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

## ORAL HEARING COMPENDIUM OF THE RECEIVER

September 30, 2025

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## OUTLINE OF ARGUMENT

1. The Respondent is the court-appointed Receiver of Mizrahi (128 Hazelton) Inc. (**Hazelton**), an insolvent company that was developing a luxury condominium. The Appellant, David Berry, had an agreement of purchase and sale to purchase the penthouse unit in the development.

2. The Motion Judge authorized the Receiver to disclaim the APS and sell the condominium on the open market. The evidence was uncontested that this approach would bring the best return for creditors. The Motion Judge held that to enforce the APS would wrongly prefer the unsecured debt of Mr. Berry over Hazelton's secured creditors.

3. Mr. Berry's argument hinges on his position that a Supplementary Agreement allowed him to close on the purchase of the unit without paying the $3,892,244 balance of the purchase price. The Motion Judge rejected this argument, in part because of an "entire agreement" clause in the purchase agreement which precluded application of the Supplementary Agreement.

4. The Motion Judge did not err in applying the entire agreement clause. He considered each part of the *Tercon* analysis to determine whether the entire agreement clause was enforceable. His findings on each part of that test are entitled to deference and he made no palpable or overriding error.

5. Even if the entire agreement clause did not apply to the Supplementary Agreement, the Supplementary Agreement does not apply to the APS. When the Supplementary Agreement was executed, Mr. Berry was party to a different APS for a unit that combined the penthouse with space on the floor below. That APS was later terminated and replaced with a new APS for the penthouse alone. Mr. Berry signed that new APS which required him to pay the full purchase price. The APS made no reference to the Supplementary Agreement and contained no language

relieving Mr. Berry of the obligation to pay the full purchase price. The Supplementary Agreement never applied to the APS at all.

6. The Motion Judge concluded that the equities favoured approving the disclaimer of the APS. To do otherwise – to compel the Receiver to specifically perform the APS – would have altered the statutory priorities that apply in an insolvency. It would have leapfrogged Mr. Berry's unsecured claim over all other secured and unsecured creditors. The Motion Judge concluded that the equities did not justify such a result. That finding is consistent with prior case law and is subject to deference.

7. In any event, the Receiver cannot specifically perform the APS. Construction of the unit is not complete and the Receiver does not have the funds to complete it. Mr. Berry's proposal that he receive the unit "as is" would not constitute specific performance of the APS, but rather a court-created modification of the APS.

**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.

# TERM SHEET

| | |
|---|---|
| 1. BORROWER: | Mizrahi Developments Inc. (the "**Borrower**") |
| 2. GUARANTORS: | Mizrahi Development Group (1451 Wellington) Inc. ("**1451**") as to Loan Facility #1 and Loan Facility #2; and Sam Mizrahi ("**Sam**"), personally, as to Loan Facility #2 only(collectively, the "**Guarantors**")<br><br>(the Borrower and the Guarantors are hereinafter collectively referred to as the "**Credit Parties**", and Loan Facility #1 and Loan Facility #2 are collectively referred to as the "**Loan**") |
| 3. LENDER: | David Berry, or an affiliate to be named (the "**Lender**") (the Lender shall have the right to assign all or any part of the Loan at any time after a period of one (1) year following the date of the initial advance of funds pursuant to this loan facility) |
| 4. LOAN FACILITY #1: | Commercial Loan Financing [Term Loan, Non-Revolving]. |
| 5. LOAN FACILITY #2: | Commercial Loan Financing [Term Loan, Non-Revolving]. |
| 6. LOAN AMOUNT #1: | $4,000,000(CDN) (available in a single draw of the entire Loan amount) |
| 7. LOAN AMOUNT #2 | $6,000,000(CDN) (available in a single draw of the entire Loan amount) |
| 8. USE OF PROCEEDS: | To finance: (a) repayment of any existing mortgages registered on title to the Property (as hereinafter defined), save and except the Vendor-Take-Back Mortgage registered as Instrument No. OC1484155 on June 6, 2013 on title to 1451 Wellington Street West, Ottawa, Ontario, in the principal sum of $1,000,000.00 in favour of Dacando Enterprises Limited (the "**Vendor-Take Back Mortgage**"); (b) certain to be agreed upon development costs in respect of the development, construction and sale (the particulars of which are set out on the budget annexed hereto as Schedule "A") relating to a proposed midrise condominium project (the "**Project**") to be constructed on the properties municipally known as 1445 Wellington and 1451 Wellington, and as more particularly described in Schedule "B" attached hereto (collectively, the "**Property**"); and (c) a portion of the Borrower's equity in the Project in order to obtain construction financing for the Project. The Borrower covenants not to remove or distribute any equity in or profit from the Project or otherwise compensate any of its shareholders or other persons by way of income, dividend or other payment other than to repay the Loan or as otherwise agreed upon by the parties. |

| | |
|---|---|
| 9. LOAN FACILITY #1 TERM: | The Loan shall mature the earlier of: (a) 2 years from the date of the initial advance of Loan Facility #1 (the "**Two Year Deadline**"); (b) issuance of the above-grade building permit; and (c) receipt of any proceeds or funds from the Construction Lender (as defined in Section 16(c) herein) (the "**Loan Facility #1 Term**"). |
| 10. LOAN FACILITY #2 TERM: | The Loan shall mature the earlier of: (a) 45 days following the date of registration of the condominium corporation Project on the Property; and (b) December 31, 2021 (the "**Loan Facility #2 Term**"). |
| 11. LOAN FACILITY #1 INTEREST RATE: | 12.0% per annum, calculated and compounding annually, and payable on maturity of the Facility #1 Term. |
| 12. LOAN FACILITY #2 INTEREST RATE: | 12.0% per annum, calculated and compounding annually, and payable on maturity of the Facility #2 Term. |
| 13. CLOSING DATE: | Subject to the satisfaction of all of the conditions herein, as determined by the Lender, in its sole discretion, Friday, June 10, 2016 or such other date as the parties may mutually agree upon (the "**Closing Date**"). |

To be defined at due prep. modified Sightly

14. CONDITIONS PRIOR TO FUNDING:

(a) All Security, in form and content satisfactory to Lender and its legal counsel, to be executed, delivered and, where applicable, registered creating a first priority security interest (save as otherwise noted herein);

(b) Receipt of credit reports for the Credit Parties and financial statements for 1451 as the Lender may request that are satisfactory to the Lender, in sole and absolute discretion;

(c) the Lender being satisfied, in its sole and absolute discretion, with the results of the due diligence searches, enquiries and reports provided by the Borrower to the Lender and in respect of such additional due diligence, searches, enquiries and reports prepared for the Lender, including, without limitation:

(i) reliance letters addressed to the Lender with respect to the soil tests and geotechnical reports;

(ii) reliance letters addressed to the Lender with respect to the phase 1 environmental tests (and if recommended, Phase 2 environmental tests or audits);

(iii) current appraisals of the Property, if available;

(d) Satisfactory review of the Altus Group report with respect to the Borrower

and its subsidiaries and their projects, the Project budget, the draft Project plans and the appraisals.

(e) The Borrower has provided the Lender to its satisfaction with information or an organizational list or chart setting out: (i) all of the subsidiaries of the Borrower; (ii) the properties each one owns; and (iii) confirmation that all such subsidiaries are owned solely by the Borrower.

(f) The cost consultant for the Project (the "**Cost Consultant**") shall be acceptable to and approved by the Lender. The Lender hereby confirms that Altus Group is an acceptable Cost Consultant.

(g) Delivery by the Borrower to the Lender of a statutory declaration (in a form provided by the Lender) executed by Sam Mizrahi, confirming, inter alia, the terms of the leases and that all of the landlord's and tenants' obligations, if any, therein have been complied with and the Lender being satisfied with its review of all of the leases of the Property.

(h) Delivery by the Borrower to the Lender of evidence of all-risk and liability insurance (inclusive of IBC standard mortgage clauses) naming the Lender as mortgagee and additional loss payee.

(i) Delivery by the Borrower to the Lender of evidence that all realty taxes for the Property have been paid in full to date.

(j) The Lender having received officer's certificates and certified copies of resolutions of the board of directors for each of the Credit Parties concerning the due authorization, execution and delivery of all of the Security Documents and such other related matters as may be required by the Lender.

(k) The Lender receiving an opinion from the Borrower's counsel regarding the corporate status of each of the Credit Parties, the due authorization, execution, delivery and enforceability of the Security Documents and such other matters as the Lender may require, in form and substance satisfactory to the Lender.

(l) A title insurance policy issued by a recognized title insurer in Ontario, in a form satisfactory to the Lender, in respect of the Property which title insurance policy insures the interest of the Lender for the full amount of the Loan. The Borrower will pay all premiums and costs associated with the title insurance policy. The Lender may deduct such premiums and costs from the initial advance.

(m) The Borrower has provided evidence, satisfactory to the Lender of the current zoning of the Property.

(n) Satisfactory ruling from the OMB.

(o) 1451 shall have delivered to the Lender a warrant (or similar contractual

entitlement) entitling the Lender, for the price of $1.00, to acquire twenty five percent (25%) of the Net Profits in the Project. "**Net Profits**" shall be defined in the loan agreement, but shall include the net sale proceeds from all unit closings in respect of the Project immediately following repayment of the Construction Financing and payment of Harmonized Sales Tax. The loan agreement shall provide the Lender with an audit right in order to confirm the calculation of Net Profits, and the loan agreement shall further define the nature of expenses which may be included in such calculation.

15. GENERAL CONDITIONS:

(a) All costs incurred by Lender in connection with the Loan including legal as well as other costs which may be identified as time progresses shall be the responsibility of the Borrower (collectively, the "**Lender's Costs**").

(b) During the Term, with respect to each subsidiary, nominee or trustee corporation or development property owned or controlled directly or indirectly by the Borrower, the Lender shall be provided with a copy of each survey, appraisal, environmental, geotechnical or soil and/or cost consultant's report, zoning approvals and permits, approvals and agreements with respect to the construction, as applicable, as soon as same is available to the Borrower.

(c) During the Term, the Borrower will have monthly meetings to update the Lender with respect to all its subsidiaries, projects and operations, including without limitation, the Project. In connection with the monthly meetings the Borrower is to provide a written report in respect of the Project budget, Project related expenditures, zoning and approval status, marketing and sales status, (including, if applicable, copies of all signed agreements of purchase and sale) copies of all Project related agreements and contracts and, if required by the Lender, acting reasonably, periodic written reports from the Cost Consultant regarding all of the foregoing, provided that the Cost Consultant's report shall not be required more frequently than quarterly.

16. SECURITY:

(a) a loan agreement reflecting the terms herein and such other terms as the Lender may require including, without limitation, positive and negative covenants and reporting;

(b) promissory notes reflecting the terms herein;

(c) Prior to commencement of construction of the Project, the Lender acknowledges and agrees that the Borrower (or the appropriate Credit Parties) shall be permitted to register a charge/mortgage in favour of a construction lender for the Project (the "**Construction Lender**"). The Lender further acknowledges and agrees that the Borrower shall be permitted to register a charge/mortgage on title to the Property in favour of Tarion and Aviva and or Westmount Insurance (or some other entity approved by the Lender), acting as a deposit bond insurer, as security for

the deposit bond facility and excess deposit bond facility for the Project;

(d) a general security agreement from the Borrower and 1451 being a first priority security interest in all present and after-acquired personal property of the Borrower and 1451 pursuant to the provisions of the *Personal Property Security Act* (Ontario) ("**PPSA**"); only to be registered upon under a default

(e) A pre-signed acknowledgement and direction, witnessed by counsel for 1451, irrevocably authorizing the Lender to register a mortgage on title to the Property should all amounts due and owing under Loan Facility #1 not be repaid to the Lender in full by the Two Year Deadline,

(f) an assignment of any/all contracts relating to the Project, which shall not be the subject of a registration under the PPSA unless there is an event of default which has not been remedied;

(g) an assignment of all policies of insurance, which shall not be the subject of a registration under the PPSA unless there is an event of default which has not been remedied;

(h) a joint and several guarantee and postponement of claim from the Guarantor for all indebtedness, which shall not be the subject of a registration under the PPSA;

(i) a guarantee from Sam for all indebtedness under Loan Facility #2 only which shall not be the subject of a registration under the PPSA (the "**Sam Guarantee**");

(j) a postponement of claim from Sam in respect of all indebtedness of the Borrower and 1451 in favour of Sam Mizrahi; and

(k) an environmental indemnity from the Borrower and Guarantor.

Save and except for the Vendor-Take-Back Mortgage, the construction loan security and the deposit bond and excess bond security, no additional encumbrances shall be permitted to be registered on title to the Property without the prior written consent of the Lender.

The Borrower acknowledges and agrees that any default by the Borrower or any of its subsidiaries to any permitted lender shall be a default under this Loan Facility.

For greater certainty, a default by the Borrower shall not constitute an event of default unless: (a) in the case of a default in payment of money by the Borrower, which has continued for at least ten (10) days after receiving notice of such monetary default; and (b) in the case of a default in performance of any other obligation, it has continued for at least ten (10) days after notice thereof has been given to the Borrower. Notwithstanding the foregoing, the Borrower shall be deemed to have committed a default, without having received notice of such default and an opportunity to cure same, in the event the Borrower gives or creates a mortgage, charge, lien (save and except for construction liens, in

respect of which the Borrower shall have received notice with an opportunity to bond off and vacate such lien) or encumbrance upon the Property or any Project asset, save and except for the Permitted Encumbrances referred to in Paragraph 8 herein, or in the event the Borrower sells, agrees to sell or otherwise disposes of all or any part of the Property, the Project or any collateral secured by the security contemplated by this Section 16.

17. REPAYMENT OF LOAN FACILITY #1

The Borrower shall repay the Lender the principal amount of Loan Facility #1 plus accrued interest on the maturity date of the Loan Facility #1 Term.

18. REPAYMENT OF LOAN FACILITY #2

The Lender shall in his sole discretion have the following options with respect to repayment of Loan Facility #2:

(a) The Borrower shall repay the Lender the principal amount of Loan Facility #2 plus accrued interest on the maturity date of the Loan Facility #2 Term; or

(b) The Lender shall have the right to exercise an option within 6 months from the date of Closing to notify the Borrower of its intention to convert any or all of the accrued interest (for both Loan Facility #1 and/or Loan Facility #2) and/or the Net Profits to which the Lender is entitled towards the purchase of a residential unit in the Project, based upon the sale price of $900 per square foot for a penthouse unit, and $875 per square foot for a sub-penthouse unit. The Lender covenants to execute the Borrower's (or its related party's) standard form of Agreement of Purchase and Sale and to pay a minimum of 20% down payment.

19. PURCHASE AT 128 HAZELTON

The Credit Parties and Lender acknowledge that the Lender has executed an Agreement of Purchase and Sale, as the same may be amended from time to time (the "**APS**") for the purchase of Suite PH 901, at 128 Hazelton Avenue, Toronto (the "**Lender's Unit**"), being a condominium project to be developed by Mizrahi (128 Hazelton) Inc. ("**Hazelton Inc.**"), a company affiliated with Sam. In the event that the final closing of the Lender's Unit occurs before Loan Facility #2 is repaid to the Lender in full, then Sam unconditionally agrees to pay to Hazelton Inc. (or any successor or assignees) any and all amounts due and owing by the Lender to Hazelton Inc. for the Lender's Unit pursuant to the APS (such payment referred to herein as the "**Mizrahi Bridge Payment**") up to a maximum amount of that amount of principal that remains outstanding under Loan Facility #2 plus all accrued interest, and such Mizrahi Bridge Payment shall bear the following terms:

(i) The Mizrahi Bridge Payment will bear interest at a rate of 5% per

annum (for a maximum of eighteen (18) months from the date of advance of the Mizrahi Bridge Payment (the "**Interest End Date**")), calculated and compounding annually, and payable on the Mizrahi Bridge Repayment Date (as defined below). It is understood that notwithstanding that the Mizrahi Bridge Repayment Date may occur after the Interest End Date, the Mizrahi Bridge Payment shall only bear interest for a maximum of eighteen (18) months from the date of advance of the Mizrahi Bridge Payment, and after such time shall be non-interest bearing;

(ii) Repayment of the Mizrahi Bridge Payment by the Lender to Sam shall occur immediately subsequent to full confirmed repayment by the Borrower to the Lender of all amounts due and owing to the Lender pursuant to Loan Facility #2 (such repayment date referred to as the "**Mizrahi Bridge Repayment Date**").

SUCCESSION:

In the event of the death or incapacity (for a period of 120 days) of Sam Mizrahi prior to repayment in full of the Loan, the Credit Parties acknowledge and agree that the Lender shall be appointed (and the Security Documents shall contain such power of appointment) to act as the sole manager of the Project, with the authority, but not the obligation and liability, to administer and manage the completion of the Project and the sale or disposition the rest or completion of unit sales and the terms and conditions herein shall remain in full force and effect.

20. CONFIDENTIALITY:

The matters set forth in this Term Sheet and any information provided with respect to the transaction are confidential. Any party may disclose such information to their respective parties who need to know such information in order to conclude the transaction contemplated by this Letter of Intent and who are informed of the obligation to keep such information confidential or as may be required by applicable law.

21. COUNTERPARTS:

This Term Sheet may be executed: (i) by electronic transmission, including facsimile, scanned or email, and scanned electronic or facsimile signatures shall be treated as originals for all purposes; and (ii) in counterparts and all counterparts taken together shall constitute an executed copy of this Letter of Intent.

22. SUCCESSORS AND ASSIGNS

This Term Sheet shall be binding upon the parties hereto and their respective heirs, executors, administrators, representatives, successors and permitted assigns.

**Signature page follows**

The foregoing reflects the general terms and conditions on which the Borrower wishes to have the Lender proceed with the Loan.

Yours truly,

BORROWER:

MIZRAHI DEVELOPMENTS INC.

PER: _____
Sam Mizrahi, President
I have authority to bind the Corporation

GUARANTOR:

MIZRAHI DEVELOPMENT GROUP (1451 WELLINGTON) INC.

PER: _____
Sam Mizrahi, President
I have authority to bind the Corporation

ACCEPTANCE

Accepted on the terms and conditions herein provided this 6th day of June, 2016.

LENDER:

_____
DAVID BERRY

# SUPPLEMENTARY AGREEMENT

This agreement ("**Agreement**") is made the 28 day of June, 2016 (the "**Effective Date**").

BETWEEN: **DAVID BERRY,** of the City of Toronto in the Province of Ontario

(hereinafter referred to as "**David**")

AND **SAM MIZRAHI**, of the City of Toronto in the Province of Ontario

(hereinafter referred to as "**Sam**")

AND **MIZRAHI (128 HAZELTON) INC.**, an Ontario corporation

(hereinafter referred to as "**Hazelton Inc.**")

**RECITALS**

**WHEREAS** David, Sam, Mizrahi Developments Inc. ("**MDI**") and Mizrahi Development Group (1451 Wellington) Inc. ("**Wellington Inc.**") have entered into a term sheet (the "**Term Sheet**") whereby David has agreed to loan MDI the aggregate amount of ten million dollars ($10,000,000) (the "**Loan Transaction**");

**AND WHEREAS** on or about the date of execution of this Agreement, David, Sam, MDI and Wellington Inc. have, or shall, enter into a loan agreement, personal guarantee, general security agreements and other ancillary documents to consummate the Loan Transaction;

**AND WHEREAS** David has executed an Agreement of Purchase and Sale, as the same may be amended from time to time (the "**APS**") for the purchase of Suite PH 901, at 128 Hazelton Avenue, Toronto (the "**Lender's Unit**"), being a condominium project to be developed by Hazelton Inc., a company affiliated with Sam;

**AND WHEREAS** in the event that the closing of the Lender's Unit occurs before all amounts due and owing pursuant to Loan Facility #2 have been repaid to David in full, Sam has agreed to provide a bridge loan whereby Sam will pay to Hazelton Inc. any and all amounts due and owing by David to Hazelton Inc. for the Lender's Unit pursuant to the APS up to a maximum amount of that amount of principal that remains outstanding under Loan Facility #2 plus all accrued interest (the "**Mizrahi Bridge Payment**");

**AND WHEREAS** in order to guarantee repayment of the Loan Facility #2, Sam has agreed to execute a personal guarantee in favour of David (the "**Sam Personal Guarantee**");

**AND WHEREAS** 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., has agreed that David shall not be required to 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 (the "**Payment Postponement**");

**AND WHEREAS** in the event that any amounts remain due and owing to David on account of Loan Facility #1, and after Sam provides the Mizrahi Bridge Payment to Hazelton Inc. (or its successors or assigns (per Section 2 above), there remains any amounts owing to Hazelton Inc. on account of the final closing (or otherwise) of the Lender's Unit, David shall be entitled to use any and all cash and/or shares of Yappa Corp. held in escrow (as further described in this Agreement) to fund such remaining payment;

**AND WHEREAS** the Bridge Loan, the Sam Personal Guarantee and the Payment Postponement are intended to be confidential in nature;

**NOW THEREFORE**, in consideration of the background, the mutual covenants contained herein, and other good and valuable consideration (the receipt and sufficiency of which are acknowledged by the Parties), the Parties agree as follows:

**ARTICLE 1 – DEFINED TERMS**

Capitalized terms used herein but not defined herein shall have the meanings ascribed thereto in the Term Sheet.

**ARTICLE 2 - BRIDGE LOAN**

In the event that the final closing of the Lender's Unit occurs before Loan Facility #1 and Loan Facility #2 are repaid to David in full, Sam unconditionally covenants and agrees to pay to Hazelton Inc. (or any successors or assignees) any and all amounts due and owing by David to Hazelton Inc. for the Lender's Unit pursuant to the APS (such payment referred to herein as the "**Mizrahi Bridge Payment**") up to a maximum amount of that amount of principal that remains outstanding under Loan Facility #2 plus all accrued interest, and such Mizrahi Bridge Payment shall bear the following terms:

(i) The Mizrahi Bridge Payment will bear interest at a maximum rate of 5% per annum (for a maximum of eighteen (18) months from the date of advance of the Mizrahi Bridge Payment (the "**Interest End Date**")), calculated and compounding annually, and payable on the Mizrahi Bridge Repayment Date (as defined below). It is understood that notwithstanding that the Mizrahi Bridge Repayment Date may occur after the Interest End Date, the Mizrahi Bridge Payment shall only bear interest for a maximum of eighteen (18) months from the date of advance of the Mizrahi Bridge Payment, and after such time shall be non-interest bearing. Notwithstanding the foregoing, it is understood that Sam will obtain a credit facility in order to provide the Mizrahi Bridge Payment, and, in connection therewith, Sam agrees to use his best efforts to obtain the credit facility to support the Mizrahi Bridge Payment at the best possible rate of interest and David shall pay such favourable rate of interest (up to a maximum rate of 5% per annum, as set out above);

(ii) Repayment of the Mizrahi Bridge Payment by David to Sam shall occur immediately subsequent to full confirmed repayment by the Borrower to David of all amounts due and owing to David pursuant to Loan Facility #1 and Loan Facility #2 (such repayment date referred to as the "**Mizrahi Bridge Repayment Date**").

In connection with the foregoing, Hazelton Inc. agrees that, upon notice by David that Loan Facility #1 and/or Loan Facility #2 has not been repaid in full, notwithstanding anything to the contrary contained in the APS, (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.

**ARTICLE 3 - YAPPN SHARES**

In the event that:

(i) any amounts remain due and owing to David on account of the Loan Facility #1 and/or Loan Facility #2, and

(ii) after Sam provides the Mizrahi Bridge Payment to Hazelton Inc. (or its successors or assigns (per Section 2 above), there remains any amounts owing to Hazelton Inc. on account of the final closing (or otherwise) of the Lender's Unit (the "**Remaining Fees**"),

David shall be entitled to use any and all cash and/or Yappn Shares (being common shares of Yappn Corp.) held in escrow (as same is detailed in the amending agreement dated April 28, 2016 between David and Hazelton Inc. amending the terms of the APS (the "**Amending Agreement**")) up to a maximum amount of the Remaining Fees, to pay such Remaining Fees. In the event David obtains Yappn Shares from escrow in order to fund such Remaining Payment, the value attributed to such Yappn Shares shall be equal to the average VWAP per Yappn Share for the period covering the ten (10) trading days immediately preceding the date that David obtains such shares from escrow. "VWAP" means, for any date, the price determined by the first of the following clauses that applies:

(a) the dollar volume-weighted average price of the Yappn Shares in the U.S. over-the-counter market on the electronic bulletin board for such shares during the Trading Period as reported by Bloomberg, L.P.;

(b) the dollar volume-weighted average price for the Yappn Shares on any other trading market during the Trading Period as reported by Bloomberg, L.P.;

(c) if no dollar volume-weighted average price is reported for the Yappn Shares by Bloomberg, L.P. for such hours, the average of the highest closing bid price and the lowest closing ask price of any of the market makers for the Yappn Snares as reported by OTC Markets Group in the OTC Pink marketplace; and

(d) if the VWAP cannot be calculated for the Yappn Shares on a particular date on any of the foregoing bases, the VWAP of the Yappn Shares shall be the fair market value of the Yappn Shares on such date as determined by an independent appraiser selected in

**ARTICLE 4 PERSONAL GUARANTEE**

In the event that Loan Facility #2 is not repaid to David in full (including any and all accrued interest thereon) by the expiration of the Loan Facility #2 Term, or if Sam fails to provide the Mizrahi Bridge Payment, David may use all legal remedies available to him in order to enforce the Sam Personal Guarantee.

**ARTICLE 5 PAYMENTS POSTPONED**

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 to 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.

**ARTICLE 6 - MISCELLANEOUS PROVISIONS**

**6.1 Amendment:**
This Agreement may be amended, modified or supplemented only by a written agreement signed by each party hereto.

**6.2 Waiver of Rights:**
Any waiver of, or consent to depart from the requirements of any provision of this Agreement shall be effective only if it is in writing and signed by the party giving it, and only in the specific instance and for the specific purpose for which it has been given. No failure on the part of any party to exercise, and no delay in exercising, any right under this Agreement shall operate as a waiver of such right. No single or partial exercise of any such right shall preclude any other or further exercise of such right or the exercise of any other right.

**6.3 Choice of Law:**

This Agreement shall be construed by, interpreted and enforced in accordance with the laws of the province of Ontario. The parties agree that the courts located in Toronto, Ontario shall be the exclusive forum for the resolution of any dispute arising from or relating to this Agreement. Each party hereby consents to the jurisdiction and venue of any such Ontario court.

**6.4 Assignment:**

Neither party may assign this Agreement without the prior written consent of the other party, except that David shall have the right to assign all or any part of this Agreement at any time after a period of one (1) year following the date of the initial advance of funds pursuant to the Loan Transaction.

**6.5 Severability:**

Nothing contained in this Agreement shall be construed as requiring any act contrary to the law. In the event there is a conflict between any provision of this Agreement and any applicable statute, law or regulation, the latter shall prevail and, within sixty (60) days of any such conflict coming to their attention, the parties shall confer to negotiate in good faith to modify this Agreement to the extent necessary to make the terms valid and enforceable.

**6.6 Notice:**

Any notice, demand or other communication (in this Article, a "**notice**") required or permitted to be given or made hereunder shall be in writing and shall be sufficiently given or made if; or

(a) delivered in person during usual business hours of the recipient on a business day in Toronto, Canada ("**Business Day**") and left with a receptionist or other responsible employee of the recipient at the applicable address set forth below;

(b) sent by prepaid first class mail; or

(c) sent by any electronic means of sending messages, including email transmission, which produces a record ("**Transmission**") during normal business hours on a Business Day, charges prepaid and confirmed by prepaid first class mail;

in the case of a notice to Sam, addressed to him at:

189 Forest Hill Road
Toronto, Ontario
M5P 2N3
Email: sam@mizrahidevelopments.ca

in the case of a notice to David, addressed to him at:

124 Park Rd.
Toronto, Ontario
M4W 2N7
Email: davidmmberry@rogers.com

Each notice sent in accordance with this Article shall be deemed to have been received:

(a) on the day it was delivered; or

(b) on the third Business Day after it was mailed (excluding any Business Day which there existed any general interruption of postal services due to strike, lockout or other cause); or

(c) on the same day it was sent by Transmission, or on the first Business Day thereafter if the day on which it was sent by transmission was not a Business Day.

Any Party may change its address for notice by giving notice to the other Party.

**6.7 Term**

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.

**6.8 Notwithstanding**

This 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.

**IN WITNESS WHEREOF**, the Parties have executed this Agreement as of the date first above written.

**SAM MIZRAHI**

**DAVID BERRY**

**MIZRAHI (128 HAZELTON) INC.**

Sam Mizrahi
President

As representative of Mizrahi developments I acknowledge this is the only copy of Supplementary agreement

June 28/16

witness

Ashley Brake

Concierge 133 Hazelton

June 28/16

Josh Lax

VP Development

Mizrahi Developments

# CONFIDENTIALITY AGREEMENT

This agreement ("**Agreement**") is made the 28 day of June, 2016 (the "**Effective Date**").

BETWEEN: **DAVID BERRY,** of the City of Toronto in the Province of Ontario

(hereinafter referred to as "**David**")

AND **SAM MIZRAHI,** of the City of Toronto in the Province of Ontario

(hereinafter referred to as "**Sam**")

## RECITALS

**WHEREAS** David, Sam, Mizrahi Developments Inc. ("**MDI**") and Mizrahi Development Group (1451 Wellington) Inc. ("**Wellington Inc.**") have entered into a term sheet (the "**Term Sheet**") whereby David has agreed to loan MDI the aggregate amount of ten million dollars ($10,000,000) (the "**Loan Transaction**");

**AND WHEREAS** on or about the date of execution of this Agreement, David, Sam, MDI and Wellington Inc. have, or shall, enter into a loan agreement, personal guarantee, general security agreements and other ancillary documents to consummate the Loan Transaction;

**AND WHEREAS** David, Sam and Mizrahi (128 Hazelton) Inc. entered into a Supplementary Agreement relating to certain supplemental security and obligations with respect to the Loan Transaction, which Supplementary Agreement is intended to be strictly confidential

**NOW THEREFORE,** in consideration of the background, the mutual covenants contained herein, and other good and valuable consideration (the receipt and sufficiency of which are acknowledged by the Parties), the Parties agree as follows:

## SECTION 1 - CONFIDENTIALITY

It is understood by the parties hereto that the Supplementary Agreement is intended to be confidential in nature. In the event that it has been finally determined by a court of competent jurisdiction from which no appeal lies that David has disclosed the existence and terms of the Supplementary Agreement by delivering a signed copy of the Supplementary Agreement to any third parties who were not otherwise aware of the Supplementary Agreement, David shall forfeit (i) repayment of all amounts due and owing under Loan Facility #1 and Loan Facility #2, and (ii) his right to exercise the warrant which shall be delivered to him on consummation of the Loan Transaction entitling David to obtain twenty five percent (25%) of the Net Profits in the Project.

Notwithstanding the foregoing, David shall be entitled to disclose the existence and/or terms of the Supplementary Agreement and deliver a copy of same to his accountants, lawyers and other professional advisors (on a need-to-know basis), and such disclosure shall not be considered a violation of this Section 1. In addition, disclosure of the existence and/or terms of the Supplementary Agreement by David (which includes by way of delivering a copy of same) with the consent of Sam, or disclosure of the existence and/or terms of the Supplementary Agreement by David (which includes by way of delivering a copy of same) subsequent to any disclosure of the Supplementary Agreement by Sam, or disclosure of the existence and/or terms of the Supplementary Agreement by David (which includes by way of delivering a copy of same) pursuant to an order of a court of competent jurisdiction, or disclosure of the existence and/or terms of the Supplementary

Agreement by David (which includes by way of delivering a copy of same) as required by law, or disclosure of the existence and/or terms of the Supplementary Agreement by David (which includes by way of delivering a copy of same) in connection with enforcement of this Supplementary Agreement or any other agreement or document delivered in connection with the Loan Transaction, shall not be considered a violation of this Section 1.

**IN WITNESS WHEREOF**, the Parties have executed this Agreement as of the date first above written.

**SAM MIZRAHI**

**DAVID BERRY**

**Residential Unit No.: 01 Level No.: 9**
**Suite No.: 901**

## AGREEMENT OF PURCHASE AND SALE

The undersigned, **DAVID BERRY** (collectively, the **"Purchaser"**), hereby agrees with **MIZRAHI (128 HAZELTON) INC.** (the **"Vendor"**) to purchase the above-noted unit, as outlined for identification purposes only on the sketch attached hereto as Schedule "A", together with **THREE (3)** Parking Unit(s), and **ONE (1)** Locker Unit(s), which shall be allocated by the Vendor in its sole discretion being (a) proposed unit(s) in the Condominium, to be registered against those lands and premises situate in the City of Toronto and which are currently municipally known as 126 and 128 Hazelton Avenue (hereinafter called the "**Property**"), together with an undivided interest in the common elements appurtenant to such unit(s) and the exclusive use of those parts of the common elements attaching to such unit(s), as set out in the proposed Declaration (collectively, the "**Unit**") on the following terms and conditions:

1. The purchase price of the Unit is **SIX MILLION TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($6,250,000.00)** (the "**Purchase Price**") in lawful money of Canada, payable as follows:

   (a) to Harris, Sheaffer LLP, in Trust, (the "**Vendor's Solicitors**" or "**Escrow Agent**" or "**Trustee**") in the following amounts at the following times, by cheque or bank draft, as deposits pending completion or other termination of this Agreement and to be credited on account of the Purchase Price on the Occupancy Date:

      (i) The sum of **ONE MILLION TWO HUNDRED AND FIFTY THOUSAND ($1,250,000.00)** Dollars submitted with this Agreement.

   (b) the balance of the Purchase Price by certified cheque on the Title Transfer Date to the Vendor or as the Vendor may direct, subject to the adjustments hereinafter set forth.

2. (a) The Purchaser shall occupy the Unit on the First Tentative Occupancy Date [as defined in the Statement of Critical Dates being part of the Tarion Addendum as hereinafter defined], or such extended or accelerated date that the Unit is substantially completed by the Vendor for occupancy by the Purchaser in accordance with the terms of this Agreement including, without limitation, the Tarion Addendum (the "**Occupancy Date**").

   (b) The transfer of title to the Unit shall be completed on the later of the Occupancy Date or a date established by the Vendor in accordance with Paragraph 14 hereof (the "**Title Transfer Date**").

   (c) The Purchaser's address for delivery of any notices pursuant to this Agreement or the Act is the address set out in the Tarion Addendum.

   (d) Notwithstanding anything contained in this Agreement (or in any schedules annexed hereto) to the contrary, it is expressly understood and agreed that if the Purchaser has not executed and delivered to the Vendor or its sales representative an acknowledgement of receipt of both the Vendor's disclosure statement and a copy of this Agreement duly executed by both parties hereto, within fifteen (15) days from the date of the Purchaser's execution of this Agreement as set out below, then the Purchaser shall be deemed to be in default hereunder and the Vendor shall have the unilateral right to terminate the Agreement at any time thereafter upon delivering written notice confirming such termination to the Purchaser, whereupon the Purchaser's initial deposit cheque shall be forthwith returned to the Purchaser by or on behalf of the Vendor.

The following Schedules of this Agreement, if attached hereto, shall form a part of this Agreement. The Purchaser acknowledges that he has read all Sections and Schedules of this Agreement and the form of Acknowledgement, if any:

Schedule "A" – Unit Plan/sketch
Schedule "B" – Features & Finishes
Schedule "C" – Occupancy Licence
Schedule "D" - Warning Provisions
Schedule "E" – Receipt Confirmation
Schedule "F" – Purchaser Provisions
Schedule being the Tarion Warranty Corporation Statement of Critical Dates and Addendum to Agreement of Purchase and Sale (collectively the "**Tarion Addendum**") and such other Schedules annexed thereto.

DATED, signed, sealed and delivered this 16 day of AUGUST, 2019.

**SIGNED, SEALED AND DELIVERED in the presence of** )
)
)
)
)

PURCHASER: **DAVID BERRY**

WITNESS )
(as to all Purchaser's signatures, if more than one) )
)
)

The undersigned accepts the above offer and agrees to complete this transaction in accordance with the terms thereof.

DATED, signed, sealed and delivered, this 16 day of AUGUST, 2019.

Vendor's Solicitors:

HARRIS, SHEAFFER LLP
Suite 610 - 4100 Yonge Street
Toronto, Ontario, M2P 3B5
Attn: Jeffrey P. Silver
**Telephone:** (416) 250-5800 **Fax:** (416) 250-5300

**MIZRAHI (128 HAZELTON) INC.**

Per: _____
Authorized Signing Officer
I have the authority to bind the Corporation

(c) If the Purchaser's solicitor is unwilling or unable to complete this transaction via TERS, in accordance with the provisions contemplated under the Escrow Document Registration Agreement, then said solicitor (or the authorized agent thereof) shall be obliged to personally attend at the office of the Vendor's Solicitors, at such time on the Title Transfer Date as may be directed by the Vendor's solicitor or as mutually agreed upon, in order to complete this transaction via TERS utilizing the computer facilities in the Vendor's Solicitors' office, and shall pay a fee as determined by the Vendor's Solicitors, acting reasonably for the use of the Vendor's computer facilities.

(d) The Purchaser expressly acknowledges and agrees that he or she will not be entitled to receive the Transfer/Deed to the Unit for registration until the balance of funds due on closing, in accordance with the statement of adjustments, are either remitted by certified cheque via personal delivery or by electronic funds transfer to the vendor's solicitor (or in such other manner as the latter may direct) prior to the release of the Transfer/Deed for registration.

(e) Each of the parties hereto agrees that the delivery of any documents not intended for registration on title to the Unit may be delivered to the other party hereto by telefax transmission (or by a similar system reproducing the original or by electronic transmission of electronically signed documents through the Internet), provided that all documents so transmitted have been duly and properly executed by the appropriate parties/signatories thereto which may be by electronic signature. The party transmitting any such document shall also deliver the original of same (unless the document is an electronically signed document pursuant to the *Electronic Commerce Act*) to the recipient party by overnight courier sent the day of closing or within 7 business days of closing, if same has been so requested by the recipient party.

(f) Notwithstanding anything contained in this Agreement to the contrary, it is expressly understood and agreed by the parties hereto that an effective tender shall be deemed to have been validly made by the Vendor upon the Purchaser when the Vendor's solicitor has:

(i) delivered all closing documents and/or funds to the Purchaser's solicitor in accordance with the provisions of the Escrow Document Registration Agreement and keys are made available for the Purchaser to pick up at the Vendor's sales of customer service office;

(ii) advised the Purchaser's solicitor, in writing, that the Vendor is ready, willing and able to complete the transaction in accordance with the terms and provisions of this Agreement; and

(iii) has completed all steps required by TERS in order to complete this transaction that can be performed or undertaken by the Vendor's Solicitors without the cooperation or participation of the Purchaser's solicitor, and specifically when the "completeness signatory" for the transfer/deed has been electronically "signed" by the Vendor's Solicitors;

without the necessity of personally attending upon the Purchaser or the Purchaser's solicitor with the aforementioned documents, keys and/or funds, and without any requirement to have an independent witness evidencing the foregoing.

**General**

31. The Vendor shall provide a statutory declaration on the Title Transfer Date that it is not a non-resident of Canada within the meaning of the ITA.

32. The Vendor and Purchaser agree to pay the costs of registration of their own documents and any tax in connection therewith.

33. 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 herein in writing.

34. This Offer and its acceptance is to be read with all changes of gender or number required by the context and the terms, provisions and conditions hereof shall be for the benefit of and be binding upon the Vendor and the Purchaser, and as the context of this Agreement permits, their respective heirs, estate trustees, successors and permitted assigns.

35. The Purchaser acknowledges that the suite area of the Unit, as may be represented or referred to by the Vendor or any sales agent, or which appear in any sales material is approximate only, and is generally measured to the outside of all exterior, corridor and stairwell walls, and to the centre line of all party walls separating one unit from another. NOTE: For more information on the method of calculating the floor area of any unit, reference should be made to Builder Bulletin No. 22 published by the TWC. Actual useable floor space may (therefore) vary from any stated or represented floor area or gross floor area, and the extent of the actual or useable living space within the confines of the Unit may vary from any represented square footage or floor area measurement(s) made by or on behalf of the Vendor. In addition, the Purchaser is advised that the floor area measurements are generally calculated based on the middle floor of the Condominium building for each suite type, such that units on lower floors may have less floor space due to thicker structural members, mechanical rooms, etc., while units on higher floors may have more floor space. Accordingly, the Purchaser hereby confirms and agrees that all details and dimensions of the Unit purchased hereunder are approximate only, and that the Purchase Price shall not be subject to any adjustment or claim for compensation whatsoever, whether based upon the ultimate square footage of the Unit, or the actual or useable living space within the confines of the Unit or otherwise. The Purchaser further acknowledges that the ceiling height of the Unit is measured from the upper surface of the concrete floor slab (or subfloor) to the underside surface of the concrete ceiling slab (or joists). However, where ceiling bulkheads are installed within the Unit, and/or where dropped ceilings are required, then the ceiling height of the Unit will be less than that represented, and the Purchaser shall correspondingly be obliged to accept the same without any abatement or claim for compensation whatsoever.

36. This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario.

37. The headings of this Agreement form no part hereof and are inserted for convenience of reference only.

38. Each of the provisions of this Agreement shall be deemed independent and severable and the invalidity or unenforceability in whole or in part of any one or more of such provisions shall not be deemed to impair or affect in

# COURT OF APPEAL FOR ONTARIO

CITATION: Shewchuk v. Blackmont Capital Inc., 2016 ONCA 912
DATE: 20161202
DOCKET: C60982

2016 ONCA 912 (CanLII)

Strathy C.J.O., Weiler and Watt JJ.A.

BETWEEN

Robert B. Shewchuk

Plaintiff (Appellant)

and

Blackmont Capital Inc.

Defendant (Respondent)

Joseph Groia and Kevin Richard, for the appellant

Nigel Campbell and Doug McLeod, for the respondent

Heard: September 9, 2016

On appeal from the judgment of Justice Suhail A.Q. Akhtar of the Superior Court of Justice, dated August 14, 2015, with reasons reported at 2015 ONSC 5079.

**Strathy C.J.O.:**

## A. INTRODUCTION

[1] The trial judge found that the parties' contract was ambiguous. He considered the factual circumstances surrounding the contract to interpret it and to resolve the ambiguity. The main question on this appeal is whether he erred in

### (1) The admissibility of evidence of subsequent conduct

[39] In *Sattva*, the Supreme Court held that evidence of the "factual matrix" or "surrounding circumstances" of a contract is admissible to interpret the contract and ought to be considered at the outset of the interpretive exercise. This approach contrasts with the earlier view that such evidence is admissible only if the contract is ambiguous on its face: see *Eli Lilly & Co. v. Novopharm Ltd*., [1998] 2 S.C.R. 129, at paras. 55-56; and *Seven Oaks Inn Partnership (c.o.b. Best Western Seven Oaks) v. Directcash Management Inc*., 2014 SKCA 106, 446 Sask. R. 89, at para. 13.

[40] The issue addressed in this appeal is whether evidence of the contracting parties' conduct subsequent to the execution of their agreement is part of the factual matrix such that it too is admissible at the outset, or whether a finding of ambiguity is a condition precedent to its admissibility.

[41] In my view, subsequent conduct must be distinguished from the factual matrix. In *Sattva*, the Supreme Court stated at para. 58 that the factual matrix "consist[s] only of objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (citation omitted and emphasis added). Thus, the scope of the factual matrix is temporally limited to evidence of facts known to the contracting

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parties contemporaneously with the execution of the contract. It follows that subsequent conduct, or evidence of the behaviour of the parties after the execution of the contract, is not part of the factual matrix: see *Eco-Zone Engineering Ltd. v. Grand Falls – Windsor (Town)*, 2000 NFCA 21, 5 C.L.R. (3d) 55, at para. 11; and *King v. Operating Engineers Training Institute of Manitoba*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 72.

[42] There is an additional reason to distinguish subsequent conduct from the factual matrix – a reason rooted in the reliability of the evidence. In *Sattva*, the Supreme Court stated at para. 60 that consideration of the factual matrix enhances the finality and certainty of contractual interpretation. It sheds light on the meaning of a contract's written language by illuminating the facts known to the parties at the date of contracting. By contrast, as I will explain, evidence of subsequent conduct has greater potential to undermine certainty in contractual interpretation and override the meaning of a contract's written language.

[43] There are some dangers associated with reliance on evidence of subsequent conduct. One danger, recognized in England where such evidence is inadmissible, is that the parties' behaviour in performing their contract may change over time. Using their subsequent conduct as evidence of their intentions at the time of execution could permit the interpretation of the contract to fluctuate over time. Thus, in *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester Ltd.)*, [1970] A.C. 583 (H.L.), Lord Reid observed, at p. 603:

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> I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reasons of subsequent events meant something different a month or a year later.

Indeed, in *F.L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1974] A.C. 235 (H.L.), at p. 261, Lord Wilberforce described reliance on subsequent conduct as "nothing but the refuge of the desperate."

[44] Another danger is that evidence of subsequent conduct may itself be ambiguous. For example, as this court observed in *Canada Square Corp. v. Versafood Services Ltd*. (1981), 34 O.R. (2d) 250 (C.A.), at p. 261 quoting from the writing of Professor Stephen Waddams, "the fact that a party does not enforce his strict legal rights does not mean that he never had them." As a consequence of the potential ambiguity inherent in subsequent conduct, "some courts have gone so far as to assert that evidence of subsequent conduct will carry little weight unless it is unequivocal": see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3d ed. (Toronto: LexisNexis, 2016), at p. 105.

[45] A third danger is that over-reliance on subsequent conduct may reward self-serving conduct whereby a party deliberately conducts itself in a way that would lend support to its preferred interpretation of the contract.

[46] These dangers, together with the circumscription of a contract's factual matrix to facts known at the time of its execution, militate against admitting

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evidence of subsequent conduct at the outset of the interpretive exercise. Evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix.

[47] This approach is consistent with the weight of authority: see *Adolph Lumber Co. v. Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306, at p. 307; *Corporate Properties Ltd. v. Manufacturers Life Insurance Co.* (1989), 70 O.R. (2d) 737 (C.A.), at p. 745, leave to appeal to S.C.C. refused, [1990] S.C.C.A. No. 48; *Arthur Andersen Inc. v. Toronto-Dominion* (1994), 17 O.R. (3d) 363 (C.A.), at p. 372; *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 24 O.R. (3d) 97 (C.A.), at p. 108; and Hall, at p. 103. The leading Canadian case is *Re Canadian National Railways and Canadian Pacific Limited* (1978), 95 D.L.R. (3d) 242 (B.C. C.A.), aff'd, [1979] 2 S.C.R. 668, in which Lambert J.A. stated, at p. 262:

> In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one. …
>
> The types of extrinsic evidence that will be admitted, if they meet the test of relevance and are not excluded by other evidentiary tests, include evidence of the facts leading up to the making of the agreement, evidence of the circumstances as they exist at the time the

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> agreement is made and, in Canada, evidence of subsequent conduct of the parties to the agreement.

[48] Despite its dangers, evidence of subsequent conduct can be useful in resolving ambiguities. It may help to show the meaning the parties gave to the words of their contract after its execution, and this may support an inference concerning their intentions at the time they made their agreement: see *Montreal Trust Co.*, at p. 108; *3869130 Canada Inc. v. I.C.B. Distribution Inc.*, 2008 ONCA 396, 239 O.A.C. 137, at para. 55; *Whiteside v. Celestica International Inc.*, 2014 ONCA 420, 321 O.A.C. 132, at para. 58; and *Sobocynski v. Beauchamp*, 2015 ONCA 282, 125 O.R. (3d) 241, at para. 60 leave to appeal to S.C.C. refused, [2015] S.C.C.A. No. 243.

[49] Canadian courts have never adopted the absolute exclusionary rule prevailing in the United Kingdom: see *Bank of Montreal v. University of Saskatchewan* (1953), 9 W.W.R. (N.S.) 193 (Sask. Q.B.), at p. 199; *Manitoba Development Corp. v. Columbia Forest Products Ltd.* (1973), 43 D.L.R. (3d) 107 (Man. C.A.), at p. 114; *Gastel v. Methner*, [1979] O.J. No. 1032 (S.C.), at para. 13; and *Three Hats Productions Inc. v. RCA Inc*., 1987 CarswellOnt 3295 (S.C.), at para. 36.

[50] However, the lesson learned in Canada from the British position is that the parties' subsequent conduct is relevant only to inferentially establishing their intentions at the time they executed their contract. Like evidence of post-offence

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conduct in criminal matters, it is a kind of circumstantial evidence that "invokes a retrospectant chain of reasoning"; the trier of fact is invited to infer the parties' prior intentions from their later conduct: see *R. v. Rybak*, 2008 ONCA 354, 90 O.R. (3d) 81, at para. 142, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 311; and *R. v. Vant*, 2015 ONCA 481, 324 C.C.C. (3d) 109, at para. 121. As Juriansz J. (as he then was) wrote in *Danforth-Woodbine Theatre Ltd. v. Loblaws Inc*, [1999] O.J. No. 2059 (Gen. Div.), at para. 55:

> [W]here evidence of the conduct of the parties and their method of performance is admissible, it is not admitted so that the contract may be construed to be consonant with the parties' conduct, but rather, it is admitted because the parties' conduct and method of performance may be of assistance in determining what the signatories intended at the time they entered the contract.

**(2) The weight or cogency of evidence of subsequent conduct**

[51] In *Canadian National Railways*, Lambert J.A. suggested, at p. 262, that, once admitted, the weight or cogency of evidence of post-contractual conduct may depend on the circumstances:

> However, to say that these types of evidence become admissible where two reasonable interpretations exist is not to say that the evidence, if tendered, must be given weight … In no case is it necessary that weight be given to evidence of subsequent conduct. In some cases it may be most misleading to do so and it is to this danger that allusions are made throughout the recent English cases, particularly *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, and *James Miller & Partners Ltd. v.*

2016 ONCA 912 (CanLII)

April 16, 2020

David Berry
124 Park Road
Toronto, Ontario
M4W 2M7

Dear David,

Re: Additional Parking Space for Suite 901 at 128 Hazelton

This letter is to confirm that upon your final closing of Suite 901 at 128 Hazelton Avenue, on unit transfer date, Suite 901 will have four (4) parking spaces in total, 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 our separate agreement relating to 1451 Wellington in Ottawa, we agreed that you would receive one (1) additional parking space at 128 Hazelton.

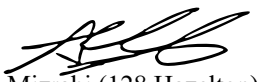
As stated on page 30 of the loan agreement, under Section 15.1:

In connection with the Lender's Unit (as defined herein), it is understood that notwithstanding anything to the contrary contained herein or in any documentation relating to the purchase of the Lender's Unit, Sam irrevocably agrees to provide to the Lender, at no charge or cost whatsoever, one (1) additional parking space, combined with the three (3) existing parking spaces purchased by the Lender pursuant to the APS, shall be separately "walled" (such that, subject to receipt of applicable building permits (which Sam shall use commercially reasonable efforts to obtain), the space is a self-contained four (4) parking space garage unit and only provides access to the Lender or his designee with an automatic garage door opener.

Please accept this letter as confirmation of the above.

Sincerely,

Mizrahi Developments Inc.
Per: Sam Mizrahi
President



Mizrahi (128 Hazelton) Inc.
Per: Sam Mizrahi
President

Mizrahi Development Group (1451 Wellington) Inc.
Per: Sam Mizrahi
President

Sam Mizrahi

# COURT OF APPEAL FOR ONTARIO

CITATION: Kearns v. Canadian Tire Corporation, Limited, 2020 ONCA 709
DATE: 20201109
DOCKET: C67413

2020 ONCA 709 (CanLII)

Lauwers, Brown and Nordheimer JJ.A.

BETWEEN

Jamie Kearns

Plaintiff (Respondent)

and

Canadian Tire Corporation, Limited

Defendant (Appellant)

Stephen F. Gleave, for the appellant

Matthew A. Fisher, for the respondent

Heard: in writing

On appeal from the judgment of Justice Peter J. Cavanagh of the Superior Court of Justice dated August 22, 2019, with reasons reported at 2019 ONSC 4946, 57 C.C.E.L. (4th) 270.

**BROWN J.A.:**

## I. OVERVIEW

[1] The appellant, Canadian Tire Corporation, Limited ("Canadian Tire"), terminated the employment of the respondent, Jamie Kearns, effective July 2018. Canadian Tire made termination-related payments to Mr. Kearns in July and September 2018. Mr. Kearns started a wrongful dismissal action in October 2018.

company's representatives at the mediation deposed that they had reviewed the pay stubs for Mr. Kearns.

[41] Second, Canadian Tire's argument ignores a key principle of contractual interpretation. It suggests that the ""context", or factual matrix, that the motion judge failed to take into account included the subjective understandings, or state of mind, of the two Canadian Tire representatives at the time of the mediation. But, as taught by *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 58, the factual matrix consists only of objective evidence of the background facts at the time of the execution of the contract – that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contract: see also, *Olivieri*, at para. 44. Evidence of the undisclosed or uncommunicated subjective knowledge or state of mind of the two Canadian Tire representatives at the mediation does not qualify as part of the factual matrix that could assist the interpretative process.

[42] Finally, Canadian Tire's position stands at odds with its own statement of issues filed at the mediation. That document was signed by its counsel. In it, the company acknowledged that it had provided Mr. Kearns with "thirty (30) weeks' pay in lieu of additional notice." That 30 weeks' pay was part of the "Additional Notice" that Canadian Tire had offered to Mr. Kearns in the termination letter, upon his execution of a release. The statement of issues was sent to Mr. Kearns' counsel on December 18, 2018, after Canadian Tire had made the November Payment.

2020 ONCA 709 (CanLII)

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

| | | |
|---|---|---|
| CONSTANTINE ENTERPRISES INC.<br>Applicant (Respondent in Appeal) | -and- | MIZRAHI (128 HAZELTON) INC. et al.<br>Respondents (Respondents in Appeal) |

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT
TORONTO

**ORAL HEARING COMPENDIUM OF THE RECEIVER**

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