



**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-23-00707839-00CL DATE: October 18, 2023

NO. ON LIST: 2

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

BEFORE JUSTICE: **Osborne**

PARTICIPANT INFORMATION

For Applicant:

Name of Person Appearing	Name of Party	Contact Info
Michael De Lellis, Jeremy Dacks and Shawn Irving	KEB Hana Bank as trustee of IGIS Global Private Placement Real Estate Funds Nos. 301 and 434	mdelellis@osler.com jdacks@osler.com sirving@osler.com

For Respondents:

Name of Person Appearing	Name of Party	Contact Info
Kenneth D. Kraft	Mizrahi Commercial (The One) LP, Mizrahi Development Group (The One) Inc. and Mizrahi Commercial (The One) GP Inc.	kenneth.kraft@dentons.com
Nina Perfetto David Levangie	Coco International Inc., 12823543 Canada Ltd. and Jenny Coco	nperfetto@foglers.com dlevangie@foglers.com
David Bish	Coco International Inc. and 12823543 Canada Ltd.	dbish@torys.com
Brendan Monahan	Counsel to CERIECO Canada Corp.	bmonahan@babinbessnerspry.com
Roger Jaipargas Scott Hutchison	Mizrahi Inc., Sam M Inc., and Sam Mizrahi	rjaipargas@blg.com shutchison@hhllp.ca
Stuart Brotman	NongHyup Bank in its capacity as trustee of Hana Private Real Estate Investment Trust No. 137	sbrotman@fasken.com

For Other Parties:

Name of Person Appearing	Name of Party	Contact Info
Brendan O'Neill Christopher Armstrong Jennifer Linde	Counsel to Proposed Receiver	boneill@goodmans.ca carmstrong@goodmans.ca jlinde@goodmans.ca
Stephen Ferguson, Josh Nevsky and Melanie MacKenzie	Proposed Receiver	sferguson@alvarezandmarsal.com inevsky@alvarezandmarsal.com mmackenzie@alvarezandmarsal.com

ENDORSEMENT OF JUSTICE OSBORNE:

Context: “The One”

1. This Application arises out of the construction of one of Canada’s largest mixed-use construction projects (the “Project”) marketed as “The One”. It is located at a property the intersection of Bloor and Yonge Streets in downtown Toronto (“One Bloor”).
2. The Project, still under construction and far from complete, contemplates an 85 storey mixed-use (residential, hotel, retail and restaurant) tower.
3. In short, the Senior Secured Lenders seek the appointment of a receiver and related relief as a result of financial and other covenant defaults by the Borrower, pursuant to section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “*BLA*”) and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended (the “*CJA*”).
4. Defined terms have the meaning given to them in this Endorsement or in the Application materials unless stated otherwise.
5. The Applicant relies on the Affidavit of Joo Sung Yoon affirmed October 17, 2023 together with Exhibits thereto.
6. The Application has been served on the Service List which includes, among other parties, all of the secured lenders to the Project.
7. The appointment of a receiver is not opposed by any party. As further described below, however, certain responding parties made submissions about the scope of relief being sought today.

The Parties, the Application, the Credit Facilities and the Status of the Project

8. The Applicant, KEB Hana Bank, as trustee of IGIS Global Private Placement Real Estate Fund No. 301, (the “Term Lender”) and as trustee of IGIS Global Private Placement Real Estate Fund No. 434 (the “Standby Lender”) (and together, the “Senior Secured Lenders”), seeks an order as set out in the Notice of Application at paragraph one granting the following relief in particular:
 - a. appointing Alvarez & Marsal Canada Inc. (“A&M”) as Receiver over the assets and property of the Respondents, Mizrahi Commercial (The One) LP, (the “Beneficial Owner”), Mizrahi Development Group (The One) Inc. (the “Nominee”) (and together, the “Borrower”), and Mizrahi Commercial (The One) GP Inc. (“GP Inc.”) in connection with the Project and the project itself, including all proceeds thereof (the “Property”);

- b. granting the Receiver a charge over all of the Property as security for Receivership Costs, with priority other than Aviva's security interest in the Condo Deposits and subject to the relevant provisions of the BIA (the "Receiver's Charge");
 - c. approving the Receivership Funding Credit Agreement;
 - d. granting KEB Hana Bank, but this time in its capacity as trustee of IGIS Global Private Placement Real Estate Fund No. 530 (the "Receivership Lender"), a charge over the Property as security under the Receivership Funding Credit Agreement with priority other than the Receiver's Charge and Aviva's security interest in the Condo Deposits; and
 - e. a stay of proceedings in respect of the Borrower, GP Inc. and the Property.
9. The Beneficial Owner is an Ontario-based limited partnership formed to undertake the Project. Ms. Jenny Coco (and/or her family, directly or indirectly) and Mr. Sam Mizrahi (and related parties) each have a 50% ultimate indirect voting interest in the Beneficial Owner through its two limited partners owned by each of them respectively. The sole general partner is GP Inc., the common shares of which are owned by each of the limited partners as to 50%.
10. The Nominee, an Ontario corporation wholly-owned by GP Inc., is the registered owner of One Bloor as nominee for and on behalf of the Beneficial Owner.
11. Mizrahi Inc. is the developer and general contractor of the Project (the "Developer").
12. To finance the development of the Project, the Borrower, the Senior Secured Lenders (and others) entered into a credit agreement dated August 30, 2019, as amended on April 30, 2020, October 30, 2020, February 4, 2021, September 9, 2021 and August 30, 2022 (as amended, the "Credit Agreement").
13. The Credit Agreement made available to the Borrower a Term Credit Facility and a Standby Credit Facility (together, the "Credit Facilities"). As at September 29, 2023, the total amount outstanding under the Credit Facilities was approximately \$1.235 billion, inclusive of principal, interest, fees and expenses.
14. The Senior Secured Lenders were granted various security for all of the obligations owing, including:
- a. a general security agreement with the Borrower dated August 30, 2019 registered under the *Personal Property Security Act*;
 - b. a demand debenture from the Nominee in the maximum principal amount of \$957 million, a charge in respect of which was registered against title to One Bloor;
 - c. a general assignment of rents and leases, also registered against title;
 - d. two pledge agreements from GP Inc. granting first priority interests in certain of its bank accounts and investment assets, including its common shares in the Nominee; and
 - e. guarantees from Ms. Coco and Mr. Mizrahi, each in their personal capacity, and from GP Inc.
15. The Term Credit Facility matured on August 30, 2023 and the Standby Credit Facility matured on September 29, 2023. Neither has been repaid.
16. The Borrower also has secured indebtedness owing to other creditors:

- a. Aviva Insurance Company of Canada (“Aviva”) in respect of its surety to Tarion Warranty Corporation on behalf of the Nominee in the amount of \$8,320,000 and excess condominium deposit insurance to the Nominee with a coverage limit of \$201,680,000;
 - b. Coco International Inc. (the “Coco Lender”), in respect of a credit agreement with the Beneficial Owner pursuant to which a \$75 million credit facility was provided;
 - c. CERIECO Canada Corp. and its agent 10216267 Canada Corp. in respect of several agreements pursuant to which a contractor’s loan in the amount of \$213 million was agreed to be advanced to fund the first stage of construction of the Project; and
 - d. NongHyup Bank, in its capacity as trustee of Hana Private Real Estate Investment Trust No. 137 (the “Hana Lender”) in respect of a credit agreement pursuant to which the funds in the amount of \$55 million were agreed to be advanced under a term loan facility.
17. The total secured indebtedness of the Borrower is therefore approximately \$1.662 billion.
 18. The Senior Secured Lenders have first priority over One Bloor and the other assets of the Borrower (other than the Condo Deposits) pursuant to several priority, subordination and standstill agreements. The relative priorities are set out in the motion materials and are not in issue today.
 19. The Application materials show that the Borrower has committed several defaults since the closing of the Credit Agreement in 2019. In particular, it failed to repay the obligations under the Credit Facilities at maturity. Each such failure represents a separate and independent Event of Default.
 20. On October 4, 2023, the Senior Secured Lenders delivered a formal Demand letter demanding repayment of all indebtedness under the Credit Facilities and enclosing a Notice of Intention to Enforce Security pursuant to section 244 of the *BIA*. The statutory cure period has long expired. The Demand and the Notice have not been satisfied, with the result that the Repayment Events of Default continue today.
 21. To say that the Project has been delayed and faced challenges would be an understatement. The original anticipated completion date of December 31, 2022 was obviously not met.
 22. The original construction budget has already been materially exceeded. The most recent budgets, based on the Borrower’s latest construction schedule and commitments and cost data to May 31, 2023, reflect anticipated gross Project expenditures in excess of \$2 billion, an amount that exceeds the costs projected in 2019 by more than \$600 million.
 23. As stated above, the Project is far from complete. In fact, as of October 4, 2023, concrete columns and walls had been poured only up to the 40th floor and completion is now projected by the Borrower for March, 2025. 70 condominium units remain unsold as of August 31, 2023.
 24. In addition, the Borrower has not been able to complete a sale or mortgage of the Commercial Component nor has it completed a severance of the Commercial Component lands. The Project recently lost its anchor retail tenant and has yet to find a replacement.
 25. The relationship between Ms. Coco and Mr. Mizrahi, together with their respective related parties, is acrimonious. Those parties have had, and continue to have, significant and material disputes about their respective obligations and their involvement in the Project generally.
 26. While responsibility for all of those disputes has neither been determined and nor is such a determination necessary to dispose of this motion, the fact of those disputes and the difficult relationship between those two principal parties has affected both the completion of the Project and, among many other things, the relationship with the Senior Secured Lenders.

27. It is the position of the Senior Secured Lenders on this Application that the information they have received (or not received) has been insufficient for them and their cost consultant to form an accurate view of the ultimate expected costs to complete the Project, or to accurately estimate a completion date.
28. At the same time, the Borrowers cannot continue construction of the Project without further advances under the Credit Agreement or alternative financing.
29. The result of all of this is that the Senior Secured Lenders have lost confidence in the Borrower with the further result that the Applicant seeks the appointment of a receiver today, to bring stability to the situation and bring oversight to the Project in an effort to maximize recovery for the benefit of all stakeholders.
30. As further discussed below, whether, when and on what terms the Project is to be sold prior to completion, is for another day. The immediate objective is to bring stability and provide for the continuation of work on the Project as an overarching strategy is developed.
31. That will require the engagement of a project manager to work with trades and sub-trades as well as other advisors to assist with and oversee the administration and construction of the Project.
32. Clearly, such an undertaking will require significant funds, and the Borrower obviously has limited cash resources. Accordingly, the Applicant seeks approval today of a Receivership Funding Credit Agreement (the “RFCA”) pursuant to which, and in connection with a receivership if (and only if) granted, the Receivership Lender has agreed to make available to the Receiver a non-revolving term credit facility in the maximum principal amount of \$315 million on a super priority basis, to fund Project Costs and Receivership Costs.
33. That RFCA contemplates an initial advance of \$80 million followed by possible monthly advances beginning in November 2023 of up to \$30 million (to a maximum of \$235 million) to fund approved costs based on actual expenditures incurred in the preceding month, subject to the conditions of the proposed facility.
34. The issue is therefore whether the relief sought today should be granted.

The Test for the Appointment of a Receiver

35. The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 101 of the *CJA* is not in dispute. Is it just or convenient to do so?
36. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.
37. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

38. The Courts have considered numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and which I have considered in this case:

- a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;
- b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;
- c. the nature of the property;
- d. the apprehended or actual waste of the debtor's assets;
- e. the preservation and protection of the property pending judicial resolution;
- f. the balance of convenience to the parties;
- g. the fact that the creditor has a right to appointment under the loan documentation;
- h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
- i. the principle that the appointment of a receiver should be granted cautiously;
- j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;
- k. the effect of the order upon the parties;
- l. the conduct of the parties;
- m. the length of time that a receiver may be in place;
- n. the cost to the parties;
- o. the likelihood of maximizing return to the parties; and
- p. the goal of facilitating the duties of the receiver.

See: *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para. 25, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999).

39. How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54).

Analysis

40. Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case?

41. In my view, it is not only just or convenient to appoint a receiver in the particular circumstances of this case, but it is both just *and* convenient.

42. I am reinforced in this conclusion by the fact that the appointment of a receiver is not opposed by any party today. While not determinative of the issue, the lack of opposition from the key stakeholders, which include for greater certainty the Coco Parties, the Mizrahi parties, and all of the other secured lenders, underscores the need for a Court-supervised receivership for the Project.
43. The Senior Secured Lenders have the contractual right to the appointment of a receiver in the event of default such has clearly occurred here. That is contemplated in each of the Credit Agreement, the General Security Agreement and in the Demand Debenture. They have lost confidence in the Borrower and its management.
44. More substantively, the Repayment Events of Default are continuing. The Credit Facilities have matured, all of the Obligations are due and payable, and remain unpaid. They remain unpaid notwithstanding not only the numerous demands, delivery of the section 244 Notice and the expiry of the cure period, the other Pre-Existing Events of Default as set out in the motion materials, and the Milestone Defaults, but also notwithstanding extensive discussions between and among the key stakeholders and various extensions and other accommodations offered or provided by the Senior Secured Lenders.
45. Notwithstanding the significant and material disagreements between and among some of the key stakeholders on various issues, which are for another day, all agree that the appointment of a receiver today is appropriate.
46. I share that view. I am more than satisfied on the basis of the evidence in the Record that the situation cries out for the stability, transparency and orderly process that must be the hallmarks of a Court-appointed receivership for the Project. This will operate to the benefit of all stakeholders and will, I am satisfied, provide the necessary environment for the maximization of proceeds and outcomes generally for all stakeholders.
47. The Project is a significant one in scale, complexity and regrettably, in challenges it has encountered already. The appointment of a receiver today easily meets the test as being just or convenient.
48. The proposed Receiver, A&M, is experienced in such matters and I am satisfied is an appropriate candidate to fulfil the role of a Court-appointed officer here. Together with its counsel, the Receiver will have a significant task ahead. This will include liaising and communicating with key stakeholders as well as others in order that all affected parties can have confidence in the process that lies ahead, and therefore the outcome that it generates, whatever that may be.
49. A&M is appointed Receiver on the terms set out in the proposed draft order.
50. For the same reasons, the stay of proceedings, in the form and according to the terms sought, is also appropriate. What is required is a period of calm, in order that the Receiver can assess the situation and make a reasonable and informed recommendation as to the path forward.
51. The Applicant also seeks approval of the RFCA. Its principal terms are summarized above and set out in detail in the motion materials, but it would provide additional and immediate funding up to a maximum of \$315 million.
52. I am also satisfied that it should be approved. All parties are in agreement that significant additional and immediate funding is required. The RFCA itself is part of the Record.
53. The jurisdiction of this Court to authorize such borrowing is found in section 31(1) of the *BIA*. That statutory provision also permits a receiver to give security on the property of a debtor in any amount, and on any terms that may be authorized by the court. Advances obtained must be repaid out of the property of the debtor in priority to creditors' claims.

54. In my view, residual or additional jurisdiction is found in both section 243(1)(c) of the *BIA* which authorizes the Court to take any other action that the Court considers advisable, as well as section 101(2) of the *CJA* which gives the Court jurisdiction to appoint a receiver on such terms as are considered just.
55. I draw additional comfort from the observation of the Supreme Court of Canada that the very expansive wording of section 243(1)(c) of the *BIA* has been interpreted as giving judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise in relation to court ordered receiverships: see *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 at para. 148, citing *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226 at para. 20; *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508 at para. 57; and *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.*, 1994 CanLII 7468, 114 D.L.R. (4th) 176 (Ont. Ct. J. (G.D.)) at p. 185.
56. I am satisfied that the terms of the RFCA are fair and reasonable and indeed are appropriate in the circumstances. The Receiver has prepared a comparative analysis of the economic terms with those of credit facilities approved in other Court-supervised insolvency proceedings, and particularly those in real estate and construction-based insolvencies. I am satisfied that the terms of the RFCA, including but not limited to the interest rate and fees, is appropriate in the circumstances.
57. In approving the RFCA, I am recognizing not only the urgent and immediate need for funding, and the fact that the proposed RFCA is the only commitment for funding put forward today by any party, but also the fact that this process is obviously in its earliest days. In approving the RFCA, I am authorizing the funding required to underlie the necessary stability referred to above.
58. I make no determination, and nor is one sought by the Applicant today, as to whether, when and on what terms a sales process might be sought to be approved. To allay the concerns expressed today on behalf of the Coco Parties, no determination was sought and none is made with respect to whether construction of the Project under the auspices of the Receiver should continue for two years, or indeed for any fixed period of time. All of that is for another day.
59. What the timelines and milestones set out in the RFCA do is satisfy the Court, and demonstrate to stakeholders (including possible purchasers, lenders, investors and others) that there is a substantive commitment for financing in place to backstop the receivership.
60. Indeed, one of the key, if not *the* key, tasks of the Receiver and its advisors will be to determine and make appropriate recommendations concerning whether the Project should be sold, and if so when and on what terms. To do that, and to do it properly, the Receiver needs an opportunity to gather all necessary information, complete and analysis, and make recommendations on an informed basis. The Receiver will seek advice, directions and/or approvals, as required. The proposed order contains the usual comeback clause, permitting any party to seek the assistance of this Court on seven days' notice if necessary.
61. I am also satisfied that the Receiver's Borrowings Charge is appropriate and should be approved for all of the above reasons. It is to have priority over all other charges and security interests other than the Receiver's Charge, Aviva's security interest in the Condo Deposits, and is subject to subsections 14.06(7), 81.4(4) and 81.6(2) of the *BIA*.
62. 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.

63. I am satisfied that jurisdiction to make such an order is found in section 243(1)(c) of the *BIA* and section 101 of the *CJA* and that such an order is advisable in the circumstances of this case.
64. This relief is required here to ensure that the ability of the Developer to continue with the Project is not undermined by disruption of current contractual relationships or potential litigation, all of which is consistent with the imperative of ensuring that the Receiver has a reasonable opportunity to determine how to maximize value for stakeholders here.
65. The terms of the draft order are appropriate. They are largely consistent, with necessary modifications as are justified by the Record here, with the Model Order of the Commercial List. While not determinative of whether the order is appropriate in any case, this is of considerable assistance.

Disposition

66. The Application is granted, the Receiver is appointed and the other relief set out in the Notice of Application is approved.
67. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.
68. In closing, I am grateful to the parties, their counsel and other professional advisors for working together cooperatively and collaboratively such that the appointment of a receiver today was unopposed by any key stakeholder. I recognize the complexities of the Project and the fact that there are various and material differences in perspective and disputes between and among the same parties that will have to be resolved or determined. I urge the parties in the strongest possible terms to focus on the overarching objective of maximizing the value for all stakeholders in the Project.

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

Peter J. Osborne, J.