Court File No. CV-23-00707839-00CL

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

Applicants

and

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

Respondents

RESPONDING FACTUM OF MIZRAHI INC.
(RECEIVER'S CROSS-MOTION)

June 2, 2025

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PART ONE – OVERVIEW OF RESPONSE

1. This factum responds to the Receiver's Factum and its distorted characterization of the facts and contractual terms of Project documents put forward to fit its narrative and support its unjustified claim that MI was overpaid as the Project's general contractor.

2. Central to the Receiver's position is that MI was not entitled to charge the Project for labour. The Receiver relies on the terms of the 2019 CCDC2. As a result, the Receiver advances a "claim" against MI for "overpayment" for $49.3 million without specifying a cause of action.[1]

3. This "claim" entirely disregards what actually happened, what the parties agreed to and the documents they signed.

4. The Receiver's claim is also inherently inconsistent and contrary to the terms of the 2019 CCDC2 on which it relies, despite it being clear that the Project did not follow the contract. Now, relying on the 2019 CCDC2, the Receiver incredulously claims that it made a mistake and overpaid MI, and that MI has to repay an overpayment for its post-filing work.

5. In October 2024, the Receiver commenced this proceeding to challenge historic payments to MI that began, to the knowledge and authorization of all relevant stakeholders, in November 2020. Those payments continued the payment practice that effectively began when construction commenced in August 2017.

6. The Project's payment practices were subject to arbitration and mediation and subsequent agreements between the beneficial owners.[2] These payment practices were transparent and known. Ms. Coco was undeniably aware of these payment practices and ultimately elected not to challenge

[1] Receiver's Motion Record, dated October 18, 2024, Tab 1 Notice of Cross-Motion at para 3.
[2] Mizrahi 2025, Exhibit M (Mediator's Proposal); Mizrahi 2025, Exhibit Q (Control Agreement); Coco Submissions, Fifth Report Appendix 16.

them. She "conceded" to them.[3] She felt this was the "lesser of two evils".[4]

7. MI was entitled to the money it received and is entitled to the money it seeks in the Payment Motion. In addition, the Receiver's claims also raise a limitation defence, along with the defences of laches and estoppel by convention.

8. Contrary to the Receiver's contention, Mr. Mizrahi was not in *de facto* control of the Project (except during the Control Period) and was never its directing mind. This is clear from the fact that he continuously faced litigation from his 50% partner, who fought him over payments to contractors, payments to MI, the termination of CCM and a myriad of other issues.

9. The uncontested evidence is that Ms. Coco, through Ms. Rico and other members of the Coco team, held the accounting and financial control of the Project from the time of the implementation of the Mediator's Proposal in November 2019 onward.[5] Ms. Coco continued to sign the Payment Listings and cheques during the Control Period. According to Ms. Coco, she did so in order to maintain her insight and transparency into Project finances.[6]

10. Under the 2019 CCDC2, MI was to provide all labour to the Project, and could not recover the cost of CCM. It was also obligated to pay for all the other hard costs incurred for the Project.[7]

11. To accept the Receiver's position is to accept that more than $370 million[8] in payments for Project hard costs were paid in error. If there was an error in overlooking the 2019 CCDC2 terms as erroneously contended – it was the error of the Coco Parties, Ms. Rico, the Senior Secured Lender, its Administrative Agent and Altus, who prepared monthly reports reviewing Project costs. As noted in the Receiver's factum at paragraph 93, MI *managed* to get paid for the CCM time-based

[3] Coco at Qs 31, 117, 118, 138, and 172.
[4] Coco at Q 54.
[5] Mizrahi 2025, Exhibit M; Mizrahi 2025 at paras 83-104.
[6] Coco at Q128, lns 11-25.
[7] Kilfoyle 2024, Exhibit C at ss. 3.8.1.
[8] Mizrahi 2025, Exhibit K47 at Appendix A Capital Cost and Cost-to-Complete Summary.

labour rates. There was never any unilateral payment by Mr. Mizrahi to MI.

12. The Receiver also advances discrete contractual claims against MI. MI acknowledges that it owes the Project pursuant to the ELA for unit sales terminated owing to a default by purchasers. But MI advances a set-off claim for sums already owing to MI under the ELA.

13. For the other contractual claims, the Receiver again chooses to ignore the facts of what actually happened. The owners came to a distinct and enforceable agreement to address the HST Reserve in February 2020, later papered following a settlement of an arbitration in the summer of 2020.[9]

14. With respect to the third-party real estate costs, the Project signed an agreement with Royal LePage,[10] and the Senior Secured Lender agreed to pay for Magix (and did so).[11]

15. The $100,000 monthly marketing invoices are included in MI's Residential Management Fee, a large portion of which is owing to MI and forms a further basis for a set-off claim.[12]

16. The contractual claims concerning the HST Reserve, Magix and the monthly marketing invoices also fail due to the lapse of the limitation period many years ago.

17. The Project is incredibly complex. Its construction and development were messy due in part to infighting and skirmishes between owners. But ultimately the story is a relatively clear one. The Project was developed on a cost-plus basis because the Project had not yet been fully designed, fully permitted, fully approved and budgeted.[13] The design, cost and schedule were moving targets. This was known to and agreed to by all. MI, a general contractor, has been scape-goated for the fall of an ambitious and inspiring development, sabotaged by unprecedented turmoil due to a global pandemic, labour strikes and infighting. To say otherwise is to simply ignore what

[9] Mizrahi 2025 at paras 161-180, Exhibits W, X, Y, Z, AA and BB; Mizrahi Supplemental at Ex D.
[10] Mizrahi 2025 at paras 192-202; Fifth Report, Appendix 47.
[11] Mizrahi 2025 at paras 192-202; Fifth Report, Appendix 46.
[12] Mizrahi 2025 at paras 189 and 191, Exhibit GG.
[13] Mizrahi Cross at Qs 189, 254-255.

happened and to ignore the truth.

PART TWO – RESPONSE TO RECEIVER'S FACTUAL AND LEGAL CLAIMS

A. The Receiver's Position on the 2019 CCDC2 is Inherently Inconsistent

18. The Receiver's "overpayment" claim for labour costs relies on the 2019 CCDC2 and, in particular, the provision requiring MI, as general contractor, to provide labour to the Project.

19. The Receiver appears to acknowledge that the payments to CCM for its labour were not objectionable. It solely focuses on payments made to MI for labour it provided to the Project as contrary to the 2019 CCDC2.

20. The Receiver's focus on MI's lack of experience building a high-rise building like The One (which is itself unique) is irrelevant and incorrect. MI brought in a team of professionals with experience constructing high-rise developments.[14] The Receiver's position is also inconsistent with Ms. Coco, Aviva-Westmont, CERIECO, Hana Financial and the Senior Secured Lender having invested over $1 billion in the Project knowing it would be constructed and developed by MI.

21. The ultimate issue is whether the Project and MI were bound by the terms of the 2019 CCDC2 – a contract that was never implemented. The Receiver contends MI "brazenly" breached the 2019 CCDC2, but it did not. The payments to MI were authorized by the Project and its Senior Secured Lender. MI did not pay itself. Mr. Mizrahi did not pay MI. There were no secret payments. There was no breach of contract. At issue is the Project's payment practices, not MI's payment practices.

22. The 2019 CCDC2 as a fixed-price contract specifically states that MI is to provide, not just labour at its own expense, but effectively everything conceivably required to construct the building, including "labour, *Products*, tools, *Construction Equipment*, water, heat, light, power, transportation, and other facilities and services necessary for the performance of the *Work*." *Work*

[14] Kilfoyle 2024, Exhibit N; See resume of Bob Scott and Jeff Murva.

includes "concrete and reinforced concrete work", "masonry and tile work", "carpentry and joinery work", "waterproofing", "mechanical work", and "painting work". *Products* means the "material, machinery, equipment and fixtures forming the *Work*, but does not include *Construction Equipment." Construction Equipment* means "all machinery and equipment…that is required for preparing, fabricating, conveying, erecting or otherwise performing the *Work*". [15]

23. It is not just the procedure for the payment of fees to MI that was never undertaken, but the entirety of the 2019 CCDC2 payment terms. MI sought reimbursement of all recoverable hard costs for the Project and these expenses were paid without objection. Even during the receivership, the Receiver paid these costs. This reveals the inherent inconsistency in the Receiver's position.

24. If MI and the Project were bound by this provision in the 2019 CCDC2, then the payments to CCM were also contrary to the contract. MI would have been obligated to pay for all Project hard costs. It would have had to pay for the utilities, the concrete, the concrete pump, the cranes, dump trucks, elevators, hammers, paint brushes, nails, bricks and the millions of hard costs incurred to construct Canada's tallest residential tower.

25. The 2019 CCDC2 confirms Altus' role in the Project in reviewing and approving payments to MI, not just payment to MI of CM Fees, but all payments.[16] It is the complete payment history of the Project that establishes the Project operated on a cost-plus basis.

26. The Receiver's factum wrongly claims that MI "breached" the 2019 CCDC2 (without advancing a claim in contract) because its payment provisions were never implemented. This entirely ignores that neither MI, nor Mr. Mizrahi, held the purse strings. They were incapable of affecting payment to MI without the cooperation and authorization of Ms. Coco (except during the Control Period, but even then, Ms. Coco approved those payments), and the Senior Secured Lender. Payments

[15] Kilfoyle 2024, Exhibit C at ss. 3.8.1, and Definitions 3, 14, and 25,
[16] Kilfoyle 2024, Exhibit C at s. 2.5.5.

were made to MI after the expiry of the Control Period over the objection of Ms. Coco, but they followed the exact form of all of the past Project payments.

27. The final Altus Report before the receivership establishes that the construction budget was for $635,880,755, of which $379,294,174 had been incurred.[17] The Project had spent $107,468,339 on general requirements, $37,730,196 on site work, $63,746,358 on concrete, $27,471,647 on metals, $58,796,997 on doors and windows, $21,260,684 on conveying systems and, among other things, $23,543,488 on mechanical systems.[18] Altus did not consider MI's entitlement to be paid based on a percentage of completion of the Project. Not once did Ms. Coco, Altus, or the Senior Secured Lender (or the Receiver) deny MI's claim for payment of hard costs incurred.

28. A breach of contract means that one of the parties to the contract did something that they should not have done, or failed to do something they were required to do.[19] MI did not breach the 2019 CCDC2 when it was paid *by the Project* as part of the monthly construction draw process.

29. The Receiver cites the Supreme Court of Canada's decision in *Jedfro* for the proposition that the 2019 CCDC2 cannot be discharged absent the parties reaching a new agreement to terminate the 2019 CCDC2.[20] This is only relevant to a claim to enforce the terms of the 2019 CCDC2. The Receiver's Notice of Motion makes clear that the overpayment claim is not a claim in contract.[21]

30. Nonetheless, the Payment Listings are evidence of the agreement to develop this Project on a cost-plus basis, as are the Mediator's Proposal and the Control Agreement. These establish that there was an agreement not to proceed with the payment terms under the 2019 CCDC2.

31. In the Construction Financing Release Notices the beneficial owners confirmed that there are no

[17] Mizrahi 2025, Exhibit K47 at Appendix A Capital Cost and Cost-to-Complete Summary.
[18] Mizrahi 2025, Exhibit K47 at Appendix H Construction Budget and Cost Report.
[19] *Behrouzi v Yan*, 2024 BCJ No 2047 at para 15.
[20] *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55
[21] Receiver's Motion Record, dated October 18, 2024, Tab 1 Notice of Cross-Motion at para 3.

defaults under the Credit Agreement. Yet, the Receiver claims that despite Ms. Coco signing these forms and testifying that she "conceded" her objections about the payment of fees to MI, she was compelled to authorize the payments and could renew her objections years later.

32. Ms. Coco testified she signed the Payment Listings as the "lessor of two evils".[22] She clearly considered contesting the payment practice under the 2014 CCDC2 and the 2019 CCDC2, and she chose not to and "conceded" to it.[23]

33. Even the payments to MI by the Receiver during the receivership are inconsistent with the Receiver's claim against MI. Initially, the Receiver claimed MI was not entitled to a 5% CM Fee *and* the time-based CCM labour rates. It paid MI a CM Fee of 5% on a reduced amount for the time-based labour rates. But the corollary of the Receiver's interpretation of the 2019 CCDC2 is that MI was not entitled to anything for the time-based labour rates.

34. Incredibly, the Receiver argues payments to MI were made under a "practical compulsion" by Ms. Coco to argue the Project can recover the money freely paid to MI from November 2020 to August 2022, and those paid over Ms. Coco's protests from August 2022 to August 2023. This completely ignores Ms. Coco's evidence and paints this experienced, sophisticated and litigious businesswoman as a paper tiger, which she clearly is not.

35. Practical compulsion only applies when the money is paid "under the compulsion of urgent and pressing necessity, or of seizure, actual or threatened".[24] It is an exception to the general rule that money is "not recoverable when it is paid with knowledge of the facts and in the circumstances where there is no legal obligation to pay".[25] It is abundantly clear that there was no practical compulsion for Ms. Coco. She brought an arbitration to challenge the payments to MI. She

[22] Coco at Q 54.
[23] Coco at Qs 31, 117, 118, 138, and 172.
[24] *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership*, 2017 BCCA 307 at para 12.
[25] *BNSF Railway Company v Teck Metals Ltd.*, 2020 BCSC 1133 at para 532.

"conceded" the issue.[26] While she later renewed her complaints, she brought another arbitration proceeding and did not litigate her complaints about payments to MI.[27] The payments to MI from November 2020 to August 2022 were not under protest. Ms. Coco signed the Payment Listings. There is absolutely no evidence of any threats or seizure by MI.

36. The Receiver's claim requires the court to ignore what actually happened. It also undermines all of the payments of Project hard costs. It is inconsistent with the 2019 CCDC2, the payment practices, the Payment Listings, the Mediator's Proposal, the Control Agreement and the law.

B. The Entitlement to the 5% CM Fee Survives the Termination of the Control Agreement

37. The Receiver argues that the entitlement to a 5% CM Fee expired when the Control Agreement expired, despite the unambiguous language of the agreement. The Receiver relies on an arbitral decision that struck down the Control Resolution, but the panel did not consider paragraph 3 of the Control Agreement granting MI the retroactive entitlement to a 5% CM Fee.[28]

38. The panel's decision on the Control Resolution did identify the central purpose of the Control Agreement as giving Mr. Mizrahi control of the Project during the Control Period. It does not follow that the entitlement to a 5% CM Fee ends when the Control Period ends. To hold otherwise, is to ignore the unambiguous language of paragraph 3.[29] It is also inconsistent with the retroactive payment to MI of a CM Fee to ensure that, at all times, it received a 5% CM Fee.

C. The Senior Secured Lender's Approval of MI's Claim for Payment is Relevant

39. The Receiver contends that the Senior Secured Lender's knowledge and agreement with the Project's payment practices is irrelevant. It is not.

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[26] Coco at Qs 31, 117, 118, 138, and 172.
[27] Fifth Report, Appendix 23, Arbitral Award.
[28] Fifth Report, Appendix 23, Arbitral Award; Mizrahi 2025, Exhibit Q Control Agreement at 3.
[29] *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 SCR 129 at para 55; *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633 at para 57.

40. The Senior Secured Lender held the purse strings and undertook exacting reviews of the construction draws.[30] The Senior Secured Lender's consultant, Altus, was contractually obligated to review the construction draws to ensure they complied with Project contracts.[31]

41. The Senior Secured Lender is in the driver's seat of this Project and this litigation and instructs the Receiver/Monitor, A&M. It chose to sit silent knowing that its knowledge and agreement of the payment practices was directly put in issue by MI. MI's position is supported by the project documents and Ms. Coco's testimony. Ms. Coco's described the Senior Secured Lender's response to her complaints in August 2022 about payments to MI as "belligerent".[32] The Senior Secured Lender had no interest in Ms. Coco's complaints. Afterall, as she freely admitted, she had "conceded" the issue of the payment to MI as the "lessor of two evils" long ago.[33]

42. Suggesting that the Senior Secured Lender and Altus did not understand what they were paying and approving is nonsense. The Senior Secured Lender no doubt knew and understood that MI was seeking and obtaining payment for Project hard costs and charging the Project a CM Fee as a percentage of hard costs. It is patently clear in the payment records. There is no allegation of fraud or even a lack of transparency. The Senior Secured Lender knew of the CCDC5A and knew its labour rates.[34] It knew that MI sought to take on the work of CCM.[35] All of MI's invoices for labour included the same CCM time-based labour rates under the CCDC5A.[36]

43. The Receiver relies on a November 2020 email exchange between the Senior Secured Lender and its lawyer as evidence that it thought the project was proceeding on a fixed-price basis.[37]

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[30] Kilfoyle 2024 at paras 27.
[31] Kilfoyle 2024, Exhibit C at s. 2.5.5.
[32] Coco at Q130.
[33] Coco at Q 54.
[34] Mizrahi 2025, Exhibit H: email with Senior Secured Lender enclosing CCDC5A with labour rates.
[35] Kilfoyle 2024; Exhibit N Transition Deck provided to Senior Secured Lender.
[36] Receiver's Answers, Question 8.
[37] Mizrahi 2025, Exhibit H.

44. This email exchange establishes that the Senior Secured Lender was specifically reminded by its counsel of the terms of the 2019 CCDC2. This advice was given in the wake of CCM's termination. The Senior Secured Lender was advised: (1) that there is no contract between CCM and the Project; (2) that the 2019 CCDC2 is a fixed-price contract; and (3) that MI was only entitled to payment on the basis of a percentage of completion of the Project.[38] Despite this advice, the Senior Secured Lender disregarded all of the payment terms of the 2019 CCDC2 over the 35 months from November 2020 until the appointment of the Receiver.

45. This exchange establishes that the stakeholders knew and understood that the Project was being developed on a cost-plus basis. To say otherwise is to offend the intelligence of those involved.

D. MI was Entitled to the Amounts it was Paid, and, in the Alternative, the Receiver's Claims are Time-Barred

46. MI maintains that it was entitled to the fees and amounts it was paid by the Project. In any event, the Receiver's claim against MI for overpayment is barred by the expiry of the limitation period.

47. A receivership does not reset the limitations clock.[39] There was a significant period of time in which Ms. Coco and Mr. Mizrahi shared control of the Project. Approximately 47 months lapsed between the time MI began charging the Project for the CCM time-based labour rates in November 2020 to October 2024 when the Receiver commenced these proceedings.

48. The Receiver's own version of events establishes that the Project and Ms. Coco knew that MI was being paid the CCM time-based labour rates as of November 2020. Ms. Coco commenced an arbitration proceeding to prohibit MI from charging these rates.[40] She abandoned that arbitration.

49. While the Receiver repeatedly states that Ms. Coco did not "withdraw" the arbitration, it ignores

[38] Mizrahi 2025, Exhibit H.
[39] *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32 at para 175.
[40] Coco Submissions, Fifth Report, Appendix 13.

her evidence that she had "conceded" the issue.[41] The fact that Ms. Coco elected to try to sell her interest in the Project to Mr. Mizrahi may explain why she did not commence an action immediately, but it does not explain her lack of action upon the expiry of the Control Period in August 2022. It also does not amount to a tolling agreement.

50. Ms. Coco sued Mr. Mizrahi over the Control Resolution. She advanced a claim of oppression. By the time the arbitral panel released its decision on the Control Resolution in July 2023, Ms. Coco had known that MI was charging the CCM labour-rates and a CM Fee since November 2020.

51. There are no allegations of fraud raised by the Receiver. The payment practices challenged by the Receiver were transparent and consistent. Absent fraud there is no reason to apply the corporate attribution to extend the date of discoverability.[42] The claim advanced by the Receiver was discoverable in November 2020 and Ms. Coco was actively litigating her complaints. She elected not to pursue her complaints about the payments to MI.[43]

52. The overpayment claim was discovered and known to the Project and its beneficial owners in November 2020. At that time, Ms. Coco was aware that MI was paid the CCM time-based labour rates[44], Ms. Coco knew that the 2019 CCDC2 specified a fixed-price,[45] and she obviously knew that a legal proceeding was available as she not only commenced an arbitration to contest the issue,[46] she threatened a derivative action on behalf of the Project,[47] and she subsequently commenced a further arbitration against Mr. Mizrahi.[48] In November 2020, the Project had actual knowledge of all of the facts relied upon by the Receiver in its claim for overpayment against MI.

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[41] Coco at Qs 31, 117, 118, 138, and 172.
[42] *Aquino v Bonfield*, 2024 SCC 31 at para 82.
[43] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at para 100.
[44] Coco at Qs 117 and 205; Coco Submissions, Fifth Report, Appendix 16.
[45] Coco at Qs 31, 117, 118, 138, and 172.
[46] Coco Submissions, Fifth Report, Appendix 16.
[47] Letter from Foglers to Lax O'Sullivan dated October 28, 2020, Fifth Report, Appendix 13.
[48] Fifth Report, Appendix 23 Arbitral Award.

E. MI is Owed Money and a Set-Off under the Exclusive Listing Agreement

53. The ELA entitles MI to the payment of a commission on Project sales equal to 4.89%, net of HST of the sale price of any unit. The commission to MI is payable under the ELA in three tranches: (1) 33% upon the execution of the purchase agreements; (2) 33% upon construction financing; and (3) 34% upon the closing of each unit. [49]

54. MI has not received the final tranche of the fees payable under the ELA as no closings have occurred. On March 27, 2025, the Receiver disclaimed the ELA, giving MI a right to claim damages and set-off against the Project for this breach of contract.[50] Under the terms of the ELA, MI is entitled to a further commission of $9,627,992.64.[51]

55. Even if the unit sales had been disclaimed by the Receiver, MI would be entitled to its commission pursuant to s. 3 of the ELA from the deposits paid by the purchasers.[52]

56. MI acknowledges that the ELA requires repayment of commissions paid to MI for unit sales terminated owing to the default by purchasers. The majority of unit sales have not been terminated. Given the disclaimer of the ELA gives MI a right to sue the Project for breach of contract and a set-off claim, any obligation MI has to the Project for repayment of commissions under the ELA are set-off against MI's entitlement to commissions under the ELA, as reviewed below.

F. Retaining Both Magix and Royal LePage was Authorized

57. Royal LePage was retained by the Project. Mr. Mizrahi signed the agreement during the Control Period, as he was entitled to do.[53] The Senior Secured Lender reviewed the request for payment of the cost of Royal LePage and approved it as part of the Project's usual payment practices.[54] MI

[49] Mizrahi 2025, Exhibit HH ELA at ss. 4(a)(i) and 4(a)(ii) - Fee reduced to 2.25% for "Friends and Family".
[50] *Forjay Management Ltd v 0981478 BC Ltd*, 2018 BCSC 527 at para 38.
[51] Mizrahi Supplementary at para 11 and Exhibit F.
[52] Mizrahi 2025, Exhibit HH ELA at s. 3.
[53] Fifth Report, Appendix 47 Listing Agreement.
[54] Kilfoyle 2024, Exhibit K February 2023 Payment Listing at pg. 5; Mizrahi 2025 at paras 195.

is not liable whatsoever for the cost of Royal LePage. It is a Project expense and a Project contract. Royal LePage provided the Project with valuable services. Unit sales are the fundamental revenue source for the Project.

58. Magix is a foreign real estate marketing firm retained by MI to secure overseas sales during the COVID-19 pandemic.[55] It was impossible to sell units internationally during the pandemic. In August 2022, MI sought payment by the Project for the cost of Magix and those payments were included and authorized in a monthly construction draw release.[56] The Senior Secured Lender explicitly approved of retaining Magix, finding it to be "required for the project".[57]

59. The ELA provides that the Project is liable for "the advertising and sales promotion in connection with the sales of the Units inclusive of promotional material and displays."[58] Both Royal LePage and Magix are proper Project expenses.

60. The Receiver's claims against MI related to Royal LePage and Magix ignore the approval of the payments to these third-parties as part of the Project's normal payment practices and disregards the approval of retaining Magix by the Senior Secured Lender. In addition, the Receiver's claim with respect to Magix was brought more than two years after the payment was first made in August 2022 and is therefore statute-barred.

G. The HST Reserve is Not Owed and, in the Alternative, is Statute-Barred

61. The Receiver misconstrues the facts and circumstances surrounding the HST Reserve. There is no justification to ignore the undisputed evidence of Ms. Coco that a set-off agreement on the HST Reserve was reached. She confirmed this agreement in a June 1, 2020 affidavit.[59]

[55] Mizrahi 2025 at paras 192.
[56] Kilfoyle 2024 Exhibit J August 2022 Payment Listing at pg. 5.
[57] Fifth Report, Appendix 46 Correspondence re Senior Secured Lenders approved Magix.
[58] Mizrahi 2025, Exhibit HH ELA at s. 5.
[59] Mizrahi 2025 at para 167.

62. The HST Reserve Set-Off was first proposed in January 2020. Then the Project owed MI $2,064,799.[60] The proposal was implemented in February 2020.[61] The paperwork was drafted after the 2020 Resolution to settle a 2020 arbitration proceeding between Mr. Mizrahi and Ms. Coco.[62] Ms. Coco never signed the paperwork and never responded to the draft. It was ultimately signed by Mr. Mizrahi pursuant to the Control Agreement.[63] The Set Off Agreement follows the initial proposal in January 2020 and the implementation of that proposal in February 2020.

63. MI is not liable to pay the Project $1.2 million to be held in trust. The record is undisputed that the obligation under the Mediator's Proposal was amended, both by the emails between Mr. Kilfoyle and Ms. Rico, and the terms of the 2020 Resolution.[64]

64. Under the Set-Off Agreement, the $1.2 million was credited against the Mizrahi units. If the estimated HST liability was realized, MI would pay that tax liability, and the tax liability would be credited to the deposits owed on the Mizrahi Units. If the estimated HST liability was not realized by the closing of the Mizrahi Units, it would not be credited to the purchase price and an amount equal to the tax liability would be paid by the Debtor into a trust account.[65]

65. The Receiver called Ms. Coco and elected not to examine her *on her testimony* that this agreement was implemented and in place. The Receiver's misapprehension is no basis to claim MI is liable to pay $1.2 million. In the alternative, if any amounts are owing pursuant to the Mediator's Proposal, MI claims a set-off against the amounts owing to MI pursuant to that agreement.

66. Not only is MI not liable to the Project for the HST Reserve, but the claim is statute-barred. The Receiver claims the failure to remit the HST Reserve amounts to a breach of the November 2019

[60] Mizrahi 2025, Exhibit W.
[61] Mizrahi 2025 at paras 169-172, Exhibits X and Y.
[62] Mizrahi 2025, Exhibit Z.
[63] Mizrahi 2025 at paras 177-178, Exhibits AA, and BB.
[64] Mizrahi 2025 at paras 167-178, Exhibits X, Y and Z.
[65] Mizrahi Supplemental at Exhibit D Executed Set-Off Agreement.

Mediator's Proposal. Setting aside the evidence of a subsequent agreement and assuming MI had two-years to set aside the funds, then the limitation period for this alleged breach of the Mediator's Proposal expired in November 2023.

H. The Monthly Marketing Expenses and the Residential Management Fee

67. The Receiver claims $2.7 million from MI for repayment of monthly marketing expenses charged to and paid by the Project. The monthly marketing invoices were included in the payment listings from June 2021 to August 2023. From June 2021 to July 2022, Ms. Coco signed and authorized the payments to MI as part of the monthly payment process. At all times, the Senior Secured Lender reviewed the requests for payments and approved the payments.[66] The monthly marketing invoices do not constitute a breach of the Mediator's Proposal but are just a component of the Residential Management Fee.

68. The Receiver appears to take the position that MI is not entitled to a Residential Management Fee on the sale of units to Mr. Mizrahi, his family or friends. The Mediator's Proposal is clear. The Residential Management Fee is calculated on "all existing and future residential sales equal to 2.0% of the selling price, including upgrades and extras".[67] The Receiver disclaimed the Mediator's Proposal giving MI claim to damages and a right to set-off.[68]

69. The Receiver has identified inaccuracies in MI's calculation of the Residential Management Fee and an adjustment is required. Adjusting to account for the APS with insufficient deposits, MI claims a Residential Management Fee of $3,663,734.23.[69]

70. In the alternative, the Project's claim for breach of contract for payment of the monthly marketing invoices is statute-barred. The Receiver acknowledges that the monthly marketing invoices began

[66] Kilfoyle 2024 Exhibits I (June-December 2021), J (2022) and K (2023).
[67] Mizrahi 2025 Exhibit M Mediator's Proposal.
[68] *Forjay Management Ltd v 0981478 BC Ltd*, 2018 BCSC 527 at para 38.
[69] Schedule C – Residential Management Fee Calculation.

in June 2021. At that time, Ms. Rico was in charge of reviewing the Project finances.[70] She and Ms. Coco reviewed and approved the monthly construction draw requests when compiled by MI. MI simply sought payment. The Project (and the Senior Secured Lender) decided to pay MI these amounts. If MI seeking payment of the monthly marketing invoices constitutes a breach of contract, then that breach of contract arose in June 2021.

I. Legal and Equitable Set-Off Apply

71. In the alternative to the response to the contractual claims of the Receiver set out above, both legal and equitable set-off operate to eliminate any of the Receiver's contractual claims against MI. Section 97(3) of the *BIA* recognizes the application of the law of set-off.[71]

72. *Bennet on Receiverships* explains the consequences of a receiver disclaiming a contract as follows:

> If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has **a claim for damages and can claim set-off against any moneys that it owes to the debtor.**[72] **[emphasis added]**

73. Legal set-off applies to mutual, liquidated debts or damages between the same parties.[73] The claims advanced by the Receiver for breach of contract all concern the Mediator's Proposal and/or the ELA. MI's claim for the Residential Management Fee and the payment of commissions under the ELA arise from the exact same contracts. Legal set-off therefore applies to set-off these mutual, liquidated claims (should MI be liable) between the parties to these agreements.

74. Equitable set-off is applied to claims when the relationship between the obligations is sufficiently close.[74] The defending party must show equitable grounds for why it would be protected by a set-off defence.[75] Lord Denning described the issue as "what should we do now so as to ensure fair

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[70] Mizrahi 2025 at paras 83-104.
[71] *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3 at s.97(3).
[72] Cited in *Forjay Management Ltd v 0981478 BC Ltd*, 2018 BCSC 527 at para 38
[73] *Thyssenkrupp Elevator (Canada) Inc v 1147335 Ontario Inc*, 2015 ONSC 503 at para 9.
[74] *Green v. Mirtech International Security Inc.,* 2009 CanLII 2905 (ON SC) at para 16.
[75] *Algoma Steel Inc v Union Gas Ltd*, [2003] OJ No 71 at para 26.

dealing between the parties?"[76]

75. In this case, MI's claim for damages for the Residential Management Fee and the commissions under the ELA are not recoverable against the Project given its secured debt. If equitable set-off is not applied, MI effectively loses its right of action while the Project (and particularly the Senior Secured Lender) reaps the rewards. There are no allegations of fraud or any impropriety that amounts to "unclean hands". If the set-off defences are not accepted, the Project will enjoy a windfall, and MI will be left without recourse.

J. The Receiver's Claims are Barred by Laches

76. In the alternative to MI's position that it was entitled to all amounts it received, the Receiver's claim for overpayment is foreclosed by the doctrine of laches. To reach back now and try to unwind years of payments that were known to all relevant stakeholders is entirely unreasonable.

77. As noted, no cause of action is identified or advanced by the Receiver for its "overpayment" claim. Presumably the Receiver relies on equity for the repayment of funds it says MI was not entitled to receive. The claim with respect to the CCM time-based labour and CM Fees cannot be based in contract because MI was not the party that paid the money. It simply requested and sought payment, and the evidence establishes that MI could not pay itself on its own accord. Even after the Control Period expired, MI was only paid when the Senior Secured Lender agreed to do so over the objections of Ms. Coco.

78. There are two branches of laches (1) acquiescence by the claimant, and (2) any change of position by the defendant arising from reasonable reliance on the claimant's acceptance of the *status quo*.[77]

79. In *M(K),* the Supreme Court of Canada confirmed that the two grounds are to be treated as "distinct branches to the laches doctrine and either will suffice as a defence to a claim in equity." Laches

[76] *Algoma Steel Inc v Union Gas Ltd*, [2003] OJ No 71 at para 29.
[77] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 145 ("*Manitoba*").

must be resolved as a matter of justice between the parties.[78]

80. There is no specific time limit for laches. The equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay with full knowledge of their rights.[79] Both branches of the laches test apply to bar the Project's claim for "overpayment".

81. There was nothing preventing the Project or its beneficial owner, Ms. Coco, from advancing the claims the Receiver now advances. Ms. Coco raised her complaints in November 2020 and then again raised them in August 2022 at the end of the Control Period. She then commenced an arbitration against Mr. Mizrahi. It was within her rights and her capacity to challenge the payments to MI for the CCM time-based labour rates.

82. The Receiver criticizes MI for now seeking an order that it was entitled to receive the amounts for which it sought and received payment from the Project through the dispute resolution procedures with Ms. Coco. This submission emphasizes that Ms. Coco chose not to act. There was no need for MI to bring a proceeding to confirm the payment practices that had been in place for years. She acquiesced to the Project's payment practices. MI reasonably relied on the Project's payment practices continuing and the *status quo* when it incurred hundreds of millions in Project hard costs and continued to provide labour to the Project after the termination of CCM.

K. Estoppel by Convention Barrs the Receiver's Claim for Overpayment

83. The Receiver's claim for "overpayment" is also defeated by the doctrine of estoppel by convention, which requires:

> 1. The parties' dealings must have been based on a shared assumption of fact…: estoppel requires manifest representation by…conduct creating a mutual assumption…. estoppel can arise out of *silence* (impliedly);
>
> 2. A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position;

[78] *M.(K.) v M.(H.)*, [1992] 3. S.C.R. 6 at para 98.
[79] *Manitoba* at para 145; *Barker v Barker* 2020 ONSC 3746 at para 1303.

3. It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption.[80]

84. The Supreme Court of Canada held: "The court must determine what state of affairs the parties have accepted and decide whether there is sufficient certainty and clarity in the terms of the convention to give rise to any enforceable equity."[81]

85. The first branch of estoppel by convention is met. Years of payments to MI for all Project hard costs were paid by the Project, authorized by Ms. Coco, and paid by the Senior Secured Lender. Ms. Coco signed dozens of Payment Listings authorizing MI's claim for payments.[82] She did not pursue her CCM arbitration. Ms. Coco testified that she "conceded" to the Project being developed on a cost-plus basis.[83] The Senior Secured Lender ignored her complaints.[84]

86. Ms. Coco, aware that the Project was developed on a cost-plus basis, settled her issues with Mr. Mizrahi through the Mediator's Proposal, amending the "original structure" of payment to MI.[85] The settlement was to "resolve all outstanding issues between the parties".[86]

87. Yet in October 2024, nearly five years after the Mediator's Proposal, the Receiver brings a claim premised on the enforceability of the 2019 CCDC2, which was never once implemented.

88. The second branch of estoppel by convention is met. MI acted in reasonable reliance on this convention. It continued to undertake its work and was paid in accordance with the Project's payment practices. It relied on Ms. Coco's "conceding" the issue, along with the Control Agreement retroactively reimbursing MI for the CM Fees reduced by the Mediator's Proposal.[87]

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[80] *Ryan v. Moore*, 2005 SCC 38 at para 59 ("*Ryan*").
[81] *Ryan* at para 61.
[82] Kilfoyle 2024, Exhibit G, H, I and J.
[83] Coco at Qs 31, 117, 118, 138, and 172.
[84] Coco at Q130.
[85] Mizrahi 2025, Exhibit M Mediator's Proposal at s. 8.
[86] Mizrahi 2025, Exhibit M Mediator's Proposal at s. 10.
[87] Coco at Qs 31, 117, 118, 138, and 172; Mizrahi 2025, Exhibits M (Mediator's Proposal) and Q (Control Agreement)

Ms. Coco signed the Payment Listing for that retroactive payment and for the payment of the CCM time-based labour rates to MI.[88]

89. This third branch of estoppel by convention is met. It would be grossly unfair for the Project to resile from the shared understanding that payments made to MI for years were permitted, in the context of many arbitration proceedings, Ms. Coco's concession, and no attempt to challenge those payment practices.

90. As a result, the Receiver's claim for overpayment offends estoppel by convention. It would be unjust to allow the Project to unwind years of payments paid pursuant to its own transparent and well-known payment practices.

L. MI's Procedural Objections

91. MI raises the following objections that arise from the Receiver's motion:

1. The Receiver's motion raises "complicated and contentious"[89] facts that should not be decided on a summary basis;
2. The Core Architect and Knightsbridge Reports are inadmissible hearsay;[90] and
3. Mr. Finnegan is not an expert, and his evidence is limited to what he told the Receiver in February 2024 and is not proof of the truth. [91] There is no evidence of market rates.

ALL OF WHICH IS RESPECFTULLY SUBMITTED June 2, 2025

J. R. Morse

Jerome R. Morse

D Trafford

David M. Trafford

[88] Mizrahi 2025 at paras 125-126, Exhibit Q.
[89] Factum of the Receiver at para 3.
[90] Fifth Report, Appendices 30, 33, 34, 35, 36, and 40.
[91] Endorsement of Osborne J., March 29, 2025 at para 11.

LAWYER'S CERTIFICATE

I, David Trafford, counsel for Mizrahi Inc. am satisfied as to the authenticity of every authority listed in the Responding Factum of Mizrahi Inc. as required by *Rule* 4.06.1.

D Trafford

David M. Trafford

SCHEDULE A

1. *Behrouzi v Yan,* 2024 BCJ No 2047
2. *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55
3. *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership*, 2017 BCCA 307
4. *BNSF Railway Company v Teck Metals Ltd.*, 2020 BCSC 1133
5. *Eli Lilly & Co. v. Novopharm Ltd.,* [1998] 2 SCR 129
6. *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633
7. *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32
8. *Aquino v Bonfield*, 2024 SCC 31
9. *Deloitte & Touche v. Livent Inc. (Receiver of),* 2017 SCC 63
10. *Forjay Management Ltd v 0981478 BC Ltd*, 2018 BCSC 527
11. *Thyssenkrupp Elevator (Canada) Inc v 1147335 Ontario Inc*, 2015 ONSC 503
12. *Green v. Mirtech International Security Inc.,* 2009 CanLII 2905 (ON SC)
13. *Algoma Steel Inc v Union Gas Ltd*, [2003] OJ No 71
14. *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14
15. *M.(K.) v M.(H.)*, [1992] 3. S.C.R. 6
16. *Barker v Barker* 2020 ONSC 3746
17. *Ryan v. Moore*, 2005 SCC 38

SCHEDULE B

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 at s.97

Protected transactions

97 (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:

(a) a payment by the bankrupt to any of the bankrupt's creditors;

(b) a payment or delivery to the bankrupt;

(c) a transfer by the bankrupt for adequate valuable consideration; and

(d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

Definition of *adequate valuable consideration*

(2) The expression ***adequate valuable consideration*** in paragraph (1)(c) means a consideration of fair and reasonable money value with relation to that of the property assigned or transferred, and in paragraph (1)(d) means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

Law of set-off or compensation

(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

R.S., 1985, c. B-3, s. 971992, c. 27, s. 411997, c. 12, s. 802004, c. 25, s. 582005, c. 47, s. 74

SCHEDULE C – RESIDENTIAL MANAGEMENT FEE CALCULATION

$6,213,429.69 for sold units as part of tranche 1[1]

$6,213,429.69 owing to MI as tranche 2[2]

Less $719,121.49 already paid to MI[3]

Less $2,700,000 for the monthly marketing expenses[4]

Less $2,648,733.26 reduction due to the Mediator's Proposal[5]

Less $1,269,270.40 reduction due to terminated APS owing to purchaser default[6]

Less $1,426,000 reduction due to other defaulting purchasers (2% of total sales price of $71.3 million)[7]

Total owing: $3,663,734.23

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[1] Mizrahi 2025 at paras 188-189, Exhibit GG.
[2] Mizrahi 2025 at paras 188-189, Exhibit GG.
[3] Mizrahi 2025 at paras 188-189.
[4] Mizrahi 2025 at paras 188-189.
[5] Mizrahi 2020, Exhibit M Mediator's Proposal at s. 8 at pg. 6, Exhibit W January 10, 2020 letter of Ms. Nadia Campion calculating Residential Management Fee offset as per Mediator's Proposal.
[6] Fifth Report at paras 13.22 to 13.25: 2% of total purchase price of $63,463,520 equals $1,269,270.40.
[7] Fifth Report at paras 13.26: Receiver identifies that MI received $2.3 million in ELA fees on units with insufficient deposits, where purchasers owe approximately $12 million in deposits. Given ELA fee of $2.3 million, with a further 34% of fee payable on closing and total fee equaling 4.89% of purchase price, it follows that total value of further units identified by Receiver with insufficient deposits is equal to $71.3 million.

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

-and-

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

Applicant

Respondents

Court File No. CV-23-00707839-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

RESPONDING FACTUM OF MIZRAHI INC. (RECEIVER'S CROSS-MOTION)

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