

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

B E T W E E N:

**FIRST SOURCE FINANCIAL MANAGEMENT INC.**

Applicant

- and -

**BLOCK 80 HOLDINGS INC. and ANDRE SHERMAN**

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 July 8, 2024)

July 2, 2024

**Paliare Roland Rosenberg Rothstein  
LLP**  
155 Wellington Street West  
35th Floor  
Toronto ON M5V 3H1

**Jeffrey Larry** (LSO# 44608D)  
Tel: 416.646.4330  
[jeff.larry@paliareroland.com](mailto:jeff.larry@paliareroland.com)

**Ryan Shah** (LSO# 88250C)  
Tel: 416.646.6356  
[ryan.shah@paliareroland.com](mailto:ryan.shah@paliareroland.com)

**Lawyers for the Applicants**

TO: **SERVICE LIST**

## PART I. OVERVIEW

1. This Application is made by First Source Financial Management Inc. (the “**Lender**”) for an order pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act* (Canada) (“**BIA**”) and section 101 of the *Courts of Justice Act* (Ontario) (the “**CJA**”) appointing TDB Restructuring Limited (“**TDB**”) as receiver, without security, over the real property municipally known as Block 80, Bellisle Heights, 61 Thompsons Road, Penetanguishene, Ontario (the “**Property**”).
2. The Applicant was granted a mortgage against the Property in the amount of \$5,310,000 pursuant to the terms of a loan that the Lender advanced to the Respondent Block 80 Holdings Inc. (the “**Borrower**”).
3. The Lender and the Borrower entered into a series of forbearance agreements whereby the Borrower and its principal, Andre Sherman (the “**Guarantor**”), consented to the appointment of a receiver over the Borrower and judgment against both the Borrower and the Guarantor if the Borrower failed to repay the Loan (as defined below) by April 8, 2024.
4. The Borrower failed to repay the Loan by April 8, 2024. Accordingly, the Lender now seeks to rely on the consents executed by the Borrower and Guarantor to: (i) appoint TDB as receiver of the Property and (ii) obtain judgment against the Borrower and the Guarantor.
5. The appointment of a receiver is just and convenient, in the best interests of the Borrower’s creditors generally and is not opposed by the Borrower.

## PART II. FACTS

### **A. The Parties**

1. The Lender is an Ontario corporation in the business of providing mortgage financing and other loans.
2. The Borrower is an Ontario corporation in the business of real estate development.
3. The Guarantor is an individual resident in Ontario and is an officer, director, and shareholder of the Borrower.

### **B. The Property**

4. The Borrower owns the Property,
5. The Property is the site of a residential apartment building with 18 units (the “**Building**”).<sup>1</sup>

### **C. The Loan**

6. On April 6, 2021, the Lender completed a mortgage loan transaction (the “**Loan**”) with the Borrower in accordance with a Letter of Commitment dated November 30, 2020 (the “**Commitment Letter**”) issued by First Source Mortgage Corporation (an affiliate of the Lender). The Commitment Letter was subsequently assigned to the Lender.<sup>2</sup>
7. At the time of the Commitment Letter, the Building was not yet complete, and the purpose of the Loan was to fund its construction. The Loan initially contemplated a facility

---

<sup>1</sup> Affidavit of Kunj Patel, affirmed June 7, 2024 (the “**Patel Affidavit**”) at para. 6, Application Record of the Applicant (“**AR**”), Tab 2, p. 18 ([A333](#)).

<sup>2</sup> Patel Affidavit at para. 7, AR, Tab 2, p. 18 ([A333](#)).

in the amount of the lesser of \$3,285,000 or 65.70% of the appraised value of the Property (as if the Building were complete) advanced across a number of progress draws.

8. The Lender ultimately advanced \$3,285,000 to the Borrower under the Commitment Letter.<sup>3</sup>

9. The Commitment Letter contemplated monthly interest-only payments and a repayment of the Loan on maturity, being May 8, 2022. On maturity, the Lender was also entitled to enter into an agreement with the Borrower to extend the maturity date, increase the interest rate or amend any of the Charge (as defined below) registered on title to the Property in favour of the Lender.<sup>4</sup>

10. The Borrower's obligations under the Loan are guaranteed by the Guarantor, by way of a guarantee and postponement of claim executed on March 30, 2021 (the "**Guarantee**").<sup>5</sup>

**D. Security for the Loan**

11. The Loan is secured by a first mortgage (the "**Mortgage**") registered on April 6, 2021 against the Property as Instrument No. SC1768805 (the "**Charge**") in favour of the Lender. On January 23, 2023, the Charge was amended with the consent of the Borrower to increase the amount secured to \$5,310,000.<sup>6</sup>

---

<sup>3</sup> Patel Affidavit at paras. 8-9, AR, Tab 2, pp. 18-19 ([A333](#)).

<sup>4</sup> Patel Affidavit at para. 11, AR, Tab 2, p. 19 ([A334](#)).

<sup>5</sup> Patel Affidavit at para. 12, AR, Tab 2, p. 19 ([A334](#)).

<sup>6</sup> Patel Affidavit at para. 13, AR, Tab 2, p. 20 ([A335](#)).

12. The terms of the Charge expressly provide that the Lender has the right to appoint a receiver in the event of a default by the Borrower.<sup>7</sup>

13. There is a second mortgage registered on the Property in favour of 2070409 Ontario Inc. (the “**Second Mortgage**” and the “**Second Mortgagee**”).<sup>8</sup>

14. As further security, the Borrower granted to the Lender a General Security Agreement by which the Borrower granted security to the Lender over its personal property (the “**GSA**”) and an assignment of rents in respect of the Property.<sup>9</sup>

15. As with the Charge, the GSA expressly provides that the Lender can appoint a receiver over the Borrower if the Loan is in default.<sup>10</sup>

#### ***E. Loan Amendments***

16. Between March 8, 2022, and September 27, 2023, the Lender, Borrower and the Guarantor executed five increase and amendment agreements in respect of the Loan.

17. The most recent of the amendments, dated September 27, 2023 (the “**Fifth Amending Agreement**”) extended the Maturity Date to November 8, 2023.<sup>11</sup>

18. The Lender and Borrower also agreed to two amendments to the Charge, dated April 4, 2022 and January 23, 2023, respectively (the “**Charge Amendments**”). Both of the Charge Amendments were registered on title prior to the Second Mortgage. The effect

---

<sup>7</sup> Charge on the Property, Exhibit D to the Patel Affidavit, AR, Tab 2, p. 68 ([A383](#)).

<sup>8</sup> Patel Affidavit, para. 15, AR, Tab 2, p. 20 ([A335](#)).

<sup>9</sup> Patel Affidavit, para. 16, AR, Tab 2, p. 20 ([A335](#)).

<sup>10</sup> GSA, Exhibit F to the Patel Affidavit, AR, Tab 2, p. 95 ([A410](#)).

<sup>11</sup> Patel Affidavit, para. 24, AR, Tab 2, pp. 21-22 ([A336](#)).

of the Charge Amendments was to, among other things, increase the Charge's principal amount to \$5,310,000.<sup>12</sup>

**F. Forbearance Agreements**

19. In or around October 2023, the Borrower advised the Lender that it would not be able to repay the Loan in full by November 8, 2023, as the Borrower agreed to do under the Fifth Amending Agreement.<sup>13</sup>

20. Accordingly, on November 1, 2023, January 27, 2024 and March 1, 2024, the Lender, the Borrower and the Guarantor executed three forbearance agreements (the "**Forbearance Agreements**") to provide the Borrower with opportunities to repay the Loan.<sup>14</sup>

21. As part of the forbearance agreement dated November 1, 2023 (the "**First Forbearance Agreement**"), the Borrower and the Guarantor executed consents to:

- (a) Judgment as against the Borrower and the Guarantor in the amount of \$5,500,000 plus applicable interest (the "**Consent Judgment**"); and
- (b) The appointment of a receiver in respect of all the assets, undertakings and properties of the Borrower (the "**Consent to Receiver**" and, together with the Consent Judgment, the "**Consents**").<sup>15</sup>

---

<sup>12</sup> Patel Affidavit, paras. 25-27, AR, Tab 2, p. 22 ([A337](#)).

<sup>13</sup> Patel Affidavit, para. 28, AR, Tab 2, p. 22 ([A337](#)).

<sup>14</sup> Patel Affidavit, para. 29, AR, Tab 2, p. 22 ([A337](#)).

<sup>15</sup> Patel Affidavit, para. 30, AR, Tab 2, p. 22 ([A337](#)). See the Consents at Exhibit K to the Patel Affidavit, AR, Tab 2, pp. 212-233 ([A527](#)).

22. The Borrower and the Guarantor agreed that the Lender could rely on the Consents in the event of default under the First Forbearance Agreement by the Borrower.<sup>16</sup>

23. The First Forbearance Agreement also further increased the principal amount under the Loan by \$400,000 (all of which was advanced to the Borrower by the Lender) and made certain amendments to the Loan's interest rate.<sup>17</sup>

24. Ultimately, the Lender advanced \$5,100,000 to the Borrower under the Loan.<sup>18</sup>

25. Under the most recent forbearance agreement, dated March 1, 2024 (the "**Third Forbearance Agreement**"), the Lender agreed to forbear from enforcement of the Loan until April 8, 2024 (or an event of default under Third Forbearance Agreement) and the Borrower agreed to repay the Loan by April 8, 2024.<sup>19</sup>

26. The Borrower failed to repay the Loan in full by April 8, 2024 or since and thereby defaulted on the Loan and each of the Forbearance Agreements. Accordingly, the Lender is entitled to rely upon the Consents.<sup>20</sup>

27. Under all the Forbearance Agreements, the Borrower and the Guarantor acknowledged their indebtedness under the Loan.<sup>21</sup>

---

<sup>16</sup> Patel Affidavit, para. 31, AR, Tab 2, p. 23 ([A338](#)).

<sup>17</sup> Patel Affidavit, para. 32, AR, Tab 2, p. 23 ([A338](#)).

<sup>18</sup> Patel Affidavit, para. 33, AR, Tab 2, p. 23 ([A338](#)).

<sup>19</sup> Patel Affidavit, para. 34, AR, Tab 2, p. 23 ([A338](#)).

<sup>20</sup> Patel Affidavit, para. 35, AR, Tab 2, p. 23 ([A338](#)).

<sup>21</sup> Patel Affidavit, para. 36, AR, Tab 2, p. 24 ([A339](#)).



28. As of May 21, 2024, the total amount outstanding under the Loan, inclusive of interest, fees and costs is \$6,002,774.66 (the “**Indebtedness**”).<sup>22</sup>

**G. Application for the Appointment of a Receiver**

29. The Lender is only seeking the appointment of the receiver over the Property. The Applicant does not seek the appointment of a receiver over the Borrower’s business or assets generally.

30. TDB has provided its consent to its appointment as receiver.<sup>23</sup>

**PART III. ISSUES**

31. The Applicant submits that the following issues needs to be determined on this application:

- (a) is it just or convenient for the Court to appoint a Receiver over the Property?;
- and
- (b) Is the Lender entitled to judgment against the Borrower and Guarantor.

32. The Applicant submits that these issues should be answered in the affirmative.

**PART IV. LAW AND ARGUMENT**

**A. Appointment of a Receiver**

33. The Applicant seeks the appointment of a receiver pursuant to subsection 243(1) of the BIA and section 101 of the CJA.

---

<sup>22</sup> Patel Affidavit, para. 38, AR, Tab 2, p. 24 ([A339](#)).

<sup>23</sup> Consent of TDB to Act as Receiver, June 7, 2024, AR, Tab 3, p. 253 ([A568](#)).

34. 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".<sup>24</sup>

35. 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].<sup>25</sup>

36. 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. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.<sup>26</sup>

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

37. 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:

---

<sup>24</sup> *Bankruptcy and Insolvency Act*, RSC. 1985, c. B-3, [s. 243\(1\)](#); *Courts of Justice Act*, RSO 1990, c. C.43, [s. 101](#).

<sup>25</sup> *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. Dalcour Inc.*, [2012 ONSC 5707](#) at [para. 40](#) [*"Dalcour"*].

<sup>26</sup> *Bank of Montreal v. Sherco Properties Inc.*, [2013 ONSC 7023](#) at [para. 42](#) [*"Sherco"*].

- (a) The Borrower has specifically consented to the appointment of a receiver over its assets and undertakings in the event of a default;
- (b) There is no evidence of going concern operations or projects that would be frustrated; and
- (c) There is no evidence of a plan by the Borrower to pay the indebtedness, in the near term or at all.

### **1. Consent by the Borrower**

38. The Borrower has specifically consented to the appointment of a Receiver over its assets and undertakings in the event of a default under the Forbearance Agreements. The Borrower has defaulted on the Loan and the Forbearance Agreements and the Lender is now entitled to rely on the Consent to Receiver.<sup>27</sup> This is not contested by the Borrower.

39. The Borrower's failure to pay off the Loan in accordance with the Third Forbearance Agreement disentitles it to the benefit of the forbearance afforded by the Lender and therefore renders it just and convenient to permit the Lender to rely on the Consent to Receiver.<sup>28</sup>

### **2. No Evidence of Business or Project Frustration**

40. Courts are more inclined to appoint receivers where the appointment of a receiver would not frustrate the debtor's ongoing contracts or projects.<sup>29</sup> In this case, there is no

---

<sup>27</sup> Consents at Exhibit K to the Patel Affidavit, AR, Tab 2, pp. 212-233 ([A527](#)).

<sup>28</sup> See *Alexander v. 2025610 Ontario Ltd.*, [2012 ONSC 3486](#) at [para. 50](#).

<sup>29</sup> See e.g. *Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.*, [2013 ONSC 6809](#) at [para. 10](#).

evidence before the Court to demonstrate that the appointment of a receiver would harm any ongoing operations or projects.

41. The Property is the site of a completed residential apartment building. The role of the receiver, once appointed, would merely be to stand in the shoes of the Borrower to collect rent from the Property and market it for sale.

### **3. No Evidence of a Plan to Pay Indebtedness**

42. The Borrower has not provided this Court with any evidence of a plan to pay back the Indebtedness. In the absence of a “reasonable certainty”<sup>30</sup> of the Borrower’s ability to repay the Indebtedness in the near future or at all, the appointment of a receiver in respect of the Property is the only way to protect the interests of the Borrower’s creditors.

### **4. Orderly Realization**

43. In addition to the Lender, the Second Mortgagee has registered an encumbrance on the Property.

44. In these 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.<sup>31</sup>

---

<sup>30</sup> *Royal Bank of Canada v 1731861 Ontario Inc.*, [2023 ONSC 3292](#) at [para. 33](#).

<sup>31</sup> *Dalcor Inc.* at [para. 41](#) and *Sherco* at [para. 48](#).

**C. Judgment**

45. This Court should grant judgment against the Borrower and the Guarantor for the amount of the outstanding Indebtedness. There is no dispute that the Borrower must pay the Indebtedness to the Lender and that the Guarantor has guaranteed this Indebtedness.

46. The Borrower and Guarantor have executed the Consent Judgment<sup>32</sup> and have agreed that the Lender can rely on it in the event of a default under the Forbearance Agreements by the Borrower. The Borrower has now defaulted under the Third Forbearance Agreement by failing to pay off the Indebtedness by April 8, 2024.<sup>33</sup>

47. The Borrower is, therefore, entitled to rely upon the Consent Judgment and entitled to judgment for the full amount of the Indebtedness against the Borrower and the Guarantor.

**PART V. ORDER REQUESTED**

48. The Lender requests that:

- (a) TDB be appointed as receiver over the Property; and
- (b) Judgment be granted against the Borrower and the Guarantor in the amount of the Indebtedness.

---

<sup>32</sup> Consent Judgment, Exhibit K to the Patel Affidavit, ARB, Tab 2, p. 212 ([A527](#)).

<sup>33</sup> First Forbearance Agreement, ss. 25-28, Exhibit K to the Patel Affidavit, AR, Tab 2, pp. 204-205 ([A519](#)); Third Forbearance Agreement, s. 3, Exhibit K to the Patel Affidavit, AR, Tab 2, p. 242 ([A557](#)).

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 2<sup>nd</sup> day of July, 2024.



---

Jeffrey Larry / Ryan Shah

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

**Schedule “A” – Authorities Cited**

*Alexander v. 2025610 Ontario Ltd.*, [2012 ONSC 3486](#).

*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](#).

*Royal Bank of Canada v 1731861 Ontario Inc.*, [2023 ONSC 3292](#).

*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.



First Source Financial Management Inc.  
Applicant

-and- Block 80 Holdings Inc. et al.  
Respondent

Court File No CV-24-00720929-00CL

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

PROCEEDING COMMENCED AT  
TORONTO

**FACTUM OF THE APPLICANT**  
(Application Returnable July 8, 2024)

**Paliare Roland Rosenberg Rothstein LLP**

155 Wellington Street West  
35<sup>th</sup> Floor  
Toronto, ON M5V 3H1

**Jeffrey Larry** (LSO #44608D)

Tel.: 416.646.4330  
email: jeff.larry@paliareroland.com

**Ryan Shah** (LSO# 88250C)

Tel.: 416.646.6356  
email: ryan.shah@paliareroland.com

Fax: 416.646.4301

**Lawyers for the Applicant**