SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

ENDORSEMENT

COURT FILE NO.: CV-23-00707839-00CL **DATE: May 25, 2026**

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

BEFORE: JUSTICE OSBORNE

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ENDORSEMENT OF JUSTICE OSBORNE:

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[1] This motion and cross-motion are in many respects a mirror image of one another. They arise out of the ongoing construction of an 85-story mixed-used tower located at the iconic intersection of Yonge and Bloor Streets in Toronto, originally known as "The One" and now called "One Bloor West" (the "Project").

[2] Mizrahi Inc. ("Mizrahi") was, until it was terminated by the Receiver, the developer, general contractor, and exclusive listing agent for the Project. Mr. Sam Mizrahi is the owner and president. He was also the

president, a director, and a 50% owner (indirectly) of the Debtors[1], the entities that owned and originally undertook the development and construction of the Project.

[3] The remaining 50% owner (indirectly) of the Debtors are entities controlled by the Coco family (collectively, "Coco") and principally represented by Ms. Jenny Coco.

The Motions

[4] Mizrahi brings a motion (its "Payment Motion") for an order directing the Receiver to pay to Mizrahi the sum of $7,579,792.09 plus interest for post-receivership work provided to the Project as requested by the Receiver. It submits that such is payable pursuant to the Receivership Order.

[5] The Receiver brings a cross-motion for an order directing Mizrahi to repay amounts the Receiver submits were improperly charged, and for a declaration that no further amounts are owing to Mizrahi. The Receiver denies that any amounts are owing to Mizrahi. It conducted a lengthy investigation and concluded that Mizrahi owes to the Debtors, on whose behalf the Receiver claims for the benefit of creditors, at least $58.8 million.

[6] Mizrahi denies that any amounts already paid to it are owing to the Receiver.

[7] The Senior Secured Lenders ("SSL") support the position of the Receiver.

[8] Given the significance of these issues to the parties and the fact that these essentially competing claims engaged many overlapping issues and a significant amount of overlapping evidence, I directed that they proceed together, according to a court-imposed timetable, and that the record be coordinated. The record is voluminous, and the materials comprise in excess of 6,300 pages. Numerous affidavits were filed, extensive cross-examinations were conducted, and the motions were heard over the course of three days. In part due to document production disputes and resulting adjournments, the parties had months to prepare. All parties agree that the court should determine the issues and decide whether the relief sought on the motion and cross-motion should be granted on the basis of the record now before the court.

[9] The material on which the Receiver relies is principally set out in the Fifth Report dated October 18, 2024 and the Supplement thereto dated February 28, 2025. The evidence of Mizrahi is principally found in three affidavits of Mr. Sam Mizrahi and two affidavits of the Chief Financial Officer of Mizrahi, Mr. Mark Kilfoyle ("Kilfoyle"). Both of them were cross-examined. The Receiver provided written interrogatories. In addition, Ms. Jenny Coco was examined pursuant to r. 39.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[10] Given the sensitivity of certain of the financial and other information filed in the context of this and other ongoing proceedings (including litigation between and/or among the Debtors and/or between the Debtors and the Lenders) certain of the material was redacted in the public file, on the consent of all parties. The Receiver submitted that Redactions, including the Confidential Appendices to the Fifth Report, contain confidential and sensitive commercial information regarding the business and operations of the Debtors, the

[1] The Debtors are comprised of Mizrahi Commercial (The One) LP (the "Beneficial Owner"), an Ontario limited partnership formed to undertake the development of the Project; Mizrahi Commercial (The One) GP Inc., an Ontario corporation that is the general partner of the Beneficial Owner; and Mizrahi Development Group (The One) Inc. (the "Nominee"), an Ontario corporation wholly-owned by GP Inc. The Nominee is the registered owner of the property as bare trustee for the Beneficial Owner.

public disclosure of which will negatively impact the ongoing sale and investment solicitation process for the Debtors in the *CCAA* proceeding and other restructuring initiatives to the detriment of the Debtors and their stakeholders. No party opposed these confidentiality provisions.

[11] To the extent necessary, I am satisfied that the test for a sealing order set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, and refined in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, has been met here. I note that it is not opposed by any party. The Project remains uncompleted, and the sale of almost all condominium units and the leasing of retail units remains to be completed. Those processes are critical to stakeholder recovery. At my direction, copies of all redacted materials were filed with the Commercial List office in order that the record is complete. Any party may seek access to those materials at any time. No one has done so.

[12] Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.

Analysis

The Two Competing Motions

[13] Fundamentally, Mizrahi's position is that the amounts it seeks to be paid represent post-receivership work done, are payable according to a plain reading of para. 17 of the Receivership Order, and are payments in accordance with the normal payment practices for the Project. Mizrahi submits that it continued as general contractor to the Project following the appointment of the Receiver, with the result that it should be paid in accordance with normal payment practices.

[14] The Receiver disputes that the payment practices were anything but "normal" and that no amounts are owing to Mizrahi. It submits that Mizrahi agreed to pay for its own labour and then charged the Debtors $49.3 million for its labour at marked-up rates. It submits that the original agreement with Mizrahi is reflected in a CCDC 2 Stipulated Price Contract dated July 7, 2014 (the "First GC Agreement"), which did not permit Mizrahi to charge separately for labour that it provided to the Project, and that none of the subsequent agreements or events (save for a brief period of time discussed below) changed that.

[15] Mizrahi concedes that the First GC Agreement, according to its terms, limits its entitlement to payment based upon the percentage of completion of the Project and a stipulated fixed price. However, it submits that all payments made to Mizrahi over the entire course of construction of the Project prior to the receivership were on a cost-plus basis. Accordingly, it submits that historical cost-plus payment basis constitutes "the normal payment practice" as contemplated in the Receivership Order notwithstanding that it is completely at odds with the written agreements.

[16] The chronology of key events, and particularly the agreements and payment practices, both before and after the appointment of the Receiver are relevant to both motions. That chronology is complex due to three principal factors:

a. the sheer scale and complexity of the Project as one of the largest mixed-use retail, commercial, and residential high-rise projects ever undertaken in Canada. Once completed, the Project will be one of Canada's tallest residential buildings, comprised of approximately 85 floors, almost

642,000 ft.^{2} of residential space, and 189,000 ft.^{2} of commercial space. Total cost estimates for the Project exceed $2 billion;

b. the number of relevant agreements between and among the parties that need to be considered, and the fact that the parties did not state in those agreements which contract precedence and priority although multiple contracts appear to have been in force at the same time; and

c. the fact that, as more particularly discussed below, Mizrahi takes the position that certain terms of the agreements were amended by the conduct of the parties.

[17] Mizrahi submits that there are three legal issues to be determined on its motion:

a. whether para. 17 of the Receivership Order requires the Receiver to pay Mizrahi in accordance with the normal payment practices for the Project (i.e., the historical payment practices);

b. whether the payment terms of the First GC Agreement bind the Project and Mizrahi; and

c. whether Mizrahi is entitled to the amounts sought pursuant to para. 17 of the Receivership Order, the Credit Agreement, the Mediator's Proposal, the First GC Agreement, and the Control Agreement since the payment practices were authorized and known to the Project, its beneficial owners (Mizrahi and Coco), the SSL, their Administrative Agent, and Altus Group Limited, the cost consultant to the Project later appointed under the Credit Agreement ("Altus").

[18] The Receiver submits that the core issue on its cross-motion is whether Mizrahi breached the agreements governing its relationship with the Debtors by charging amounts that it was not entitled to charge and failing to repay amounts it was and remains obliged to repay. The Receiver submits that the following issues need to be determined:

a. whether Mizrahi was entitled to charge separately for labour, contrary to the terms of the First GC Agreement, with the result that it was overpaid by $49.3 million for labour that it improperly charged to the Debtors and for which it is liable to repay;

b. whether Mizrahi also breached other contracts governing its work on the Project, such that Mizrahi is liable to the Debtors for at least an additional $9,539,853.71 payable as a result of the following additional breaches:

   i. Mizrahi refused to return sales commissions totaling $1.8 million that it was required to repay. Mizrahi was the exclusive listing agent for all condominium units in the Project and agreed that if a condominium sales agreement was terminated for purchaser default, Mizrahi would return any commissions paid in respect of that unit, but has refused to do so;

   ii. Mizrahi improperly charged the Debtors for third-party real estate agent fees, since it agreed that it would sell all units and pay for its own advertising and sales costs. The Receiver submits that, instead, it hired or caused the Debtors to hire third-party brokers

and then charged those brokers' commissions in addition to its own, in the total amount of $891,778.60;

iii. Mizrahi breached its obligation to hold and retain $1.2 million in trust for the benefit of the Project. The Receiver submits that pursuant to the terms of a Mediator's Proposal agreed to by Mizrahi and Coco on November 26, 2019, Mizrahi agreed to transfer a $1.2 million Reserve it held against a specific future potential liability to a trust fund or GIC pending a determination as to whether that liability was owing. Since that potential liability never arose, the funds ought to have been returned and made available to the Debtors, but Mizrahi has refused to deliver or account for those funds; and

iv. Mizrahi charged marketing fees of $100,000 per month, to which it was not entitled or authorized to take pursuant to any agreement between Mizrahi and the Debtors. This occurred over a period of 27 months, such that Mizrahi owes to the Project a total of $2.7 million.

[19] For the reasons that follow, Mizrahi's motion is dismissed, and the cross-motion of the Receiver is granted.

<u>The Receivership Order and Paragraph 17</u>

[20] The Receiver was appointed by order dated October 18, 2023 (the "Appointment Order"). The Appointment Order is in a form consistent with the Model Order of the Commercial List. It includes most of the terms of receivership orders granted daily by this court.

[21] Mizrahi relies principally on para. 17 of the Appointment Order in support of its position that the amounts it claims are properly due and owing to it. Paragraph 17 is a standard provision in the Commercial List Model Order that provides, in relevant part, as follows:

> This Court orders that Persons having oral or written agreements with the Debtors, or the Developer … for the supply of goods and/or 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 … <u>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</u> 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, <u>or as may be ordered by this Court</u>. [Emphasis added].

[22] Mizrahi submits simply but fundamentally that, by operation of para. 17, it was prohibited from ceasing to provide construction management services following the date of the appointment of the Receiver, and in exchange, it was assured it would be paid "in accordance with normal payment practices of the Debtors".

[23] It argues that since, prior to the appointment of the Receiver, it was in fact paid the 5% construction management fee and the inflated labour rates, para. 17 gives it the unconditional right to continue to be paid those amounts for post-receivership work since such was a "normal payment practice" of the Debtors.

[24] I reject this argument for a number of reasons.

[25] As a preliminary point of clarification, para. 17 clearly operates only with respect to post-appointment services and amounts that may be owing in respect thereof. It is not applicable whatsoever to pre-appointment services provided or amounts owing for those services. Accordingly, even if Mizrahi's interpretation were correct, para. 17 would apply only to the period from the date of the appointment of the Receiver (October 18, 2023) until the Receiver terminated Mizrahi's construction management role some months later. Para. 17 is irrelevant to a determination regarding amounts owing for services provided in the pre-receivership period.

[26] In my view para. 17 does not assist Mizrahi in its claim for amounts it submits are owing post-receivership.

[27] First, para. 17 does not impose any payment obligation on the Receiver as alleged by Mizrahi, or at all. On the contrary, it is a restrictive paragraph that operates to prevent parties from discontinuing the supply of goods or services so long as they are paid the normal price for such goods or services - in accordance with one of three things:

a. normal payment practices;

b. a new agreement; or

c. a court order.

[28] Accordingly, para. 17 expressly contemplates that a court order may be made that affects payment terms. This is consistent with the broad discretion given to a court supervising a restructuring proceeding, and in my view is particularly appropriate for a proceeding involving such a complex and high-value project like this one - one of the most complex and expensive commercial/residential high-rise projects ever undertaken in Canada. It is also consistent with the duty of a court officer appointed pursuant to s. 247 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, (as the Receiver is here) to deal with the Debtors' property in a commercially reasonable manner.

[29] Second, a party supplying goods or services that is not being paid based on one of those three factors (normal payment practices, a new agreement, or a court order) is not restrained by operation of para. 17 from discontinuing, altering, interfering with, or terminating the supply of such goods and services as may be required by the Receiver.

[30] In this particular case, Mizrahi never sought to discontinue its services (as construction manager), and the Receiver ultimately issued a disclaimer notice terminating the agreement with Mizrahi and therefore also terminating the supply of its services.

[31] Third, and while (given my findings above) it is not necessary to go further with respect to para. 17 to dispose of Mizrahi's motion, I do wish to be clear that the critical language of para. 17, as with any order of the Court, must be interpreted based on "the text, context, and purpose of the provision in issue": *Business Development Bank of Canada v. 170 Willowdale Investments Corp.*, 2025 ONCA 251, 18 C.B.R. (7th) 1, at para. 24.

[32] A provision in an order providing that a supplier is to be paid "in accordance with normal payment practices" does not, and cannot be interpreted to, condone or authorize payments by a court officer (in this case, the Receiver), if the previous payments to that supplier that are submitted to constitute "normal payment practices" were improper or unlawful. Mizrahi submits that since it received payments based on an inflated construction management fee basis and received inflated labour rates, it is entitled based on the Receivership Order to continue to do so. This is not correct. A party cannot rely on its own breach of contract as evidence of "normal payment practices" of the counterparty to that contract. I have reviewed all of the authorities relied on by Mizrahi in this regard. None supports the proposition for which they are submitted.

[33] Finally in this regard, Mizrahi's submission that para. 17 entitles it to be paid in accordance with historical payment practices, notwithstanding that by its own admission those practices were inconsistent with the terms of the First and Second GC Agreements, is significantly undermined by the submission made by Mizrahi when the Receivership Order was granted, which is that it must include para. 6.

[34] Paragraph 6 was specifically negotiated by and included at the request of Mizrahi. It provided that the Receiver was authorized and directed to pay specified amounts "in respect of the amounts owing to Mizrahi Inc. pursuant to the Construction Management Agreement and/or the GC Agreement for services performed on or prior to August 31, 2023" [emphasis added], although the provision was also clear that by making such payments, the Receiver was not affirming either agreement.

[35] The important point for purposes of these motions is that Mizrahi expressly relied on and asked the Court to authorize the Receiver to pay the amounts it was seeking pursuant to the written agreements. This is discussed further below.

[36] This point is further reinforced by Mizrahi's Notice of Motion dated February 27, 2024, in which the relief sought by Mizrahi is clear. It sought an order directing the Receiver "to comply with paragraph 17 of the Appointment Order … in connection with the payments required to be made by the Receiver to Mizrahi in its capacity as general contractor … pursuant to the terms of the Construction Management Agreement … or the GC Agreement" [emphasis added]. Those are the same agreements that Mizrahi submits on this motion do not govern or define "normal payment practices" on which it relies.

[37] In conclusion, para. 17 was never relied on by the Receiver in connection with Mizrahi, and it does not operate to grant to Mizrahi any automatic right to payment according to normal payment practices. Paragraph 17 simply is not the determinator of the quantum of fees, if any, that may or may not be payable to Mizrahi.

The Agreements and the Payment Practices

[38] As observed at the outset of these reasons, the chronology of relevant agreements is complex and not entirely consistent. It is therefore necessary to set out the key provisions of each together with my findings about the effect thereof.

The First GC Agreement

[39] Well before the commencement of any construction on the Project, Mizrahi and the Debtors entered into a CCDC 2 Stipulated Price Contract (the "First GC Agreement") on July 7, 2014. It was a fixed-price contract that provided for payments based on progress. It was executed by Mr. Sam Mizrahi on behalf of both sides, Mizrahi and the Debtors.

[40] As noted above, Mizrahi readily concedes that the First GC Agreement did not permit Mizrahi to charge a construction management fee or any amounts for labour provided to the Project. Instead, it provided that Mizrahi was to receive a fixed fee of approximately $422.7 million plus HST for providing all of its services and construction costs. Mizrahi agreed to commence work by February 8, 2015 and complete the work by September 30, 2021.

[41] As set out below, when construction on the Project began in 2017 (approximately three years after the date of the First GC Agreement) and Mizrahi began paying itself a construction management fee and the costs of its own labour (marked up), such payments represented a clear breach of the First GC Agreement according to its terms. I address below Mizrahi's argument that the parties, and particularly Coco, agreed to amend the First GC Agreement through acquiescence and waiver.

Unanimous Shareholders Agreement

[42] Ownership and control of the Debtors was, prior to the appointment of the Receiver, divided equally between Mizrahi and Coco. Coco invested in the Project in 2014, and the parties entered into a series of agreements to govern the terms of that investment and their relationship with respect to the Project. The majority of those agreements were dated December 17, 2014. They effectively divided control of the Debtors between Mizrahi and Coco on an equal basis.

[43] The most relevant of those agreements for the purposes of these motions was a Unanimous Shareholders Agreement ("USA") dated December 17, 2014. Pursuant to s. 3.7 of the USA, Coco had to agree to all contracts entered into by the Debtors. This was consistent with a resolution of the Board of Directors of the Nominee dated November 2016 confirming that any contract entered into by the Nominee was required to be executed by both Coco[2] and Mr. Sam Mizrahi. That was confirmed again by Kilfoyle, the CFO of Mizrahi, on his cross-examination on these motions. His evidence was that a contract between the Debtors and Mizrahi was "something the Cocos had to approve".

[44] This clear contractual requirement for consent of Coco to any contracts entered into by the Debtors, including but not limited to any contract or agreement between the Debtors and Mizrahi, was never amended, cancelled, or revoked.

[45] Accordingly, when Mizrahi began paying itself a construction management fee and labour costs without Coco's consent, such also represented a breach of the USA.

The CCM Contract

[46] In July 2017, approximately when construction on the Project began, Mizrahi retained Clarke Construction Management Inc. ("CCM"), an experienced construction manager, to be the construction manager for the Project. Those parties entered into a CCDC 5A – 2010 Construction Management Agreement dated July 2017 (the "CCM Contract").

[47] Pursuant to the CCM Contract, Mizrahi agreed to pay CCM a construction management fee equal to 1.5% of the Project's total construction cost, together with labour costs based on marked-up labour rates. The Receiver submits, and Mizrahi does not contest, that the labour rates incorporated into the CCM Contract

[2] One of either Ms. Jenny Coco or her father, Rocky Coco, on behalf of the Coco Entities.

are materially higher than the actual costs paid by CCM to the relevant staff. In the result, CCM earned a profit by charging the labour rates it did.

[48] Oddly, neither the Project itself nor the Debtors were parties to the CCM Contract. This is clear according to the terms of the CCM Contract (which defined the counterparty "Owner" as Mizrahi Inc.), and was confirmed by Mr. Sam Mizrahi on his cross-examination on these motions. Approval of Coco was neither sought nor obtained.

[49] In my view, if Mizrahi were entitled to subcontract to a third party such as CCM any of the construction management responsibilities and obligations which Mizrahi was already contractually obligated to perform in exchange for the fixed fee payable proportionate to the percentage of completion of the Project, the costs of any such subcontract would be for Mizrahi's own account.

[50] However, Mizrahi charged the Debtors for those marked-up labour costs of CCM and for the 1.5% construction management fee payable to CCM. Mizrahi recovered the amounts that it paid to CCM with respect to the increased labour rates from the Debtors. It had no entitlement to do that either.

[51] As discussed below, Mizrahi later purported to terminate CCM and assign the CCM contract to itself.

Mizrahi Begins Charging Its Own Construction Management Fee

[52] It is important to refer, within the chronology of relevant agreements, to the fact that Mizrahi began charging its own construction management fee and labour costs, since this is relevant to certain of the agreements and events that follow.

[53] Beginning in 2017, at or around the time of commencement of construction on the Project, Mizrahi began to charge a construction management fee of its own. The construction management fee that Mizrahi charged the Debtors was equal to 5% of the sum of:

a. Hard Costs (costs in respect of subcontractors working on the Project);

b. Recoverable Costs (out-of-pocket recoverable costs, such as for equipment rentals, storage and materials); and

c. the inflated labour rates charged by CCM.

[54] To be clear, the 5% construction management fee being charged from 2017 forward included the 1.5% that Mizrahi had unilaterally agreed to pay CCM and then to itself following the purported assignment of the CCM Contract, together with its own additional construction management fee of 3.5% (i.e., 5% in total).

[55] At that time, there was neither any agreement permitting it to do so, nor any practice of such having been done. To be clear, Mizrahi was not permitted to charge a construction management fee by either the First GC Agreement or the USA, both of which were in full force and effect at that time.

[56] Coco objected to Mizrahi's payment practices not long after construction began when in November 2017 Coco and its principals (Ms. Jenny Coco) realized that the First GC Agreement was not being followed. In

November 2017, several questions and concerns were raised by Ms. Coco to the effect that Coco had not approved various budgets Mizrahi had sent, and she confirmed that Coco was "only committing to the agreements we executed!".

[57] The response on behalf of Mizrahi came from Kilfoyle (the CFO of Mizrahi) in an email to Coco dated November 9, 2017, in which Kilfoyle stated that the 5% construction management fee was "per the Subcontract Agreement". A plain reading of the email makes it clear that he was reassuring Ms. Coco that Mizrahi was entitled to all fees and amounts it was charging and paying itself. Mr. Sam Mizrahi was part of that email exchange.

[58] There was, at that time, no such subcontract agreement. On cross-examination on these motions, Kilfoyle admitted that there was no contract that allowed Mizrahi to take a 5% fee on construction costs and that his advice to Ms. Coco was untrue: his evidence was, "That sentence seems to be—that sentence in that email on that particular seems to be incorrect."[3]

The Second GC Agreement

[59] On May 14, 2019, Mizrahi and the Debtors entered into a second CCDC 2 Stipulated Price Contract (the "Second GC Agreement"). It is this Second GC Agreement on which Mizrahi principally relies as the successor agreement to the First GC Agreement and the primary agreement governing its role as general contractor for the Project from that point forward until it was terminated.

[60] According to its terms, the Second GC Agreement superseded all "representations or agreements, either written or oral". As a result, it replaced and superseded the First GC Agreement. It would also, according to its terms, replace and supersede any alleged oral agreement that permitted Mizrahi to charge a separate construction management fee or any additional labour costs, even if there were one.

[61] Pursuant to this Second GC Agreement, Mizrahi agreed to complete construction on the Project by December 31, 2022 for an increased total fixed price of $583.2 million plus HST, inclusive of all costs and fees.

[62] The parties agreed that:

a. payments to Mizrahi against the fixed price were to be made proportionate to progress and completion (i.e., achieving 20% Project completion triggered an entitlement to 20% of the Contract Price);

b. Mizrahi was not permitted to charge separately for its labour (ss. 1.1.1 and 3.8.1); and

c. any waiver or amendment required an agreement in writing.

[63] Mizrahi reported to the Project cost consultant at the time, Altus. As Altus' reports expressly itemized, the revised fixed Contract Price of $583.2 million included the following components:

[3] Cross-examination of Kilfoyle, Q. 201 – 205.

a. Construction Hard Costs of $510,656,521;

b. Design and Post Contract Contingency of $20,006,850;

c. Hotel and Retail Finishes of $24,731,000; and

d. Construction Management Fees (calculated at 5%) of $27,769,719.

[64] Mizrahi was to be paid (subject to a 10% holdback) based on the percentage of completion, as certified by Altus acting as independent cost consultant.

[65] Accordingly, as of the date of the Second GC Agreement, Mizrahi was entitled to be paid a fixed fee, payable in in installments relative to the percentage of completion, subject to the holdback. Nothing more. In exchange, it was obligated to deliver the finished Project for the agreed-upon revised fixed price of $583.2 million.

[66] Importantly, both the Contract Price and the construction management fee were fixed quantums. If Mizrahi completed the Project for less than the agreed-upon price, it would be entitled to keep the difference, and conversely, if the Project had cost overruns, those would be the responsibility of Mizrahi. Mizrahi agreed to complete substantial performance of the work by December 31, 2022.

[67] To be clear, Mizrahi's fixed construction management fee expressly included labour, products, and services. Mizrahi was not entitled to charge the Project separately for labour that it provided, whether at its actual labour costs or the inflated labour rates it was previously charging. Its fixed fee was inclusive of those amounts.

[68] The Second GC Agreement provided that Mizrahi was entitled to interest on unpaid and overdue amounts at a rate of 4% per annum. Mizrahi's claim includes a component for interest that it alleges is owing. I agree with the submission of the Receiver that given that: i) Mizrahi itself vigourously submitted that the Second GC Agreement was never followed; and ii) the Project was not substantially completed by the agreed-upon scheduled date or at all, Mizrahi is not entitled to any interest payment. In any event, and as further discussed below, I find that no amounts are owing to Mizrahi under the Second GC Agreement, and therefore there is no principal on which to calculate interest in any event.

[69] I note for completeness in the chronology that Mr. Sam Mizrahi unilaterally amended the Second GC Agreement on May 4, 2022. By executing an amendment on behalf of both Mizrahi and the Nominee, he purported to remove any contractual limit on the quantum Mizrahi could charge for the Project, and give Altus the discretion to set the budget and schedule for the Project. Leaving aside the issue of whether or not the amendment is valid, having been signed in the manner that it was and without any consent from Coco, it did not amend the existing prohibition on Mizrahi charging for its own labour (either at cost or at inflated rates) in any event.

The Credit Agreement

[70] Approximately three months following the date of the Second GC Agreement, on August 30, 2019, the Beneficial Owner and the Nominee (together as "Borrower") entered into a Credit Agreement with the SSL,

including KEB Hana Bank Canada. The Asset Manager, the General Partner, Mizrahi, Coco, and others were also parties.

[71] The Credit Agreement also included a representation from Debtors (on whose behalf Mr. Sam Mizrahi signed) to the effect that the Second GC Agreement was in full force and effect, and had not, except as had been disclosed to the SSL, been amended. The Credit Agreement also prohibited any amendment to the Second GC Agreement without written consent from the SSL. (I note that pursuant to the USA, consent for any amendment to the Second GC Agreement was also required from Coco.)

[72] In the main, the Credit Agreement provided that the SSL would advance funds to the Project to finance specified construction costs. The structure under the Credit Agreement provided that, as funding tranches were required, the Debtors would submit a Construction Financing Release Request (often referred to as a "Payment Listing") on a monthly basis.

[73] Each Payment Listing set out the monthly expenses incurred. Those were reviewed by the SSL and then funded through additional advances made under the Credit Agreement.

[74] The Credit Agreement also provided for the appointment of Altus as Independent Cost Consultant whose role included the ongoing review of the costs and schedule for completion of the Project, measured against the approved budget and schedule. The Credit Agreement provided that the SSL were entitled to receive from Altus confirmation that it had reviewed the Project budget, certified construction costs incurred, identified cost overruns, and estimated the cost to complete the Project. Altus estimated that completion costs would not exceed $1.39 billion.

[75] Mizrahi submits that it is entitled to the amounts it claims, in large part, because such amounts were "approved" by Altus and funded by the SSL. I agree with the Receiver, as further discussed below, that Mizrahi's entitlement must flow from its own agreements with the Debtors, and not from monitoring and reporting requirements and obligations between the SSL and their Independent Cost Consultant. Neither the SSL nor their agent, Altus, had any legal ability to amend the terms of any agreement between Mizrahi and the Debtors, the Project, or the other beneficial co-owner, Coco.

The Amending Agreement

[76] In September 2019, when some minor adjustments to the schedule and scope of work in the Second GC Agreement were required by the Credit Agreement, Mr. Sam Mizrahi executed an Amending Agreement to give effect to the necessary adjustments. In that Amending Agreement, he confirmed that the balance of the terms of the Second GC Agreement remained in full force and effect, unamended and unmodified, and that the Second GC Contract [as amended by the Amending Agreement] "is hereby ratified and confirmed".

[77] The Amending Agreement does not change the fee structure set out in the Second GC Agreement.

[78] The Amending Agreement was signed by Mr. Sam Mizrahi on behalf of the Nominee and Mizrahi. Neither Coco nor the SSL signed the Amending Agreement.

The Mediator's Proposal

[79] The objections and concerns raised by Coco began, as noted above, not long after the commencement of construction on the Project in 2017. They continued with varying degrees of intensity thereafter. Ultimately,

in September 2019, the relationship had deteriorated to the point that Coco commenced a formal arbitration proceeding against Mizrahi. The arbitration process proceeded, and numerous rulings were issued by the arbitral panel (including The Hon. Gloria Epstein, The Hon. Frank Newbould, and Mr. Stephen Morrison).

[80] That evolved into an extended mediation process conducted by one member of the arbitral panel appointed as mediator, Mr. Stephen Morrison, whose role it was to assist the parties in attempting to end what were clearly acrimonious (and seemingly never-ending) disputes and arbitration proceedings or motions and interlocutory steps therein. I am satisfied that as of this point forward (and likely earlier), Coco had lost all trust and confidence in Mizrahi and wanted to exit the Project as quickly as possible.

[81] On November 26, 2019, the mediator delivered jointly to the parties a formal Mediator's Proposal. It was ultimately accepted by both Mizrahi and Coco as a form of settlement. Clearly, it represented compromises by all parties with a view to achieving some peace and resolution in the relationship so that the Project could continue. Both Mizrahi and Coco subsequently referred to the Mediator's Proposal as their Settlement Agreement.

[82] The sheer frustration of the mediator and his objective in making the Proposal is clear from the first few paragraphs of the Mediator's Proposal:

> I am not entirely sure that the proposal I am about to make is the right way to deal with the situation but, frankly, I have run out of alternatives, and it is my observation that, after more than two months, the parties have run out of patience for this ongoing mediation process. … The proposal I am going to outline in a few minutes is, first and foremost, based on my assessment of the needs and interests of the parties and, to the best of my ability, represents an attempt to balance those needs and interests as equitably and fairly as I can. Both sides have exhibited extraordinary levels of anxiety with respect to the behaviour of the other, and no resetting of the relationship will ultimately be successful unless those anxieties and concerns can be addressed to the greatest extent possible.

[83] Given that the disputes had, by that point, already continued for over two years, the objective of the Mediator's Proposal was to reset the relationship between Mizrahi and Coco, the principals and (indirect) equal co-owners of the Project. Importantly, for the purposes of these motions, the Mediator's Proposal made material amendments to some terms of the contractual relationship among Mizrahi, Coco, and the Debtors.

[84] First, the Debtors agreed to pay to Mizrahi a construction management fee of 3.5% in the aggregate. That was to be divided between Mizrahi, which was for the first time entitled to charge a 2% construction management fee for its "ongoing, but reduced, construction management duties", and another 1.5%, which would "continue to be paid to" CCM. As noted above, CCM was entitled to 1.5% pursuant to the CCM Contract.

[85] Mizrahi submits in the alternative that, at least from this point forward, the Mediator's Proposal changed entirely the structure of the Second GC Agreement from a stipulated price contract to a "cost-plus" agreement between Mizrahi and the Debtors.

[86] A plain reading of the Mediator's Proposal does not support this submission. While it clearly authorized a construction management fee of 3.5% for Mizrahi and CCM in the aggregate, the other payment terms in the Second GC Agreement - including, for greater certainty, the prohibition on Mizrahi charging for its own labour either at cost or at a marked-up rate - were unamended.

[87] Aside from being clear on a plain reading of the Mediator's Proposal, this makes commercial and common sense: CCM remained in place as construction manager in exchange for its (unchanged) fee of 1.5%. As Mizrahi was now being paid a percentage-based construction management fee as well (for what is not clear since CCM was managing the Project), there was no reason for it to charge labour costs in addition thereto.

[88] Notwithstanding the terms of the Mediator's Proposal and the fact that it effectively superseded some but not all of the payment terms in the Second GC Agreement, no formal amendment agreement was ever prepared or executed.

[89] The Mediator's Proposal also reflected the continuing concerns, primarily of Coco, with respect to the financial management and accountability of the Project. It required that the parties implement "the disciplined use of basic financial control measures", which were to include, among others, the following:

a. budgets that were "realistically established and regularly updated";

b. segregated bank accounts; and

c. accurate monthly reporting to stakeholders.

[90] The fact that such basic financial controls in a project of this scale and complexity were thought to be required is telling.

[91] In addition, the Mediator's Proposal required that a new employee, Ms. Maria Rico, be taken on by Mizrahi, but with the responsibility to report primarily to Coco with respect to the above items. Ms. Rico's role was essentially that of a monitor.

[92] The Mediator's Proposal also addressed two other items that are the subject of disputes on these motions:

a. it required some security in respecting funds for an existing $1.2 million Liability Reserve that had been established to satisfy a potential liability and which funds were held partially in bank accounts of Mizrahi and partially in bank accounts of the Project. Those funds were required to be transferred to a GIC or joint trust account pending a resolution or determination of the potential liability; and

b. it provided that Mizrahi would be entitled to a Residential Management Fee equal to 2% of the sale price for condominium units in the Project sold. Mizrahi was entitled to be paid 50% of the Residential Management Fee (or 1% of the condominium unit purchase price) when a purchaser signed an agreement of purchase and sale and paid the appropriate deposit. The balance of the Residential Management Fee was due on the closing of the condominium unit.

[93] Each of these is addressed further below.

Termination and Purported Assignment of the CCM Contract

[94] On October 26, 2020, Mizrahi terminated CCM as construction manager of the Project by delivering a termination notice. However, the termination notice also included a "notice of assignment of the contract to Mizrahi". In other words, Mizrahi purported to assign the rights and obligations of CCM under the CCM Contract to itself.

[95] I note that s. 1.4.1 of the CCM Contract prohibited assignment by either party without the consent of the other. Put differently, the consent of both parties was required for any assignment. Such a provision is not unusual in agreements, but it is conceptually inconsistent with the scenario in which one party is purporting to assign the rights and obligations of the other party to itself. Even if CCM could consent to such an assignment, as was purportedly done here, there is no evidence that it was ever requested to do so, or that it did so.[4]

[96] Here, Mizrahi did not purport to assign its own rights and obligations under the CCM Contract, but rather, it unilaterally terminated the relationship with CCM and then purported to assign the rights and obligations of the counterparty, CCM, to itself. The result was that it purported to have what it maintained was a valid and continuing contractual relationship with itself.

[97] Even if such an assignment were valid, a conclusion about which I have very significant reservations, it would not bind the Debtors or the Project. Mizrahi did not even provide the Debtors or Coco with notice of the CCM termination.

[98] As noted above, Mizrahi entered into the CCM Contract in its own name and without the consent of any of Coco, the Debtors, or the Project. Even assuming without deciding that it had the contractual right to do so, the result upon termination should have been that the parties reverted to their pre-contractual state. Here, that would have meant that Mizrahi was responsible for all construction management functions in accordance with the First or Second GC Agreement and that it was entitled to be paid according to the terms thereof.

[99] Instead, it appears that Mizrahi purported to assign the CCM Contract to itself with the sole purpose of creating an entitlement to be paid the fees and other amounts that were previously payable to CCM (and which exceeded any amounts to which Mizrahi was entitled).

[100] Mizrahi then hired staff to complete the construction management functions that were previously undertaken by CCM. It then charged the Debtors for that staff at inflated rates that exceeded its costs. No contract or agreement with the Debtors permitted Mizrahi to do that.

[4] Mizrahi asserted for the first time in its factum that the counterparties to the CCM Contract were in fact the Lenders who had acquired party status via an assignment pursuant to the terms of the Credit Agreement. For completeness, I reject this argument also. The SSL obtained certain assignment rights under the CCM Contract, but they were exercisable only in the event of default. There is no evidence that the SSL ever exercised those rights, and such a proposition was never put to them in the record on these motions. The SSL themselves, who were represented on these motions, do not take the position that the CCM Contract was assigned to them. In any event, and as submitted by the Receiver, the assertion by Mizrahi that such an assignment was made is inconsistent with Mizrahi's own conduct: it terminated CCM without any prior notice to, let alone the consent of, the SSL, and asserted that the contract was its (alone) to assign.

Coco Commences Arbitration Proceedings

[101] The unilateral termination of CCM by Mizrahi understandably alarmed Coco. On November 6, 2020, it therefore commenced an arbitration proceeding in respect of a number of disputed actions by Mizrahi, including but not limited to the termination of CCM.

[102] Among other heads of relief, Coco sought a declaration that Mizrahi breached the Mediator's Proposal by terminating CCM, and that the Debtors were not required to pay the fees charged by Mizrahi for staff working on the Project.

[103] The arbitration proceeding never proceeded to a hearing on the merits. The arbitral panel apparently denied a request of Coco for urgent relief, and thereafter Coco and Mizrahi entered into negotiations relating to Coco's potential sale of its interest in the project. Put simply, Coco wanted out.

[104] The Receiver reports that Coco ultimately decided to pursue the sale of its interest in the Project and therefore did not continue its arbitration relating to the termination by Mizrahi of CCM. Mizrahi was going nowhere; this was effectively its Project and it would buy out Coco's interest.

[105] Ultimately, the parties entered into a Control Agreement to govern the operation of the Project pending completion of the contemplated purchase by Mizrahi of Coco's interest in the Project. However, that would not occur for approximately six months.

[106] In the intervening period, Mizrahi continued to charge labour rates that exceeded costs for staff working on the Project. Mizrahi was paid a construction management fee of 3.5% in addition to the inflated labour rates. As contemplated in the Credit Agreement, Mizrahi executed, and Coco reviewed, Payment Listings to request funding from the SSL for payments to Mizrahi.

[107] Mizrahi takes the position on these motions that these Payment Listings, project budgets, and the corresponding payments made by the SSL should be accepted by this Court as evidence that Coco, the SSL, and Altus all approved its payment practices (i.e., the payment to Mizrahi of the increased construction management fee and inflated labour costs). I reject the submission for a number of reasons.

[108] First, there is no evidence in the record that any of the SSL, Altus, or Coco expressly approved the Mizrahi payment practices.

[109] Second, (and as noted above) the relevant agreements are those between Mizrahi on the one hand, and Coco, the Debtors, and the Project on the other hand. Information or documentation submitted by Mizrahi to the SSL to authorize further funding is, in and of itself, not capable of amending contracts between Mizrahi and Coco, the Debtors, or the Project. What the SSL required to satisfy themselves that it was appropriate to advance further funds is not determinative of Mizrahi's right to charge whatever fees, costs, and other amounts that may have been reflected on those Payment Listings. It is simply not relevant to that issue. The budgets referred to and distributed from time to time were prepared by Altus in its role as Independent Cost Consultant. That role was created under the Credit Agreement. Altus prepared monthly reports to the SSL for those parties: each report expressly stated that no other party was entitled to rely on it.

[110] In the result, neither the SSL nor their cost consultant (Altus) had any right or ability to bind Coco, the Debtors, or the Project to any terms with Mizrahi, and they never purported to do so.

[111] Third, to the extent that Mizrahi's submission is that Coco's receipt and review of the Payment Listings amounted to waiver or amendment by acquiescence and conduct, I reject this submission also:

a. the relevant agreements required amendments to be in writing as noted above. The parties turned their minds to the possibility of amendment or waiver by conduct and rejected it;

b. the Second GC Agreement specifically and expressly foreclosed waiver by conduct, and reaffirmed the requirement for any amendment to be in writing.[5] I note, again, that Sam Mizrahi himself had signed that Second GC Agreement for both parties. He was well aware that any amendment to the payment terms was required to be in writing, and that understanding is completely inconsistent with the bald statement he now makes that "everyone agreed" to ignore the clear terms of the GC Agreement and proceed on a fundamentally different basis;

c. each Payment Listing provided to the SSL included a specific confirmation by the Debtors that its representations made in the Credit Agreement (i.e., that the Second GC Agreement was in full force and effect) remained accurate; and

d. the Payment Listings themselves did not reflect the requisite information or particulars to support the submission now made by Mizrahi. The review by the Receiver of the Mizrahi Staff Invoices that showed how much Mizrahi had charged for staff working on the Project (different from the more general Payment Listings) do not specify how the staff costs were calculated, nor do they break out the embedded profit inherent in the inflated labour rates charged by Mizrahi. Even if they had done so, the Receiver was unable to locate any evidence that the Staff Invoices were provided to, let alone approved by, Coco.[6]

[112] Clearly, Coco signed Payment Listings that included amounts paid to Mizrahi for the inflated labour rates. Also, clearly, the SSL advanced the funds requested in the Payment Listings. There is no evidence in the record, however, that Coco ever explicitly agreed or authorize the Debtors to agree that Mizrahi would be entitled to charge the inflated labour rates in addition to the construction management fee going forward.

[113] Similarly, there is no evidence on these motions to satisfy me, as Mizrahi submits, that either:

a. the SSL ever waived any contractual entitlement they had under the Credit Agreement; or

b. the SSL were aware of, and consciously waived or acquiesced in, Mizrahi charging fees to which it was not entitled, contrary to the Second GC Agreement.

[114] There was no direct evidence from either the SSL (or from Altus) to this effect. Clearly, they wanted (and were given) reassurance that the Project would be completed based on the Second GC Agreement. Construction counsel for Mizrahi prepared a detailed memorandum extolling the benefits of fixed-price construction contracts and stating that such an agreement had been "selected" for the Project because of those benefits. There are numerous references to the GC Agreement in the Altus reports. None of that, however, corroborates the unsupported statements on cross-examination from Kilfoyle and Mr. Sam

[5] Section 1.3.2.
[6] Fifth Report, s. 9.56 and Appendix 19.

Mizrahi to the effect that all parties expected and agreed (essentially from the outset) that Mizrahi could and would ignore both GC Agreements.

[115] Finally in this regard, Mizrahi submits that if "there was an error in overlooking the [First GC Agreement] terms … it was the error of the Coco Parties, Ms. Rico [hired by the Senior Secured Lenders to review invoices and charges], the Senior Secured Lender[s], [their] Administrative Agent, and Altus, who prepared monthly reports reviewing Project costs."[7] This is an astonishing submission. The evidence is clear that what occurred did not occur by way of inadvertence or overlooking, but rather represented an intentional and deliberate course of conduct by Mizrahi, who knew precisely what it was paying itself and that such was inconsistent with the relevant agreements.

[116] In any event, Coco approved Payment Listings for only a short period of time in respect of payments to Mizrahi: each month from November 2020 to and including May 2021, when the Control Agreement was executed, so at its highest, any potential approval by Coco - which I reject - would relate only to that period.

<u>The Control Agreement</u>

[117] As noted above, Mizrahi and Coco (together with others) entered into a Control Agreement in May, 2021. It set out terms pursuant to which the Project would operate pending completion of the intended sale of Coco's interest to Mizrahi, which was then anticipated to occur by August 30, 2022. Importantly for the purposes of this motion, the Debtors were not parties to the Control Agreement.

[118] The Control Agreement gave Mizrahi effective control of the project until the expected sale and exit of Coco was completed. During that interim period, Mizrahi was entitled to execute numerous documents on behalf of the Debtors without Coco's approval.

[119] For the purposes of these motions, the relevant effect of the Control Agreement is that, while it was in effect, Coco did not have the right to dispute payments to Mizrahi, and Mizrahi was able to authorize payments by the Debtors (including payments to itself) without Coco's approval.

[120] The Control Agreement included a retroactive increase of the construction management fee to 5% (increased from the 3.5% permitted by the Mediator's Proposal). It did not authorize Mizrahi to charge the Debtors for labour rates, nor did it amend the term of the Second GC Agreement that prohibits Mizrahi from charging the Debtors separately for its own labour.

[121] The Receiver submits that the agreement for this increased construction management fee expired when the Control Agreement expired on August 30, 2022. Mizrahi submits that the Control Agreement, and in particular its entitlement to be paid the increased construction management fee, did not expire on August 30, 2022, or at all. Mizrahi submits that, while the parties did discuss the possibility of it [Mizrahi] buying out Coco's interest, the Control Agreement was not by its terms tied in any way to a pending sale, and instead simply reflected a resetting of the contractual relationship between the parties going forward generally.

[122] I reject that submission also. The Control Agreement, like any contract, must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014

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[7] Responding factum, at para. 11.

SCC 53, [2014] 2 S.C.R. 633, at para. 47. The court should interpret a contract in a manner that is commercially reasonable, to avoid commercially absurd interpretations, and can examine the surrounding circumstances to better understand the mutual and objective intentions of the parties as expressed in the text of the contract: *Sattva*, at para. 57.

[123] The Recitals to the Control Agreement expressly refer to a Purchase Agreement dated March 30, 2021 having been entered into by Mizrahi (defined as "Buyer") and Coco (defined as "Seller") "pursuant to which Mizrahi will buy Coco's interest in the Project".[8]

[124] Recital "J" states that the parties "wish to provide for certain matters with respect to the operation and control of the GP and the Partnership during the period from the date hereof until the mutual release of the escrow (the 'Escrow Period')".

[125] Section 1 provides that the Closing Date for the purchase transaction shall be the day that the last of the Escrow Release Conditions has been satisfied, provided that if they are not satisfied on or before August 30, 2022 the transaction shall be terminated, all escrow deliveries shall be returned, and the parties shall have no liability pursuant to the Purchase Agreement.

[126] Section 2 then provides that during the Escrow Period, Mizrahi "shall have the sole control and management of all aspects of the Project" and "shall have sole authority to execute any documents on behalf of the GP, the Partnership and the Nominee".

[127] Section 3 then provides for the increased construction management fee of 5% of hard costs "in accordance with the terms of the construction management agreement between Mizrahi Inc. and the GP". The same section also provides for a retroactive construction management fee payable to Mizrahi to increase it up to 5% of hard costs. It states, "To the extent that any payments on account of construction management fees have been made to Mizrahi Inc. prior to the date of this Agreement at a rate less than 5% of the hard costs, the difference between such payments and 5% of the hard costs shall be paid to Mizrahi Inc. immediately upon execution of this Agreement".

[128] The Control Agreement did not create any entitlement of Mizrahi to charge the Project for labour in addition to the construction management fee, either at cost or at any inflated labour rates.

[129] The dispute between Mizrahi and the Receiver on these motions about the effect of the Control Agreement arises in large part because the contemplated purchase by Mizrahi of Coco's interest in the Project never occurred. The Receiver maintains that the "Control Period" arising from the Control Agreement expired in August, 2022, the date on which the Escrow Period ended.

[130] Mizrahi submits that, while the purchase transaction never took place, the Control Agreement did not explicitly provide that the unilateral control of the Project it granted to Mizrahi expired at the end of the Escrow Period.

[131] I reject the submission also, for a number of reasons. First, it is completely inconsistent with the plain language of the Control Agreement, and particularly Recital "J", referred to above, which expressly states that the parties wished to "provide for certain matters with respect to the operation and control of the GP

[8] The Control Agreement is in fact between two Coco parties and two Mizrahi parties, but that is not relevant to this issue.

and the Partnership during the period from the date hereof until the mutual release of the escrow (the 'Escrow Period')". The intent of the parties in managing the relationship between Mizrahi and Coco (and therefore, by extension between Mizrahi and the Debtors) to give Mizrahi unilateral control, but only for a temporary period during which the parties were trying to finalize the purchase agreement that would result in Coco's exit from the Project completely, could not be clearer.

[132] If there were any ambiguity, the factual matrix and surrounding circumstances within which the Control Agreement was executed support the finding that the control was intended to be temporary. Coco had commenced the arbitration proceeding expressly because Mizrahi was overcharging, and it had (as reflected in the Mediator's Proposal) developed, by this point, such a profound and complete lack of trust for Mizrahi that Coco simply wanted to exit the Project. In these circumstances, it is commercially absurd that Coco would enter into the Control Agreement to give Mizrahi increased fees on a retroactive basis and complete control of the Project on an indefinite basis.

[133] There is no evidence that the parties - and particularly Coco - intended to give Mizrahi a permanent increase in compensation payable even if Mizrahi failed to complete the purchase.

[134] First, there is a complete absence of any evidence of such an intention. I find additional support for this result in the fact that in response to continuing objections from Coco about its fees, Mizrahi purported to pass a so-called Control Resolution giving itself indefinite control over the Debtors and the Project. Such a resolution would not be necessary if the Control Agreement on its own had the intended effect that Mizrahi submits it did.

[135] Mr. Sam Mizrahi relied on the authority conferred by the Control Agreement - which was expiring, ironically - to unilaterally extend that control. That, also, is commercially absurd.

[136] Unsurprisingly, Coco objected, and the Control Resolution was declared void *ab initio* in June 2023 by the arbitral panel as part of the then ongoing arbitration proceedings.

[137] Moreover, Mizrahi's submission about the permanent effect of the Control Agreement is inconsistent with that arbitral award itself, in which the arbitral panel held that the Control Agreement "was entered into between the parties for a specific and limited purpose which was to provide [Mr. Sam Mizrahi] with exclusive operational control of the Project during the defined Escrow Period. It was premised on the expectation that [Sam Mizrahi] would buy out [Ms. Jenny Coco] and become the Project's sole beneficial owner and manager."

[138] Mizrahi concedes in this motion that the decision of the arbitral panel "did identify the central purpose of the Control Agreement as giving Mr. Mizrahi control of the Project during the Control Period". However, Mizrahi submits that it does not follow that the entitlement to a 5% construction management fee ended when the Control Period ended, since such would be inconsistent with the provision of the Control Agreement making the entitlement to the 5% construction management fee retroactive. I reject the submission, and it makes no common or commercial sense. The retroactivity element relates to when the entitlement to the increased fee began. It has no bearing whatsoever on when the entitlement to the increased fee ended.

[139] Further, Mr. Sam Mizrahi took the position on his cross-examination on these motions that he "had a ruling" from the mediator/arbitrator to the effect that Mizrahi was entitled to the fees it had been paying itself. There

is no evidence of any such ruling. A fair reading of the transcript suggests that Mr. Sam Mizrahi may have been referring to the Mediator's Proposal, but if that is correct, there is certainly no such term in that document[9].

[140] Accordingly, I find that Mizrahi had no right to continue to charge a 5% construction management fee after the Control Agreement expired in August, 2022. I find it was entitled only to a 3.5% construction management fee after August 2022. However, the record is clear that Mizrahi continued to pay itself the 5% construction management fee thereafter until the Receiver was appointed.

Result Re: Construction Management Fees and Labour Rates

[141] Notwithstanding all of the terms of the Second GC Agreement (on which Mizrahi principally relies for the relief sought on its motion), the Credit Agreement, and the ratification and confirmation of the terms of the Second GC Agreement as found in the Amending Agreement, Mizrahi failed to adhere to its terms virtually from the outset. As set out above, Mizrahi charged the Debtors both a construction management fee and the labour rates charged by CCM. In the aggregate, Mizrahi received approximately $49.3 million, according to the calculations of the Receiver, comprised of amounts to which it was not entitled.

[142] The evidence on these motions establishes that Mizrahi had no contractual or other entitlement to charge those amounts to the Debtors. That is clear from a plain reading of the agreements themselves as set out above: *Sattva*, at paras. 47, 57.

[143] Mizrahi had no valid explanation or justification for charging these amounts, nor for having done so effectively since the start of construction in 2017. This is not a case where Mizrahi was not aware of, or misunderstood, the structure of the relevant agreements and the payment regime. On the contrary, Mr. Sam Mizrahi's evidence with respect to both the First GC Agreement and the Second GC Agreement was to the effect that he understood exactly their terms and that, at his direction, Mizrahi was not acting in accordance therewith.

[144] On his cross-examination, Mr. Sam Mizrahi claimed that Mizrahi never planned to follow the First GC Agreement[10]. This is an admission that he understood that the payment practices were inconsistent with the First GC Agreement. He executed the First GC Agreement on behalf of Mizrahi. He also executed it on behalf of the Debtors. Accordingly, I am left with his evidence to the effect that when he signed - on behalf of both parties - he as the directing mind had no intention that Mizrahi would follow its terms.

[145] He also signed the Second GC Agreement on behalf of the Debtors. He could not explain why he entered into either agreement when he had no intention of adhering to the terms of either one.

[146] Moreover, even if Coco had agreed to amendments to the two GC Agreements to permit Mizrahi to charge a construction management fee and inflated labour rates from the time of the commencement of the construction (which I find on this record, it had not, other than with respect to the brief period during the currency of the Control Agreement), such would not be binding on the Debtors or amount in any way to some implied consent on their behalf.

[9] Cross-examination of Mr. Sam Mizrahi, Q. 928 – 936.
[10] Cross-examination of Mr. Sam Mizrahi, Q. 259 – 270.

[147] Mr. Sam Mizrahi asserted on his cross-examination that he signed the Second GC Agreement because Coco and the SSL (who at the time were completing their due diligence on the Project) told him to, but that both Coco and the SSL knew and agreed that Mizrahi would not adhere to the Second GC Agreement and that "everyone agreed" to the manner in which he was causing his company Mizrahi to be paid.[11] As with the First GC Agreement, such a course of conduct is completely inconsistent with the written terms of the document. In addition, there is no corroborating evidence from either the SSL or from Coco to this effect.

[148] Mizrahi submits that the Project is incredibly complex but that "ultimately the story is a relatively clear one. The Project was developed on a cost-plus basis because the Project had not yet been fully designed, fully permitted, fully approved and budgeted. The design, cost and schedule were moving targets. … [Mizrahi], as general contractor, has been scape-goated for the fall of an ambitious and inspiring development, sabotaged by unprecedented turmoil due to a global pandemic, labour strikes and infighting."[12]

[149] In my view, Mizrahi may be partially correct that extraneous factors such as the pandemic may have impacted Project costs and the construction schedule. Mizrahi is misguided, however, that even if such were the case, the circumstances somehow entitled it to charge and be paid amounts not authorized by any agreement.

[150] Finally in this regard, I observe that Mizrahi itself expressly concedes in its factum (with reference to the evidence of its own CFO, Kilfoyle, that "under the [the Second GC Agreement], [Mizrahi] was to provide all labour to the Project, and could not recover the costs of CCM. It was also obligated to pay for all the other hard costs incurred for the Project."[13] With that, I agree.

[151] In summary, with respect to the contractual entitlements of Mizrahi, I find that at no time did it have any contractual entitlement to charge for its own labour, whether at rates equal to the cost or inflated to provide for a profit. I further find that the construction management fee that Mizrahi was entitled to charge to the Project changed over time, depending on the date and the agreement or agreements that governed the contractual entitlements to Mizrahi at any given time. In summary:

a. July 7, 2014 – May 14, 2019: pursuant to the First GC Agreement, no construction management fee was authorized (fixed price contract);

b. May 14, 2019 – November 26, 2019: pursuant to the Second GC Agreement, no construction management fee was authorized (fixed price contract);

c. November 26, 2019 – May, 2021: pursuant to the Mediator's Proposal accepted by the parties, Mizrahi was entitled to a construction management fee of 3.5% (including the 1.5% payable to CCM);

d. May, 2021 – August 30, 2022: pursuant to the Control Agreement, Mizrahi was entitled to a construction management fee of 5%, including a retroactive payment; and

[11] Cross-examination of Mr. Sam Mizrahi, Q. 269 – 277 & 309 – 311.
[12] Responding factum, at para. 17.
[13] Responding factum of Mizrahi on Receiver's motion, at para. 10.

e. August 31, 2022 – March 13, 2024: pursuant to the Mediator's Proposal, to which the parties reverted as the governing document upon the expiry of the Control Agreement, Mizrahi was entitled to a construction management fee of 3.5%.

Result on Mizrahi's Motion

[152] For all of the above reasons, I find that Mizrahi is not entitled to the sum claimed of $7,579,792.09 plus interest for post-receivership work on the basis of para. 17 of the Receivership Order and the submission that the amounts it may have been paid prior to the Receivership Order constituted "normal payment practices" as that phrase is used in para. 17 of the Receivership Order.

[153] Mizrahi submits that in the alternative, it ought to be entitled to be paid for post-receivership work at least on a *quantum meruit* basis. I need not decide that issue given my findings above and below, since even if Mizrahi were entitled to be paid some consideration for post-receivership construction management work prior to its termination, such amounts would be set off as against the overwhelmingly greater amounts owing by Mizrahi to the Receiver on behalf of the estate in respect of the pre-receivership overpayments.

[154] Fundamentally, according to the terms of the Second GC Agreement, Mizrahi agreed to deliver the completed Project on or before December 31, 2022 for a total contract price of $583.2 million. That fee was to be inclusive of all of Mizrahi's costs and third-party construction costs.

[155] When Mizrahi's role as construction manager was terminated on March 13, 2024, it had charged, according to the Receiver's investigation, approximately 84% of the total Contract Price, yet the Project was less than 50% complete.

[156] Based on if the analysis of the books and records of the Debtors, the aggregate fees already paid to Mizrahi for its work on the Project total $123 million.[14]

[157] The Receiver calculates the total improper and unauthorized payments made to Mizrahi by the Project as $47.4 million, to which is added the construction management fee of $1.9 million charged on those labour rates, for a total of $49.3 million.

[158] Accordingly, I find that no amounts are owing to Mizrahi, and its payment motion is dismissed.

Receiver's Cross-Motion

[159] It follows for the reasons above that the Receiver's cross-motion should be granted in respect of the labour rates charged by Mizrahi to the Project together with the construction management fees charged thereon, and to which I have found it was not entitled. As noted above, s. 3.8.1 of the Second GC Agreement clearly provides that Mizrahi is to provide and pay for labour required to complete the Project. Accordingly, it has no entitlement to the costs for labour charged, totaling $47.4 million, or the construction management fee it added to that amount, totaling $1.9 million.

[14] Fifth Report, at para. 11.8.

[160] In addition, the Receiver claims specific amounts in respect of other items, each of which I address below. In the aggregate, the Receiver's claim for these items totals $9,539,853.71.

The Exclusive Listing Agreement and Real Estate Sales Commissions Charged by Mizrahi

[161] The Receiver claims from Mizrahi the amount of approximate $1.8 million that it received in respect of sales commissions on Condominium Sales Agreements ("CSAs"). A number of these CSAs were terminated by the Receiver on behalf of the Debtors because the purchasers failed to pay all required deposits (and in some cases, any deposits at all) as they were owed.

[162] I am satisfied that these amounts are owing by Mizrahi to the Receiver.

[163] The relevant agreement is the Exclusive Listing Agreement ("ELA") pursuant to which Mizrahi had the exclusive right to sell condominium units in the Project and the corresponding entitlement to be paid commissions on those sales. However, Mizrahi had the obligation to return any commissions paid with respect to a sold condominium unit if the CSA was subsequently terminated.

[164] Pursuant to the ELA, commissions of 4.89% of the net sale price of any unit were payable on sales other than those to "Friends and Family". For that latter category of purchasers, commissions were payable at a rate of 2.5%. No commissions were payable on the sale of units to equity investors.[15]

[165] A significant proportion of the commissions were payable before closing: 33% of the commission was payable 10 business days following execution of the CSA; 33% was payable upon construction financing; and the balance of 34% was payable upon the final closing of each condominium unit.

[166] As set out in detail in the Fifth Report, unit purchasers with CSAs for a total of 28 units owed overdue deposits totaling approximately $23.8 million[16]. There is no dispute on these motions that the defaulting purchasers were in breach of their applicable CSAs for failing to pay some or all of the required deposit amounts in accordance with the required milestones.

[167] The ESA is clear that upon termination due to a default by a condominium unit purchaser, commissions paid are to be "returned promptly" by Mizrahi to the Debtors.[17] A number of these units in respect of which the agreements were in default were identified prior to the appointment of the Receiver by the SSL.

[168] On October 5, 2023, the SSL requested that Mizrahi repay all of the commissions that had been paid in respect of CSAs in default and for which no deposits had been received at all. The next day, Mizrahi "suggested and recommended" to the SSL that such commissions could be repaid either over a 10 month period by way of set-off as against Mizrahi's construction management fees owing to Mizrahi, or by set-off against commissions on future condominium unit sales, and then readjusted as the respective deposits were paid.

[169] In that correspondence with the SSL, Mizrahi did not even assert that it had any entitlement to keep the commissions taken; it simply proposed alternative, time-extended repayment terms as a proposal "that

[15] ELA, s. 4(a)(1).
[16] See paras. 13.19 – 13.22.
[17] ELA, s. 4(a)(v)(2).

satisfies the concern in a mutually acceptable solution".[18] No such amendment to the ELA was ever agreed to.

[170] Yet Mizrahi has not returned the related commissions, and it is in breach of the ELA.

[171] The peculiar circumstances surrounding the CSAs in default make those breaches all the more egregious, in the submission of the Receiver, since those CSAs never had any realistic chance of closing. Those circumstances are set out in the Fifth Report at paras. 13.21 - 13.25. In summary, a number of the sales in respect of which commissions were paid are irregular and unusual at best. These include the following:

a. the most expensive sale in the entire Project (two units combined into one larger unit) was a sale to a United States resident who pled guilty to fraud. Yet that CSA only required a deposit of less than 0.1% of the gross sale price;

b. three units were sold to members of a family resident in Iran, just prior to the coming into effect of the *Prohibition on the Purchase of Residential Property by Non-Canadians Act*, S.C. 2022, c. 10, s. 235, on January 1, 2023. That statute did not apply to non-Canadians who had entered into binding conditional sales agreements prior to that date. No deposits whatsoever were paid on these sales to the Iranian family, as a result of which the validity of these CSAs was questioned by the Receiver. Sam Mizrahi advised the Receiver that all of the purchasers were part of the same family, the principal of which was the same individual who was funding the purchases. However, that individual apparently died shortly after the CSAs were executed. The advice from Sam Mizrahi to the Receiver was to the effect that the estate was tied up in Iran in what would be roughly analogous to probate proceedings here (with the implicit result that completion of those CSAs - already in default - was uncertain at best); and

c. one unit was sold to a company located in the United Arab Emirates said to be owned by a princess of the Principality of Liechtenstein. That agreement required only a 10% deposit as of the date on which the Receiver was appointed (materially less than the standard CSA term) and in respect of which only $20,000 (much less than even the 10%) had in fact been paid.

[172] As set out in the Fifth Report, the result was that, taking into account only the CSAs in default, Mizrahi sold units with an aggregate value of $63.46 million and then paid itself commissions of $1,816,012.85, notwithstanding that the deposits actually paid on those same units totalled in the aggregate only $39,967.50 or approximately 0.06% of the aggregate purchase prices of those units and 2.2% of the deposits paid to Mizrahi.[19]

[173] The concern and skepticism of the Receiver about these CSAs and the lack of any realistic prospect that they would ever close has now been borne out. In light of the significant deposit defaults and concerns about the ability or willingness of the purchasers to complete the sale transactions, the Receiver sent Default Notices to the Defaulting Purchasers on May 1, 2024, requiring each Defaulting Purchaser to cure their

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[18] See Fifth Report, at para. 13.20 and Appendix 42.

[19] While not the subject of these motions, the Receiver has identified a further 22 CSAs in respect of which Defaulting Purchasers owed approximately $12 million in deposits as of the date the Receiver was appointed. The Receiver advises in the Fifth Report that it may seek to terminate those CSAs in the future. Mizrahi has been paid commissions of approximately $2.3 million on these additional CASs. If and when those CSAs are terminated due to purchaser default, Mizrahi would have the same obligation to repay the Debtors those associated commissions pursuant to the ELA.

default by paying the overdue deposits, failing which the relevant CSAs would be terminated and any deposit amounts forfeited.

[174] None of the Defaulting Purchasers to whom Default Notices were sent even responded, let alone paid any further deposit amounts, or otherwise took any steps to attempt to cure the defaults. Accordingly, on May 13, 2024, those CSAs were terminated.[20]

[175] In any event, the terms of the ELA are clear[21], and Mizrahi has the obligation to "promptly repay" the commissions it received which it has failed to do. On May 15, 2024, the Receiver advised Mizrahi of the termination of the CSAs in default and requested the repayment of the associated commissions in the amount of $1,816,012.85. Not only has Mizrahi not made the requested repayment, but it also responded by correspondence dated May 29, 2024 refusing to do so.

[176] In its responding factum filed on the Receiver's motion, Mizrahi "acknowledges that it owes the Project pursuant to the ELA for unit sales terminated owing to a default by purchasers."[22] However, it advances a set-off claim for amounts it claims are owing to Mizrahi under the ELA.

[177] Even if Mizrahi were entitled to a set-off, the amounts are grossly overstated. For example, it is not entitled to a Residential Management Fee until the relevant purchaser pays "the appropriate deposit". A number (indeed, most) of the purchasers did not pay the appropriate deposits because they breached the applicable Agreement of Purchase and Sale or because Mizrahi inappropriately reduced the deposit requirements below the standard amount required to be a "Qualifying Sale".

[178] The Receiver estimates that, at a maximum, the Residential Management Fee payable would be approximately $4.8 million, not the $6.3 million claimed. Even from that amount, the payments already made to Mizrahi of $719,000, unpaid deposits owed but not paid by the Mizrahi family of $1.3 million, and the amounts that Mizrahi agreed to pay pursuant to the terms of the Mediator's Proposal of $2.6 million, all need to be deducted.

[179] The balance of the damages claimed by Mizrahi are, as the Receiver submits, speculative, contingent, unliquidated, and unproven. For example, Mizrahi's claims are based on a "but-for" scenario that assumes that the Project has been completed and the CSAs entered into prior to the appointment of the Receiver were affirmed and completed. Clearly, in many cases that has not occurred and will not occur.

[180] Finally with respect to the ELA, I find that Mizrahi is liable to repay commissions it paid or caused to be paid to third-party brokers. The Exclusive Listing Agreement was precisely that - exclusive. Pursuant to the terms of the ELA, Mizrahi agreed to sell (and be paid to sell) all of the units in the Project. It was granted and accepted the *exclusive* right to do so (article 1). Instead of doing so, it retained or caused the Debtors[23] to retain third-party real estate brokers and then charged the Project both its own commission and also commissions owed to those brokers, for the same units.

[181] This is a clear breach of the ELA, which provides, in addition to the terms of the grant itself being exclusive, that Mizrahi "will be responsible for the cost and provision of all of his or her own advertising and sales

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[20] See Fifth Report, at paras. 13.21-13.24 and Appendix 43.
[21] Section 4(v)(2).
[22] At para. 12.
[23] Or the Nominee.

promotion, qualified sales people and support staff", and further that "it shall be the sole responsibility of [Mizrahi] to pay any of its sales people who participate in the sale of the Units".[24]

[182] As set out in the Fifth Report, the Receiver has identified agreements with third-party brokers to which either Mizrahi or the Nominee are counterparties and which entitled those brokers to commissions in addition to those provided for in the ELA. Pursuant to those agreements, these brokers have invoiced $1.6 million for commissions and a retainer of which $892,000 has been paid. Those amounts are for the account of Mizrahi.

[183] Next, Mizrahi engaged an entity called Magix Technologies, LLC ("Magix") to sell units in Dubai and charged the Debtors for commissions payable to Magix in addition to its own commission for the same units. What is even more egregious is that even if such a subcontract were permitted, the agreement with Magix provided according to its terms that commissions were payable only when the purchase price was actually paid.

[184] Notwithstanding that as of the date of the appointment of the Receiver, the full purchase price for any sold units had not been paid by the respective buyers, Magix was nonetheless paid $190,000 by the Debtors (at Mizrahi's direction) in respect of commissions for two units, one of which is among the defaulting CSAs that have since been terminated. This was in addition to $368,000 in commissions paid to Mizrahi for the very same units. Magix has invoiced $571,000 in total. Mizrahi offers no explanation as to why the commissions paid were paid by the Debtors well in advance of when they were due under the agreement with Magix, even if that agreement were valid.

[185] With respect to the Magix agreement, Mizrahi submits that it is a foreign real estate marketing firm retained by it to "secure overseas sales during the COVID-19 pandemic". Mizrahi submits that it was impossible to sell units internationally during the pandemic, and that in any event, the SSL approved of the retainer of Magix.

[186] The challenge with this submission is the same as that set out above in the context of other claims: first, such an agreement was in clear breach of the ELA, and even if the SSL approved of it, the SSL had no ability or right to amend the ELA, an agreement to which they were not parties. Accordingly, these arguments cannot succeed. Mizrahi's alternative submission that this claim is statute-barred is addressed below.

[187] In addition, Mizrahi entered into listing agreements with the Royal LePage brokerage, pursuant to which that broker was to receive a commission of 2.5 – 5% on condominium unit sales. As of the date of these motions, Royal LePage had been paid $334,000 in commissions, with $353,000 claimed as still owing in respect of three units pursuant to that listing agreement. All of this is an addition to the sum of $545,000 in commissions already paid to Mizrahi for the sale of the same units.

[188] With respect to the Royal LePage agreement, Mizrahi's position is that Mr. Sam Mizrahi unilaterally signed the Royal LePage agreement during the Control Period, as he was then entitled to do. He submits that the commissions were Project expenses paid pursuant to a Project Contract, and that Royal LePage provided valuable services. He submits that "unit sales are the fundamental revenue source for the Project".[25]

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[24] Article 7, 8.
[25] Responding factum, at para. 57.

[189] The Royal LePage listing agreement was indeed signed during the Control Period during which Mr. Sam Mizrahi had the authority to cause the Debtors (or the Project) to sign agreements. What neither Mizrahi nor Mr. Sam Mizrahi personally had was the authority to breach or cause the Debtors to breach the ELA and essentially pay commissions twice for the same sales of the same condominium units. The submission that unit sales are a fundamental revenue source is no answer to that.

[190] Accordingly, in my view, Mizrahi is liable for an amount equal to the aggregate of commissions paid to Royal LePage in respect of units for which Mizrahi was also paid a sales commission.

[191] Mizrahi submits that it never received the final tranche of fees payable under the ELA (which is accurate since no closings have occurred). On March 27, 2025, the Receiver disclaimed the ELA as it was authorized to do under the Appointment Order. Mizrahi submits that, as a result of the disclaimer, it has a right to set off against the Project amounts owing under the ELA, which it claims in the amount of $9,627,992.64.

[192] I reject this argument. Mizrahi relies upon the decision of the British Columbia Supreme Court in *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527, 11 B.C.L.R. (6th) 395, at para. 38, aff'd 2018 BCCA 251, 11 B.C.L.R. (6th) 429, where the court quoted from Frank Bennett, *Bennett on Receiverships,* 2nd ed. (Toronto: Carswell, 1999), at 341-342, to the effect that while in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor and nor is the receiver personally liable for the performance of those contracts entered into before the receivership, the debtor may remain liable for damages suffered as a result of the cancellation of a contract by the receiver. *Bennett* states that in a proper case, the third party has a claim for damages and can set off against any monies that it owes to the debtor the amounts it can prove in damages for a breach of the contract.

[193] In the present case, no funds are owing under the ELA in respect of any unit, at best unless and until it is sold. Moreover, article 4 of the ELA provides that such obligations arise only for the sale of a unit during the Term of the ELA. The Initial Term is defined in article 2 to be three years from the date of the ELA, being July 12, 2017. That expired before the Receiver was appointed. Article 2(b) further provides that either party may terminate the ELA on 90 days' written notice, provided that the ELA may not be terminated prior to three months after the first sales day of [the Agent], an exception not relevant here.

[194] Finally, article 6 provides that the obligations of [the Project] to pay compensation to [Mizrahi] survive the expiration of the Term of the ELA, but that applies to commissions owing in respect of sales that were completed during the Term, not thereafter.

[195] I also note article 4(a)(vii), which provides that in the event the Project is cancelled at any time, the [Project] agrees to pay that portion of the fee that has been earned but shall not be required to pay the balance of the fee. That is consistent with my conclusion here.

The Trust Reserve

[196] When the mediation that ultimately resulted in the Mediator's Proposal took place, Mizrahi was holding the amount of $1.2 million as a Reserve against a potential future liability to the federal government in respect of HST remittances. This amount was held partially in a non-segregated Mizrahi account and partially in a segregated account.

[197] This Reserve was specifically addressed in the Mediator's Proposal (settlement), which required that the Reserve be transferred into a joint trust account or used to purchase a GIC that would be held in trust to

fund the potential future liability if it became due and owing. The objective was to give the Project certainty and security through the requirement that the funds would be held in trust until it was known whether the contingency would occur or not. Contrary to the terms of the Mediator's Proposal, that did not occur. Nor have the funds been used to satisfy any Project-related liability.

[198] Mizrahi does not challenge the fact that the funds were never repaid. Instead, in his affidavit, Mr. Sam Mizrahi asserted that the $1.2 million Reserve was set off or "credited" against amounts owed to Mizrahi for outstanding deposits on various units in the Project purchased by him and/or his family members. He submits that while the obligation to repay this Reserve amount under the Mediator's Proposal is clear, the Mediator's Proposal was amended by emails between Mizrahi's CFO and Ms. Rico, on behalf of Coco, and resulted in a set off agreement.

[199] I reject this assertion, bald as it is. First, there is no evidence of any such credit being given. Second, the purported credit is nonsensical in any event. The Mediator's Proposal provided in relevant part that Mr. Sam Mizrahi and members of his immediate family had the right to purchase one unit in the Project upon payment of a 50% deposit.[26] They purported to buy five units but paid only nominal deposits.

[200] Leaving aside the inescapable conclusion that this itself was a breach of the Mediator's Proposal (because the net result was that the Mizrahi family owed unpaid deposit amounts to the Project in the amount of $2,704,640)[27], the assertion that Mizrahi would be entitled to set off the $1.2 million owing on the Reserve liability against deposits that were owing but never paid in any event is commercially absurd. Not only are the two debts owed by different parties, but more importantly, both debts were owed *to* the Debtors: one cannot be set off against the other to reduce the amount owing to those parties.

[201] Mizrahi submits that the $1.2 million was credited against the Mizrahi condominium units. If the estimated HST liability was realized and payable, Mizrahi would pay that tax liability, and the tax liability would be credited to the deposits owed on the Mizrahi units. If, however, the estimated HST liability was not realized by the closing of the Mizrahi units, there would be no purchase price against which to credit that amount, and "an amount equal to the tax liability would be paid by the debtor into a trust account."[28]

[202] In further addition, there is no evidence that the purported set-off agreement, an unsigned version of which is attached to Sam Mizrahi's affidavit, was ever signed by Coco. Mizrahi asserts that Coco's consent was not needed when the set-off agreement was entered into on May 4, 2022 since that was during the Control Period. Yet, inexplicably, if that were the case, counsel for Mizrahi continued to follow up with Coco for her signature as late as September, 2023. Then, in October, 2023 when the Receiver was appointed, Mr. Sam Mizrahi provided a different but also unsigned version of the agreement to the Receiver. That also is inconsistent with the submission that the earlier version of the agreement was final and binding.

[203] I find there is no binding agreement to set off the amount owing to repay the Reserve. Even if it were binding, it would have provided that if the related liability had been assessed by the time Mr. Sam Mizrahi purchased his own units in the Project, then the amount of $1.2 million would be transferred to an interest-bearing trust account jointly held with the Beneficial Owner. But in any event, the Mizrahi units never

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[26] Section 7.
[27] For clarity, the Receiver is not seeking recovery of these amounts.
[28] Responding factum, at para. 64.

closed. And now, the CSAs will never close in the future as they have been disclaimed by the Receiver and, as noted above, the contingent liability has never materialized.

[204] Fundamentally, it does not matter: either way, the $1.2 million remains unaccounted for by Mizrahi. It has no beneficial entitlement to keep the funds, nor did it ever assert that it did. They are owing.

Marketing and Promotional Fees Charged by Mizrahi

[205] Finally, with respect to marketing fees, and pursuant to the ELA, Mizrahi was responsible for all marketing costs in connection with the sale of condominium units in the Project. This was affirmed in the Mediator's Proposal, which provided that, apart from the commissions discussed above, the sole compensation payable to Mizrahi for marketing and selling the Project was to be a Residential Management Fee. That Residential Management Fee was to "include all efforts and services rendered associated with marketing and selling the remaining units, including all creative direction provided by Sam Mizrahi.". It was "intended to include everything save and except for services provided by arm's-length consultants and suppliers, save and except for the current real estate commission structure …. To be more specific, Sam will no longer mark up third-party marketing invoices."

[206] Notwithstanding this, Mizrahi charged an additional "fee" of $100,000 plus HST every month from 2021 to and including August 2023 in the total aggregate amount of $2.7 million. There is no evidence of any contractual basis for doing so.

[207] To the extent I understand Mizrahi's position, it does not allege that there was any basis. Rather, Mizrahi's position is that these marketing fees were in fact advances paid as against the Residential Management Fee. However, again, there is no evidence to support this assertion. The first connection ever asserted between the marketing fees and the Residential Management Fee appears to be in Mr. Sam Mizrahi's January 2025 affidavit.

[208] The marketing fee invoices rendered by Mizrahi do not reference the Residential Management Fee at all, let alone state that the marketing fees invoiced are an advance or credit against that Residential Management Fee. Moreover, correspondence to the Receiver from counsel for Mizrahi, in which they calculate the Residential Management Fee Mizrahi claims to be owed, did not reflect any deduction for these payments of the so-called "marketing fees". If, as Mizrahi submits, these fees were advances, they ought to have been properly deducted. They weren't.

[209] For all of these reasons, I find the marketing fees were improperly charged and must be repaid.

The Applicable Limitation Period, Laches, and Estoppel by Convention

[210] Mizrahi submits, in the alternative to its primary position addressed above that it was entitled to charge all amounts that it did, that even if it were not, the claim of the Receiver for: i) the inflated labour rates charged by Mizrahi after it replaced CCM; ii) the Trust Reserve; and iii) the third-party real estate broker commissions, is barred by the expiry of the applicable limitation period.

[211] Given the sheer scale and complexity of the Project, it took the Receiver some time to understand and assess the numerous agreements related to the Project, and particularly those with Mizrahi, to determine (among other things) whether Mizrahi was entitled to the payments it now claims based on the payment practices it had implemented prior to the appointment of the Receiver.

[212] Less than two weeks after its appointment, on October 30, 2023, the Receiver advised Mizrahi that it would not pay certain fees claimed until its review was complete. One month later, on November 26, 2023, the Receiver advised Mizrahi that it could see no basis to pay both the 5% Construction Management Fee claimed by Mizrahi as well as the inflated costs of labour it had been charging. The Receiver reserved its rights and advised that its review of the contracts was ongoing and that any payments to Mizrahi did not constitute affirmation of any contract.

[213] Ultimately, when the Receiver concluded its review of the relevant agreements and the evidence relating to the obligations of the parties, it concluded that Mizrahi was entitled to a 3.5% Construction Management Fee following the expiry of the Control Agreement (as opposed to the 5% Construction Management Fee Mizrahi had been charging), and that Mizrahi had never been entitled to charge the inflated labour rates it was charging.

[214] In support of its alternative argument that the applicable limitation period has expired, Mizrahi relies on *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32, at para. 175, for the proposition that a receivership does not reset the running of a limitation period, and submits that that there was a period of time in which control of the Project was shared between Mizrahi and Coco. Mizrahi claims that approximately 47 months lapsed between the time Mizrahi began charging the Project for the CCM time-based labour rates, in November 2020, and when the Receiver "commenced these proceedings", in October 2024.[29]

[215] Mizrahi further submits that the Project, or at least Coco, knew that Mizrahi was being paid the inflated labour rates as of November 2020 since it (Coco) commenced the arbitration proceeding referred to above in which part of the relief sought was an order prohibiting Mizrahi from charging those rates. Mizrahi submits that Coco later abandoned that arbitration, which is contested by the Receiver who submits that Coco did not withdraw or abandon the arbitration, but rather, the proceeding ultimately resulted in a settlement in the form of the Mediator's Proposal.

[216] In any event, Mizrahi submits that as a result of the knowledge of Coco and its principal representative, Ms. Jenny Coco, "the Project had actual knowledge of all of the facts relied upon by the Receiver in its claim for overpayment".[30]

[217] With respect to the Trust Reserve, Mizrahi submits that the applicable limitation period expired in November 2023. It calculates this date by submitting that the court should assume that Mizrahi had two years to set aside the funds following the November 2019 Mediator's Proposal, such that the limitation period began to run in November 2021.

[218] I reject the submission that the claims now advanced by the Receiver are statute-barred, and I largely accept the position of the Receiver in this regard.

[219] Section 3.7 of the USA is clear that the Debtors could not commence any action without the consent of Mr. Sam Mizrahi. His evidence on these motions is, not surprisingly, that he would never have consented

[29] Responding factum, at para. 47. I understand Mizrahi's reference to the Receiver "commencing these proceedings" to be a reference to the date on which the Receiver brought its cross-motion for repayment of the amounts improperly charged by Mizrahi, in response to Mizrahi's own motion for post-receivership amounts it claimed were owing.
[30] Responding factum, at para. 52.

to a claim against Mizrahi Inc.[31] Accordingly, the Debtors could not commence a claim to enforce their rights until the Receiver was appointed.

[220] The Supreme Court was clear in *Golden Oaks*, at para. 77, citing with approval *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 36, that a claim is not discoverable within the meaning of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, until it can be pursued and that the purpose of this rule is "avoid the injustice of precluding an action before the person is able to raise it".

[221] In *Golden Oaks*, Justice Côté held in concurring reasons that the limitation period did not begin to run in that case until the trustee was appointed, because the company's directing mind would never have commenced an action founded on his own wrongdoing: at paras. 174 - 176. The majority in that case reached the same result based on the doctrine of corporate attribution and rejected the notion that a claim could be statute-barred before the trustee was able to assert it: at para. 78.

[222] In this case, Mr. Sam Mizrahi had an effective veto over any potential claims against his companies pursuant to the terms of the USA. In addition, he exercised exclusive and sole control over the Debtors from May 2021 pursuant to the Control Agreement. If one accepted his submission as to the Control Resolution, which he unilaterally exercised in an attempt to extend his exclusive control pursuant to the Control Agreement even after it expired according to its terms, he therefore exercised sole control over the Debtors also in the period following August, 2022. For these reasons, I am satisfied that the Debtors could not commence a claim against Mizrahi, and therefore the limitation period did not begin to run until the Receiver was appointed.

[223] Further, in my view, the fact that one of the beneficial co-owners of the Project (Coco) commenced the arbitration proceeding against Mizrahi does not displace this analysis. The limitation period does not run until it can be asserted by the "person with the claim": s. 5(1) of the *Limitations Act*.

[224] The conclusion that the limitation period could not run until the person who had obtained the right to prosecute the claim (including through a bankruptcy process) is also consistent with the rationale of the reasons of the Court of Appeal for Ontario in *AssessNet Inc. v. Taylor Leibow Inc.*, 2023 ONCA 577, 168 O.R. (3d) 276, at paras. 43-54. In that case, the court observed that the discoverability of a claim, pursuant to s. 5(1)(a)(iv) of the *Limitations Act*, includes the question of when the person with the claim knew "that the proceeding would have been an appropriate means to seek to remedy the injury", and that this inquiry turns on the "facts of each case and the abilities and circumstances of the particular claimant": at para 54.

[225] In the further alternative, Mizrahi submits that the Receiver's claim for overpayment is barred by the doctrine of laches, in respect of which there is no specified time limit. Rather, this equitable doctrine requires a claimant to prosecute the claim without undue delay, with full knowledge of their rights: *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 145.

[226] The doctrine of laches has two branches: 1) acquiescence by the claimant; and 2) any change of position by the defendant arising from reasonable reliance on the claimant's acceptance of the status quo: *Manitoba*, at para. 145. Mizrahi submits that both branches apply "to bar the Project's claim for overpayment" and that there was "nothing preventing the Project or its beneficial owner, Ms. Coco, from advancing the claim the

[31] Cross-examination of Mr. Sam Mizrahi, Q. 324-325.

Receiver now advances." Mizrahi relies on the fact of the arbitration and the complaints raised by Ms. Coco at the end of the Control Period.

[227] Leaving aside for the moment the fact that this submission is entirely inconsistent with Mizrahi's principal defence to the overpayment claim that the Control Resolution extended the Control Period and therefore the period of exclusive control by Mr. Sam Mizrahi, it suffers from the same weakness as the limitation period argument discussed above. Put simply, the Project or the Debtors (as opposed to Coco) lacked the legal ability to advance the claim absent the express consent of Mizrahi (never given) until the Receiver was appointed. The submission that there was nothing preventing the Project or Ms. Coco from advancing the claims is incorrect for those reasons.

[228] Moreover, in this regard, the doctrine of laches applies only to equitable claims. The claim of the Receiver is based on breach of contract: *M(K) v. M(H)*, [1992] 3 S.C.R. 6, at p. 77.

[229] Mizrahi submits that it reasonably relied on the payment practices continuing and the status quo when it incurred hard costs and continued to provide labour after the termination of CCM. Given the repeated objections of Coco, and the lack of any express agreement to what Mizrahi was doing at any time, this submission cannot succeed.

[230] Mizrahi also submits that the claims now advanced by the Receiver on behalf of the Debtors are barred by the doctrine of estoppel by convention, which requires three things:

a. the dealings between the parties must have been based on a shared assumption of fact—conduct creating a mutual assumption;

b. a party must have conducted itself and acted in reliance on that shared assumption to change its legal position; and

c. it must be unjust or unfair to allow one of the parties to resile or depart from the common assumption.

See: *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 59.

[231] Mizrahi submits that all three requirements are met here. Payments to Mizrahi for hard costs were paid and approved by Coco and the SSL. Mizrahi acted in reliance on the status quo by continuing its work, and it would be "grossly unfair" for the Project to resile from the shared understanding that the payments made were in fact permitted.

[232] In my view, this submission cannot succeed either. The Court of Appeal for Ontario has cautioned that estoppel by convention is a relatively rare form of estoppel, and properly so, since it has the potential to undermine the certainty of contract and "must be applied with care, especially in the context of commercial relationships between sophisticated parties represented by counsel": *Grasshopper Solar Corporation v. Independent Electricity System Operator*, 2020 ONCA 499, 8 B.L.R. (6th) 169, at para. 54, leave to appeal refused, [2020] S.C.C.A. No. 360.

[233] As the Supreme Court has previously stated, the crucial requirement for estoppel by convention is that "at the material time both parties must be of 'a like mind'": *Ryan*, at para. 61. In my view, Mizrahi has not demonstrated, let alone satisfied this Court, that such a shared assumption is "unambiguous and unequivocal": *Grasshopper* at para. 56.

[234] Mizrahi and Coco (and therefore, by extension, the Debtors) were never of like mind about Mizrahi's right to charge the inflated labour rates. When Coco realized what was happening, it formally objected. I agree with the submission of the Receiver that through the Control Agreement, Coco temporarily paused or suspended those objections because the sale of its interest and its exit from the Project was pending. When the sale fell through, Coco resumed those objections. The chronology here reflects the opposite of a situation where two parties are of like mind.

[235] Moreover, I reject the submission that Mizrahi can establish detrimental reliance by arguing that it continued its work. It certainly did not rely on any assumption about approval from Coco (let alone the Project) when it unilaterally and without notice took over construction management work from CCM and began charging the inflated labour rates. Mizrahi similarly terminated CCM unilaterally and assumed the role performed by CCM without any prior notice to Coco. I accept the submission of the Receiver that rather than relying upon a position or acquiescence of Coco, Mizrahi simply did not care and was indifferent to whether Coco consented or not.

[236] Lastly in this regard, and heeding the caution from the Court of Appeal that the doctrine of estoppel by convention should be applied rarely and cautiously, particularly when the parties are sophisticated parties represented by counsel, I conclude that there is no unfairness worked on the parties by declining to apply this equitable doctrine here.

Result and Disposition

[237] For all of these reasons, the motion of Mizrahi is dismissed and the cross-motion of the Receiver is allowed.

[238] The parties are strongly encouraged to agree on costs. If they cannot agree, the Receiver shall file a Bill of Costs together with Costs Submissions not exceeding four pages in length within 20 days, and Mizrahi shall file its Costs Submissions not exceeding four pages in length within 20 days thereafter.

Osborne J.