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

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

Applicant

- and –

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

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

NOTICE OF APPEAL OF MIZRAHI INC.
(Appeal from decision of Justice Osborne, released May 25, 2026)

The Appellant, Mizrahi Inc. ("MI"), appeals to the Court of Appeal from the Order of Justice Osborne dated May 25, 2026, dismissing MI's motion for payment for post-receivership supply and granting the Receiver's motion for judgment against MI (the "Order").

THE APPELLANT ASKS that the Order be set aside in its entirety, and that judgment be granted as follows:

1. Granting MI judgment for the MI Payment Motion;

2. Dismissing the Receiver's Motion; and

3. Granting MI costs of the motions below and of this appeal on a partial indemnity basis.

THE GROUNDS OF APPEAL are as follows:

1. MI is a corporation beneficially owned by Mr. Sam Mizrahi. MI provides construction and development management services in Ontario.

2. Mr. Mizrahi (and related entities) have a 50% ultimate indirect voting interest in the beneficial owner of the development project at issue in this proceeding – an 85-storey condominium, hotel and retail tower located at the southwest corner of Yonge Street and Bloor Street West in Toronto, Ontario (the "Project"). The owner of the Project is the Debtor.[1] The other 50% indirect voting interest in the Debtor is held by Coco (and related entities).

3. On December 14, 2017, Mr. Mizrahi and Coco (through their entities) entered into the USA, which gave Coco, in section 3.9, sole power and discretion to exercise the Debtor's and Project's rights against MI.

4. On October 18, 2023, Justice Osborne granted an order placing the Owner and related entities into receivership (the "Receivership Order") and appointed the Receiver.

5. Within the receivership, MI brought a motion for payment pursuant to paragraph 17 of the Receivership Order for post-receivership supply as general contractor (the "MI Payment Motion").

6. In response, the Receiver brought a cross-motion for judgment against MI for a wide variety of claims: (i) alleged overpayment to MI for labour charges and construction

[1] Defined terms used herein that are not otherwise defined are adopted from the terms used by Justice Osborne in the Order.

management fees; (ii) alleged breaches of the Mediator's Proposal; and (iii) alleged breaches of the ELA.

7. Since the Project commenced in 2014, MI has been paid or reimbursed for construction services and labour provided to the Project based on time-based labour rates.
8. In addition, MI was paid a 5% construction management fee since the beginning of the Project (with the exception of invoices between December 2019 and May 2021 when MI's entitlement to a construction management fee was reduced to 3.5% by agreement before it was retroactively increased back to 5%).
9. MI has not been paid for the construction services and labour it has provided to the Project, based on its time-based labour rates for services provided following the Receivership Order. It has not been paid the entirety of its entitlement to a 5% construction management fee for services provided following the issuance of the Receivership Order. In total, MI has outstanding invoices for fees and services, including construction services, of $7,579,792.09.
10. On July 7, 2014, MI entered into the First GC Contract for the Project, which was replaced by the Second GC Contract, dated May 14, 2019.
11. The Second GC Contract provides that MI is responsible to the Owner for the supply of Project labour.
12. On July 25, 2014 MI and the Owner entered into a Commercial Development Management Agreement, pursuant to which MI was retained as the GC for the commercial development and construction of the Project. Despite the terms of the Second GC Agreement being a stipulated price contract, Coco and Mr. Mizrahi agreed that the Project was to be constructed and developed on a cost-plus basis. At all times, MI was paid a construction

management fee based on a percentage of hard costs incurred by the Project and was reimbursed for hard costs. These payments were reviewed and approved by Coco from the time construction began in 2017 until the summer of 2022.

13. Pursuant to MI's obligation to provide labour to the Project, in July 2017, MI entered into a heavily modified CCDC 5A contract with CCM, pursuant to which CCM agreed to provide certain supplemental construction management services and labour for the Project, in addition to what MI was providing.
14. CCM was entitled to payment equal to 1.5% of the Project's construction costs, in addition to a fee based on time-based rates for certain labour provided by CCM to the Project.
15. MI paid CCM its invoice costs consistent with the CCDC 5A agreement on a monthly basis. Those costs were then recovered by MI by payment through a construction draw process from the Project with payments approved by the SSL and Coco.
16. Prior to the Second GC Contract, the construction draw process involved the issuance of promissory notes signed by the beneficial owners of the Project who would review each and every Project expense.
17. In addition, Altus would review and approve these expenses, which included construction management fees payable to MI on a cost-plus basis, i.e. 5% of Project hard costs. After the execution of the Second GC Contract, a construction draw process was implemented by which the SSL and Altus would review and approve the monthly construction draw requests, which included payments to MI of a construction management fee on all Project hard costs. These monthly construction requests were also reviewed and approved by Coco.
18. The administrative agent for the SSL who reviewed the construction draw requests on behalf of the SSL, and Altus, the cost consultant, would closely scrutinize the requests for

payment and the supporting invoices before the SSL would issue the payment certificate and the release notice and, ultimately, pay the funds required to satisfy the construction draw request.

19. In November 2019, the Mediator's Proposal amended the agreement between Coco and Mr. Mizrahi that MI would be paid a construction management fee on Project hard costs, reducing the fee to 3.5% of Project hard costs. This confirmed the agreement that the Project was to be developed on a cost-plus basis. There are no "Project hard costs" under a stipulated price contract. There was no written or formal amendment to the Second GC Agreement.
20. Following the Mediator's Proposal, Coco continued to sign the monthly payment listings and, pursuant to the Mediator's Proposal, obtained complete transparency into the Project's finances. In advance of every monthly construction draw, Coco and her team received MI's invoices for construction labour and construction management fees, among other things.
21. Coco testified that she conceded to MI being paid by the Project on a cost-plus basis.

The Payment of Construction Management Fees on Project Hard Costs

22. From the very beginning of the Project, MI charged the Project a construction management fee equal to 5% on each and every monthly draw (with the exception of the time period between November 2019 when the Mediator's Proposal was signed to May 2021 when the Controle Agreement was signed, during which MI was paid a 3.5% construction management fee). The SSL and all stakeholders were aware of MI's entitlement to a 5% construction management fee, which was paid to MI on a monthly basis through the

construction draw request protocol after being approved by the SSL, its Administrative Agent, and Altus.

23. During the time that CCM provided construction management services to the Project, MI paid CCM its 1.5% construction management fee required by the CCDC 5A contract, out of MI's 5% construction management fee chargeable to the Project. The Project always incurred a total construction management fee equal to 5% of the construction cost.

Labour was Provided to and Paid by the Project based on Time-Based Rates

24. In addition to CCM's construction management fee of 1.5%, CCM also provided certain labour to the Project based on time-based labour rates set out in Schedule A to the CCDC 5A contract with CCM. The time-based rates for Project labour were subject to a 3% annual increase.

25. These labour costs were paid on a monthly basis through the construction draw request protocol after being approved by the SSL, its Administrative Agent, and Altus.

Payment Practice Continued after Termination of CCM

26. On October 26, 2020, MI terminated the CCDC 5A agreement with CCM. MI subsequently assumed CCM's responsibilities and duties to provide CCM's portion of the construction management services to the Project with the knowledge and approval of the SSL, and to the knowledge of Coco. While Coco contested MI's authority to terminate CCM, she later "conceded" to the termination and to the payment to MI of construction management fees equal to 5% of construction hard costs and the continued practice of the Project of paying

MI on a cost-plus basis, including recovering the exact same time-based labour rates that had been charged to the Project by CCM.

27. Coco testified, once again, that she "conceded" to the practice of paying MI the CCM time-based labour rates and a construction management fee based on Project hard costs.

28. Consistent with past practice, following the termination of CCM, MI delivered construction draw requests each month to the SSL, the Administrative Agent and Altus seeking payment of MI's costs and fees calculated using the exact same time-based labour rates provided for in the CCDC 5A contract with CCM and MI's entitlement to a 5% construction management fee. Coco signed the payment listings and authorized these payments to MI after reviewing the related invoices.

29. In May 2021, Coco and Mr. Mizrahi signed the Control Agreement, which retroactively increased MI's entitlement to a construction management fee to 5% of Project hard costs, again confirming the agreement between the Project principals for payment to MI on a cost-plus basis. Even during the Control Period, which expired August 2022, Coco continued to review and sign the Payment Listings and related cheques and had complete transparency into the Project finances and knew and "conceded" to the payment to MI on a cost-plus basis.

30. Consistent with the normal and historical payment practices of the Project, in October 2023 MI was paid a 5% construction management fee of $653,342.24, plus HST which was ordered payable to MI pursuant to paragraph 6 of the Receivership Order.

31. Following the Receivership Order, MI received payment of $783,305.03, as required by paragraph 6 of the Receivership Order, but was not paid its post-receivership construction services, labour and other services in accordance with past practices and the normal

payment practices of the Project and as required by the Receivership Order. The Receiver agreed to pay MI for some Project hard costs and paid MI a construction management fee equal to 5% of the Project hard costs.

The Mediator's Proposal – the HST Reserve

32. The Mediator's Proposal included a purported provision requiring MI to set aside $1.3 million for the HST Reserve. Following the Mediator's Proposal, Coco and Mr. Mizrahi amended the terms of this agreement through the settlement of a subsequent arbitration, which required the parties to enter into a set off agreement (the "Set Off Agreement").
33. The record established that Coco agreed to the Set Off Agreement, even though it was never signed. The evidence established that the Set Off Agreement was implemented.

The Exclusive Listing Agreement

34. The Receiver's Motion advanced a claim against MI for breach of the ELA arising from the payments by the Project to Royal LePage and Magix.
35. The contract with Royal LePage was entered into between the Project/Debtor and Royal LePage. MI was not a party to the Royal LePage contract.
36. Magix was retained pursuant to a contract with MI. The payment made to Magix was approved and authorized by the Project, not by MI.

Errors of Law and Fact by Justice Osborne

37. In granting the Receiver's Motion with respect to the claim for overpayment of construction management fees and labour to MI and dismissing the MI Payment Motion, Justice Osborne:

    a. Erred in law in his interpretation of paragraph 17 of the Receivership Order;

    b. Erred in law by finding that the Second GC Agreement governed MI's entitlement to both pre-receivership and post-receivership entitlement to payment as general contractor;

    c. Erred in law and made a palpable and overriding error of fact by disregarding the Receiver's own statements about the meaning of paragraph 17 of the Receivership Order;

    d. Erred in law and made a palpable and overriding error of fact by disregarding the fact that paragraph 6 of the Receivership Order provided for payment to MI on a cost-plus basis;

    e. Erred in law and made a palpable and overriding error of fact by disregarding and not properly considering Coco's evidence that she "conceded" to the development of the Project on a cost-plus basis;

    f. Erred in law and made a palpable and overriding error of fact in interpreting the Mediator's Proposal and finding it did not authorize MI to be paid on a cost-plus basis;

    g. Erred in law and made a palpable and overriding error of fact in disregarding Coco's undisputed evidence that she conceded to the

development of the Project on a cost-plus basis as a term of the Mediator's Proposal;

h. Erred in law and made a palpable and overriding error of fact in disregarding the undisputed fact that MI was reimbursed by the Project for the CCM costs, including its labour costs, contrary to the terms of the Second GC Agreement, and with the express agreement of Coco;

i. Erred in law and made a palpable and overriding error of fact by finding that there was no evidence that any of the SSL, Altus or Coco expressly approved the MI payment practices;

j. Erred in law and made a palpable and overriding error of fact by finding that the MI invoices for labour were not provided and approved by Coco;

k. Erred in law and made a palpable and overriding error of fact by finding that the SSL was not aware of and consciously waived or acquiesced to MI charging for construction management fees and labour contrary to the Second GC Agreement;

l. Erred in law and made a palpable and overriding error of fact in finding that Coco only signed Payment Listings from November 2020 to May 2021, when she signed them from the date of the first draw under the Credit Agreement, August 30, 2019 to the expiry of the Control Agreement in June 2022;

m. Erred in law and made a palpable and overriding error of fact in the interpretation of the Control Agreement;

n. Erred in law and made a palpable and overriding error of fact by finding that Sam Mizrahi was the directing mind of the Project;

o. Erred in law by not rendering a ruling on MI's claim for payment for post-receivership supply on the basis of *quantum meruit*; and

p. Erred in law by finding that MI is obligated to return payments for construction management fees paid by the Receiver for post-receivership supply.

38. In addition, in granting the Receiver's Motion with respect to claims arising from the Mediator's Proposal and the ELA, Justice Osborne:

a. Erred in law in not awarding MI its claim for a set-off arising from its entitlement to a Residential Management Fee

b. Erred in law and made a palpable and overriding error of fact by finding that MI charged for third party real estate fees from Royal LePage when the contract with Royal LePage was with the Project, not MI and MI did not charge for Royal LePage, nor was it paid for Royal LePage;

c. Erred in law and made a palpable and overriding error of fact by finding that MI directed the payment of Magix on behalf of the Project;

d. Erred in law by finding that MI is not entitled to a damages award and a set-off for amounts owing under the ELA upon its disclaimer by the Receiver; and

e. Erred in law and made a palpable and overriding error of fact by disregarding the undisputed evidence of Coco that she agreed to the set off

agreement which amended the terms of the Mediator's Proposal with respect to the HST Reserve.

39. In addition, in granting the entirety of the Receiver's Motion, Justice Osborne:

a. Erred in law and made a palpable and overriding error of fact by failing to consider the terms of the USA which gave Coco absolute authority to commence an action on behalf of the Project against MI;

b. Erred in law by not addressing the prohibition on pre-post compensation;

c. Erred in law and made a palpable and overriding error of fact in finding that the claims advanced in the Receiver's Motion were not discoverable by the Project because Mr. Mizrahi would not consent to an action against MI;

d. Erred in law and made a palpable and overriding error of fact by finding that the claims advanced in the Receiver's Motion were not statute barred;

e. Erred in law and made a palpable and overriding error of fact by finding that MI's defence of laches to the Receiver's Motion must fail because the Project or the Debtors lacked the legal ability to advance the claim absent the express consent of Mizrahi; and

f. Erred in law and made a palpable and overriding error of fact by finding that all parties agreed to conduct the Motion on a paper record, when MI expressly submitted that the Receiver's Motion raises disputes on material facts and required examinations for discovery and a trial.

40. Section 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3;

41. Section 6 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43;

42. Rules 14 and 61 of the *Rules of Civil Procedure*; and

43. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. Section 183(2) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "BIA"), as amended, provides that an appeal lies to the Court of Appeal for Ontario pursuant to the BIA;

2. Section 193(c) of the BIA provides that unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court without leave, *inter alia*, if the point at issue involves future rights (section 193(a)); if the decision is likely to affect other cases of a similar nature (section 193(b)); or if the property involved in the appeal exceeds in value ten thousand dollars (section 193(c)). The point at issue in the MI Payment Motion and the Receiver's Motion involves future rights, the issues are likely to affect other cases of a similar nature, and the issues concern property with a value far in excess of ten thousand dollars;

3. An appeal to the Court of Appeal is provided under section 6 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;

4. The Order is a final order; and

5. Leave to appeal is not required.

Date: June 3, 2026

MORSE TRAFFORD LLP
100 King Street W., Suite 5700,

Toronto, Ontario, M5X 1C7
David M. Trafford (68926E)
dtrafford@morsetrafford.com
Tel: (416) 369-5440

Adam Beyhum (79276Q)
abeyhum@morsetrafford.com
Tel: (416) 369-5440

Lawyers for the Appellant,
Mizrahi Inc.

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

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PROCEEDING COMMENCED AT TORONTO

NOTICE OF APPEAL

MORSE TRAFFORD LLP
100 King Street W., Suite 5700,
Toronto, Ontario, M5X 1C7

David M. Trafford (68926E)
dtrafford@morsetrafford.com
Tel: (416) 369-5440

Adam Beyhum (79276Q)
abeyhum@morsetrafford.com
Tel: (416) 369-5440

Lawyers for the Appellant, Mizrahi Inc.