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

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

Applicants

and

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

Respondents

MOVING FACTUM OF MIZRAHI INC.
(PAYMENT MOTION RETURNABLE JUNE 17-19, 2025)

May 12, 2025

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MOVING FACTUM OF MIZRAHI INC.
(PAYMENT MOTION)

PART ONE – OVERVIEW

1. MI[1] seeks to enforce paragraph 17 of the Receivership Order, and an order for payment to MI by the Project in the sum of $7,579,792.09, plus interest, for post-receivership work provided to the Project as requested by the Receiver, in accordance with the Project's normal payment practices.[2]

2. Following the appointment of the Receiver on October 18, 2023, MI continued as general contractor to the Project at the direction and request of the Receiver.[3] The Receiver has refused to pay MI for these services in accordance with the normal payment practices of the Project, in breach of paragraph 17 of the Receivership Order.

3. While the Receiver acknowledged that MI's claim for payment is consistent with the historical payment practice of the Project,[4] it nonetheless resists MI's claim.

4. The Receiver relies on a May 2019 CCDC2 Stipulated Price Contract (the "2019 CCDC2") to limit MI's entitlement to payment based upon the percentage of completion of the Project and a stipulated price, notwithstanding no payments were made to MI on this basis. Rather, the first and every payment made to MI over the entire course of construction prior to the receivership was on a cost-plus basis.

5. What the Receiver contends should be paid to MI is inconsistent with the normal payment practices of the Project. The Receiver acknowledges that the Project, MI, the Senior Secured Lender, and the Project's beneficial owners did not follow the terms of the construction agreements between

[1] Capitalized terms used herein as are defined in the Motion Record ("MR"), MI's Responding Motion Record ("MMRM"), the Receiver's Fifth Report ("Fifth Report") or the Supplementary Report to the Fifth Report ("Supp. Fifth Report"), unless otherwise noted.
[2] October 18, 2023, Order of Justice Osborne, Fifth Report, Appendix 1 ("Receivership Order") at para 17.
[3] Affidavit of Sam Mizrahi, sworn January 20, 2025, RMR Tab 2 ("Mizrahi 2025), Exhibit A.
[4] Affidavit of Kilfoyle, sworn February 27, 2024, MR Tab 2 ("Kilfoyle 2024"), Exhibit P.

MI and the Project appointing MI as general contractor stipulating a fixed-price.[5] It is incontestable that the Senior Secured Lender's consultant, Altus, who reviewed and approved all costs paid to MI, did so on a cost-plus basis, not a percentage of completion of the Project (as would be the case if payment was based on a stipulated price).[6]

6. Nonetheless, the Receiver argues that MI should be bound by the payment terms of the 2019 CCDC2. That contract stipulated a price of $583,164,100.00 and a completion date of December 31, 2022.[7] But in May 2019, there was no final design or issued for construction finalized permits for the complete building. Two days after the execution of the 2019 CCDC2, the Project applied for its conditional foundation permit and the permit was not granted until March 4, 2020.[8]

7. Later budgets generated by the Senior Secured Lender's consultant increased the construction budgets substantially to $635,881,000 in August 2022[9] and $847,593,130 in May 2023.[10]

8. The Receiver reviewed and satisfied itself that all payments approved and paid to MI were expended on the Project yet argues the fixed-price governs all in an attempt to avoid the plain and ordinary language of the Receivership Order, which requires payment to suppliers of goods and services in accordance with the Project's normal payment practices.

9. To decide this motion (and the Receiver's cross-motion) the court must consider and review the history of the Project and its normal payment practices. The evidence of those payment practices is clear: the Project was developed on a cost-plus basis. Despite there being two CCDC2 Stipulated

[5] Response to Written Questions, dated February 28, 2025 ("Receiver's Answers"), Question 16.
[6] Mizrahi 2025, Exhibit K (Altus Reports).
[7] Kilfoyle 2024, Exhibit C.
[8] Mizrahi 2025 at para 112.
[9] Mizrahi 2025, Exhibit K38A, Altus Interim Project Budget Review Letter at August 2022.
[10] Mizrahi 2025, Exhibit K35A, Altus Interim Project Budget Review Letter at May 31, 2023.

Price Contracts, the Project's general contractor was always paid on a cost-plus basis from the very first construction draw to the receivership.[11]

10. This was known to everyone. The Senior Secured Lender knew and approved of MI operating on a cost-plus basis, but still required the signing of the 2019 CCDC2, knowing it would never be implemented and MI would not be held to its payment terms.[12] Altus, the Senior Secured Lender's consultant, never once questioned MI's payments on a cost-plus basis or undertook the payment protocol specified by the 2019 CCDC2.[13] Ms. Coco, the other beneficial owner, recognized and understood that the payments to MI did not follow the terms of the 2019 CCDC2 and "conceded" to the development of the Project on a cost-plus basis.[14]

11. None of the actions or payment practices supports the development of the Project on a fixed price basis. Neither the 2014 CCDC2 (referred to below at paragraph 35) nor the 2019 CCDC2 reflect the intentions of the parties, and their agreements or correspond with their actions. They are inconsistent with the Project's normal payment practices.

12. This Project is now in the hands of the Senior Secured Lender. While it has not foreclosed on its debt, it effectively stands in the position of the owner of the Project. The Receiver resists MI's claim for payment in the face of the Senior Secured Lender's explicit decision to pay MI on a cost-plus basis for years predating the Receivership Order.[15]

13. The Receiver claims that MI was paid too much. This assertion is belied by: (1) the historical authorization of the MI payment practice by the co-beneficial owner of the Project, Ms. Coco,

[11] Mizrahi 2025 at paras 26-32.
[12] Cross-examination of Ms. Jenny Coco, May 1, 2025 ("Coco") at Q172; Cross-examination of Mr. Sam Mizrahi, May 2, 2025 ("Mizrahi Cross") at Q189.
[13] Mizrahi 2025 at paras 29-30.
[14] Coco at Qs 31, 117, 118, 138, and 172.
[15] Receiver's Answers, Question 17; See Also Payment Listings and Construction Financing Release Notices for August 2019 to September 2023 at Kilfoyle 2024, Exhibits G, H, I, J, and K.

who is a long-time adversary of MI;[16] (2) the approval by the Senior Secured Lender, its Administrative Agent and the Cost Consultant, Altus, of the MI payments;[17] and (3) the undisputed fact that the MI payments are consistent with the Project's payment practice for its former construction manager, Clark Construction Management ("CCM").[18]

14. Importantly, the Project paid MI the exact same time-based labour rates and construction management fees that were historically charged and paid by the Project to its first construction manager, CCM adjusted for a 3% annual inflation increase.[19]

15. If the Receiver's interpretation of paragraph 17 is accepted and it need not pay for post-filing services in accordance with normal payment practices, the court will not only contradict its previous ruling when granting the Receivership Order,[20] but will upend the law of insolvency. Contractors and the suppliers of goods and services to projects under receivership (particularly development and construction projects) will lose the protection afforded by paragraphs 16 and 17 of the Receivership Order, which are adopted from the Model Order.

16. The Receivership Order is clear in plain language – if you supply goods and services after the appointment of the receiver, then you will be paid as you were prior to the receivership and you must continue to provide services as you have in the past.

17. Every receiver remains free to disclaim agreements. The receiver, unlike the contractor, is not bound by the normal payment practices since it (and it alone) is entitled to either affirm or disclaim contracts.[21] Meanwhile, the contractor is 'stuck'. It must continue to provide services, for which

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[16] Kilfoyle 2024, Exhibits G (2019), H (2020), I (2021) and J (January 2022 to June 2022) Payment Listings signed by Ms. Coco.
[17] Receiver's Answers, Question 17; Kilfoyle 2024 at paras 24-26, 33.
[18] Receiver's Answers, Question 8; Kilfoyle 2024 at paras 39 to 40.
[19] Receiver's Answers, Question 8.
[20] *KEB Hana Bank as Trustee et al. v. Mizrahi Commercial (The One) LP et al*., 2023 ONSC 5881 at para 62.
[21] *Pope & Talbot Ltd (Re)*, 2009 BCSC 17 at para 13.

the receivership order grants it the right to be paid in accordance with normal payment practices. To hold otherwise is contrary to the aim and intention of the receivership and the overarching policy principles of the *BIA*.

18. If the Receiver is correct in its interpretation, it can decide what constitutes a normal payment practice within the meaning of paragraph 17 of the Receivership Order, with little to no regard to the historical practice, i.e. what was actually agreed to and paid in the past. If this interpretation is accepted, there will be a torrent of applications by contractors looking to withdraw from troubled construction and development projects as soon a receiver is appointed.

19. The Receiver cannot be correct. Such an interpretation offends what the Receiver identified as a principal reason for the Receivership: "to create a stabilized environment for the continued construction of the Project."[22]

20. This factum sets out MI's position on its motion. It will respond to the claims tactically advanced by the Receiver as part of its cross-motion in a Responding Factum.

PART TWO – STATEMENT OF FACTS

I. The Receivership Order Requires Payment for Post-Receivership Work in Accordance with Normal Payment Practices

21. Paragraphs 16 and 17 of the Receivership Order contain the usual language taken from the Model Order that protects contractors and suppliers of goods and services to the Project by providing that they will be paid in accordance with normal payment practices, but requires them to continue to provide goods and services:

[22] Mizrahi 2025, Exhibit A, October 20, 2023, Letter of Alvarez & Marsal Canada Inc.

NO INTERFERENCE WITH THE RECEIVER

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

CONTINUATION OF SERVICES

17. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtors, or the Developer or contractual, statutory or regulatory mandates for the supply of goods and/or services to the Debtors, or the Developer and/or the Project, including without limitation…construction management services, project management services…or other services to the Debtors, or the Developer and/or the Project are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver…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 the normal payment practices of the Debtors or the Developer, as applicable, or with respect to the Debtors or the Developer, such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.[23] [underlining added]

22. This language is clear. The Receiver must pay MI for its post-receivership work on the same terms MI was paid historically by the Project according to the Project's normal payment practices. The Receiver's mandate is to determine the Project's normal payment practices, not determine what they should or could have been.

23. To hold otherwise is to insert an unpredictable and subjective interpretation to plain and ordinary language from the Model Order. This would leave suppliers of goods or services to insolvent projects with no comfort that they will be paid for their post-receivership work, while still being required to continue to provide those goods or services. It is urged upon this Court that it ought not to endorse an interpretation of the Model Order that does not protect suppliers of goods and services for post-receivership work from non-payment by the Receiver.

[23] Receivership Order at paras 16-17.

24. Typically, as here, resources of the contractors are vastly overmatched by the resources of the Receiver and Debtor. Contractors cannot withstand the cashflow deprivation when not paid for post-filing work or due to litigation against a receiver, which, as here, uses its deep pockets and resources to litigate claims disproportionate to the amount sought for post-receivership work. In effect, by failing to comply with paragraph 17 of the Receivership Order and pursuing its own claims against MI, the Receiver wrongly seeks to effect pre-post compensation.[24]

25. In the endorsement appointing the Receiver, Justice Osborne referred to paragraphs 16 and 17 in the draft order and made a finding consistent with MI's interpretation, finding:

> Finally, the draft receivership order contemplates certain protections being extended to the Developer as set out in the motion materials. These include, for example, a limited stay, and an order that any supplier be restrained from discontinuing goods or services during the receivership provided that, with respect to post-filing supplied, the Developer continues to pay for those goods or services.[25]

26. The position and interpretation now advanced by the Receiver is contrary to its own correspondence instructing suppliers of goods and services to the Project on the import of the Receivership Order.

27. For example, on October 20, 2023, the Receiver delivered a letter to all suppliers and stakeholders of the Project advising of its appointment. The Receiver advised that a principal purpose of "these receivership proceedings is to create a stabilized environment for the continued construction of The One…".[26] It confirmed that MI is "**continuing in its capacity as the General Contractor of…the Project under the supervision of the Receiver**". [27] The Receiver's letter referred to

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[24] *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53 (CanLII), [2021] 3 SCR 736.
[25] *KEB Hana Bank as Trustee et al. v. Mizrahi Commercial (The One) LP et al*., 2023 ONSC 5881 at para 62.
[26] Mizrahi 2025, Exhibit A.
[27] Mizrahi 2025, Exhibit A.

paragraph 17 of the Receivership Order and echoed the finding of Justice Osborne in his endorsement quoted above. The Receiver wrote:

> Pursuant to the Receivership Order, all persons having oral or written agreements or mandates for the supply of goods and/or services relating to The One Project **are required to continue supplying goods and services** to The One Project and **are prohibited from discontinuing or terminating the supply of any such goods and services**. **This means all contractors and trades are required to continue providing goods and services, and will continue to be paid in the ordinary course**.[28] **[emphasis added]**

28. This advice from the Receiver was reiterated in a February 26, 2024 letter to contractors supplying goods and services to the Project. In providing answers to questions that may be raised by contractors, the Receiver confirmed:

> Can I terminate my contract with The One Project?
> **No**. **Pursuant to paragraph 16 of the Receivership Order, all contractors and trades are prohibited from terminating or ceasing to perform any contract in respect of The One Project**. Further, pursuant to paragraph 17 of the Receivership Order, all persons having oral or written agreements or mandates for the supply of goods and/or services relating to The One Project are restrained from discontinuing or terminating the supply of any such goods and services.[29] **[emphasis added]**

29. Despite its position in its letters of October 2023 and February 2024, and despite the explicit finding of Justice Osborne in his Endorsement granting the application to appoint a receiver, the Receiver now claims that the Project has no obligation to pay MI for the goods and services it provided to the Project at the Receiver's request in accordance with the normal payment practices of the Project. In effect, it is the Receiver's position that it can decide what a supplier is paid. This is offside the plain and ordinary language of the Receivership Order and is contrary to the purpose of the Receivership to stabilize the construction progress.

30. The facts at issue in the interpretation of paragraph 17 of the Receivership Order are not complex, nor are they reasonably disputed. The evidentiary and historical record is clear – the Project's

[28] Mizrahi 2025, Exhibit A.
[29] Mizrahi 2025, Exhibit C.

payment practices and the payments to MI were known to all relevant parties and authorized by the Senior Secured Lender, Altus, and both beneficial owners of the Project.[30]

31. The Receiver cannot deny the historical payments, nor can it credibly deny that the payments to MI were known and authorized by the Coco Parties, the Senior Secured Lender, the Administrative Agent and Altus.

32. There are no allegations of secrecy by MI or its principal. There is no allegation of self-dealing. As shown below, the Coco Parties, the Senior Secured Lender, its Administrative Agent and Altus were intimately involved in the finances of the Project. They all had their 'fingers on the pulse' during the material times. MI's payment practices were crystal clear and unwavering: a CM Fee of either 5% or 3.5% on all Project hard costs.

33. This payment practice was confirmed by a settlement agreement between the beneficial owners, the Mediator's Proposal[31], and a subsequent agreement between the beneficial owners, the Control Agreement.[32] Even when concerns were raised by the Coco Parties, the Senior Secured Lender disagreed, and the Coco Parties "conceded" the issue.[33]

34. The payment practice was implemented without fail each and every month of the Project, including the years before the involvement of the Senior Secured Lender.[34]

35. MI is entitled to its post-receivership work on the basis of the Project's normal payment practices. It was also entitled to the payment it received for pre-receivership work. It was entitled to the money it received from the Project according to the agreements reached between the beneficial

[30] Kilfoyle 2024 at para 40 and Exhibits G, H, I, J, K; Mizrahi 2025 at paras 24, 32, 33, 50, 57, 63, 73; Coco at Q128, lns 11-25.
[31] Mizrahi 2025, Exhibit M.
[32] Mizrahi 2025, Exhibit Q.
[33] Coco at Qs 31, 117, 118, 138, and 172.
[34] Mizrahi 2025 at para 28; Kilfoyle 2025 at paras 7-10.

owners, and the Senior Secured Lender. To hold otherwise is to disregard years of consistent and transparent construction draw procedures, implemented by the Project lenders and overseen by the Coco Parties, Altus and the Administrative Agent.

II. July 2014 – The First CCDC2 Contract Identifies a Stipulated Price, but the Project Proceeds on a Cost-Plus Basis

36. In July 2014, MI and the Project entered into a CCDC2 Stipulated Price Contract (the "2014 CCDC2"). It provided for payment to MI, as general contractor, based on a fixed total price for the delivery of the Project paid to MI in monthly increments based on the percentage of completion of the Project as judged by the cost quantity consultant, Altus.[35] Despite the Project and MI entering into a stipulated price contract, as shown below, the parties conducted the Project on a cost-plus basis. This practice continued throughout the entire history of the Project without fail.

37. MI was always paid a construction management fee ("CM Fee") equal to a percentage of all Project hard costs. Initially, MI received a CM Fee of 5% of all Project hard costs.[36] In November 2019, it was reduced to 3.5% pursuant to the Mediator's Proposal.[37] In May 2021, it was retroactively reinstated to 5% on all Project hard costs.[38]

38. MI's CM Fee was calculated and approved by the Project, through the beneficial owners and its lenders, as a percentage of **all** Project hard costs. This payment practice was approved by CERIECO (the lender during the 2014 CCDC2),[39] the Senior Secured Lender, Altus, and the

[35] Kilfoyle 2024, Exhibit B; Mizrahi 2025 at para 29.
[36] Kilfoyle 2024 at para 28; Kilfoyle 2025 at para 8.
[37] Mizrahi 2025 at paras 40, 47, 70 and 71, Exhibit I, Exhibit M.
[38] Mizrahi 2025 at paras 125-126, Exhibit Q.
[39] Kilfoyle 2025 at para 8, Exhibit A.

Administrative Agent,[40] along with the beneficial owners, including Ms. Coco (with the exception of construction draws from July 2022 to the date of the Receivership, discussed further below).[41]

III. July 2017 - Clark Construction Management is Retained as Construction Manager Pursuant to the CCDC5A Contract

39. In July 2017, MI, as general contractor to the Project, retained CCM as the construction manager for the Project pursuant to CCDC5A Construction Management Contract for Services (the "CCDC5A"). CCM was retained to provide the bulk of the construction labour and management to the Project. It was tasked with designing and implementing a construction schedule.

40. The CCDC5A sets out Clark's entitlement to payment for its construction services and labour as a CM Fee of 1.5% of hard costs and time-based labour rates as identified in the CCDC5A.[42] The time-based rates charged by CCM to the Project are set out in Schedule C to the CCDC5A.[43]

41. CCM was entitled to be paid based on the number of hours worked for a particular class of labour at a specified rate. The time-based labour rates increased by approximately 3% each year.[44]

42. Unsurprisingly, CCM did not charge the Project for labour at its costs. It was entitled to charge and did charge the Project a markup on the labour it provided.[45] Also unsurprisingly, the markup on the time-based labour rates charged by CCM is unknown. CCM's profit as construction manager was both its entitlement to a 1.5% CM Fee and its profit on the time-based labour rates. This was the deal that was struck between MI and CCM – a deal that was approved by the Project through its consistent and uninterrupted approval and payment of CCM's costs.[46]

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[40] Kilfoyle 2024 at paras 24-33.
[41] Kilfoyle 2024 Exhibits G, H, I, J and K (for Payment Listings from August 2019 to June 2022 signed by Ms. Coco); Coco at Q128, lns 11-25.
[42] Kilfoyle 2024 at para 19, Exhibit F.
[43] Kilfoyle 2024 at para 20, Exhibit F.
[44] Kilfoyle 2024 at para 21, Exhibit F.
[45] Kilfoyle 2024 at para 22.
[46] Kilfoyle 2024, Exhibit G (2019 Payment Listings) and Exhibit H (2020 Payment Listings).

43. From the date of the CCDC5A to the termination of CCM from the Project in November 2020, MI and CCM charged the Project a CM Fee on CCM's time-based labour rates, just as it did for all Project hard costs.[47]

44. Ms. Coco took the position throughout her arbitrations with Mr. Mizrahi that CCM and, in particular, Mr. Mike Clark, its principal, was a valuable asset to the Project.[48] She testified under cross-examination, however, that she complained to Mr. Mizrahi prior to November 2019 that CCM's labour rates under the CCDC5A were "excessive".[49] She "kept telling Sam, we could get cheaper rates".[50] These complaints do not appear to have been made in writing and contradict Ms. Coco's submissions in her arbitration materials that CCM was an asset to the Project.

45. Despite her complaints in and around November 2019 that the CCM rates paid to CCM pursuant to the CCDC5A were "excessive", Ms. Coco authorized the payments to CCM each and every month when she signed the Payment Listings.[51]

IV. August 2017 - The First Construction Draw Requests Pays MI 5% CM Fee on all Project Hard Costs

46. In August 2017, the first construction draw request was processed pursuant to the 2014 CCDC2. MI sought and was paid a CM Fee of 5% on Project hard costs. Of the 5% CM Fee, 1.5% was paid to CCM and the remaining 3.5% was paid to MI. Both CCM and MI were paid a CM Fee on the time-based labour rates.[52]

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[47] Kilfoyle 2024, Exhibit G (2019 Payment Listings), Exhibit H (2020 Payment Listings), Exhibit L; Mizrahi 2025 at para 37, Exhibit D.
[48] Written Submissions of 889 Canada, Fifth Report Appendix 16 ("Coco Submissions") at paras 25 to 29.
[49] Coco at Q 205.
[50] Coco at Q 205.
[51] Kilfoyle 2024, Exhibit G (2019 Payment Listings) and Exhibit H (2020 Payment Listings).
[52] Kilfoyle 2025 at para 8, Exhibit A.

47. At this time, the construction draws were funded from a credit facility provided to the Project by CERIECO. From August 2017 until November 2019, MI was paid a 5% CM Fee on all Project hard costs, of which 1.5% was paid to CCM.[53] Ms. Coco was aware of this payment practice.[54]

48. During the period of time prior to the Senior Secured Lender's involvement in the Project, MI sought payment of its CM Fee by delivering an invoice to the Project, and the beneficial owners of the Project both signed a promissory note to CERIECO for the full construction draw. Included with the promissory note was a detailed invoice of the Project hard costs incurred and for which payment was sought.[55]

49. The Project practice of paying MI a CM Fee on the CCM time-based labour rates was never challenged by the Coco Parties, who signed the monthly promissory notes as part of the construction draw process.[56] As noted above, Ms. Coco "conceded" to this payment practice.[57] It was also never challenged by Altus or CERIECO.

50. Ms. Coco, who is a 50% beneficial owner of the Project, commenced no less than five arbitration proceedings with Mr. Mizrahi, the other 50% beneficial owner.[58] She advanced numerous claims for relief in those arbitration proceedings. She did not advance a claim that MI was overpaid for CM Fees or time-based labour rates.

51. On cross-examination, Ms. Coco acknowledged that during the time of the 2014 CCDC2, she was aware "immediately" that MI was not being paid as general contractor on fixed price basis.[59] She

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[53] Kilfoyle 2024, Exhibit G (2019 Payment Listings) and Exhibit H (2020 Payment Listings); Mizrahi 2025 at paras 36-39.
[54] Coco at Qs 31, 117, 118, 128, 138, and 172.
[55] Kilfoyle 2025 at paras 8-10.
[56] Kilfoyle 2025 at paras 8-10, Exhibit A and B.
[57] Coco at Qs 31, 117, 118, 138, and 172.
[58] (1) The 2019 arbitration resulting in the Mediator's Proposal; (2) the 2020 arbitration resulting in the 2020 Resolution; (3) the 2020 arbitration resulting concerning Core Architects; (4) the November 2020 arbitration regarding the termination of CCM (not pursued); and (5) the 2023 arbitration concerning the Control Resolution.
[59] Coco at Q 31.

testified it was her position MI was not entitled to charge the Project on a cost-plus basis, i.e. a CM Fee based on a percentage of hard costs. Nonetheless, Ms. Coco "conceded to it".[60]

52. She also testified:

> Q. But I just want to be clear, you understood that from 2014, when the CCDC2 contract was entered into from the very first payment. Up until the CCDC2 contract, 2019, is entered into, Sam has not been paid based upon the fixed-price contract formula; he has been paid on a cost-plus basis?
> A. **We conceded to it as I previously stated, but that doesn't mean he was entitled to it.**
> Q. I didn't ask you that. I asked you whether you were aware of it, that that is how he had been paid?
> A. **I acknowledge**.
>
> […]
> A. **And I already stated in the best interest of the project we went ahead**. And because we were the only ones with funds in the project, Mizrahi had zero investment, capital investment, we undertook to go ahead and to ensure the subs were paid and ensure that the project continued in lieu of going ahead and putting it into a receivership at an earlier state.[61] **[emphasis added]**

53. There were good reasons that the 2014 CCDC2 was not followed, and that MI was entitled to be paid on a cost-plus basis. When the 2014 CCDC2 was signed, the Project did not own the land, permitting was not obtained, the building had not yet been designed and none of the subcontracts had been let. It was impossible to enforce a stipulated price contract for the tallest residential building in Canada which had not yet been designed.[62]

54. Ms. Coco took the position as part of the construction draw process in 2017 that her signing the Promissory Notes required by the construction lender, CERIECO, did not constitute agreement on the payables.[63] When asked why she signed the documentation authorizing the payables anyway,

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[60] Coco at Qs 31, 117, 118, 138, and 172.
[61] Coco at Qs138-139, and 142.
[62] Mizrahi Cross at Qs 189, 254-255.
[63] Coco, Exhibits 2-16.

she testified: "So obviously I thought, okay the lesser of two evils, it is best for me to come to some sort of a resolve with Sam in some mediation, arbitration or litigation process".[64]

55. As reviewed below, this is exactly what occurred. Soon after the introduction of the Senior Secured Lender into the Project, the owners engaged in a blended arbitration and mediation process before Mr. Stephen Morrison, which culminated in the Mediator's Proposal, confirming MI's entitlement to charge the Project on a cost-plus basis – 3.5% CM Fee on all Project hard costs of which 1.5% was payable to CCM.[65]

56. In summary, during the era that the 2014 CCDC2 was in play, the Project always operated on a cost-plus basis with the full knowledge and concession of the beneficial owners of the Project, along with Altus, and the Project's lender.

V. May 2019 – The Senior Secured Lender Becomes Involved and the 2019 CCDC2 is Signed

57. As noted in the Overview, in May 2019, MI entered into another CCDC2 Stipulated Price Contract - the 2019 CCDC2. It is substantially similar to the 2014 CCDC2, with updated budget and price terms and a date of completion.[66]

58. The new 2019 CCDC2 reflected the involvement of the Senior Secured Lender in the Project. The written terms of the 2019 CCDC2, like the 2014 CCDC2, provided for a fixed price payment to MI as general contractor, which would be paid monthly based on the percentage of completion of the Project as judged by the cost quantity consultant retained by the Senior Secured Lender, Altus.[67] In other words, the terms of the 2019 CCDC2 provide for payment to MI as general contractor on substantially the same terms as the 2014 CCDC2.

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[64] Coco at Q 54.
[65] Mizrahi 2025, Exhibit M.
[66] Kilfoyle 2024, Exhibit B.
[67] Kilfoyle 2024, Exhibit B.

59. This process was never once followed, just as it had not been followed for payments to MI from 2017 during the time of the 2014 CCDC2.[68]

60. In August 2019, the Project, the Senior Secured Lender, the Administrative Agent, Mr. Mizrahi, Ms. Coco and MI entered into the Credit Agreement.[69] With the introduction of the Senior Secured Lender to the Project and the execution of the Credit Agreement, the construction draw process changed. The beneficial owners no longer signed a promissory note to secure the monthly draw payments, but instead signed a monthly payment listing, which similarly set out the details of the Project costs incurred for which payment was sought by MI.[70]

61. The Administrative Agent and Altus reviewed each and every monthly construction draw request through a prescribed construction draw protocol mandated by the Credit Agreement.[71]

62. Just as it had under the 2014 CCDC2, MI continued to recover the costs it paid to CCM for construction management services and labour provided to the Project pursuant to the CCDC5A contract. But now, to recover those costs from the Senior Lender, MI provided to the Administrative Agent, among other things, (1) an itemized payment listing (the "Payment Listing"), which detailed the invoices and amounts sought and was signed by both beneficial owners to the Project authorizing the payment of those funds on behalf of the Project, and (2) supporting documentation, including invoices that supported the claim for payment in the Payment Listing.[72] Ms. Coco and Mr. Mizrahi signed these Payment Listings each and every month up to and including the Payment Listing for the month end of June 2022.[73]

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[68] Mizrahi 2025 at paras 29-31, Exhibits K (Altus Reports); Kilfoyle 2024 Exhibits G, H, I, J, K; E (Payment Listings).
[69] Supplementary Affidavit of Sam Mizrahi, affirmed April 28, 2025, Exhibit G.
[70] Kilfoyle 2024 at paras 24-27.
[71] Kilfoyle 2024 at paras 24-27.
[72] Kilfoyle 2024 at paras 24-27.
[73] Kilfoyle 2024 at paras 24-27.

63. Following a review of the Payment Listing, supporting documentation and the issuance of a report by Altus, the Administrative Agent would issue a payment certificate and release notice approving the construction draw, after which it would release the payment of funds. This protocol was substantially identical for each and every month.[74]

64. The Credit Agreement required that Altus provide a line-by-line analysis of each monthly construction draw. The Senior Secured Lender was only obligated to release funding pursuant to the Credit Agreement upon receipt of a report from Altus.[75] The Senior Secured Lender and its Administrative Agent were exacting in their review and approval of the Payment Listings and would reject requests for payment that were miscalculated by as little as $1.00.[76]

65. The Credit Agreement also provides that MI assign its subcontracts, including the CCDC5A, to the Administrative Agent, as security for the Senior Secured Lender's loan.[77] These contractual terms put the Senior Secured Lender in the 'driver's seat' and gave it considerable authority on the direction and control of the construction, the budget for the Project and the construction schedule.

VI. The First Construction Draw Processed After the 2019 CCDC2 – The Beneficial Owners Authorize a 5% CM Fee on All Project Hard Costs

66. In August 2019, the first construction draw was processed pursuant to the Credi Agreement. In keeping with the historical practice of the Project and despite the terms of the 2019 CCDC2, MI sought and was authorized to be paid a CM Fee of 5% on all Project hard costs, of which 1.5% was paid to CCM.[78]

[74] Kilfoyle 2024 at paras 24-27, Exhibits G, H, I, J, and K.
[75] Kilfoyle 2024 at paras 25.
[76] Kilfoyle 2024 at paras 27.
[77] Supplementary Affidavit of Sam Mizrahi affirmed April 28, 2025, Exhibit G at s.1.07(p).
[78] Mizrahi 2025 at paras 35-39, Exhibit D.

67. As they would for nearly 3 years without interruption, Ms. Coco and Mr. Mizrahi signed the Payment Listing for August 2019, which clearly provided for a 5% CM Fee payable to MI and included a CM Fee on the CCM time-based labour rates.[79]

68. The parties never intended to abide by the payment terms in the 2019 CCDC2 (as had been the case with the 2014 CCDC2). Not once did Altus review MI's claim for payment of a CM Fee on the basis of the percentage of completion of the Project.[80] There is no evidence it was ever asked to do so. Not once did Altus review MI's payments as general contractor compared to the stipulated price set out in the 2019 CCDC2 - neither did the Senior Secured Lender, or its Administrative Agent. Even Mr. Mizrahi's long-time adversary, Ms. Coco, who, as detailed below, would soon commence an arbitration proceeding against Mr. Mizrahi, did not raise issue with MI's request for and receipt of a CM Fee of 5% on all Project hard costs, including a CM Fee on the CCM time-based labour rates.

69. The involvement of the new lender, and the execution of the 2019 CCDC2 and the Credit Agreement, therefore, did not change the Project's historical payment practices of the Project on a cost-plus basis.

VII. November 2019 – the Mediator's Proposal Reduces MI's Entitlement to a CM Fee to 3.5% on All Project Hard Costs

70. As noted above, in November 2019, the beneficial owners of the Project agreed to the Mediator's Proposal.[81] The Mediator's Proposal crystallized MI's entitlement to charge the Project a CM Fee

[79] Kilfoyle 2024, Exhibits G, H, I, J, K.
[80] Mizrahi 2025 at paras 29-31, Exhibits K (Altus Reports); Kilfoyle 2024, Exhibits G, H, I, J, K; E (Payment Listings).
[81] Mizrahi 2025, Exhibit M.

of 3.5% on all Project hard costs, of which 1.5% was paid to CCM pursuant to the terms of the CCDC5A.[82]

71. One of the motivations behind the 2019 arbitration which resulted in the Mediator's Proposal was, according to Ms. Coco on her cross-examination, the market rates charged to the Project by CCM. Ms. Coco testified:

> Q. My question was following up on your answer, Ms. Coco: **You had indicated that you had let Sam know that you had objected to the payments to Clark Construction on the basis that they were in excess of market, and you were not prepared to agree to them. Correct**?
>
> A. **I objected to the rates** on a multitude of occasions. They were not market rates. **That is why we ended up in mediation, in arbitration**.
>
> […] But you have to remember, Clark Construction was under contract with Sam Mizrahi. So Sam was supposed to pay Clark directly. And that is what was supposed to happen. **And that is what we contested, and that is why we ended up in mediation, in arbitration, specifically on that point**.[83] **[emphasis added]**

72. The Mediator's Proposal did address the issue of fees, but the parties agreed that CCM's entitlement to fees and labour-rates would remain unchanged. It also confirmed that the Project had been operating on a cost-plus basis. The Mediator's Proposal reduced MI's entitlement to a CM Fee from 5% of Project hard costs to 3.5% of Project hard costs, and provided that 1.5% would continue to be paid to CCM as a CM Fee.[84] Despite having raised complaints over the quantum of the rates to Clark as being in excess of market, the owners agreed to reduce MI's CM fee by 1.5%, but it was still payable on all Project hard costs, including the CCM time-based labour rates.

73. In addition, the Mediator's Proposal provided for MI's entitlement to a Residential Management Fee equal to 2% of all future and past Project sales, special entitlements to equity holders to units

[82] Mizrahi 2025, Exhibit M.
[83] Coco at Qs 207, 210.
[84] Mizrahi 2025, Exhibit M.

in the Project with reduced deposit obligations, and the transition of the financial administration and control of the Project from MI to Ms. Coco, through her designate Ms. Maria Rico, a chartered accountant who had the training and experience to manage the financial controls of the Project.[85]

74. Pursuant to the Mediator's Proposal, Ms. Rico was tasked with the responsibility to provide a "comprehensive system of monthly reporting of cash flows, source and use of funds, account balances, and hard and soft cost budget variances, such that both parties will be fully informed on a regular basis of the financial condition of the project".[86]

75. In addition, the Mediator's Proposal provided that "if costs of any sort are incurred that are not reflected in the appropriate up-to-date budgets, are not backed up by the proper paperwork…they will not be paid unless both parties agree or they have been submitted to adjudication…".[87]

76. Following the Mediator's Proposal, MI continued to seek and was paid its CM Fee, now equal to 3.5% of all Project hard costs, less 1.5% which was paid to CCM. The CM Fee paid to both MI and CCM included 3.5% of the time-based labour rates charged to the Project.[88]

77. From that point onward, Ms. Maria Rico (and her subsequent replacements) held the reigns of the financial and administrative control of the Project.[89] Ms. Rico was tasked with reviewing, in detail, each and every construction draw request and related invoice. Ms. Rico, just like the Senior Secured Lender through its Administrative Agent, was exacting in reviewing the construction draw requests.[90]

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[85] Mizrahi 2025, Exhibit M.
[86] Mizrahi 2025, Exhibit M.
[87] Mizrahi 2025, Exhibit M.
[88] Mizrahi 2025 at paras 40, Exhibit F and G; Kilfoyle 2024, Exhibit G (November 2019-December 2019), Exhibit H (2020), Exhibit I (January 2021-May 2021).
[89] Mizrahi 2025 at paras 83-104.
[90] Mizrahi 2025 at paras 83-104.

78. As a result of the Mediator's Proposal, MI's entitlement to a CM Fee of 3.5% on all Project hard costs was settled. The Mediator's Proposal confirmed MI's entitlement to a CM Fee based on a percentage of all Project hard costs, and not, therefore, pursuant to the terms of the 2019 CCDC2 or the 2014 CCDC2:[91]

> The Construction Management Fee of 5% of the hard construction costs, currently estimated at approximately $560 million, will be reduced to 3.5%, of which 1.5% will continue to be paid to Mike Clark, and the remaining 2% will be paid to MI in respect of its ongoing, but reduced, construction management duties.

79. The Mediator's Proposal also addressed MI having been historically paid a CM Fee of 5% on all Project hard costs. This entitlement was retroactively reduced by the Mediator's Proposal as part of the settlement, further confirmation that the Project and its beneficial owners did not abide by the terms of the 2014 CCDC2 or the 2019 CCDC2. The Mediator's Proposal states on this issue:[92]

> To the extent that construction management fees to date have been paid in accordance with the original structure, any such fees received to date in excess of the new percentage (3.5%) will be offset against the Residential Management Fee otherwise payable for residential sales made to date. For example, assuming for the sake of illustration that there have been $100 million of hard costs expended to date and that there are currently $500 million of firm residential sales. MI would be entitled to receive $5 million in Residential Management Fee at this time (i.e. 1% of current sales), less $1.5 million of Construction Management Fees received to date (i.e. 1.5% of $100 million) for a net payment of $3.5 million. Going forward, MI will receive Construction Management Fees at the reduced level of 3.5%, of which 1.5% will be paid to Mike Clark, and 1% on all new sales, plus a further 1% of total sales at the time of the closing each unit.

80. In fact, given the agreement of the beneficial owners to the Mediator's Proposal, the settlement confirms that the "original structure" of MI's entitlement to a CM Fee was 5% of all Project hard costs – further confirmation that the Project and the beneficial owners developed the Project on a cost-plus basis. To the extent that the CCDC2 contracts applied, therefore, they applied as appointing MI as general contractor to the Project. It is abundantly clear that the parties were

[91] Mizrahi 2025, Exhibit Q.
[92] Mizrahi 2025, Exhibit Q.

operating this Project on a cost-plus basis and the Mediator's Proposal confirms that understanding in a written contract between the owners.

81. In a November 2020 arbitration filing, Ms. Coco noted: "Prior to the Settlement Agreement, Mizrahi Inc. was collecting a construction management fee of 5% of the Project's hard construction costs".[93] She described the Mediator's Proposal as the "negotiation of a new, comprehensive fee structure that was intended to govern the parties' relationship going forward", and that the "fees payable to Mizrahi Inc. were reduced to reflect this new arrangement".[94]

82. The Mediator's Proposal was not the end of the litigation between the Coco and Mizrahi Parties, but it firmly established MI's entitlement to seek and be paid a CM based on a percentage of Project hard costs, which included the CCM time-based labour rates.

VIII. October 26, 2020 – CCM is Terminated as Construction Manager and MI Takes Over the CCDC5A

83. On October 26, 2020, MI terminated CCM as construction manager for the Project pursuant to the terms of the CCDC5A.[95] MI also claimed the assignment of the contract to MI.[96] As noted above, the terms of the Credit Agreement required the assignment of MI's contracts, including the CCDC5A to the Senior Secured Lender's Administrative Agent.[97] The Senior Secured Lender supported the termination of CCM and MI taking over its role in providing construction management and construction labour to the Project.[98]

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[93] Coco Submissions, Fifth Report, Appendix 13 at para 33.
[94] Coco Submissions, Fifth Report, Appendix 13 at paras 31-33.
[95] October 26, 2020, letter from MI to CCM, Fifth Report, Appendix 13; Kilfoyle 2024 Exhibit F, CCDC5A Supplemental Conditions at s. 6.1.10.
[96] October 26, 2020, letter from MI to CCM, Fifth Report, Appendix 13.
[97] Supplementary Affidavit of Sam Mizrahi affirmed April 28, 2025, Exhibit G at s.1.07(p).
[98] Mizrahi Cross at Q805.

84. Ms. Coco was advised of CCM's termination the same day and Mr. Mizrahi contends she knew of the intention to terminate CCM and approved of it in September 2020.[99]

85. Two days later, on October 28, 2020, Ms. Coco objected to the termination of CCM. In a letter dated October 28, 2020, Ms. Coco's lawyers wrote to Mr. Mizrahi's lawyers taking the position that the termination of CCM was a breach of the Amended and Restated Unanimous Shareholders Agreement, the Amended and Restated Covenant Agreement, the Mediator's Proposal, and, potentially, the lending agreements for the Project. The letter specifically set out Ms. Coco's position on the payment of CM Fees: "The Project will not pay the 1.5% construction management fee that was allocated to CCM under the [Mediator's Proposal] to Mizrahi Inc."[100]

86. Furthermore, Ms. Coco's lawyers advised that Ms. Coco, on behalf of the Project, intended to hold both MI and Mr. Mizrahi responsible for the termination of CCM and threatened to commence a derivative action on behalf of the Project.[101]

87. On November 6, 2020, Ms. Coco commenced an arbitration alleging that the termination of CCM was a breach of the Mediator's Proposal. In addition, Ms. Coco sought to prevent MI from being paid the CM Fee of 1.5% of Project hard costs that had been paid to CCM and took the position that MI could not step into the shoes of CCM and provide construction management services to the Project.[102] She also claimed MI's actions in terminating CCM amounted to a breach of the Credit Agreement, despite the Senior Secured Lender's agreement with the termination of CCM.[103]

88. In particular, the arbitration brought by Ms. Coco (through her corporation 8891303 Canada Inc.) sought, among other relief:

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[99] October 26, 2020, email from Mizrahi to Coco, Fifth Report, Appendix 15; Mizrahi Cross at Qs 780-781.
[100] Letter from Foglers to Lax O'Sullivan dated October 28, 2020, Fifth Report, Appendix 13.
[101] Letter from Foglers to Lax O'Sullivan dated October 28, 2020; Fifth Report, Appendix 13.
[102] Coco Submissions, Fifth Report, Appendix 13 at para 1(b).
[103] Coco Submissions, Fifth Report, Appendix 13 at para 25(a).

A. A declaration that MI breached the Mediator's Proposal by terminating CCM;

B. A declaration that the Project is not obligated to pay the 1.5% CM Fee payable to CCM under the Mediator's Proposal to MI; and

C. A declaration that the Project is not required to pay the fees of certain MI personnel reflected on invoice C874.[104]

89. Coco's arbitration submissions claimed that the relief sought on the arbitration as it pertained to the termination of CCM was necessary to "avoid future disputes concerning the payment of construction management fees".[105]

90. In her arbitration materials, Ms. Coco specifically identified that MI would likely take over the role of CCM:

> Alternatively, Mizrahi Inc. might attempt to choose to perform CCM's role itself and in turn receive CCM's compensation (1.5%). In effect, this would negate the reduction in Mizrahi Inc's fees (also 1.5%) that the parties agreed to under the [Mediator's Proposal].[106]

91. On cross-examination, Ms. Coco testified that she: (1) commenced the arbitration in respect of the termination of CCM and the steps being taken by MI to charge the fees previously paid to CCM;[107] (2)_ that she conceded to the payments to MI because she thought that her interests in the Project would be bought out;[108] and (3) that while she disagreed with MI's actions, she signed the cheques and the construction financing statements to ensure the Project continued.[109]

92. Despite Ms. Coco's objections, MI proceeded with taking over the construction management role of CCM. MI's decision to take over CCM's role was shared with the Senior Secured Lender and

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[104] Coco Submissions, Fifth Report, Appendix 13 at para 1.
[105] Coco Submissions, Fifth Report, Appendix 13 at para 16.
[106] Coco Submissions, Fifth Report, Appendix 13 at para 75.
[107] Coco at Q105.
[108] Coco at Qs 31, 117, 118, 138, and 172.
[109] Coco at Q128, lns 11-25.

the trades.[110] The CCDC5A, including the time-based labour rate sheet, for which MI assumed responsibility was shared with the Senior Secured Lender.[111]

93. Pursuant to the Credit Agreement, the CCDC5A had already been assigned to IGIS as security for the construction loan.[112] In essence, MI stepped into CCM's role to the CCDC5A with IGIS as the counterparty. Regardless of the technicalities, MI assumed the role of CCM as construction manager for the Project and began to charge the Project on the same terms CCM had charged under the CCDC5A.

94. Ms. Coco abandoned her arbitration and objections over the termination of CCM and the payment of the CM Fee to MI. Since MI had taken over the role of CCM as construction manager to the Project and was now providing the Project with site labour, MI charged the Project and was paid for the time-based labour provided to the Project, just as CCM had done for approximately 3 years. MI charged the Project and was paid for this time-based labour at the same time-based labour rates that the Project had paid to CCM from August 2017 to November 2020.[113] Ms. Coco was aware of this, as was the Senior Secured Lender as evidenced by Ms. Coco's own testimony and the Payment Listings.[114] In other words, while CCM was no longer involved in the Project, the Project incurred the exact same costs – 3.5% CM Fee and the CCDC5A time-based labour rates.

95. While the Receiver suggests that Ms. Coco did not pursue her objections because the parties began to negotiate the sale of Ms. Coco's interest in the Project, she nonetheless authorized the payment to MI of the CM Fee on all Project hard costs when she signed the November 2020 Payment Listing

[110] Kilfoyle 2024, Exhibits M and N.
[111] Mizrahi 2025, Exhibit H.
[112] Supplementary Affidavit of Sam Mizrahi affirmed April 28, 2025, Exhibit G at s.1.07(p).
[113] Kilfoyle 2024, Exhibit H (October-December 2020), Exhibit I (2021), Exhibit J (2022), Exhibit K (2023); Receiver's Answers, Question 18.
[114] Coco at Qs 170, 172-173; Kilfoyle 2024, Exhibit H (October-December 2020), Exhibit I (2021), Exhibit J (2022).

under which MI was paid the entirety of the 3.5% CM Fee payable pursuant to the Mediator's Proposal.[115]

96. After electing not to pursue the arbitration, Ms. Coco conceded the issue and signed the Construction Financing Release Notice, which confirmed that there had been no breaches or material changes under the Credit Agreement.[116] She signed all of the Payment Listings and Construction Release Notices until July 2022 for the June 2022 construction draw.[117]

97. As of November 2020, when MI took over for CCM and began to charge the CCM time-based labour rates and recover the entire 3.5% CM Fee pursuant to the Mediator's Proposal, Ms. Coco knew:

A. The labour rates charged under the CCDC5A to CCM;[118]

B. That the Project was operating on a cost-plus basis despite the language of the 2014 CCDC2 and the 2019 CCDC2;[119]

C. Had agreed to the Mediator's Proposal confirming that the Project was proceeding on a cost-plus basis and agreed that MI could charge a CM Fee based on a percentage of Project hard costs;[120]

D. That MI was stepping into the role of CCM and would charge the same rates as CCM for MI's staff that replaced the CCM staff;[121]

E. That she executed Payment Listings that reflected the payment of these fees to MI and authorized them on behalf of the Project;[122]

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[115] Kilfoyle 2024, Exhibit H (October-December 2020); Coco, Exhibit 24.
[116] Kilfoyle 2024, Exhibit H; Coco at Q252.
[117] Kilfoyle 2024, Exhibit H (October-December 2020), Exhibit I (2021), Exhibit J (2022).
[118] Coco at Q 205.
[119] Coco at Qs 31, 117, 118, 138, and 172.
[120] Mizrahi 2025, Exhibit M.
[121] Coco at Q117; Coco Submissions, Fifth Report, Appendix 16.
[122] Kilfoyle 2024, Exhibit H (October-December 2020).

F. That she had conceded the issue of MI taking over for CCM and charging the CCM rates and fees to the Project;[123] and

G. That she was entitled to challenge this action by MI through arbitration, a lawsuit or through a derivative action on behalf of the Project and elected not to do so.[124]

98. On November 16, 2020, the Senior Secured Lender and its counsel at Oslers exchanged emails on Ms. Coco's complaints concerning the termination of CCM. Mr. Davidge, counsel for the Senior Secured Lender, reviewed the terms of the 2019 CCDC2 and explained that MI's entitlement to payment, pursuant to the 2019 CCDC2, is based on a percentage of completion as verified by Altus. Mr. Davidge expressly noted that MI's CM Fee is not "express in the construction contract". In a response on the same day, the representative of the Senior Secured Lender wrote to Mr. Davidge and advised:

> 1. There is no contract or legal agreement between The One Inc. (borrower) and Mizrahi Inc (as construction management company).
>
> […]
>
> 3. 5%, CM fee, [sic] was initially included in the Altus CF, and construction budget.[125]

99. This email clearly establishes that the Senior Secured Lender knew and was advised of the terms of the 2019 CCDC2 and knew that the payment of a 5% (or 3.5%) CM Fee on all Project hard costs was contrary to the terms of the 2019 CCDC2. Mr. Davidge would later respond and reiterate that there was a contract between MI and the Project, being the 2019 CCDC2.[126] Nonetheless, the Senior Secured Lender, with its eyes wide open, continued to authorize MI's requests for payments

[123] Coco at Qs 31, 117, 118, 138, and 172.
[124] Coco Submissions, Fifth Report, Appendix 16.
[125] Mizrahi 2025, Exhibit H.
[126] Mizrahi 2025, Exhibit H.

of a CM Fee based on a percentage of Project hard costs and the time-based labour rates under the CCDC5A.

100. Going forward, the same CM Fee and time-based labour rates were submitted by MI and authorized by Ms. Coco in subsequent Payment Listings each month for the next 21 months through to the Payment Listing for work completed in May 2022, dated June 22, 2022.[127] With each Payment Listing authorized by Ms. Coco (and Mr. Mizrahi) for the month's end October 2020 to June 2022, MI sought and was paid a CM Fee and time-based labour rates in accordance with the CCDC5A.

101. Each and every MI invoice for time-based labour rates included the same information as the MI invoices that sought to recover CCM's time-based labour rates. The total labour costs were set out, followed by a calculation of the applicable CM Fee. Enclosed with the MI invoices was a labour rate sheet, which reflected the exact same labour rates from the CCDC5A, plus the 3% annual increase also provided for in that contract.[128] Every MI invoice followed the exact same format up until its termination from the Project in March 2024.

IX. May 2021 – The Control Agreement Increases MI's Entitlement to a CM Fee to 5% of All Project Hard Costs

102. In May 2021, Ms. Coco and Mr. Mizrahi entered into the Control Agreement, under which control of the Project was transferred to Mr. Mizrahi, while the parties pursued the purchase of Ms. Coco's interest in the Project.[129]

103. While the Control Agreement transferred significant control to Mr. Mizrahi, it still provided for Ms. Coco to sign "cheques and other payments made on behalf of the Project", provided that if

[127] Kilfoyle 2024, Exhibit H (October-December 2020), Exhibit I (2021), Exhibit J (2022).
[128] Kilfoyle 2024 at paras 39-40, Exhibit S; Mizrahi 2025 at paras 58-64; Receiver's Answers Question 7.
[129] Mizrahi 2025, Exhibit Q.

Ms. Coco "refuses or fails to sign within forty-eight (48) hours of receipt of a request for signature", then Mr. Mizrahi was authorized to sign any such cheques or payments.[130]

104. The Control Agreement defined an Escrow Period, which ended on August 30, 2022, at which point the control provisions of the Control Agreement expired. During the Escrow Period, Ms. Coco continued to sign the monthly Payment Listings up until the construction draw for the period ending June 2022 (submitted in July 2022).[131] On cross-examination, Ms. Coco testified that she continued to sign the monthly Payment Listings while the Control Agreement was in place in order to maintain her visibility into the Project's finances.[132]

105. In addition to setting out the control provisions and defining the Escrow Period, the Control Agreement also provided for an increase in MI's entitlement to a CM Fee from 3.5% (as provided for by the Mediator's Proposal) back to the original 5% CM Fee on all Project hard costs. In addition, MI was entitled to be paid (and was paid) a retroactive payment for any CM Fees paid to MI prior to the execution of the Control Agreement at a rate less than 5% of hard costs.[133] The Control Agreement provides:

> 3. Upon execution of this Control Agreement, Mizrahi Inc. shall be paid a construction management fee of 5% of hard costs in accordance with the terms of the construction management agreement between Mizrahi Inc. and the GP. 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.

[130] Mizrahi 2025, Exhibit Q Control Agreement at s.2(a)(ii).
[131] Kilfoyle 2024, Exhibit H (October-December 2020), Exhibit I (2021), Exhibit J (2022).
[132] Cross at Q128, lns 11-25.
[133] Mizrahi 2025, Exhibit Q Control Agreement at s. 3.

106. MI sought and was paid this retroactive payment, which included a retroactive payment of a CM Fee on the CCDC5A time-based labour rates.[134] The Payment Listing was signed by Ms. Coco at a time when she knew the CCM rates; and that MI was charging the CCM rates.[135]

107. The Control Agreement entitled MI to receive a 5% CM Fee on all Project hard costs. There was no exception or suggestion that MI was not entitled to charge the Project a CM Fee on the time-based labour rates. On cross-examination, the Receiver's witness, Mr. Finnegan, who has decades of experience in the construction industry, confirmed that construction labour costs, construction material and equipment are all included under the general term "hard costs".[136]

108. The Control Agreement, like the Mediator's Proposal, is further confirmation that the Project was operated on a cost-plus basis. The owners agreed that MI would be paid based on a percentage of Project hard costs. MI was paid a CM Fee calculated as a percentage of hard costs and recovered all the hard costs it expended on the Project, including the time-based labour rates, along with all the other hard costs necessary to build a building.[137] As noted above, Ms. Coco already knew that MI was charging the CCM labour rates in addition to its CM Fee of 3.5%. She agreed to continue and agreed to this practice by signing the Control Agreement (and the subsequent Payment Listings until the June 2022 draw), which also increased MI's entitlement to an additional 1.5% CM Fee.

109. At the time of signing the Control Agreement, Ms. Coco knew MI had taken over for CCM, knew the CCM labour rates, and knew and conceded to MI seeking and recovering a CM Fee on all Project hard costs, including labour rates. The Control Agreement makes it abundantly clear that MI was entitled to a CM Fee of 5% on hard costs. To suggest that the Control Agreement (or the

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[134] Mizrahi 2025 at paras 131.
[135]Coco at Qs 31, 117, 118, 138, 172, 205, and 209; Mizrahi 2025 at paras 131-135, Exhibits R and S.
[136] Cross-examination of Niall Finnegan, May 7, 2025 ("Finnegan Cross") at Qs 68-74, Exhibit 4.
[137] Finnegan Cross at Qs 68-74, Exhibit 4.

Mediator's Proposal) includes an implicit exception such that MI is not permitted to recover a CM Fee on the CCM labour rates is completely unsupported by the evidentiary record and the language of the documentation.

110. The Control Agreement did not place any restriction on MI's entitlement to a 5% CM Fee on all Project hard costs. The Receiver now takes the position that MI's entitlement to a 5% CM Fee ended when the Escrow Period expired on August 30, 2022, but nothing in the Control Agreement supports this interpretation. In fact, despite being aware of the Control Agreement, the Receiver paid MI a 5% CM Fee for its post-receivership work. It only refused to pay a CM Fee on top of the time-based labour rates.[138]

X. May 2022 – the 2019 CCDC2 is Amended

111. In May 2022, during the period the Control Agreement was in place, Mr. Mizrahi signed an amendment to the 2019 CCDC2 on behalf of MI and the Project. The intention of the amendment was to address the fact that the payment terms under the 2019 CCDC2 had not been honoured.[139]

XI. August 2022 – The Control Agreement Expires

112. Beginning in August 2022 for the construction draw process for Project expenses incurred up until the end of July 2022, Ms. Coco refused to sign the Payment Listings.[140]

113. Mr. Mizrahi relied on the Control Agreement and signed a resolution (the "Control Resolution") purporting to extend the control terms under the Control Agreement indefinitely. The Control Resolution was held to be invalid by an arbitral panel in July 2023.[141]

[138] Kilfoyle 2024, Exhibit P.
[139] Mizrahi 2024 at paras 122-124.
[140] Kilfoyle 2024, Exhibit J (2020), Exhibit K (2023).
[141] Fifth Report at s.9.70-9.71.

114. From August 30, 2022 onward, the Payment Listings were signed by Mr. Mizrahi alone. At that time, Ms. Coco began to renew her 2020 complaints about the payment of the CCM time-based labour rates to MI (despite having "conceded" the issue in November 2020) and the payment of a CM Fee of 5% on all Project hard costs.[142]

115. The Senior Secured Lender was aware of Ms. Coco's refusal to sign the Payment Listings and her position that MI was not entitled to a CM Fee of 5% on all Project hard costs and to the time-based labour rates. When Ms. Coco raised her complaints with the Senior Secured Lender, they refused to discuss them or even meet with Ms. Coco. Ms. Coco described the Senior Secured Lender's response to her objections as "belligerent".[143]

116. Notwithstanding Ms. Coco's failure to sign the Payment Listings, which sought payment to MI on the exact same payment terms that had been in place for years, the construction draw requests were all approved and paid by the Senior Secured Lender and its Administrative Agent after receipt of the Altus report.[144]

117. Despite having renewed her complaints about MI's entitlement to fees, particularly the time-based labour rates, which she "conceded" approximately 18 months earlier in November 2020, Ms. Coco did not pursue any legal recourse against Mr. Mizrahi, but she did commence an arbitration to set aside the Control Resolution.[145]

118. August 2022 represented the 5th anniversary of construction on the Project. During the entire course of the Project from August 2017 to August 2022, MI sought and was paid a CM Fee as a percentage of all Project hard costs, including a CM Fee on the CCM time-based labour rates. Ms.

[142] Coco at Qs 129-131.
[143] Coco at Q130.
[144] Kilfoyle 2024, Exhibits J, K.
[145] Fifth Report, Appendix 23.

Coco, the Senior Secured Lender, its Administrative Agent and Altus knew of and approved (or conceded) to that payment practice. Despite commencing five arbitrations against Mr. Mizrahi, Ms. Coco never once sought recourse for this payment practice.

119. Over Ms. Coco's objections, which she had previously abandoned approximately 18 months earlier, the payment practice continued from August 2022 to August 2023, when the Project was put into receivership.

XII. August 2023 to October 2023 – The Project Suffers a Funding Shortfall and Enters Receivership

120. On August 30, 2023, the Senior Secured Lender's Term Facility matured. There was no longer any funding for the Project. As a result, MI's invoice for a 5% CM Fee for the month ending August 2023 was deferred by the Administrative Agent.[146] The Senior Secured Lender approved and paid MI's invoice C1395 for labour costs, calculated in accordance with the CCM time-based labour rates, but deferred payment of a 5% CM Fee on that amount.[147]

121. The funding shortfall would result in an October 17, 2023 application by the Senior Secured Lender to appoint a receiver over the Debtors.

122. MI and Mr. Mizrahi consented to the appointment of the Receiver. It also had input on the terms of the Receivership Order.[148]

123. Paragraph 6 of the Receivership Order provided for payment to MI of $783,305.03, which, among other things, represented the 5% CM Fee owed to MI on its August 2023 invoice Project hard costs. Paragraph 6 of the Receivership Order states:

> 6. THIS COURT ORDERS that the Receiver is authorized and directed to pay the amount of $783,305.03, in respect of the amounts owing to Mizrahi Inc. pursuant to the Construction Management Agreement and/or the 2019 CCDC2 for services performed on or prior to

[146] Kilfoyle 2024 at para 38.
[147] Kilfoyle 2024 at para 38.
[148] Mizrahi 2025 at para 11.

> August 31, 2023, and the Receiver is further authorized to pay all fees owing under the Construction Management Agreement and the 2019 CCDC2 that are properly incurred on or after September 1, 2023, pursuant to the terms of such agreements...[149]

124. The payment of $783,305.03 ordered to be paid by the Project to MI pursuant to paragraph 6 of the Receivership Order is comprised of (1) a 5% CM Fee of $653,342.24, (2) HST on the CM Fee, and (3) an additional $45,028.30 for flight and hotel expenses.[150]

125. MI consented to the Receivership Order and had specifically sought additional protections in the terms of the order, which were accepted by Justice Osborne as set out above in paragraph 25.

126. As noted above, the Receivership Order prohibits those with a contract for the supply of services to the Project from discontinuing their services and requires the Receiver to pay the suppliers in accordance with the normal payment practices of the Project.

127. The evidence establishes the payment practices underlying MI's claim for post-filing claims. It was a payment practice conceded to by Ms. Coco and agreed to and approved by the Senior Secured Lender. MI was entitled to the fees it received, and it is entitled to its claim for post-filing services provided pursuant to the Receivership Order.

128. In this motion, MI seeks to enforce its entitlement to be paid for post-receivership work as it was prior to the receivership in the same manner authorized by the beneficial owners of the Project from November 2020 to July 2022, and authorized and approved by the Senior Secured Lender, its Administrative Agent and Altus from November 2020 until August 2023, just prior to the commencement of the receivership application.

[149] Receivership Order at para 6.
[150] Kilfoyle 2024 at paras 35-36.

129. MI's demand for payment is in accordance with the historical payment practices of the Project, MI's normal payment practices as Developer, consistent with the terms of the Credit Agreement, the Mediator's Proposal and the Control Agreement.

130. Payment to MI as sought will result in the Project paying a CM Fee, which it had always paid, and time-based labour rates, which it had also always paid, equal to the liability the Project would have had if CCM had remained as construction manager to the Project.

PART THREE – LEGAL ISSUES

131. The following legal issues are raised:

A. Paragraph 17 of the Receivership Order requires the Receiver to pay MI in accordance with the Project's normal payment practices, meaning the historical payment practices of the Project;

B. The payment terms of the 2019 CCDC2 do not bind the Project and MI, as the Project was developed on a cost-plus basis; and

C. MI is entitled to the amount sought pursuant to paragraph 17 of the Receivership Order, the Credit Agreement, the Mediator's Proposal, the CCDC5A and the Control Agreement and these payment practices were authorized and known to the Project, its beneficial owners, the Senior Secured Lender, its Administrative Agent and Altus.

PART FOUR – LAW AND ARGUMENT

A. <u>Paragraphs 16 and 17 of the Receivership Order Require MI to Provide Services and the Receiver to Pay MI</u>

132. The plain and ordinary language of paragraphs 16 and 17 of the Receivership Order is clear – MI was obligated to continue to provide general contracting services to the Project as it had in the

past, and, so long as the Receiver required this work, the Project had to pay MI in accordance with the Project's normal payment practices.

133. MI was asked by the Receiver to continue to act as general contractor to the Project.[151] This was a reasonable and necessary step to create stability following the appointment of the Receiver and to ensure that construction proceeded.

134. The Receiver was aware of the 2019 CCDC2 (it is explicitly referred to in the Receivership Order), and it was aware of the historical payment practice of the Project.[152] From the very first draw request for the month ending October 31, 2023, the Receiver received a request for payment from MI consistent with the Project's normal payment practice and inconsistent with the payment terms of the 2019 CCDC2.

135. The Receiver's decision not to pay MI was not based on the terms of the 2019 CCDC2. Instead, it decided that payment of a 5% CM Fee in addition to the time-based labour rates was not reasonable.[153] In doing so, it contravened paragraph 17 of the Receivership Order. It also disregarded the years long history of payment to MI, reviewed and approved by the Senior Secured Lender, its Administrative Agent and Altus, and conceded to by Ms. Coco. In effect, the Receiver has sought to wrongly implement its own priority scheme and pre-post compensation when relying on its untested interpretation of paragraph 17 and electing to litigate a series of discreet and complex claims against MI.[154]

[151] Mizrahi 2025, Exhibit A.
[152] Kilfoyle 2024, Exhibit P.
[153] Kilfoyle 2024, Exhibit P.
[154] *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53.

136. Courts interpret court orders much like they are statutes – with regard to the plain and ordinary language of the order, the surrounding circumstances, and the purposes and intention of any relevant statutes.

137. In *Fontaine v Canada,* this court confirmed that the interpretation of a court order is like the interpretation of a statute and considered the "plain and ordinary meaning" of the language in the order at issue in deciding whether it was properly interpreted.[155] In the same case, this court cautioned: "When interpreting a court order, one must pay particular attention to the language used in the court order itself".[156]

138. In *Onion Lake Cree Nation v Stick*, the Court of Appeal for Saskatchewan reviewed the importance of ensuring consistency on the interpretation of court orders, which, like the interpretation of statutes, have an immediate effect on the private litigants, but also have an effect on the public at large. The court held:

> [A]n *appeal court* has a different role or purpose in ensuring the uniformity in the interpretation of a court order than it does when a contract is interpreted… While in many cases a court order directly relates to the private affairs of litigants, often it does not. **More importantly, a court order, every [sic] much as a statute, is about the exercise of the state's authority**.[157] **[emphasis added]**

139. In the same case, the court held:

> Finally, if this Court were to adopt the palpable and overriding error standard to its review of the interpretation given to court orders by a first instance court, it would suggest that the meaning given to a Court order could legitimately vary according to the view taken by the judge or Court making it. **Respect for the rule of law demands that a court order, much like a statute, must have a singular, correct, meaning**.[158] **[emphasis added]**

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[155] *Fontaine v Canada (Attorney General)*, 2020 ONCA 688 at paras 29 and 44.
[156] *Fontaine v Canada (Attorney General)*, 2020 ONCA 688 at para 44.
[157] *Onion Lake Cree Nation v Stick*, 2020 SKCA 101 at para 58.
[158] *Onion Lake Cree Nation v Stick*, 2020 SKCA 101 at para 60.

140. As noted, paragraphs 16 and 17 of the Receivership Order are taken from the Commercial List Model Order. These paragraphs are found in nearly every receivership proceeding in Ontario, if not across the country. The interpretation of these paragraphs raises issues far beyond the interests of MI and the Project.

141. Despite routinely finding these provisions in receivership orders throughout Canada, there is very little relevant case law. Arguably this is explained because the plain and ordinary meaning of the provisions is obvious, and this is reflected in the jurisprudence that does address the meaning of these provisions.

142. For example, in *Pacific Shores Resort & Spa Ltd (Re)*, Justice Fitzpatrick for the British Columbia Supreme Court considered the interpretation of a paragraph similar to paragraphs 16 and 17 of the Receivership Order in the context of a priority claim, writing:

> As stated above, the receivership order was granted on March 23, 2012. Paragraph 11 of that order provides that persons having agreements with Parkside for the supply of services are restrained from discontinuing such services as may be required by the Receiver. If the Receiver arranges for such services, then the Receiver is required to pay for such services in accordance with normal payment practices or such other practices as may be agreed upon by the supplier and the Receiver or as may be ordered by the court.[159]

143. Justice Fitzpatrick's finding is remarkably similar to the advice the Receiver gave to the suppliers of goods and services to the Project in October 2023 and February 2024.[160] It is also consistent with the findings of Justice Osborne when he granted the receivership application.[161]

144. In *Pope & Talbot (Re)*, Justice Brenner considered the interpretation of similar paragraphs in a receivership order on a motion for payment of a post-filing claim. In *Pope*, Westcoat Energy Inc. sought payment of standby charges for natural gas supply from the court appointed receiver. The

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[159] *Pacific Shores Resort & Spa Ltd (Re)*, 2013 BCSC 480 at para 64.
[160] Mizrahi 2025, Exhibits A and C.
[161] *KEB Hana Bank as Trustee et al. v. Mizrahi Commercial (The One) LP et al.*, 2023 ONSC 5881 at para 62.

terms of the receivership order provided that "all suppliers including Westcoast were obligated to continue their contractual obligations to supply goods and/or services to Pope…as may be required by the receiver".[162] Westcoast sought confirmation from the receiver that its invoices would be paid and the receiver never responded. Unique to *Pope* is the fact that the court-appointed receiver did not request that Westcoast provide the debtor with anything.

145. The Receiver argues that MI was free to stop working for the Project once the payment dispute initially arose. This is belied by the fact that the Receiver was continuing to request general contracting services from MI and was also requesting the production of documentation while they investigated the payment practices. The Receiver, in other words, at least initially, did not deny MI's claim to payment.

146. In reviewing the law and addressing the issue of who was to act first, Justice Brenner in *Pope* held:

> The issue is this: on these facts, which party had a positive duty to act? Did the receiver have the obligation to assess this contract and make a decision whether to affirm or disclaim and notify Westcoast, or did Westcoast have a duty to call on the receiver to make the election and, in the absence of a response, apply to the court to force the receiver to make an election? Here neither party took such a step during the billing period. The question is: which party should bear the loss for its failure to act?
>
> It is well settled law that, in the absence of an affirmation, a court appointed receiver is not bound by existing contracts made by the debtor. See New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd., 2005 BCCA 154, 251 D.L.R. (4TH) 328.
>
> In order to fix a receiver with the burden of making payments under a contract existing at the time of the receiver's appointment, there must be an affirmation of that contract by the receiver, either expressly or by implication. Here there was clearly no express affirmation.
>
> The question is whether, on the particular facts of this case, the receiver's silence or its August 18 letter constituted an implied affirmation.
>
> **Typically, after a receiver is appointed, it will assess the various contracts under which goods or services are being supplied to the debtor and make a decision as to the ones it wishes to continue. Its decision is usually prompted by post-appointment deliveries of**

[162] *Pope & Talbot Ltd (Re)*, 2009 BCSC 17 at para 5.

> **goods or services under various contracts. The decision to be made at that point by the receiver is whether it wishes to affirm the particular contract and continue receiving the supply or, alternatively whether it wishes to disclaim the contract, halt the supply and leave the contracting party with a claim provable in the insolvency proceeding**.[163] **[emphasis added]**

147. The Receiver failed in its obligation to make the election to affirm or disclaim within a reasonable period of time. By December 2023, it knew the facts necessary to formulate its decision on whether to disclaim or affirm MI as general contractor. To string MI along, it issued partial payment and unilaterally amended the self-serving terms of the payment letters, over the objection of MI.[164]

148. If the Receiver did not like the normal payment practices of the Project, the Receiver was entitled, and obligated, to disclaim MI as the general contractor at that point in time. Meanwhile, MI complied with its obligations under paragraph 16 of the Receivership Order not to discontinue its services absent a court order.

149. The record is clear that the Receiver requested MI's continued involvement in the Project.[165] While the Receiver took the position that its monthly payments to MI did not amount to an affirmation of MI's entitlement to a CM Fee, the Receiver did not disclaim and terminate MI as general contractor until March 2024, approximately 6 months after the appointment of the Receiver.

150. If the Receiver's interpretation of the Receivership Order is correct, then MI was free to leave the Project as soon as the payment dispute was identified. Not only is this contrary to the plain and ordinary language of the Receivership Order, but it also puts the Project in peril. MI had the relationship with the subcontractors, the architect and the other professionals. MI had the institutional knowledge of the status of construction and what needed to be done next. It knew the issues that were likely to arise and when they needed to be addressed. There is no doubt the

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[163] *Pope & Talbot Ltd (Re),* 2009 BCSC 17 at para 13.
[164] Affidavit of Mr. Sam Mizrahi, affirmed February 27, 2024, MR Tab 3, at paras 8-13.
[165] Mizrahi 2025, Exhibit A.

Receiver had a huge learning curve, dependent on MI's cooperation to be in a position to hire SkyGrid and terminate MI. The interactions to do so occurred in the period MI reasonably understood it was negotiating new payment terms and failing agreement would be paid as required by the Receivership Order until terminated.

151. Adopting the Receiver's untested interpretation of paragraphs 16 and 17 of the Receivership Order, for which there is no precedent, will lead to chaos, not just for this Project, but for all receiverships which adopt the Model Order.

152. If the purpose of the receivership is to create stability and allow for the orderly construction of the development, then finding that the Model Order language included in the Receivership Order permits suppliers of goods and/or services to 'walk the job' in the event of a payment dispute will wreak havoc. Similarly, finding that the language in the Model Order and the Receivership Order allows the receiver to determine what constitutes a normal payment practice will result in a torrent of applications by suppliers of goods and/or services for permission to quit. The plain and ordinary meaning of the payment provision in the Receivership Order should determine the rights of suppliers of goods and services, not the Receiver's theory and the adoption of an unspecified criteria for supplier payments that is not supported by the language of the order.

153. The language of the order is simple, as is the law. The Receiver had an obligation to determine whether the disclaim or affirm MI as general contractor. It was required to do so immediately upon identifying the payment dispute. Instead, it 'strung along' MI.

B. The Project Operated on a Cost-Plus Basis

154. There can be no credible dispute that the Project was developed and paid for on a cost-plus basis. The intention of the parties, being the Project, MI, the beneficial owners, Ms. Coco and Mr.

Mizrahi, and the Project's lenders to develop the Project on a cost-plus basis, despite the existence of two stipulated price contracts, is consistent with the entire payment history of the Project.

155. Ontario law is clear that parties may, by subsequent conduct, amend a written agreement.[166]

156. Courts have repeatedly applied that principle in situations where parties changed a fixed price contract to a cost-plus arrangement.

157. In *Triple R Contracting Ltd. v. 384848 Alberta Ltd*.,[167] the court held that even though the parties had entered into a fixed price contract, from the outset, they departed significantly from that contract and decided on payment on an entirely different basis.

158. *Triple* was a construction lien and debt action. The plaintiff and defendant entered into a CCDC contract to construct a Dairy Queen at a stipulated price. Justice Philips held that the "Contract was not followed but instead replaced with a different arrangement for the construction of the Dairy Queen, which was never reduced to writing".[168]

159. Finding that the CCDC did not govern the relationship between the parties, Justice Philips held:

> From the outset, the parties departed significantly from the Contract. Instead of Triple R dealing with and paying the sub-trades as part of its responsibilities for the fixed price under the Contract, the parties agreed and the practice developed that Mr. Hum would deal directly with and pay the majority of the sub-trades himself…According to Triple R, the parties verbally agreed Triple R would be compensated for this by a payment to it of a supervisory fee of 5% on the total amount paid to sub-trades by Mr. Hum.
>
> The parties did not adhere to the other payment terms in the Contract either. As is typical in the construction industry, the Contract calls for monthly payments in accordance with a schedule of values of the various parts of the work, aggregating the total Contract price and divided so as to facilitate applications for payment. This procedure was not followed. Instead, as described above, Triple R would simply invoice 384848 for tasks relating to the construction of the Dairy Queen as it saw fit, and await payment from Mr. Hum.[169]

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[166] *Colautti Construction Ltd. v. Ottawa* (City), 46 O.R. (2d) 236 (C.A.); *Reid v. Xiao*, 2021 ONSC 7468 at para 24; *Kor-Ban Inc. v. Pigott Construction Ltd*., [1993] O.J. No. 1414 at para 110.

[167] *Triple R Contracting Ltd. v. 384848 Alberta Ltd.*, 2001 ABQB 52.

[168] *Triple R Contracting Ltd. v. 384848 Alberta Ltd.*, 2001 ABQB 52.

[169] *Triple R Contracting Ltd. v. 384848 Alberta Ltd.*, 2001 ABQB 52 at para 13.

160. While the quantum at issue in *Triple* are no doubt substantially less than the quantum at issue in for the Project, the facts are remarkably similar. The payment practice for the Project makes it abundantly clear that the Project was being developed on a cost-plus basis, despite the fixed-price payment procedure in the 2019 CCDC2. Ms. Coco knew "immediately" and "conceded". Ms. Coco raised the issue with the Senior Secured Lender and CERIECO who disregarded her concerns. A November 2020 email communication between the Senior Secured Lender and its lawyers established that the Senior Secured Lender were advised that MI was supposed to be operating under a fixed-price contract, but the Senior Secured Lender continued to review and approve payments to MI on a cost-plus basis and never raised an issue with MI.[170]

161. The court's review of post-contractual conduct does not offend the parole evidence rule, as confirmed by S. M. Waddams in *The Law of Contracts*:

> A distinction must be made between extrinsic evidence of what occurred before execution of the document, and extrinsic evidence of subsequent events. It has long been accepted that a written document, even if under seal, may be rescinded or varied pursuant to oral agreement, though if the contract is one required to be evidenced in writing the variation may be unenforceable.[171]

162. Similar to *Triple, i*n *Wolf Construction v Kinniburgh*, despite the fact that a fixed price contract was executed between the parties, the court accepted evidence that showed that from the outset, both parties had treated it as a cost-plus contract.[172]

163. Both *Triple* and *Wolf Construction* were followed in *Twister Developments Ltd v. 1406676 Alberta Ltd*.,[173] in which the court again found that even though the parties had executed three fixed price

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[170] Kilfoyle 2024; Exhibit O.
[171] Quoted in: *Triple R Contracting Ltd. v. 384848 Alberta Ltd.*, 2001 ABQB 52 at para 24.
[172] *Wolf Construction v Kinniburg*h, 2019 ABQB 660 at para 6.
[173] *Twister Developments Ltd v 1406676 Alberta Ltd*, 2023 ABQB 535.

contracts, they conducted their business on a cost-plus basis from the outset. In *Twister*, no evidence was called that established an alternative agreement to the three fixed-price contracts that were signed, but the trial judge nonetheless held that the arrangement was a cost-plus one, on the basis of the "evidence with respect to the relationship and how they conducted themselves within that relationship".[174]

164. Ontario courts have also held that the post-contractual actions of parties can establish that a contractor is working under a cost-plus arrangement, despite having signed a fixed-price contract.

165. *Braun v. 974850 Ontario Inc*. concerned the construction of a vacation home near Kenora.[175] The plaintiff general contractor was initially retained pursuant to a fixed price contract, which was "mutually abandoned".[176] The court held that "[i]t is my finding that, although the parties signed a fixed price contract in September 2000, once construction began in October of that year, they immediately moved to a cost plus arrangement as a result of the many changes requested by Braun". The court held that it was clear from the actions of the parties that they mutually agreed to depart from the written contract, including the payment schedule and to embark upon a cost-plus regime.

166. Similarly, in *D.A. Sharp Construction Co. v. Martin*, the court held that while a fixed price contract had been entered, the parties conduct from the outset changed that agreement into a times and materials one. Payments inconsistent with a fixed price contract were made from the outset, neither

[174] *Twister Developments Ltd v 1406676 Alberta Ltd*, 2023 ABKB 535 at para 17.

[175] *Braun v. 974850 Ontario Inc.*, 2006 CanLII 34417 (ON SC).

[176] *Braun v. 974850 Ontario Inc.*, 2006 CanLII 34417 (ON SC) at para 10.

party raised issues relating to those payments, which the court said it would have expected "if either of [the parties] thought the original agreement was still binding".[178]

167. The evidence is overwhelming that the Project was developed and paid for on a cost-plus basis. Despite there being two fixed-price CCDC2 contracts, not one single construction draw process followed the payment procedure set out in those agreements. Not once was Altus asked the percentage of completion of the Project for the purposes of calculating MI's entitlement to a fee. The beneficial owners of the Project clearly and unequivocally agreed through the Mediator's Proposal and the Control Agreement that MI's entitlement to a fee was a percentage of all Project hard costs (either 3.5% or 5% depending on the period of time).

168. If the Project intended on proceeding on a fixed-price basis with MI as its general contractor, then none of the actions of Ms. Coco (in agreeing to the Mediator's Proposal and the Control Agreement), Altus (in releasing its monthly reports), the Senior Secured Lender and IGIS (in approving the construction draws from August 2019 onward), or CERIECO (in approving the construction draws from 2017 to 2019) make any sense. These are sophisticated parties working together in the development of a multi-billion-dollar project.

169. At the very least, if the 2019 CCDC2 was meant to set out MI's entitlement to payment as general contractor from the time of signing onward, then the Mediator's Proposal and the Control Agreement must be found to have amended the 2019 CCDC2, such that MI was entitled to charge as it did. Otherwise, those agreements make no sense and the Payment Listings signed by both Ms. Coco and Mr. Mizrahi, who had been actively suing each other, make no sense.

[178] *DA Sharp Construction Co v Martin*, [1994] OJ No 3136 at para 35.

170. The payment practices of the Project, which were clearly contrary to the payment terms of the written 2019 CCDC2 may have been atypical, but it defies credulity to find this group of sophisticated commercial players intended on complying with the terms of the 2019 CCDC2 and failed to do so for years. Yet the Receiver submits the Court should make such a finding.

C. MI is Entitled to the Amount Sought Pursuant to Paragraph 17 of the Receivership Order

171. MI is entitled to its claim for payment in the sum of $7,579,792.09 for its post-filing services. There is no dispute that MI's claim for payment is calculated in keeping with the Project's normal payment practices.

172. MI was entitled to the fees it was paid historically. As set out above, the Project's payment practices were known to everyone. Ms. Coco knew "immediately" that the Project was not being developed on a fixed-price basis and "conceded" electing to take the issue to mediation and arbitration.[179] That litigation resulted in the Mediator's Proposal, which confirmed the cost-plus nature of the Project and crystallized MI's entitlement to a CM Fee at 3.5% of all Project hard costs, of which 1.5% was paid to CCM.

173. When CCM was terminated in October 2020, the Senior Secured Lender supported MI's decision and it stepping in to provide construction management and labour services to the Project. While Ms. Coco objected and commenced an arbitration, she, again, conceded the issue in November 2020 and signed the first Payment Listing in which MI recovered not only a CM Fee as a percentage of Project hard costs, but also recovered its claim to the time-based labour rates.

174. Approximately 7 months later in May 2021, the beneficial owners entered into the Control Agreement, which provides further confirmation that the parties intended on developing the

[179] Coco at Qs 31, 117, 118, 138, and 172.

Project on a cost-plus basis. The Control Agreement replaced MI's contractual entitlement to a CM Fee of 3.5% with a CM Fee of 5% on all Project hard costs and a retro-active payment of $725,214.74 (net of HST) to top up MI's CM Fee to 5%.[180] There was complete transparency that this CM Fee included a fee on the time-based labour rates.

175. Even during the Escrow Period, Ms. Coco continued to sign the Payment Listings each and every month until July 2022, authorizing the payments to MI for the CM Fee of 5% and the time-based labour rates.

176. The interpretation of the Control Agreement must be grounded in its plain and ordinary language. In *Coco v GFL,* when interpreting a contract (which happened to include Ms. Coco as a party), Justice Osborne held:

> The law is clear that the interpretation of written contractual provisions must be grounded in the text and read in light of the entire contract. The 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.[181]

177. The text of the Control Agreement entitles MI to a 5% CM Fee on all Project hard costs. There is nothing in the Control Agreement that suggests or implies that MI's entitlement to a 5% CM Fee ended when the Escrow Period ended, or that the entitlement did not include a CM Fee on the time-based labour rates, which were known to Ms. Coco by the execution of the Control Agreement for more than 18 months.[182]

178. The Receiver argues in its cross-motion that MI is not entitled to charge for the time-based labour rates with reliance on the terms of the 2019 CCDC2. But the evidence is clear that at no point did

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[180] Mizrahi 2025 at para 131.
[181] *Coco Intl. Inc. et al. v. Green Infrastructure Partners Inc. et al.*, 2024 ONSC 1616 at para 52.
[182] Coco at Q205 (knowledge of labour rates). See also: Coco at Q117 and Coco Submissions, Fifth Report, Appendix 16 (Coco knew MI was stepping in for CCM), Qs 31, 117, 118, 138, and 172 (Coco conceded to the payment practice).

the Project, its owners, its lenders, or Altus treat the payment terms of the 2019 CCDC2 as binding. Even if the payment terms were meant to be binding and meant to be acted upon (even though they were not once implemented), the execution of the Mediator's Proposal and the Control Agreement provided for material amendments to MI's entitlement to be paid fees as general contractor on the basis of a percentage of all Project hard costs.

179. Paragraph 6 of the Receivership Order, submitted by the Senior Secured Lender as part of its application to appoint a Receiver, includes a 5% CM Fee payable to MI. The Receiver itself agreed that based on its review of the "Project contracts and related documentation" it was prepared to pay MI a 5% CM Fee for post-receivership work, but not the cost of labour "despite historical practice prior to the commencement of the Receivership.[183] It was only in October 2024, approximately one year later, that the Receiver decided it too had overpaid MI by agreeing to a 5% CM Fee.

180. In October 2020, a panel of Mr. Stephen Morrison, the Honourable Frank Newbould, and Mr. John Keefe, decided an arbitration between Ms. Coco and Mr. Mizrahi concerning payments of invoices issued to the Project by its architect, Core. The written contract between Core for the Project was with MI, and Ms. Coco argued that its invoices should be paid by MI, not the Project. Setting aside the issues of contractual technicalities, the panel found that the Project adopted the obligation to pay the Core invoices through its conduct, writing:

> The Panel finds, as a matter of fact, that Coco was aware that the architect was delivering services for the benefit of the Project. Given the quantum of the invoices approved over time, Coco was also aware that the fees for those services exceeded the original approved budget and that, in subsequent budget adjustments, the amount was increasing. Up to and including February 2020, Coco continued to approve invoices that made specific reference to specific contracts…without complaint or further inquiry.

[183] Kilfoyle 2024, Exhibit P.

> […]
>
> [T]he Panel has concluded…that the existing architect's agreements should be regularized by assigning them to or having them executed by the Nominee, as the case may be. Insofar as the services are being rendered on behalf of the Project…[184]

181. This is analogous to the Receiver's argument that the Project need not pay for MI's time-based labour rates, whether they were provided to the Project pursuant to the CCDC5A or otherwise.

182. There is simply no support for the Receiver's position that MI was not entitled to charge the time-based labour rates to the Project as provided for in the CCM CCDC5A. The Project paid those rates for years. The beneficial owner knew about the payment of those rates to MI. The lender knew about the payments to MI. Litigation ensued between the owners, but the challenge to MI taking over the role of CCM was never renewed.

183. The Receiver held MI hostage, required it to undertake work as general contractor, until it was in a position to terminate and implement a replacement. It withheld funds owed to MI pursuant to the Project's normal payment practices and improperly sought to set-off that claim for pre-filing claims, which all raise difficult and complex factual issues not amenable to adjudication on a summary basis. The Receiver flatly ignores the Mediator's Proposal and the Control Agreement, which in clear and unequivocal language entitle MI to charge a CM Fee on all Project hard costs. The evidence of the Receiver's own witness establishes that construction labour is a Project hard cost.[185] There is no justification in any of the documentation to limit the entitlement to a CM Fee to Project hard costs, except for the time-based labour rates. That was not the deal struck, and the Receiver cannot be in a better position than the Project when seeking to enforce or avoid the Project's agreements or the agreements of the Project's owners.

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[184] Mizrahi 2025 at paras 157-158, Exhibit V, Arbitral Award at paras 33 and 51.
[185] Finnegan Cross at Qs 68-74, Exhibit 4.

184. MI seeks an order for payment of its post-filing claim paid in accordance with the Project's normal payment practices. It relies on the conduct of all the parties, who knew and approved of the payment practices. While there were disagreements and litigation, the payment practices continued uninterrupted.

185. The Receiver is essentially acting on behalf of the Senior Secured Lender – the fulcrum creditor and the only party to benefit from the Receiver's resistance to MI's claim and from the prosecution of the Receiver's claim. Yet the Senior Secured Lender approved each and every payment along the way. They have sat silent in this litigation. Knowing that their agreement and approval was plainly put in issue, they have elected not to participate and not to dispute or attempt to contradict the evidence of Mr. Kilfoyle, Mr. Mizrahi and even Ms. Coco, all who explicitly testified that the Senior Secured Lender knew and understood that this Project was being conducted on a cost-plus basis.

186. Suppliers of goods and services to projects in receivership need confidence that they will be paid. They need confidence that their rights and entitlements under court orders will be interpreted and applied in keeping with the plain and ordinary language of those orders. They need the confidence that court-appointed receivers will keep their word when they say, in writing, that all suppliers continue to be bound by their agreements and will continue to be paid on the same basis.

187. MI's claim for payment of $7,579,792.09 is not only consistent with the Project's normal payment practices, but is consistent with the conduct of the Project, its owners, its lenders, the lenders consultant and the agreements between the owners.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of May 2025.

J. R. Morse
Jerome R. Morse

D Trafford
David M. Trafford

LAWYER'S CERTIFICATE

I, David Trafford, counsel for Mizrahi Inc. am satisfied as to the authenticity of every authority listed in the Factum of Mizrahi Inc. as required by *Rule* 4.06.1.

D Trafford

David M. Trafford

SCHEDULE A

1. *KEB Hana Bank as Trustee et al. v. Mizrahi Commercial (The One) LP et al.*, 2023 ONSC 5881.
2. *Pope & Talbot Ltd (Re)*, 2009 BCSC 17.
3. *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53.
4. *Fontaine v Canada (Attorney General)*, 2020 ONCA 688.
5. *Onion Lake Cree Nation v Stick*, 2020 SKCA 101.
6. *Pacific Shores Resort & Spa Ltd (Re)*, 2013 BCSC 480.
7. *Colautti Construction Ltd. v. Ottawa* (City), 46 O.R. (2d) 236 (C.A.).
8. *Reid v. Xiao*, 2021 ONSC 7468.
9. *Kor-Ban Inc. v. Pigott Construction Ltd.*, [1993] O.J. No. 1414.
10. *Triple R Contracting Ltd. v. 384848 Alberta Ltd.*, 2001 ABQB 52.
11. *Wolf Construction v Kinniburgh*, 2019 ABQB 660.
12. *Twister Developments Ltd v 1406676 Alberta Ltd*, 2023 ABQB 535.
13. *Braun v. 974850 Ontario Inc.*, 2006 CanLII 34417 (ON SC).
14. *DA Sharp Construction Co v Martin*, [1994] OJ No 3136.
15. *Coco Intl. Inc. et al. v. Green Infrastructure Partners Inc. et al.*, 2024 ONSC 1616.

SCHEDULE B

Nil.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

FACTUM OF MIZRAHI INC.
(Payment Motion)

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