disclaimer and complete the contract has established that the equities support that result, rather than a disclaimer.[89]

97. When the Receiver was appointed, Berry had a valuable and equitable interest in Unit 901. The Supplementary Agreement was not executory. Berry had performed his obligations under the

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[86] *Armdale; Centurion; 1565397 Ontario Inc. (Re),* 2009 ONSC 32257, para 60 *[156 Ontario]*.
[87] Decision Below, para 109, ABCO, Tab 2, p 47.
[88] *KingSett Mortgage Corporation et al. v. Vandyk-Uptowns Limited et al*., 2024 ONSC 6205, paras 24-26 *[KingSett]*.
[89] *Forjay Management Ltd. v 0981478 B.C. Ltd.,* 2018 BCSC 527, para 44; *KingSett*, para 26.

contract and his interest could not be terminated in respect of future obligations. In these circumstances, the equities should favour Berry.[90]

98. Using the "ordinary hierarchy" Berry's proprietary interest is greater than the secured creditor's interest,[91] and far greater than that of an unsecured creditor.

99. However, even if the "ordinary hierarchy"[92] applies, the equities favour Berry's position.

100. In that regard, the Motion Judge made several errors, which taken together are palpable and overriding, and tainted his analysis on the equities.

101. First, the Motion Judge's finding that the Supplementary Agreement was "secret and undisclosed" should have had no bearing in his equities analysis. As argued below, in entering the Supplementary Agreement and all other agreements, Berry transacted with Hazelton and Mizrahi on the basis of the indoor management rule, that Mizrahi had authority to act on behalf of and bind Hazelton.[93] It was never Berry's obligation to advise Mizrahi's co-director, officer and shareholder of Hazelton of the Supplementary Agreement, particularly in the case where there is no basis or evidence that Berry had constructive knowledge that Mizrahi would act in a manner offside his obligations to Hazelton.[94] Accordingly, the conclusion that Berry's equities arguments should be given no effect on the grounds of the Supplementary Agreement being secret[95] should be set aside.

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[90] *156 Ontario,* paras 80-81.
[91] See *Centurion,* para 55 where the Court comments that the purchasers proprietary and financial interest (like Berry's here) is greater than the purely financial interest of the secured creditor.
[92] Decision Below, para 125, ABCO, Tab 2, p 49.
[93] *Centurion,* paras 47-49; See also: *AOD Corporation v. Miramare Investment Incorporated*, 2021 ONSC 4280, paras 28-32.
[94] Berry Factum, para 11, ABCO, Tab 25, p 622; See for example, a similar undisclosed loan being of no consequence to the purchaser in *Centurion,* paras 47-49.
[95] Decision Below, para 119, ABCO, Tab 2, p 48.

102. Second, 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 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 and Hiscox represented to the court (and Berry) that its intention was for the Receiver to complete the sale of units already subject to agreements of purchase and sale.[96]

103. The court can and should consider that notwithstanding the Receivership Proceedings, the intentions and representations made were that Berry would retain his interest in the Unit.[97] Notwithstanding that the Receiver is seeking the relief, as developer, debtor and senior creditor, it would be inequitable to allow a disclaimer in CEI's favour given the circumstances of the case.

PART V - RELIEF REQUESTED

104. Berry respectfully submits that, as the Motion Judge erred in law in failing to apply the correct legal test, that this court is empowered to and should substitute its own analysis of the correct legal test based on the uncontested evidentiary record.

105. In the alternative, Berry asks that the Court remit the matter back to the lower court back to the Motion Judge to apply the appropriate legal tests to the facts.

106. As a result of the foregoing, the Appellant asks that the Motion Judge's decision be set aside and an Order be granted as follows:

1. An Order setting aside the Motion Judge's decision;
2. An Order authorizing and directing the Receiver to transfer title of Unit 901 to Berry on an as-is, where-is basis;

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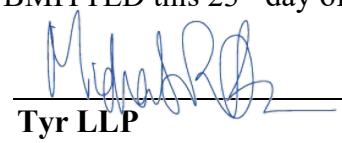
[96] Berry Affidavit, paras 60 and 68-74, ABCO, Tab 8, pp 192-193, 195-196; Hiscox Affidavit, para 57, Berry Affidavit, Exhibit FF, ABCO, Tab 12, pp 296-297; Factum of CEI, dated April 26, 2024, para 58, Berry Affidavit, Exhibit GG, ABCO, Tab 14, pp 356.
[97] See: *156 Ontario,* para 85.

3. Costs of the motion below and Appeal be Awarded to the Appellant; and

4. Such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of July, 2025.



Tyr LLP
488 Wellington Street West
Suite 300-302
Toronto, ON M5V 1E3
Fax: 416-987-2370

Jason Wadden (LSO#: 46757M)
Email: jwadden@tyrllp.com
Tel: 416.627.9815

Michael O'Brien (LSO#: 64545P)
Email: mobrien@tyrllp.com
Tel: 416.617.0533

Nick Morrow (LSO#: 87335T)
Email: nmorrow@tyrllp.com
Tel: 416.434.9114

Lawyers for the Appellant, David Berry

Court of Appeal File No. COA-25-CV-0659
Court File No. CV-24-00715321-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N

CONSTANTINE ENTERPRISES INC.

Applicant

– and –

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

Respondents

CERTIFICATE

I estimate that 120 minutes will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required. The factum complies with subrule (5.1). There are 9140 words in Parts I to V.

The person signing this certificate is satisfied as to the authenticity of every authority listed in Schedule "A".

DATED AT Toronto, Ontario this 23rd day of July 2025.

TYR LLP
Jason Wadden/ Michael O'Brien/ Nick Morrow
Lawyers for the Appellant, David Berry

SCHEDULE "A"
LIST OF AUTHORITIES

1. *1284225 Ontario Limited v. Don Valley Business Park Corporation,* 2024 ONCA 247
2. *1565397 Ontario Inc. (Re),* 2009 ONSC 32257
3. *7326246 Canada Inc. v. Ajilon Consulting*, 2014 ONSC 28
4. *AOD Corporation v. Miramare Investment Incorporated*, 2021 ONSC 4280
5. *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.,* 2001 ONSC 28461
6. *Buchanan v. Oliver Plumbing & Heating Ltd.,* 1959 ONCA 141
7. *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.,* 2020 ONSC 5071
8. *Campbell River Common Shopping Centre v. Nuszdorfer*, 2013 BCSC 141
9. *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447
10. *Centurion Mortgage Capital Corp. et al. v. Brightstar Newcastle Corp et al.,* 2022 ONSC 1059
11. *Colautti Construction Ltd. v. City of Ottawa*, 1984 ONCA 1969
12. *Dolatabadi v. Top/Star Executives Realty*, 2024 ONSC 2742
13. *Forjay Management Ltd. v 0981478 B.C. Ltd.,* 2018 BCSC 527, para 44
14. *Galt Machine and Plating Inc. v. MLS Group Ltd.*, 2021 ONSC 8156
15. *Graham v Sable Developments Inc.,* 2019 BCSC 1157
16. *Gregor Homes Ltd. v. Woodyer*, 2022 ONSC 4089
17. *Highclass v Ansari*, 2023 ONSC 4138
18. *Housen v. Nikolaisen*, 2002 SCC 33
19. *James Bay Resources Limited v. Mak Mera Nigeria Limited*, 2025 ONCA 448
20. *Kathryn Farms Ltd v 1572548 Alberta Ltd,* 2021 ABQB 245
21. *Kielb v. National Money Mart Co.*, 2015 ONSC 3790
22. *KingSett Mortgage Corporation et al. v. Vandyk-Uptowns Limited et al.*, 2024 ONSC 6205
23. *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37
24. *Mynerich v. Hampton Inns Inc.*, 2009 ONCA 281
25. *North v. Metaswitch Networks Corporation*, 2017 ONCA 790
26. *Packall v Ciszewski*, 2015 ONSC 2837, affirmed at 2016 ONCA 6

27. *Parkland Industries Ltd. v. Smart Gas and Auto Detailing Ltd.*, 2013 BCSC 1046
28. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53
29. *Shelanu Inc. v. Print Three Franchising Corp.*, 2003 ONCA 52151
30. *Simcoe Vacant Land Condominium Corporation No. 272 v. Blue Shores Developments Ltd.*, 2015 ONCA 378
31. *Soboczynski v. Beauchamp*, 2015 ONCA 282
32. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4
33. *Turner v. Visscher Holdings Inc.*, 1996 BCCA 1436
34. *Whiteside v. Celestica International Inc.*, 2014 ONCA 420

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

The Appellant is not relying on any statutes, regulations or by-laws.

Court of Appeal File No.: COA-25-CV-0659
Court File No.: CV-24-00715321-00CL

CONSTANTINE ENTERPRISES INC.	-and-	MIZRAHI (128 HAZELTON) INC., ET AL
Applicant (Respondent on Appeal)		Respondents (Appellant)

ONTARIO COURT OF APPEAL

Proceeding commenced at TORONTO

FACTUM OF THE APPELLANT, DAVID BERRY

Tyr LLP
488 Wellington Street West
Suite 300-302
Toronto, ON M5V 1E3
Fax: 416-987-2370

Jason Wadden (LSO#: 46757M)
Email: jwadden@tyrllp.com
Tel: 416.627.9815

Michael O'Brien (LSO#: 64545P)
Email: mobrien@tyrllp.com
Tel: 416.617.0533

Nick Morrow (LSO#: 87335T)
Email: nmorrow@tyrllp.com
Tel: 416.434.9114

Lawyers for the Appellant, David Berry