

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY**

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

TRUSTEE'S REPLY FACTUM

(Trustee's motion for directions re: settlement approval and inspector vote,
now returnable at October 26, 2021 at 10:00am)

October 24, 2021

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TO: THE SERVICE LIST

I. INTRODUCTION

1. This reply factum is delivered by the Trustee to update the Court and stakeholders on matters that have arisen since the service of the Trustee's Motion Record and Factum on October 6 and 7, 2021, including matters referred to in the various responding materials of ART.
2. Defined terms used in this reply factum have the meaning ascribed in the Trustee's main factum unless otherwise indicated.

II. FURTHER FACTS

A. The nature of Ms. Heinrichs' interest in the Brazilian Trust

3. After the delivery of the Trustee's Second Report and its Factum, the Trustee was advised by counsel for Ms. Heinrichs that she is a discretionary beneficiary of the Brazilian Trust.¹
4. The Trustee has no reason to doubt this information, but it has not engaged in any further review of that issue, because in the Trustee's view this stated interest of Ms. Heinrichs would still be one that appears to warrant her exclusion from voting on matters related to the possible claim by the Bankrupt against NV.²

¹ Supplement to the Second Report of the Trustee dated October 22, 2021 (the "Supplement") para. 5; Trustee's Supplementary Motion Record, Tab 1 page 3.

² Supplement, para. 6; Trustee's Supplementary Motion Record, Tab 1 page 3.

B. The Trustee's review of the proof of claim by NV

5. ART has questioned the steps that the Trustee took prior to accepting the proof of claim of NV.³
6. The Trustee's review of NV's claim consisted of:⁴
 - a) reviewing proof of claim supplied by NV and the supporting documentation;
 - b) reviewing the financial statements of the Bankrupt and of NV, which reflected amounts owing by the Company to NV both historically and near the date of bankruptcy; and
 - c) reviewing the original loan documents dated December 31, 1980, by which NV loaned CAD \$950,000 and USD \$3,250,000 to the Company, which were signed by Victor Seabrook as the (then) managing director of the Bankrupt.
7. The amounts noted above correspond to those described by Mr. Seabrook in his affidavit sworn October 19, 2021, with the exception that the CAD funds advance was \$950,000, not \$750,000 as set out by Mr. Seabrook.⁵
8. Mr. Seabrook's affidavit sworn October 19, 2021 also questions how the amount owing to NV could have reached more than CAD \$23,000,000 and what further advances there were.⁶

³ Affidavit of Victor Seabrook sworn Oct. 19, 2021, para. 16; Supplementary Responding Motion Record, Tab 1, page 4.

⁴ Supplement, para. 8; Trustee's Supplementary Motion Record, Tab 1 pages 3-4.

⁵ Supplement, para. 9; Trustee's Supplementary Motion Record, Tab 1 page 4. Affidavit of Victor Seabrook, paras. 8 and 14; Supplementary Responding Motion Record, Tab 1, pages 3 and 4.

⁶ Affidavit of Victor Seabrook sworn Oct. 19, 2021, para. 18(a); Supplementary Responding Motion Record, Tab 1, pages 4-5.

9. The Trustee's review does not indicate that further funds were advanced by NV to the Bankrupt. The Trustee's review also indicates that interest accruing at the stated rate of 7.125% per annum when compounded annually will have a significant effect on the amounts owing.⁷

C. Prior inspector discussions of the claim by NV

10. The proof of claim of NV was discussed among the inspectors and the Trustee on several occasions before the August 30, 2021 meeting about the Proposed NV Settlement.
11. At a meeting of inspectors on Sept. 25, 2020, the inspectors and Trustee discussed that the amount of NV's claim could affect the relief that the Bankrupt's estate might be able to get as against NV.⁸ This is the same economic effect that the Trustee has already noted, whereby NV appears to comprise between 84-92% of all claims, which makes the effective return for other creditors much less and makes the possible costs of such proceedings relatively more pronounced.
12. The Sept. 25, 2020 meeting also included discussion that the Trustee's review of NV's claim indicated that it was not limitation barred. There was further discussion via emails regarding the treatment of the amounts owing to NV on the Bankrupt's draft and then final financial statements. The Trustee subsequently reported to the inspectors that the final financial statements showed the amounts as debts owing, rather than an equity interest.⁹

⁷ Supplement, para. 10; Trustee's Supplementary Motion Record, Tab 1 page 4.

⁸ Supplement, para. 13; Trustee's Supplementary Motion Record, Tab 1 pages 4-5.

⁹ Supplement, para. 13; Trustee's Supplementary Motion Record, Tab 1 pages 4-5

13. The inspectors were provided with the proof of claim of NV on October 22, 2020 and again on August 17, 2021.¹⁰
14. The issues that ART raises in its responding materials on this motion were not previously raised by Mr. Chapman, whether as an inspector or as counsel for ART, or by ART as a claimed creditor.

D. The tolling agreement

15. The discussions with the inspectors about NV's claim and the Bankrupt's possible claim against NV were all in the context of limitations issues on that possible claim that could arise as soon as March of 2021. It was for that reason that approval was granted by the inspectors in the fall of 2020 to pursue a tolling agreement.¹¹
16. The tolling agreement that NV was prepared to sign called for its expiry on August 11, 2021. It was subsequently extended to October 15, 2021 to permit the Trustee to bring this motion regarding appropriate approval of the Proposed NV Settlement, and then further extended to October 26, 2021 at 10:00pm or at 10:00pm on the date that the Court releases its reasons on this motion.¹²
17. Given the position of ART on this motion, including the question in ART's whether the Trustee has attempted to seek an extension,¹³ the Trustee has corresponded further with NV on that issue. NV has advised that it is not prepared to provide any further extensions

¹⁰ Supplement, para. 25; Trustee's Supplementary Motion Record, Tab 1 page 8.

¹¹ Supplement, para. 15; Trustee's Supplementary Motion Record, Tab 1 page 5.

¹² Supplement, para. 15; Trustee's Supplementary Motion Record, Tab 1 page 5.

¹³ Affidavit of Ron Chapman sworn October 14, 2021, para. 7; Responding Motion Record, Tab 1, pages 3-4.

beyond that noted above, based on its views of ART's position in this matter and previously (on which the Trustee makes no comment).¹⁴

E. Questions about possible assets of the Bankrupt

18. Mr. Seabrook's Oct. 19, 2021 affidavit questions what happened to an equity position that he believes that the Bankrupt held in a company called Intelix, and which he says was sold in June of 2019.¹⁵ This was the first that the Trustee was made aware of any such issue, notwithstanding that the bankruptcy occurred more than 2.5 years ago, and there were no records provided by Mr. Seabrook on that issue. The Trustee's review of the Bankrupt's transactions in the year prior to the date of bankruptcy showed no transactions involving an interest in a company by that name. The sale noted by Mr. Seabrook also took place several months after the date of bankruptcy in this matter.¹⁶
19. Mr. Seabrook's Oct. 19, 2021 affidavit also questions what happened to the proceeds of sale of 88 Elm in April of 2015.¹⁷ The accounting for the sale proceeds had been discussed in the Trustee's Preliminary Report to Creditors upon the bankruptcy, albeit briefly. The Trustee has, and has included in its Supplementary Motion Record, the documentation regarding the disposition of the proceeds. Those documents show that the proceeds were applied to pay an existing mortgage, the non-resident income tax on the sale (as the Bankrupt was a Netherlands company), and real estate commissions, with the balance

¹⁴ Supplement, para. 16; Trustee's Supplementary Motion Record, Tab 1 page 5.

¹⁵ Affidavit of Victor Seabrook sworn Oct. 19, 2021, paras.18(b) and (c); Supplementary Responding Motion Record, Tab 1, page 4.

¹⁶ Supplement, para. 19; Trustee's Supplementary Motion Record, Tab 1 page 5.

¹⁷ Affidavit of Victor Seabrook sworn Oct. 19, 2021, para.18(d); Supplementary Responding Motion Record, Tab 1, page 4.

being held in trust by the Bankrupt's former solicitors and ultimately turned over to the Trustee.¹⁸ The subsequent refund of the non-resident tax paid is what led to the \$1.1 million payment by the Bankrupt to NV in 2017 as noted in the Second Report.

F. Questions about limitations issues on NV's proof of claim

20. Mr. Chapman's affidavit sworn October 22, 2021 indicates that ART has concerns that the amounts claimed by NV in its proof of claim are statute barred.¹⁹
21. The Trustee had already reported to the inspectors on September 22, 2020 that its review of the claims by NV indicated that they were not limitation barred, as noted above. No questions on that issue were raised since that time until Mr. Chapman's Oct. 22, 2021 affidavit.²⁰
22. In reaching that conclusion, the Trustee had reviewed:
 - a) loan documents between the Bankrupt and NV dated Dec. 31, 1980, which had been signed by Mr. Seabrook as the (then) managing director of the Bankrupt. Those documents called for the loan to be due on Dec. 31, 1990;²¹
 - b) note extension agreements dated Dec. 31, 1990 signed by Mr. Seabrook on behalf of both the Bankrupt and on behalf of NV, in which the loans were extended to

¹⁸ Supplement, para. 20; Trustee's Supplementary Motion Record, Tab 1 page 5.

¹⁹ Affidavit of Ron Chapman sworn October 22, 2021, paras. 6-7; Second Supplementary Responding Record, Tab 2, page 6..

²⁰ Supplement, para. 23; Trustee's Supplementary Motion Record, Tab 1 page 7.

²¹ Supplement, para. 24(a); Trustee's Supplementary Motion Record, Tab 1 page 7.

Dec. 31, 2000 and the amounts were acknowledged as being USD \$4,881,156 and CAD \$1,868,266 at that time;²²

- c) financial statements filed by Mr. Seabrook on behalf of the Bankrupt for tax return purposes for the fiscal years ending Dec. 31 of each of 1992-1995, which showed increasing amounts owing to NV;²³
- d) a new loan agreement between the Bankrupt and NV signed as of Jan. 1, 2010, under which the amounts owing were due on or before Dec. 31, 2017;²⁴ and
- e) the Bankrupt's financial statements for the fiscal year ending Dec. 31, 2017, which showed an amount owing to NV in the amount of € 12,778,265.²⁵

23. The documents noted at items (a) to (d), above, were part of what was provided to all inspectors, including Mr. Chapman, on Oct. 22, 2020 and August 27, 2021.²⁶

III. ISSUES RAISED BY ART'S RESPONDING MATERIALS AND LAW

24. The issues raised in ART's responding materials appear to include:

- a) is there a need to further review the proof of claim by NV?
 - b) is the proof of claim of NV limitation barred?
 - c) is the estate of the Bankrupt able to extend the tolling agreement with NV further?
- and

²² Supplement, para. 24(b); Trustee's Supplementary Motion Record, Tab 1 page 7.

²³ Supplement, para. 24(c); Trustee's Supplementary Motion Record, Tab 1 page 8.

²⁴ Supplement, para. 24(d); Trustee's Supplementary Motion Record, Tab 1 page 8.

²⁵ Supplement, para. 24(e); Trustee's Supplementary Motion Record, Tab 1 page 8.

²⁶ Supplement, para. 25; Trustee's Supplementary Motion Record, Tab 1 page 8.

d) are there other assets of the Bankrupt?

A. is there a need to further review the proof of claim by NV

25. The Trustee is concerned that ART is raising issues about the quantum owing to NV at a very late stage in the administration of the estate. The amounts owing to NV have been the subject of ongoing discussion with the inspectors for over a year, and the concerns being voiced by Mr. Seabrook and/or Mr. Chapman are only arising since the service of the Trustee's motion.
26. The Trustee is also concerned that ART's position on this point is being asserted without having brought a motion to challenge to the Trustee's acceptance of NV's proof of claim as contemplated by s. 135(5) of the *Bankruptcy and Insolvency Act*.
27. It has been clear for more than a year that the estate of the Bankrupt needs to consider and deal with the amounts owing to NV as part of the consideration of the possible claim it has against NV. The Trustee has attempted to discuss all such issues with the inspectors over several meetings from Sept. 25, 2020 to this past August.
28. Given the time constraints of the limitation period and the looming expiry of the tolling agreement, the Trustee has attempted to put forward to the inspectors and now to the Court what it believes is the most appropriate result for the estate of the Bankrupt in light of those discussions and the Trustee's review.

B. is the proof of claim of NV limitation barred

29. The Trustee's view is that the documentation of the Bankrupt and of NV shows that the most recent due date for the amounts owing to NV was Dec. 31, 2017. Since that is less than two years before the bankruptcy, any amounts owing to NV do not appear to be statute barred.

30. The Trustee does not understand the reference in the affidavits from Mr. Seabrook or Mr. Chapman on behalf of ART that there was no demand by NV on the loans to the Bankrupt. The loans appear to have been term loans throughout, such that the presence or absence of demand is not necessary to establish limitations issues. If these references are intended to ask why NV should be paid if it has not made demand, then it is the Trustee's practice to distribute the assets of a bankrupt to all creditors as of the date of the bankruptcy, irrespective of whether demand has been made for any amounts properly owing.²⁷

C. is the estate of the Bankrupt able to extend the tolling agreement with NV further

31. The Trustee's information is as set out in the Oct. 22, 2021 email from NV in which it indicates that no further extensions of the tolling agreement will be granted.

D. are there other assets of the Bankrupt

32. The Trustee does not believe that there are. It would be fair to note that this conclusion is limited by the very recent and rather general suggestions made in Mr. Seabrook's Oct. 19, 2021 affidavit.

33. Leaving that aside, the Trustee is unaware of how issues of other possible assets that do not relate to the amount owing to NV might affect whether the Proposed NV Settlement should be approved or not.

²⁷ Supplement, para. 27; Trustee's Supplementary Motion Record, Tab 1 page 8.

[10]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of October, 2021.

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SCHEDULE A – LIST OF AUTHORITIES

[none]

SCHEDULE B – RELEVANT STATUTORY PROVISIONS

Bankruptcy and Insolvency Act, [R.S.C., 1985, c. B-3](#) s. 135(5)

Expunge or reduce a proof

135(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

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