

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

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

Applicant

- and -

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

Respondents

**AIDE MEMOIRE OF THE RECEIVER,
ALVAREZ & MARSAL CANADA INC.**

**(RE: Case Conference to be held before Justice Osborne
on March 18, 2024)**

1. **Introduction and overview.** This is the *aide memoire* of Alvarez & Marsal Canada Inc. in its capacity as receiver and manager (in such capacities, the “**Receiver**”), without security, of all of the assets, undertakings and properties of Mizrahi Commercial (The One) LP, Mizrahi Development Group (The One) Inc., and Mizrahi Commercial (The One) GP Inc. (collectively, the “**Debtors**”) pursuant to the Order (Appointing Receiver) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated October 18, 2023 (the “**Receivership Order**”).

2. Mizrahi Inc. (“**MI**”) claims that the Debtors owe it a substantial, but unquantified, amount. The Debtors may have substantial claims against MI. The Receiver (supported by all of the other stakeholders that have taken a position) seeks to have all of these claims resolved together on a reasonable schedule that contemplates a hearing in September 2024. MI asks to have its claims heard and decided before any claims can be advanced against it, and before evidence that is relevant to those claims can be gathered and put before the Court.

3. The Receiver respectfully submits that MI’s position – and the urgent schedule that it seeks to impose – should be rejected. MI and the Debtors should proceed with an orderly adjudication of all of the issues in dispute.

4. **Procedural History.** On February 26, 2024, MI commenced a motion (the “**MI Motion**”) seeking payment of an unspecified sum that is said to exceed \$6 million. It sought to set an urgent schedule for that motion at the hearing of the Receiver’s unrelated motion on March 7, 2024. By Endorsement dated March 7, 2024, Justice Osborne determined that the motion ought to be scheduled at a case conference because the issues were “not ripe for determination or even scheduling today”.¹ The Receiver tried to discuss a consent schedule with MI, but MI refused to engage in those discussions unless the Receiver agreed to reserve an unspecified amount for

¹ Endorsement of Justice Osborne dated March 7, 2024, para. 51, Tab A.

interest and costs, and made a final determination about what claims it would advance against MI before its investigation was complete.

5. The Receiver’s position on the MI Motion was set out in section 3 of the Supplemental Report to the First Report of the Receiver dated March 6, 2024 (the “**Supplemental Report**”). In summary, the Receiver requires further time to assess what (if any) amount MI may be owed under the contracts that it entered into, and it is investigating substantial claims that the Debtors may have against MI. Once its investigation is complete, the Receiver intends to bring a cross-motion based on its findings (the “**Cross-Motion**”).

6. **The Receiver has proposed a reasonable schedule. MI has not.** The Receiver is prepared to agree to an expedited schedule for the MI Motion that contemplates a hearing of the MI Motion and the Cross-Motion in September 2024. The Receiver’s proposed schedule is attached as Appendix “A”.

7. MI’s proposed schedule contemplates a hearing on May 6, 2024. It also resists having the MI Motion and the Cross-Motion being heard concurrently. MI’s proposal contravenes the well-established principle that cases involving the same parties and the same or similar facts should be adjudicated together.² It would deprive the Receiver (and other affected stakeholders) of a fair opportunity to respond to MI’s claims and assert defences that may be available, including the substantial potential set-off claims summarized in the Supplemental Report.

8. **A reasonable schedule will not prejudice MI.** MI has not shown that it will suffer any legally relevant prejudice if a reasonable schedule is imposed. MI’s desire for prompt adjudication should not – and does not – outweigh the other parties’ entitlement to procedural fairness.

² *Raza Kayani LLP v. Toronto-Dominion Bank*, 2014 ONCA 862, para. 2; *Healey-Page-Chaffons Co. v. Bailey*, 1913 CarswellOnt 501 (H.C.J.), para. 3.

9. MI's prejudice argument rests on speculation that if the motion is delayed then funds may not be available to pay its claim. There is no evidentiary foundation for, or legally cognizable theory supporting, this position. Despite this, and in order to allay MI's hypothetical concerns about prejudice, the Receiver already agreed to reserve \$6 million to pay any amount it is ordered to pay to MI. The Receiver notes that MI has not reserved or provided security for any amounts that MI may be ordered to pay to the receivership estate.

10. MI's prejudice argument is, in any event, unfounded and premature. It assumes that the Receiver will enter into a transaction that will leave nothing available to pay MI. But any sale transaction will require Court approval and MI will have a full and fair opportunity to address any *actual* prejudice it faces at that stage. MI's fears about what *might* happen in the future do not justify the schedule that it seeks.

11. **The dispute between MI and the Debtors is more complex than MI claims.** MI claims that its motion is simply a matter of interpreting the Receivership Order. This is not correct. The Receivership Order *does not* require payment of any amount to MI that is not otherwise owing.

12. MI's position rests on its incorrect interpretation of section 17 of the Receivership Order. It argues, in essence, that the Receivership Order requires that the Receiver continue the payment practices implemented when Sam Mizrahi controlled both MI and the Debtors (the "**MI Payment Practices**"). The Receivership Order does not mandate that, and the Receiver never continued the MI Payment Practices during the receivership because there was no basis to do so, in the relevant contracts or otherwise. Instead, the Receiver paid a lesser amount each month that it considered reasonable, and MI continued performing under the contracts.

13. The Receivership Order does not elevate the Mizrahi Payment Practices into a Court-ordered mandate. Section 17 of the Receivership Order – titled "Continuation of Services" –

prohibits any person who has a written or oral agreement with the Debtors from discontinuing services provided that they are paid, as determined by the Receiver, in one of three ways: using historical payment practices; a new agreement between the contractor and the Receiver (which was pursued between the Receiver and MI, but ultimately, not achieved); **or** an Order of the Court.³ In this case, MI never discontinued its services. The Receiver never invoked section 17 of the Receivership Order to keep MI working. MI attempts to turn paragraph 17 on its head and use it as a sword to compel payment of amounts the Receiver never agreed to and does not believe are supported by any contract between the parties. MI must prove that it is legally entitled to the amounts that it claims. Assessing that entitlement requires a complete evidentiary record. A complete evidentiary record requires a reasonable schedule.

³ Order (Appointing Receiver) of Justice Osborne dated October 18, 2023, section 17, Tab B.

Appendix “A”

Proposed Schedule of the Receiver

1. Receiver’s responding material and cross-motion by May 31, 2024;
2. MI reply and response to cross-motion by June 28, 2024;
3. Cross-examinations on affidavits, and written questions posed to Receiver, by July 30, 2024;
4. Receiver to respond to written questions by August 16, 2024;
5. Factums to be exchanged, based on hearing date; and
6. Hearing in September 2024.

A



**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

ENDORSEMENT

COURT FILE NO.: CV-23-00707839-00CL **DATE:** March 7, 2024

NO. ON LIST: 2

TITLE OF PROCEEDING: KEB HANA BANK as Trustee v. MIZRAHI COMMERCIAL (THE
ONE) LP et al.

BEFORE JUSTICE: Osborne

PARTICIPANT INFORMATION

For Applicant:

Name of Person Appearing	Name of Party	Contact Info
Brendan O'Neill Christopher Armstrong Mark Dunn Jennifer Linde	The Receiver	boneill@goodmans.ca carmstrong@goodmans.ca mdunn@goodmans.ca jlinde@goodmans.ca

For Respondents:

Name of Person Appearing	Name of Party	Contact Info
Jeremy Dacks and Michael De Lellis	KEB Hana Bank as trustee of IGIS Global Private Placement Real Estate Funds Nos. 301 and 434	mdelellis@osler.com jdacks@osler.com
Jerome Morse and Steven Weisz	Mizrahi Inc., Sam M Inc., and Sam Mizrahi	jmorse@morseshannon.com sweisz@cozen.com
David Bish, Nina Perfetto and David Levangie	Coco International Inc. and 12823543 Canada Ltd.	dbish@torys.com nperfetto@foglers.com dlevangie@foglers.com
Edward Babin and Brendan Monahan	CERIECO Canada Corp.	bmonahan@babinbessnerspry.com ebabin@babinbessnerspry.com
Adam Slavens	Tarion Warranty Corp.	aslavens@torys.com

Harvey Chaiton	Aviva Insurance Company of Canada	harvey@chaitons.com
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For Other Parties:

Name of Person Appearing	Name of Party	Contact Info
Stephen Ferguson, Josh Nevsky and Melanie MacKenzie	The Receiver	sferguson@alvarezandmarsal.com jnevsky@alvarezandmarsal.com mmackenzie@alvarezandmarsal.com

ENDORSEMENT OF JUSTICE OSBORNE:

1. The Receiver brings this motion for various relief sought to be granted in two orders: a Lien Regularization Order and a Construction Continuance Order as set out in the motion record, all in respect of the project, which is an 85 story condominium, hotel and retail tower located at the southwest corner of Yonge Street and Bloor Street West, Toronto currently under construction and known and marketed as “The One” (“the Project”).
2. At the conclusion of the hearing of this motion yesterday, I granted the motion subject to certain revisions to the draft orders submitted (a number of which were resolved on the consent of the parties), with reasons to follow. These are those reasons.
3. The Construction Continuance Order would:
 - a. approve the engagement by the Receiver of SKYGRiD Construction Inc. (“SKYGRiD”) as construction manager of the Project on the terms set out in the SKYGRiD Engagement Letter dated February 26, 2024;
 - b. extend the scope of the stay of proceedings already granted to SKYGRiD from the Effective Date of March 13, 2024 until further order of this Court and related relief;
 - c. declare that Mizrahi Inc. in its capacity as the Former Developer shall have no liability in respect of the supply of services or materials to the Project on or after the Effective Date (a “Post-Disclaimer Supply”);
 - d. require that the former developer and any other Person shall permit the Receiver to access and take possession of the Project Materials;
 - e. declare that the Receiver, in making payments directly or indirectly to suppliers, contractors, subcontractors and other creditors, is not affirming or assuming (and has not affirmed or assumed) any agreement for the supply of goods or services to the Debtors, the Former Developer and/or the Project, and shall have no personal liability for any payments or other obligations under any such agreement; and
 - f. approve the First Report of the Receiver dated February 26, 2024 and the activities set out therein.
4. The Lien Regularization Order would:

- a. stay the rights of any person (a “Lien Claimant”) who supplied labour, materials and/or services to the Project to serve, register, preserve or perfect liens with respect to the Project pursuant to the *Construction Act*, R.S.O. 1990, c.C.30, as amended, except as permitted by the Lien Regularization Order;
 - b. require that any person who wishes to assert a Lien Claim in respect of the project, whether in respect of materials and/or services supplied before, on or after the Filing Date, do so by delivering a Lien Notice to the Receiver within the timeframe prescribed by the provincial Lien legislation;
 - c. grant a Lien Charge against the project in favour of any Lien Claimant asserting a lien equivalent to, and only to the extent of, any security granted in respect of a Lien Claim under the provincial Lien legislation, subject to the quantification and verification of such Lien Charge as provided for in the Lien Regularization Order; and
 - d. provide that the priority of a Lien Charge will be equivalent to the priority granted under the provincial Lien legislation with respect to other Lien Charges, rank subordinate to the Receiver’s Charge and the Receiver’s Borrowings Charge, and be equivalent to such priority with respect to other creditors of the Debtors, as is accorded to Lien Claims under the provincial Lien legislation and any applicable federal laws.
5. Defined terms in this Endorsement have the meaning given to them in the motion record of the Receiver, the First Report or my earlier Endorsement made in this proceeding, except as otherwise stated.
 6. The Receiver relies on the First Report and the Supplemental Report to the First Report dated March 6, 2024.
 7. The motion materials were served on the Service List. For greater certainty, the Receiver has also served all known suppliers of goods or services to the Project, contractors, subcontractors and trades.
 8. The relief sought today is unopposed save and except for objections to, or clarifications sought in respect of, certain terms of the Construction Continuance Order by Mizrahi Inc., Sam M Inc., and Sam Mizrahi (collectively “the Mizrahi Parties”). Those issues, as well as a motion brought by the Mizrahi Parties, are discussed below.
 9. The relief sought by the Receiver today is strongly supported by the senior secured lenders, KEB Hana Bank as trustee of IGIS Global Private Placement Real Estate Funds Nos. 301 and 434 (collectively “the Lenders”) and by Coco International Inc. and 12823543 Canada Ltd. (collectively “the Coco Parties”).
 10. I granted the Receivership Order and appointed the Receiver in this proceeding on October 18, 2023.
 11. To permit and ensure that construction continued on the Project during these receivership proceedings, the Receivership Order authorized the Receiver as borrower, IGIS Asset Management Co. Ltd., as asset manager, and KEB Hana Bank as trustee of IGIS Global Private Placement Real Estate Fund No. 530 (“the RFCA Lender”), to enter into a \$315 million Receivership Funding Credit Agreement dated as of October 18, 2023 (“the RFCA”). The Lenders advise that as of today, already over \$100 million has been advanced pursuant to the RFCA to keep construction going.
 12. When the Receiver was appointed, Mizrahi Inc. as the Former Developer was the developer and general contractor of the Project pursuant to the Construction Management Agreement and the GC Agreement. The Receivership Order permitted the Receiver to terminate or disclaim those agreements, which it has now done, with the consent of the RFCA Lender.
 13. The Receiver seeks approval, as noted above, for the engagement of SKYGRiD as the new construction manager. The engagement would proceed for an interim period at least until the completion of a sales and investment solicitation process (“SISP”), for which approval is expected to be sought in the near future.

14. The Receiver recognizes that transition of a project of this magnitude and complexity to a new construction manager midstream may, and notwithstanding that it is necessary and in the best interests of this Project, cause uncertainty for contractors and trade suppliers who have contractual arrangements with the Former Developer, and present an increased risk that construction liens could be registered against the Project. Those in turn could negatively impact upon the ability of the Receiver to obtain future financing advances under the RFCA which are necessary to ensure the ongoing construction of the Project.
15. The overarching objective of the proposed Construction Continuance Order is to ensure that the transition of the Project to the new construction manager does not impact either the ongoing construction of the Project itself or prejudice the rights of any party.
16. The overarching objective of the Lien Regularization Order is to establish a Court-supervised process to ensure that Lien Claims, if any, are addressed in an orderly and fair manner that does not risk a negative impact on the ability of the Receiver to access ongoing funding necessary for the continued construction of the project, while ensuring that the rights of any Lien Claimant are similarly not negatively impacted.
17. Those claimants will continue to enjoy the same substantive rights as are available to them under the provincial lien legislation and related regime. The proposed Lien Regularization Order is intended to achieve this while maximizing efficiency and removing the need (and associated costs and expenses) of having to bring a motion to lift the stay for any Lien Claimant individually, which Lien would then have to be preserved and perfected and ultimately vacated by posting security.
18. Accordingly, the issues on this motion are whether the court has the jurisdiction to grant the orders sought, and if so, whether the orders should be granted in this particular case.
19. For the reasons set out below, I am satisfied that both proposed orders should be granted.

Construction Continuance Order

20. I am satisfied that the engagement of SKYGRiD by the Receiver should be approved. The Receivership Order made earlier at paragraph 4(e) gives the Receiver the authority to retain a construction manager. The statutory basis for court approval is found in section 243(1)(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended ("the *BIA*").
21. Given the fundamental importance of the role to be performed by SKYGRiD if this receivership is to be successful, however, the Receiver seeks specific authority to retain SKYGRiD on the terms set out in the SKYGRiD Engagement Letter which is attached to the First Report.
22. The circumstances leading to the negotiation and execution of the SKYGRiD Engagement Letter are fully set out in the First Report. The Receiver solicited proposals on a confidential basis from two construction managers to manage the Project, including for an interim period until the completion of the SISP.
23. SKYGRiD was selected as the successful candidate. I observe that it was willing to accept an engagement for only an interim period up and until the completion of the SISP with the understanding that the ultimate owner of the Project could decide whether or not to continue its retention.
24. The Receiver is satisfied that its fees are competitive with prevailing market rates and are lower than the fees that the Former Developer asserts are payable to it in respect of project management. Finally, the RFCA Lender consented to the retention of SKYGRiD (as is required according to the terms of the RFCA).
25. The engagement of SKYGRiD on the terms set out in the SKYGRiD Engagement Letter is approved. The Receiver is authorized to enter into the SKYGRiD Construction Agreement.
26. It follows that SKYGRiD should benefit from the limited stay of proceedings already granted in this matter (particularly as set out in paragraphs 14 and 15 of the Receivership Order) to the extent that such

proceedings, rights and remedies affect the Project or the performance by SKYGRiD of its obligations in connection thereto. I observe that the same limited stay protection was similarly provided in the Receivership Order to the Former Developer.

27. I am satisfied that this relief is what practicality demands, as well as what justice dictates, as contemplated by the Supreme Court of Canada when it concluded that the “very expansive wording” of section 243(1)(c) of the *BIA* gives this Court the jurisdiction to expand the scope of the stay in this matter where appropriate: *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 at para 148, citing *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226 at para 20; *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508 at para 57; and *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.*, 1994 CanLII 7468, 114 D.L.R. (4th) 176 (Ont Ct J (GD)) at para 16.
28. This Court and other Canadian courts have granted stay protection in favour of third parties where necessary and appropriate to facilitate restructuring efforts. In determining whether or not such relief is appropriate, the factors to be considered include whether extending the stay to the third party in question would help maintain stability and value during the restructuring proceedings: *JTI-Macdonald Corp. Re*, 2019 ONSC 1625 at para 15; *McEwan Enterprises Inc.*, 2021 ONSC 6453 at paras 42-43; and *Laurentian University of Sudbury*, 2021 ONSC 659 at para 40.
29. The Construction Continuance Order is either supported or not opposed by any party present in court today, with the limited exception of the Mizrahi Parties. While they do not oppose the order generally or what it seeks to achieve, they raised objections with respect to certain particular terms of the proposed form of order, as discussed below.

Lien Regularization Order

30. The proposed Lien Regularization Order would establish a court-supervised, streamlined, claims process to be administered by the Receiver. It would stay the rights of Lien Claimants to register any lien against the Project, but substitute such rights with the ability to file a Lien Claim with the Receiver and benefit from a court-appointed Lien Charge, all consistent with rights established under the provincial lien legislation.
31. I am satisfied that my jurisdiction to make such an order, where appropriate, flows from section 243(1)(c) of the *BIA* referred to above.
32. The proposed Lien Regularization Order is, in effect, in the nature of a claims procedure order. Those orders are granted by Canadian courts in similar proceedings on a regular basis. It is critical that such orders be tailored to the particular circumstances of each individual case. The specific provisions that are appropriate in one proceeding may not be appropriate or necessary in another. The overarching objective is to establish a claims process that is efficient, flexible and fair.
33. In similar circumstances where the registration of liens against a development project has risked causing delays and disruption to the progress of construction or imperiling restructuring efforts, this Court has exercised its jurisdiction to establish a claims process for lien claimants similar to that proposed here: See, for example, *Comstock Canada Ltd., et al* (7 August 2013), Ont. Sup. Ct. J [Commercial List] CV-13-10181-00CL (Lien Regularization Order); *FirstOnSite GP Inc.*, (21 April 2016), Ont. Sup. Ct. J [Commercial List] CV-16-11358-00CL (Amended and Restated Initial Order); *Carillion Canada Inc., et al* (14 March 2018), Ont. Sup. Ct. J [Commercial List] CV-18-590812-00CL (Lien Regularization Order, and subsequent Amended Lien Regularization Order dated May 23, 2019).
34. I am satisfied that such circumstances exist here. The proposed terms of the Lien Regularization Order recognize the rights of Lien Claimants while ensuring the Receiver’s continuing access to financing available under the RFCA through the following proposed process, the particulars of which are set out in the motion materials and the First Report:

- a. the rights of Lien Claimants to serve, register, preserve or perfect liens pursuant to the provincial lien legislation will be stayed, and Lien Claimants wishing to assert lien rights against the Project will be required to comply with the process now established;
- b. any Lien Claimant will be able to preserve its rights available under the provincial lien legislation whether in respect of materials and/or services provided before, on or after the Appointment Date by delivering a Lien Notice to the Receiver within the timeframe prescribed by the provincial lien legislation;
- c. any Lien Claimant that has delivered (or is deemed to have delivered) a Lien Notice will be granted a Lien Charge equivalent to, and only to the extent of, any security granted in respect of a Lien Claim under the provincial lien legislation. In all cases, such a Lien Charge will be subject to the quantification and verification in accordance with the procedures established;
- d. the Lien Charge will rank subordinate to the Receiver's Charge and the Receiver's Borrowing Charge, all of which is consistent with the priorities established under the Receivership Order and will otherwise be subject to the priority as is accorded to Lien Claims under the provincial lien legislation and the applicable federal laws;
- e. any outstanding liens registered against the Project at the time of the granting of the proposed Lien Regularization Order will be vacated and the applicable Lien Claimant will be deemed to have delivered a Lien Notice. I pause to observe that to the knowledge of the Receiver, as of the date of today's motion, there are no outstanding liens registered against title to the Project; and
- f. any Lien Claimant with a Lien Claim that has been vacated prior to the granting of the order will also be deemed to have provided a Lien Notice, although I observe again that to the knowledge of the Receiver there are no such vacated liens.

35. I am satisfied that this relief is appropriate in the circumstances of this case. While not determinative of whether such relief should be granted, I observe that it is strongly recommended by the Receiver, is consistent with the relief granted by this Court in other cases referred to above, and is not opposed today by any contractor, subcontractor, supplier or trade, all of which (to the extent their existence is within the knowledge of the Receiver) have been put on notice of the motion today. None has appeared.

36. Finally, and as noted above, there are, to the knowledge of the Receiver, no liens registered against the Property as of today's date, with the result that while the proposed order provides for how any such liens should be treated, there are none. Accordingly, the proposed relief is prospective and prophylactic in nature and does not seek to retroactively affect any liens already registered on title to the Project.

37. All parties present in court today (including for greater certainty the Mizrahi Parties) either support or do not oppose the Lien Regularization Order.

38. I am also satisfied that my jurisdiction to grant such an order is fair and reasonable since the rights granted to any Lien Claimant are substantively consistent with those granted to such parties under the provincial lien legislation, with the result that they are not prejudiced by the making of this order. In short, they have the same rights as the statutory regime provided under the *Construction Act* already gives them.

39. Accordingly, no element of the provincial lien legislation regime is being circumvented or compromised. Rather, it is either being complied with, or is deemed to have been complied with, albeit on a streamlined basis. I am satisfied that compliance with the proposed Lien Regularization Order, which will have the effect of removing the requirement in respect of each lien of obtaining a motion to lift the stay, filing, perfecting and registering that lien and then vacating that lien upon the posting of security, is accretive to maximizing value for the benefit of all stakeholders. Importantly, it is accretive in a way that does not prejudice the rights of any Lien Claimant. It is approved.

Approval of the First Report and Activities of the Receiver

40. The Receiver seeks approval of the First Report and the activities summarized therein. Such motions are brought regularly in this Court and make good practical sense where appropriate in that they allow court-appointed officers to move forward with next steps, they bring the activities of that court-appointed officer before the court for scrutiny, they allow an opportunity for the concerns of stakeholders to be addressed and problems to be rectified on a periodic and timely basis and before they are magnified or continued, and enable the court to be satisfied that the activities have been conducted in a prudent and diligent manner, and in accordance with the mandate granted: *Target Canada Co, Re*, 2015 ONSC 7574 at para 12; *Laurentian University of Sudbury*, 2022 ONSC 2927 at paras 13-14; and *Triple-I Capital Partners Limited v. 12411300 Canada Inc*, 2023 ONSC 3400 at para 66.
41. With the exception of the position of the Mizrahi Parties referred to above and discussed below, approval of the First Report and the activities of the Receiver is not opposed, and is supported by the Lenders.
42. I am satisfied that the activities undertaken by the Receiver were necessary, appropriate and consistent with the mandate given to the Receiver in the Receivership Order. One of my overarching objectives in appointing the Receiver on the terms set out in the Receivership Order in the first place, was to ensure that construction on the Project continued in an orderly and cost-effective way, all with a view to minimizing delays and preserving value. I am satisfied that the activities of the Receiver have been consistent with that objective.
43. Subject to the caveat referred to below with respect to the Mizrahi Parties, the First Report and the activities of the Receiver are approved.

The Mizrahi Parties: Their own Motion and Objections or Requests for Clarification with respect to the Construction Continuance Order

44. The objections of the Mizrahi Parties arise in large part out of, and are related to, their own motion in respect of which materials were just recently delivered.
45. In essence, the Mizrahi Parties seek an order requiring the Receiver to pay to them fees they say are owing in respect of their project management services provided between the date of the appointment of the Receiver and the Effective Date of the transition to SKYGRiD, as well as declaratory relief with respect to certain Disputed December Payment Letters and other relief.
46. The Mizrahi Parties submit that the Receivership Order and particularly paragraph 17 thereof compelled the Former Project Manager to continue to provide services, but on terms that it would be paid for those services provided post-appointment of the Receiver. Their position is that they have provided those services, but have not been paid, and therefore seek an order compelling the Receiver to make those payments. They want that motion scheduled as soon as possible, citing an urgent need for funds as well as the fact that fairness dictates that the motion be heard and determined.
47. The Receiver, strongly supported by the Lenders and by the Coco Parties, takes the position that it needs an opportunity to first investigate the underlying facts, and then prepare and file responding materials. As set out in the First Report and particularly in the Supplemental Report to the First Report, the Receiver has concerns with various payments already made to the Mizrahi parties and the basis for those payments, as well as numerous other issues relating to the entitlement of the Mizrahi Parties to the fees they say are owing. The Receiver anticipates taking the position on that motion that rights of setoff apply in a quantum that would exceed the amounts said to be owing to the Mizrahi Parties in any event.
48. Finally, the Receiver submits that paragraph 17 of the Receivership Order does, as submitted by the Mizrahi Parties, require the Receiver to pay for goods and services received after the date of that order. However, the Receiver submits that paragraph 17 also contemplates that such fees as may be owing to the

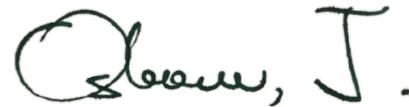
Mizrahi Parties (or others) must be determined by the Receiver, agreed by the parties, or ordered by the court, with the result that nothing in paragraph 17 is inconsistent with its position that amounts claimed by the Mizrahi Parties must be investigated, proven and determined following the hearing of the motion that is now pending.

49. All of these issues are for another day, and are not properly or necessarily determined as part of the motion before the court.
50. I observe that part of the relief sought by the Receiver in the Construction Continuance Order relates to the provision of relevant books and records from various parties, including but not limited to the Mizrahi Parties. Simply put, the Receiver is still trying to investigate the underlying facts, gather and evaluate the relevant documentation, and then consider its position. I further observe that the transition from the Mizrahi Parties to SKYGRiD as project manager is not even yet effective, with the result that the facts that may ultimately be relevant to a determination of what amounts may be owing to the Mizrahi Parties have themselves not fully crystallized.
51. The parties have submitted dueling case management timetables for the delivery of materials and the scheduling of that motion. As I advised the parties at the conclusion of the hearing, that motion is properly scheduled at a Case Conference (for which I will make myself available as supervising judge) but those issues are not ripe for determination or even scheduling today. Counsel to the court-appointed Receiver will coordinate discussions among the key stakeholders.
52. The quantum of the fees at issue are significant and the issues are important to this proceeding. Fairness to all parties requires that that motion be fully briefed and determined on the basis of a full record.
53. With respect to the alleged prejudice that, as submitted by the Mizrahi Parties, will result from any delay, I observe the commitment of the Receiver made in court that it will hold an amount of not less than \$6 million pending a consensual resolution of the issues with the Mizrahi Parties or the determination of the motion they have now brought, such that the risk that there will be no funds available to satisfy a possible order made, is thereby mitigated.
54. The submissions of the Mizrahi Parties that need to be addressed today are those that flow from this outstanding motion but which relate to the specific terms of the Construction Continuance Order sought today.
55. Their opposition, or concern for clarification, with respect to the Construction Continuance Order, is directed towards their concern that their pending motion not be prejudiced by relief being granted now.
56. Some of the concerns were resolved through the cooperation and negotiation among the key parties and particularly the Mizrahi Parties and the Receiver. Those are reflected in the revised draft order and in the commitment to hold funds referred to above. (I pause to observe that similar cooperation resulted in paragraph 15 of the proposed order, which resolved on the consent of the parties the concerns expressed by Tarion that the limitations of liability provided for in the order do not extend to obligations or liabilities arising under the *Ontario New Home Warranty Plan Act*, which continues to apply).
57. The remaining concern of the Mizrahi Parties related to paragraphs 14 and 16 of the draft Construction Continuance Order.
58. Paragraph 14 provides that in making payments to suppliers, contractors, subcontractors and other creditors, the Receiver is not affirming or assuming (and has not affirmed or assumed) any agreement or mandate for the supply of goods and/or services to the Debtors, the Former Developer, the Construction Manager and/or the project, and the Receiver shall have no personal liability for any payments or other obligations.

59. I am satisfied having heard the submissions of counsel for the Mizrahi Parties that the claims they wish to assert are asserted as against the Project assets and not the Receiver in it personal capacity in any event, and are further addressed by the commitment to hold funds as noted above.
60. Further, and more fundamentally, the effect of paragraph 14 is to preserve the status quo, in the sense that the Receiver is making payments to suppliers and others to keep the Project going, but in doing so is not prejudicing its position and nor is it deemed to have affirmed or assumed any agreement. It is simply making payments to keep the construction activities going. I am satisfied that this paragraph, which I observe is consistent with the terms of the Receivership Order already made in any event, is appropriate.
61. Paragraph 16 provides for the approval of the activities of the Receiver. For the reasons set out above, I am satisfied that the activities should be, and they are, approved. To be clear, however, that approval does not prohibit the Mizrahi Parties from advancing the claims made in their pending motion, which as noted above will be determined on a full record another day.

Result and Disposition

62. The motion of the Receiver is granted. The Construction Continuance Order and the Lien Regularization Order are approved in the revised form submitted to me. I have signed both orders and they are effective immediately and without the necessity of issuing and entering.

A handwritten signature in black ink, appearing to read "Osborne, J.", with a stylized, cursive script.

Osborne J.

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

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

THE HONOURABLE MR.

JUSTICE OSBORNE

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WEDNESDAY, THE 18TH

DAY OF OCTOBER, 2023

**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

**ORDER
(Appointing Receiver)**

THIS APPLICATION made by KEB Hana Bank as trustee of (i) IGIS Global Private Placement Real Estate Fund No. 301 and (ii) IGIS Global Private Placement Real Estate Fund No. 434 (the “**Applicant**”) for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”) appointing Alvarez & Marsal Canada Inc. (“**A&M**”) as receiver and manager (in such capacity, the “**Receiver**”) without security, of all of the assets, undertakings and properties of Mizrahi Commercial (The One) LP, Mizrahi Development Group (The One) Inc., and Mizrahi Commercial (The One) GP Inc. (together, the “**Debtors**”) acquired for, or used in relation to a business carried on by the Debtors including, without limitation, in connection with the development of an 85-storey condominium, hotel and retail tower located at the southwest corner of Yonge Street and Bloor Street West in Toronto, Ontario and legally described on Schedule “A” hereto (the “**Project**”), was heard this day at 330 University Avenue, Toronto, Ontario.

NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that all rights and remedies against the Debtors, the Receiver, or affecting the Property, or against the Developer for matters arising after the date of this Order, including, without limitation, licenses and permits required for the Project regardless of who is the legal holder of any such licenses and permits, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any “eligible financial contract” as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

16. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of the Debtors, the Developer, or in respect of the Project, or held by the Debtors or the Developer, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

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.

18. **THIS COURT ORDERS** that any Person who has provided any kind of letter of credit, guarantee, surety or bond (collectively, "**Financial Assurance**") to or for the benefit of the Debtors, including where such Financial Assurance has been provided to the Developer, on or before the date of this Order shall be required to continue honouring such Financial Assurance in accordance with its terms, notwithstanding any default of cross-default arising as a result of this Order, the financial circumstances of the Debtors or otherwise. For greater certainty, the guarantees of the Guarantors referred to in paragraph 65 of the Yoon Affidavit shall not be affected by this paragraph and such guarantees are not included in the definition of Financial Assurance.

RECEIVER TO HOLD FUNDS

19. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new bank accounts to be opened by the Receiver or on the instructions of the Receiver into a lawyer's trust account held in trust in accordance with purchase and sale agreements for condominium units in the Project (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

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. et al

Respondents

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

AIDE MEMOIRE OF THE RECEIVER

Goodmans LLP

Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Mark Dunn LSO No. 55510L
mdunn@goodmans.ca

Kirby Cohen LSO No. 67765Q
kcohen@goodmans.ca

Jerred Kiss LSO No. 84365O
jkiss@goodmans.ca

Tel: 416.979.2211

Fax: 416.979.1234

Lawyers for the Receiver