

**ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)**

**IN THE MATTER OF THE BANKRUPTCY OF
GALTY B.V.
HAVING ITS HEAD OFFICE IN THE CITY OF AMSTERDAM, NETHERLANDS**

**FIRST REPORT TO THE COURT
SUBMITTED BY MNP LTD.**

FEBRUARY 27, 2020

I. INTRODUCTION

1. On March 11, 2019, Galty B.V. (“**Galty**” or the “**Company**”) made an assignment in bankruptcy, which was accepted by the Office of the Superintendent of Bankruptcy the same day. MNP Ltd. (the “**Trustee**”) was appointed to act as Licensed Insolvency Trustee of Galty’s bankruptcy estate, subject to affirmation by the creditors at the First Meeting of Creditors.
2. On March 13, 2019, the Notice of Bankruptcy and First Meeting of Creditors (the “**Notice**”), a list of the creditors and a proof of claim form, along with a proxy were sent to all known creditors of Galty. Pursuant to subsection 102(4) of the *Bankruptcy and Insolvency Act* (“**BIA**”), a Notice of Bankruptcy was published in the Friday, March 15, 2019, edition of the *Toronto Sun* newspaper. A copy of the Notice and Statement of Affairs (“**SOA**”) are attached as **Appendix “A”**.
3. The First Meeting of Creditors (the “**Meeting**”) was held on April 1, 2019 and was presided over by Sheldon Title. At the Meeting, the creditors resolved to affirm the Trustee’s

appointment and to appoint five Inspectors. A copy of the minutes of the Meeting are attached as **Appendix “B”**.

II. RESTRICTIONS

4. In preparing this Report and making the comments herein, the Trustee has been provided with, and has relied upon, certain unaudited, draft and/or internal financial information, the Company’s books and records, discussions with employees and management of the Company and information from other third-party sources (collectively, the **“Information”**). Except as described in this Report, the Trustee has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards of the Chartered Professional Accountants of Canada.

III. PURPOSE OF THIS REPORT

5. The purpose of this Report is to provide the Court with:
 - (i) information related to Galty, its assets and liabilities; and
 - (ii) the Trustee’s recommendations that the Court issue an order, *inter alia*, directing Aird & Berlis LLP (**“A&B”**) release to the Trustee the balance of the Sale Proceeds (defined below) after deducting the Retained Amount (defined below), such funds hereafter referred to as the **“Remaining Sale Proceeds”**.

IV. BACKGROUND INFORMATION

6. Galty was incorporated on July 31, 1979 as a limited liability company under the laws of the Netherlands and previously operated as a property investment, property rental and holding company. As detailed in the OTHER MATTERS section, at the date of bankruptcy, the Company was involved in litigation (the **“Litigation”**).
7. The Trustee has been advised by Galty’s designated officer, Harold Pothoven, that the Company’s bankruptcy was as a result of the ongoing legal costs associated with defending the Litigation.

Assets

8. The Company's assets, their estimated realizable value according to its SOA and the recoveries to date, are as follows:

Description	Estimated Realizable Value (\$)	Amount Recovered (\$)
Cash in Bank	1,539	1,464
Funds Held in Trust by A&B (the " Sale Proceeds ") -see below	591,503	0
Costs Award – Victor M. Seabrook & Timothy Seabrook, trustees	8,000	0
Cause of Action	6,752,100	0

Sale Proceeds

9. Galty owned a property with a municipal address of 88 Elm Avenue, Toronto (the "**Property**"). The Property was sold in April 2015. Portions of the proceeds of sale were applied to satisfy payment of the mortgage, real estate commissions, utilities and remittance to CRA of taxes withheld by a non-resident on the sale of the Property and other miscellaneous disbursements.
10. A&B is holding the Sale Proceeds, being the balance of the proceeds of sale less the payments noted above, in its trust account. As part of the Litigation, Victor M. Seabrook ("**Victor**") and Timothy Seabrook ("**Timothy**"), trustees of the Avenue Road Trust ("**ART**") and Isobel R. Seabrook ("**Isobel**" and together with Victor and Timothy hereinafter collectively referred to as the "**Plaintiffs**"), by her litigation guardian Timothy, asserted a trust claim over the Sale Proceeds.
11. Upon its appointment, the Trustee served A&B with its notice of its appointment and its interest in the Sale Proceeds. A&B responded by noting that the Court has previously ordered that the Sale Proceeds remain in A&B's trust account pending further Court order.

Goldman Sloan Nash & Haber (“**GSNH**”), the Trustee’s counsel, requested that no steps be taken by A&B in respect of the Sale Proceeds without consent of the Trustee or further order on notice to the Trustee. On March 29, 2019, A&B responded to the Trustee and GSNH to advise that, *inter alia*:

- (i) Not all of the Sale Proceeds are being held by A&B in trust on behalf of Galty;
- (ii) Pursuant to a written direction from Galty to A&B (the “**Direction**”), which written direction specifically authorizes and directs A&B to apply a portion of the funds in A&B’s possession on account of A&B’s outstanding legal fees and disbursements for professional fees rendered by A&B to Galty (“**A&B’s Professional Fees and Disbursements**”), the portion of the funds in the possession of A&B equal to the amount of A&B’s Professional Fees and Disbursements is the property of A&B, not the property of Galty, the Trustee or any other person; and
- (iii) Certain parties alleged an interest in certain amounts of the above-mentioned funds and commenced certain legal proceedings in respect of this allegation. A&B subsequently made an undertaking to not release certain amounts of these funds in certain circumstances, which undertaking was subsequently recognized and confirmed by Orders of the Ontario Superior Court of Justice.

12. In respect of the A&B Professional Fees and Disbursements, A&B provided four invoices, dated July 27, 2017 in the amount of \$44,903.93 (the “**July, 2017 Invoice**”); November 20, 2018; December 31, 2018; and April 10, 2019, respectively, which reflect an aggregate balance of \$66,922.01. The Trustee has not determined the extent to which the A&B Professional Fees and Disbursements are subject to a valid Solicitor’s Lien and/or subject to the Direction, or the extent to which the amounts claimed are properly owing by the Company.

Property Claim filed by Avenue Road Trust

13. On March 29, 2019, after issuing ART a Notice by Trustee to Prove Claim pursuant to s.81(4) of the BIA, the Trustee received a Reclamation of Property form from ART asserting a trust claim over all of Galty’s assets, including the Sale Proceeds. In support

of its claim, the claimant provided the Amended Amended Amended Statement of Claim filed by the Plaintiffs, by her litigation guardian Timothy, as Plaintiffs and Galty, et al, as Defendants. A copy of this claim is attached as **Appendix “C”**.

Trustee’s Response to ART’s Property Claim

14. Section 81(2) of the BIA requires the Trustee to determine the claim within 15 days of the Meeting, which in this case was on April 1, 2019. That determination was therefore required by April 16, 2019.

15. After reviewing the materials submitted with the claim, on April 15, 2019, the Trustee served, via registered mail, ART with Notice of Dispute. In issuing the Notice of Dispute, the Trustee advised ART’s counsel that it would be prepared to review any further additional particulars and supporting evidence that ART wishes to also provide. In addition to any further documentation in support of ART’s claim that it may wish to provide, the Trustee requested it consider submitting:

- (i) The evidence on which the allegation is made in the Amended Amended Amended Statement of Claim attached as Exhibit “C” to the claim for reclamation of property at para. 31 that the 2008 refinancing was impressed by a trust, such that the Sale Proceeds are also said to be subject to a trust.
- (ii) The basis on which the claim for the reclamation of property also claims all other assets of the bankrupt as disclosed on Exhibit “B” to the affidavit (i.e. beyond the Sale Proceeds) and the associated evidence.

16. The Trustee also asked ART to consider delivering any further materials within the statutory 15-day appeal period referred to in the Notice.

Appeal of the Trustee’s Disallowance

17. On April 30, 2019, ART’s counsel served the Trustee’s counsel with Notice of Appeal from Disallowance of Claim by Trustee (“**NOA**”). The NOA referenced that in support of its application are the affidavits of Victor sworn on the 25th and 29th days of March 2019 and the Affidavit of Bruce G. Buckley sworn the 17th day of December 2018. The

affidavits of March 25, 2019 and December 17, 2018 were filed with the unsecured proof of claim filed by the Plaintiffs in Galty's bankruptcy.

18. The appeal was scheduled for a hearing on July 23, 2019 before Master Jean of the Ontario Superior Court of Justice (In Bankruptcy). Prior to the hearing, counsel for the Plaintiff requested the Trustee consent to an adjournment to allow it an opportunity to submit new evidence and offered to pay \$2,000 in costs. The Appellant's counsel did not have this evidence with it at the hearing. The Trustee did not agree to the adjournment. The Appellant requested an adjournment and intended to bring a motion to file further evidence. The Master recused herself of the matter on the basis of a conflict, without disclosing the nature of the conflict and ordered that the motion proceed to September 3, 2019. The Master also adjourned the appeal to September 3, 2019 for a motion by the Appellant to adduce fresh evidence and for scheduling the appeal. A copy of the Court's endorsement is attached as **Appendix "D"**.
19. Subsequent to the July 23, 2019 hearing, on August 20 and 21, 2019, ART, through its counsel offered to settle ("**Offer to Settle**") the dispute over ART's claim to reclaim Galty's property by abandoning its appeal of the Trustee's decision to dispute ART's entitlement to reclaim Galty's property without costs, provided such abandonment did not affect or prejudice ART's claim as being a creditor of the bankrupt.. On August 28, 2019, ART's counsel advised that the Offer to Settle was retracted and then subsequently reinstated. A copy of the email exchanges between counsel for ART and the Trustee are attached as **Appendix "E"**.
20. On August 29, 2019, the Trustee, through its counsel and with Inspector approval, communicated its acceptance of the Offer to Settle.
21. On August 30, 2019, counsel for ART served the Trustee's counsel with Notice of Abandonment in respect of ART's appeal of the Trustee's dispute of its claim for reclamation.
22. On September 3, 2019, the Trustee's counsel appeared before Master Mills wherein the Court noted the dispute was settled and the appeal of the Trustee's disallowance was

withdrawn. A copy of the endorsement dated September 3, 2019 is attached as **Appendix “F”**.

Settlement of A&B’s fee claim

23. Subsequent to September 3, 2019, A&B advised the Trustee that notwithstanding the matter of ART’s claim to Galty’s property being settled:

- (i) It still requires a Court Order before releasing the funds to the Trustee as the previous Court orders obligated A&B to hold the funds in its trust pending further order of the Court; and
- (ii) A&B initially took the position that it was is amenable to directing to the Trustee the balance of Sale Proceeds after deducting the A&B Professional Fees and Disbursements (the “**Net Sale Proceeds**”). Under this scenario, the A&B Professional Fees and Disbursements would have been held by A&B pending further order of the Court or by mutual agreement between the A&B and the Trustee.

24. Thereafter, the Trustee’s counsel entered into discussions with representatives of A&B wherein A&B asked whether the amount payable to it could be resolved as part of the Trustee’s motion seeking authorization to have A&B release the Sale Proceeds to the Trustee.

25. As a result of A&B’s request, the Trustee called an Inspectors meeting to seek their instructions on settling A&B’s claim in relation to the A&B Professional Fees and Disbursements on a pragmatic basis. At the Inspectors meeting held on December 11, 2019, the Inspectors provided the Trustee with instructions.

26. After the Inspectors meeting and having regard to the Inspectors’ instructions, the Trustee’s counsel engaged in discussions with representatives of A&B wherein the parties agreed to settle the A&B Professional Fees and Expenses for an amount of \$45,805.93 (the “**Retained Amount**”), representing payment of the July, 2017 Invoice plus interest. A&B would be paid from the Sale Proceeds, such payment representing full and final settlement

of A&B's entitlement to payment of the A&B Professional Fees and Expenses from the Sale Proceeds. The Trustee recommended the settlement to the Inspectors on the basis that:

- (i) A substantial portion of the July, 2017 Invoice was for services rendered in connection with the sale of the Property and related tax work, whereas the balance of the A&B Professional Fees and Expenses relate, in part, to the Litigation and efforts to have A&B paid;
- (ii) The July, 2017 Invoice appears to be subject to the direction given by Galty in favour of A&B; and
- (iii) Settling the A&B Professional Fees and Disbursements as part of this motion eliminates the costs associated with bringing a separate motion to have the matter determined.

The settlement was confirmed in an email exchange on January 7, 2020 between counsel for the Trustee and a representative of A&B, a copy of which is attached as **Appendix "G"**.

Recommendation

27. Given the foregoing, the Trustee recommends and requests the Court's assistance in directing A&B to transfer the Remaining Sale Proceeds to the estate. These funds will then be in the hands of the Trustee and available for distribution in accordance with the scheme of distribution set out in the BIA or to fund the Litigation or a challenge to Galty's payment to the Brazilian Trust (see OTHER MATTERS section).

Liabilities

28. The claims of creditors as per the Company's sworn SOA and the claims filed as at January 16, 2020 are summarized below:

	As per Statement of Affairs	Claims as Filed
Secured	\$ Nil	\$ Nil
Preferred Unsecured	Nil	Nil
Ordinary Unsecured	21,400,488	21,882,296
Contingent	1	3,197,204
	<hr/> \$ 21,400,489 <hr/>	<hr/> \$ 25,079,500 <hr/>

29. At this time, the Trustee has not determined the admissibility of the proofs of claim for distribution purposes.

V OTHER MATTERS

The Litigation

30. As noted above, Galty was involved in the Litigation, wherein the Plaintiffs claimed from Galty, *inter alia*:

- (i) Payment of £472,790 and \$1,150,000 Canadian; and
- (ii) An interlocutory injunction as against all defendants not to dispose of the Sale Proceeds until further order of the Court or consent of the Plaintiff.

31. Galty defended the claim and the various cross claims it has become subjected to as part of the Litigation. It also brought a cross claim against certain of the defendants for, *inter alia*, contribution and indemnity for any amount for which Galty is found to be liable.

32. Galty also commenced a claim against Victor, for, *inter alia*:

- (i) \$3,600,000 in damages due to Victor's alleged negligence and breach of fiduciary duties; and

- (ii) An accounting and restitution or disgorgement of any and all benefits that Victor unjustly received as a result of his breach of fiduciary duty to Galty, including legal and professional fees paid to Victor in respect of his positions at Galty.

33. At this time, the Trustee has served a Notice of Stay of Proceedings on the parties to the Litigation but has not taken any other steps in respect of the Litigation.

Payment to Brazilian Trust

34. The Trustee completed a limited review of the Company's books and records in order to identify any potential transfers at undervalue or preference payments. The scope of the review was limited to a review of Galty's bank statements for the period January 1, 2018 and March 11, 2019 (the "**Banking Records**"), a review of certain board of director meeting minutes and inquiries with management.

35. Apart from the matter noted in paragraph 36, the Trustee did not identify any noteworthy and material transactions from its review of the Banking Records.

36. Galty is owned by Galty Investments N.V. ("**N.V.**"). N.V. is owned by a Brazilian Trust. At a meeting of Galty's directors, held on July 13, 2017, the Directors authorized Galty transferring the sum of \$1,100,000 from its bank account to the Brazilian Trust. Based on the SOA, N.V. is Galty's largest unsecured creditor, with a declared claim of \$20,169,128 against Galty. N.V. has now filed a proof of claim against the estate, which asserts that the transfer of \$1,100,000 to the Brazilian Trust was to be set off against this loan. The monies used to fund payment of this transfer were derived from a corporate tax refund (associated with the taxes withheld by a non-resident on the sale of the Property) paid by Canada Revenue Agency on May 26, 2017 and deposited to Galty's bank account on July 6, 2017. The payment to the Brazilian Trust occurred on July 14, 2017. The Trustee is still reviewing the proof of claim of N.V. and the documents that accompanied it.

Potential Inspector Conflict

37. As noted above, there are five Inspectors appointed to act in this estate, including Ron Chapman and Maisel Matus, each of whom is counsel to a party in the Litigation. At the Meeting, the Trustee and its counsel considered whether the BIA disqualifies these

individuals as being eligible to be appointed or act as Inspector, given their respective clients are a party to a contested action or proceedings by or against the estate of the bankrupt.

38. After reviewing the case law and commentary on this matter, the Trustee and its counsel concluded that the removal or disqualification of individuals other than as noted in subsection 116(2) of the BIA (being parties to litigation against the bankrupt) is a matter for the Court and not the Trustee to determine, and accordingly suggested that these individuals remain on the slate of nominees, with the understanding that, if appointed, they would have to be removed from dealing with matters put to the Inspectors that involve the Litigation.
39. At the October 4, 2019 meeting of the Inspectors, the Inspectors were asked to consider the following:
 - (i) Status of the Sale Proceeds; and
 - (ii) A&B's claim to those funds.
40. After discussion, the Inspectors unanimously resolved that the Trustee bring an application to Court to seek a Court Order directing A&B to pay the Net Sale Proceeds to the Trustee and providing that A&B's entitlement to keep the Retained Funds will be determined by mutual agreement or by Court Order.
41. Subsequent to the Meeting, Ron Chapman and Masiel Matus respectively advised the Trustee that each of them wished to take no position on the motion notwithstanding their support of the motion at the October 4th Meeting, and further that they objected to the payment of the funds by A&B to the Trustee based on the interests of their clients. Copies of emails received from them are attached as **Appendix "H"**. Copies of the responses from counsel for the Trustee are attached as **Appendix "I"**.
42. In a further Inspectors meeting on December 11, 2019, Mr. Chapman indicated that his position on the A&B fee matters under discussion required instructions from his client.

43. The Trustee is concerned that despite not being themselves parties to litigation against Galty within the meaning of subsection 116(2) of the BIA, their roles as inspectors are being guided by such parties.

44. The Trustee therefore intends on excluding these Inspectors from participating in any matter, directly or indirectly related to the Litigation.

VI. CONCLUSION

45. Based on the foregoing, the Proposal Trustee respectfully recommends that the Court make an order granting the relief detailed in paragraph 5.

All of which is respectfully submitted on this 27th day of February 2020.

MNP Ltd.

In its capacity as Trustee of the Estate of
Galty B.V., a bankrupt

Per:



Sheldon Title, Senior Vice-President

**IN THE MATTER OF THE BANKRUPTCY
OF GALT B.V., HAVING ITS HEAD OFFICE IN THE CITY OF AMSTERDAM, NETHERLANDS**

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)**

FIRST REPORT TO THE COURT

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