SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF: THE RECEIVERSHIP OF CIVIC HOMES LIMITED

Citation: ***Royal Bank of Canada v. Civic Homes Limited***, 2021 NSSC 373

Date: 20210622
Docket: *Halifax*, No. 494188
Registry: Halifax

Between:

Royal Bank of Canada

Applicant

v.

Civic Homes Limited

Respondent

DECISION

Judge:	The Honourable Justice Darlene Jamieson
Heard:	June 22, 2021, in Halifax, Nova Scotia
Oral Decision:	June 22, 2021

Counsel: Mr. Stephen Kingston, for Loon Lake
Mr. Matthew J.D. Moir for Mr. Mohsen Teimouri
Mr. Gavin D.F. MacDonald for the Receiver

By the Court (Orally):

[1] Loon Lake Developments Limited ("Loon Lake") submits that it is entitled to a distribution of $50,000 from the Estate Funds. Mr. Teimouri takes objection to the proposed entitlement. Loon Lake says Mr. Teimouri is barred from making his objection by reason of *res judicata* and abuse of process.

[2] The Receiver, Deloitte Restructuring Inc. ("Receiver") who is both the Trustee in Bankruptcy and Court Appointed Receiver for Civic Homes Limited ("Civic Homes"), has completed the sale of Civic Homes' assets and sought the Court's approval of its proposed distribution of estate funds. The Receiver's Distribution Motion proceeded before Justice Jamie Campbell on February 26, 2021. The proposed distributions to Royal Bank of Canada ("RBC") and Dexter Construction Limited ("Dexter") were approved (unopposed). Mr. Teimouri, who was the sole Officer and Director and founder of Civic Homes contested the proposed $50,000 distribution to Loon Lake. Justice Campbell ordered the balance of the Receiver's Distribution motion to be adjourned. The question of whether Mr. Teimouri's objection to the Loon Lake distribution is barred by *res judicata* or abuse of process is the issue before me today.

Background

[3] Civic Homes and Loon Lake executed a Purchase Agreement dated July 13, 2013 with regard to Civic Homes' purchase of lands at Westphal, Halifax Regional Municipality. Civic Homes granted a Collateral Mortgage and a General Security Agreement to Loon Lake.

[4] In order to appreciate the parties' arguments on this motion, it is helpful to set out the chronology of the prior motions relating to the insolvency proceedings.

[5] On April 30, 2020 a court appointed Receivership Order was issued. RBC was the Applicant seeking an order to appoint Deloitte as receiver and manager of all of the assets, undertakings and properties of Civic Homes. Civic Homes consented to the Receivership Order. The Order, for example, at paragraph three, sets out the Receiver's authority with regard to sale of property.

[6] On July 7, 2020 an Order for Approval of Sales Process was granted by Justice Denise Boudreau. The Order approved the activities of the Receiver to the date of the Order, approved the proposed sale process for the assets of Civic

Homes as described in the First Report of the Receiver, and authorized and directed the Receiver to carry out the proposed sale process, and to take any and all steps to execute such documentation necessary or desirable to implement the terms of the proposed sale process. No appeal from this decision and order was filed.

[7] The Debtor, Civic Homes, and Mr. Teimouri had objected to the Approval of Sales Process motion. Prior to the Motion, on July 3, 2020, counsel for the Debtor Company and Mr. Teimouri, filed a submission with the court and also the affidavit of Mr. Teimouri and legal assistant, Ms. Corey, both sworn on July 3, 2020. The position put forward was that the court should not approve a forced sale of Civic Homes' real property prior to the outcome of its dispute with Loon Lake. The affidavit evidence filed in advance of the motion contained a copy of the Notice of Application in Court (Hfx. No. 498499) with Civic Homes and Mr. Teimouri, as the Applicants, and Loon Lake, as the Respondent. The dispute centers around a 2013 Agreement of Purchase and Sale between Civic Homes and Loon Lake and, specifically, the clauses providing for payment for golf privileges in the total amount of $4.05 million. The relief sought is a declaration that no amount is owing under the Agreement and security and that the General Security Agreement, Mortgage and Promissory Note all be discharged.

[8] A Motion for Directions in relation to the Application in Court (Hfx. No. 498499) was held on September 2, 2020 and the hearing of the matter was set for February 1 and 2, 2021.

[9] On October 2, 2020 the Receiver filed a Notice of Motion seeking a Sale Approval and Vesting Order approving the sale of assets by the Receiver, vesting title in such assets to the purchaser as well as a Bankruptcy Order against Civic Homes. In support of the motion, the Receiver filed a solicitor's affidavit of Mr. Gavin McDonald, a Second Report and a Confidential Supplemental Report to the Second Report of the Receiver, both dated October 1, 2020. Combined, the reports provide an overview of the three offers the Receiver received for Civic Homes' assets. The Supplemental Report states that "Loon Lake offered $6.9 million consisting of $2.9 million in cash and a credit bid for $4.0 million. The Loon Lake offer was not subject to any conditions." It further states:

> 7. Based on the information outlined above and contained in Appendix A and B, the Receiver recommends that the Loon Lake offer be accepted for the following reasons:

> a) The Loon Lake offer, when considering the value of their encumbrance, exceeds the fair market value of the asset as contained within the Real Estate Appraisal.
>
> b) Although the FH offer provides $300,000 of incremental cash (as compared to the Loon Lake offer), it is significantly less than total offer made by Loon Lake. Additionally, the only beneficiary of the incremental cash is Loon Lake.
>
> c) The Loon Lake offer does not contain any conditions.
>
> 8. On September 2, 2020 the receiver notified Loon Lake that its offer had been accepted pending the court granting the Sale Approval and Vesting Order.

[10] The Second Report attached the independent legal opinions regarding the security held by the secured creditors of Civic Homes including RBC, Dexter and Loon Lake. The Report indicates that on August 27, 2020 Cox and Palmer provided the Receiver with a security opinion which indicated that Loon Lake's security was valid and enforceable as against the assets of Civic. The opinion is attached to the report as Exhibit D. It is useful to quote from the Cox and Palmer opinion to provide context for the information that was before Justice Norton in relation to the Loon Lake security:

> OPINIONS
>
> Based upon and subject to the foregoing, and subject to the qualifications set forth hereinafter, we are of the opinion that the Security forms a valid and binding charge on the personal and real property described in the Security, enforceable against the Debtor and its estate in bankruptcy.
>
> In our review of the Security, we did note that the promissory note states that upon payment of the principal amount owing ($810,000) Civic shall be entitled to a release of the Collateral Mortgage. We are advised that this amount has been paid. However, the Agreement obligates the Debtor to make other payments, namely for golf privileges following sale of approved units or by September 24, 2020. This payment would, in our view, be caught by the definition of indebtedness in the Collateral Mortgage. Nevertheless, in the event that the Collateral Mortgage should have been released, this would impact the Security held by Loon Lake.
>
> With respect to the Debtor's assertion that the Agreement has been frustrated, we do not find a sufficient basis to reach that conclusion. The Agreement contemplates a sale of golf memberships for defined "Units". These Units have been created by the approved and recorded Development Agreement issued by Halifax Regional Municipality (Document No. 106827778). The obligation to pay the golf memberships is contingent

> (on a sale of a unit or the expiry of time) but such a contingent obligation is caught by the definition of indebtedness in the Collateral Mortgage.
>
> QUALIFICATIONS
>
> The opinions expressed herein are subject to the following qualifications:
>
> …
>
> 4. We are not sufficiently familiar with the relationship between the Debtor and Loon Lake to know whether any funds were actually advanced to the Debtor or whether the Debtor is actually indebted to Loon Lake;
>
> …
>
> 7. We express no opinion about the validity of any loans secured by the Security;…

[11] The Debtor company, Civic Homes, through counsel, filed written submissions and also advanced oral submissions in opposition to the motion by the Receiver to approve the sale. In the October 9, 2020 written submission, the debtor company noted that it had contested the sale process earlier. It referenced its Application in Court (Hfx. No. 498499), seeking declaratory relief that Lake Loon was not owed any money or alternatively owed a significantly reduced amount under its alleged security. It noted that the separate dispute continued to proceed through the litigation process. It argued that the majority of the purchase price by Loon Lake was to be paid by credit against secured debt, and that this presupposed Loon Lake would be successful in the litigation. It argued:

> Civic Homes may succeed in its application in court. If the sale as worded is approved, and if Loon Lake acquires the property, paying the majority of the agreed purchase price by using a credit on debt which turns out later not to have been owed, then an injustice will result unless it is clear that Loon Lake must repay any part of the credit which is over and above that which is, in time, determined to have been owing.
>
> These are not circumstances which were foreign to the receiver at the time it accepted Loon Lake's offer. That is not to suggest that the receiver acted improperly, but rather that, in the particular circumstances of this case, having accepted Loon Lake's offer without properly securing the purchase price was not commercially reasonable.
>
> …
>
> It is, therefore, submitted that the sale in its present terms ought not to be approved. If, however, it is made clear that Loon Lake must pay the balance of the purchase price to

> the extent that it is determined the credit exceeds what is owing by Civic Homes to Loon Lake, then we would agree that the sale is commercially reasonable, and should be approved

[12] This request by Civic Homes to incorporate a provision into the sale transaction was not accepted by the court. On October 13, 2020 Justice Scott Norton granted a Sale Approval and Vesting Order and a Bankruptcy Order. The Sale Approval and Vesting Order approved the sale of certain real property contemplated by an accepted offer constituting an agreement of purchase and sale dated August 24, 2020 between the Receiver and Loon Lake transferring real property owned by Civic Homes located at Lot A-1R Loonview Lane, Westphal, Nova Scotia and more particularly described in Schedule D to the Order. The Order contains the following provisions:

> 5. Upon the delivery of a Receiver's Deed and a Receiver's Certificate, substantially in the form attached as Schedule "**A**" hereto (the "**Receiver's Certificate**"), to the Purchaser or the Purchaser's assignee, nominee or designate as the case may be, and closing the transaction in accordance with the APS, all of Civic Homes Limited's and the Receiver's right, title and interest in and to the Purchased Assets shall vest absolutely in such Purchaser or the Purchaser's assignee, nominee or designate as the case may be, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise including, without limiting the generality of the foregoing any encumbrances or charges created by the Receivership Order issued April 30, 2020, and all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Nova Scotia), *Land Registration Act* (Nova Scotia), or any other personal or real property registry system (all of which are collectively referred to as the "**Claims**)."
>
> 6. With respect to the Purchased Assets as more particularly described within Schedule "**D**" hereof;
>
> > (i) the interests of Civic Homes Limited's and the Receiver shall vest in the Purchaser subject to any applicable permitted encumbrances, easements or restrictive covenants listed on Schedule "**C**" hereto and any obligations or liabilities assumed by the Purchaser, or the Purchaser's assignee, nominee or designate pursuant to the APS; and
> >
> > (ii) upon the registration of a Form 24 attaching a certified copy of this Sale Approval and Vesting Order and the Receiver's Certificate, with an applicable certificate of legal effect from the recording solicitor, in the applicable Land

> Registration Office or Registry of Deeds as the case might be, the Registrar for that Registration District shall remove and release all applicable registered encumbrances listed ~~in~~ Schedule "**B**" hereto, leaving in place only those permitted encumbrances, easements and restrictive covenants listed on Schedule "**C**" hereto.
>
> 7. For the purpose of determining the nature and priority of any Claims by operation of this Order, the net proceeds from the Transaction shall stand in the place and stead of the Purchased Assets, and from and after the closing of the Transaction, all Claims shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the closing of the Transaction…

[13] A transcript of the motion and Justice Norton's decision was filed as an exhibit to Mr. Kingston's affidavit on this motion. Counsel for the Receiver, when asked to respond to counsel for Mr. Teimouri's written submissions, indicated:

> **THE COURT**: What do you have to say in response to Mr. Moir's letter?
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> **MR. MACDONALD**: Well, Mr. Moir's letter, and I'll let him speak for himself. I mean, what he's basically concerned with is, if the portion of the purchase price, which is by way of credit bid, **is ultimately determined in a future proceeding not to be owing**, what the consequence of that is. **That's an issue which has – that the Receiver, as the Court's agent in effecting the sale, we don't really have a position on.** We've given our opinion. The Receiver has given its view on the security. Cox and Palmer has provided a legal opinion for the information of the Court as set out in the report. **But we do recognize that the quantum is something that's currently before the Court. Our position would be that that issue should not hold up the sale of the asset because it would cause great harm to other parties, and, in particular, the holder of the first Mortgage on the property, Royal Bank of Canada.**
>
> [Emphasis Added]

[14] Counsel for Mr. Teimouri made oral submissions, again taking issue with the fact that the majority of the purchase price was to be covered by an amount that Loon Lake claimed was owing under its security and asserted if it was not found owing, at issue would be what would happen to the rest of the purchase price. He submitted that it would be commercially reasonable that the balance of the purchase price be secured, at least to the extent that it was clear that it was owing - the transaction could close right away and the credit could be issued but if it turns out that the credit was never owing then it had to be clear the balance of the purchase price was owed back to Civic Homes.

[15] The Receiver then responded to the court that the offer from Loon Lake was significantly higher in its totality than any other offer and that it was unconditional

unlike some other offers and "so the analysis of the Receiver, whether you look at it, the credit side of it or just the cash side, you have an unconditional offer here with a significant amount higher than the next highest offer which has significant conditions. To our mind it's demonstrably the best offer and we continue to be of the view we should proceed."

[16] RBC indicated it was supportive of the process and was prepared to accept the Receiver's recommendation. Loon Lake also indicated that it supported the Receiver's recommendation arguing that a receiver's recommendations are entitled to significant deference by the court and that it should be only in the most exceptional circumstances that the court would disregard such a recommendation. Counsel for the secured creditor Dexter indicated they were not taking any position and would leave it to the court to determine.

[17] Justice Norton's decision states:

> … I'm satisfied, on the evidence and submissions made on behalf of the Receiver and the authorities cited, that I should extend them significant deference in their choice of the best bid to accept and that I am satisfied that they have dealt with the matter in a commercially reasonable manner and so that order will issue….

[18] Mr. Teimouri did not appeal Justice Norton's decision to grant the Sale Approval and Vesting Order.

[19] After hearing the Sale Approval Motion, Justice Norton heard the motion for a Bankruptcy Order. That Order was also issued on October 13, 2020 authorizing and directing the Receiver to make an assignment in bankruptcy in respect of Civic Homes in accordance with the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c.B-3 ("*BIA*").

[20] On February 26, 2021, as noted above, the Receiver brought a motion to approve the actions of the Receiver to that date; taxing and approving the accounts and expenses of the Receiver and its counsel; authorizing the distribution of funds from the Receiver to the Applicant, RBC, Lake Loon and Dexter Construction Company Limited; authorizing the distribution of the balance of the funds remaining in trust with the Receiver to Deloitte in its capacity as Trustee in Bankruptcy of Civic Homes; and discharging the Receiver. Mr. Teimouri took the position that he and Civic Homes intended to bring a proceeding challenging whether Loon Lake was owed anything on its security. He said if the $50,000 was paid to Loon Lake and later they were successful in the proceeding then Civic

Homes could have difficulty recovering the overpayment. He further said that it was their position that Justice Norton made no ruling in his October 13, 2020 decision on the validity of the Loon Lake security. I note that at the time of this submission, Civic Homes was bankrupt and Deloitte was the Trustee in Bankruptcy. Loon Lake took the position that the issue had already been determined by the court, in that the validity of the Loon Lake debt and security were before the court as part of the Sale Approval Motion in October of 2020 - Loon Lake's offer was comprised in part of a credit against the secured debt owed by the Company to Loon Lake. It further noted that the court had the benefit of the Receiver's recommendation supported by the independent legal opinion of the Receiver's counsel regarding the validity of the Loon Lake debt and security, which was disclosed to both the court and to creditors. It said that the current proposed distribution of $50,000 to Loon Lake was a residual portion of the same debt and security as previously accepted by the court.

[21] In response to Civic Homes written submission concerning the proposed action against Loon Lake, counsel for the Receiver in a written submission of February 25, 2021 asked the court to grant the requested relief without further delay and stated:

> … we would draw to the Court's attention the fact that these matters have been raised by counsel for Mr. Teimouri at each stage of this proceeding and yet that litigation is no further ahead. The Trustee provided written correspondence to Mr. Teimouri's counsel dated December 17, 2020 giving the Trustee's consent to an application by Mr. Teimouri pursuant to the *Bankruptcy and Insolvency Act*, s.38 allowing him to bring an action against Loon Lake Developments in the name of the bankrupt and with respect of the obligations reiterated once again in his counsel's submissions. To the knowledge of the Receiver and based on the affidavit of Mr. Teimouri, no action has been commenced since the correspondence of the Trustee. Given this lack of action by Mr. Teimouri, we submit it is unreasonable to delay the distribution of funds and discharge of the Receiver. These matters and issues have been known for some time and we submit there is a lack of prompt action by Mr. Teimouri…

[22] The secured creditor Dexter filed a written submission on February 25, 2021 taking the position that any issue between Loon Lake and Civic Homes should not prejudice the interests of the other secured creditors and that their claim should be paid. They further submitted that should the court determine there was validity to Civic Homes' argument then the other secured creditors should be paid and only the funds related to Loon Lake's claim be withheld from disbursement.

[23] As noted above, the order issued by Justice Campbell approved the distributions to the Applicant, RBC, and to Dexter, lifted the confidentiality order in relation to the Second Report of the Receiver and adjourned the balance of the motion.

Evidence on this motion

[24] Loon Lake filed a solicitor's affidavit of Mr. Stephen Kingston sworn on April 8, 2021 and written submissions. Mr. Teimouri filed an affidavit of Ms. Lindsay Corey, legal assistant sworn on April 23, 2021 and written submissions. Counsel for the Receiver, Deloitte, filed written submissions. There was no cross examination of the Affiants.

Position of the Parties

Loon Lake

[25] Loon Lake argues that Mr. Teimouri's objections to the proposed distribution of $50,000 to Loon Lake are governed by *res judicata* and that his objections constitute an abuse of process. It says the validity of the Loon Lake debt and security were squarely before the court as part of the Sale Approval and Vesting motion in October of 2020 and that the bulk of the Loon Lake offer consisted of a credit against the secured debt owed by Civic Homes to Loon Lake. They submit that when the court considered the prior motion it had the benefit of the Receiver's recommendation and, specifically, its recommendation at paragraph 7 (a) and (b) of the Confidential Supplemental Report, which speaks to the value of the offer exceeding fair market value. They say this recommendation was supported by an independent legal opinion of the Receiver's counsel regarding the validity of the Loon Lake debt and security. They say as the $4 million credit against secured debt was an essential term of the Loon Lake offer, the evaluation of commercial reasonableness necessarily required an assessment of the enforceability of the underlying secured debt both by the Receiver and the Court. They further submit that the order could not have issued without the court having directed its mind to the validity and enforceability of Loon Lake's secured debt, and having been satisfied with the result. It says the court was aware of the collateral proceeding and chose to accept the offer which included a $4 million credit. It further says Mr. Teimouri's objections were heard by the court and were rejected. Loon Lake says the court could not have accepted the bid of $6.9 million without accepting the value of the debt being presented by Loon Lake.

[26] They say the Sale Approval and Vesting Order, as issued, was a final judicial determination of the rights of the relevant parties as regards the assets which were subject to the sale and that Mr. Teimouri is bound by that result. They further say the proposed sale of the assets of Civic Homes pursuant to the Loon Lake offer was approved by the court, has been completed, no appeal was filed and the appeal period has expired**.** They say the current proposed distribution to Loon Lake of $50,000 is the residual portion of the same debt and security as previously accepted by the Court on the Sale Approval Motion.

Mr. Teimouri

[27] Mr. Teimouri says that Civic Homes did not contest the Receiver's choice to accept Loon Lake's bid as Loon Lake had offered a higher purchase price than the other bidders and the offer was unconditional. It says one of the other offers was for less cash and the other was for slightly more cash, not accounting for Loon Lake's alleged $4 million credit, making that offer unattractive even if the $4 million credit were eventually found not to have been owing because Loon Lake's offer was unconditional. It says that the Loon Lake offer was the most commercially reasonable offer to accept.

[28] It submits that it was abundantly clear from the submissions before Justice Norton that Civic Homes intended to carry on its proceeding against Loon Lake and if it were successful in that proceeding it expected to seek repayment of the $4 million of the purchase price which Loon Lake had agreed to pay by credit it had no power to issue.

[29] Counsel for Mr. Teimouri notes that after the bankruptcy order was issued, the Application in Court could no longer proceed and it was agreed between counsel that the Application in Court would be withdrawn (notwithstanding that the lawsuit had by then become a claim of the Trustee) and that Mr. Teimouri would be permitted to bring a motion under s. 38 of the *BIA* to permit him to continue the claim against Loon Lake. They further say that at the first meeting of creditors on November 10, 2020, the Trustee determined it would not pursue the Civic Homes' claim against Loon Lake and that Mr. Teimouri should be permitted under s.38 to continue the claim. A motion to that effect was adopted at the creditors' meeting.

[30] A motion was filed with the court on March 23, 2021 to authorize Mr. Teimouri pursuant to s.38 of the *BIA* to bring a proceeding but was withdrawn on

March 29, 2021 with the consent of the Trustee in Bankruptcy. Counsel for Mr. Teimouri says they expect to be in a position to file the s.38 motion very quickly and that it would be sensible to wait until Loon Lake's *res judicata* and abuse of process positions are adjudicated.

[31] In relation to Loon Lake's position that the matter is *res judicata*, Mr. Teimouri says that it does not follow from Justice Norton's decision to approve the sale, without requiring the term they sought to be added, that one can conclude the court considered and accepted the validity of the Loon Lake debt and security.

[32] Mr. Teimouri submits that had Justice Norton scrutinized the Receiver's legal opinion as Loon Lake alleges he must have done, he would have found that after the opinion that the mortgage etc. formed a valid and binding charge and tied the golf privilege payments to the indebtedness, it then goes on to qualify the opinion stating in the qualifications section:

> Nevertheless, in the event that the Collateral Mortgage should have been released, this would impact the security held by Loon Lake.

[33] They say that this acknowledges the opinion would be incorrect if the mortgage should have been released, which is what Civic Homes was in the process of arguing in its proceeding against Loon Lake. It says that the legal opinion addresses the assertion that the agreement was frustrated but does not address the other grounds which Civic Homes was arguing in the proceeding. They submit it was very clear during the motion that the question of whether anything remained owing to Loon Lake was to be decided in the more complex proceeding which was ongoing.

[34] They further say that it is irrelevant that Civic Homes did not appeal the vesting order. Mr. Teimouri says that he is not suggesting the vesting order failed to vest title with Loon Lake free and clear of encumbrances. They say they agree that the sale should have taken place and vested title with the purchaser free and clear of encumbrances. What is in dispute is the amount if any which is owed, not whether the security was valid. They say there was no finding or pronouncement made by Justice Norton on the question of whether anything remained owing to Loon Lake. They point to the Sale Approval and Vesting Order and note that it says nothing about the amount, if any, Loon Lake was owed.

[35] Mr. Teimouri says that there has been no abuse of process. He has not been attempting to reargue the same issues. He says it would have been impossible to

determine the merits of the lawsuit in General Chambers. It would have required an adjournment for scheduling several days of hearings after completion of discovery examinations. He says the fact the separate proceeding was already initiated and well underway was raised at the Sale Approval motion. He says the essence of the claim against Loon Lake neither directly nor indirectly contradicts the Sale Approval and Vesting Order. He says they asked the court to require a term in the sale transaction which would have made it less difficult to recover its money if eventually successful against Loon Lake and that request was denied.

[36] They say that everything written and said in the Sale Approval motion pointed to an expectation that the claim would proceed in the other court file, not in the receivership file and that nothing inconsistent with such an expectation was said in or out of court until after the Order was issued. He says that the stakes of Civic Homes' claim against Loon Lake were far too high to be decided in General Chambers and that Civic Homes never disputed that Loon Lake's bid was the best among the three available for consideration, it raised only that it would have been more commercially reasonable of the Receiver in light of Civic Homes' separate ongoing proceeding against Loon Lake to negotiate an additional term requiring the repayment of the credit to the extent the debt to Loon Lake would ultimately be found not to be owing. The court disagreed and approved the sale to Loon Lake on the terms of its existing offer.

The Receiver, Deloitte

[37] The Receiver takes the position that Mr. Teimouri is not barred from making his objection because of the principle of res judicata nor does it consider his objection to be an abuse of process. It says that as counsel to the Receiver, Cox and Palmer issued an opinion on the validity of security held by Loon Lake within the receivership process. The opinion concluded that Loon Lake had a valid and enforceable charge against the assets of the Respondent; however, the Receiver notes the opinion was expressly limited to a review of the documents and no independent investigations were completed and was subject to qualifications including the following:

> 4. We are not sufficiently familiar with the relationship between the Debtor and Loon Lake to know whether any funds were actually advanced to the Debtor or whether the Debtor is actually indebted to Loon Lake;
>
> …

7. We express no opinion about the validity of any loan secured by the Security;

[38] The Receiver further notes that the opinion referenced an amount owing of $810,000 under the promissory note of March 27, 2015 but the amount had been paid as of the date of the opinion.

[39] The Receiver says it is important to consider the nature of the debt. Loon Lake's claim of money owing arises from breach of contract. It is not a matter of simply doing some accounting, as it turns on the value of the golf memberships and this is something that should be allowed to be adjudicated.

[40] The Receiver submits that the Loon Lake offer was the most desirable as all of the other offers contained conditions, some of which were beyond the control of the Receiver, whereas the Loon Lake offer was an "as is where is" offer. The Receiver states that it did not make any submissions to the court as to the quantum owed to Loon Lake, rather it submitted that Loon Lake's unconditional $2.9 million cash portion was superior especially since any incremental consideration would have flowed *prima facie* to Loon Lake. The Receiver says the distribution of proceeds was a matter to be dealt with at a later time. In short, the Receiver's position is that the issue of the validity and enforceability of the security of Loon Lake has been decided but there's been no ruling as to the quantum owed, or alternatively if such an implicit ruling has been made that it was limited to the $4 million credit rather than the additional $50,000 claimed by Loon Lake in their proof of claim dated January 8, 2021.

Analysis

[41] This motion arose as a result of the Receiver proposing various distributions to secured creditors, which included an amount of $50,000 to Loon Lake. Mr. Teimouri took issue with any payment to Loon Lake given its position that the amount owing, if any, to Loon Lake had not been determined. The Receiver states in its submission that it had reviewed Loon Lake's Proof of Claim dated in January of 2021 which identified $50,000 as the debt amount still owing. It says the Receiver's recommendation to distribute that outstanding amount to Loon Lake was based on review of the proof of claim; lack of any objection at that time; and the absence of communication or filing by Mr. Teimouri following the Sale Approval and Vesting order, which would indicate the amount outstanding was in dispute.

[42] Before I turn to the issue of *res judicata*, I note there is no dispute among the parties as to the validity and enforceability of the Loon Lake security. Nor is there any dispute that title vested with the Loon Lake free and clear of encumbrances. Therefore, I need not comment further in this regard.

Res Judicata

[43] Loon Lake submits that the validity of its debt and security were squarely before the court on the sale approval motion and the doctrine of *res judicata* applies. It says that the order was a final judicial determination of the rights of the relevant parties as regards the assets which were subject to the sale and that Mr. Teimouri is bound by that result. The Nova Scotia Court of Appeal in ***Hoque v. Montréal Trust Co. of Canada***, 1997 NSCA 153 considered *res judicata* and stated as follows:

> 20 *Res judicata* has two main branches: cause of action estoppel and issue estoppel. They were explained by Dickson, J. (as he then was) in *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.) at 555:
>
> > .... The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a Court of competent jurisdiction. ..... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins, J., of the High Court of Australia in *Hoysted et al. v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537 at pp. 560-1:
> >
> > > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").
>
> 21 ***Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action.** This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": ibid at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

> …
> 38 Although many of these authorities cite with approval the broad language of *Henderson v. Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide**. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, *should* have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.**
>
> (Emphasis added)

[44] Mr. Teimouri agrees that the sale should have taken place and that it vested title with the purchaser free and clear of encumbrances. He says what is in dispute is the amount, if any, which is owed not whether the security itself is valid.

[45] In *9-Ball Interests v Traditional Life-Sciences Inc*., 2012 ONSC 2788, the court indicated there are a number of factors to consider in assessing a proposed sale of a debtor's assets by a receiver:

> 27 As Morawetz J. observed in *Tool-Plas Systems Inc., Re* [2008 CarswellOnt 6258 (Ont. S.C.J. [Commercial List])], while a "quick flip" transaction is not the usual form of transaction by a receiver, in certain circumstances it may the best, or only, alternative. In such circumstances courts still have applied the principles out in *Royal Bank v. Soundair Corp.*: a court should consider (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently, (ii) the interests of all parties, (iii) the efficacy and integrity of the process by which offers are obtained, and (iv) whether there has been unfairness in the working out of the process.

[46] Did Justice Norton, the presiding judge in General Chambers, make a determination as to an amount owing under the Security? In my view, the Record indicates he did not. I make this determination for the following reasons. First, there was no clear evidence before Justice Norton upon which to make such a finding. The sum total of the information was what was contained in the Receiver's Reports. The information that was before the court were the offers, the real estate appraisal and the Cox and Palmer legal opinion and that legal opinion included specific qualifications.

[47] The legal opinion from Cox and Palmer while providing an opinion that the Loon Lake security formed a valid and binding charge on the personal and real property enforceable against the debtor and its estate in bankruptcy, did not reach any conclusion as to the amount owed. In fact, it specifically indicates that the promissory note states upon payment Civic Homes shall be entitled to a release of the collateral mortgage and that Cox and Palmer were advised the amount had been paid. It goes on to state that in the event that the collateral mortgage should have been released, this would impact the security held by Loon Lake. In addition the opinion is specifically qualified by the following statements: "We are not sufficiently familiar with the relationship between the Debtor and Loon Lake to know whether any funds were actually advanced to the debtor or whether the debtor is actually indebted to Loon Lake" and "we express no opinion about the validity of any loan secured by the security".

[48] Secondly, everyone participating in the motion was aware of the separate action brought by Civic Homes and Mr. Teimouri against Loon Lake (Hfx. No. 498499). During the motion, counsel for the Receiver, when questioned about Mr. Teimouri's written submission said "… That's an issue which has that the Receiver, as the court's agent in effecting the sale, we don't really have a position on. We've given our opinion. The Receiver has given its view on the security. Cox and Palmer has provided a legal opinion for the information of the court as set out in the report. **But we do recognize that the quantum is something that's currently before the court.** Our position would be that that issue should not hold up the sale of the asset because it would cause great harm to the other parties, and, in particular, the holder of the first mortgage on the property, RBC".

[49] Thirdly, during the hearing of the motion, counsel for the Receiver indicated to the court that, even without the credit of $4 million, the offer from Loon Lake was commercially reasonable because it included cash of $2.9 million and no conditions. The other offers contained conditions. The next highest offer was in the total amount of $3.2 million cash with various conditions including environmental inspections, discussions with HRM and the purchaser obtaining financing. I recognize the Receiver, in the Confidential Supplemental Report stated " The Loon Lake offer, when considering the value of the encumbrance, exceeds the fair market value of the asset as contained within the Real Estate appraisal." In light of the Record, these were an unfortunate use of words. During the motion, counsel for the Receiver qualified or further explained this prior statement of value by acknowledging the quantum of the debt was before the court in the collateral

proceeding and pointing out to the court that if one looked at the cash side of the offer, and that is was an unconditional offer, it was still the best offer.

[50] Counsel for the Receiver said "… it is unconditional, unlike some other offers, and so the analysis of the Receiver, **whether you look at it, the credit side of it or just the cash side, you have an unconditional offer here with a significant** amount higher than the next highest offer which has significant conditions. To our mind, it's demonstrably the best offer and we continued to be of the view we should proceed."

[51] Of course, I cannot determine what was in Justice Norton's mind when he made his decision to extend deference to the Receiver's choice of the bid to accept, but the decision as set out in the transcript does not reference the collateral proceeding nor confirm an amount owing as between Civic Homes and Loon Lake. I am satisfied that a determination of the amount owing as between Civic Homes and Loon Lake is not *res judicata*. No amount owing was determined by the Sale Approval motion and resulting order. Justice Norton chose to accept the Receiver's recommendation stating that the court was satisfied it should extend the Receiver significant deference in their choice of the best bid to accept and that he was satisfied the Receiver had dealt with the matter in a commercially reasonable manner. Whether Loon Lake was owed zero or $4 million, the Receiver was accepting the best offer from a commercially reasonable perspective because the $2.9 million in cash with no conditions (and potentially the credit offered being of a value up to $4 million) was the best offer when compared to the offer of $3.2 million with significant conditions. That is the answer to Loon Lake's proposition that the court could not have accepted the bid without accepting the value of the $4 million credit. A bid with a cash value of $2.9 million and no conditions, plus a credit with a potential value of up to $4 million, was the best offer of the three offers presented.

[52] It is not as simple as saying that Loon Lake, as a secured creditor, valued the debt at $4.05 million and used $4 million as a credit in its purchase so now it is owed $50,000. The motion Record does not support there having been a determination by Justice Norton of Loon Lake being owed $4.05 million. There is no question the offer was presented by Loon Lake as being $6.9 million to purchase the assets (2.9 million in cash and a $4 million credit) and the Receiver accepted this offer subject to court approval. However, the assessment of this offer did not include a decision by the court that as a result of offering a credit of $4 million, that amount was determined to be due and owing. As the Receiver said:

the issue of the amount owing was before the court in the separate proceeding and whether with the credit or without the credit, the Loon Lake offer was the best offer. It was commercially reasonable for the Receiver to accept it.

[53] After the motion, those involved clearly understood the matter would continue to be litigated by Mr. Teimouri, as at the First Creditors' meeting the ongoing litigation was discussed and there was agreement to consent to the s.38 application under the *BIA*. I am satisfied on the totality of the Record that there has been no determination as to whether Loon Lake was owed zero or $4.05 million or something in between under the Agreement and security.

Vesting Order

[54] The use of vesting orders allows for the assets of an insolvent to be converted into money early on in the process and prior to the assets diminishing in value. Typically, at this early stage competing creditor claims have not yet been adjudicated. The process usually provides for the value that is received for the assets to be substituted for the assets themselves and then the stakeholders can proceed to make their claims for these maximized funds, rather than sit back and watch the assets deteriorate while they vie for their share. In these unusual circumstances, I see no issue with the assets being sold free and clear of encumbrances and then later, the amount owing, if any, being determined in the collateral proceeding.

[55] After consideration of the Record including all of the evidence, it is clear to me that the court did not make a determination that the $4 million credit offered by Loon Lake was in fact due and owing.

Abuse of Process

[56] Loon Lake says that in the alternative Mr. Teimouri's attempt to continue to challenge Loon Lake's debt and security constitutes an abuse of process of the court. The leading authority on the doctrine of abuse of process is the Supreme Court of Canada's decision in ***Toronto (City) v. C.U.P.E., Local 79***, 2003 CarswellOnt 4328. It stated:

> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), at para. 55, *per* Goudge J.A., dissenting (approved

> [2002] 3 S.C.R. 307, 2002 SCC 63 (S.C.C.))). Goudge J.A. expanded on that concept in the following terms, at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. *It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel*. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> >
> > *One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined*.
> > [Emphasis added.]
>
> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *F. (K.) v. White* (2001), 53 O.R. (3d) 391 (Ont. C.A.), *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.), and *Bjarnarson v. Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), affirmed (1987), 21 C.P.C. (2d) 302 at 312 (Man. C.A.)). This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is, in effect, non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-625).

[57] Mr. Teimouri has not brought a collateral attack on the Sale Approval and Vesting Order. He clearly states he takes no issue with the decision to accept Loon Lake's offer to purchase the property nor the fact that the property has vested with Loon Lake free and clear of any encumbrances. His issue is solely with respect to what, if any, amount is owing pursuant to the agreements in place between Loon Lake and Civic Homes.

[58] As noted above, everyone participating in the motion, was aware of the separate proceeding wherein Civic Homes and Mr. Teimouri claimed nothing was owing to Loon Lake under the Agreement and security.

[59] Therefore, in answering the question-would Civic Homes' claim, if allowed to proceed, effectively undermine the validity and finality of Justice Norton's order and thereby be an abuse of process - the answer is no. The October motion was to

consider the Receiver's request for a Sale Approval and Vesting Order, it was not to determine the merits of the collateral proceeding being whether the credit of $4 million, offered as part of the purchase price by Loon Lake, was in fact an amount actually due and owing. That is not to say this could never happen on such a motion but on the current facts it did not. It was not a determination made by the court.

[60] Mr. Teimouri and Civic Homes did not ask the court in the current proceeding to make a determination as to its claim against Loon Lake, nor should they have. I agree with Civic Homes' submission that having the issue of whether anything was owing to Loon Lake determined within the insolvency proceeding would have sidelined the sale which was not in anyone's best interest. Counsel for the Receiver pointed out that the Development Agreement for the property was expiring and a lengthy delay would, therefore, impact the value of the assets. The determination of the amount, if any, owing required a full hearing or trial which would significantly slow down the fulfilment of the Receiver's mandate. Again this was not in anyone's best interest. Putting everything on hold while a Hearing of the Application in Court took place would not have been consistent with the objective of preserving and maximizing the value of the assets. Prior to the bankruptcy, Civic Homes and Mr. Teimouri had brought an Application in Court to determine what amount if any was owing to Loon Lake. I note that subsequent to the October Bankruptcy Order, at the first meeting of creditors on November 10, 2020 they discussed the "ongoing litigation" between Civic Homes and Loon Lake, and the request by Mr. Teimouri for the Trustee to consent to a s.38 application under the *BIA* and it was ultimately decided that the Trustee should consent.

[61] Nothing in this decision should be taken as expressing an opinion on the merits of Civic Homes'/ Mr. Teimouri's claim disputing anything is owing to Loon Lake. Further, Mr. Teimouri asked the court, during the sale approval motion, to add a clause regarding repayment by Loon Lake if the separate action were to be successful. The court refused this request. What that means, if anything, in relation to the separate proceeding is not for me to determine today.

Conclusion

[62] In conclusion, the amount owing has not been adjudicated and, therefore, *res judicata* is not applicable. In addition there is no abuse of process in allowing Civic

Homes to raise its objection to the distribution of $50,000 to Loon Lake and seek a determination of what amount, if any, is owing to Loon Lake.

Jamieson, J.

(Attached to this decision is a copy of the resulting Order.)

Form 78.05

2019

Hfx No. 494188

Supreme Court of Nova Scotia
In Bankruptcy and Insolvency

SUPREME COURT
OF NOVA SCOTIA
JUN 28 2021
HALIFAX, N.S.

IN THE MATTER OF: the Receivership of Civic Homes Limited

Between:

Royal Bank of Canada

Applicant

-and-

Civic Homes Limited

Respondent

ORDER

BEFORE THE HONOURABLE JUSTICE DARLENE JAMIESON IN CHAMBERS

WHEREAS Deloitte Restructuring Inc. in its capacity as the court appointed receiver of the Respondent (the "**Receiver**") filed a Notice of Motion on February 18, 2021 (the "**Distribution Motion**") seeking approval of the actions of the Receiver; approval of accounts and expense; distribution of funds and discharge of the Receiver;

AND WHEREAS following a hearing in chambers before Justice Jamie S. Campbell on February 26, 2021, an order was issued approving distribution of funds to the Applicant and Dexter Construction Company Limited and adjourning the balance of the motion;

AND WHEREAS following a Motion for Directions held on March 12, 2021, a hearing was heard on June 22, 2021 in respect of the preliminary objections by Loon Lake Development Limited ("**Loon Lake**") that the arguments advanced by Mr. Mohsen Teimouri, the principal of the Respondent ("**Mr. Teimouri**") were barred by reason of *res judicata* and constituted an abuse of process (the "**Preliminary Objections**");

UPON HEARING and considering the written and oral submissions by Gavin Macdonald on behalf of the Receiver, Stephen Kingston on behalf of Loon Lake, and Matthew Moir on behalf of Mr. Teimouri, the Court issued an oral Decision on June 22, 2021 dismissing the Preliminary Objections raised by Loon Lake;

IT IS HEREBY ORDERED that:

1. Mr. Teimouri's objections to the distribution of funds by the Receiver to Loon Lake are not barred by the doctrine of *res judicata* and do not constitute an abuse of process.

Form 78.05

2. Loon Lake shall pay to Mr. Teimouri forthwith costs as regards the June 22, 2021 Motion in the amount of One Thousand Five Hundred Dollars ($1,500.00).

3. Loon Lake shall pay to the Receiver forthwith costs as regards the June 22, 2021 Motion in the amount of One Thousand Five Hundred Dollars ($1,500.00).

4. The Receiver, in its capacity as the licensed insolvency trustee of the Respondent, shall admit or disallow the proof of claim filed by Mr. Teimouri in the bankruptcy on or before July 9, 2021.

5. If Mr. Teimouri's proof of claim is allowed, he shall file his motion pursuant to Section 38 of the *Bankruptcy and Insolvency Act* on or before July 23, 2021 (the "**Section 38 Motion**").

6. Mr. Teimouri shall commence the action authorized by the Section 38 Motion against Loon Lake within 10 days of the issuance of order resulting from the Section 38 Motion.

7. Following the commencement of an action by Mr. Teimouri, the Receiver has leave to set down a hearing on the balance of their Distribution Motion and amend the original Discharge Motion to seek authorization to pay the disputed sum of Fifty Thousand Dollars ($50,000.00) into Court.

DATED at Halifax, in the Province of Nova Scotia, this 28 day of June, 2021.

Prothonotary
AMANDA HAWBOLDT
Deputy Prothonotary

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