Court File No. BK-19-02484304-0031
Estate No. 31-248304

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

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

# FACTUM OF THE MOVING PARTY
## THE AVENUE ROAD TRUST
## (RE MOTION RETURNABLE AUGUST 16, 2023)

August 2, 2023

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## PART I -OVERVIEW

1. This is a motion by a creditor for an order admitting certain documents as evidence on a to-be-scheduled appeal from a trustee's disallowance of a proof of claim.

2. The trustee and the creditor agreed that the appeal would proceed on the material that was before the trustee at the time of the disallowance, plus fresh evidence filed by each side. The documents that are the subject-matter of this motion were discovered by the creditor's current representative after the passage of an agreed-upon deadline for the filing of the fresh evidence.

3. The applicable test is whether a refusal to admit the evidence would prejudice the creditor. That test is clearly passed here: the documents are not dispositive, but they are probative and relevant, in that they evidence the transactions asserted by the creditor. They should be admitted.

## PART II -THE FACTS

### *(i) The Claim*

4. In March 2021, The Avenue Road Trust (the "**ART"**) filed an unsecured claim for €685,687.95 and $1,992,312.99 in the within bankruptcy (the "**Claim**"). Enclosed as part of the Claim were an affidavit of Bruce Buckley sworn December 17, 2018, (the "**Buckley Affidavit**") and an affidavit of Victor M. Seabrook ("**Victor**") sworn March 25, 2019 (the "**First Seabrook Affidavit**").[1]

5. At that time, Victor was a trustee of the ART. He had been involved in some of the

[1] Affidavit of Timothy Seabrook, sworn May 5, 2023, (the "**Seabrook Affidavit**"), Motion Record, Tab 2, at paragraph 2 and Exhibit "A"

transactions which gave rise to the Claim. These transactions were also among the subject-matter of (ongoing) civil litigation in which the ART was the plaintiff (the "**Civil Litigation**").[2]

6. The ART subsequently provided MNP Limited, trustee in bankruptcy of Galty B.V. (the "**Trustee**") with supplementary evidence in support of its Claim, being the affidavit of Richard Wigley sworn February 27, 2018, (the "**Wigley Affidavit**"), and a second affidavit of Victor's, sworn August 14, 2020 (the "**Second Seabrook Affidavit**").[3]

7. The Trustee considered this supplementary evidence. In August 2021, the claim was disallowed by the Trustee (the "**Disallowance**"). The Trust appealed the disallowance (the "**Appeal**").[4]

8. After appealing the Disallowance, the ART provided further evidence in support of the claim to the Trustee, in the form of a third affidavit from Victor, sworn October 5, 2021 (the "**Third Seabrook Affidavit**"). The Trustee considered the Third Seabrook Affidavit, and concluded that it did not alter the Trustee's position.[5]

9. Victor died in May 2022. After his death, his son, Timothy Seabrook, ("**Tim**"), who is also a trustee of the ART, became involved in this matter.[6]

10. In September 2022, the Trustee, through its lawyer R. Brendan Bissell, ("**Bissell**") informed the ART, through its insolvency lawyer Colby Linthwaite, ("**Linthwaite**"), that it

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[2] Seabrook Affidavit, Motion Record, Tab 2, at paragraph 3 and Exhibit "A", First Seabrook Affidavit at paragraphs 2-3
[3] Seabrook Affidavit, Motion Record, Tab 2, at paragraph 4
[4] Seabrook Affidavit, Motion Record, Tab 2, at paragraphs 5-6 and Exhibits "B" and "C"
[5] Seabrook Affidavit, Motion Record, Tab 2, at paragraphs 7
[6] Seabrook Affidavit, Motion Record, Tab 2, at paragraph 8

(the Trustee) also wished to use further evidence on the hearing of the Appeal, being certain financial statements of the bankrupt (the "**Financial Statements**").[7]

11. Tim subsequently instructed the ART's civil lawyer, Ron Chapman, ("**Chapman**"), who has possession of Victor's files respecting the relevant transactions, to review those files to determine if there was anything further the ART should produce for use on the Appeal. Chapman advised Tim that there was nothing for ART to add to the record. Linthwaite so advised Bissell.[8]

### *(ii) The Agreement Respecting Fresh Evidence*

12. The Trustee and the ART then agreed that each side would file fresh evidence for use on the Appeal. (There is no dispute on this point.) The agreement was recorded in an endorsement of this Honourable Court dated October 25, 2022, ("*Counsel have agreed to forego preliminary evidentiary motions and will both be filing fresh evidence*.")[9]

13. The material to be used on the appeal was identified in an email exchange between Linthwaite and Bissell later that month, as follows.

1. The Proof of Claim.
2. The Disallowance.
3. The First, Second, and Third Seabrook Affidavits.
4. The Buckley Affidavit.
5. The Wigley Affidavit.

[7] Seabrook Affidavit, Motion Record, Tab 2, at paragraph 9 and Exhibit "D"
[8] Seabrook Affidavit, Motion Record, Tab 2, at paragraphs 10
[9] Seabrook Affidavit, Motion Record, Tab 2, at paragraph 11 and Exhibit "E"

6. The Financial Statements.[10]

*(the **"Appeal Record"**)*

### *(iii) The New Documents*

14. Tim is the co-executor of Victor's estate.[11]

15. In January 2023, Tim was emptying the contents of Victor's storage locker, in preparation for the sale of Victor's former residence, when he (Tim) unexpectedly came upon documents he believed would be relevant to the Appeal (the "**New Documents**"). These consist of documents contemporaneous with, and referring to, the transactions which form the basis of the ART's claim in the bankruptcy.[12]

16. The New Documents were sent to the Trustee in January 2023. After reviewing the documents, the Trustee took the position that the Trust required an order of this Court declaring the New Documents admissible as evidence on the Appeal. The ART subsequently brought the within motion.[13]

17. In response to the motion, the Trustee served its Third Report to the Court (the "**Third Report**"), wherein the Trustee articulated its objection to the admission of the New Documents as follows. (i) The Trustee had not considered the New Documents when determining whether to disallow the Claim;[14] (ii) the Trustee had been advised by Anne Marie Heinrichs, (an inspector in the estate and an adverse-party litigant in the

[10] Seabrook Affidavit, Motion Record, Tab 2, at paragraph 12 and Exhibit "F"
[11] Seabrook Affidavit, Motion Record, Tab 2, at paragraph 13
[12] Seabrook Affidavit, Motion Record, Tab 2, at paragraph 14 and Exhibit "G"
[13] Seabrook Affidavit, Motion Record, Tab 2, at paragraph 15 and Exhibit "H"
[14] Third Report, page 11, paragraph 48 (i)

Civil Litigation) "*that most of the Supplementary [New] Documents have previously been disclosed as part of the [Civil] Litigation and were available to ART…such that ART could have submitted them to the Trustee [previously]…*";[15] (iii) the admission of the New Documents "*may result in additional delay and expense to the estate*";[16] and (iv) the ART had agreed that it would not seek to introduce further evidence.[17]

## PART III – THE ISSUES AND THE LAW

18. The issue before this Honourable Court is whether the New Documents should be admitted as evidence on the hearing of the Appeal.

## THE LAW

### *(i) The Test*

19. This is *not* another in the line of cases about the proper procedure to be followed on an appeal from a disallowance. The ART and the Trustee have agreed that the Appeal will not proceed as a true appeal, (i.e. solely on the material that was before the Trustee when it issued its Disallowance), as both sides will rely upon fresh evidence.[18] Similarly, the parties have agreed that the Appeal will not proceed *de novo* (i.e. with both sides entitled to call whatever admissible evidence they wish), as they have, subject to the resolution of the within motion, settled on the content of the Appeal Record.[19]

20. The parties' agreement means that, subject to direction from this Honourable Court, the Appeal will proceed as a "hybrid": on the record that was before the Trustee,

[15] Third Report, page 11, paragraph 48 (ii)
[16] Third Report, page 11, paragraph 48 (iii)
[17] Third Report, page 11, paragraph 48 (iv)
[18] Seabrook Affidavit, Motion Record, Tab 2, at paragraph 11 and Exhibit "E"
[19] Seabrook Affidavit, Motion Record, Tab 2, at paragraph 12 and Exhibit "F"

plus specific fresh evidence. The issue on this motion is whether the New Evidence is to be included among that specific evidence.

21. The resolution of that issue is to be achieved by applying to the New Evidence the established test for whether there should be a *de novo* hearing. In the words of the Court of Appeal for Ontario, the New Evidence should therefore be admitted "*if to proceed otherwise* ***would result in an injustice to the creditor***".[20] (This is hereinafter "**the Test**".) This means that the test for the admission of the New Evidence (as with the test for a *de novo* appeal) is "*not limited to the stringent test which applies to appeals from trials conducted in a Court as set out in R. v Palmer (1979), [1980] 1 S.C.R. 759 (SCC)…*"[21]

***(ii) The Result***

22. The application of the Test to the New Evidence is straightforward.

23. The Trustee has not alleged that the New Evidence is irrelevant to the issues to be decided on the Appeal. (Indeed, the Trustee's submission that "*most*" of the New Evidence has been produced in the Civil Litigation[22] is an implicit concession that the New Evidence *is* relevant, as the matters relevant to the Appeal are also matters relevant to the Civil Litigation, and as only relevant documents should have been produced in the Civil Litigation.)

24. The question therefore resolves into whether it would unjust *to the ART* if relevant evidence, that the ART wishes to rely upon, was excluded from the Appeal Record. The

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[20] *Credifinance Securities Ltd., Re*, 2011 ONCA 160, at paragraph 24, emphasis added; see also *YG Limited Partnership and YSL Residences Inc.*, 2022 ONSC 6548, at paragraph 34
[21] *Aronson v Whozagood Inc.*, 2019 ABQB 656, at paragraph 29
[22] Third Report, page 11, paragraph 48 (ii)

answer is clearly that it would be. The ART does not claim that the New Evidence will, by itself, dispose of the Appeal in its favour; yet the Evidence is probative concerning the existence and details of the transactions involving the ART and the bankrupt which form the basis for the Claim. The ART has a presumptive right to lead relevant evidence. As La Forest J. put it:

> *The organizing principles of the law of evidence may be simply stated. All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy*.[23]

25. There is no possibility of the New Evidence prejudicing, misleading, or confusing this Court on the hearing of the Appeal. Further, as the Court of Appeal's test is "*injustice to the creditor*",[24] there is to be no weighing of hypothetical prejudice to the estate. In any event, there would be no prejudice to the Trustee if the order sought was granted.

(a) The Trustee objects to the admission of the New Evidence because "*the Trustee's determination of ART's claim and its Notice of Disallowance did not consider the Supplementary [New] Documents*", but this is also true of the Third Seabrook Affidavit, which the Trustee has agreed may be used by the ART, and the Financial Statements, which the Trustee itself will rely upon. (It is, of course, open to the Trustee to consider the aforementioned documents now, and if those documents persuade the Trustee to admit the claim, then the delay and expense of the appeal would be avoided.)

(b) The Trustee has also foreseen possible "*delay and expense to the estate*", but the

[23] *R. v. Corbett*, [1988] 1 S.C.R. 670 at paragraph 99. La Forest J. was dissenting on other grounds, and his statement of the law has been widely cited.
[24] *Credifinance Securities Ltd., Re*, 2011 ONCA 160, at paragraph 24

Appeal has not yet been scheduled and facta have not yet been drafted and exchanged, so the incorporation of a relatively few additional documents into the existing corpus of evidence will not result in any material extra expense. Any such expense could be addressed at the conclusion of the Appeal hearing.

(c) It is true that the ART was given an opportunity to submit further evidence in the fall of 2022, and advised the Trustee that it had none to submit. However, given the above-described stage in the proceeding, and given the circumstances in which the New Evidence came to light (on which more below), allowing the admission of that Evidence would, while relieving the ART of compliance with its bargain, cost the estate nothing beyond the trouble of responding to a limited amount of relevant evidence.

26. This leaves for consideration the Trustee's objection that most of the New Evidence was produced in the Civil Litigation, and was therefore available to the ART for submission (and use on the Appeal) at any point prior to the October 2022 agreement on the content of the Appeal Record. The objection appears to be a loose articulation of the first of the Supreme Court of Canada's four criteria for the admission of new evidence on a civil or criminal appeal, (the "***Palmer* Test**"), being that "*the evidence could not, by the exercise of due diligence, have been obtained for the trial*".[25] The ART's response is threefold.

27. Firstly, and most importantly, "*the stringent test which applies to appeals from trials conducted in a Court as set out in R. v Palmer"* is not the Test applicable on this and

[25] *Barendregt v. Grebliunas*, 2022 SCC 22, at paragraph 29

similar motions: a judge of the Alberta Court of Queen's Bench has said so explicitly,[26] and the Court of Appeal for Ontario has said so implicitly, by adopting its "*injustice to the creditor*" test for *de novo* hearings.[27] That should be the end of the objection.

28. Secondly, and in the alternative, "*the first Palmer criterion…focuses on the conduct of the party seeking to adduce the evidence"*[28]*,* and the ART's conduct has not been blameworthy.

(a) The *Palmer* Test "*requires litigants to take all reasonable steps to present their best case at trial*."[29] The ART was not facing a trial before a judge: it was participating in a far less formal procedure, further to which it submitted a proof of claim, then submitted more evidence, then received a disallowance, and then submitted further evidence, which was considered. This was all totally appropriate: the *BIA* allows trustees to request, and creditors to submit, supplementary evidence in support of a proof of claim.

> *135(1) Trustee shall examine proof*
>
> *The trustee shall examine every proof of claim or proof of security and the grounds therefor* ***and may require further evidence in support of the claim or security****.*
>
> [Emphasis added]

To apply the *Palmer* test, or any part of it, to a bankruptcy would not simply be contrary to the binding jurisprudence but inconsistent with the statute.

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[26] *Aronson v Whozagood Inc.*, 2019 ABQB 656, at paragraph 29
[27] *Credifinance Securities Ltd., Re*, 2011 ONCA 160, at paragraph 24
[28] *Barendregt v. Grebliunas*, 2022 SCC 22, at paragraph 36
[29] *Barendregt v. Grebliunas*, 2022 SCC 22, at paragraph 36

(b) It appears that the New Evidence *had* been produced in the Civil Litigation. It must be remembered, however, that the conduct of that litigation, like the conduct of the within proceeding until well after the Disallowance, had been directed by Victor and implemented by Chapman. Victor is now deceased, and Chapman no longer has carriage of the bankruptcy proceeding. In the fall of 2022, Tim, who succeeded his father as the guiding trustee of the ART, duly instructed Chapman to review his (and Victor's) files in order to determine if there was additional material to be produced in support of the Claim. This was a "*reasonable step*", in the language of the Supreme Court. Tim was told there was no such material. It appears that Chapman's initial review of the files was imperfect. However, the Courts are loath to prejudice a client due to an oversight by their lawyer, and routinely relieve clients from the consequences of such oversights.[30]

29. Thirdly, and in the further alternative, the theoretical purpose of the first of the *Palmer* criteria does not apply in these circumstances. The Supreme Court has recently described that purpose as follows.

> *…A party who has not acted with due diligence should not be afforded a "second kick at the can": [citation omitted]. And the opposing party is entitled to certainty and generally should not have to relitigate an issue decided at first instance, absent a reviewable error. Otherwise, the opposing party must endure additional delay and expense to answer a new case on appeal. Permitting a party in an appeal to fill the gaps in their trial evidence based on the failings identified by the trial judge is fundamentally unfair to the other litigant in an adversarial proceeding.*
>
> *40 On a systemic level, this principle preserves the distinction between the roles of trial and appellate courts. Evaluating evidence and making factual findings are the responsibilities of trial judges. Appellate courts, by contrast, are designed to review trial decisions for errors. The admission of additional evidence on appeal*

[30] *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, [2009] O.J. No. 4492 (Div. Ct.) at paragraph 14, cited for this principle in *Ling v Bemac*, 2017 ONSC 4113 at paragraph 16-17, and *1944949 Ontario Inc. (OMG ON THE PARK) v. 2513000 Ontario Ltd.*, 2019 ONCA 628, at paragraph 34

> *blurs this critical distinction by permitting litigants to effectively extend trial proceedings into the appellate arena.*[31]

30. Here, there is no "*additional delay and expense*", (most of the Appeal work remains undone, and the Appeal has not been scheduled), no "*new case on appeal*" (the New Evidence does not raise novel issues), no "*other litigant in an adversarial proceeding*", (the Trustee is an officer of the Court performing a quasi-judicial but also quasi-administrative function, and the ART simply a prospective creditor), and no improper effort "*to effectively extend trial proceedings into the appellate arena*" (as the parties have already agreed to a hybrid proceeding pursuant to which they both submit fresh evidence).

31. In short, there is no reason, legal or practical, for this Court not to admit the New Evidence. If it is not admitted, the prejudice to the creditor would be plain.

## PART IV – ORDER REQUESTED

17. The ART seeks:

1. An order that the New Evidence is shall be admitted as evidence at the hearing of the Appeal.

2. Costs of this motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED BY**

**COLBY LINTHWAITE**

of counsel for The Avenue Road Trust

August 2, 2023

[31] *Barendregt v. Grebliunas*, 2022 SCC 22, at paragraphs 39-40

**SCHEDULE "A"**

**Authorities Cited**

1. *Credifinance Securities Ltd., Re*, 2011 ONCA 160
2. *YG Limited Partnership and YSL Residences Inc.*, 2022 ONSC 6548
3. *Aronson v Whozagood Inc.*, 2019 ABQB 656,
4. *R. v. Corbett*, [1988] 1 S.C.R. 670
5. *Barendregt v. Grebliunas*, 2022 SCC 22
6. *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, [2009] O.J. No. 4492 (Div. Ct.)
7. *Ling v Bemac*, 2017 ONSC 4113
8. *1944949 Ontario Inc. (OMG ON THE PARK) v. 2513000 Ontario Ltd.*, 2019 ONCA 628

## SCHEDULE B”

## STATUTES AND REGULATIONS CITED

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

*135(1) Trustee shall examine proof*

*The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.*

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