

**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**

AIDE MEMOIRE OF THE RECEIVER

(Case Conference March 24, 2025 re: MI Payment Motion and Receiver's Cross-Motion)

1. This case conference was convened to address three issues relating to MI's Payment Motion and the Receiver's Cross-Motion (collectively, the "**Motions**"): ¹ (i) proposed updates to the schedule leading up to the Motions, which are on consent and summarized at Schedule "A"; (ii) MI's objection to the Receiver's proposed Rule 39.03 examination of Jenny Coco; and (iii) MI's assertion that the Affidavit of Niall Finnegan sworn February 27, 2025 (the "**Finnegan Affidavit**") is improper reply and/or opinion evidence.
2. MI's objections should be addressed, together with its other evidentiary objections, at the hearing of the motion based on a full record. MI's objections are, in any event, without merit.
3. **Examination of Ms. Coco is Proper and Timely:** The Receiver advised on February 28, 2025 that it intended to examine Jenny Coco pursuant to Rule 39.03. MI has objected to this proposed examination as "improper reply evidence", but this is without merit. Rule 39.03 examinations may be conducted at any time "before the hearing of a pending motion... for the purpose of having a transcript of [a third party's] evidence available for use at the hearing". ² Ms. Coco's evidence would not be put forward *by the Receiver*. She will be subject to cross-examination by both the Receiver and MI. ³ There is no obligation, under the *Rules* or otherwise, to conduct a Rule 39.03 examination before delivering moving evidence. The right to examine must merely be exercised with "reasonable diligence". ⁴ There is no suggestion in this case that the Receiver did not act with reasonable diligence. Even if Ms. Coco's evidence is reply evidence (which the Receiver denies)

¹ Capitalized terms not otherwise defined have the meaning ascribed to them in the Fifth Report of the Receiver dated October 11, 2024 and the Supplemental Report to the Fifth Report of the Receiver dated February 28, 2025.

² Rule 39.03, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

³ Rule 39.03(2)

⁴ Rule 39.03(3)

it is perfectly appropriate. In the Affidavit of Sam Mizrahi affirmed January 20, 2025 (the “**Mizrahi Affidavit**”), Mr. Mizrahi alleges that Ms. Coco agreed to certain aspects of the MI Payment Practices.⁵ The Receiver expects Ms. Coco’s evidence will reply to these allegations.

4. **Finnegan Affidavit is Admissible:** The Finnegan Affidavit is tendered in reply to the affidavit of Jeff Murva, MI’s Director of Project Management for the Project. Mr. Murva alleges that certain aspects of the MI Payment Practices are “common knowledge” with “larger Cost Consultants, involved with residential multi-family high-rise projects in the GTA”. Mr. Murva’s claims could not have been reasonably anticipated, especially because it contradicts the advice provided to the Receiver by experienced construction professionals. The Receiver is entitled to reply to Mr. Murva’s claim.⁶
5. Nor is Mr. Finnegan proffered as an expert. MI alleges that the Receivership Order requires that the Receiver make payments based on the MI Payment Practices, despite the fact that the Receiver was advised that the payments were not commercially reasonable. Mr. Finnegan provides (and is entitled to provide) factual evidence about the advice he gave to the Receiver on this issue.

⁵ See, for e.g., Mizrahi Affidavit, paras. 27-32, 38-45, 48-53, 63, 70, 73, 83-110, 117, 132, 138

⁶ Reply evidence is admissible when a respondent “has raised a new matter that could not be reasonably anticipated” or “where the reply evidence is in response to an issue enlarged by the opponent in a manner that could not have been reasonably foreseen.” Further, “The standard for permissible reply evidence ... is less strict for motion and application procedure than the standard applied at trial. When the reply evidence for a motion or application is introduced before the cross-examination and the hearing on the merits, a less rigorous standard applies.” *Johnson v. North American Palladium Ltd.*, 2018 ONSC 4496, [paras. 13-14](#)

March 20, 2025

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Schedule A

- Cross-examinations to be completed by April 24, 2025;
- Moving facta by May 12, 2025;
- Responding facta by June 2, 2025,
- Reply facta by June 9, 2025;
- Hearing of the Motions on June 17-19, 2025.

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

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Proceeding commenced at Toronto

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(Case Conference March 24, 2025)

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