

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

CONSTANTINE ENTERPRISES INC.

Applicant

- and -

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

Respondents

REPLY FACTUM

Cassels Brock & Blackwell LLP

Suite 3200, Bay Adelaide Centre – North Tower
40 Temperance St.
Toronto, ON M5H 0B4

Jane Dietrich LSO #: 49302U

Tel: 416.860.5223
jdietrich@cassels.com

Jessica Zagar LSO #: 57305Q

Tel: 416.869.5449
jzagar@cassels.com

John M. Picone LSO #: 58406N

Tel: 416.640.6041
jpicone@cassels.com

Lawyers for the Applicant

TO: **THE SERVICE LIST**

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A. Overview

1. The Debtors¹ seek to muddy a straightforward receivership application by mischaracterizing the evidentiary record and relying on unproven allegations in a recently issued pleading. Tellingly though, the Debtors do not dispute that Hazelton and Retail owe CEI more than \$47 million on a combined basis under secured lending facilities that are in default² and that they granted CEI a contractual right to seek the appointment of the Receiver.

2. The fact is that the development of the Hazelton Project is at a standstill. It is more than \$50,000,000 over budget and more than five years behind schedule. CEI has no confidence in the Mizrahi Group, which has consistently demonstrated that it cannot and will not meet its financial and other obligations. The application should be granted.

3. Although there is *no* requirement that a receiver only be appointed where it is necessary—as the Debtors suggest—the court may consider whether it is necessary to enable the receiver to

¹ Capitalized terms have the meaning given to them in the Factum of the Applicant dated April 26, 2024.

² The Retail Demand, Hazelton Demand, and Hazelton Subordinate Demand were delivered on September 22, 2022, December 6, 2023, and February 27, 2024, respectively.

carry out its work and duties *more efficiently* in determining whether a receivership is just and convenient.³ Given the repeated allegations of bad faith and ‘breach of duty’ by Mizrahi, and the recent issuance of the Statement of Claim against the Applicant and its principals in excess of \$100 million (the “**Mizrahi Claim**”), the Court can, like in *Freure Village* “infer from the history and evidence that the [Applicant’s], attempts to enforce its security privately will only lead to more litigation”.⁴

4. The actual evidence in the record clearly shows that the appointment of the Receiver by the Court is just and convenient in the circumstances. The Court should approach the series of brief affidavits filed by the Debtors in complete disregard of the Court-endorsed timetable—right up to and including with service of its factum—with the skepticism warranted by the circumstances. This haphazard approach to filing selective, slapdash, and inaccurate evidence in breach of the timetable (which the Debtors’ themselves proposed) is a telltale sign that these affidavits are nothing more than a last-ditch effort to detract from the issues actually before this Court. More importantly, the evidence provided for in the affidavits is irrelevant to the issues underlying CEI’s application.

B. CEI Has Not Blocked the Closing or Sale of Units

5. Contrary to the Debtors’ unsupported allegations, there is no evidence that units subject to agreements of sale are in a position to close or that CEI used its position to prevent those closings. In fact, part of the reason why CEI urgently seeks the appointment of the Receiver is to facilitate closings of those units when it is practical to do so.⁵

³ *Bank of Nova Scotia v Freure Village of Clair Creek* (1996), [40 CBR \(3d\) 274](#) (ONSC) at para [10](#) [*Freure Village*].

⁴ *Freure Village* at para [13](#); see also for e.g., *Bank of Montreal v Carnival National Leasing Ltd*, [2011 ONSC 1007](#) at para [36](#).

⁵ Affidavit of Rober Hiscox sworn February 23, 2024 at para 57 [*Hiscox Affidavit*].

6. Even if the units subject to agreements of sale close, a significant amount of secured Indebtedness will remain owing to CEI. The Debtors speculate that Hazelton will receive \$27 million from the sale and close of the units. Even accepting the values proposed by the Debtors, almost half of that amount—\$13 million—relates to units that are not yet subject to agreements of purchase and sale and are not yet completed. It is unknown when those units will be sold or how much they will sell for. The Debtors also do not account for how the Debtors will fund the additional costs to complete the Hazelton Project and carry the debt in the interim. The Debtors' argument that certain units may close absent a receivership is nothing more than a red herring.

7. Furthermore, the appointment of the Receiver is not sought to simply close units already subject to an agreement of purchase and sale, as the Debtors seem to suggest. The Receiver would also facilitate the final phase of construction of the Hazelton Project required for completion of the remaining units and, when appropriate, the closing of sold units and the marketing and sale of the unsold units.⁶ The granting of the Receivership Order would also provide a structured environment to address creditor claims (including lien claims), while also preserving the value of the Property and allowing for its realization in an efficient and transparent manner in the interests of all stakeholders.

8. There are important decisions to be made with respect to the completion and sale of the remaining Hazelton Project units that cannot be made because of the breakdown of the relationship between CEI and Mizrahi Group.⁷ That breakdown is most recently evidenced by the Mizrahi Claim. The appointment of the Receiver would provide the necessary stability so decisions can be made to complete the Hazelton Project.

⁶ Hiscox Affidavit at para 57.

⁷ Hiscox Affidavit at para 53; Reply Affidavit of Robert Hiscox sworn April 16, 2024 at para 15 [*Hiscox Reply Affidavit*].

9. CEI has also lost confidence in Mizrahi as a partner and developer and the Receiver could facilitate a sale process without the risk of litigation or further constructions liens.⁸

10. In any event, courts have not hesitated to appoint a receiver in dealing with a condominium or residential development in the later stages of construction where appropriate to do so.⁹ The appointment of the receiver in such circumstances may be justified on the basis that it, among other things, allows for the efficient realization of the project, free and clear from shareholder or creditor disputes, or provides a means for maximizing the value attributable to creditors of the debtor.¹⁰ Each of these factors are relevant in the present circumstances and weigh in favour of the appointment of the Receiver.¹¹

11. The appointment of the Receiver would allow it to carry out its duties more efficiently since a court-appointed receiver is protected from potential claims related to decision-making and the sales process. Any potential purchaser would enjoy similar protections, which is likely to improve the outcome of any potential sales process.

12. The Debtors inappropriately rely on *Royal Trust Corporation of Canada v Dq Plaza Holdings Ltd*,¹² a case which predates the relevant provisions in the *Bankruptcy and Insolvency Act* and is not on point. In that case, the applicant mortgagee was already in receipt of the rents

⁸ Hiscox Affidavit at paras 49 and 53-57; Hiscox Reply Affidavit at para 15.

⁹ See for e.g., *C&K Mortgage Services Inc v Camilla Court Homes Inc* (Court File No. CV-20-00643021-00CL), [Receivership Order Endorsement of Conway J dated July 2, 2020](#) [*C&K Mortgage Services*]; *KingSett Mortgage Corporation et al v Stateview Homes (Minu Towns) Inc et al* (Court File No. CV-23-00698576-00CL), [Receivership Order dated May 2, 2023](#) [*Stateview Receivership Order*] (and the subsequent related [Sale Process Endorsement of Steele J dated July 19, 2023](#) at para 3); *Daniels Aquaview Inc v Westport Beach Development Corporation et al* (Court File No. CV-13-9978-00CL), [Receivership Order dated January 28, 2013](#) [*Daniels Aquaview Receivership Order*]; *Romspen Investment Corp v 6176666 Canada Ltee*, [2012 ONSC 1727](#) at paras 3-4.

¹⁰ *Daniels Aquaview Receivership Order*, and see *Daniels Aquaview Inc v Westport Beach Development Corporation et al* (Court File No. CV-13-9978-00CL), [Motion Record dated January 18, 2013](#), Tab 2, Affidavit of Ashley D'Silva sworn January 3, 2013 at paras 35, 46 and 48.

¹¹ Hiscox Affidavit at paras 50-53, 54 and 57.

¹² [\(1984\) 36 Sask R 84](#) (SK KB) [*Dq Plaza Holdings*].

and profits of the mortgaged property, such that the applicant's mortgage was being serviced and the appointment of a receiver was not necessary to preserve assets.¹³ Also in that case, there was no evidence that a court appointment would enable the receiver to more efficiently carry out its work and duties.¹⁴ That is certainly not reflective of CEI's predicament. The Indebtedness is not being serviced and the evidence establishes that the Receiver is urgently necessary to preserve the value of the Property.

C. CEI is Not the Only Creditor

13. The Debtors wrongly assert that "CEI is effectively the only creditor".

14. Aviva has a second priority registration against the Real Property for certain deposit insurance indemnification obligations, securing the maximum amount of \$18,500,000.¹⁵

15. There also two registered construction lien claimants:

(a) CEC Mechanical Ltd., pursuant to a construction lien registered on September 8, 2023 in the amount of \$506,657.76; and

(b) CLM General Enterprises, pursuant to a construction lien registered on February 2, 2024 in the amount of \$68,262.¹⁶

16. While the Debtors argue that they have requested to bond off the construction liens, this has not yet occurred. There is no evidence that it is possible or desirable to do so, particularly when the Debtors are insolvent and it is unclear what security would be available. Nor does bonding off the liens address the ultimate resolution of the lien claimants. It only delays the matter.

¹³ *Dq Plaza Holdings* at paras [11-12](#).

¹⁴ *Dq Plaza Holdings* at para [14](#).

¹⁵ Hiscox Affidavit at paras 11 and 38.

¹⁶ Hiscox Reply Affidavit at para 13; cited by the Factum of the Respondents dated May 3, 2024 at paras 15-16.

Accordingly, it should not be taken as a foregone conclusion that the liens can readily be addressed. In any event, even if the liens were removed, there are numerous other creditors, including additional trade claims, TSCC 2967 (the Hazelton Project condominium corporation), and potential claims from parties who have agreed to purchase units that have not yet closed. To preserve the value of the Property and protect CEI's collateral, CEI has made protective advances directly to TSCC 2967 on account of condominium fees that Hazelton failed to pay when due.

17. In any event, the existence of only one secured creditor is hardly a bar to the appointment of a receiver. Courts have routinely appointed a receiver in these circumstances.¹⁷

18. The Debtors rely on *M&K Construction Limited et al v Kingdom Covenant International*¹⁸ in support of its argument that the appointment of the Receiver is not appropriate, but that case is also entirely distinguishable. In that case, the underlying debt was in question, there was no urgency to sell the property, the property was not diminishing in value, the value of the property greatly exceeded the value of the outstanding debt, and the appointment of a receiver would have effectively ended the action commenced by the respondent (which was a not for profit corporation that operated a church and school) against the applicants and others.¹⁹

19. That is not the case before this Court. The subject property is imminently at risk of diminishing in value if the Receiver is not appointed. Even on the Debtors' evidence, the value of the sold units, once closed, is far less than the current value of the secured Indebtedness owed to CEI. Also, the plaintiffs to the Amended Statement of Claim are Sam Mizrahi and members of

¹⁷ See e.g., *Pandion Mine Financial Fund LP v Otso Gold Corp*, [2022 BCSC 136](#) at para [4](#) [*Pandion*]; *General Motors v Peco Inc* (2006), [15 BLR \(4th\) 282](#) (ONSC) at paras [27-28](#); *Forest & Marine Financial Corp, Re*, [2009 BCSC 1554](#) at para [1](#); *306440 Ontario Ltd v 782127 Ontario Ltd*, [2014 ONCA 548](#) at para [5](#); *Royal Bank of Canada v MBA Asset Management Inc*, [2024 BCSC 546](#) at paras [3-4](#).

¹⁸ [2015 ONSC 2241 \[M&K Construction\]](#).

¹⁹ [2015 ONSC 2241](#) at para [6](#).

the Mizrahi Group, for-profit entities, for whom the appointment of the Receiver will not prejudice or end their ability to advance their claims.

20. Similarly, *9-Ball Interests Inc v Traditional Life Sciences Inc*,²⁰ cited in the Debtors' Factum, is entirely distinguishable. In that case, not only was a receivership order sought, but in the same application the applicant secured creditor sought to approve a sale of the property to a related purchaser. The secured creditor, debtor, and purchaser were all related entities and the security interest was granted when the debtor was insolvent. Given the applicant and respondent were related parties, there was no prospect that the respondent would resist the appointment of a private receiver, or that the applicant, receiver, or purchaser would face litigation or claims by the respondent. The court inferred that the reason to seek the appointment of a receiver was to facilitate a quick-flip sale transaction, which the applicant was seeking court approval of without a proper evidentiary basis to allow the court to consider the efficacy and integrity of the sale process or whether the receiver made sufficient effort to get the best price.²¹ That is also not the case before this Court.

D. The Receivership is Not Sought to Remedy a Business Dispute

21. The Debtors' also incorrectly assert that the nature of the issue before the Court is a partnership dispute. In that context, the Debtors err in relying on *Milborne v Kepinski*²² where the person seeking the appointment of a receiver was not a secured creditor. There was no loan. There was no security. There was no contractual right to seek the appointment of a receiver. There was not even a contractual requirement for the respondent to make additional contributions

²⁰ [2012 ONSC 2788](#) [*9-Ball Interests*].

²¹ *9-Ball Interests* at paras [20](#), [25-26](#) and [31-33](#).

²² [2024 ONSC 1825](#) [*Kepinski*].

to fund the project. Rather the relief sought was a unique 'interlocutory receiver' in the context of an oppression application.²³

22. In this case, it is undisputed that CEI is a secured creditor. The underlying Indebtedness is in default and it is uncontested that the Debtors granted CEI a contractual right to seek the appointment of the Receiver. CEI has reasonably lost confidence in the Debtors because, among other things, of the significant amount of unpaid debt still owing, the significant delays and cost overruns with respect to the Hazelton Project, the repeated allegations by Mizrahi of bad faith and breach of duty, the commencement of Mizrahi Claim, and the occurrence of other receivership proceedings involving the Mizrahi Group.²⁴

23. CEI urgently seeks the appointment of the Receiver to protect its interests and the interest of other stakeholders, and provide a path to realize on the Property in an efficient, transparent, and orderly manner.²⁵

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of May, 2024.

Cassels Brock & Blackwell LLP

²³ *Kepinski* at paras [32](#) and [35](#).

²⁴ *Hiscox Affidavit* at para 50.

²⁵ *Hiscox Affidavit* at paras 54 and 57.

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40 Temperance St.
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Jane Dietrich LSO #: 49302U

Tel: 416.860.5223
jdietrich@cassels.com

Jessica Zagar LSO #: 57305Q

Tel: 416.869.5449
jzagar@cassels.com

John M. Picone LSO #: 58406N

Tel: 416.640.6041
jpicone@cassels.com

Lawyers for the Applicant

SCHEDULE "A"

LIST OF AUTHORITIES

1. *306440 Ontario Ltd v 782127 Ontario Ltd*, [2014 ONCA 548](#)
2. *9-Ball Interests Inc v Traditional Life Sciences Inc*, [2012 ONSC 2788](#)
3. *Bank of Montreal v Carnival National Leasing Ltd*, [2011 ONSC 1007](#)
4. *Bank of Nova Scotia v Freure Village of Clair Creek* (1996), [40 CBR \(3d\) 274](#) (ONSC)
5. *C&K Mortgage Services Inc v Camilla Court Homes Inc* (Court File No. CV-20-00643021-00CL), [Receivership Order Endorsement of Conway J dated July 2, 2020](#)
6. *Daniels Aquaview Inc v Westport Beach Development Corporation et al* (Court File No. CV-13-9978-00CL), [Receivership Order dated January 28, 2013](#)
7. *Forest & Marine Financial Corp, Re*, [2009 BCSC 1554](#)
8. *General Motors v Peco Inc*, [15 BLR \(4th\) 282](#) (ONSC)
9. *KingSett Mortgage Corporation et al v Stateview Homes (Minu Towns) Inc et al* (Court File No. CV-23-00698576-00CL), [Receivership Order dated May 2, 2023](#)
10. *KingSett Mortgage Corporation et al v Stateview Homes (Minu Towns) Inc et al* (Court File No. CV-23-00698576-00CL), [Sale Process Endorsement of Steele J dated July 19, 2023](#)
11. *M & K Construction Limited et al v Kingdom Covenant International*, [2015 ONSC 2241](#)
12. *Milborne v Kepinski*, [2024 ONSC 1825](#)
13. *Pandion Mine Financial Fund LP v Otso Gold Corp*, [2022 BCSC 136](#)
14. *Romspen Investment Corp v 6176666 Canada Ltee*, [2012 ONSC 1727](#)
15. *Royal Bank of Canada v MBA Asset Management Inc*, [2024 BCSC 546](#)
16. *Royal Trust Corporation of Canada v Dq Plaza Holdings Ltd*, [\(1984\) 36 Sask R 84](#) (KB)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B-3

PART XI SECURED CREDITORS AND RECEIVERS

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

[...]

Courts of Justice Act, R.S.O. 1990, c. C.43

PART VII COURT PROCEEDINGS

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

CONSTANTINE ENTERPRISES INC.

-and-

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

Respondents

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

Applicant

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Cassels Brock & Blackwell LLP

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40 Temperance St.
Toronto, ON M5H 0B4

Jane Dietrich LSO #: 49302U

Tel: 416.860.5223
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