Court File No. CV-24-00715321-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:

CONSTANTINE ENTERPRISES INC.

Applicant

- and -

MIZRAHI (128 HAZELTON) INC.

and MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 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

RESPONDING FACTUM OF MIZRAHI INC. AND SAM MIZRAHI
(Motion Returnable February 4, 2026)

January 29, 2026

Morse Trafford LLP
100 King Street West, Suite 5700
Toronto, ON, M5X 2C7

David M. Trafford (68926E)
dtrafford@morsetrafford.com

Adam S. Beyhum (79276Q)
abeyhum@morsetrafford.com

Tel: (416) 863-1230
Fax: (416) 863-1241

Lawyers for Mizrahi Inc. and Sam Mizrahi.

TO: **NORTON ROSE FULBRIGHT CANADA LLP**
222 Bay Street, Suite 3000
Toronto ON M5K 1E7

James Renihan LSO#: 57553U
Tel: 416.216.1944
james.renihan@nortonrosefulbright.com

Jennifer Stam LSO#: 46735J
Tel: 416.202.6707
jennifer.stam@nortonrosefulbright.com

Lauren Archibald LSO#: 87151U
Tel: 416.278.3787
lauren.archibald@nortonrosefulbright.com

Fax: 416.216.3930
Lawyers for the Receiver

AND TO: **CASSELS BROCK & BLACKWELL LLP**
Barristers and Solicitors
Suite 3200, Bay Adelaide Centre – North Tower
40 Temperance St.
Toronto ON M5H 0B4

Jason Arbuck
Tel: 416.860.6889
jarbuck@cassels.com

Alan Merskey
Tel: 416.860.2948
amerskey@cassels.com

Jeremy Bornstein
Tel: 416.869.5386
jbornstein@cassels.com

Tel: 416.869.5300
Fax: 416.360.8877
Lawyers for the Applicant

AND TO: **COZEN O'CONNOR LLP**
Barristers and Solicitors
Bay Adelaide Centre – North Tower
40 Temperance Street, Suite 2700
Toronto ON M5H 0B4

Steven Weisz
Tel: 647.417.5334
Fax: 416.361.1405
sweisz@cozen.com
Lawyers for the Respondents

I. OVERVIEW

1. Mizrahi (128 Hazelton) Inc. ("**Hazelton**") is the owner of a luxury condo development property in Toronto (the "**Project**"), currently under Receivership.

2. The shareholders of Hazelton are Constantine Enterprises Inc. ("**CEI**") and Mizrahi Enterprises Inc. ("**MEI**"). Robert Hiscox and Edward Rogers are the principals of CEI. Sam Mizrahi is the principal of MEI. MEI's interest was subsequently transferred to Mizrahi Developments Inc. ("**MDI**"), which is also controlled by Sam.

3. Mizrahi Inc. ("**MI**") was the general contractor and developer for the Project. Mr. Mizrahi is also the principal of MI. MI was party to a construction management agreement (the "**CMA**") with Hazelton for the Project. MI was also in charge of the development of the property under a separate development management agreement with Hazelton (the "**DMA**").

4. The Receiver of Hazelton advances two claims against MI and Sam – one based on the CMA and one based on the DMA.

5. The CMA claim is barred by the expiry of the limitation period. Hazelton and CEI knew of the essential elements of the CMA claim advanced by the Receiver for far more than two years prior to the commencement of this motion. In addition, this proceeding raises significant disputes on material facts. It is properly brought as an action with documentary production and examinations for discovery. The merits of both the CMA and the DMA claims cannot be fairly addressed on a paper record, not only because of the material facts in dispute, but because the same issues are raised in two related proceedings, the Mizrahi Civil Claim and the CEI Guarantee Application (both defined below).

6. The CMA claim should be dismissed owing to the expiry of the limitation period and the remainder of the Receiver's claims should be converted into an action.

The CMA Claim

7. The Receiver claims that MI overbilled Hazelton by $1,064,322.00 when it charged a mark-up on invoices for labour charged to the Project. MI denies that any improper billing occurred.

8. As a threshold issue, the CMA claim is statute-barred by operation of the *Limitations Act*, 2002. As reviewed below, as early as May 2022 and no later than March 2023, Hazelton was aware of the essential elements of the CMA claim. The motion was commenced in July 2025.

9. Moreover, Hazelton/CEI approved MI's assumption of the contract from the project's original construction manager, Clark Construction Management ("**CCM**") and accepted for years that MI was charging precisely the same rates that CCM was charging. CEI only took issue with MI's billings once it realized the Project would lose money.

The DMA Claim

10. MI was paid $2,000,000.00 (the "**Development Fee**") pursuant to the DMA. The DMA contains a term that requires repayment of $500,000.00 from the Development Fee in the event the DMA is terminated prior to "final closing of all of the Units and the completion of all other aspects of the project".

11. The Receiver terminated the DMA on June 21, 2024 (the "**Termination Date**"). It is not disputed that the final closing of all the units at Hazelton had not been completed by Termination Date.

12. But MI was stopped from complying with the terms of the DMA owing to CEI's bad faith when it, among other things, deliberately blocked Hazelton from obtaining the necessary financing to complete the Project. As will be described further below, this conduct by CEI is subject of a separate civil action (the "**Mizrahi Civil Action**") in which Sam alleges that CEI, and his partners, Mr. Edward Rogers, andMr. Robert Hiscox (the Receiver's witness), breached their duties of good

faith and fiduciary duties owed to Sam, and deliberately undermined Sam in order to force him out of the Project and a related project at 180 Steeles Ave West (the "**180 SAW Project**").

13. The Mizrahi defence to the DMA claim cannot be fairly adjudicated on this motion. The DMA claim should be converted into an action and should be tried together with or following the Mizrahi Civil Action. The defence to the DMA claim is directly tied to the factual allegations and claims made therein. If the Mizrahi Civil Action succeeds, then there is a strong possibility that the DMA claim will be defeated as well.

14. This is reinforced by the fact that on cross-examination, Hazelton and CEI's principal, Robert Hiscox, refused to answer any questions about the refinancing of the Project (which was raised in his affidavit) and is central to MI's response to the DMA claim. The objection was premised on the undisputed fact that the questions posed directly relate to the claims in the Mizrahi Civil Action, raising a concern of "pre-discovery discovery". The Respondents were thus precluded from advancing a defence to the DMA claim via cross-examination.

II. FACTS

The Project

15. Mr. Mizrahi is an experienced developer of luxury real estate. In 2014, Mr. Mizrahi (the principal of MEI), Mr. Hiscox and Edward Rogers (the principals of CEI) agreed to work together to develop the Project. MEI and CEI formed Hazelton and executed a shareholder's agreement on June 19, 2015 (the "**Shareholder's Agreement**").[1] MEI and CEI were each 50% shareholders.

16. On the same date June 19, 2015, Hazelton and MI executed the DMA. Per the DMA, Hazelton paid MI $2,000,000.00 to act as the development manager for the Project.

[1] Mizrahi Affidavit, Exhibit E

17. On March 13, 2017, when construction on the Project was ready to begin, Hazelton and MI entered into the CMA, in the form of a CCDC5A contract. MI's compensation under the CMA was a fee equal to 5% of the "construction cost" of the Project, plus monthly fees for certain MI employees.[2] MI had no obligation to provide the Project with labour under the CMA.

The Retention of CCM

18. In July 2017, MI (with the approval of Hazelton/CEI[3]) retained Clark Construction Management ("**CCM**") as Construction Manager for the Project under a CCDC5A contract (the "**CCM Contract**").[4] The retention of CCM was contrary to the language of the CMA that required all trade contractors be retained directly by Hazelton.[5] There was no written waiver of this condition under the CMA.

19. While the CCM Contract has similarities to the CMA (they are both in the CCDC5A form), the CCM Contract included approximately 50 pages of supplemental terms not included in the CMA.[6]

20. CCM was specifically retained by MI to provide construction management and labour services to Hazelton. CCM provided unionized labourers and was entitled to be paid based on time-based labour rates set out in Appendix A to the CCM Contract.[7] All of these terms and the requirement to provide these services were absent from the CMA.

21. From the beginning of construction in 2017 until October 2020, MI provided monthly invoices to Hazelton, which sought reimbursement for the cost of the CCM invoices to MI. The CCM invoices applied overtime rates for overtime worked by labourers at the time-based labour rates set out in

---

[2] CMA, Article A-5 – Mizrahi Affidavit, Exhibit D, PDF p. 103
[3] Affidavit of Robert Hiscox sworn October 29, 2025 ("**Hiscox First Affidavit**"), para. 4.
[4] Affidavit of Sam Mizrahi sworn November 28, 2025 ("**Mizrahi Affidavit**"), para. 16
[5] CMA, General Condition 3.1.1.5 - Mizrahi Affidavit, Exhibit D, PDF p. 119
[6] CCM Contract, Supplementary Conditions - Mizrahi Affidavit, Exhibit F, PDF pp. 184-233
[7] CCM Contract, Appendix A to Supplementary Conditions Mizrahi Affidavit, Exhibit F, PDF p. 216

the CCM Contract.[8] Hazelton/CEI never took issue paying CCM's time-based rates. All cheques paid for monthly invoices had to be signed by both Mr. Mizrahi and Mr. Hiscox. The reimbursement of CCM's invoices was always paid to MI, who would then in turn pay CCM.[9]

The Parties Agree for MI to Assume CCM's Role and to Provide Labour

22. In or around October 2020, MEI and CEI agreed that they would terminate CCM from its role as construction manager. It was agreed that MI would "assume" CCM's role for the Project.[10]

23. On October 26, 2020, MI shared a transition plan for taking over the construction management of the Project with CEI.[11] On October 27, MI's CFO, Mark Kilfoyle, emailed additional details about the transition to CEI, including financial projections that MI taking over the Project would save the Project approximately $1.1 million relative to CCM.[12] Mr. Kilfoyle's analysis assumed that the Project would use the CCM time-based labour rates[13]

24. On October 28, 2020, CEI's VP Development, David Ho, wrote back to MI and confirmed the agreement to, among other things, terminate CCM and for MI to "assume management control" of the Project.[14]

25. After CCM was terminated, MI stepped into CCM's role in the Project and began to provide construction management and labour services. MI used a third-party company, CLM Enterprises, to provide the labour services for the Project.[15]

---

[8] Shareholder's Agreement for Hazelton- Mizrahi Affidavit, Exhibit E, paras. 19-20
[9] Mizrahi Affidavit, paras. 30-33.
[10] Email from D. Ho to MI, October 28, 2020 – Mizrahi Affidavit, Exhibit M.
[11] Email from Josh Lax to CEI, October 26, 2020 – Mizrahi Affidavit, Exhibit J.
[12] Email from M. Kilfoyle to CEI – Mizrahi Affidavit, Exhibit K.
[13] Mizrahi Affidavit, para. 46.
[14] Mizrahi Affidavit, Exhibit M
[15] Mizrahi Affidavit, paras 47-48

26. As part of the transition process, MI sent a copy of the CCM Contract to Mr. Hiscox and Mr. Donlan, and Mr. Mizrahi gave Mr. Hiscox an overview of it.[16] As of November 2020, CEI consented to MI taking over CCM's role, had reviewed the CCM contract and knew the CCM time-based labour rates, which continued to be used for each and every MI invoice.

27. From then on, MI sought and was paid for the provision of labour to Hazelton, calculated using the exact same labour rates as had been charged by CCM prior to its termination.[17] Afterall, it was now responsible for the additional services set out in supplementary conditions to the CCM Contract.

May 2022: CEI Expresses Discontent with MI's Profiting from Labour Services

28. In May 2022, MI had outstanding invoices for construction labour services that had not been paid. CEI initially refused to release payment for these invoices.[18] Mr. Donlan and Mr. Hiscox requested to see the contract which supported the rates that MI was charging in its invoices. In internal emails, Mark Kilfoyle writes to the MI team, including Mr. Mizrahi, and asks for a copy of the contract labour rates. A member of the MI team obtains the labour rate sheet from the CCM contract, and asks Mr. Mizrahi if he wants to share the document with CEI. Mr. Mizrahi responds "Yes go ahead".[19]

29. In an effort to get the invoices paid, Mr. Kilfoyle of MI provided the labour rate sheet to Mr. Donlan, and explained that "[MI has] always charged these rates whether it was CCM doing the work or now". The attachment provided to Mr. Donlan was titled "Pages from Supplementary

---

[16]Email from D. Ho to MI and CEI, December 18, 2020 - Reply Affidavit of Robert Hiscox, sworn Dec. 22, 2025 ("**Hiscox Reply Affidavit**"), Exhibit D, PDF p. 49.
[17] Mizrahi Affidavit, para. 50.
[18] Mizrahi Affidavit, para. 58.
[19] Email from S. Mizrahi to J. Lax and M. Kilfoyle, May 5, 2022 - Answer to Under Advisement 4 from Mizrahi Cross-Examination.

Conditions to CCDC5A Mizrahi Revised [executed]".[20] Mr. Donlan and Mr. Hiscox had already been provided with the CCM Contract approximately a year and half earlier, in November 2020.[21]

30. Mr. Donlan responded, in part, to complain that MI was earning a profit on the provision of labour, writing:

> When you say that we've always paid these rates, you're missing my point. CEI trusted you the first few years and didn't challenge everything because we thought you were going to deliver a profitable project. Instead, we're on pace to lose a massive amount of money on this project. In that Situation, every expense should be challenged and optimized. You won't engage on this particular expense because you make a profit here on the back of a project with epic losses. The conflict of interest is obvious.
> …
> If you want Robert to approve your cheque you need to address his questions.[22]

31. While neither CEI nor MI have identified any further exchange between Mr. Donlan and Mr. Kilfoyle, the fact is that MI's outstanding invoice was paid and Mr. Hiscox (Robert) signed the cheque. Hazelton resumed paying MI's labour invoices from that point up until December 2022,[23] at which point payments to MI stopped on account of a shortage of Project funding.[24]

The March 2023 Meeting with Mr. Hiscox

32. CEI and the Mizrahi team met every week to review the status of construction and the Project.

33. In 2023, funding for the Project was depleted resulting in a significant decrease in construction. In March 2023, CEI challenged Mizrahi on the cost of labour, already knowing since May 2022 that MI was earning a profit on the provision of labour to Hazelton.

---

[20] Email from Mark Kilfoyle to Chris Donlan, May 6, 2022 – Mizrahi Affidavit, Exhibit Q.
[21] Email from D. Ho to MI and CEI, December 18, 2020 - Hiscox Reply Affidavit, Exhibit D, PDF p. 49.
[22] Email from C. Donlan to M. Kilfoyle, May 6, 2022 – Mizrahi Affidavit, Exhibit R.
[23] Mizrahi Affidavit, paragraphs 64-66.
[24] Mizrahi Affidavit, paragraph 73.

34. Following a March 9, 2023 meeting, and in response to inquiries made by Mr. Hiscox, MI's VP Construction, Esteban Yanquelevech ("**Esteban**") sent an email providing a breakdown of unionized labour costs that CEI could expect to pay if it were to source unionized labour for Hazelton.[25]

35. After a subsequent meeting on March 22, 2023, where Mr. Hiscox raised questions about Esteban's breakdown email, Esteban sent an email to Mr. Hiscox clarifying that the breakdown he provided was about typical market rates, and not the specific rates that MI was paying for labour.[26] CEI gave no response to Esteban's clarifying email.

March 23, 2023: Upon Request, Mr. Hiscox is Provided with a CLM Invoice

36. On March 22, 2023, Mr. Hiscox met with Mr. Mizrahi and other members of the MI team at the Mizrahi offices for the weekly construction meeting. This was a routine meeting for MI to provide Mr. Hiscox and Mr. Donlan with updated on the Project.

37. During the meeting, Mr. Hiscox requested to see copies of CLM's invoices to MI. Mr. Mizrahi requested his associate, Taline Melkonian, Controller of Mizrahi Developments, to provide Mr. Hiscox with the most recent CLM invoices, which she did.[27]

38. Although this fact is disputed – MI and Mr. Mizrahi state that Mr. Hiscox was already aware that MI was utilizing a third-party contractor to supply labour and was charging a mark-up on their rates.[28] He simply did not know the identity or the specific rates of the third-party contractor until the March 2023 meeting.

39. By no later than March 22, 2023, CEI knew (1) that MI was earning a profit on labour provided to Hazelton and the time-based labour rates MI was charging based on the CCM Contract (which it

---

[25] Hiscox First Affidavit, Paragraph 26.
[26] Email from Esteban to R. Hiscox, March 22, 2023 - Hiscox First Affidavit, Exhibit G.
[27] Mizrahi Affidavit, paragraph 68.
[28] Mizrahi Affidavit, para 68.

knew as of May 2022); (2) that MI had retained CLM to provide labour to the Project; and (3) the differences in the rates charged by MI to Hazelton and the rates CLM charged MI.[29]

40. Following the production of the CLM invoice to Mr. Hiscox, CEI never raised any further concern or objection to MI regarding the mark-ups.[30] In fact, as reviewed below, as the parties entered negotiations to refinance Hazelton, there was an agreement that MI would be paid for approximately a further $400,000.00 in outstanding invoices for labour services provided to the Project.[31]

Fall 2023: CEI Blocks Reasonable Efforts to Refinance Hazelton: The TEC Refinancing

41. By the fall of 2023, a lack of funding halted progress. Accordingly, consistent with its obligations under the DMA, MI arranged for financing for the Project from Third Eye Capital ("**TEC**").[32] On November 21, 2023, CEI and Hazelton signed a Non-Binding Proposal with TEC for an inventory loan of $17.5 million (the "**TEC Proposal**").[33]

42. Certain strikeouts and initials on the face of the TEC Proposal shows that it was negotiated between MI/Hazelton and TEC, including by altering the amount of the loan, reducing the interest rate, and reducing the closing fee, among other things.[34]

43. Following the signing of the TEC Proposal, Mr. Kilfoyle and Mr. Donlan exchanged draft schedules that set out the proposed payments to be made upon closing of the financing.

44. On January 15, 2024, Mr. Donlan expressed that there are approximately $400,000.00 of outstanding MI labour invoices (the "Outstanding Invoices") that should be paid out from the TEC

---

[29] Transcript of Cross-Examination of Robert Hiscox dated, Jan. 20, 2026 ("**Hiscox Cross**"), p. 31, Q. 89, lines 11-15.
[30] Hiscox Cross-Examination, p. 32, Q. 92, lines 12-25.
[31] Mizrahi Affidavit, paras. 74-80.
[32] Mizrahi Affidavit, paragraph 99.
[33] Non-Binding Proposal with TEC, Nov. 21, 2023 – Mizrahi Affidavit, Exhibit Z.
[34] Non-Binding Proposal with TEC, Nov. 21, 2023 – Mizrahi Affidavit, Exhibit Z.

financing.[35] Mr. Kilfoyle added the Outstanding Invoices to his cash flow projection for accounts payable that would have been paid upon the closing of the TEC Financing (the "Cash Flow Projection"). Mr. Mizrahi sent the Cash Flow Projection to Mr. Hiscox for CEI's review on January 16, 2024.[36] That same day, Mr. Donlan responded and stated that he had reviewed the Cash Flow Projection with Robert Hiscox. The next day, Mr. Donlan replied again and approved the Cash Flow Projection to be sent to TEC, raising no issue with the inclusion of the Outstanding Invoices for payment.[37]

Senior Lender on Project Begins Steps to Enforce Security

45. While the TEC financing was being prepared, the senior lender on the Project, DUCA, delivered a demand for payment and a Notice of Intention to Enforce Security. Mr. Hiscox wrote to DUCA on December 21, 2023, acknowledging receipt, and proposing a forbearance to DUCA on the basis that Hazelton was "quite close to finalizing a refinancing of the Commitment with a third party lender".[38]

46. CEI refused to close on the final terms of the TEC financing. Instead, without warning to MI, CEI acquired the DUCA loan and took an assignment of DUCA's security on February 2, 2024.[39] On February 22, 2024, CEI issued a Notice of Application for the appointment of a receiver over Hazelton and the Project.

47. The Respondents' defence to the DMA claim is, in part, that CEI's refusal to close on the TEC financing amounted to, among other things, bad faith and prevented MI from completing the Project prior to the DMA's termination.

---

[35] Email from C. Donlan to M. Kilfoyle, Jan. 15, 2024 – Mizrahi Affidavit, Exhibit T.
[36] Email from S. Mizrahi to R. Hiscox, Jan. 16, 2024 – Mizrahi Affidavit, Exhibit V.
[37] Email chain between C. Donlan and M. Kilfoyle, Jan. 16-17, 2024 – Mizrahi Affidavit, Exhibit W.
[38] Mizrahi Affidavit, para. 100.
[39] Mizrahi Affidavit, Paragraph 109.

48. In his Reply Affidavit, Mr. Hiscox lists a number of reasons justifying why he, Mr. Rogers, and CEI declined to close on the TEC financing.[40] As will be elaborated on below, Mr. Hiscox broadly refused many basic, but highly relevant questions related to that transaction, and the validity of the reasons he gave. The specific reason for the refusals was that questions relating to the TEC Financing were related to the Mizrahi Civil Action, and amounted "pre-discovery discovery".[41] The Respondents agree that questions regarding the TEC Financing are relevant to the Mizrahi Civil Action.

Procedural Context – Related Proceedings and the Risk of Inconsistent Findings

49. The Fresh as Amended Statement of Claim for the Mizrahi Civil Action was issued on October 21, 2025. That action has an upcoming motion to strike being heard on March 3, 2026.

50. CEI has also commenced an application to enforce a guarantee (the "**Guarantee Application**") against Mr. Mizrahi relating to Hazelton and 180 SAW Project. The Court will hear a motion to convert the Guarantee Application into an action on March 3rd, 2026, at the same time as CEI's motion to strike the Mizrahi Civil Action. The hearing of the Guarantee Application has not been scheduled yet.

III. ISSUES

51. **Issue 1 –** The CMA claim is statute-barred.

52. **Issue 2** – In the alternative, both claims should be converted into an action.

53. **Issue 3** – In any event, MI was authorized to charge the CCM rates.

54. **Issue 4** – In the further alternative, MI is entitled to a set-off

---

[40] Hiscox Reply Affidavit, paragraph 71(a)-(f)
[41] Hiscox Cross, pp. 34-35, Q. 102.

IV. LAW AND ARGUMENT

Issue 1 – The CMA Claim is Statute-Barred

55. MI was authorized to charge the rates it charged on the labour invoices when CEI agreed with the termination of CCM in October 2020 and agreed that MI would "assume" CCM's role on the Project to provide Hazelton with labour services.

56. Notwithstanding MI's substantive defence to the CMA claim, which necessarily raises disputed facts on an incomplete, paper record, the CMA claim was commenced after the expiry of the two-year limitation period.

57. Even assuming that CEI did not know from the beginning that MI was factoring in a profit-margin into the labour invoices (which defies commercial sense), the record establishes that Hazelton/CEI had discovered the CMA claim against MI more than two years prior to the commencement of this proceeding.

58. By no later than May 2022, Hazelton/CEI had knowledge that MI was charging a mark-up on labour invoice, which the Receiver alleges is a breach of the CMA and a breach of Mr. Mizrahi's duty to Hazelton. In addition, by no later than March 23, 2023, Hazelton/CEI had explicit knowledge that MI had retained CLM to provide labour services, and the quantum of the markup charged by MI to Hazelton. Under both scenarios, the CMA claim is time-barred.

(A) These Claims were Commenced on July 18, 2025

59. The Receiver inaccurately states at para. 69 of its factum that this claim was commenced on December 16, 2024. The Receiver's reference to December 2024 is when the Receiver enclosed

an undated ***Draft*** Notice of Motion in an email to the Respondents' counsel (the "**Draft NOM**").[42] The Receiver specifically described it as a draft.[43]

60. The Draft NOM was circulated because the Receiver wanted to seek the Respondents' consent to lift a stay of proceedings granted to MI in an unrelated proceeding. The consent to lift the stay of proceedings was granted by MI the very next day, but there was no consent given for the Receiver's claims to be advanced by way of motion. The Respondents in fact opposed these claims being advanced by way of motion and expressed to the Receiver that the claims should be brought through an action.[44] The Receiver disagreed, but ultimately did not serve its Notice of Motion until July 18, 2025.

61. The delivery of a draft Notice of Motion does not toll the limitation period. Where a party seeks to amend their pleading to add a new cause of action via motion, the date the limitation period crystallizes is the date the Notice of Motion is served.[45] Just as the delivery of a draft pleading does not stop the running of a limitation period,[46] neither should the delivery draft Notice of Motion.

62. In *Bank of Nova Scotia et al. v. PCL Constructors*, the plaintiffs brought a motion to amend their Statement of Claim to add a new cause of action. The defendants argued that the amendment was being sought after the expiry of the limitation period. The plaintiffs argued that the date the limitation period stopped running was when they delivered a letter asking for the plaintiff's consent to the amendments being granted. Master Glustein (as he then was) rejected the plaintiff's contention and held that the new cause of action was out of time. He concluded "… a letter

---

[42] Email dated Dec. 16, 2024, with attachment, from Jennifer Stam - Exhibit "A" to Mizrahi Cross Examination.
[43] Letter From J. Stam to J. Morse, Dec. 23, 2023 - Exhibit "C" to Mizrahi Cross Examination.
[44] Aide Memoire of the Mizrahi Parties, dated September 29, 2025, at para. 4: [Linked Here]
[45] *Philippine v. Portugal*, 2010 ONSC 956 at para. 34; *Sweda Farms Ltd. et al. v. Ontario Egg Producers et al*, 2011 ONSC 6146; *Suevilia Development Corporation v. Liang*, 2022 ONSC 1856 at para. 36
[46] *Ranganathan v. Wasim*, 2024 ONSC 7211 at para. 35.

requesting consent to a proposed draft pleading is not sufficient to stop the limitation period from running".[47]

63. The Notice of Motion here was served on July 18, 2025.[48] That is the date that the Receiver commenced the CMA and DMA claims. Any claim discoverable prior to July 18, 2023 is barred.

(B) Hazelton Knew MI was Charging a Profit-Margin on Labour Invoices in May 2022

64. Mr. Hiscox acknowledges in his affidavit that "…MI did not disclose that it was marking up labour rates until May 2022…".[49] He further states at paragraph 52 of his affidavit that "MI did not disclose its labour rates until May 2022, eighteen months post-transition, and the scale of the embedded mark-up was not revealed until March 2023 after repeated requests".[50]

65. Emails sent from CEI's CFO, Chris Donland, to MI also display CEI's knowledge that MI was charging a profit on labour:

> When you say that we've always paid these rates, you're missing my point. CEI trusted you the first few years and didn't challenge everything because we thought you were going to deliver a profitable project. Instead, we're on pace to lose a massive amount of money on this project. In that Situation, every expense should be challenged and optimized. **You won't engage on this particular expense because you make a profit here on the back of a project with epic losses**. The conflict of interest is obvious.[51] **[emphasis added]**

66. The above statements from CEI's CEO and CFO make clear CEI's longstanding awareness of MI's mark-up on labour expenses, beginning at least in May 2022.

67. When showed Mr. Donlan's May 2022 email to MI, Mr. Hiscox acknowledged that CEI knew that MI was charging a markup on the labour rates at that time. [52]

---

[47] *Bank of Nova Scotia v. PCL Constructors Canada Inc*., 2009 CanLII 56303 (ON SC) at para. 94.
[48] The Notice of Motion in the Receiver's Motion Record contains a typo. It states that the Notice of Motion was served on July 18, 2024 – it was served on July 18, 2025, together with the Receiver's Motion Record.
[49] Hiscox Reply Affidavit, paragraph 33.
[50] Hiscox Reply Affidavit, paragraph 33.
[51] Hiscox Reply Affidavit, paragraph 52.
[52] Hiscox Cross, p. 17, Q. 35, lines 12-16.

68. Although CEI's claims it did not know the "extent" or "scale" of MI's profit in May 2022, that does not defer the running of the limitation period. The Court of Appeal for Ontario has expressly held that limitation periods run even if the plaintiffs "are unsure whether the scale of the eventual commercial loss will make an action remunerative".[53]

69. Therefore, CEI's knowledge in May 2022 of MI earning a profit on the provision of labour, which Hazelton now claims is a breach of the CMA, establishes the discoverability of the CMA claim.

70. The Receiver relies on the doctrine of fraudulent concealment to extend the running of the limitation period from May 2022 to March 2023. The Receiver's argument that MI fraudulently concealed its profits must fail. By Mr. Hiscox's own admission, it was MI that disclosed to CEI that it was making a profit on the labour invoices in May 2022.[54] The Receiver is asking this court to find that MI was *concealing* its profits at the exact time CEI says MI was actually *disclosing* that it was making a profit.

71. Moreover, the Court of Appeal has made clear that the doctrine of fraudulent concealment does not toll the limitation period unless the concealment actually results in the objective lack of knowledge of the facts which trigger the running of the limitation period.[55]

(C) The Record also Shows that CEI had Knowledge of MI's Mark-Ups in March 2023

72. Paragraph 8 of the Receiver's Fifth Report makes clear that, if they did not already have sufficient information, the absolute latest that CEI became aware of MI's mark-ups of the labour invoices was March 22, 2023. As noted above, at that time, CEI and Hazelton were aware of the markup, the quantum of the markup and that CLM was providing the labour services to Hazelton.

---

[53] *Dass v. Kay*, 2021 ONCA 565 at para 43.
[54] Hiscox Reply Affidavit, paras. 33 and 52.
[55] *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47 at paras 71-72.

73. Mr. Hiscox acknowledged on his cross-examination, that once he was shown a copy of the CLM invoice as requested on March 22, 2023, it was simply a matter of arithmetic to determine however much MI was marking-up its invoices.[56] He also testified that "right after" he was shown the CLM invoice, his team "went home to investigate" and began doing the arithmetic to calculate the extent of MI's mark ups.[57] Nonetheless, Mr. Hiscox allowed MI to continue to provide labour services to Hazelton (through CLM). At no time, did CEI complain that MI was not entitled to earn a profit on the provision of labour under the CMA or the CCM Contract.

74. CEI/Hazelton had sufficient knowledge regarding the CMA claim to commence a lawsuit once Mr. Hiscox was provided a copy of the CLM invoice on March 22, 2023. This motion was commenced more than two years afterwards.

75. Regardless of whether the starting point for the limitation period is May 2022, or March 2023, the CMA claim is out of time. The Receivership does not reset the limitation clock.[58]

Issue 2 - The Claims Should be Converted into an Action

76. In the alternative to the position that the CMA claim should be dismissed due to the expiry of the limitation period, both the CMA claim and the DMA claim should be converted into an action as they clearly raise material facts in dispute. The mode of proceeding elected by the Receiver robs MI and Mr. Mizrahi of their substantive rights under the *Rules of Civil Procedure* to full and fair documentary discovery and examinations for discovery. Complex claims of breach of contract and breach of fiduciary duty cannot be fairly decided on a paper record, especially given the significant risk of inconsistent factual findings in this proceeding, the Mizrahi Civil Claim and the CEI Guarantee Application.

---

[56] Hiscox Cross, pp. 30-31, QQ 86-89, lines (12-25).
[57] Hiscox Cross, pp. 30-31, QQ 86-89, lines (12-25).
[58] *Scott v. Golden Oaks Enterprises Inc*., 2024 SCC 32 at para. 176.

(A) Law

77. Although this is a motion, it is fundamentally akin to a claim brought by application.

78. Factors the court considers in determining whether to convert an application into a trial include:[59]

    a) whether there are material facts in dispute;
    b) the presence of complex issues;
    c) whether there is a need for the exchange of pleadings and discovery; and
    d) the importance and the nature of the relief sought by application. The court should consider whether the affidavits and the transcript of the cross-examination is sufficient to decide any credibility issues or whether a trial is required.

79. In making such an order, the court should consider whether, if the proceeding had already been commenced as an action and the moving party had brought a motion for a summary judgment, the court be satisfied that there is no genuine issue requiring a trial.[60]

(B) There are Material Facts in Dispute

80. The points in dispute are central to the resolution of this claim and cannot be determined on a paper record. These points include:

    a) Whether CEI was aware that MI was charging a mark-up when it continued charging CCM's rates;
    b) Whether CLM used unionized or non-unionized labour, and whether MI knew about the unionization status of CLM's labour;
    c) Whether CEI's bad-faith conduct caused or contributed to the failure of MI to complete it's obligations under the DMA (these issues are raised into the Mizrahi Civil Action);

---

[59] *Dell v. The Corporation of the Town of Niagara on the Lake et al,* 2023 ONSC 1610 (CanLII) at para 21 and 22.
[60] *2516216 Ontario Ltd. o/a NUMBRS v. AbleDocs Inc*., 2023 ONSC 4713 (CanLII) at para. 17; Li v. Bank of Nova Scotia, 2023 ONSC 4235 at para. 39.

d) Whether CEI caused a delay in the Project by, for example, refusing to close on units, assigning units to others at a Profit, thereby reducing revenue in the Project, which prevented MI, as developer, from completing the Project on time and on budget (these issues are also directly tied to the Mizrahi Civil Action).

(C) There is Need for Discovery in this Matter

81. The dealings between the parties on the Project began more than a decade ago. MI assumed CCM's role as construction manager almost five and half years ago. The parties had weekly meetings over that time.[61] The volume of dealings and communications involved in this matter, both between the parties and internally amongst themselves, is extensive.

82. On his cross-examination, Mr. Hiscox acknowledged there were likely thousands of emails between the parties relating to this matter,[62] that CEI had not provided all of those emails to the Receiver,[63] and that he had not undertaken a review of them in preparation of his affidavit.[64] There are also likely many internal emails from CEI that have not been produced, or even reviewed by any party before this court.

83. Similarly, the Receiver's claim for the return of funds on the DMA claim is based on an isolated review of the contract. However, the Respondents' central defence to the DMA claim is the bad-faith conduct of CEI, which is tied not just to the Project but also to the 180 SAW Project. The Respondents position is that CEI consistently refused to take reasonable steps to refinance Hazelton, consistently refused to allow Project units to close,[65] took unreasonable steps and decisions with respect to trades, and held the completion of the Project hostage as a negotiation

[61] Hiscox Cross, p. 20, Q47, lines 4-7.
[62] Hiscox Cross, p. 19, Q. 44, lines 12-16.
[63] Hiscox Cross, p. 19, Q 46, lines 21-24.
[64] Hiscox Cross, p. 19, Q. 45, lines 17-20.
[65] Mizrahi Affidavit, para. 112.

tactic to extract concessions from their partner, Mr. Mizrahi on both the Hazelton Project and the much larger and more valuable 180 SAW Project.[66] These issues are being litigated in the Mizrahi Civil Action and the CEI Guarantee Application.

84. The interconnectedness of the DMA claim to the Mizrahi Civil Action and the CEI Guarantee Application is particularly evident given CEI's counsel's refusal to allow Mr. Hiscox answer almost any questions relating to the refinancing of the Project due to concerns of so-called "pre-discovery discovery" of the Mizrahi Civil Action.[67]

85. Given the absence of a discovery process, the acknowledged non-production of a large volume of related documentation, the interrelatedness of the present proceeding to the Mizrahi Civil Action and the CEI Guarantee Application, and the refusals to straightforward and important questions relevant to MI's defence of the DMA claim, the Respondents submit that there is more to the story than is currently before this Court.

86. The Receiver relies on the single proceeding model in favour of its claims being adjudicated on a paper record. There is no doubt that Mr. Mizrahi is not a stranger to the litigation, but nothing in the jurisprudence relied upon by the Receiver supports to elimination of procedural protections afforded to litigants in complex, intertwined and competing claims, which should be adjudicated on a full record. If following the production of relevant documentation and examinations for discovery, the Receiver believes its claim are amendable to summary judgment, then it will have the right to advance that argument. But the fact is that there are material facts in dispute, competing and interrelated proceedings (all of which are under the Commercial List's jurisdiction) and a real

[66] Fresh as Amended Statement of Claim in Mizrahi Civil Action, dated October 21, 2025 – Mizrahi Affidavit, Exhibit A, paras. 139, 142, and 145.
[67] Hiscox Cross, pp. 34-35, lines 20-25 and 1-3.

and significant chance of inconsistent findings of facts involving the same transactions and the same parties.

87. Accordingly, the DMA claim should be converted to an action to be tried together with the Mizrahi Civil Action. The CMA claim should be dismissed on the basis that the limitation period has expired, but if this court is of the view that the CMA claim cannot be decided on the basis of the limitation period, then it should also be converted into an action.

The Receiver's Allegations of Breaches of the DMA are not Sufficient

88. The Receiver argues that MI breached the DMA in two ways: (a) by failing to keep the Project within budget; and (b) by generally failing to exercise its duties in a reasonable commercial manner.

89. The Project went over the original budget. However, Mr. Mizrahi's evidence is that the Project budget was consistently being revised with the approval of CEI,[68] and nothing in the record indicates that CEI ever objected to any of the revised budgets or expressed that they considered MI to be in breach of the DMA.

90. The increases in the budget were due to factors beyond MI's control, including delays and increased expenses due to COVID-19, unreasonable refusals by CEI to permit units to close, and instances of self-dealing by CEI and Mr. Hiscox which deprived the Project of revenues and increased Hazelton's cost of borrowing.[69] Mr. Mizrahi's evidence on this point was not challenged on cross-examination.

91. The Receiver relies on the fact that the Project went into receivership before it was completed to argue that MI did not exercise its duties in a commercially reasonable manner. But this goes back to MI's central point – MI's position is that it was CEI's improper conduct that caused or

[68] Mizrahi Affidavit, paragraph 112.
[69] Mizrahi Affidavit, paragraph 112.

significantly contributed to the Project's failure. While this question cannot be determined on the current record, MI is entitled to advance its defence that it should not be liable to Hazelton for a breach of the DMA that was produced by one of Hazelton's principals.

Issue 3 – The CMA Claim Should be Dismissed

MI Assumed CCM's Role and Contract with CEI's Approval

92. MI was entitled to charge the rates that it did for the labour invoices. The Receiver's primary contention is that there is nothing in the CMA that supports the rates that MI was charging in its invoices to Hazelton. The Receiver has fixated on the wrong document. The rates MI charged for labour invoices stems from MI's assumption of the CCM contract, not from the CMA. CEI approved of MI's assumption of the CCM contract, which significantly expanded MI's responsibilities on the Project.

93. When the parties were planning to transition MI into CCM's role, CEI required, and was provided, detailed plans and financial and budgetary projections from MI. The analysis provided by Mr. Kilfoyle to the CEI team assumed that the Project would use labour at rates consistent with the CCM time-based labour rates.[70] CEI's agreement for MI to assume CCM's role was never premised on MI undercutting CCM's labour *rates*. The projected cost savings proposed by MI were instead intended to come from, among other things, accelerated completion targets,[71] which would reduce total costs on labour and overhead.

94. MI's scope on the Project grew significantly as of the termination of CCM in October 2020. It was now responsible for the tasks set out in the more than 50 pages of supplementary conditions in the

[70] Mizrahi Affidavit, para. 46.

[71] Email from D. Ho to MI, Dec. 18, 2020- Hiscox Reply Affidavit, para. 26, Exhibit D; Email from D. Ho to MI, October 26, 2020 – Mizrahi Affidavit, Exhibit J.

CCM Contract, which are not included in the CMA. If MI was not to be compensated on the basis of the time-based labour rates, then MI would be providing all of the supplementary tasks under the CCM Contract for free. This is unreasonable given CEI's agreement that MI would "assume" CCM's role on the Project. CEI knew that CCM, not MI, was providing labour services and that MI was tasked with taking over this role.[72]

95. It is simply a matter of reasonable commercial sense that CCM would have incorporated a profit margin included in its time-based rates. Given that MI had advised CEI that it would be using the same labour rates as CCM, it should have never been surprising to CEI that profit would be earned by MI.

96. The Receiver has characterized MI's profit from the supply of labour to the Project as a conflict of interest on Mr. Mizrahi's part. But this ignores that CEI was informed what rates would be charged, and consistently agreed to continue payments.

MI Never Hid that it was Using Third-Party Labour

97. At all times throughout the Project, MI advocated for the use of unionized labour. This is because MI wanted to avoid the disruptive risk that labourers could attempt a unionization drive, which could severely interrupt construction. Mizrahi Developments had faced this challenge in a past project and greatly wanted to avoid a repeat.[73]

98. MI re-emphasized this point to CEI at the time it took over the role from CCM. The transition plan provided to CEI specifically stated: "We will be using Union staff on this project".[74] In his October 27, 2020 email to Mr. Hiscox and Mr. Donlan, Mr. Kilfoyle explained that the assumption for his GE budget was that after replacing CCM, MI would utilize unionized labour. He explained "If we

[72] Email from D. Ho to MI, October 28, 2020 – Mizrahi Affidavit, Exhibit M.
[73] Application to Unionize Mizrahi Developments, February 2014 – Mizrahi Affidavit, paragraph 86 and Exhibit Y.
[74] Transition plan, sent October 26, 2020 – Mizrahi Affidavit, Exhibit J, RMR PDF p. 4024.

use non-union we will save an additional $7,500 per month… However, this has risks in that union workers might shut down or slow down the site."[75]

99. CEI was aware at all times that MI does not have a staff of construction labourers[76] and was thus not a unionized company. This was the very rationale for hiring CCM to the Project in the first place.[77] CEI therefore could not have reasonably believed that MI was directly employing all of the labour it was invoicing for Mr. Hiscox claim that he was "shocked"[78] that MI was using a third-party company is not credible. Mr. Hiscox either knew, or ought to have known, otherwise.

MI Never Concealed its Mark-Ups

100. MI did not conceal the CCM Contract from CEI. A copy was sent to each of Mr. Hiscox and Mr. Donlan in November 2020.[79]

101. In May 2022, when CEI was asking for backup to support the rates that MI was charging for labour, MI readily and openly disclosed that it was earning a profit margin on the labour charges.[80] CEI resumed payments notwithstanding this disclosure, which MI submits is indicative of the fact that CEI accepted MI's right to charge a mark up on the labour invoices.

102. MI was transparent once again during the March 22, 2023 meeting with Mr. Hiscox. When Mr. Hiscox asked Mr. Mizrahi to see a copy of an invoice from CLM, Mr. Mizrahi readily had his associate retrieve a copy and give it to Mr. Hiscox. The willing production of the CLM invoice to Mr. Hiscox is entirely inconsistent with the theory that MI was trying to conceal their use of third-party labour, or trying to conceal their profits.

---

[75] Email from M. Kilfoyle to R. Hiscox and C. Donlan dated October 27, 2020 – Mizrahi Affidavit, Exhibit K.
[76] Mizrahi Affidavit, paragraph 37.
[77] Mizrahi Cross, p. 32, Q 111, lines 16-23,
[78] Hiscox Cross, p. 30, Q. 86, lines 19-20.
[79] Email from D. Ho to MI and CEI, December 18, 2020 - Hiscox Reply Affidavit, Exhibit D, PDF p. 49.
[80] Hiscox Reply Affidavit, paras. 33 and 52.

CEI's Subsequent Conduct Regarding MI's Use of CCM Rates

103. CEI's conduct in the period following the March 2023 meeting further suggests that CEI accepted MI's right to charge a mark up on labour invoices.

104. Following the March 2023 meeting with Mr. Hiscox, CEI never once even suggested any impropriety or concern with MI's use of CLM. CEI did not object to the continued use of CLM on the Project for the remainder of that year.

105. Furthermore, in January 2024, when the parties were arranging their materials in preparation for the anticipated closing of the TEC Financing, Mr. Donlan approved payment of the Outstanding Invoices that would have been paid from the TEC Financing.[81] Mr. Mizrahi sent the Cash Flow Projection to Mr. Hiscox for CEI's review on January 16, 2024.[82] That same day, Mr. Donlan responded and stated that he had reviewed the Cash Flow Projection with Robert Hiscox. The next day, Mr. Donlan replied again and approved the Cash Flow Projection to be sent to TEC, raising no issue with the inclusion of the Outstanding Invoices for payment.[83]

106. The above sequence demonstrates that CEI approved of the payment of Outstanding Invoices even after knowing that MI was charging a mark up on CLM's services.

107. Even if CEI's position that it did not originally agree that MI could charge the CCM rates is accepted, their conduct demonstrates that once they fully became aware of all of the relevant details, they did agree to allow MI to proceed on that basis, effectively ratifying MI's right to do so (if it was ever contended to begin with).

Issue 4 – If any Amounts are Found to be Owing by the Respondents to Hazelton, the Respondents are entitled to Set Off

---

[81] Email from C. Donlan to M. Kilfoyle, Jan. 15, 2024 – Mizrahi Affidavit, Exhibit T.
[82] Email from S. Mizrahi to R. Hiscox, Jan. 16, 2024 – Mizrahi Affidavit, Exhibit V.
[83] Email chain between C. Donlan and M. Kilfoyle, Jan. 16-17, 2024 – Mizrahi Affidavit, Exhibit W.

108. MI is owed $453,847.56 for Outstanding Invoices by Hazelton and is entitled to a set-off for any amounts found owing between MI and Hazelton.[84] Section 97(3) of the *BIA* recognizes the application of the law of set-off.[85]

109. Legal set-off applies to mutual, liquidated debts or damages between the same parties.[86] The claims advanced by the Receiver for breach of contract all concern the contracts between MI and Hazelton. Legal set-off therefore applies to set-off these mutual, liquidated claims (should MI be liable) between the parties to these agreements.

110. Equitable set-off is applied to claims when the relationship between the obligations is sufficiently close.[87] The defending party must show equitable grounds for why it would be protected by a set-off defence.[88] Lord Denning described the issue as "what should we do now so as to ensure fair dealing between the parties?"[89]

In this case, MI's claim for damages for unpaid fees and labour expenses are not recoverable from the Project given its secured debt. If equitable set-off is not applied, MI effectively loses its right of action while the Project (and particularly the CEI as the Project's lender) reaps the rewards. If the set-off defences are not accepted, the Project will enjoy a windfall, and MI will be left without recourse.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of January, 2026

David Trafford

David M. Trafford

---

[84] Mizrahi Inc. Invoices dated from December 2022-January 2024 – Mizrahi Affidavit, para. 114 and Exhibit JJ.
[85] *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3 at s.97(3).
[86] *Thyssenkrupp Elevator (Canada) Inc v 1147335 Ontario Inc*, 2015 ONSC 503 at para 9.
[87] *Green v. Mirtech International Security Inc.,* 2009 CanLII 2905 (ON SC) at para 16.
[88] *Algoma Steel Inc v Union Gas Ltd*, [2003] OJ No 71 at para 26.
[89] *Algoma Steel Inc v Union Gas Ltd*, [2003] OJ No 71 at para 29.

Morse Trafford LLP
100 King Street West, Suite 5700
Toronto, ON, M5X 2C7

David M. Trafford (68926E)
dtrafford@morsetrafford.com

Adam S. Beyhum (79276Q)
abeyhum@morsetrafford.com

Tel: (416) 863-1230
Fax: (416) 863-1241

Lawyers for Mizrahi Inc. and Sam Mizrahi.

SCHEDULE A

LIST OF AUTHORITIES

1. *Philippine v. Portugal*, 2010 ONSC 956 at para. 34
2. *Sweda Farms Ltd. et al. v. Ontario Egg Producers et al*, 2011 ONSC 6146.
3. *Suevilia Development Corporation v. Liang*, 2022 ONSC 1856
4. *Ranganathan v. Wasim*, 2024 ONSC 7211 at para. 35.
5. *Bank of Nova Scotia v. PCL Constructors Canada Inc.,* 2009 CanLII 56303 (ON SC)
6. *Dass v. Kay*, 2021 ONCA 565 at para 43.A
7. *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd*., 2019 ONCA 47
8. *Dell v. The Corporation of the Town of Niagara on the Lake et al,* 2023 ONSC 1610 (Can LII)
9. *2516216 Ontario Ltd. o/a NUMBRS v. AbleDocs Inc*., 2023 ONSC 4713 (CanLII)
10. *Li v. Bank of Nova Scotia*, 2023 ONSC 4235
11. *Thyssenkrupp Elevator (Canada) Inc v 1147335 Ontario Inc*, 2015 ONSC 503
12. *Green v. Mirtech International Security Inc.,* 2009 CanLII 2905 (ON SC)
13. *Algoma Steel Inc v Union Gas Ltd*, [2003] OJ No 71

I certify that I am satisfied as to the authenticity of every authority.

David Trafford

David M. Trafford

Schedule B
STATUTES, REGULATIONS & BY-LAWS

1. *Limitations Act, 2002*, SO 2002, c 24, Sch B, s 5:

Discovery

5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

CONSTANTINE ENTERPRISES INC.
Applicant

MIZRAHI INC. et al.
Respondents
CV-24-00715321-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

RESPONDING FACTUM OF MIZRAHI INC. AND SAM MIZRAHI
(Motion Returnable February 4, 2026)

Morse Trafford LLP
100 King Street West, Suite 5700
Toronto, ON, M5X 2C7

David M. Trafford (68926E)
dtrafford@morsetrafford.com

Adam Beyhum (79276Q)
abeyhum@morsetrafford.com

Tel: (416) 863-1230
Fax: (416) 863-1241

Lawyers for the Respondents,
Mizrahi Inc. and Sam Mizrahi.