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

REPLY FACTUM OF MIZRAHI INC.

June 9, 2025

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REPLY FACTUM OF MIZRAHI INC.

A. The Payment Practices are Not Non-Arm's Length and were Not Implemented when Mr. Mizrahi Controlled Both MI and the Debtors

1. The Receiver's contention in paragraphs 3 and 62 of its responding factum that the payment practices at issue were "non-arm's length" and implemented when Mr. Mizrahi was in control of both the Project and MI over the objections of Ms. Coco is false.

2. The payment practice of MI charging the Project for labour (initially provided by CCM) began in 2017. The Mediator's Proposal maintained that payment practice, described by Mr. Morrison as the "original structure", except MI's entitlement to a CM Fee was reduced. The payment practice proceeded uninterrupted despite Ms. Coco's abandoned arbitration in November 2020 over the termination of CCM. In May 2021, when the Control Agreement was signed, i.e. agreed to by Ms. Coco, the "original structure" identified in the Mediator's Proposal was again implemented and MI's entitlement to a CM Fee was retroactively increased back to 5% and the payment practice continued. None of these payment practices were implemented when Mr. Mizrahi was in control of both MI and the Debtors.

3. Mr. Mizrahi was not in *de facto* control of the Project before the Control Agreement when the payment practices were fully implemented. MI was paid by the Project for all Project hard costs, including labour charged in accordance with the CCM CCDC5A, plus a CM Fee of 5%. This payment practice was not implemented by Mr. Mizrahi. It was implemented by an agreement between the owners and a clear, year's long practice with the support, approval and agreement of the Senior Secured Lender and Altus.

4. The Receiver argues that neither the Mediator's Proposal nor the Control Agreement amended or waived the condition in the 2019 CCDC2 that MI would not charge for labour. As noted in MI's Responding Factum, this entirely ignores the actual payment history on the Project. It is not just the payment of labour to MI that was "conceded" by Ms. Coco, but the payment of *all* Project hard

costs. Over $370 million in hard costs flowed through MI.[1] To interpret the Mediator's Proposal and the Control Agreement as not reflecting the actual and agreed upon payment practices of the Project makes no sense. It makes absolutely no sense for every Payment Listing to reflect a cost-plus development and then to make a claim on one category of hard costs recovered by MI.

5. Contrary to the Receiver's position, Ms. Coco explicitly "conceded" to the non-performance of the payment provisions in the CCDC2 and to address her concerns through mediation and arbitration. To concede is to admit, acknowledge, accept, allow, yield or capitulate. This concession was not conditional as the Receiver maintains. Ms. Coco's evidence of her "concession" makes clear that the payment practices were not unilaterally imposed.

6. After the signing of the 2019 CCDC2, Ms. Coco signed Payment Listings for the payment of hard costs to MI and a CM fee thereon, including a fee on the CCM time-based labour rates. None of the Payment Listings were signed under protest or with conditions attached. Ms. Coco testified in response to questions by counsel for the Receiver on why she signed the Payment Listings:

> A. …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.[2]

7. The "mediation, arbitration or litigation process" culminated with the Mediator's Proposal agreed to in November 2019. Ms. Coco knew the CCM labour rates as of November 2019,[3] knew (as of November 2020) that MI was charging a CM Fee on the CCM time-based labour rates[4] and always knew that the Payment Listings reflected that MI was recovering all Project hard costs from the Project as agreed, which was inconsistent with the payment terms of the CCDC2 contracts. The parties proceeded to mediation and settled "all outstanding issues" in a settlement agreement that

[1] Mizrahi 2025, Exhibit K47 at Appendix A Capital Cost and Cost-to-Complete Summary.
[2] Coco at Qs 53-54.
[3] Coco at Q 205.
[4] Coco at Qs 170, 172-173; Kilfoyle 2024, Exhibit H (October-December 2020), Exhibit I (2021), Exhibit J (2022).

identified the payment of hard costs and CM Fees thereon at 5% as the "original structure".[5] The Project's payment practice of paying for all recoverable hard costs, including time-based labour rates, through MI continued. There was never any protest to the payment practice of MI charging the Project for hard costs and recovering a CM Fee thereon.

8. Immediately after signing the Mediator's Proposal, Ms. Coco signed Payment Listings that clearly evidenced the cost-plus nature of the Project, consistent with the payment practice reflecting the agreement for MI to MI recover all Project hard costs dating all the way back to 2017.[6]

9. Ms. Coco's complaints in November 2020 concerned the termination of CCM and MI's replacement of MI. She claimed terminating CCM was a breach of the Mediator's Proposal.[7] She conceded her complaints about MI taking CCM's place and charging for staff and labour that replaced CCM. She testified that she "conceded" the issue to avoid another dispute with Mr. Mizrahi (even though she subsequently brought another arbitration).[8]

10. While Ms. Coco did claim that she did not agree that MI could charge labour rates to the Project if the buy-out transaction did not close, this is not documented anywhere. There are no reservations of rights noted on the Payment Listings. The November 2020 CCM arbitration was abandoned six months before the execution of the Control Agreement. When she brought the 2020 CCM arbitration, the buy-out had already been contemplated for four months as confirmed by the 2020 Resolution. Ultimately, Ms. Coco is clear that she decided to sign the financing statements to authorize the payments to MI. She testified:

> Q: And you knew that MI had begun to charge what we have defined in the motion record as labour rates, which are costs for its staff…including the staff that replaced Clark Construction Management?
> **A. Yes**

[5] Mizrahi 2025, Exhibit M at pg. 6.
[6] Kilfoyle 2024, Exhibits H, I, and J; Kilfoyle 2025 at paras 7-10.
[7] Coco Submissions, Fifth Report, Appendix 16 at para 1(a).
[8] Coco at Q 117.

> Q. …including the staff that replaced Clark Construction Management staff?
> A. **Yes.**
> […]
> Q. And did you agree that Mi was entitled to charge and recover those fees during that?
>
> A. So I was in a Catch-22 situation, only because we had the buyout there. And so **I wasn't going to get into another dispute with Sam, or else we would [be] back at arbitration. So we conceded to it, because he wanted to make sure that the successor to our equity and debt, he would be able to garner the fees and you know, the five percent and also the salaries and the compensation for the salaries**. **And, at that point in time, we conceded to that.** At the same time, we had other things that were transpiring, so we wanted to obviously ensure that we worked together with Sam through this transition. [9] **[emphasis added]**

11. Immediately after signing the Control Agreement, Ms. Coco signed Payment Listings that continued the payment practice but reinstated MI's entitlement to a 5% CM Fee for the entire Project. Agreeing to a retro-active payment to MI of a CM Fee of 5% on all Project hard costs, including the CCM time-based labour rates charged to the Project by MI is an implicit and tacit agreement of that payment practice. Why would she agree to pay MI a 5% CM Fee on time-based labour rates that MI was not entitled to recover? No one forced Ms. Coco to sign the Control Agreement. She signed it freely and, again, "conceded" to it. [10]

12. The Control Agreement was a return to the "original structure".[11] It was, by definition, an arm's length agreement, as was the Mediator's Proposal, as was Ms. Coco's concession to allow the Project to be developed on a cost-plus basis. It is wrong to say that Mr. Mizrahi implemented the payment practices challenged by the Receiver, when Ms. Coco signed the Mediator's Proposal and the Control Agreement authorizing this payment practice and then signed all the Payment Listings up until July 2022. Ms. Coco signed all the cheques for the payment of hard costs up until the end of the Control Period, even though her authorization was not required.[12]

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[9] Coco Q 114-115 and 117.
[10] Coco at Q. 124.
[11] Mizrahi 2025, Exhibit M at pg. 6.
[12] Kilfoyle 2024, Exhibits I and J (January 2022-July 2022); Mizrahi 2025, Exhibit Q Control Agreement at s. 2(a)(ii).

13. The only fees to which Ms. Coco objected were the fees paid to MI after the Control Period ended in August 2022, yet the Receiver's claim for overpayment stretches all the way back to 2020, nearly 3 years before the receivership, and nearly 4 years before the Receiver brought its motion.[13]

B. Receiver's Interpretation of Paragraph 17 will Cause Chaos

14. The Receiver argues that paragraph 17 does not require the Receiver to pay suppliers and that suppliers to the Project are only constrained to provide services if they are paid (1) in accordance with the normal payment practices; (2) through agreement with the Receiver; or (3) order of the Court. This interpretation is contradicted by paragraph 16 of the Receivership Order which, unequivocally, provides that no one *shall* discontinue without written consent of the Receiver or leave of the Court.[14] The Receiver's interpretation is also inconsistent with the heading for paragraph 17, "Continuation of Services" – a clear indication that paragraph 17 is to preserve order and the continuation of all services to the Project.[15]

15. If the Receiver's interpretation of paragraph 17 is correct, suppliers of goods or services will be left not knowing whether they will be paid. Under the Receiver's interpretation, no one has to do any work without prior confirmation of their payment terms. Construction would grind to a halt while the Receiver reviews or renegotiates hundreds of agreements. Suppliers would either have to provide work for the first month of a receivership with no guarantee of payment, or they need not provide any work until there are assurances they will be paid. Of course, the Receiver clearly assured suppliers that they would be continued to be paid once the receivership commenced.[16]

[13] Coco at Q 131.
[14] Fifth Report, Appendix 1, Receivership Order at para 16.
[15] Fifth Report, Appendix 1, Receivership Order at para 17.
[16] Mizrahi 2025, Exhibit A, October 20, 2023 letter of Receiver, and Exhibit C, February 26, 2024 letter of Receiver.

16. The Receiver also misunderstands MI's reliance on *Pope* and its application to the Receivership Order. *Pope* confirms that the Receiver is the party who must act first. MI does not argue the Receiver must *immediately* affirm or disclaim a supplier. It must do so within a reasonable time.[17]

17. Paragraph 17 imposes an obligation on the Receiver to pay suppliers in accordance with the normal payment practices, absent an agreement or court order. If the Receiver concludes the normal payment practice exceed what it is prepared to pay, then the Receiver terminates the supplier.

18. The Receiver places heavy reliance on MI wanting to complete this Project. No doubt MI wanted to complete the Project. It is an ambitious and beautiful development. MI wanted to finish the Project. It did not want to be terminated. It did not want to bring these proceedings. But what MI wanted is irrelevant to the interpretation of paragraph 17.

19. While the Receiver maintains it did not say MI was restrained from discontinuing services, this is clearly contradicted by the Receiver's October 2023 and February 2024 letters to suppliers confirming that they are prohibited from discontinuing their services.[18] Not once is there any suggestion by the Receiver in its communications that these suppliers may discontinue their services on the basis of the Receiver's interpretation of paragraph 17.

C. There is No Evidence of Market Rates or Commercial Unreasonableness

20. The Receiver claims it chose not to pay MI the CCM time-based labour rates and the CM Fee of 5% because it was advised it was not commercially reasonable. The Receiver refused to pay MI its claim for payment in October 2023, but Mr. Finnegan's affidavit confirms he provided the advice relied upon by the Receiver in February 2024.[19] Mr. Finnegan's evidence is proffered as evidence of what he told the Receiver. This court decided he is not an expert.[20]

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[17] *Pope & Talbot Ltd (Re),* 2009 BCSC 17 at paras 13 and 22.
[18] Mizrahi 2025, Exhibit A, October 20, 2023 letter of Receiver, and Exhibit C, February 26, 2024 letter of Receiver.
[19] Affidavit of Niall Finnegan, sworn February 27, 2025 at paras 1 and 7.
[20] Endorsement of Osborne J., March 29, 2025 at para 11.

21. Mr. Finnegan did not tell the Receiver that the actual labour rates charged by MI or CCM were above-market rates. His evidence was limited to mark-ups on labour for "self-performing" contractors, i.e. a contractor controlled by the Project. MI does not meet this definition. It is a corporation unrelated to the Debtors. The Debtors are jointly owned by Ms. Coco and Mr. Mizrahi.

22. As the Receiver points out, Ms. Coco's cooperation and agreement was required. To accept that MI could not garner a profit by charging the same time-based labour rates as CCM would mean that MI was required to provide substantial labour to the Project at cost with no benefit, while undertaking all the work that CCM had previously undertaken. MI's charging of the CCM time-based labour rates to the Project was revenue neutral to the Project as the labour rates remained unchanged. Regardless, this issue is irrelevant to the interpretation of paragraph 17 of the Order. There is no dispute that the Receiver was entitled to terminate MI as general contractor.

D. The Receiver Relies on Inadmissible Hearsay

23. The Receiver relies on inadmissible hearsay from Knightsbridge to the extent it tries to argue that the evidence establishes MI underperformed. To hold otherwise is to allow the Receiver to rely on third-party fact and opinion evidence without a right to cross-examine.

E. The Payment Practices are Not Inconsistent with the Receivership Order

24. The payment practices are not inconsistent with the Receivership Order, which provided for payment to MI of a CM Fee of 5% and the recovery of Project costs. The Receivership Order is contrary to the Receiver's position that the payment terms of the 2019 CCDC2 governed the development. It is further evidence that everyone understood and agreed to the cost-plus payment terms governing the Project, not the payment terms of the 2019 CCDC2.

ALL OF WHICH IS RESPECTFULLY SUBMITTED June 9, 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

Pope & Talbot Ltd (Re), 2009 BCSC 17

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.
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Proceedings commenced at Toronto

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