

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

B E T W E E N:

KEB HANA BANK as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE
FUND NO. 301 and as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE
FUND NO. 434

Applicant

- and -

MIZRAHI COMMERCIAL (THE ONE) LP, MIZRAHI DEVELOPMENT GROUP (THE ONE)
INC., and MIZRAHI COMMERCIAL (THE ONE) GP INC.

Respondents

**AIDE MEMOIRE OF MIZRAHI INC.
(Case conference February 24, 2025)**

1. Mizrahi Inc. (“MI”) seeks to address the following issues at the February 24, 2025 case conference:
 - a. The scheduling of the oral hearing for the MI Payment Motion and the Receiver’s cross-motion;
 - b. To determine whether the Altus Reports and commercial information for the Project are confidential. The Altus Reports are excerpted in the Receiver’s Fifth Report and are appended in their entirety as exhibits to Mr. Mizrahi’s affidavit, sworn January 20, 2025, in the MI Responding Motion Record. In addition, the MI Responding Motion Record includes reference to commercial information about the Project such as schedules, revenue projections and budgets which the Receiver claims is confidential; and
 - c. To advise the court of MI’s intention to challenge the admissibility of sections of the Receiver’s Fifth Report as hearsay and/or improper opinion evidence that does not comply with Rule 53.

The Time Required for Oral Argument

2. MI maintains its position that the MI Payment Motion and the Receiver's cross-motion require five days of oral argument. The Receiver has previously advised of its position that only two days of oral argument are required. Such a restriction in time to present the case would be unfair to MI. There are simply too many factual and legal issues to address. These motions raise many issues, which are not only important to the Project and the parties, but to the law of insolvency in general.
3. The following are just examples of the many factual issues in dispute:
 - a. The detailed factual history of the Project's normal payment practices – how payments to MI and others were sought, approved and processed monthly. This process changed throughout the evolution of the Project. These facts establish the knowledge and approval of the Project's payment practices to MI by the Senior Secured Lender, its Administrative Agent, Altus, and the Coco Parties at issue in the interpretation of the Receiver's order and MI's claim to payment;
 - b. The evolution of the Project's budget and schedule, the impact of COVID-19 and other unanticipated and unavoidable delays like a plumber's strike and difficulties with the City of Toronto in the permitting process;
 - c. The fact that the Project was operated on a cost-plus basis despite there being a stipulated price contract;
 - d. The detailed factual history of the disputes between the Mizrahi Parties and the Coco Parties. The agreements reached between these parties, the positions they took during private arbitrations and the decisions that resulted from those private arbitrations are all relevant to the court's consideration of the motions, including the applicability and validity of the Control Agreement between the beneficial owners, and the legal defences

that will be advanced by MI, such as the defence of laches, an expired limitation period, waiver, estoppel and acquiescence;

- e. The status of construction of the Project, whether SkyGrid's performance is better than the performance of MI, and whether the Receiver's decisions with respect to the construction of the Project will actually result in delay and increased costs to the Project;
- f. The commercial reasonableness of MI's fees and what tasks and responsibilities it undertook;
- g. The facts concerning the signing of the payment letters in dispute;
- h. The complex contractual arrangements that underly the relationships between the beneficial owners of the Project, MI as general contractor, and Clark Construction Management as the former construction manager; and
- i. The history of the Project's agreement with retaining third party real estate brokers to market, the Project's approval of these contracts and how these effect MI's entitlement to a commission for sales, if at all.

4. In addition to the many of factual issues, there are a number of important legal issues in dispute, including:

- a. A determination of contractual entitlements under the stipulated price contract in the context of the Project operating on a cost-plus basis;
- b. A determination of contractual entitlements under the Mediator's Proposal, and the Control Agreement as it concerns MI's entitlement to be paid a construction management fee, charge the Project for marketing expenses, and to the calculation of the Residential Management Fee;
- c. A determination of contractual entitlements under the Exclusive Listing Agreement;

- d. The interpretation of paragraph 17 of the Receivership Order, particularly as it concerns the requirement for the Receiver to pay suppliers of goods and services to the Project in accordance with the normal payment practices of the Project and prohibits suppliers of goods and services from discontinuing its services;
 - e. Whether the Receiver can claim pre-post compensation to set off alleged pre-receivership claims against post-receivership obligations to MI;
 - f. Whether MI can make a set-off claim for pre-receivership claims against the Project;
 - g. Whether the Receiver can seek to adduce and rely on hearsay evidence in its Fifth Report;
 - h. Whether the Receiver can seek to adduce its own opinions in its Fifth Report;
 - i. Whether the Receiver can seek to adduce the opinion evidence of others in its Fifth Report without complying with Rule 53 and without delivering affidavit evidence which could be subject to cross-examination; and
 - j. Whether the claims advanced by the Receiver are defeated by a limitation defence, or the defences of laches, waiver, estoppel or acquiescence.
5. The court has previously been advised that third parties, such as Gamma and Core Architects may seek to make submissions on the interpretation of paragraph 17 of the Receivership Order.
6. It is respectfully submitted that MI cannot properly present its case if it is only granted one day of oral argument. The Receiver's motion seeks \$58 million in damages against MI. There are significant reputational interests of MI or Mr. Mizrahi raised by the Receiver's report. MI and Mr. Mizrahi should be granted the opportunity to fully answer such allegations.
7. The Receiver's motion raises a number of factual issues, which are more appropriately addressed in an action through Statement of Claim. MI's motion, on the contrary, involves the simple

interpretation of paragraph 17 of the Receivership Order, given there is no significant dispute that MI's claim to payment for post-receivership services provided to the Project complies with the normal payment practices of the Project, i.e. what was historically paid to MI for the entire Project. To limit MI's ability to present its case and its defence to the Receiver's claim raises significant issues of procedural fairness.

The Receiver's Position on Confidentiality does Not Comply with the Test in *Sherman Estate*

8. The Receiver has taken the position that certain appendices in its Fifth Report and exhibits in MI's Responding Motion Record are confidential. In particular, the Receiver asked MI to redact the following from its Responding Motion Record:
 - a. The names of MI employees and employees of Clark Construction Management;
 - b. All Altus Reports;
 - c. Budget, scheduling and projected revenue information for the Project; and
 - d. Information concerning the Project's agreement with Hyatt Hotels.
9. MI takes no issue with the redaction of the employee names, although it does not agree that such information meets the test for a sealing order in *Sherman Estate*.
10. MI objects to the remainder of the evidence being sealed.
11. The test for a sealing order is well-known and was set out by the Supreme Court of Canada in *Sherman Estate v Donovan*, as follows:
 - a. Court openness poses a serious risk to an important public interest;
 - b. The sealing order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk;
 - c. As a matter of proportionality, the benefits of the order outweigh its negative effects.
12. The Receiver has the onus of establishing this test is met. It cannot meet this test.

13. Court openness is an important public right and there is no important public interest to be protected in this case. In paragraph 16 of the Fifth Report, the Receiver claims that disclosure of its confidential appendixes “may negatively impact the ongoing sale and investment solicitation process for the Debtors and other restructuring initiatives to the detriment of the Debtors and their stakeholders”.
14. The SISP for the Project has been completed. The Receiver and the Senior Secured Lender have accepted Tridel’s development bid, meaning the Senior Secured Lender will remain involved in the Project. There will be no sale.
15. There is no evidence that disclosure will negatively impact the Debtors (only that it *may*) and there is no evidence about why or how disclosure of historic data *may* negatively impact the Debtors.
16. The Receiver has not met the evidentiary onus of establishing that there is a “serious risk to an important public interest” as required by the first branch of the test in *Sherman Estate*.
17. The information in the Altus Reports and the other evidence concerning budgets, schedules and revenue projections is historic data. It is not current. It is also directly relevant to MI’s defence to the Receiver’s motion.
18. Granting a sealing order of historic data that is directly relevant to MI’s defence of the Receiver’s claim in a proceeding that has garnered considerable media attention is not proportionate, especially when the Receiver has failed to identify any “negative effects” that would result from disclosure within the meaning of the third step in the test.
19. Favouring the unidentified commercial interests of private parties which *may* be affected by the disclosure of this information over the principle of court openness is disproportionate.
20. MI’s reputation has been unfairly tarred by the Receiver in its Fifth Report. MI is entitled to have its complete defence publicly available to the media and the public at large.

21. MI has delivered a Responding Motion Record with the Receiver's requested redactions, without prejudice to its position that the *Sherman Estate* test cannot be met.
22. MI seeks an order permitting it to deliver an unredacted Responding Motion Record.

Inadmissible Hearsay and Opinion Evidence in the Receiver's Fifth Report

23. MI submits that the Receiver attempts to skirt the well-known laws of evidence in its Fifth Report to obtain an unfair procedural advantage over MI. Receivers are generally protected from cross-examination, but a Receiver cannot hide behind this general proposition to adduce hearsay evidence from third parties, present its own opinion evidence when it has no expertise, and adduce opinion evidence from third parties through hearsay – evidence which also does not comply with Rule 53.
24. Before the delivery of the Receiver's Fifth Report, MI's lawyers wrote to counsel for the Receiver to inquire whether the Receiver intended to deliver any third-party affidavits or expert reports. The response was that the Receiver may do so. It chose not to. Accordingly, MI did not retain any experts to address the Receiver's position that the MI claim to a construction management fee of 5% and its claim to payment based on time-based labour rates is not commercially reasonable. MI has adduced evidence of Mr. Jeff Murva, who is a fact witness with the required expertise and experience to provide opinion evidence on the issue of the commercial reasonableness of a 5% construction management fee.
25. The Receiver, on the other hand, has not adduced any admissible evidence on point. Instead, it appends to the Fifth Report memoranda and reports provided to the Receiver from third parties, such as Knightsbridge, which challenge the sufficiency of the work undertaken by MI. The Receiver also makes unsubstantiated claims about market rates for construction management fees.

This is inadmissible evidence on an important issue and MI is effectively precluded from cross-examining on this evidence.

26. MI does not seek an order striking this evidence on this case conference but proposes to include a motion to strike the evidence, which will be specifically identified in its factum, at the return of the motion on the merits. There is no absolute rule as to when a motion to strike affidavit evidence should be heard. MI does not want to delay the hearing on the merits to address an interlocutory evidentiary issue, especially given it has already delivered its responding record.

27. The Receiver is required to deliver any reply materials by February 28, 2025. While MI does not know what materials the Receiver intends to deliver by that date, MI submits that any reply evidence must be limited to new evidence as contained in the MI Responding Motion Record, meaning the Receiver cannot now seek to adduce expert evidence or affidavit evidence on the issues of MI's performance as general contractor, the speed and status of construction or the commercial reasonableness of MI's claim to a construction management fee and time-based labour rates. Such an attempt to remedy the deficiencies in the Receiver's Fifth Report would be procedurally improper and unfair.

ALL OF WHICH IS RESPECTFULLY SUBMITTED February 21, 2025

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PROCEEDING COMMENCED AT TORONTO

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