

**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 FACTUM

(Trustee's motion for directions re: settlement approval and inspector vote)

October 7, 2021

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TO: THE SERVICE LIST

I. INTRODUCTION

1. This is a motion by MNP Ltd. in its capacity as the trustee in bankruptcy (the “**Trustee**”) of Galty B.V. (the “**Bankrupt**”) for advice and directions regarding the vote by inspectors on a proposed settlement of a potential claim by the Bankrupt. In the alternative, or if the Court determines that the inspectors did not approve the proposed settlement, then the Trustee seeks review of such decision by the Court as permitted by s. 119(2) of the *Bankruptcy and Insolvency Act* (the “**BIA**”).

II. OVERVIEW

2. A meeting of inspectors was held on August 30, 2021 by Zoom to consider the proposed settlement. Three of five inspectors attended. One was recused due to his ties with the target of the possible claim. One was absent. The vote was 2:1 to approve the proposed settlement of the three inspectors who attended.
3. One of the inspectors attending that meeting, Anne Marie Heinrichs, appears to have an indirect or beneficial interest in the target of the possible claim according to the information available to the Trustee. If so, the question is should Ms. Heinrichs have been entitled to vote at the meeting. The Trustee seeks direction on that question.
4. If Ms. Heinrichs was not entitled to vote, then the remaining inspectors who attended the meeting would have been in a 1:1 tie. In that case, the BIA requires that the opinion of any absent inspector(s) be sought. The Trustee did so for the inspector who had been absent, Ron Chapman, who advises that he opposes the settlement.

5. Before providing that position Mr. Chapman also said, however, that he would seek instructions. Mr. Chapman is a lawyer representing a party with litigation against the Bankrupt. The issue of Mr. Chapman seeming to take instructions on inspector matters rather than acting in a personal capacity and in the interest of the estate, rather than his client, has been raised by the Trustee in its First Report and causes concerns about whether his vote on the Proposed Settlement can be properly included or not.
6. If Mr. Chapman's vote is to be considered, the Trustee then seeks a review of the decision of the inspectors that will reject the proposed settlement, as contemplated by s. 119(2) of the BIA. The proposed settlement is more beneficial for all creditors of the estate than litigation that would have an uncertain result, and which would likely require legal proceedings in Canada and then in one or more overseas jurisdictions because the target of the possible claim is offshore.

III. FACTS

A. The Bankrupt

7. The Bankrupt is a company incorporated in the Netherlands as a property investment, rental and holding company.¹ As of the date of bankruptcy, its only tangible asset was \$591,503 held by its solicitors on account of the sale of property in Toronto.²

¹ Second Report of the Trustee dated October 6, 2021 (the "Second Report") para. 10; Motion Record of the Trustee ("MR") Tab 2 page 12.

² Second Report, para. 5; MR Tab 2 page 10.

B. The Litigation

8. At the date of bankruptcy, the Bankrupt was involved in litigation (the “**Litigation**”) with The Avenue Road Trust (“**ART**”) and with La Houge Financial Management Services Corp. and Pantrust International (collectively “**LaHogue**”). The Litigation concerned respective claims by ART and LaHogue against the Bankrupt, Galty N.V. and individuals and entities affiliated with them for multimillion dollar amounts claimed to be owing to each of ART and LaHogue. ART also relies in its claims on a partial assignment by LaHogue to ART of claims against the Bankrupt.³
9. The Trustee has been advised by Bankrupt’s designated officer, Harold Pothoven, that the bankruptcy was as a result of the ongoing legal costs associated with defending the Litigation.⁴

C. The Creditors

10. The creditors of the Bankrupt have filed claims totalling \$25,079,500.⁵
11. Of the total claims, the largest claim is by Galty N.V., which has filed a claim for \$20,679,439. The Trustee has reviewed that claim, which accords with the Bankrupt’s records, and has advised the inspectors of the estate that the Trustee has accepted it. That proof of claim is not subject to further review by the Court on the application of any creditors at this time.⁶

³ Second Report, para. 10; MR Tab 2 page 12

⁴ Second Report, para 11, MR Tab 2 page 12.

⁵ Second Report, para. 14, MR Tab 2 page 13.

⁶ Second Report, paras. 26 and 27; MR tab 2 page 15.

12. The claims of creditors also include a claim by ART for an amount that the Trustee calculates as being CAD \$3,197,203.86 (a foreign currency is in the claimed amounts).⁷ ART had originally made a trust claim against the Bankrupt for those amounts, but that claim was disallowed by the Trustee for which an appeal was abandoned. ART's claim then proceeded as unsecured but it has since also been disallowed by the Trustee and an appeal from that decision is pending.⁸
13. The remaining creditors are in smaller amounts by entities including professional services firms that provided services to the Bankrupt.

D. The Bankrupt's assets

14. The estate of the Bankrupt only has \$499.654.03 of assets on hand.⁹ That is before fees for administration of the estate.
15. The Bankrupt also has claims, including a possible claim against Galty N.V., for a \$1.1 million payment made to an entity called the Brazilian Trust on account of amounts owing to Galty N.V. within one year of the bankruptcy.¹⁰
16. The Trustee has identified that payment as a potential preference in favour of Galty N.V.¹¹

E. Tolling agreement and settlement discussions with Galty N.V.

17. After accounting for the suspension of limitation periods during COVID, the Trustee believes that the limitation period for the possible claim against Galty N.V. on behalf of the Bankrupt would have been September 8, 2021. The Trustee therefore sought and

⁷ Distribution Analysis, Appendix "F" to the Second Report; MR Tab 2(F) page 77.

⁸ Second Report, paras. 16-24; MR Tab 2 pages 14-15.

⁹ R&D as of Sept. 30, 2021, Appendix "D" to the Second Report; MR Tab 2(D) page 65.

¹⁰ Second Report, para. 31; MR Tab 2 page 16.

¹¹ Second Report, para. 32; MR Tab 2 page 16.

obtained an agreement from Galty N.V. to toll the possible limitation period for this claim, which has been extended and now expires on October 15, 2021.¹²

18. The Trustee has had settlement discussions with Galty N.V. regarding the possible preference claim. This has culminated in a proposed settlement (the “**Proposed Settlement**”) in which Galty N.V. will return to the estate of the Bankrupt the portions of the \$1.1 million payment that would not have gone to Galty N.V. in any event as a distribution in the bankruptcy. This will likely be done by deducting those amounts from its dividend from the estate. The Proposed Settlement is predicated on the Trustee accepting Galty N.V.’s claim, which is the case.¹³
19. The Trustee recommended the Proposed Settlement to the inspectors of the estate. It did so for several reasons:¹⁴
 - a) the Proposed Settlement avoids further extension of the tolling agreement (which is not assured);
 - b) it avoids the costs of litigation in Canada, which may not succeed, and which if successful would then need to be enforced against Galty N.V. in one or more foreign jurisdictions as Galty N.V. has no assets in Canada; and
 - c) given the extent of Galty N.V.’s claim against the Bankrupt, the Proposed Settlement is a cost-effective and efficient way of resolving a potential dispute and will contribute to a timelier completion of the bankruptcy administration.

¹² Second Report, paras. 34-37; MR Tab 2 pages 16-17.

¹³ Second Report, para. 38; MR Tab 2 page 17.

¹⁴ Second Report, para. 39; MR Tab 2 page 17.

20. On that latter point, it is notable that Galty N.V.'s claim against the Bankrupt makes up between 82% and 94% of the total claims filed, depending on whether the ART claim is allowed on appeal from the Trustee's disallowance. Hence the economic considerations seem to be that any steps to recover \$1.1 million to the estate of the Bankrupt end up with substantially all of those funds just going back to Galty N.V. as a dividend in the bankruptcy.
21. It should be noted that subsequent to the bankruptcy, ART has made claims against Galty N.V. in the Litigation in connection with the \$1.1 million payment as well.¹⁵

F. The August 30, 2021 meeting of inspectors to consider the Proposed Settlement

22. The Trustee called a meeting of inspectors on August 30, 2021 to consider the Proposed Settlement. Before that meeting, the Trustee circulated to them a table to illustrate possible distribution scenarios in order to understand the economic impact of the Proposed Settlement.¹⁶
23. There are five inspectors in the Bankrupt's estate.¹⁷ One inspector did not attend that meeting because he represents Galty N.V. and would therefore be in a conflict of interest. The remaining four inspectors had confirmed their availability for the meeting, but only three attended. One, Mr. Chapman, did not end up attending.¹⁸
24. The presence of three out of five inspectors was a quorum and the meeting proceeded. When a vote was called, two out of three inspectors voted in favour of the Proposed Settlement.¹⁹

¹⁵ Second Report, para. 25; MR Tab 2 page 15.

¹⁶ Second Report, paras. 40 and 41; MR Tab 2 page 18.

¹⁷ Second Report, para. 4; MR Tab 2, page 10.

¹⁸ Second Report, para. 42; MR Tab 2 page 18.

¹⁹ Second Report, para. 43; MR Tab 2 page 18.

G. Potential conflict of interest regarding the August 30, 2021 meeting of inspectors to consider the Proposed Settlement

25. The information available to the Trustee is that one of the inspectors who voted at the August 30, 2021 meeting, Anne Marie Heinrichs, is a beneficiary of the Brazilian Trust.²⁰ The Trustee also understands that the Brazilian Trust owns Galty N.V.²¹
26. The Trustee had previously raised with Ms. Heinrichs whether she should be recused from any consideration of the possible claim against Galty N.V., who disagreed that this should be the case. Ms. Heinrichs noted that all the inspectors are related to parties to the Litigation. The Trustee noted that adversity to the Bankrupt is not a disqualifying interest in the same manner as having an interest in the possible target of a claim by the Bankrupt.²²

H. Potential conflict of interest regarding the August 30, 2021 meeting of inspectors to consider the Proposed Settlement and other inspector issues

27. The Trustee recognized that a possible outcome of how the August 30, 2021 meeting of inspectors proceeded is that Ms. Heinrichs' vote could be disqualified. In that case, the remaining inspectors would have tied 1:1 for and against the Proposed Settlement.²³
28. Such a tie result engages s. 117(2) of the BIA, which provides that the opinion of any absent inspector(s) should be sought in order to break a tie. If there are no absent inspectors, then the Trustee is permitted to cast a deciding vote under that provision.²⁴

²⁰ Second Report, para. 45; MR Tab 2 pages 18-19.

²¹ Second Report, para. 31; MR Tab 2 page 16.

²² Second Report, para. 45; MR Tab 2 pages 18-19.

²³ Second Report, para. 46; MR Tab 2 page 19.

²⁴ Second Report, para 47; MR Tab 2 page 19.

29. Since Mr. Chapman was an absent inspector on August 30, 2021, the Trustee sought his opinion on the Proposed Settlement.²⁵
30. In response, Mr. Chapman advised on October 4, 2021 that he would seek instructions.²⁶
31. Mr. Chapman's client is ART and its principal, Victor Seabrook. As noted above, they are engaged in the Litigation against the Bankrupt, as well as against Galty N.V. and persons related to it and the Bankrupt.
32. In reply to Mr. Chapman's October 4 reference to instructions, counsel for the Trustee replied that day to Mr. Chapman to state that:
- ... your reference to seeking instructions is concerning. As noted in the Trustee's First Report to the Court dated February 27, 2020, your appointment as inspector is in a personal capacity with fiduciary obligations to the entire group of creditors of the bankrupt and is not supposed to be on the basis of representing your client. This dynamic is all the more problematic because your client would be precluded from being an inspector himself by virtue of BIA s. 116(2) since he is involved in litigation against the estate.²⁷
33. After being advised (again)²⁸ of the terms of the proposed settlement, Mr. Chapman advised on October 6, 2021 that it was his view that the Proposed Settlement should not be accepted.²⁹
34. The Trustee has previously noted in its First Report that Mr. Chapman seemed to be acting on the basis of instructions from his client.³⁰ Mr. Chapman has statedly and consistently

²⁵ Second Report, para. 48; MR. Tab 2 page 19.

²⁶ Ibid.

²⁷ Second Report, para. 49; MR Tab 2 pages 19-20.

²⁸ Second Report para. 49; MR Tab 2 page 19.

²⁹ Second Report para. 50; MR Tab 2 page 20.

³⁰ First Report, paras. 41-43; MR Tab 2(C) pages 61-32.

acted in in the interest of his client, which causes the Trustee to be concerned whether his vote on the Proposed Settlement should be considered.

IV. ISSUES AND LAW

35. The issues are:

- a) should Ms. Heinrichs have been recused from voting on the Proposed Settlement?
- b) if so, should the opinion of Mr. Chapman be considered in connection with the approval of the Proposed Settlement?
- c) Assuming that Ms. Heinrichs' vote on the Proposed Settlement is not valid, and irrespective of whether Mr. Chapman's opinion should be considered, should the Court authorize the Trustee to enter into the Proposed Settlement?

A. Should Ms. Heinrichs be recused

36. The law is clear that inspectors must remain clear of any conflict of interest to their duty to act in the best interests of the estate of the bankrupt.³¹ A trustee may disregard an inspector on an issue if the trustee has reasonable basis to believe that a conflict exists. Proof to the standard required in court is not required.³²

37. In the absence of any further information or evidence to suggest that Ms. Heinrichs does not have an interest in the Brazilian Trust, which in turn owns Galty N.V., the Trustee is

³¹ *Intercoast Lumber Inc. (Re) (Trustee of)*, [1995 CanLII 1240](#) (BC SC) at para. 11.

³² *Ibid.* at para. 9.

unaware of any basis to conclude that Ms. Heinrichs could properly vote on the Proposed Settlement insofar as it affected the interests of Galty N.V.

B. Should Mr. Chapman's opinion on the Proposed Settlement be considered

38. If Ms. Heinrichs' vote on the Proposed Settlement is not valid then there is no authorization from the inspectors at the August 30, 2021 meeting. In that case, the views of Mr. Chapman need to be sought pursuant to s. 117(2) of the BIA, which provides:

Trustee votes in case of tie

(2) In the event of an equal division of opinion at a meeting of inspectors, the opinion of any absent inspector shall be sought in order to resolve the difference, and in the case of a difference that cannot be so resolved, it shall be resolved by the trustee, unless it concerns his personal conduct or interest in which case it shall be resolved by the creditors or the court.

39. Technically speaking, Mr. Chapman's views would be expressed in a further meeting of inspectors, because decisions of inspectors need to be made at formal meetings of inspectors.³³
40. Nonetheless, it is both clear what Mr. Chapman's vote will be and also that the principles applicable to inspectors noted above about Ms. Heinrichs also apply to Mr. Chapman's involvement in the inspectors' review of the Proposed Settlement.
41. In that latter regard, the Trustee has reason to believe that Mr. Chapman is not being guided by the best interests of the estate of the Bankrupt, but rather that he is acting in the interest of his client. He has stated as much on several occasions, including after that conduct was

³³ *Mimarco Investments Ltd. v. Edgecastle Holdings Inc.*, [2009 CanLII 32913](#) (ON SC) at para.5.

noted as being an issue in the First Report in early 2020. The level of proof in this case may in fact meet the standard that a Court might require.

42. The dynamic of Mr. Chapman relying on client instructions to fulfil his role as an inspector also seems to be circumventing the provisions of s. 116(2) of the BIA, which would prevent Mr. Seabrook or any other person affiliated with ART from being an inspector. The practical effect of Mr. Chapman acting on instructions is that ART is an inspector nonetheless. The law of solicitor/client relationships and agency may mean that is in fact the legal result as well.
43. If the foregoing means that Mr. Chapman is unable to vote on the Proposed Settlement, then there remains a 1:1 tie between the two inspectors entitled to vote. In that case, the trustee would be entitled to itself cast the deciding vote under the latter part of BIA s. 117(2). There may, however, be issues with whether a decision of two out of five inspectors in that scenario would make a quorum. There does not seem to be any case law on the question of whether the numbers required for a quorum may be reduced due to recusal(s) of some inspectors, so the Trustee would seek advice and direction from the Court on that point before proceeding in that manner if appropriate.

C. Should the Court authorize the Trustee to enter into the Proposed Settlement

44. If the August 30, 2021 vote of inspectors does not validly authorize the Trustee to enter into the Proposed Settlement, then the Trustee seeks advice and direction of the Court on the Proposed Settlement.
45. The Trustee's motion could arise under BIA s. 119(2), because that provision allows for the Court to review the decision of the inspectors. That would apply here if the vote of Mr. Chapman were to be considered such that there ends up being a 2:1 vote against the

Proposed Settlement. As noted above, that vote would technically need to take place at a further inspectors meeting. Due to the tolling agreement expiring on October 15, 2021, it is likely not possible to hold a further inspectors meeting and bring a further motion to the Court before that time, such that it may be preferable to obtain the ruling of the Court now.

46. The Trustee's motion could also arise under BIA s. 34, which broadly permits a trustee to seek advice and direction from the Court. That could apply if Mr. Chapman's views are not to be considered, because in that case there would remain a 1:1 tie and the Court were to conclude that a vote by two inspectors that could be broken by the vote of the Trustee runs afoul of quorum issues. If so, the Court may be in a position to provide advice and directions under the general provisions of s. 34 because there will not (and cannot, if the recusal and quorum issues are applied in that manner) be any valid decision by the inspectors that would be reviewable under s. 119(2) instead.
47. Irrespective of how the Trustee's motion for advice and directions on the Proposed Settlement is properly before the Court, the Trustee recommends to the Court that the Proposed Settlement be authorized. It does so for the same reasons that the Trustee recommended it to the inspectors. The economics of the possible claim against Galty N.V. make no sense for creditors of the estate of the Bankrupt if Galty N.V. will just get back 82-94% of whatever the Bankrupt's estate is able to recover. On the other hand, a recovery of 6-18% for the estate without the risk of litigation and the cost of proceedings in Canada and elsewhere is beneficial.
48. If the motion is before the Court as a review of the decision of the inspectors under s. 119(2), which would require that Mr. Chapman's vote counts, then the Trustee does need to comment on the principles that apply to such a review. In that regard, the case law

appears clear that while the “practical administration of the estate of the bankrupt” is to be normally to be done by the inspectors, if that administration is not being done in good faith and for the benefit of the estate then the Court may intervene.³⁴

49. In the circumstances of this case, it is not clear how any decision but to approve the Proposed Settlement is in the best interests of the creditors of the Bankrupt – unless extraneous factors related to the litigation are considered.

V. NATURE OF THE ORDER SOUGHT

50. The Trustee therefore seeks advice and directions in connection with the August 30, 2021 authorization by the inspectors to enter into the Proposed Settlement, or for the Court to authorize the Trustee to do so if appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of October, 2021.

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³⁴ *Impact Tool & Mould Inc. (Re)*, [2006 CanLII 7498](#) (ON CA) at para. 30.

SCHEDULE A – LIST OF AUTHORITIES

- 1 *Impact Tool & Mould Inc. (Re)*, [2006 CanLII 7498](#) (ON CA)
- 2 *Intercoast Lumber Inc. (Re) (Trustee of)*, [1995 CanLII 1240](#) (BC SC)
- 3 *Mimarco Investments Ltd. v. Edgecastle Holdings Inc.*, [2009 CanLII 32913](#) (ON SC)

SCHEDULE B – RELEVANT STATUTORY PROVISIONS

Bankruptcy and Insolvency Act, [R.S.C., 1985, c. B-3](#) ss. 34, 116(2), 117(2) and 119(2)

Trustee may apply to court for directions

34 (1) A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.

Persons not eligible

116(2) No person is eligible to be appointed or to act as an inspector who is a party to any contested action or proceedings by or against the estate of the bankrupt.

Trustee votes in case of tie

117(2) In the event of an equal division of opinion at a meeting of inspectors, the opinion of any absent inspector shall be sought in order to resolve the difference, and in the case of a difference that cannot be so resolved, it shall be resolved by the trustee, unless it concerns his personal conduct or interest in which case it shall be resolved by the creditors or the court.

Decisions of inspectors subject to review by court

119(2) The decisions and actions of the inspectors are subject to review by the court at the instance of the trustee or any interested person and the court may revoke or vary any act or decision of the inspectors and it may give such directions, permission or authority as it deems proper in substitution thereof or may refer any matter back to the inspectors for reconsideration.

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