

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

FOREMOST MORTGAGE HOLDING CORPORATION

Applicant

- and -

BARAKAA DEVELOPER INC., LERRATO INC., and 2145499 ONTARIO INC.

Respondents

**APPLICATION UNDER section 243(1) of the *Bankruptcy and Insolvency Act*,
R.S.C. 1985, c. B-3, and section 101 of the *Courts of Justice Act*,
R.S.O. 1990, c. C.43**

FACTUM OF THE APPLICANT

(Application Returnable October 21, 2024)

October 17, 2024

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TO: **SERVICE LIST**

PART I. OVERVIEW

1. This Application is made by Foremost Mortgage Holding Corporation (the “**Lender**”) for an order appointing KSV Restructuring Inc. (“**KSV**”) as receiver and manager over the following assets, which are owned by Barakaa Developer Inc. (“**Barakaa**”), Lerrato Inc. (“**Lerrato**”) and 214549 Ontario Inc. (“**214**” and, together with Barakaa and Lerrato, the “**Borrowers**”):

- (a) the Madison Properties (as defined below) owned by Barakaa;
- (b) the Porte Properties and the Porte Cash Collateral (both as defined below) owned by Lerrato; and
- (c) all of the assets and undertakings of 214 (collectively, the “**Receivership Property**”).

2. In 2022, the Lender was granted mortgages in favour of real property which are owned by the Borrowers, in connection with loans of \$4,133,000 to Barakaa, \$3,155,000 to Lerrato and \$6,185,000 to 214.

3. The Borrowers have defaulted under the terms of these mortgages in a number of ways including:

- (a) failing to repay the Loans (as defined below) on maturity;
- (b) permitting encumbrances to be registered on title to the Secured Properties (as defined below) without the consent of the Lender;

- (c) permitting realty taxes to accrue on title to the Secured Properties (as defined below); and
 - (d) permitting other encumbrances to fall into default.
4. Given these defaults, the Lender seeks the appointment of KSV as receiver of the Receivership Property as the Lender is entitled to do under the explicit terms of its security, for the benefit of all of the Borrowers' stakeholders.
5. The appointment of KSV as receiver of the Receivership Property is just and convenient and in the best interests of the Borrowers' stakeholders generally.

PART II. FACTS

A. *The Parties*

6. The Lender is an Ontario corporation in the business of providing mortgage financing and other loans.¹
7. The Borrowers are real estate development corporations. The Borrowers are controlled by Hitesh Jhaveri and Niketa Wadia (together, the "**Principals**").²

B. *The Secured Properties*

1. The Madison Properties

8. Barakaa owns the real property municipally known as 23 Madison Avenue, Richmond Hill, Ontario ("**23 Madison**") and 25 Madison Avenue, Richmond Hill,

¹ Affidavit of Andrew Stern, Application Record (**AR**), Tab 2, p. 27, at para 2 ([A32](#))

² Affidavit of Andrew Stern, AR, Tab 2, p. 27-28, at para 3 ([A32](#)).

Ontario (“**25 Madison**” and, together with 23 Madison, the “**Madison Properties**”).³

9. The Madison Properties are the site of two fully constructed residential freehold single-family dwellings (the “**Madison Dwellings**”).⁴
10. On October 29, 2023, Barakaa entered into an agreement of purchase and sale with two individuals (the “**23 Madison Homebuyers**”) in respect of 23 Madison (the “**23 Madison Transaction**”).⁵
11. On February 22, 2024, Barakaa entered into an agreement of purchase and sale with two individuals (the “**25 Madison Homebuyers**”) in respect of 25 Madison (the “**25 Madison Transaction**”).⁶
12. The 25 Madison Homebuyers no longer wish to complete the 25 Madison Transaction because of delay caused by a mortgage dispute, described in greater detail below.⁷

³ Affidavit of Andrew Stern, AR, Tab 2, p. 28, at para 4 ([A33](#)); Madison Property Legal Description, Exhibit A to the Affidavit of Andrew Stern, AR, Tab 2, p.50 ([A54](#)).

⁴ Affidavit of Andrew Stern, AR, Tab 2, p. 28, at para 7 ([A33](#)); Parcel Register June 21, 2024, Exhibit B to the Affidavit of Andrew Stern, AR, Tab 2, p.51 ([A56](#)); Parcel Register June 28, 2024, Exhibit C to the Affidavit of Andrew Stern, AR, Tab 2, p.54 ([A59](#)).

⁵ Affidavit of Andrew Stern, AR, Tab 2, p. 28, at para 8 ([A33](#)).

⁶ Affidavit of Andrew Stern, AR, Tab 2, p. 28, at para 9 ([A33](#)).

⁷ Affidavit of Andrew Stern, AR, Tab 2, p. 29, at para 10 ([A34](#)).

2. The Porte Properties

13. Lerrato owns the real property municipally known as 369, 371, 373, 375 and 377 Porte Road, Ajax, Ontario.⁸
14. The Porte Properties are comprised of six parcels of land, five of which are the site of five fully constructed residential freehold townhomes (the “**Porte Dwellings**”).⁹
15. In May 2021 and August 2022, Lerrato entered into five agreements of purchase and sale (the “**Original Porte APSs**”) with a number of individuals (the “**Porte Homebuyers**” and, together with the Madison Homebuyers, the “**Homebuyers**”) in respect of the Porte Dwellings (the “**Porte Transactions**”).¹⁰
16. The sixth parcel of land (PIN 26454-0558, the “**Sixth Parcel**”) is intended for use by the Town of Ajax to construct municipal waterworks as set out in a development agreement between Lerrato and the Town of Ajax dated August 21, 2018 (the “**Porte Development Agreement**”).¹¹
17. Section 30(1) of the Porte Development Agreement requires Lerrato to convey title to the Sixth Parcel to the Town of Ajax.¹²
18. The Porte Development Agreement also required Lerrato to post a performance guarantee to secure Lerrato’s performance of the Porte Development Agreement.

⁸ Affidavit of Andrew Stern, AR, Tab 2, p. 29, at para 11 ([A34](#)); Porte Property Legal Description, Exhibit D to the Affidavit of Andrew Stern, AR, Tab 2, p.58 ([A63](#)).

⁹ Affidavit of Andrew Stern, AR, Tab 2, p. 29, at para 12 ([A34](#)); Porte Property, Exhibit E to the Affidavit of Andrew Stern, AR, Tab 2, p.61 ([A65](#)).

¹⁰ Affidavit of Andrew Stern, AR, Tab 2, p. 29, at para 14 ([A34](#)).

¹¹ Affidavit of Andrew Stern, AR, Tab 2, p. 29, at para 15 ([A34](#)); Parcel Registers June 21, 2024, Exhibit F to the Affidavit of Andrew Stern, AR, Tab 2, p.78 ([A79](#)).

¹² Affidavit of Andrew Stern, AR, Tab 2, p. 30, at para 16 ([A35](#)).

Pursuant to this security requirement, Lerrato paid the Town of Ajax \$184,973 (the “**Porte Cash Collateral**”) which is now being held by the Town of Ajax.¹³

3. 214 and the Doric Property

19. 214 owns the real property municipally known as Units A-J, Ruback Lane, Ajax, Ontario and also known as 10 Doric Street Ajax, Ontario.¹⁴
20. The Doric Property is the site of ten fully constructed residential freehold townhomes (the “**Doric Dwellings**” and, together with the Madison and Lerrato Dwellings, the “**Dwellings**”).¹⁵
21. The construction of the Doric Dwellings is substantially completed, but the Doric Dwellings are not yet connected to the electricity grid and have not been severed into individual units.¹⁶
22. 214 entered agreements of purchase and sale in respect of two of the units (the “**Contracted Doric Dwellings**”) comprising the Doric Property on December 17 and 19, 2021. The transactions in respect of the Contracted Doric Dwellings (the “**Doric Transactions**” and, together with the 23 Madison Transaction and the Porte Transactions, the “**Transactions**”) have not closed (and cannot close unless and until the electricity is connected and the units are severed).¹⁷

¹³ Affidavit of Andrew Stern, AR, Tab 2, p. 30, at para 17 ([A35](#)).

¹⁴ Affidavit of Andrew Stern, AR, Tab 2, p. 30, at para 19 ([A35](#)); Doric Property, Exhibit G to the Affidavit of Andrew Stern, AR, Tab 2, p. 111.

¹⁵ Affidavit of Andrew Stern, AR, Tab 2, p. 30, at para 21 ([A35](#)).

¹⁶ Affidavit of Andrew Stern, AR, Tab 2, p. 31, at para 22 ([A36](#)).

¹⁷ Affidavit of Andrew Stern, AR, Tab 2, p. 31, at para 23 ([A36](#)).

C. The Loans

1. The Barakaa Loan

23. On or around June 24, 2022, the Lender completed a mortgage loan transaction (the “**Barakaa Loan**”) with Barakaa in accordance with a Letter of Commitment dated April 27, 2022 (the “**Barakaa Commitment Letter**”) issued by Foremost Financial Corporation, an affiliate of the Lender. The Commitment Letter was subsequently assigned to the Lender.¹⁸
24. The Barakaa Loan contemplated a facility in the amount of \$4,133,000, all of which was ultimately advanced to Barakaa.¹⁹
25. Under the Barakaa Commitment Letter, the annual interest rate for the Barakaa Loan was the greater of 7.50% and HSBC Bank Canada Prime + 4.30%.²⁰
26. The Barakaa Commitment Letter contemplated monthly interest-only payments and a repayment of the Loan on maturity, being October 1, 2023.²¹
27. On September 28, 2023, Foremost Financial Corporation and Barakaa agreed to an amendment of the Barakaa Commitment Letter extending its term to April 1, 2024.²²

¹⁸ Affidavit of Andrew Stern, AR, Tab 2, p. 31, at para 24 ([A36](#)); Barakaa Commitment Letter, Exhibit I to the Affidavit of Andrew Stern, AR, Tab 2, p. 117 ([A125](#))

¹⁹ Affidavit of Andrew Stern, AR, Tab 2, p. 31, at para 25 ([A36](#)).

²⁰ Affidavit of Andrew Stern, AR, Tab 2, p. 31, at para 26 ([A36](#)).

²¹ Affidavit of Andrew Stern, AR, Tab 2, p. 32, at para 27 ([A37](#)).

²² Affidavit of Andrew Stern, AR, Tab 2, p. 32, at para 28 ([A37](#)); Amendment to Barakaa Commitment Letter, Exhibit J to the Affidavit of Andrew Stern, AR, Tab 2, p. 129 ([A137](#)).

28. Barakaa failed to pay the Barakaa Loan when it became due (or since). Barakaa partially repaid the Barakaa Loan following maturity, as discussed in paragraph 42 below.

2. The Leratto Loan

29. On or around July 5, 2022, the Lender completed a mortgage loan transaction (the "**Leratto Loan**") with Leratto in accordance with a Letter of Commitment dated June 10, 2022 (the "**Leratto Commitment Letter**") issued by Foremost Financial Corporation. The Leratto Commitment Letter was subsequently assigned to the Lender.²³

30. The Leratto Loan contemplated a facility in the amount of \$3,155,000, all of which was ultimately advanced to Leratto.²⁴

31. Under the Leratto Commitment Letter, the annual interest rate for the Leratto Loan was the greater of 8.00% and HSBC Bank Canada Prime + 4.30%.²⁵

32. The Lerrato Commitment Letter contemplated monthly interest-only payments and a repayment of the Loan on maturity, being September 1, 2023.²⁶

33. Leratto failed to pay the Leratto Loan when it became due on September 1, 2023 (or since).

²³ Affidavit of Andrew Stern, AR, Tab 2, p. 32, at para 30 ([A37](#)); Leratto Commitment Letter, Exhibit K to the Affidavit of Andrew Stern, AR, Tab 2, p. 135 ([A143](#))

²⁴ Affidavit of Andrew Stern, AR, Tab 2, p. 32, at para 31 ([A37](#)).

²⁵ Affidavit of Andrew Stern, AR, Tab 2, p. 32, at para 32 ([A37](#)).

²⁶ Affidavit of Andrew Stern, AR, Tab 2, p. 33, at para 33 ([A38](#)).

D. The 214 Loan

34. On February 16, 2022, the Lender completed a mortgage loan transaction (the “**214 Loan**” and, together with the Leratto Loan and Barakaa Loan, the “**Loans**”) with 214 in accordance with a Letter of Commitment dated December 10, 2021 (the “**214 Commitment Letter**”) issued by Foremost Financial Corporation. The 214 Commitment Letter was subsequently assigned to the Lender.²⁷
35. The 214 Loan contemplated a facility in the amount of \$6,185,000, all of which was ultimately advanced to 214.²⁸
36. Under the 214 Commitment Letter, the annual interest rate for the 214 Loan was the greater of 7.25% and HSBC Bank Canada Prime + 4.80%.²⁹
37. The 214 Commitment Letter contemplated monthly interest-only payments and a repayment of the Loan on maturity, being May 1, 2023.³⁰
38. The 214 Loan was renewed on or around April 27, 2023 and the maturity date was extended to December 1, 2023. 214 failed to pay the 214 Loan when it became due (or since).³¹

²⁷ Affidavit of Andrew Stern, AR, Tab 2, p. 33, at para 35 ([A38](#)); 214 Commitment Letter, Exhibit L to the Affidavit of Andrew Stern, AR, Tab 2, p. 146 ([A155](#))

²⁸ Affidavit of Andrew Stern, AR, Tab 2, p. 33, at para 37 ([A38](#)).

²⁹ Affidavit of Andrew Stern, AR, Tab 2, p. 33, at para 38 ([A38](#)).

³⁰ Affidavit of Andrew Stern, AR, Tab 2, p. 33, at para 39 ([A38](#)).

³¹ Affidavit of Andrew Stern, AR, Tab 2, p. 33, at para 40 ([A38](#)).

E. Security for the Loans

39. The Loans were secured by mortgages registered on title to the Secured Properties as follows:

(a) Instrument number YR3443814, registered on title to the Madison Properties on June 24, 2022;³²

(b) Instrument number DR2150311, registered on title to the Porte Properties on July 5, 2022;³³

(c) Instrument number DR2092949, registered on title to the Doric Property on January 24, 2022 (collectively, the "**Foremost Mortgages**").³⁴

40. With the exception of the mortgage in respect of the Doric Property, the Foremost Mortgages are subsequent to the following prior charges registered on title to the Secured Properties also in favour of the Lender (which prior charges secured past advances made by the Lender to the Borrowers):

(a) Instrument number YR2706667, registered on title to the Madison Properties on July 24, 2017 (the "**Prior Madison Mortgage**");³⁵ and

³² Madison Property Charge, Exhibit M to the Affidavit of Andrew Stern, AR, Tab 2, p. 156 ([A164](#)).

³³ Porte Properties Charge, Exhibit N to the Affidavit of Andrew Stern, AR, Tab 2, p. 161 ([A169](#)).

³⁴ Doric Properties Charge, Exhibit O to the Affidavit of Andrew Stern, AR, Tab 2, p. 165 ([A173](#)).

³⁵ Prior Madison Mortgage, Exhibit P to the Affidavit of Andrew Stern, AR, Tab 2, p. 171 ([A179](#)).

- (b) Instrument number DR1850098, registered on title to the Porte Properties on November 26, 2019 (the “**Prior Porte Mortgage**” and, together with the Prior Madison Mortgage, the “**Prior Foremost Mortgages**”).³⁶
41. There are no amounts outstanding under the Prior Foremost Mortgages. The loans secured by the Prior Foremost Mortgages have been paid off with advances made pursuant to the Loans (which advances are secured by the Foremost Mortgages).³⁷
42. The Lender’s mortgage on the Madison Properties was also registered on title to property municipally known as 19 Madison Avenue, Richmond Hill, Ontario. However, in or around January 2024, Barakaa discharged that mortgage in connection with the closing of a sale transaction with a homebuyer which resulted in payment to the Lender in respect of the Barakaa Loan in the amount of \$1,421,190.64.³⁸
43. The Foremost Mortgages incorporate standard charge terms 201035 by reference (the “**Charge Terms**”). The Charge Terms expressly provides that the Lender has the right to appoint a receiver in the event of a default by the Borrowers.³⁹

³⁶ Prior Porte Mortgage, Exhibit Q to the Affidavit of Andrew Stern, AR, Tab 2, p. 174 ([A181](#))

³⁷ Affidavit of Andrew Stern, AR, Tab 2, p. 35, at para 42 ([A39](#)).

³⁸ Affidavit of Andrew Stern, AR, Tab 2, p. 35, at para 45 ([A40](#)).

³⁹ Affidavit of Andrew Stern, AR, Tab 2, p. 35, at para 46 ([A40](#)); Standard Charge Terms, Exhibit S to the Affidavit of Andrew Stern, AR, Tab 2, p. 184 ([A192](#))

44. In addition to the Foremost Mortgages, the Borrowers granted to the Lender, among other things, General Security Agreements over the Borrowers' personal property (the "**GSAs**").⁴⁰
45. The GSAs expressly provided that the Lender can appoint a receiver in respect of the Borrowers if the Loans are in default.
46. The obligations of the Borrowers to the Lender are guaranteed by the Principals.⁴¹

F. Status of the Secured Properties

(a) The Transactions

47. As noted above, the Borrowers have entered into contracts for the sale of 23 Madison, two of the Doric Dwellings and all five of the Porte Dwellings to third parties.⁴²
48. Following its appointment, the Receiver will evaluate the Transactions to determine whether, among other things, the net proceeds payable on closing of each of the transactions are sufficient to support a recommendation by the Receiver that the Court approve the completion of the transactions in accordance with their terms or, alternatively, whether some or all of the agreements of purchase and sale

⁴⁰ Affidavit of Andrew Stern, AR, Tab 2, p. 36, at para 47 ([A41](#)); General Security Agreements, Exhibit T to the Affidavit of Andrew Stern, AR, Tab 2, p. 219 ([A227](#)).

⁴¹ Guarantee of Barakaa Loan, Exhibit U to the Affidavit of Andrew Stern, AR, Tab 2, p. 237 ([A246](#)); Guarantee of Leratto Loan, Exhibit V to the Affidavit of Andrew Stern, AR, Tab 2, p. 242 ([A251](#)); Guarantee of 214 Loan, Exhibit W to the Affidavit of Andrew Stern, AR, Tab 2, p. 247 ([A256](#));

⁴² Affidavit of Andrew Stern, AR, Tab 2, p. 36, at para 52 ([A41](#)).

should be disclaimed and some or all of the Secured Properties remarketed for sale.⁴³

49. As noted above, Barakaa also entered an agreement of purchase and sale with respect to 25 Madison. The closing date for the transaction has passed and the homebuyers advised Barakaa that they do not wish to close this transaction given the ongoing delay caused by the uncertainty relating to the disputed Joshi Mortgages (discussed and defined below). Barakaa has relisted 25 Madison for sale. It is presently contemplated that, should the Receiver be appointed in respect of 25 Madison, the Receiver will take control of the listing for 25 Madison.⁴⁴
50. The Madison Project and the Porte Project are fully complete, and save for the mortgage dispute described below, the Transactions are ready to be closed should the Receiver determine that it is advisable to do so following its analysis referenced in paragraph 48 above.⁴⁵

2. Secured Charges and the Disputed Joshi Mortgages

51. The following parties have mortgages registered on title to the Madison Properties⁴⁶ (in the order of their registration and excluding the Prior Madison Mortgage):

⁴³ Affidavit of Andrew Stern, AR, Tab 2, p. 36-37, at para 53 ([A41](#)).

⁴⁴ Affidavit of Andrew Stern, AR, Tab 2, p. 37, at para 54 ([A42](#)).

⁴⁵ Affidavit of Andrew Stern, AR, Tab 2, p. 37, at para 55 [A42](#).

⁴⁶ 141 Madison Charge, Exhibit X to the Affidavit of Andrew Stern, AR, Tab 2, p. 263 ([A272](#)); BIP Madison Charge, Exhibit Y to the Affidavit of Andrew Stern, AR, Tab 2, p. 274 ([A282](#)); Joshi Madison Charge, Exhibit Z to the Affidavit of Andrew Stern, AR, Tab 2, p. 283 ([A291](#));

| Instrument Number | Registration | Secured Party | Amount (\$) |
|--------------------------|---------------------------------------|---|---|
| YR3443814 | | The Lender | 4,133,000 (Note: this indebtedness was reduced as a result of the payment to the Lender described in paragraph 42). |
| YR3561972 | (the “ 141 Madison Charge ”) | 1417199 Ontario Limited | 750,000 |
| YR3596443 | (the “ BIP Madison Charge ”) | BIP Management Corporation (“ BIP ”) | 1,500,000 |
| YR3610007 | (the “ Joshi Madison Charge ”) | (Sanjive Joshi, Xpert Credit Control Solutions Inc. and Xpert law Inc. (collectively, the “ Joshi Parties ”) | 5,000,000 |
| Total | | | 11,383,000 |

52. The following parties have mortgages registered on title to the Porte Properties (in the order of their registration and excluding the Prior Porte Mortgage):⁴⁷

| Instrument Number | Registration | Secured Party | Amount (\$) |
|--------------------------|---------------------|----------------------|--------------------|
|--------------------------|---------------------|----------------------|--------------------|

⁴⁷ BIP Porte Charge, Exhibit AA to the Affidavit of Andrew Stern, AR, Tab 2, p. 285 ([A294](#)); Joshi Porte Charge, Exhibit BB to the Affidavit of Andrew Stern, AR, Tab 2, p. 294 ([A303](#));

| | | |
|---|-------------------|-----------|
| DR2150311 | The Lender | 3,155,000 |
| DR2253705 (the “ BIP Porte Charge ”) | BIP | 700,000 |
| DR2272795 (the “ Joshi Porte Charge ”). Note that this mortgage is only registered on title to one of the five parcels (this being “ Unit 5 ”) that make up the Porte Dwellings: PIN 26454-0557 (LT), and the Sixth Parcel. | The Joshi Parties | 5,000,000 |
| Total | | 8,855,000 |

53. The following parties have mortgages registered on title to the Doric Property (in the order of their registration):⁴⁸

| Instrument Number | Registration | Secured Party | Amount (\$) |
|--------------------------|---------------------|----------------------|--------------------|
| DR2092949 | | The Lender | 6,185,000 |

⁴⁸ Dhingra Doric Charge, Exhibit CC to the Affidavit of Andrew Stern, AR, Tab 2, p. 298 ([A306](#)); BIP Doric Charge, Exhibit DD to the Affidavit of Andrew Stern, AR, Tab 2, p. 311 ([A320](#)); BIP and Galidan Doric Charge, Exhibit EE to the Affidavit of Andrew Stern, AR, Tab 2, p. 320 ([A328](#)); Joshi Doric Charge, Exhibit FF to the Affidavit of Andrew Stern, AR, Tab 2, p. 329 ([A337](#));

| | | |
|--|----------------------|------------|
| DR2181520 (the “ Dhingra Doric Charge ”) | Tripta Dhingra | 1,500,000 |
| DR2209605 (the “ BIP Doric Charge ”) | BIP | 2,000,000 |
| DR2227427 (the “ BIP and Galidan Doric Charge ”) | BIP and Galidan Inc. | 1,000,000 |
| DR2255792 (the “ Joshi Doric Charge ” and, together with the Joshi Madison Charge and the Joshi Porte Charge, the “ Joshi Mortgages ”) | The Joshi Parties | 5,000,000 |
| Total | | 15,685,000 |

54. The Principals allege that the Joshi Mortgages are fraudulent.⁴⁹

55. The Principals and the Joshi Parties are engaged in ongoing litigation concerning the propriety of the Joshi Mortgages, among other things, in an action bearing court file number CV-23-00710241-0000.

3. Default under the Loans

56. All of the Loans are in default. In particular:

⁴⁹ Sworn Affidavit of Hitesh Jhaveri, Exhibit GG to the Affidavit of Andrew Stern, AR, Tab 2, p. 335 at para 15 ([A344](#)).

- (a) all of the Loans have matured and are due and payable immediately;⁵⁰
 - (b) the registration of the Joshi Mortgages on certain of the Secured Properties without the consent of the Lender (which was not obtained) represents a default under section 33(p) of the Charge Terms;
 - (c) significant realty tax arrears have accrued in respect of the Secured Properties, which represents a default under section 33(a) of the Charge Terms;
 - (d) 214 has defaulted under the terms of the second mortgage registered on title to the Doric Property, which represents a default under section 33(a) and (b) of the Charge Terms.⁵¹
57. The Borrowers have failed to pay back the Loans despite the fact that all of the Loans are due and payable by their terms.
58. The current outstanding indebtedness:
- (a) on the Barakaa Loan is \$3,045,577.15;⁵²
 - (b) on the Lerrato Loan is \$3,469,760.10;⁵³ and

⁵⁰ Affidavit of Andrew Stern, AR, Tab 2, p.43, at para 77 ([A48](#)).

⁵¹ Standard Charge Terms, Exhibit S to the Affidavit of Andrew Stern, AR, Tab 2, p. 201-202, a-b, p ([A210](#)).

⁵² Mortgage Discharge Statement, Exhibit MM to the Affidavit of Andrew Stern, AR, Tab 2, p. 385 ([A393](#)).

⁵³ Mortgage Discharge Statement, Exhibit NN to the Affidavit of Andrew Stern, AR, Tab 2, p. 386 ([A395](#)).

(c) on the 214 Loan is approximately \$6.83 million⁵⁴ (collectively, the “**Indebtedness**”).

G. *Need for a Receiver*

59. The Lender is entitled to the appointment of a receiver over the Receivership Property as a result of the Borrowers’ defaults under the Loans.

60. KSV has consented to its appointment in this role, if so appointed.

H. *Application for the Appointment of a Receiver*

61. The Lender seeks the appointment of KSV as receiver and manager of the Receivership Property.

62. KSV has provided its consent to act in this role.⁵⁵

PART III. ISSUES

63. The only issue to be decided on this Application is whether it is just and convenient for the Court to appoint KSV as receiver and manager of the Receivership Property.

64. The Lender submits that this issue should be answered in the affirmative.

⁵⁴ Affidavit of Andrew Stern, AR, Tab 2, p. 43 at para 81 ([A48](#)).

⁵⁵ Consent of Fuller to Act as Receiver, April 10, 2024, AR, Tab 3, p. 229 ([A479](#)).

PART IV. LAW AND ARGUMENT

A. *Appointment of a Receiver*

65. The Applicant seeks the appointment of a receiver pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act* (“**BIA**”) and section 101 of the *Courts of Justice Act* (“**CJA**”).

66. Subsection 243(1) of the BIA is clear that where it is "just or convenient" to do so, the court may appoint a receiver. Similarly, the CJA enables the court to appoint a receiver and manager where such appointment is "just or convenient".⁵⁶

67. In *Bank of Nova Scotia v. Freure Village on Clair Creek*, Blair J. (as he then was) described the basic principles governing the judicial appointment of a receiver as follows:

The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so [citation omitted]. In deciding whether or not to do so, it 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. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered, but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently [citations omitted]. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed [citation omitted].⁵⁷

68. The case law is clear that, where a security instrument provides a creditor with a right to appoint a receiver upon default, courts do not view this remedy as extraordinary.

⁵⁶ *Bankruptcy and Insolvency Act*, RSC. 1985, c. B-3, [s. 243\(1\)](#); *Courts of Justice Act*, RSO 1990, c. C.43, [s. 101](#).

⁵⁷ *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996 CanLII 8258](#) (Ont. Ct. J [Gen Div - Commercial List]) at [para. 10](#); *1529599 Ontario Ltd v. Dalcov Inc*, [2012 ONSC 5707](#) at [para. 40](#) [*"Dalcov"*].

This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.⁵⁸

B. It is Both Just and Convenient to Appoint a Receiver

69. In the present case, having regard to all of the circumstances, it is both just and convenient for this Court to appoint a receiver over the Property. In particular:

- (a) The realty tax arrears accruing interest on the Secured Properties rank in priority to the charges of secured creditors. Further accrual of realty taxes is deteriorating the value of the secured creditors' security;
- (b) The Borrowers are unable to sell the Secured Properties as a result of the Joshi Mortgages – preventing the Borrowers from paying back the Loans – and there is no other viable alternative proposal for repayment of the Indebtedness;
- (c) There is no evidence of operations or projects that would be frustrated by the appointment of a receiver over the Receivership Property;
- (d) There are many parties with encumbrances registered on title to the Secured Properties and a complicated mortgage fraud dispute between Joshi and the Borrowers. The appointment of a neutral officer of the Court to facilitate the sale of the Secured Properties will minimize litigation and

⁵⁸ *Bank of Montreal v. Sherco Properties Inc.*, [2013 ONSC 7023](#) at [para. 42](#) [*"Sherco"*].

provide for an orderly realization for the benefit of all the Borrowers' creditors.

1. Realty Taxes

70. As of October 9, 2024, the Borrowers have accrued the following tax arrears in respect of the Secured Properties:

- (a) \$9,875.78 in respect of the Madison Properties;⁵⁹
- (b) \$89,100.01 in respect of the Porte Properties;⁶⁰ and
- (c) \$119,566.47 in respect of the Doric Property.⁶¹

71. By virtue of the *Municipal Act, 2001*, municipal tax arrears with respect to real property rank in priority to the claims of all other creditors.⁶² The continued accrual of interest on these arrears deteriorates the position of all other creditors and diminishes the value of the Lender's security.

72. It is well established in the case law that the erosion of a creditor's security interest through the accrual of priority payable such as tax arrears justifies the appointment of a receiver over a debtor.⁶³ In this case, the significant tax arrears on the Madison Properties and the Porte Properties, in particular, are causing significant prejudice to the creditors of Barakaa and Lerrato.

⁵⁹ Madison Properties Tax Arrears, Exhibit QQ to the Affidavit of Andrew Stern, AR, Tab 2, p. 400 ([A410](#)).

⁶⁰ Porte Properties Tax Arrears, Exhibit RR to the Affidavit of Andrew Stern, AR, Tab 2, p. 402 ([A413](#)).

⁶¹ Doric Property Tax Arrears, Exhibits SS to the Affidavit of Andrew Stern, AR, Tab 2, p. 423 ([A433](#)).

⁶² *Municipal Act, 2001*, [S.O. 2001, c. 25, s. 349\(3\)](#).

⁶³ See *Sherco* at [para. 47](#) and *Dalcor* at [para. 41](#).

73. So long as the Secured Properties remain in the Borrowers' possession, such security will continue to erode, to the detriment of all of the Borrowers' stakeholders. A receiver is urgently needed to facilitate realization on the Secured Properties and an end to such erosion in value.

2. Realization on the Secured Properties is Infeasible Without a Receiver

74. Without the appointment of a receiver over the Secured Properties, the Borrowers will be unable to sell the Secured Properties to facilitate the repayment of the Lender and other secured creditors.

75. This is because the registration of the Joshi Mortgages on title to the Secured Properties (which mortgages secure a purported obligation of \$5,000,000) has prevented some of the Transactions from closing and will, likewise, render infeasible any prospective transactions in respect of those Secured Properties that are encumbered by one of the Joshi Mortgages. As noted in the Affidavit of Andrew Stern, the value of the Secured Properties is insufficient to discharge all of the encumbrances registered thereon.

76. The appointment of a receiver over the Secured Properties will enable them to be sold by a receiver by way of vesting order should the receiver determine that this is the recommended course of action.. If a receiver is not appointed, the Borrowers will likely not be in a position to transfer title to the Secured Properties and value of the Secured Properties will continue to deteriorate as realty taxes accrue (as described above).

77. No party has put forward any alternative to the appointment of a receiver over the Receivership Property to facilitate the repayment of the Lender and the Borrowers' other

creditors. In the absence of any credible alternative plan, the appointment of KSV as receiver of the Receivership Property is both just and convenient.

3. No Evidence of Business or Project Frustration

78. Courts are more inclined to appoint receivers where the appointment of a receiver would not frustrate the debtor's ongoing contracts or projects.⁶⁴ In this case, there is no evidence to demonstrate that the appointment of a receiver would harm any of the Borrowers' operations or ability to operate as a going concern.

79. The Madison Properties and the Porte Properties are the site of completed residential housing developments which are ready for sale. The Doric Property is the site of a substantially complete residential housing development.

80. In all three cases, there is no evidence that the appointment of a receiver will cause any harm to the value of the Secured Properties. On the contrary, the appointment of a receiver will permit successful realization on the Secured Properties where, as a result of the significant encumbrances registered on title, such realization would otherwise not be possible.

4. Orderly Realization

81. There are many parties with encumbrances registered against the Secured Properties. At a minimum, the Borrowers are in default of their obligations to the Lender, the municipalities of Richmond Hill and Ajax and the second mortgagee in respect of the

⁶⁴ See e.g. *Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.*, [2013 ONSC 6809](#), at [para. 10](#).

Doric Property. Additionally, the Borrowers and the Principals are embroiled in litigation with the Joshi Parties over the Joshi Mortgages.

82. In such circumstances, the court has recognized that the appointment of a receiver is just and convenient so as to ensure that the sale of the debtor's assets is carried out by a neutral, court-appointed officer so as to ensure that competing claims to the debtor's assets are dealt with an equitable fashion and to minimize litigation.⁶⁵

PART V. ORDER REQUESTED

83. The Lender requests that KSV be appointed as receiver over the Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2024.



Jeffrey Larry / Ryan Shah / Dillon Gohill

**Paliare Roland Rosenberg Rothstein
LLP**
Counsel for the Applicants

⁶⁵ *Dalcor Inc.* at [para. 41](#) and *Sherco* at [para. 48](#).

Schedule “A” – Authorities Cited

Bank of Montreal v. Sherco Properties Inc., [2013 ONSC 7023](#).

Bank of Nova Scotia v Freure Village on Clair Creek, [1996 CanLII 8258](#) (Ont. Ct. J [Gen Div - Commercial List]).

Caisse Desjardins des Bois-Francs v River Rock Financial Canada Corp., [2013 ONSC 6809](#).

1529599 Ontario Ltd v Dalcor Inc, [2012 ONSC 5707](#).

Schedule “B” – Statutes Cited

Bankruptcy and Insolvency Act, RSC. 1985, c. B-3

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

Courts of Justice Act, RSO 1990, c. C.43

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

Municipal Act, 2001, SO 2001, c. 25

Recovery of taxes

349 (1) Taxes may be recovered with costs as a debt due to the municipality from the taxpayer originally assessed for them and from any subsequent owner of the assessed land or any part of it.

Interpretation

(2) Subsection (1) does not affect the taxpayer's or owner's recourse against any other person.

Taxes on escheated, etc. land

(2.1) For greater certainty, taxes that are levied or charges that are imposed under section 208 on the following land may not be recovered as a debt due to the municipality from the Crown:

1. Land that is vested in the Crown in right of Ontario because of an escheat or forfeiture as a result of the dissolution of a corporation.
2. Land that belongs to the Crown in right of Ontario as a result of the death of an individual who did not have any lawful heirs.

Special lien

(3) Taxes are a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the municipality or its agents or through taking no action to register a tax arrears certificate.

FOREMOST MORTGAGE HOLDING CORPORATION
Applicant

-and-

BARAKAA DEVELOPER INC., LERRATO INC., and 2145499 ONTARIO INC.
Respondents

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANT
(Application Returnable October 21, 2024)

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