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

Applicant

- and -

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

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 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

RESPONDING FACTUM OF THE RECEIVER
(MI Payment Motion)
Returnable June 17-19, 2025

June 2, 2025

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ADDENDA

PART I – OVERVIEW

1. MI's motion is founded on the assertion that paragraph 17 of the Receivership Order ("**Paragraph 17**") required payments to MI based on the MI Payment Practices,[1] whether or not the Debtors were legally required to make these payments and whether or not the payments were commercially reasonable. MI's argument is contradicted by the text, context and purpose of Paragraph 17.

2. The text of Paragraph 17 does not impose any payment obligation on the Receiver. It prevents a contractor (or any other contractual counterparty) from withdrawing services *provided that* they are paid based on: (i) the Debtors' normal payment practices; (ii) a new agreement; or (iii) a court order. A contractor that is not paid in one of these three ways can withdraw its services. Nothing in Paragraph 17 requires that the Receiver pay MI (or other contractors) any amount, let alone amounts that the Debtors do not legally owe.

3. The context of Paragraph 17 further undermines MI's interpretation. The Receiver was, like all court officers, required to deal with the Debtors' property in a commercially reasonable manner for the benefit of all stakeholders. It cannot be obliged to blindly adopt the heavily contested payment practices implemented by Mr. Mizrahi when he controlled both the Debtors and MI.

4. The purpose of Paragraph 17 is also inconsistent with MI's position and consistent with the Receiver's position. Paragraph 17 facilitates stability by giving the Receiver the right (but not the obligation) to prevent contractors from withdrawing services. Requiring the Receiver to adopt

[1] Capitalized terms not defined herein are as defined in the Receiver's Moving Factum on the Receiver's Cross-Motion dated May 19, 2025 (the "**Receiver's First Factum**") or the Fifth Report of the Receiver dated October 11, 2024 (the "**Fifth Report**").

the MI Payment Practices does not further this purpose. Indeed, Paragraph 17 has no application to MI, as MI always wanted to complete the Project and never tried to withdraw its services.

5. MI argues, in the alternative, that the Debtors were contractually bound to make payments based on the MI Payment Practices. The law and the evidence do not support MI's contention. As further described in the Receiver's First Factum, MI had no contractual right to charge the Labour Rates. MI *could not* have a contractual right to charge the Labour Rates without Coco's consent, and Coco did not consent. MI argues that Coco "conceded" that MI was entitled to various payments, but Ms. Coco testified that Coco's alleged concessions were temporary and conditional on Mizrahi buying Coco's interest in the Debtors. The sale did not close, so the condition was not satisfied. The GC Agreement specifically prohibits MI charging for its own labour, and the Debtors never waived this prohibition.

6. For these reasons and those set out below, MI's motion should be dismissed.

PART II – FACTS

A. No Contract Between MI and the Debtors Authorized the MI Payment Practices

7. MI's factual argument focuses almost entirely on a binary distinction between a "cost-plus" and "fixed-price" agreement.[2] This, with respect, misses the point. MI and the Debtors entered into a series of specific contracts that had specific terms. The question is whether these contracts authorized the MI Payment Practices, not how they should be labelled.

8. As set out in the Receiver's First Factum, the GC Agreement was a fixed-price contract. MI was to be paid based on the percentage of the Project completed. The Mediator's Proposal and

[2] See, for example, MI Factum dated May 12, 2025 ("**MI Moving Factum**") at paras. 4-5, 9-10, 12, 36, 53, 55, 69, 72, 80, 82, 108.

Control Agreement modified the GC Agreement by allowing MI to charge CM Fees based on hard costs. None of these agreements allowed MI to charge the Labour Rates.

9. The Receiver's First Factum contains an accurate summary of events, based on reliable evidence. MI's recitation of facts relating to the alleged authorization of the MI Payment Practices is replete with factual inaccuracies. To the extent that they are not already covered in the Receiver's First Factum, MI's most significant inaccurate claims are addressed below.

10. **Coco did not agree to the MI Payment Practices. Coco's temporary concessions were not agreements.** MI's core factual assertion is that Coco "conceded" that the Project should be developed on a cost-plus basis[3] and that MI could charge the Labour Rates.[4] Ms. Coco gave no such evidence. To the contrary:

(a) Ms. Coco testified that when construction began in 2017, Coco "conceded" to MI receiving some additional fees "initially" because MI claimed to need additional monies at the beginning of the Project. Coco did not agree that the Project could proceed on a cost-plus basis, and Ms. Coco specifically told MI that MI was "only committing to the agreements [it] executed";[5]

(b) Ms. Coco testified that Coco executed Payment Listings that included payments of the Labour Rates "on the premise that" the Sale would close and Coco would "be paid out" by Mizrahi. She specifically said that Coco did not agree that MI could be paid based on

[3] MI Moving Factum, paras. 10, 51-52.

[4] MI Moving Factum, paras. 33, 49, 109.

[5] Cross-Examination of J. Coco ("**Coco Cross**"), q. 31-32, Cross-Examination Transcript Brief of the Receiver dated May 16, 2025 ("**Transcript Brief**"), Tab 1, pdf 13; Email from J. Coco dated November 9, 2017, Receiver's MR Vol 1, Tab 2(8), pdf p. 290.

the MI Payment Practices if the Sale fell through, and immediately objected to these practices when the Sale collapsed;[6] and

(c) Coco confirmed this testimony in response to questions from MI's counsel.[7]

11. **The Mediator's Proposal does not assist MI.** Contrary to MI's position, the Mediator's Proposal did not "confirm that the Project had been operating on a cost-plus basis".[8] The Mediator's Proposal set out certain specific terms that amended certain aspects of the pre-existing agreements between the parties.[9] It did not otherwise change those agreements. The Mediator's Proposal does not say that construction of the Project would proceed on a cost-plus basis, and it did not have that effect.

12. **MI seeks to turn the Core arbitration on its head.** In 2020, Mizrahi and Coco engaged in an arbitration before Stephen Morrison, John Keefe and The Honourable Frank J.C. Newbould, K.C. (the "**2020 Panel**") relating to whether the Debtors had to pay certain additional costs to the Project's architect of record, Core Architects Inc. ("**Core**"). Coco opposed these payments because Ms. Coco did not execute the underlying contracts between Core and the Debtors, but it ultimately agreed at the outset of the arbitration that Core should be paid. The 2020 Panel held that Mr. Mizrahi was obliged to obtain Coco's consent to Project contracts, and that it had failed to obtain that consent as it related to Core's contract.[10] However, the 2020 Panel held that if Core sued for payment it could rely on the "indoor management rule" and presume its contract with the Debtors

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[6] Coco Cross, q. 114-120, Transcript Brief, Tab 1, pdf 21-22.

[7] Coco, q. 138, 207-209, Transcript Brief, Tab 1, pdf 24, 36.

[8] MI Moving Factum, para. 72.

[9] Mediator's Proposal, p. 1, Receiver's Motion Record dated October 11, 2024 ("**Receiver's MR**") Vol 1, Tab 11, pdf 528.

[10] Arbitration Award dated October 21, 2020 ("**Core Arbitration Award**"), paras. 37 and 52, Exhibit V to Affidavit of S. Mizrahi dated January 20, 2025 ("**Mizrahi #2**"), Tab 2(V), Mizrahi Responding Record dated January 20, 2025 ("**MI RMR**") Vol 3, pdf 112, 119.

was binding.[11] While the Debtors were therefore obligated to pay the particular costs to Core, the 2020 Panel refused to award costs to Mr. Mizrahi, because he had breached his contractual obligations and "perhaps the burden of the costs incurred will have a salutary impact on future behaviour."[12]

13. This finding does not, obviously, assist MI in this case. Unlike Core, MI cannot rely on the indoor management rule. Mr. Mizrahi, and therefore MI, was fully aware that Coco had to consent to any contract between MI and the Debtors, and was aware of her repeated objections. The award was also far from an endorsement of Mr. Mizrahi's conduct.

14. **The Senior Secured Lenders' advances do not assist MI.** As detailed in the Receiver's First Factum, the Senior Secured Lenders' funding of construction draw requests is irrelevant to the status of MI's contractual entitlements, given that the Senior Secured Lenders were not parties to the Debtors' contracts with MI. The Senior Secured Lenders' refusal to engage in the dispute between Mr. Mizrahi and Coco after Coco began refusing to sign Payment Listings in August 2022 was exactly that – a refusal by the lenders to be involved in a dispute between owners.

B. The Receivership Order Does Not Require (or Reference) the MI Payment Practices

15. As noted, MI's motion rests primarily on the assertion that the Receivership Order requires payments based on the MI Payment Practices. But the Receivership Order (which was prepared with input and consent from MI[13]) does not reference the MI Payment Practices, let alone require adherence to them. The terms of the Receivership Order are inconsistent with MI's position.

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[11] Core Arbitration Award, paras. 38-40, Exhibit V to Mizrahi #2, Tab 2(V), MI RMR Vol 3, pdf 112-113.

[12] Core Arbitration Award, para. 58(B), Exhibit V to Mizrahi #2, Tab 2(V), MI RMR Vol 3, pdf 118.

[13] MI Factum, para. 122; Endorsement of Osbourne J. dated October 18, 2023, para. 42; Mizrahi #2, paras. 10-11, MI RMR Vol. 1, Tab 2, pdf 20; Cross-Examination of S. Mizrahi ("**Mizrahi Cross**"), q. 504-507, Transcript Brief, Tab 4, pdf 788.

16. **The Receivership Order granted the Receiver the right to make payments without affirming the MI Payment Practices.** The history among MI, Coco and the Debtors was complex and contentious. Accordingly, the Receivership Order specifically provided that the Receiver could make payments to MI *without* affirming any agreement between MI and the Debtors.[14] This provided the Receiver with the ability to make interim payments to MI to allow construction to continue before it made a final determination with respect to MI's entitlement under its contracts with the Debtors.

17. **The Receivership Order did not resolve the dispute between Coco and Mizrahi about the MI Payment Practices.** Coco and Mizrahi had a longstanding dispute about the MI Payment Practices when the Receiver was appointed. That dispute was not resolved in the Receivership Order. There was no evidence about the MI Payment Practices before the Court when the Receivership Order was granted and the Court found in its Endorsement dated October 18, 2023 (the "**Receivership Endorsement**") that the disagreements between Coco and Mizrahi "are for another day".[15]

18. **The Receivership Endorsement did not refer to (or authorize) MI's right to receive payments from the Debtors.** The Court noted that the Receivership Order provided "certain protections" for MI. These protections included payment of an outstanding pre-Receivership invoice, a limited stay and an order that parties supplying goods *to* MI could not discontinue the supply of goods and services during the Receivership as long as MI continued to pay for those goods and services.[16]

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[14] Receivership Order dated October 18, 2023 ("**Receivership Order**"), para. 6, Receiver's MR Vol 1, Tab 2(1), pdf 137.

[15] Endorsement of Osbourne J. dated October 18, 2023, para. 45.

[16] Endorsement of Osbourne J. dated October 18, 2023, para. 62.

19. **Paragraph 17 does not reference the MI Payment Practices.** MI's argument on this motion rests on Paragraph 17, which is based on the Model Receivership Order published by the Commercial List User's Committee with some minor changes to reflect the nature of the Project. Mr. Mizrahi had "input" into terms of the Receivership Order, but did not try to negotiate any requirement, in Paragraph 17 or elsewhere, that the Receiver make payments based on the MI Payment Practices.[17]

20. **MI negotiated for terms that are *inconsistent* with the MI Payment Practices, including paragraph 6 of the Receivership Order.** Mr. Mizrahi deposed that MI "specifically negotiated" the language in paragraph 6, which states that the Receiver is "authorized" to pay "all fees owing" under the terms of the GC Agreement and the CDMA (defined below), provided that the fees are "properly incurred" on or after September 1, 2023 "*pursuant to the terms of such agreements*" [emphasis added].[18] Neither of these contracts authorize the MI Payment Practices.[19]

21. Paragraph 6 also "authorized and directed" the Receiver to pay $783,305.03 to MI in respect of amounts allegedly owed pursuant to the GC Agreement. MI now claims that this is inaccurate despite the clear wording of the Receivership Order, and that the payment was calculated based on the MI Payment Practices and not the GC Agreement.[20] In any event, the Receiver had no knowledge of the MI Payment Practices when the Receivership Order was granted. The amount specified in paragraph 6 was provided by MI as the amount of its pre-

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[17] MI Factum, para. 122; Cross-Examination of S. Mizrahi ("**Mizrahi Cross**"), q. 521-532, Transcript Brief, Tab 4, pdf 789.

[18] Receivership Order, para. 6, Receiver's MR Vol 1, Tab 2(1), pdf 137.

[19] The GC Agreement is addressed in the Receiver's First Factum. The GC Agreement specifically prohibits MI charging separately for its own labour. The Commercial Development Management Agreement (the "**CDMA**") is attached as Exhibit A to the Affidavit of Mark Kilfoyle dated February 21, 2024. It is, primarily, an agreement relating to the development services that MI provided to the Project and does not relate to or authorize the MI Payment Practices. By Agreement re Developer Agreements dated August 30, 2019, MI confirmed that it had received the full $30 million payment owed to it under the CDMA.

[20] MI Factum, paras. 123-124, 179.

Receivership claim, and the parties agreed to pay the amount in order to avoid opposition to the Receivership Order.[21]

C. The Receiver was Transparent with MI

22. MI alleges that the Receiver misled it. This did not occur. As set forth below, the Receiver told MI, clearly, repeatedly and in writing, that it would not make payments based on the MI Payment Practices unless and until it was satisfied that MI was entitled to the payments.[22]

23. **The Receiver told MI almost immediately that it would not make payments based on the MI Payment Practices.** On October 30, 2023, approximately 12 days after the Receiver was appointed, the Receiver wrote an e-mail to MI stating that it would pay third party costs (including MI's Labour Costs) but that it would not pay MI its claimed CM Fee or Labour Profits.[23]

24. In response, MI claimed that it required more money to meet its ongoing cash flow obligations.[24] The Receiver was concerned about MI's liquidity, because MI's inability to pay its operating costs could have potentially disrupted the Project's construction. However, the basis for MI's claimed liquidity issues was unclear. Based on the information provided to the Receiver, MI earned an estimated profit of $13.1 million for its work on the Project in the year prior to the commencement of the Receivership (i.e., October 1, 2022 to September 30, 2023),[25] and it received fees totalling approximately $123 million for its work on the Project.[26]

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[21] Supplemental Report, para. 2.5, Receiver's Reply MR, Tab 1, pdf 18.

[22] Supplemental Report, para. 2.18, Receiver's Reply MR, Tab 1, pdf 21; Email from J. Nevsky dated October 20, 2023, Receiver's Reply MR, Tab 1(A), pdf 57-60.

[23] Email of S. Ferguson dated November 26, 2023, Receiver's MR Vol 1, Tab 2(3), pdf 177; Supplemental Report, paras. 2.15, Receiver's Reply MR, Tab 1, pdf 21; Email from Receiver dated October 30, 2023, Receiver's Reply MR, Tab 1(A), pdf 57-60.

[24] Supplemental Report, paras. 2.19-2.20, Receiver's Reply MR, Tab 1, pdf 22.

[25] Supplemental Report, para. 2.22, Receiver's Reply MR, Tab 1, pdf 22; Fifth Report, para. 7.12-7.13, Receiver's MR Vol 1, Tab 2, pdf 69; Receiver's Revised Analysis, Receiver's MR Vol 1, Tab 2(4), pdf 181.

[26] Email of S. Ferguson dated November 26, 2023, Receiver's MR Vol 1, Tab 2(3), pdf 177.

25. **The Receiver made payments to MI to ensure construction continued, without affirming any agreement with MI.** Despite the fact that MI should not have had liquidity issues, it was important to ensure that construction continued on the Project while the Receiver stabilized the situation and investigated MI's entitlement. Accordingly, on November 26, 2023, the Receiver advised MI that it was still not prepared to pay MI based on the MI Payment Practices, which it had determined were not contractually required or commercially reasonable, but that it would pay the Hard Costs, Recoverable Costs, and Labour Costs (but not the Labour Profits that were also included in the Labour Rates), and a 5% CM Fee thereon.[27] The Receiver made it clear that this payment was not an affirmation of any contract with MI:

> As a reminder, the Receiver continues to consider the Debtors' rights and obligations under the Construction Management Agreement and the GC Agreement (each as defined in the Order (Appointing Receiver) dated October 18, 2023 (the "Receivership Order") and any related or other contracts with MI (collectively, including the Construction Management Agreement and the GC Agreement, the "Contracts"). **The Receiver has not affirmed any Contracts and will not affirm any Contracts except by signed written communication to MI. For greater certainty, in making any payment to MI, the Receiver is not affirming any Contracts.**[28]

26. The Receiver's refusal to pay the Labour Profits (the profit embedded in the Labour Rates) resulted in a monthly reduction of approximately $1 million relative to the amounts claimed by MI in the general contractor invoices submitted to the Receiver.[29]

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[27] Supplemental Report, para. 2.27, Receiver's Reply MR, Tab 1, pdf 23; Fifth Report, para. 7.15-7.16, Receiver's MR Vol 1, Tab 2, pdf 59.

[28] Receiver's Email dated November 26, 2023, Fifth Report, Appendix 3, Receiver's MR, Tab 2(3), pdf 146.

[29] Fifth Report, para. 7.17, Receiver's MR Vol 1, Tab 2, pdf 60.

D. The Receiver Never Invoked Paragraph 17 to Prevent MI's Termination

27. Paragraph 17 has no application to MI because MI never sought to cease providing services and the Receiver never sought to prevent it from doing so.

28. **MI never tried to withdraw services from the Project.** Mr. Mizrahi admits that he knew, no later than November 26, 2023, that the Receiver would not make payments based on the MI Payment Practices.[30] Even then, MI did not write to the Receiver or move to the Court for permission to withdraw services. It continued to work on the Project and sought more funds.[31]

29. Mr. Mizrahi alleges that the Receiver told him that MI was required to continue providing services to the Project under the terms of the Receivership Order.[32] This is untrue: as set out in the Fifth Report and Supplemental Report, Mr. Mizrahi told the Receiver, consistently and without exception, that MI planned to complete the Project. Mr. Mizrahi never withdrew, or tried to withdraw, its services. The Receiver never told MI that Paragraph 17 (or any other paragraph of the Receivership Order) prohibited termination of its services.[33]

30. **MI wanted to remain involved in the Project.** MI's behaviour is completely consistent with Mr. Mizrahi's unshakeable belief that his personal involvement was critical to the success of the Project.[34] Mr. Mizrahi admitted that his goal throughout the receivership proceedings was to complete the Project under his continued leadership.[35] MI announced this goal immediately after the Receiver was appointed, when MI issued a press release declaring the Receivership Order to

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[30] Mizrahi Cross, q. 986, Transcript Brief, Tab 4, pdf. 826.

[31] Mizrahi Cross, q. 992-996, Transcript Brief, Tab 4, pdf 827.

[32] Mizrahi #2, para. 6, MI RMR Vol 1, Tab 2, pdf 18.

[33] Fifth Report, para. 7.20, Receiver's MR Vol 1, Tab 2, pdf 61; For additional detail on these discussions, see Supplemental Report, paras. 2.25-2.42, Receiver's Reply MR, Tab 1, pdf 23.

[34] Mizrahi Cross, q. 945, Transcript Brief, Tab 4, pdf 822.

[35] Mizrahi Cross, qs. 954-955, Transcript Brief, Tab 4, pdf 823.

be a "welcomed decision that will allow for the successful completion of the One under the continued leadership of Sam Mizrahi and Mizrahi Developments."[36] That goal never changed.

31. The success of the Project was also critical to Mr. Mizrahi personally. Mr. Mizrahi deposed in one of Mizrahi's arbitrations with Coco that his "career is in real estate" and that his career would be "finished" if he was not able to successfully complete the Project.[37] He also personally guaranteed the Debtors' obligations to the Senior Secured Lenders and CERIECO.[38]

32. **MI articulated its position on Paragraph 17 for the first time in January 2024, and was promptly corrected by the Receiver.** MI claimed in early January 2024, for the first time, that Paragraph 17 required the Receiver to continue the MI Payment Practices, even if they were not authorized by any contract, via a memorandum prepared by MI's counsel.[39] The Receiver's counsel told MI and its counsel that the memorandum was a "mistake" and that MI's legal arguments had no merit.[40]

33. **MI admits it could have withdrawn its services any time after January 10, 2024.** It is common ground that the Receiver told Mr. Mizrahi at a meeting on January 10, 2024 – and at other times – that if MI insisted on pursuing its position that Paragraph 17 mandated adherence to the MI Payment Practices, then there would likely be no basis for a continuing working relationship between the Receiver and MI, as the Receiver would not adopt the MI Payment Practices.[41]

34. MI chose to remain on the Project. It did not serve the MI Payment Motion, or take any steps to withdraw from the Project, until *after* the Receiver issued its disclaimer notice on February

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[36] Mizrahi Cross, qs. 954-955, Transcript Brief, Tab 4, pdf 823.

[37] Exhibit 6 to Mizrahi Cross, para. 31, Transcript Brief, Tab 3(6), pdf 452.

[38] Exhibit 6 to Mizrahi Cross, para. 31, Transcript Brief, Tab 3(6), pdf 452.

[39] This memorandum is marked without prejudice. Although the Receiver does not believe that settlement privilege applies to the memorandum, it has not included the memorandum in the record out of an abundance of caution.

[40] Supplemental Report, para. 2.34, Receiver's Reply MR, Tab 1, pdf 25.

[41] Supplemental Report, para. 2.35, Receiver's Reply MR, Tab 1, pdf 25.

26, 2024.

E. The Receiver Concluded that MI Provided Below-Market Service at Above-Market Rates

35. As noted below, the Receiver had a statutory obligation to act in a commercially reasonable manner, especially in respect of payment practices implemented by related parties over Coco's objection. Since the MI Payment Practices were not supported by any legally enforceable agreement between MI and the Debtors, and were therefore not contractually binding on the Debtors, the Receiver's negotiations with MI were (and had to be) informed by its assessment of MI's performance and whether the amounts claimed based on the MI Payment Practices were commercially reasonable. The Receiver evaluated MI's performance and its fees, with the assistance of qualified professionals, and determined that MI was charging above-market rates for below-market performance.

36. **MI had significant difficulties on the Project.** With the assistance of the experienced project manager that the Receiver retained to assist it, Knightsbridge Development Corporation ("**KDC**"), the Receiver assessed MI's performance as general contractor of the Project to inform the Receiver's approach to payments made to MI. Based on this assessment, KDC and the Receiver identified that MI failed to implement a number of basic, industry standard procedures that are required to effectively manage a construction project of the nature and scale of the Project.[42]

37. MI disputes some of the Receiver's allegations about its performance, but admits to failures that are sufficient to establish that its performance fell well below industry standards. Jeff Murva, MI's own Director of Project Management, admitted in an affidavit tendered by MI that:

[42] Fifth Report, para. 2.21, Receiver's MR Vol 1, Tab 2, pdf 46.

(a) MI had "inaccurate and out of date" schedules and did not have the personnel required to produce an accurate schedule;[43]

(b) MI's budget was "incorrect and lower than the eventual projected final cost";[44]

(c) MI's progress reporting was inaccurate, and MI's senior management knew that it was inaccurate;[45]

(d) MI hired project managers that were "challenging" to coordinate;[46]

(e) The record of contracts and commitments in MI's accounting software was "knowingly incomplete and not current";[47] and

(f) MI's construction management team "consistently does not meet deliverable requests".[48]

38. **The Receiver concluded, based on advice from qualified professionals, that MI was charging above-market rates**. KDC advised the Receiver shortly after its appointment that MI had been charging above-market rates (based on the MI Payment Practices) for its work on the Project before the Receiver was appointed.[49]

39. In January 2024, Finnegan Marshall Inc. ("**FM**") replaced Altus as the cost consultant on the Project. FM confirmed to the Receiver that the MI Payment Practices were not consistent with market rates. [50] Specifically, FM advised the Receiver that:

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[43] Affidavit of J. Murva affirmed January 20, 2025 "**Murva Affidavi**t", Issues Log at Item 9, MI RMR Vol 5, pdf 12.

[44] Murva Affidavit, Issues Log at Item 12, MI RMR Vol 5, pdf 13.

[45] Murva Affidavit, Issues Log at Item 12, MI RMR Vol 5, pdf 13.

[46] Murva Affidavit, Issues Log at Item 2, MI RMR Vol 5, pdf 11.

[47] Murva Affidavit, Issues Log at Item 6, MI RMR Vol 5, pdf 12.

[48] Murva Affidavit, Issues Log at Item 8, MI RMR Vol 5, pdf 12.

[49] Fifth Report, paras. 11.1-11.6, Receiver's MR, Vol 1, Tab 2, pdf 87.

[50] Affidavit of N. Finnegan sworn February 27, 2025 ("**Finnegan Affidavit**"), para. 7, Receiver's Reply Record, Tab 2, pdf 182; Fifth Report, para. 7.18, Receiver's MR, Vol 1, Tab 2, pdf 60.

(a) A related-party general contractor like MI does not earn a profit on its own labour. MI had marked up its Labour Costs by up to 226%, with an overall markup of 119% in January 2024;[51] and

(b) MI's 5% CM Fee was above the market rate for similar projects, which ranged from 2.75% to 3.5%.[52]

40. Informed by these consultations, the Receiver concluded that the MI Payment Practices were not commercially reasonable, particularly in light of MI's performance issues. It therefore determined that the Debtors should not adopt the MI Payment Practices.

F. The Receiver's Termination of MI as General Contractor

41. Despite the Receiver's efforts from October 2023 to negotiate a mutually acceptable resolution to MI's payment claims, it was ultimately unsuccessful.[53] The Receiver thus began to investigate the possibility of hiring a replacement general contractor. It ultimately determined that SKYGRiD was likely to provide superior construction management services at a lower cost compared to MI. On February 26, 2024, the Receiver disclaimed the GC Agreement and the CDMA, with such disclaimer effective March 13, 2024.[54] MI commenced its motion thereafter.[55] As expected, SKYGRiD provided superior service and charged approximately $1 million less per month than MI for its work on the Project.[56]

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[51] Finnegan Affidavit, paras. 12, 15, Receiver's Reply Record, Tab 2, pdf 183-184.

[52] Finnegan Affidavit, para. 19, Receiver's Reply Record, Tab 2, pdf 186.

[53] Supplemental Report, paras. 2.13-2.42, Receiver's Reply MR, Tab 1, pdf 20-27.

[54] Fifth Report, para. 7.1, 12.3-12.4, Receiver's MR Vol 1, Tab 2, pdf 55, 97.

[55] MI re-served the Motion on February 27, 2024 as the first Motion Record MI served contained confidential information. The updated Motion Record is dated February 27, 2024.

[56] Fifth Report, paras. 12.1-12.4, Receiver's MR Vol 1, Tab 2, pdf 97-100.

PART III – ISSUES, LAW & ANALYSIS

42. There are two issues on this motion: first, whether Paragraph 17 requires continued payments based on the MI Payment Practices, even if such payments were not contractually required or commercially reasonable; and, second, whether the Receiver was legally obliged to make payments based on the MI Payment Practices.

A. Paragraph 17 Does Not Impose the MI Payment Practices on the Receiver

(i) The proper interpretation of Paragraph 17

43. MI's primary position is that Paragraph 17 imposed on the Receiver an absolute obligation to adopt the MI Payment Practices. It says that the Receiver "must pay MI for post-receivership work on the same terms MI was paid historically by the Project".[57] According to MI, the Receiver's only role is to determine "the Project's normal payment practices, not determine what they should or could have been."[58] The only alternative to immediately adopting the MI Payment Practices, according to MI, was to immediately terminate MI.[59]

44. MI is wrong. This Court did not – and would not – order the Receiver to pay amounts that the Debtors did not legally owe. This Court did not – and would not – order the Receiver to ignore its own conclusion that MI claimed above-market payments for below-market performance.

45. Justice Zarnett recently reiterated in *Business Development Bank of Canada v. 170 Willowdale Investments Corp*[60] that an order must be interpreted based on the text, context and

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[57] MI's Moving Factum, para. 22.
[58] MI's Moving Factum, para. 22.
[59] MI's Moving Factum, para. 153.
[60] *Business Development Bank of Canada v. 170 Willowdale Investments Corp*., 2025 ONCA 251("***BDC***").

purpose of the provision in issue.[61] The text, context and purpose of Paragraph 17 all support the Receiver's position that it was entitled (and indeed obligated) to consider whether MI was contractually entitled to payments based on the MI Payment Practices and whether such payments were commercially reasonable. This obligation is heightened in this case, because Mr. Mizrahi exerted de facto control over both parties to the contract.

(ii) The text – Paragraph 17 confers rights, not obligations, on the Receiver

46. MI claims that the text of Paragraph 17 is "clear" but does not engage in any meaningful analysis of that text, which states:

> 17. **THIS COURT ORDERS that all Persons having oral or written agreements with the Debtors,** or the Developer or contractual, statutory or regulatory mandates **for the supply of goods and/or services to the Debtors,** or the Developer and/or the Project, including without limitation, all computer software, communication and other data services, construction management services, project management services, permit and planning management services, accounting services, centralized banking services, payroll and benefit services, warranty services, sub-contracts, trade suppliers, equipment vendors and rental companies, insurance, transportation services, utility, customers, clearing, warehouse and logistics services or other services to the Debtors, or the Developer and/or the Project **are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver,** and that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, **provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver** or the Developer, as determined by the Receiver, **in accordance with normal payment practices of the Debtors** or the Developer, as applicable, **or**, with respect to the Debtors or the Developer**, such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court. [emphasis added]**[62]

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[61] *BDC* at para. 24.

[62] Receivership Order, para. 17, Receiver's MR Vol 1, Tab 2(1), pdf 17.

47. The text of Paragraph 17 supports the Receiver's position. The prohibition on withdrawing services in Paragraph 17 is conditional. Paragraph 17 restrains contractors (and any other contracting party) from discontinuing services "**provided** in each case that the normal prices or charges" are paid. It follows that if "normal prices and charges" are not paid, then a contractor can withdraw its services. In other words, Paragraph 17 sets out how the Receiver can *prevent* the termination of supply. It does not, however, *mandate* any payment to a contractual counterparty by the Receiver. As set out above, MI never sought to discontinue supplying services and Paragraph 17 is thus inapplicable.

48. **Normal payment practices are one of three payment options available to prevent the termination of services.** MI claims that Paragraph 17 mandates payments based on the Debtors' "normal payment practices". But this is incorrect: even if the Receiver had invoked Paragraph 17 to prevent the termination of MI's services (which it did not), it would have had three payment options: (a) normal payment practices of the Debtors; (b) a new agreement between MI and the Receiver; or (c) as ordered by the Court. Contrary to MI's assertion, the "normal payment practices of the Debtors" is not the default option. The prohibition applies if the Receiver makes payments based on *any* of the three options.

49. Finally, and in any event, the MI Payment Practices are not "normal payment practices of the Debtors" within the meaning of Paragraph 17. The MI Payment Practices are not supported by any contract between MI and the Debtors and are in fact prohibited by the GC Agreement and were paid over Coco's specific objection. There is no indication that this language in Paragraph 17 was intended to capture contested payments made before the Receivership Order without a legal or contractual basis.

(iii) The context – Paragraph 17 requires consideration of contractual entitlements

50. The context of Paragraph 17 also supports the conclusion derived from the text that the Receiver is not required to adopt the MI Payment Practices.

51. The Receiver is a court officer appointed pursuant to the *BIA*. The *BIA* requires that the Receiver deal with the Debtors' property in a commercially reasonable manner.[63] The Project had an acrimonious history, the MI Payment Practices were implemented between related parties and Coco specifically objected to the MI Payment Practices. The Receiver was obligated to consider whether the MI Payment Practices were contractually authorized and commercially reasonable. MI's assertion that the Receiver was bound to blindly adopt the non-arm's length MI Payment Practices is contrary to the basic principles that guide every court officer and every insolvency proceeding.

(iv) The purpose – Paragraph 17 was intended to stabilize and bring oversight to the Project

52. Similarly, an examination of the purpose of the Receivership Order, and Paragraph 17 specifically, leads to a conclusion that is contrary to MI's contention. The Receivership Order was granted to "bring stability to the situation and bring oversight to the Project in an effort to maximize recovery for the benefit of all stakeholders."[64] This goal was accomplished, in part, by giving the Receiver the option to require that certain contractors continue to work on the Project if they sought to terminate their agreements with the Debtors *and* by providing optionality on how such contractors would be paid (*i.e.*, the Debtors' normal payment practices, pursuant to a new

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[63] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*") at s. 247.

[64] Endorsement of J. Osbourne dated October 18, 2023, para. 30.

agreement or a court order).

53. This discretion is particularly important in this case. The Senior Secured Lenders brought the Receivership application because they had lost faith and confidence in MI, among others, and the Debtors had committed numerous ongoing breaches of the Credit Agreement. In light of the overwhelming evidence of the Project's very significant problems tendered in support of the application, the Receiver could not reasonably maintain the status quo without evaluating all aspects of the Project, including the payments to MI.

54. MI argues that the Receiver's position is somehow subjective and that this would create some unspecified uncertainty in receivership proceedings.[65] First, any issues that arise in other cases can be addressed in those cases, and contractual counterparties in a receivership always have the ability to seek to withdraw their services or otherwise bring any issues regarding payment before the Court. Hypothetical harm to hypothetical parties in hypothetical cases should not affect the result in this case. Second, the Receiver's position is not subjective, and it will not result in any uncertainty: MI should be paid everything to which it is legally entitled, and nothing to which it is not. Its entitlement should be governed by the ordinary (objective and certain) rules that govern all contracts.

(v) The cases cited by MI do not support MI's position

55. MI advances a novel argument. It has not identified any cases that support its assertion that Paragraph 17 requires payment based on "normal payment practices" without regard to the parties' legal and contractual rights. In fact, most of the authorities cited by MI are not relevant at all.[66]

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[65] MI Moving Factum, paras. 23, 152-153.

[66] The first case cited by MI, *Pacific Shores Resort & Spa Ltd. (Re)*, 2013 BCSC 480 was a claim for unjust enrichment. There was no claim based on the terms of the Receivership Order and the equivalent to Paragraph 17 was paraphrased in passing.

56. MI argues that the decision of the B.C. Supreme Court in *Pope & Talbot (Re)* stands for the proposition that the Receiver had to "affirm or disclaim" within a "reasonable period of time"[67], and that by failing to disclaim before February 2024, the Receiver affirmed the MI Payment Practices. But *Pope* does not support MI's position.

57. The Court in *Pope* found that a receiver cannot be fixed with "the burden of making payments" unless it affirms a contract that requires those payments.[68] The issue in *Pope* was whether the receiver had affirmed an agreement. The Court held that it had not.[69] More importantly, the Court held that since the supplier was not being paid, it could have sought direction from the Court, terminated the contract, or sought permission from the Court to terminate the contract,[70] despite a term in the court order very similar to Paragraph 17.[71] The *obiter* passage cited by MI does not establish a broad principle that every receiver in every case must immediately disclaim any agreement it does not intend to affirm.

58. More importantly, MI cannot credibly argue that the Receiver affirmed the MI Payment Practices. First, the Receivership Order specifically allowed the Receiver to make payments to MI without affirming the agreements between MI and the Debtors.[72] Second, the Receiver told MI, consistently and without exception, that it was not affirming any agreement when making payments.[73] MI knew that the Receiver had not (and would not) "affirm" the MI Payment Practices. Third, no contract with the Debtors actually required payments based on the MI Payment

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[67] *Pope & Talbot Ltd. (Re)*, 2009 BCSC 17 ("***Pope***").

[68] *Pope* at para. 15.

[69] *Pope* at paras. 21-22.

[70] *Pope* at para. 22.

[71] *Pope* at paras. 5, 23. The Receiver notes that the Court's assessment appears to have turned in part on the fact that the supplier was not actually asked to supply services during the receivership.

[72] Receivership Order, para. 6, Receiver's MR Vol 1, Tab 2(1), pdf 137.

[73] Email of S. Ferguson dated November 26, 2023, Receiver's MR Vol 1, Tab 2(3), pdf 177-179.

Practices and there was thus nothing to affirm in any event.[74]

B. The Debtors Were Not Bound by the MI Payment Practices

(i) MI mischaracterizes the Receiver's position

59. MI argues that the Receiver seeks to limit MI's entitlement to payment to the stipulated price based on percentage of completion as set out in the GC Agreement. This is incorrect. The Receiver acknowledges that certain aspects of the GC Agreement were amended in the Mediator's Proposal (which allowed a 3.5% CM Fee where none was previously separately payable) and the Control Agreement (which temporarily allowed a 5% CM Fee). But no contract between MI and the Debtors allowed MI to charge the Labour Rates, and MI was not entitled to a 5% CM Fee after the Control Agreement expired.

(ii) The cases cited by MI do not support a finding of amendment or waiver

60. According to MI, the fact that MI was in fact paid based on the MI Payment Practices proves that it was entitled to be paid based on the MI Payment Practices. But this is not the law.

61. MI argues that "parties may, by subsequent conduct, amend a written agreement".[75] As set out in the Receiver's First Factum, an amendment by conduct must have all of the elements of a new contract including an intention to contract and an agreement on all essential terms.[76] Taken at their highest, the cases cited by MI provide examples of the evidence required to meet this test:

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[74] Fifth Report, para. 7.19, Receiver's MR Vol 1, Tab 2, pdf 61; Mizrahi #2 at para. 27, MI Responding MR Vol 1, Tab 2, pdf 26.

[75] MI Moving Factum, para. 155.

[76] *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55, paras. 16-17.

(a) In *Kor-Ban*, a 1993 decision from the Ontario Court of Justice (General Division), both parties agreed that a contractual term requiring written approval for extras had been waived. The issue was the consequence of that waiver on another contractual term relating to the valuation of claims;[77]

(b) In *Triple R Contracting*, a 2001 decision of the Alberta Court of King's bench, the parties *agreed* that they had dispensed with the written fixed-price contract but disagreed over the terms of the new agreement.[78] Despite the finding that the parties agreed to a "quasi cost-plus" structure, the contractor had the burden of proving that the owner agreed to each of the disputed costs. It did not meet that burden;[79] and

(c) In *Wolf*, a 2019 decision of the Alberta Court of King's Bench, the court considered evidence from the plaintiff that the parties had never intended to follow a fixed-price contract that they executed.[80] The Plaintiff alleged that the Defendants had specifically agreed to proceed on a cost-plus basis, and the Defendants did not tender any evidence in response.[81]

62. In each of the cases cited by MI, the deciding court found on the particular facts before

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[77] *Kor-Ban Inc. v. Pigott Construction Ltd.,* [1993] O.J. No. 1414*,* para. 110-113, Receiver's Book of Authorities at Tab 2.

[78] *Triple R Contracting Ltd. v. 384848 Alberta Ltd*., 2001 ABQB 52 ("***Triple R***"), para. 4: "the parties agree in the final analysis that the Contract does not govern the construction of the Dairy Queen."

[79] *Triple R*., paras. 12, 55, 62, 72.

[80] *Wolf Construction v Kinniburgh*, 2019 ABQB 660 ("***Wolf***"), para. 15.

[81] *Wolf*, para. 18. In addition to those cases described in the body of this section, see the analysis in *Braun v. 974850 Ontario Inc*., 2006 CanLII 34417 (ON SC) at para. 55 ("It is clear from the actions of the parties that ***they mutually agreed to depart from the written contract*** including the payment schedule"); *Twister Developments Ltd v 1406676 Alberta Ltd*, 2023 ABQB 535 at para. 24 ("I find that it was ***never the intention of the parties to rely on the contracts they formally signed***"); and *DA Sharp Construction Co v Martin, [1994] OJ No 3136* at paras. 44-48, Receiver's Book of Authorities at Tab 1 ("the parties' respective conduct here was not so much a series of acts each of which was in specific response to the other's act but rather was ***a concurrent and reciprocal pattern of behaviour which would be consistent with an oral agreement***").

them that the parties had agreed to waive their rights or enter into new contracts. But the facts in *this* case support no such finding. The MI Payment Practices were implemented on a non-arm's length basis and over Coco's specific objection. Moreover, the Project was exponentially larger and more complex than the projects at issue in the cited cases, with MI represented by sophisticated and experienced counsel who understood the acrimonious relationship between Coco and Mizrahi in which actual agreements were documented in writing. Coco and Mizrahi entered into a series of specific agreements (the GC Agreement, the Mediator's Proposal and the Control Agreement), but *none* of those agreements authorized payment of the Labour Rates.

(iii) The Debtors never amended or waived reliance on their contractual entitlements

63. As detailed in the Receiver's First Factum, the Debtors and MI are the only parties with the power to amend or waive reliance on the Debtors' and MI's respective contractual entitlements. The actions of Altus and the Senior Secured Lenders have no bearing on the Debtors' contractual rights and obligations.

64. In its factum, MI has pointed to no affirmative evidence of an amendment or waiver by Coco (other than during the Control Period), whose consent was required to bind the Debtors. Instead, MI relies on Coco's "concession" to payments being advanced by the Debtors to MI. As noted above, the transcripts of Ms. Coco's examination make clear what she "conceded" – not the MI Payment Practices as a contractual entitlement for MI, but release of funds specifically to keep the Project progressing on the understanding that payments would be equalized later and/or that Coco would be selling its equity stake in the Project to Mizrahi.[82]

[82] Coco Cross, qs., 31-32, 114-120, 133-142, Transcript Brief, Tab 1, pdf 13, 21-22, 24.

65. In any event, even if Coco "conceded" to certain payments, this cannot possibly rise to the level of consensus *ad idem* to a new agreement or an unequivocal and conscious abandonment of rights. A forced acquiescence to release Project funds under the threat of the Project's failure – and the resulting loss of Coco's investment – is the exact circumstance the doctrine of practical compulsion is designed to address.[83]

PART IV – RELIEF REQUESTED

66. The Receiver respectfully requests that MI's motion should be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of June, 2025.

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[83] *Barafield Realty Ltd v. Just Energy (BC) Limited Partnership*, 2017 BCCA 307 at para. 12, citing *Eadie v Brantford (Township)*, 1967 CanLII 13 (SCC), [1967] SCR 573 at 581-582.

SCHEDULE "A"
LIST OF AUTHORITIES

I, Mark Dunn counsel for the Receiver, am satisfied as to the authenticity of every authority listed in the Factum of the Receiver as required by Rule 4.06.1.

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1) *Barafield Realty Ltd v. Just Energy (BC) Limited Partnership*, 2017 BCCA 307
2) *Business Development Bank of Canada v. 170 Willowdale Investments Corp*., 2025 ONCA 251
3) *Braun v. 974850 Ontario Inc.,* 2006 CanLII 34417 (ON SC)
4) *DA Sharp Construction Co v Martin*, [1994] OJ No 3136
5) *Jedfro Investments (U.S.A.) Ltd. v. Jacyk,,* 2007 SCC 55
6) *Kor-Ban Inc. v. Pigott Construction Ltd.,* [1993] O.J. No. 1414
7) *Pacific Shores Resort & Spa Ltd. (Re)*, 2013 BCSC 480
8) *Pope & Talbot Ltd. (Re)*, 2009 BCSC 17 (
9) *Twister Developments Ltd v 1406676 Alberta Ltd*, 2023 ABQB 535
10) *Triple R Contracting Ltd. v. 384848 Alberta Ltd*., 2001 ABQB 52
11) *Wolf Construction v Kinniburgh*, 2019 ABQB 660

SCHEDULE "B"

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

Good faith, etc.

247 A receiver shall

- **(a)** act honestly and in good faith; and
- **(b)** deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

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	**MIZRAHI COMMERCIAL (THE ONE) LP, et al.**	Court File No. CV-23-00707839-00CL
Applicant	Respondents	

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

RESPONDING FACTUM OF THE RECEIVER
(MI Payment Motion)
Returnable June 17-19, 2025

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