

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

B E T W E E N:

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

Applicant

– and –

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

Respondents

FACTUM OF MIZRAHI INC.

April 14, 2025

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1. Mizrahi Inc. (“MI”) raises two objections to the relief sought by the Receiver in its motion and application returnable April 22, 2025 as follows:

- i. The reserve set aside to address MI’s claim for payment in the Payment Motion returnable June 17-19 should be increased to address MI’s claim for interest and costs. MI seeks an increase in the reserve by \$1 million; and
- ii. The Receiver has not sought approval for the purported disclaimer of two agreements concerning the Mizrahi Parties, the Exclusive Listing Agreement, dated July 12, 2017 (the “ELA”) and the Mediator’s Proposal, dated November 26, 2019. Collectively the ELA and the Mediator’s Proposal are referred to as the “Agreements”. The Agreements are both material agreements to the Project. If the Agreements are disclaimed, then MI will advance a trust claim over the proceeds of sale and the deposits

giving rise to MI's entitlement to fees on the closing of those sales or upon the termination of the agreements pursuant to the Agreements. In addition, MI will rely upon the disclaimer of the Agreements and advance a set-off defence to the Receiver's cross-motion to be argued in June 2025.

I. The Reserve to Address MI's Claim for Payment Must be Increased

2. In its motion and application returnable April 22, 2025, the Receiver seeks to limit the amount available to address Receivership Litigation to the quantum of reserve set aside. Should this order be granted without an increase in the reserve set aside for MI, MI will be undercompensated should it succeed in its claim in the Payment Motion.
3. MI's Payment Motion and the Receiver's cross-motion are scheduled to be heard June 17, 18 and 19, 2025. The motion was initially brought by MI on February 27, 2024.
4. MI claims a right to payment from the Project for \$7,579,792 in unpaid construction management fees and labour costs and relies on, among other things, paragraph 17 of the Appointment Order.
5. As part of MI's claim for payment in the Payment Motion, MI advances a claim for interest on unpaid amounts. In particular, it claims interest calculated in accordance with the CCDC2 Contract. In the alternative, MI will seek interest at the bank prime rate compounded monthly pursuant to the courts authority under s.130 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

6. In the summer of 2024, MI and the Receiver reached an agreement whereby the Receiver set aside a reserve to address MI's claim for payment. In total \$10,912,000 was set aside by the Receiver. While this amount is in excess of the claim by MI in the Payment Motion, the remainder represents amounts claimed to be owed by third party subcontractors.
7. When the reserve was agreed upon, the parties contemplated that the Payment Motion would be returnable in September or October 2024.
8. It would be unjust to discharge the Receiver and limit MI's claim on the Payment Motion which solely concerns a post-receivership claim and seeks to enforce paragraph 17 of the Appointment Order. It is fair and reasonable to increase the reserve by \$1 million to account for MI's claim for costs on the amount sought in the Payment Motion and its costs of the motion.

II. The Disclaimer of the Mediator's Proposal and the Exclusive Listing Agreement

9. The Mediator's Proposal and the ELA are material contracts to the Project. As a result, the Receiver must obtain approval of its purported disclaimer.
10. The Mediator's Proposal is a material contract for the Project. It is one of several contracts that forms the contractual arrangement between the beneficial owners of the Project, provides for certain financial controls in favour of the Coco Parties (the other beneficial owner), and addresses MI's entitlement to construction management fees (prior to the execution of the Control Agreement in May 2021),

along with a Residential Management Fee. MI's entitlement to a Residential Management Fee is set out in the Mediator's Proposal as follows:

A Residential Management Fee will be paid to MI in respect of all existing and future residential sales equal to 2.0% of the selling price, including upgrades and extras. 50% of this fee will be payable upon entering into a firm agreement of purchase and sale with payment of the appropriate deposit, and the remaining 50% will be paid on closing of each unit. The second 50% will not, however, be earned and payable unless an application for an additional six floors is submitted to the City on or before December 31, 2020.

11. Under the terms of the Mediator's Proposal, MI is entitled to a fee equal to 2% on all future residential sales, including the cost of upgrades and extras. MI claims entitlement to a Residential Management Fee on closing of \$6,213,429 for sales of the Project, plus \$2,794,308.20 that is currently owed. It also makes a claim for 2% of all future residential sales.
12. The ELA is a contract between MI and the Project and is also a material contract. The ELA grants MI the exclusive right as agent to sell the units of the Project. The units of the Project are the most significant source of Project revenue. The ELA also sets out MI's entitlement to a fee arising from the sale of Project units as follows:

4. COMPENSATION OF AGENT

(a) Commissions

- (i) If the Vendor and a Purchaser execute a binding agreement for the purchase and sale of a Unit during the Term (the "Purchase Agreement"), the Vendor shall pay the Agent four point eight-nine percent (4.89%) (the "Agent's Fee"), net of HST of the sales price of any Unit. Sales of purchaser extras, upgrades, and/or parking spaces shall not be subject to commission. Sales to Equity investors shall not be subject to commission, and sales to Friends and Family will be subject to a reduced sales commission of 2.5%.
- (ii) The Agent's Fee shall be due and payable, in the case of a sale, as follows:
 - 33% upon the execution of the Purchase Agreement upon the expiration of the initial statutory ten (10) business day recession period, there having been no conditions added by the Purchaser which have not been satisfied; and
 - 33% upon construction financing; and
 - 34% upon final closing of each Unit.

13. The ELA provided for the prepayment of the fees owed under the ELA up to \$3.6 million. It also provided for MI's entitlement to a fee should the agreements of purchase and sale for the Project be terminated other than by default of the purchaser:

3. If a Purchase Agreement is terminated other than by the default of the suite purchaser, and if the Vendor receives from the trustee holding purchaser deposits more than 50% of the deposits contracted in the Purchase Agreement, the Vendor agrees to pay the Agent 50% of the received funds from the trustee (the "Eligible Funds"), or such lesser amount such that the sum of the Eligible Funds and previously paid commissions do not exceed the total commission that otherwise would have been payable had the Purchase Agreement not been terminated. In the event that the deposits received exceed the commissions earned, any such excess shall be adjusted in favour of the Vendor upon the final accounting of the Agent's Fee.

14. If the agreements of purchase and sale are disclaimed by the Receiver or terminated by the purchasers, MI has a claim to its fees against the deposits paid by the purchasers pursuant to the terms of the ELA.

15. MI has earned \$9,627,992.64 in fees pursuant to the ELA which will be payable upon closing of the various agreements of purchase and sale or from the deposits paid by purchasers pursuant to s. 3 of the ELA.

Court Approval is required for the Disclaimer of the Agreements

16. While the Receiver claims it is entitled to disclaim the Agreements pursuant to s. 4 of the Appointment Order, the Receiver is not entitled to disclaim contracts without regard to all of the equities.¹ It is also standard practice for receivers to seek and obtain court approval to disclaim a contract as recently confirmed by the Supreme Court of Canada in *Petrowest v Peace Group*:

¹ [*Romspen Investment Corp v Horseshoe Valley Lands Ltd*, 2017 ONSC 426 at para 28.](#)

Despite this flexibility, court-appointed receivers have a fiduciary duty to act honestly and in the best interests of *all* interested parties. **For example, a receiver is generally not permitted to terminate existing contracts between third parties and the debtor, but must apply to the court to discharge onerous contracts, such as those which would be unduly costly to perform** (F. Bennett, *Bennett on Receiverships* (3rd ed. 2011), at p. 42; *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 (P.C.), per Viscount Haldane L.C.). This demonstrates the key supervisory role that courts play in receivership proceedings.² **[emphasis added]**

17. In the same case, the Court held:

For this reason, the receiver may not “arbitrarily” break contracts entered into by the debtor with third parties prior to the receivership. **Rather, the receiver must exercise “proper discretion in doing so”, including by seeking “leave of the court” to terminate such contracts** (Bennett, at p. 434).³ **[emphasis added]**

18. In addition, when a contract is material to the debtor’s business, a Receiver must seek court approval for the proposed disclaimer, even if the Receiver is seemingly empowered by the appointment order to disclaim the debtor’s contracts.⁴

19. Where a receiver decides to disclaim a material agreement, the express approval of the court should be sought. The other party to the agreement should be served and provided an opportunity to make submissions, even where the appointment order provides the receiver with the express right to not perform the debtor’s contractual obligations.⁵

² *Petrowest v Peace Group*, 2022 SCC 41 at [para 58](#).

³ *Petrowest v Peace Group*, 2022 SCC 41 at [para 110](#).

⁴ *Royal Bank of Canada v Penex Metropolis Ltd*, [2009] OJ No 3645 at [para 23](#).

⁵ *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, t, 44 C.B.R. (5th) 171 (B.C.S.C.) at [para 58](#).

MI has a Trust Claim Over the Proceeds of Sale

20. If the Agreements are permitted to be disclaimed, then MI has a trust claim over (i) the proceeds of sale (excluding future sales) upon closing and (ii) the deposits already paid by the purchasers (with respect to the fees owed pursuant to the ELA). In addition, MI has an unsecured damages claim against the Project for 2% of all future sales as a Residential Management Fee pursuant to the Mediator's Proposal.
21. If the court elects to approve the Receiver's disclaimer of the Agreements, then MI's rights to advance its trust claim over the proceeds of sale and the deposits paid by purchasers must be preserved.
22. The deposits and the eventual sale proceeds paid by closing are subject to an express trust in favour of MI, which as developer and the exclusive agent for the sale of the Project units undertook the work to secure and obtain the sales, which resulted in the Project deriving significant revenue.
23. There was an intention to create a trust to pay MI's entitlement to a fee under the ELA and a Residential Management Fee under the Mediator's Proposal on deposits paid by purchasers and the proceeds to be paid on closing.
24. The subject matter of the trust is certain: with respect to the fee payable pursuant to the ELA 34% of 4.89% of the sale price, net of HST, and, with respect to the Residential Management Fee, 2% of the sale price (or, as applicable, 1% of the sale price for existing sales payable on closing).

25. The beneficiary of the trust are certain: the trust claim is limited to MI for each sale and deposit paid by a purchaser for all sales that pre-date the disclaimer of the Agreements, i.e. all current sales.
26. In *PWC v Bank of Montreal*, a trust claim over real estate commissions payable to realtors was found on a similar set of facts by Justice Stack of the Newfoundland and Labrador Supreme Court in the context of a court-appointed receivership.¹⁰
27. Furthermore, if the agreements are disclaimed, then MI should be entitled to advance a claim for a remedial constructive trust over the proceeds of sale and the deposits of the purchasers, as the disclaimer amounts to an unjust enrichment. The Project will be enriched by avoiding its obligations under the Agreements in the context of its insolvency while enjoying the benefits of the sales secured pursuant to the Agreements, MI will suffer a deprivation by losing its ability to recover its fees, and there is no juristic reason for the deprivation.¹¹
28. There is a substantial and direct link between the contributions of MI as developer and as the exclusive listing agent and the revenue the Project derived from the purchasers who paid deposits and will pay additional funds on closing. The entitlement to fees flows directly from the Project's receipt of the deposit and funds paid on closing.¹³
29. In summary, if the Agreements are disclaimed and the Project is transitioned into a CCAA proceeding, MI should retain the right to advance its claim to a trust over

¹⁰ *PriceWaterhouseCoopers v. Bank of Montreal*, [2017] N.J. No. 82 at [para 12](#).

¹¹ *MNC v REK*, 2022 ONSC 3281 at [para 50](#).

¹³ *MNC v REK*, 2022 ONSC 3281 at [para 50](#).

the proceeds of sale and the deposits paid by unit purchasers. This reservation of rights should be explicit in the court's order.

MI has a Claim for Damages and Set Off

30. Should the court elect to grant the Receiver's purported disclaimer of the Agreements, then MI also has a set off claim as part of its defence to the Receiver's cross-motion.

31. Justice Burnyeat in *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.* summarized the relevant considerations when considering the purported disclaimer of a contract by a court-appointed receiver as follows:

I am satisfied that the decisions referred to establish the following propositions: (a) the Receiver and Manager is not bound by the Contracts of either Chandler or Cook entered into before the receivership unless it decides to be bound by them; (b) **the Receiver and Manager should and did seek leave of the Court before disclaiming the Contracts**; (c) **Chandler and Cook will remain liable for any damages if the Contracts are disclaimed by the Receiver and Manager**; (d) any duty to preserve the goodwill of Chandler and/or Cook is owed to those entities and not to the creditors of Chandler and Cook; (e) the ability to disclaim contracts applies even if the party contracting with the debtor has an equitable interest as a result of the contract; and (f) if a receiver and manager decides in its discretion to be bound by the contracts of a company entered into before the receivership, then the receiver and manager be liable for the performance of those contracts.¹⁴ **[emphasis added]**

32. In *Bennet on Receiverships*, the author confirms that a disclaimer gives rise to a claim for breach of contract:

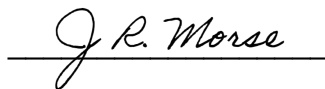
In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. **If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has a claim for damages and can claim**

¹⁴ [*bcIMC Construction Fund Corp v Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897 at para 58.](#)

set-off against any moneys that it owes to the debtor. If the court-appointed receiver can demonstrate that the breach of existing contracts does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages.¹⁵ **[emphasis added]**

33. It is clear that MI has a damages claim against the Project should the Agreements be disclaimed, in addition to its trust claims over the proceeds of sale and the deposits paid by unit purchasers. It should be entitled to advance that claim as a set-off to the claims advanced by the Receiver on behalf of the Project, and later pursue its trust claim and its unsecured claim for breach of contract against the Project. This reservation of rights should be explicit in the court's order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED April 14, 2025



Jerome R. Morse



David M. Trafford

¹⁵ [*Forjay Management Ltd v 0981478 BC Ltd*, 2018 BCSC 527 at para 38.](#)

SCHEDULE A

1. *Romspen Investment Corp v Horseshoe Valley Lands Ltd*, 2017 ONSC 426
2. *Petrowest v Peace Group*, 2022 SCC 41
3. *Royal Bank of Canada v Penex Metropolis Ltd*, [2009] OJ No 3645
4. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, t, 44 C.B.R. (5th) 171 (B.C.S.C.)
5. *PriceWaterhouseCoopers v. Bank of Montreal*, [2017] N.J. No. 82
6. *MNC v REK*, 2022 ONSC 3281
7. *Forjay Management Ltd v 0981478 BC Ltd*, 2018 BCSC 527

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