Court of Appeal File No. COA-25-CV-0659
Court File No. CV-24-007153321-00CL

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

RESPONDING FACTUM OF THE APPLICANT / RESPONDENT ON APPEAL CONSTANTINE ENTERPRISES INC.

August 15, 2025

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KSV Restructuring Inc. in its capacity as Receiver

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PART I - INTRODUCTION

1. Constantine Enterprises Inc. ("CEI") is the senior secured creditor of Mizrahi (128 Hazelton) Inc. ("Hazelton"). CEI adopts, but will not repeat, the Receiver's arguments in response to David Berry's appeal of Justice Osborne's Order dated May 6, 2025 (the "Order"), which authorized the Receiver to disclaim the agreement of purchase and sale dated August 16, 2019 for Unit 901 of the condominium project located at 128 Hazelton Avenue, Toronto, and related agreements (the "Unit 901 APS").[1]

[1] Order dated May 6, 2025, Appeal Book and Compendium of David Berry ("Appeal Book") Tab 3, p 39; Reasons for Decision dated May 6, 2025 (the "Reasons") at para. 126, Appeal Book Tab 2, p 37.

2. The primary purpose of this brief written submission is to correct factual misstatements in the appellant's factum about CEI and the equities associated with preferring Mr. Berry's unsecured debt over that of all other secured and unsecured creditors. This submission also addresses Mr. Berry's argument that the entire agreement clause in the Unit 901 APS should be construed narrowly when, in fact, the ordinary rules of contractual interpretation apply and courts have routinely enforced entire agreement clauses to preclude the operation of pre-contractual representations and agreements such as the Supplementary Agreement.

3. Mr. Berry has not raised any viable grounds of appeal and seeks only to relitigate impermissibly the matters before Justice Osborne, whose decision is entitled to deference. There is no basis to interfere with the Order or otherwise direct the Receiver to transfer title of Unit 901 to Mr. Berry.

PART II - SUMMARY OF FACTS

A. Overview

4. Hazelton has more than $50 million in secured debt in addition to millions of dollars in unsecured debt.[2] CEI is owed millions of dollars in secured debt from Hazelton. That security, and its first priority ranking, is not challenged.[3]

5. Once the Receiver was appointed in June 2024, it was required to discharge its duty to maximize recovery of Hazelton's assets. On the disclaimer motion, the Receiver sought to disclaim the Unit 901 APS so that it could sell Unit 901 on the market, which it

[2] Reasons at para 6, Appeal Book Tab 2, p 20.
[3] Reasons at para 108, Appeal Book Tab 2, p 35.

estimates would generate funds for creditors in the estate of between $7.7 million and $9 million.[4] The "as is" value of Unit 901 is $7,685,000.[5]

6. In contrast, performance of the Unit 901 APS would require the Receiver to complete the unit's construction at an estimated cost of approximately $3,215,000. The Receiver does not have those funds.[6] Mr. Berry also submits that the undisclosed Supplementary Agreement entitles him to close the Unit 901 APS without paying anything further, even though at least $3,892,244 of the final purchase price under the Unit 901 APS remains owing.[7]

7. The Supplementary Agreement was at the heart of Mr. Berry's position on the disclaimer motion and, in turn, this appeal.

B. Unit 901 APS Replaced and Superseded the Supplementary Agreement

8. Mr. Berry originally entered into an agreement of purchase and sale on April 21, 2016 to purchase Units 901 and 802 at 128 Hazelton Avenue (the "Unit 901/802 APS").[8]

9. Unbeknownst to CEI, Mr. Berry, Mr. Mizrahi, and Hazelton also ostensibly entered into a Term Sheet and Supplementary Agreement in June 2016 under which Mr. Mizrahi agreed "as a director and officer of Hazelton" that if unrelated Ottawa project loans remained owing to Mr. Berry when he closed under the Unit 901/802 APS, Mr. Mizrahi would be personally responsible for paying the balance. Under that agreement, Hazelton

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[4] Reasons at para 2, Appeal Book Tab 2, p 20.
[5] Reasons at para 32, Appeal Book Tab 2, p 23.
[6] Reasons at para 41, Appeal Book Tab 2, p 25.
[7] Reasons at paras 33-34, Appeal Book Tab 2, p 23.
[8] Reasons at para 13, Appeal Book Tab 2, p 21.

would complete the sale of Unit 901/802 to Mr. Berry even if Mr. Mizrahi failed to pay.[9] The Term Sheet and Supplementary Agreement were not disclosed to CEI or the Receiver until September 2024.[10]

10. In August 2019, Mr. Berry and Hazelton terminated the Unit 901/802 APS by entering into a Mutual Release and Termination Agreement. On the same date, the parties entered into the Unit 901 APS for the purchase of Unit 901 only.[11]

11. On Mr. Berry's own evidence, the Supplementary Agreement was replaced and superseded by the Unit 901 APS.[12] The Unit 901 APS contains an entire agreement clause, which provides:

> 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.[13]

12. Consistent with Justice Osborne's finding, the plain meaning of the entire agreement clause is that the Supplementary Agreement, even if it were actually enforceable, was at an end.[14]

13. However, Mr. Berry argues that Justice Osborne erred in finding that the Supplementary Agreement is unenforceable because of that entire agreement clause.

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[9] Reasons at para 26, Appeal Book Tab 2, p 22.
[10] Reasons at para 23, Appeal Book Tab 2, p 22.
[11] Reasons at paras 16-19, Appeal Book Tab 2, pp 21-22.
[12] Reasons at para 45, Appeal Book Tab 2, p 25.
[13] Reasons at para 46, Appeal Book Tab 2, pp 25-26; Affidavit of David Berry affirmed January 29, 2025 ("Berry Affidavit") Exhibit LL, Appeal Book Tab 18, p 460.
[14] Reasons at para 46, Appeal Book Tab 2, pp 25-26.

Mr. Berry also argues that Justice Osborne erred in his analysis of the equities, in large part based on factual misstatements about CEI.

C. Misstatements about CEI in Mr. Berry's Factum

14. In support of Mr. Berry's argument that Justice Osborne erred in his assessment of the equities, Mr. Berry claims that CEI stands in a unique position as the developer of the Hazelton project. Mr. Berry also claims that CEI's failure to oversee the project is what led to the losses it now seeks to recoup.[15] However, there is no evidence whatsoever to support these false statements. CEI's role in the Hazelton condominium project was limited to lender and shareholder. CEI was not the developer. The development and construction of the Hazelton project was outsourced by Hazelton to Mizrahi Inc.[16]

15. Mr. Berry also claims that CEI represented to him that its intention was for the Receiver to complete the sale of units already subject to agreements of purchase and sale, including his own. That claim is not only inaccurate, but it was also specifically addressed and rejected by Justice Osborne and is not a basis for appeal.[17]

16. CEI never said that it would complete and close the sale of Unit 901. Mr. Berry has recorded conversations with CEI about the Unit but tellingly did not include in his evidence any excerpts from recorded conversations to support his unfounded claim.

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[15] Factum from the Appellant David Berry dated July 11, 2025 ("Berry Factum") at para 102.
[16] Affidavit of Robert Hiscox sworn February 23, 2024 at paras 4, 14, and 42, Appeal Book Tab 12, pp 270, 273, 280.
[17] Reasons at paras 74-75, 116, 123, Appeal Book Tab 2, pp 29, 36.

17. Even if CEI had made the "representations" that Mr. Berry claims – which CEI denies – CEI had no ability to bind the Receiver as a matter of law. The Receiver is an officer of this Court, not CEI's agent. Once the Receiver is appointed, it is required to discharge its mandate to maximize value.

18. In any event, this receivership proceeding is not the appropriate forum in which to adjudicate Mr. Berry's allegations of CEI's so-called misrepresentations. That is a matter between Mr. Berry and CEI. It does not have any impact on the Receiver's mandate to maximize value or, for that matter, whether the Unit 901 APS should be disclaimed.

PART III - POSITION ON ISSUES

19. Mr. Berry submits that an entire agreement clause is construed narrowly.[18] That is simply not the case. The ordinary principles of contractual interpretation apply.

20. Contractual intention is determined objectively by reference to the actual words of the contract. Although the surrounding circumstances can inform the meaning of those words, they cannot overwhelm them or be used to deviate from the text to create a new agreement. [19] Evidence of surrounding circumstances can only be used as an interpretative aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words.[20]

21. The entire agreement clause provides that there was "no representation, warranty, collateral agreement or condition affecting [the Unit 901 APS …] other than as expressed

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[18] Berry Factum at para 39.
[19] *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 ("*Sattva*") at para 57.
[20] *Sattva* at para 60.

herein in writing". Justice Osborne did not err in finding that the "plain language" of the entire agreement clause meant that the Supplementary Agreement had been excluded from the Unit 901 APS.

22. The entire agreement clause expressly excludes any reliance on pre-contractual representations or agreements by expressly providing that pre-contractual representations or agreements do not form part of the contract.[21] The Unit 901 APS makes no mention of the Supplementary Agreement and discloses no intention that the parties intended to be bound by it notwithstanding the entire agreement clause.

23. Entire agreement clauses serve important purposes and there are strong policy reasons to enforce them. An entire agreement clause is intended to lift and distill the parties' bargain from the muck of the negotiations. These clauses provide certainty and clarity by limiting the expression of the parties' intentions to the written form.[22]

24. Courts routinely give effect to entire agreement clauses to ensure the efficacy and efficiency of commercial arrangements, particularly in situations involving commercial contracts between sophisticated businesspeople.[23] Mr. Berry is an experienced real estate investor whose relative sophistication is evident from the substantial project loans advanced to Mr. Mizrahi and the substantial purchase price of the condominium units underlying the disclaimer motion and appeal.

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[21] *Curtis Chandler v Karl Hollett*, 2017 ONSC 2969 ("*Curtis Chandler*") at para 60.
[22] *Graf v Periyathamby*, 2024 ONSC 1062 at paras 81-82; *Soboczynski v Beauchamp*, 2015 ONCA 282 at paras 41-43, leave to appeal refused 2015 CanLII 75960 (SCC).
[23] *Curtis Chandler* at paras 55, 60.

25. The entire agreement clause is clear and unambiguous. Mr. Berry's argument, at its highest, amounts to an argument that a fundamental term of the agreement – that there are no representations or collateral agreements affecting the Unit 901 APS other than as set out in writing in the Unit 901 APS – is something other than that.[24] Namely, that there is a collateral agreement – the Supplementary Agreement – that entitles him to close without payment in accordance with the Unit 901 APS. Courts routinely give effect to entire agreement clauses precisely to prevent this type of litigation.[25]

26. There is no basis to disturb Justice Osborne's decision. The equities do not support the completion of the Unit 901 APS and the transfer of title to Mr. Berry without further payment, including for the reasons set out above. The priority scheme in a receivership proceeding applies for good reason. There is no basis in equity (or at all) to prejudice the substantial secured and unsecured creditors of Hazelton to the benefit of Mr. Berry alone.

PART IV - ADDITIONAL ISSUES

27. CEI does not raise any additional issues.

PART V - ORDER REQUESTED

28. CEI respectfully requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of August, 2025.

John M. Picone

[24] See, for example, *Parkland Corporation v 2615669 Ontario Inc*, 2024 ONSC 3724 at paras 23-24.
[25] *Curtis Chandler* at para 60.

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CERTIFICATE

I estimate that 15 minutes will be needed for my oral argument of the appeal. An order under subrule 61.09(2) (original record and exhibits) is not required. The factum complies with subrule (5.1). There are 1613 words in Parts I to V.

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

DATED AT the City of Toronto this 15th day of August, 2025.

John M. Picone

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Curtis Chandler v Karl Hollett*, 2017 ONSC 2969
2. *Graf v Periyathamby*, 2024 ONSC 1062
3. *Parkland Corporation v 2615669 Ontario Inc*, 2024 ONSC 3724
4. *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53
5. *Soboczynski v Beauchamp*, 2015 ONCA 282
6. *Soboczynski v Beauchamp*, 2015 CanLII 75960 (SCC)

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