

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

BETWEEN:

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

Applicant

- and -

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

Respondents

**AIDE MEMOIRE OF MIZRAHI INC.
(Case Conference March 24, 2025)**

1. Mizrahi Inc. ("MI") requested this case conference to address the following urgent issues referable to MI's motion for payment and the Receiver's cross-motion returnable June 17, 18 and 19:
 - a. The Receiver has delivered an affidavit from Nail Finnegan in its Reply Motion Record, which is improper reply evidence and constitutes inadmissible expert evidence that does not comply with Rule 53; and
 - b. The Receiver has sought a Rule 39.03 examination of Ms. Jennifer Coco, which is tantamount to improper reply evidence, contrary to the court ordered timetable.
2. Both of these issues are urgent and will significantly affect the conduct of both MI's motion and the Receiver's cross-motion.
3. The court ordered timetable requires that cross-examinations be completed by the end of March. While the parties have reached agreement on minor modifications to the timetable such that cross-examinations will proceed April 14 and 15 (assuming the court agrees to modify the timetable), if the affidavit of Nail Finnegan is accepted into evidence and Ms.

Jennifer Coco is examined pursuant to Rule 39.03, then it will be impossible to maintain the current timetable.

4. It is a procedural injustice to permit the Receiver to introduce new witnesses and expert opinion evidence in reply after MI has already delivered its materials.
5. In an endorsement of March 18, 2024 following a case conference, Justice Osborne endorsed a timetable, which included the delivery of the Receiver's materials by May 31, 2024. There was no reason that the Receiver could not have sought to adduce the evidence of Mr. Finnegan and Ms. Coco then, let alone prior to the delivery of MI's Responding Motion Record in January 2025.
6. The evidence of Ms. Coco and the expert opinion evidence of Mr. Finnegan, if relevant, should have, at the very least, been adduced by the Receiver in its Responding Motion Record, delivered in October 2024. At the very least, the Receiver should have identified the need to call this evidence when the timetable was set during a case conference on November 13, 2024, which provided for the following timetable:
 - MI's Responding Motion Record: January 20, 2025;
 - Written questions posed to the Receiver: by January 20, 2025
 - Reply or Supplementary Motion Records: February 28, 2025;
 - Responses to written questions posed to the Receiver: February 28, 2025;
 - Cross-Examinations: By March 28, 2025;
 - Moving Factums from MI and Receiver: April 18, 2025;
 - Responding Factum of MI and the Receiver: May 9, 2025;
 - Reply facta, if any, May 16, 2025; and
 - Hearing of the Motions: Earliest available dates after May 19, 2025.
7. In addition, MI put the Receiver on Notice by correspondence dated September 4, 2024 that it would need time to respond to expert opinions to be relied upon by Receiver so as not to delay the return of the matter. As noted below, counsel for the Receiver indicated that it "may" serve an expert report or factual affidavit that addresses market rates for general contractors, but then no such report or affidavit was included in the Responding Motion Record of the Receiver served October 11, 2024.

A. The Affidavit of Nail Finnegan is Improper Reply Evidence and Inadmissible Expert Evidence

8. MI delivered its Motion Record in February 2024. The Motion Record includes the affidavits of Mr. Sam Mizrahi and Mr. Mark Kilfoyle.
9. On October 11, 2024, the Receiver delivered its Fifth Report in response to the MI Motion Record. The Fifth Report also sets out the Receiver's cross-motion. The Receiver did not rely on any affidavits in its Responding Motion Record. All of the evidence adduced by the Receiver in its Responding Motion Record is contained in the Fifth Report. In the Fifth Report, the Receiver makes claims concerning the commercial reasonableness of MI claim to construction management fees.
10. While the Receiver has subsequently advised the court and MI that the Receiver does not rely on the statements concerning (1) commercial reasonableness of the MI construction management fee, (2) the commercial reasonableness of MI's claim to time-based labour rates and (3) the efficacy of MI's performance as general contractor for proof of the truth, but rather to explain the Receiver's decisions, including the Receiver's decision to terminate MI as general contractor, the Receiver has not confirmed this position in writing.
11. Nonetheless, the Receiver is the party that raised these issues in its Fifth Report. If it intended to adduce expert evidence or affidavit evidence on these issues, then it was incumbent upon the Receiver to adduce this evidence in the Fifth Report, not in a Reply Motion Record.
12. As noted above in paragraph 4, on September 4, 2024, in advance of the delivery of the Fifth Report, counsel for MI wrote to counsel for the Receiver seeking to confirm whether the Receiver intended to deliver any expert reports. This request was made so that if the Receiver did intend on relying upon or adducing expert evidence, MI would be in a position to respond and retain an expert who was prepared and available to review the matter and deliver a responding expert report.
13. On September 12, 2024, counsel for the Receiver responded to this request and advised: "The Receiver may serve an expert report or factual affidavit that addresses market rates for general contractors working on condominium project [sic]". A copy of this email communication is enclosed as **Tab 1**.

14. The Receiver chose not to do so. No expert reports or affidavits were included in the Receiver's Responding Motion Record. As a result, MI did not incur the cost and expense of retaining an expert.
15. MI reasonably relied upon the absence of an expert report and third-party affidavit in the Fifth Report. It did not incur the time and expense of retaining an expert.
16. In its Reply Motion Record, the Receiver has delivered the affidavit of Nail Finnegan. Mr. Finnegan purports to provide reply evidence to the affidavit of Mr. Jeff Murva, who delivered an affidavit on MI's behalf as part of MI's Responding Motion Record.
17. Mr. Murva's affidavit is limited to responding to the KDC Issues Log, which is attached as Appendix 30 to the Receiver's Fifth Report. There is nothing 'new' in Mr. Murva's affidavit that would entitle the Receiver to deliver a reply affidavit from a new witness, let alone a witness who purports to give an opinion on the commercial reasonableness of the labour rates and construction management fees, put in issue by the Receiver in its motion.
18. Accepting Mr. Finnegan's affidavit and evidence into the evidentiary record will result in significant procedural unfairness to MI.
19. Mr. Finnegan's affidavit is not only improper reply evidence, but amounts to inadmissible expert opinion evidence that does not comply with Rule 53.
20. Mr. Finnegan purports to give opinion evidence on the commercial reasonableness of MI's claim to construction management fees and time-based labour rates, but he is not proffered as a Rule 53 expert because he cannot meet the Rule 53 requirement of impartiality. A copy of Rule 53.03 is attached as **Tab 2**.
21. The Receiver may argue that Mr. Finnegan is a "participant expert" within the meaning of the Court of Appeal's decision in *Westerhof v Gee Estate*. This argument must fail.
22. Mr. Finnegan states in his affidavit at paragraph 7:

FM was retained as a cost consultant for the Senior Secured Lenders on the Project in February 2024. As part of FM's mandate on the Project, the Receiver consulted with FM about whether the fees charged by MI for its work on the Project were consistent with market rates...

23. This evidence establishes that the Receiver asked Mr. Finnegan for his opinion on the commercial reasonableness of MI's claim to time-based labour rates and construction management fees. This opinion was not formed "based on the witnesses observation or participation in the events at issue" and the witness did not form "the opinion to be given as part of the ordinary exercise of his...skill, knowledge, training and experience".¹ This is the test that must be met to qualify as a participant expert.
24. Participant experts are often physicians who give evidence in personal injury or malpractice trials on opinions they form in the course of treatment of a patient. If they are specifically asked to formulate an opinion by a litigant, then that opinion is not based on the witnesses observation or participation in the events at issue.
25. Mr. Finnegan's evidence is not an opinion that was formed during his participation in the Project, but rather results from being asked a specific question by the Receiver in the litigation. In fact, his evidence goes so far as to directly comment on the KDC Issues Log to which Mr. Jeff Murva responds, despite Mr. Finnegan having no role in the preparation of the KDC Issues Log.
26. Mr. Finnegan is not impartial, as he is retained by the Project. He is not proffered as a Rule 53 expert with the attendant responsibilities and duties to the court all while attempting to insert new opinion evidence in a Reply Motion Record.
27. The issue of commercial reasonableness was raised by the Receiver more than one-year ago in its Supplemental Report to the First Report, dated March 6, 2024, where the Receiver specifically stated at paragraph 3.18, "Evidence will be required as to the commercial reasonableness of the MI Payment Practices and market rates for similar services". Despite this representation to the court, the Receiver did not adduce any such evidence in its Fifth Report, and inexplicably waited until February 28, 2025 to attempt to deliver opinion evidence on the issue in reply, which ambushes MI since the timetable does not afford MI an opportunity to answer this opinion evidence, which MI vigorously opposes.
28. It is entirely unfair to permit the Receiver to adduce and rely upon this evidence now. Doing so will eliminate any chance of maintaining the timetable as MI will need to obtain a responding expert opinion with subsequent cost and delay that is entirely unnecessary and unfair.

¹ *XPG, A Partnership v Royal Bank of Canada*, 2016 ONSC 3508 at [para 22](#).

29. MI is prepared to agree to a stipulation on the use of evidence that MI claims amounts to hearsay, improper reply evidence and improper expert opinion evidence that does not comply with Rule 53 as follows:

- a. Neither party shall rely on evidence as proof of the truth in the Receiver's Fifth Report or the Receiver's Reply Motion Record concerning: (1) commercial reasonableness of labour rates paid to MI or for which MI seeks payment; (2) the commercial reasonableness of construction management fees paid to MI or for which MI seeks payment; (3) the quality, ability or sufficiency of the work undertaken by MI or any failure to do so; and (4) concerning a comparison between the performance of MI and SkyGrid.

B. The Rule 39.03 Examination of Ms. Jennifer Coco is Also Improper Reply

30. The Receiver also seeks a Rule 39.03 examination of Ms. Jennifer Coco. MI understands that the Receiver intends to adduce evidence from Ms. Coco on whether or not she "approved" MI's Payment Practices.

31. This too is improper Reply evidence. If Ms. Coco, who has been an ardent adversary to Mr. Mizrahi for years, is permitted to be cross-examined by the Receiver, Mr. Mizrahi will be unable to deliver reply evidence to Ms. Coco's evidence. The Receiver should have included an affidavit from Ms. Coco in its Responding Motion Record delivered in October or sought a Rule 39.03 examination of Ms. Coco prior to the deadline for the delivery of MI's Responding Motion Record. To allow Ms. Coco to testify now is entirely unfair.

32. In addition, while the Receiver has indicated that it only requires 1 hour of cross-examination of Ms. Coco, if she is to be cross-examined, MI may require significantly more time for her cross-examination.

33. Finally, MI and the Receiver are in agreement on the key facts as it pertains to the expected evidence of Ms. Coco, such that her examination should be unnecessary. MI is prepared to agree on the following facts concerning Ms. Coco, which are the facts that the Receiver intends to adduce from Ms. Coco:

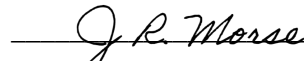
- a. In November 2020 Ms. Coco objected to the MI Payment Practices and the termination of Clark Construction Management;


- b. Ms. Coco signed Payment Listings authorizing the payments made to MI for construction management fees and time-based labour rates from the time of termination of Clark Construction Management in November 2020 until the commencement of the Control Agreement; and
- c. From the termination of the Control Agreement in August 2022 until the commencement of the Receivership, Ms. Coco refused to sign the Payment Listings and specifically objected to the MI Payment Practices.

34. It is MI's position that these facts have already been acknowledged by MI in its Responding Motion Record.

35. Allowing Ms. Coco to testify now, after the exchange of all evidence by the parties to the motion, will result in a procedural unfairness, with no opportunity for MI to reply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED March 20, 2025


Jerome R. Morse


David M. Trafford

Veronica Stasolla

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: Thursday, September 12, 2024 8:04 PM
To: David Trafford; Weisz, Steven J; Jerome Morse; Veronica Stasolla
Cc: Stothart, Sarah; Armstrong, Christopher; Linde, Jennifer; O'Neill, Brendan
Subject: RE: Mizrahi Inc

Counsel:

We are not available on October 18, but have good availability the following week.

We have pasted the questions in your earlier e-mail below, and answered in italics.

1. Are there any reports of experts the Receiver intends to rely upon?
 - a. If so, please advise of the nature of the witness' expertise and the issue addressed and when the report will be served;

The Receiver may serve an expert report or factual affidavit that addresses market rates for general contractors working on condominium project.
2. Is the Receiver proceeding with all of the issues listed in the issue list previously provided?
 - a. If not, please confirm which issues are or are not being advanced.

The Receiver previously agreed to provide, and provided, a without-prejudice list of issues that the Receiver was investigating. It continues to investigate these issues. The Receiver has not agreed to provide a definitive list of issues in advance of delivering its report.
 - b. Please confirm that the Receiver has provided our office with all documents relied upon by the Receiver for these issues.

The Receiver did not agree to provide an exhaustive list of all documents relied on in respect of each issue. MI requested, and received, a non-binding and without prejudice list of "principal" documents relied on.
3. Are there any 'new' issues that the Receiver is advancing and, if so, will the Receiver identify the new issue(s) and provide the documentation relied upon now?

There are not currently any 'new' issues that the Receiver is advancing that were not included on the without-prejudice list of issues, but the Receiver continues its investigation and has not agreed to be limited to the listed issues.
4. Will the Receiver be relying on the evidence of any third party via a sworn affidavit?
 - a. If so, please advise as to what issue this evidence will relate to so our client can prepare a response accordingly;

We do not expect any third party affidavit evidence (apart from the evidence referenced in #1 above) but reserve the right to serve affidavit evidence in the event that the Receiver determines it is necessary and appropriate.

5. Will the Receiver rely upon any of the banking information or the Project Records (emails), in which case, will the Receiver identify these documents from the voluminous productions and advise what issue is being addressed?

The Receiver may rely on the banking information, and will rely on a number of Project Records. It has not finalized what documents it will rely on, or for what issue. These issues will be apparent in the Receiver's report.

We would be pleased to discuss a schedule for remaining steps, either before or after you receive our client's material.

Regards,
Mark

From: David Trafford <DTrafford@morseshannon.com>

Sent: Wednesday, September 11, 2024 6:47 AM

To: Dunn, Mark <mdunn@goodmans.ca>; Veronica Stasolla <vstasolla@morseshannon.com>; Armstrong, Christopher <carmstrong@goodmans.ca>; Linde, Jennifer <jlinde@goodmans.ca>; O'Neill, Brendan <boneill@goodmans.ca>

Cc: Jerome Morse <jmorse@morseshannon.com>; Weisz, Steven J <SWeisz@cozen.com>; Stothart, Sarah <sstothart@goodmans.ca>

Subject: RE: Mizrahi Inc

Good morning Counsel,

I'm following up on my email below. Please advise when we can expect to receive a response. In addition, are you available for a case management conference on October 18 with Justice Osborne at 9:30 am? We propose to book this to address any issues that may arise following delivery of your client's motion record on or before September 30.

David Trafford

Partner

Direct Line: 416-941-5850

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PLEASE NOTE OUR NEW ADDRESS ABOVE!

From: David Trafford

Sent: Wednesday, September 4, 2024 10:35 AM

To: Dunn, Mark <mdunn@goodmans.ca>; Veronica Stasolla <vstasolla@morseshannon.com>; Armstrong, Christopher <carmstrong@goodmans.ca>; Linde, Jennifer <jlinde@goodmans.ca>; O'Neill, Brendan <boneill@goodmans.ca>

Cc: Jerome Morse <jmorse@morseshannon.com>; Weisz, Steven J <SWeisz@cozen.com>; Stothart, Sarah <ssstothart@goodmans.ca>

Subject: RE: Mizrahi Inc

Counsel:

We require additional information to assess the time we will require to respond to the Receiver's motion. Please advise of the following:

1. Are there any reports of experts the Receiver intends to rely upon?
 - a. If so, please advise of the nature of the witness' expertise and the issue addressed and when the report will be served;
2. Is the Receiver proceeding with all of the issues listed in the issue list previously provided?
 - a. If not, please confirm which issues are or are not being advanced.
 - b. Please confirm that the Receiver has provided our office with all documents relied upon by the Receiver for these issues.
3. Are there any 'new' issues that the Receiver is advancing and, if so, will the Receiver identify the new issue(s) and provide the documentation relied upon now?
4. Will the Receiver be relying on the evidence of any third party via a sworn affidavit?
 - a. If so, please advise as to what issue this evidence will relate to so our client can prepare a response accordingly;
5. Will the Receiver rely upon any of the banking information or the Project Records (emails), in which case, will the Receiver identify these documents from the voluminous productions and advise what issue is being addressed?

David Trafford

Partner

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PLEASE NOTE OUR NEW ADDRESS ABOVE!

From: Dunn, Mark <mdunn@goodmans.ca>

Sent: Tuesday, September 3, 2024 10:35 AM

To: Veronica Stasolla <vstasolla@morseshannon.com>; Armstrong, Christopher <carmstrong@goodmans.ca>; Linde, Jennifer <jlinde@goodmans.ca>; O'Neill, Brendan <boneill@goodmans.ca>

Cc: Jerome Morse <jmorse@morseshannon.com>; David Trafford <DTrafford@morseshannon.com>; Weisz, Steven J <SWeisz@cozen.com>; Stothart, Sarah <sstothart@goodmans.ca>

Subject: RE: Mizrahi Inc

Mr. Morse,

We are writing in response to your letter dated August 28, 2024. We expect to deliver our material no later than September 30, 2024, and may be in a position to produce materials earlier depending on what the Receiver finds in the recently produced e-mails and financial records.

In terms of a timetable following delivery of our material, we understand that you intend to propose an expedited schedule and we are prepared to accommodate that within reason. However, we want to caution that the Receiver's

Expert Witnesses

Experts' Reports

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48; O. Reg. 170/14, s. 17.

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
 - i. a description of the factual assumptions on which the opinion is based,
 - ii. a description of any research conducted by the expert that led him or her to form the opinion, and
 - iii. a list of every document, if any, relied on by the expert in forming the opinion.

6.1 A statement signed by the expert certifying that the expert is satisfied as to the authenticity of every authority or other document or record referred to in the report, other than,

- i. a document or record consisting of evidence or potential evidence in the action that the expert analysed or interpreted in the report, if the document or record was provided to the expert by or on behalf of the party intending to call the expert as a witness,

ii. an authority or other document or record cited by the expert in the report only because it was referenced in a report prepared by another expert witness in the action and the expert is commenting on the reference, and

iii. an authority or other document or record referred to in the report the authenticity of which the expert doubts.

6.2 Details of the doubts the expert has respecting the authenticity of an authority, document or record described in subparagraph 6.1 iii, and of any doubts the expert may have respecting the authenticity of an authority, document or record described in subparagraph 6.1 i or ii.

7. An acknowledgment of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48; O. Reg. 384/24, s. 4 (1, 2).

(2.1.1) An authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic for the purposes of paragraph 6.1, absent evidence to the contrary. O. Reg. 384/24, s. 4 (3).