SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: *Huphman (Re)*, 2019 NSSC 280

Date: 20190916
Docket: No. 39813
Registry: Halifax
Estate Number: 51-2088256

In the Matter of: The bankruptcy of Randall Rudolph Huphman

BETWEEN:

T&J Delaney Contracting Limited

Applicant (Appellant)

And

Grant Thornton Limited, trustee in Bankruptcy of Randall Rudolph Huphman

Respondent

Judge:	Raffi A. Balmanoukian, Registrar
Heard:	April 25, 2019, in Bridgewater, Nova Scotia
Counsel:	Michael K. Power, QC, for the Applicant, T& J Delaney Contracting Limited Shawn M. O'Hara, for the Trustee, Grant Thornton Limited G.F. Philip Romney, for the intervenors, Randall Rudolph Huphman and Judith Huphman

Balmanoukian, Registrar:

[1] Mr. Huphman filed for his third bankruptcy on February 16, 2016. At that time, he was the sole registered owner of a piece of land at Brooklyn, Queens County, Nova Scotia. Mrs. Huphman was not on title. Both subsequently made consumer proposals.

[2] The applicant, T&J Delaney Contracting Limited ("Delaney"), filed a Claim for Lien on Mr. Huphman's land as a result of work performed on it, and claims secured creditor status as a result. The Trustee, Grant Thornton Limited (the "Trustee"), disallowed that claim of security as untimely. Delaney appealed, pursuant to Section 135 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA"). This Court is called upon to adjudicate that disagreement.

[3] The Huphmans dispute the quality and value of the work. Those issues are not before the Court except to the extent that they interface with the timeliness of the Delaney claim. In other words, the matter before the Court is the status of the Delaney claim as secured or unsecured, not the value of any such security or the quantum of the claim.

BACKGROUND

[4] A timeline will be useful to this narrative.

[5] October 6, 2015 – Delaney begins work on the site; the nature of this work will be discussed in due course.

November 9, 2015 – Delaney does the last work invoiced; it is central to the issue before the Court as to whether this was the "last day worked" or whether the contract was incomplete over and above any remediation or repair to work done to that point.

November 16, 2015 – Delaney invoices the Huphmans a total of $27,260.18, for work to November 9, 2015.

November 18, 2015 – Delaney moves a wooden step structure to the Huphmans' mini-home. This work was not invoiced, but as will appear Delaney contemplated doing so in due course.

January 8, 2016 – Jeffrey (Jeff) Delaney (Delaney's principal) and his mother visit the Huphmans; I will discuss the nature of that visit in due course as well.

January 2016 – the parties, through (then) counsel attempt to resolve various issues; these efforts come to naught.

January 28, 2016 – Delaney prepares and files a Claim for Lien pursuant to the *Builders' Lien Act*, RSNS 1989, c. 277. The Claim, verified by the usual affidavit, states that the "last work being completed on January 8, 2016." Interestingly, the date appears to have been inserted by typewriter over a blank or "whited out" space.

February 16, 2016 – Mr. Huphman makes an assignment in bankruptcy. The real property thereby vested in the Trustee pursuant to Section 71 BIA. The statement of affairs shows Delaney as both a secured and unsecured creditor, with the secured portion appearing to be the difference between the assessed value of land and dwelling, and the mortgage on the mini-home (there is no prior recorded mortgage on the real property).

February 19, 2016 – Delaney files its proof of claim, claiming status as a secured creditor by virtue of its Claim for Lien.

April 4, 2016 – the Trustee disallows the Delaney claim as a secured creditor. While stated to be a disallowance of "your claim (or your right to priority or your security on the property) in whole," it appears to be a disallowance

of the priority rather than the debt. The reason stated is "The documentation on file states the last day worked as November 9, 2015. The lien was registered on February 2, 2016 and is outside of the allowable 60 day period." This, of course, is a reference to Section 24 of the *Builders' Lien Act*.

April 14, 2016 – Delaney appeals this disallowance pursuant to Section 135 of the BIA; on the same day, it filed its statement of claim.

2016-8 – Various discussions and adjournments take place; these will take their respective places in the narrative as appropriate. Ultimately, this hearing was scheduled on September 20, 2018 for hearing on November 26, 2018.

February 23, 2017 – the Huphmans make a joint consumer proposal (Mrs. Huphman did not declare bankruptcy at the same time as Mr. Huphman in 2016; Exhibit 1, Tab 22, shows that she had filed in 2014 and it is unclear whether or not she was an undischarged bankrupt as of February 23, 2017). Mr. Huphman, as a bankrupt, fell within the definition of "consumer debtor" in Section 66.11 BIA and could thus make a proposal. Mrs. Huphman could make a proposal, whatever her status at the time. This proposal showed Delaney as an unsecured creditor. Delaney, predictably, objected both to the proposal and the classification.

September 20, 2018 - This hearing was scheduled for hearing on November 26, 2018. At that time, the only participants were Delaney and the Trustee.

November 8, 2018 – Delaney files its affidavit and brief. The Trustee objected that this was untimely pursuant to Nova Scotia's Civil Procedure Rule 23.11(1) (which applies to these proceedings by virtue of Rule 3 of the *BIA General Rules*).

November 9, 2018 – I presided over a teleconference in which this matter was rescheduled by consent to January 10, 2019.

December 20, 2018 – The Huphmans, through counsel (apparently newly retained by them), wrote to the Court. Counsel advised that "I am leaving for the Christmas holidays tomorrow and returning on January 7, 2019" and requested an adjournment. The Huphmans were not, at this point, parties to the proceeding. Delaney objected by letter to the Court on the same date.

On January 3, 2019, I requested all counsel make themselves available for a conference call the following day, January 4, 2019. Messers Power and O'Hara obliged. Mr. Romney's office replied that "There is no lawyer here to partake and we are not privy to Mr. Romney's schedule at present. If you require Mr.

Romney's participation he will be back in the office on Monday." Neither Mr. Romney nor his office called in at the appointed time.

January 4, 2019 – I presided over the noted conference. I adjourned the matter "without prejudice to any party's position on costs."

January 9, 2019 – I presided over a conference call in which the Huphmans, at their counsel's request and over Delaney's objection, were added as intervenors. In my confirmatory email to counsel, I stated: "The Court shall address costs, including the costs associated with the last adjournment and the addition of the intervenors, at or following the conclusion of the hearing."

April 25, 2019 – Hearing date.

STANDARD OF REVIEW

[6] The relevant portions of Section 135 BIA read as follows:

> **135 (1)** 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.
>
> **…**
>
> **(2)** The trustee may disallow, in whole or in part,
>
> 1. **(a)** any claim;

2. **(b)** any right to a priority under the applicable order of priority set out in this Act; or

3. **(c)** any security.

> **(3)** Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.
>
> **(4)** A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules. [emphasis added]

[7] The parties disagree on whether s. 135 is a "true appeal" or a hearing *de novo*; they also disagree whether the standard of review is correctness or reasonableness.

[8] The caselaw also differs.

[9] The starting point in Nova Scotia is the decision of my learned forebear, Registrar Hill, in *Re Eskasoni Fisheries Ltd*. (2000), 187 NSR (2d) 263. He concluded that "…in order to do justice to the parties it is necessary for a Registrar, or indeed a Judge, to hear the matter *de novo* in order to render an appropriate decision." He went further, allowing an amendment to the notice of disallowance

to advance further argument on the merits, at least where there was no resultant prejudice to the appellant.

[10] *Eskasoni* has not always been favourably received.

[11] In *Re Galaxy Sports*, 2004 BCCA 284, the Court stated at para. 36-7:

> The Umbro respondents take issue both with the applicability of the Court's remarks in ***Triton*** (which they characterize as *obiter* in any event) and the proposition that where the chair or trustee has a discretion to exercise, a court of law should not interfere if there were reasonable grounds for the decision. In their submission, the hearing before the Chambers judge below was a trial *de novo* in which the Court was entitled to hear evidence regarding the valuation of the landlords' claims that was "not necessarily before the trustee." On this point, they cite ***Re Eskasoni Fisheries Ltd.*** (2000)2000 CanLII 10880 (NS SC), 16 C.B.R. (4th) 173, a decision of the Registrar of the Nova Scotia Supreme Court dealing with a trustee's disallowance of a claim. The Registrar stated:
>
> > Where a creditor appeals to the court from the decision of a trustee to disallow a claim that appeal will proceed by way of trial *de novo*. While I have found no specific case or commentary that makes this point clear, it is clear from a review of the cases generally that a Judge or Registrar hearing an appeal from a trustee's decision is not required simply to proceed upon the information before the trustee. In other words, on such appeals the court is entitled to accept and consider all evidence relevant to the claim. [para. 17]
>
> (See also ***Re MacDonald*** [2002] O.J. No. 2744 at para. 19 (Ont. Sup. Ct.), ***Re Exner*** (2003) 2003 BCSC 260 (CanLII), 41 C.B.R. (4th) 49 at para. 22 (B.C.S.C.), and ***Re Beetown Honey Products Inc.*** 2003 CanLII 32918 (ON SC), [2003] O.J. No. 3853 at para. 16 (Ont. Sup. Ct.), all of which followed ***Eskasoni***. In ***Port Chevrolet Oldsmobile Ltd. (Re)***, 2004 BCCA 37 (CanLII), a recent decision of this court, counsel did not challenge the "trial *de novo*" approach taken in ***Eskasoni***. The Court therefore proceeded on the assumption for purposes of that appeal that the Chambers judge below was entitled to consider material that had not been before the trustee in deciding whether a proof of claim had complied with s. 124 of the ***BIA***.)
>
> The respondents also argue that the chair or trustee is not a "specialized tribunal" of the kind discussed in ***Southam*** and that there was neither a "hearing" before them in this case nor any meaningful opportunity afforded at the creditors' meeting to adduce evidence to contradict the position taken by the debtor. Yet the ***BIA*** obviously intends that a meaningful opportunity be accorded to all creditors at their meeting to raise objections

and arguments for consideration by the chair or the trustee in making their determinations under ss. 108 and 135 respectively. At this point, the decision-maker has a 'gatekeeping' role with respect to creditors' voting entitlement, which in turn may decide the fate of the debtor's proposal. The fact that many of the formalities of a hearing in a court of law may be lacking is a necessary feature of the bankruptcy provisions relating to debtors' proposals as I have described them above, but in my view it is not conclusive of the issue of standard of review. Further, I know of no binding authority to the effect that such a hearing must take place before the relevant decision-maker will be regarded as a "specialized tribunal" with expertise that commands some deference. Many statutory decision-makers whose roles are not strictly "adjudicative" have been subjected to the standard of review analysis described in ***Southam*** and the cases following it. Thus in Brown and Evans, ***Judicial Review of Administrative Action in Canada*** (loose-leaf, 1998) the authors observe:

> Until recently, the extension of the pragmatic or functional analysis to determine the appropriate standard of review to be applied to administrative action outside the adjudicative context has been sporadic. For the most part, courts have assumed that the interpretation of statutory provisions conferring legislative or administrative powers on non-adjudicative agencies or officials is subject to *de novo* determination by the courts. Judicial deference was typically not afforded to the decision-maker's view of what considerations are legally relevant to, or what purposes may legitimately be pursued by, the exercise of discretion. However, in a recent decision of the Supreme Court of Canada [*Baker v. Canada*, *supra*] a pragmatic or functional analysis was applied to the review of a refusal by an immigration officer to grant permanent residence status on humanitarian and compassionate grounds to a woman who had been living in Canada illegally.
>
> *Baker* makes two important changes to the review of the exercise of administrative discretion. First, it extends the doctrine of judicial deference to areas of administrative decision-making where it had previously been assumed that, as a general rule, any legal issue decided by the decision-maker was subject to review on a standard of correctness. Second, *Baker* firmly establishes the principle that, even if the decision-maker has committed none of the errors traditionally associated with the *ultra vires* doctrine, a reviewing court may still set the decision aside or declare it to be unlawful if the exercise of discretion fails to meet a basic standard of rationality. [at 15-95 to 15-96]
>
> [emphases added]

[12] Both lines of thinking were considered by Registrar Herauf in *Re Erdman*, 2005 SKQB 515. He found the analysis in *Re Galaxy Sports* to be “compelling” (para. 10), and that the hearing in that case would proceed as a “true appeal” with

reasonableness as the standard of review. However, the learned Registrar left the door open for the Court to hear new evidence, on proper application, and determine if the new evidence "meets the legal test for admission." (para. 12).

[13] Registrar Schwann (as she then was) appears to have adopted something of a hybrid approach, proceeding *ad hoc* as the facts of the case and the demands of justice require. In *Re Pyne*, 2009 SKQB 458 she said:

> [19] There are two issues in this appeal:
>
> (a) whether the appeal is on the record or *de novo* and the appropriate standard of review; and
>
> (b) whether the trustee erred in disallowing BDC's security on the basis that the truck had no value on realization or because BDC failed to register its interest by serial number.
>
> (a) nature of a s. 135 appeal and standard of review
>
> [20] The trustee is required by the *BIA* to examine each proof of claim. Under s. 135(2), the trustee is empowered to disallow any claim in whole or in part, or to disallow any security. The disallowance is final and conclusive unless appealed pursuant to s. 135(4) within the time permitted for doing so.
>
> [21] An appeal under s. 135 must begin with consideration of whether a s. 135 appeal is a true appeal, in which case fresh evidence cannot be admitted, or if it is to proceed on a *de novo* basis. Case law is divided on this point. (see: *Re Eskasoni Fisheries Ltd.* (2000), 2000 CanLII 10880 (NS SC), 16 C.B.R.(4th) 173 (NSSC); *Re Galaxy Sports Inc.*,2004 BCCA 284 (CanLII), 1 C.B.R. (5th) 20; *Johnson v. Erdman*, 2005 SKQB 515 (CanLII), 18 C.B.R. (5th) 97 (under appeal to SKCA)).
>
> [22] Subsequent cases have concluded that, notwithstanding the decisions in *Galaxy Sports* and *Johnson*, courts may determine this issue on a case by case basis having regard to the facts and circumstances of each. (*Re San Juan Resources, Inc.*, 2009 ABQB 55 (CanLII), 52 C.B.R. (5th) 97; see also *Lloyd's Non-Marine Underwriters v. J.J. Lacey Insurance Ltd.*, 2008 NLTD 9 (CanLII); 41 C.B.R. (5th) 137)

> [23] I am prepared to treat this as a *de novo* appeal. The trustee did not prepare and file a 'record' however several affidavits were filed which effectively served the same purpose as well as providing a foundation for the eventual discharge hearing. There has been no loss of efficiency or increased formality in receiving this material and hearing argument on a *de novo* basis.
>
> [24] Where the trustee's decision involves a question of law or the interpretation of a statute, the standard of review is correctness. On the other hand, where the matter under consideration is factual in nature or involves a discretionary element, the standard of review is reasonableness. (*Eskasoni* and *Lloyd's Non-Marine Underwriters*)
>
> [emphases added]

[14] She reached a similar conclusion, in part relying upon her own decision in *Pyne*, in *Re Insley*, 2010 SKQB 17. She stated, at paras. 23 *et seq*:

> [23] I find it helpful to begin by placing the whole of s. 135 in its proper context. This section imposes a statutory obligation on trustees to examine every proof of claim and every security for the purpose of determining if the claim or security, as the case may be, is valid. (Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, vol. 2, p. 5-180; *Canadian Imperial Bank of Commerce v. 433616 Ontario Inc*. (1993), 17 C.B.R. (3d) 160). If unsatisfied with the proof of claim or its supporting material, the trustee has not only a right but a corresponding duty to demand sufficient evidence to establish the validity of the claim. The trustee is given many tools under the *BIA* to fulfil this function including, where necessary, examination of parties and requiring production of documents. (Houlden and Morawetz, vol. 2, p. 5-181)
>
> [24] Following examination, the trustee either allows the claim or disallows it in whole or in part. A disallowance is final and conclusive unless appealed by the aggrieved creditor within the time permitted for doing so under s. 135(4). Section 135(5) is the flip side of a disallowance. Where a claim is admitted, s. 135(5) permits creditors or the bankrupt to apply to expunge or reduce the claim *if the trustee declines to interfere in the matter*.
>
> [25] An application to expunge pursuant to s. 135(5) has been characterized by the courts as an *appeal* against allowance. "In effect, the motion under section 135(5) is an appeal by a creditor or the debtor against an allowance by the trustee of a proof of claim or proof of security" (Houlden and Morawetz, vol. 2, p 5-205 (cites omitted); see also s. 192(1)(n) *BIA*).
>
> [26] In *Lamont Hi-Way Service Ltd. v. Bunning*, 2003 ABQB 297 (CanLII), 44 C.B.R. (4th) 91, para. 20 and 21, an application to expunge was described in this fashion:

> Section 135 creates a two sided token. If a trustee disallows a creditor's claim the creditor's only remedy is given by s.-s. (4)……If a trustee allows a claim other creditors and the bankrupt are adversely affected, so s.-s. (5) gives then a right to challenge the trustee's decision. There is little case law on s.-s. (5). Houlden & Morawetz, Bankruptcy & Insolvency Act (The 2002 Annotated) say that 'in effect' a motion under the s.-s. is an appeal by a creditor or the bankrupt of the trustee's disallowance of a claim, p. 551.

[27] *Marsuba Holdings Ltd., Re* (1998), 1998 CanLII 5248 (BC SC), 8 C.B.R. (4th) 268 is another case where a s. 135(5) application was explored. At paragraphs 14 and 15 the learned Master examined the scope of the provision, commenting as follows on the applicable test.

> Counsel for the trustee says the applicant must show that the trustee acted unreasonably or improperly in accepting the proof of loss. Counsel would have it that so long as the trustee acted reasonably, the actual legitimacy of the claim is irrelevant. I respectfully disagree.
>
> Quite apart from questions of natural justice raised by this position….this construction of s. 135(5) is contrary to the tenor of s. 135 as a whole. The first four sub-sections deal with the procedure to be followed where a creditor appeals the *disallowance* of a claim by a trustee, and in such cases the appeal is decided simply on the basis of the legitimacy of the claim. There is no reason at all why different considerations should apply to appeals of a decision by the trustee to allow a claim. The only question should be whether the claim is indeed legitimate.
>
> [last emphasis added by Schwann, R]

[28] No further elaboration was offered in *Marsuba* as to what constitutes a "legitimate" claim nor did the Court expand upon whether an appeal under this subsection proceeds on the record or is *de novo* in nature.

[29] Regardless of the nature of a s. 135(5) appeal, the standard of review also remains an open issue unexplored in the referenced cases. This Court summarized the standard of review in the context of appeals from disallowance under s. 135(4) in the following manner: "Where the trustee's decision involves a question of law or the interpretation of a statute, the standard of review is correctness. On the other hand, where the matter under consideration is factual in nature or involves a discretionary element, the standard of review is reasonableness." (*Business Development Bank v. Pinder Bueckert*, 2009 SKQB 458 (CanLII) at para. 24; see also *Eskasoni Fisheries Ltd., Re* (2000), 2000 CanLII 10880 (NS SC), 16 C.B.R. (4th) 173; *Lloyd's Non-Marine Underwriters v. J.J. Lacey Insurance Ltd.*, 2008 NLTD 9 (CanLII); 41 C.B.R. (5th) 137.)

> [30] The application before me is one to expunge two claims filed and admitted by the trustee. The onus rests with RBC to establish error on the part of the trustee, or in keeping with the approach taken in *Marsuba*, to establish these were not "legitimate" claims. In my view there is no need to explore the contours of what is or is not a legitimate claim, or other collateral issues arising on appeal (issues not argued by the parties) for the simple reason that RBC abandoned its initial argument that the impugned claims were not filed prior to Insley's discharge or disclosed by the trustee. In any event, no argument was advanced nor evidence presented concerning the underlying validity of the claims or their allowance. There is no suggestion whatsoever that the trustee improperly interpreted the law, ignored crucial facts, exercised its discretion improperly or acted outside of its authority in the course of exercising its function under s. 135. For all of these reasons, RBC's initial argument fails.

[emphases added except where noted as added by Schwann, R]

[15] Finally, the learned Registrar Schwann (as she then was) built on this hybrid doctrine in *Mamczasz Electrical Ltd. v. South Beach Homes Ltd*., 2010 SKQB 182. She stated at paras. 29 *et seq*:

> [29] The threshold question to any s. 135 appeal concerns the nature and scope of the appeal. Case law is divided on whether a s. 135 appeal should proceed on a *de novo* basis or as a true appeal limited to a review of the record.
>
> [30] The *de novo* approach was adopted and new evidence relative to the claim admitted in the following cases: *Re Eskasoni Fisheries Ltd.* (2000), 2000 CanLII 10880 (NS SC), 16 C.B.R. (4th) 173; *Port Chevrolet Oldsmobile Ltd.*, 2004 BCCA 37 (CanLII), 49 C.B.R. (4th) 146. In contrast, other cases have declined to adopt the *de novo* approach opting instead to treat a s. 135 appeal as a true appeal on the record: *Re Galaxy Sports Inc.*, 2004 BCCA 284 (CanLII), 1 C.B.R. (5th) 20; *Johnson v. Erdman*, 2005 SKQB 515 (CanLII), 18 C.B.R. (5th) 97.
>
> [31] As observed in *Able Automotive Ltd. v. Cameron-Okolita Inc*. (cited as *Re Foreman*) 2009 SKQB 476 (CanLII)), more recent decisions have eschewed the rigid approach adopted in both *Galaxy Sports* and *Johnson v. Erdman* in favour of a more flexible, case by case approach. (see for example: *San Juan Resources, Inc. Re*, 2009 ABQB 55 (CanLII), 52 C.B.R. (5th) 97 and *Lloyd's Non-Marine Underwriters v. J.J. Lacey Insurance Ltd.*, 2008 NLTD 9 (CanLII), 41 C.B.R. (5th) 137; *Business Development Bank of Canada v. Pinder Bueckert & Associates Inc.* , 2009 SKQB 458 (CanLII))

[32] Adopting the approach taken by this Court in *Able Automotive*, I conclude that the fact-sensitive nature of the issues presented in this appeal favours a *de novo* examination of the material. This conclusion is further influenced by the absence of any discernible 'record' and by the plethora of affidavit material filed by both sides upon which reliance was placed.

[33] Having determined this appeal should proceed on a *de novo* basis, is there any concern with the trustee filing further material to buttress or amplify its conclusions? The British Columbia Court of Appeal in *Port Chevrolet*, relying upon the decision in *Eskasoni Fisheries Ltd. Re*, *supra*, accepted an expansive approach, commenting as follows on the trustee's augmented material filed on appeal:

> I note that the ability of the Court to accept "new" evidence can operate in favour of either party: in *Eskasoni Fisheries Ltd.*, a trustee was permitted to advance a separate and distinct basis for disallowing a claim on the appeal in addition to the basis previously advanced at the meeting. (*Port Chevrolet*, para. 25)

[34] Based on the more recent jurisprudence, I am satisfied this appeal should proceed on a *de novo* basis and have therefore taken into account the affidavit material filed by both sides.

2. Which party bears the 'onus' of proving a claim?

[35] To succeed, the appellant must establish that it has a claim provable in bankruptcy on the day on which the bankrupt became bankrupt. (The provisions of the *Act* pertaining to bankruptcy apply with necessary modification to Division I proposals (s. 66(1)). Section 121 of the *BIA* is the governing section and it provides:

> 121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[36] The scope of 'debt' and 'liability', employed in that provision, has been succinctly summarized in text authorities:

> A debt is a sum due by certain and express agreement, a specified sum of money owing to some person from another, including not only the obligation of a debtor to pay, but the right of a creditor to receive and enforce payment. To be a provable claim, a debt must be due, either at law or in equity, by the bankrupt to the person seeking to prove a claim and must be recoverable by legal process.
>
> The meaning of the word "liability" is broader than that of the word "debt", including almost every character of hazard or responsibility and in particular, as

> provided in s. 121, includes all obligations to which the bankrupt is subject on the day on which he or she becomes bankrupt. [footnotes omitted] (Honsberger and DaRe, *Bankruptcy in Canada*, 4th ed, (Aurora: Canada Law Book, 2009) at p. 390)

[37] Failure to disclose a claim in its records or in its statement of affairs does not affect the validity of the claim and has been found to be an irrelevant consideration. *Flewitt v. Agravoice Productions Ltd. (Trustee of)* (1986), 61 C.B.R. (N.S) 280.

[38] Inasmuch as s. 121 deals with the substantive right to participate in estate assets, sections 121 and 135, read together, address the method and process employed to determine claims. These sections provide:

> 124. (1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.
>
> (2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.
>
> (3) The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.
>
> (4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.
>
> . . .
>
> 135.(1) 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.
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.
>
> (2) The trustee may disallow, in whole or in part,
>
> (a) any claim;

> (b) any right to a priority under the applicable order of priority set out in this Act; or
>
> (c) any security.
>
> (3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.
>
> (4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.
>
> (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.
>
> [emphasis added by Schwann, R]

[39] It is undisputed that a creditor who wishes to participate and share in estate dividends must prove its claim. (s. 124(1) *BIA*) This process begins with filing a proof of claim in the prescribed form which shows and/or includes:

> … the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated." (s.124(4) *BIA*)

[40] The underlined words in s. 124(4) clearly impose an evidentiary burden on creditors to file sufficient and adequate material to enable the trustee to "make an informed decision as to whether the claim has merit." (Roderick Wood, *Bankruptcy & Insolvency Law*, (Toronto: Irwin Law, 2009) at p. 243) Subsection 135(1) imposes a corresponding duty on trustees to examine every proof of claim and the grounds in support to determine validity (s. 135(1) *BIA*). This duty extends to proposals. (*Re Toronto Permanent Furniture Showrooms Co.* (1960), 1 C.B.R. (N.S.) 16).

[41] Where a trustee is unsatisfied with the material provided in support of a claim, the trustee has both a right and duty to demand further evidence from the creditor. In the exercise of this duty, the trustee may conduct examinations or obtain the production of

documents. (see s. 163 *BIA*; Houlden and Morawetz,*Bankruptcy and Insolvency Law of Canada*, 4th ed. looseleaf, vol. 2, p. 5-181)

[42] The parties have elected to frame the issue as one of 'onus'. The trustee contends the onus of proof rests squarely with the claimant based both on the clear wording of s. 124 and as a matter of practical concern. Potential creditors possess the necessary information giving rise to an alleged claim along with the 'vouchers or other evidence' needed to support it.

[43] M.E. Ltd. takes the opposite position because of the unique challenges presented by this debtor. After having asserted a claim and provided what it believed to have been adequate supporting material, the trustee has sufficient material to make an informed choice, they submit. If it does not, then it must exercise its powers of examination to elicit evidence disproving their claim. They suggest this is so because only the trustee has access to the debtor's books and records along with an array of investigative tools which can be used to investigate them. An examination of the financial records of South Beach Electric or MLBV, they suggest, could possibly provide some answers however as a creditor, they don't have the means to access those records.

[44] Decided cases have framed the issue of onus or burden of proof in terms of creditors' duties and sufficiency of response. In *Re Norris* (1988), 67 C.B.R. (N.S.) 246 (Ont. Sup. Ct.) the trustee requested additional material from the creditor (Canada Revenue Agency "CRA") in support of its claim. The CRA in reply provided a copy of the notice of assessment (*Income Tax Act*, R.S.C. 1985, c. 1 (5th supp.)) but nothing more. The trustee found this reply inadequate and disallowed the claim. Although ultimately overturned on appeal on the 'adequacy' issue ((1989), 1989 CanLII 4079 (ON CA), 75 C.B.R. (N.S.) 97 (Ont. C.A.)), the following comments are worth noting:

> In my opinion the proof of claim with a statement of account, vouchers and/or supporting evidence should be sufficient to enable the trustee to make an informed decision as to whether the claim represents a claim which has merit and should be allowed or whether it is a claim unsupported by particulars and supporting material being in the nature of a claim which the trustee should disallow.

[45] The British Columbia Court of Appeal in *Port Chevrolet, supra*, considered the appeal from the perspective of creditor compliance with s. 124(4) of the *BIA*. Examined factually, the Court found the creditor had failed to specify the vouchers or provide any other probative evidence to support its claim, and in consequence had failed to meet the threshold of 'sufficiency' required by s. 124(4).

[46] Case authority is quite clear: the creditor bears the onus of establishing its claim. It does so by providing vouchers, statement of account or other evidence sufficient to substantiate it. Put another way, the creditor must provide sufficient evidence so as to

> enable the trustee to make an informed decision on the validity of the proposed claim. The test to be applied when examining proofs of claim has been described as follows:
>
> > In deciding the validity of a claim, *certainty* is not the test. If the method used in calculating the amount of the claim is reasonable and the evidence in support of the claim is relevant and probative, the claim should be admitted. *Re HDYC Holdings Ltd*. (1995), 1995 CanLII 488 (BC SC), 35 C.B.R. (3d) 294. [Houlden and Morawetz p. 5-181; emphasis added by Schwann, R]
>
> [47] If a creditor adduces relevant and probative evidence from which a valid claim can be reasonably inferred, the test has been met and the claim is provable. In the face of that, particularly where a trustee has suspicions, the obligation shifts to the trustee to investigate further. Disallowing a claim based on a hunch or suspicion is not enough.
>
> The trustee is entitled to have all claims investigated and if, necessary, litigated before he or she can be called to pay….The trustee "is entitled to go behind such forms to get at the truth ….When the trustee is in doubt as to whether a claim should be allowed or disallowed, the trustee may apply to the court for directions.
>
> [Bankruptcy In Canada, p. 409]

[emphases added except where noted as added by Schwann, R]

[16] I have concluded that the Schwann approach is correct.

[17] With respect to Registrar Hill, I am not satisfied that every s. 135 case, as a matter of course, must automatically proceed *de novo*. Some appeals will be frivolous and vexatious. The use of Court and institutional resources that was of concern to the British Columbia Court of Appeal in *Re Galaxy Sports* (at para. 41) must be borne in mind. "Access to justice," a term of much use in modern discourse, not only means that legitimate litigants have their just, speedy, and efficient day in Court, but also that such a day not unduly be delayed or denied by

illegitimate bottlenecks. "To no one shall we sell, to no one deny or delay right or justice" is as crucial to the rule of law today as it was at Runnymede.

[18] Trustees are professionals. They are obliged both by that professionalism and by the licensing regime set out in the BIA to exercise their duties fairly and impartially. With extremely few exceptions, they do so; often in the face of unreasonable or ill-conceived expectations. That includes evaluating claims under s. 135 and either allowing or disallowing them (or their priority as the case may be) based on their knowledge and expertise. They have a statutory obligation to examine proofs of claim and "may" call for further evidence. If the claim or priority is disallowed, the Trustee "shall" provide reasons.

[19] With that said – Trustees are also businesspeople. They perform a service in the private sector, for a profit. In Summary Administration estates, their fees are prescribed by Rule 128. In many cases, this will mean remuneration that is quite modest and indeed, may not be fully paid for some time.

[20] By necessity, this means that certain summary administration estates will be, as the name implies, administered summarily.

[21] Part of that exercise may, in some cases, involve an evaluation of material based primarily or even exclusively upon information provided by the bankrupt. I

can easily think of situations in which a bankrupt advises a Trustee (truthfully or otherwise) that a certain debt or claim of priority is not as established. Notwithstanding the duty of the Trustee to examine proofs of claim and to provide reasons for disallowance, it is easy to envisage a Trustee faced with an unsworn, untested "he-said, she-said" and being compelled to make a good-faith decision on limited or incomplete material, constrained by commercial realities of a summary administration. The Trustee "may" call for supporting documentation, but the reality of the situation is commercial or documentary constraints may not result in an examination with the same rigor as it may receive through it being tested in an adversarial and judicial forum.

[22] The Trustee may also be evaluating the claim in a jurisdiction other than the one of filing. I routinely see files in which "centres of excellence" of regional or national firms have prepared certain aspects of the file outside Nova Scotia. There is nothing wrong with that, but there is always the potential to miss legal nuances that vary within our Dominion; I routinely notice such discrepancies. Most are trivial (such as naming nomenclatures), but it is fair to say the standard is not perfection; by the nature of practice it cannot be so. It merely illustrates that the Court has a supervisory and adjudicative function that will sometimes call for its intervention.

[23] Following on that comment, it is not only quite conceivable, but probable, that over time portions of the estate will be administered by persons other than the individual trustee of record. Indeed, as appeared in evidence in this case, the Huphman file was "touched" by various persons in the employ of Grant Thornton Limited, not all of whom were still involved at the time of the hearing. Mr. MacDonald's cross-examination on his affidavit (which was essentially a return of record) frequently resulted in answers such as "such and such would have happened" or "so-and-so must have done this" rather than from his personal knowledge.

[24] These are by no means criticisms. What it means is that I do not view the private business function of the insolvency industry as a whole as being on exactly the same footing as a singular adjudicative body or administrative tribunal. For that matter, the industry is not on the same footing as a single-department administrative official such as the immigration official in Baker, or some other single-entity or public or non-marketplace arbiter.

[25] In the insolvency industry, there is more than one such possible decision-maker, in the sense that the industry has different and competing Trustees, some of whom may legitimately and ethically have different interpretations and practices from their competitors. It would be churlish to believe that different, *and perfectly*

appropriate, approaches or managerial practices do not have an impact on a Trustee's bottom line or marketplace presence.

[26] Put another way, unlike with public bodies or regulatory authorities or even governmental decision-makers (such as the immigration official in Baker), there are many Trustees authorized to make decisions under s. 135 (although only one will be in place for any given estate). There are many, all under the same licensing regime, but in regulated competition. Their approaches and interpretations, and managerial practices will, properly, differ.

[27] For all of these reasons, I conclude that the approach taken by then-Registrar Schwann is not only practical, but correct, and fully in keeping with Baker and its "pragmatic and functional analysis." I believe that the Court, when faced with a s. 135 appeal, should review the record available to that point and determine whether, on the facts of the case:

- The matter should proceed *de novo* or as a true appeal;

- If a true appeal, whether the applicable standard is one of reasonableness or correctness, based on whether the issues are of law, fact, or extricable or inextricable mixed law and fact;

- In any circumstance, whether fresh evidence is admissible and in what form, and whether new grounds of appeal or disallowance should be permitted;

- If *de novo*, whether the matter is best heard by affidavit, agreed statement of facts, *viva voce*, or a combination thereof.

[28] These considerations will allow the Court to resolve whether, *in the case before it*, there has been a reversable error, a "basic standard of rationality" has been offended, or if what if anything the interests of justice require the Court to do.

[29] In this case, all parties filed affidavits and briefs. It was clear what dispute was at hand, and the position taken by each.

[30] The parties also proceeded, through the various adjournments, on the basis that this would be heard on a contested basis and on evidence additional to that placed before the Trustee. It was only upon the filing of briefs and, to a certain extent, at the commencement of hearing, that the parties raised the issue of fresh/*viva voce* evidence and procedure.

[31] Accordingly, as a result of these disputes and the fact that no prejudice would be suffered by any party and that the administration of justice would best be served by hearing the matter on the merits, I proceeded *de novo*.

[32] Where, as here, a *de novo* hearing is appropriate, I consider that any deference owed to the original decision-maker (ie the Trustee) is subsumed in and appropriately reflected in the fact that the burden, on a civil standard, lies upon the appellant, as discussed in *Mamczasz, supra*.

[33] The date of last work is a question of fact. The deadline for filing a Claim of Lien is a question of law. As will appear, the last date worked, as determined by the Trustee, is wrong and unreasonable on the evidence presented to the Trustee insofar as it was clear that the last date worked was not November 8, but at least November 18; however, that error does not *in itself* affect the legal conclusion reached by the Trustee. It does, however, go to the point that the Court should determine how to proceed on the case-by-case basis advocated in *Pyne* and in *Insley*, and the cases cited therein.

[34] To the evidence, I now turn.

JEFFREY DELANEY

[35] Mr. Delaney has operated and managed the Appellant Delaney for his entire adult life.

[36] In September or October 2015, the Huphmans came to the home of Mr. Delaney's parents. They wanted a pad, driveway, and access to their mini home. No specifications were provided, nor was there a specific contract *per se*, in the sense of a quote for services or rigid timeline. There was contradictory evidence on whether, and to what extent, time and dollar estimates were provided.

[37] Mr. Delaney viewed the property. He opined that the proposed septic system was poorly designed for the property, and suggested a downgrade which resulted in considerable savings.

[38] The parties agreed that the appellant would supply crushed rock and plastic for the mini home's pad, and that a driveway would be built to the "usual standards." Mr. Delaney said that were no specific instructions as to width.

[39] Work continued to at least November 9, 2015. That is the last work invoiced (Exhibit 1, tab 1).

[40] Mr. Delaney subsequently mailed the invoice for the work above, totalling $27,260.18, but was uncertain as to the date. It is dated November 16, 2015.

[41] Stairs and a deck arrived later, and were dropped off in the road. The appellant carried them in "a week or two later." According to the affidavit at Delaney's affidavit (Exhibit 1, Tab 16), this was in fact November 18. Even

allowing for two weeks and for that to be part of the continuum of work, this would still place the Claim for Lien outside the 60 day period.

[42] Mr. Delaney further testified that "I always make a couple trips back to see what changed." These were unspecified "drive-by" trips, with no particular pattern.

[43] The next visit to the site, at least so far as it resulted in a meeting, was on January 8, 2016. Mr. Delaney was accompanied by his mother. He testified that he reviewed the outstanding bill with the Huphmans and that he "walked around to see what else" Mr. Huphman might like, such as the width of the driveway and the crushed rock perimeter around the house. He said that he, Delaney, was under the impression to that point that everything was "fine" with the bill.

[44] On the same day, Mr. Delaney measured the width of the driveway and the pad perimeter. These would be "extras," not included in the original bill.

[45] On cross-examination, Mr. Delaney testified that he had not billed for the November 18 work but that this was not gratuitous and would be eventually added to "touch up" works.

[46] He said that Huphman told Mr. Delaney on January 8 that the work was not done to his standards. Mr. Delaney considered any further work to be a

"continuation of the project." He considered any "grumbling" about the bill to be par for the course as "most people grumble about their bills." Any shortfalls would "not have been considered deficiencies because there was no plan."

[47] He further confirmed that the deck was moved on November 9 and that the stairs were moved "later." He considered the driveway width to be adequate and "standard."

[48] On cross-examination by Mr. Romney, Mr. Delaney became adamant and at times combative that the project was not yet completed, but a work in progress. In particular, he testified that there was re-seeding and re-raking to be done in the spring because you "don't plant grass in November." He denied being told by the Huphmans that "we wouldn't take you back."

[49] He stated that November 18 was the "last day I did any work on the property." He went on, however, to re-emphasize that the work was not complete but a job in progress. He incorporated his separate affidavit filed with Exhibit 1, Tab 16 that "I attended the site on a number of occasions to view the work that we had performed and to see <u>if there were any problems on the site arising from either our work or weather related issues</u>." [emphasis added]

[50] He concluded in the same affidavit that on January 8, 2016 he attended the site "to prepare for the work yet to be done."

[51] To Mr. Delaney's testimony, this was an assertion that there was not a remediation job to be completed, nor a separate contract to be performed, but a single piece of work (perhaps with extras) as a continuum of the same contract.

[52] This distinction is important, as if the job was "on the go" the lien is at least arguably timely; if it was complete but for remediation, it is not.

JOHN WAMBOLDT AND MRS. DELANEY

[53] I add at this juncture that John Wamboldt was called briefly to confirm his affidavit filed with the last page of Exhibit 1, Tab 16 and separately entered as Exhibit 2. This confirms the date the steps were moved as November 18, 2015. There was no cross-examination.

[54] The appellant sought to call Mr. Delaney's mother to corroborate the discussions between Mr. Delaney and the Huphmans that took place in her presence. I allowed the objection pursuant to BIA Rule 14 which requires leave of the Court to examine a party "or any other person." She was not a last-minute or

unknown witness beyond the control or knowledge of the Appellant. The Appellant did not pursue the matter.

EDWARD MACDONALD

[55] Mr. MacDonald, vice-President of the Trustee, is a frequent presence in this Court. His affidavit, Exhibit 3, is essentially a return of record in this matter, setting out the assignment, the proof of claim, and the disallowance, among other matters.

[56] He came to the file in 2017 – he could not confirm the precise date. Prior to that, other LITs had carriage of the file. As noted already, this placed considerable constraints on Mr. MacDonald's personal knowledge of the file.

[57] He testified that he "probably" examined the proof of claim and invoice, and "probably" had discussions with the debtor and/or counsel. He could not recall if he actually looked at the Claim for Lien.

[58] He did not receive the appeal or affidavits in April/May 2016, but "perhaps" other LITs at Grant Thornton did. He stated that the affidavit at Exhibit 1, Tab 16 "could have been received by Trustees in our firm" but did not know if they were reviewed in the course of the bankruptcy. With respect to the Wamboldt affidavit,

Mr. MacDonald stated that it "would have been taken into account" but he could not say by whom.

[59] Ultimately, it is fair to say that Mr. MacDonald, through no omission or negligence, had little personal knowledge of the file. This dovetails with my earlier comments respecting how a matter may – for perfectly legitimate reasons - be segregated among individuals or even among separate offices with the same firm, and thus may call for a closer examination by the Court when the interests of justice require on a s. 135 appeal.

[60] It was essentially conceded at the hearing that the notice of disallowance, referring to the last work day of November 9, 2015, is incorrect at least insofar as the stair movement (whether to be billed or not) was November 18, 2015. Again, this speaks to the function the adversarial process can have, and the Court's role in it, on s. 135 appeals. It is apparent that although Mr. MacDonald testified that the Trustee "would have taken [the Wamboldt affidavit] into account," it did not do so in its notice disallowing the claim.

[61] November 9 versus November 18, 2015 is a distinction without a difference in terms of whether the Claim for Lien filed January 28, 2016 is timely, but it is easy to see how such timelines may very well make all the difference.

JUDITH HUPHMAN

[62] Mr. and Mrs. Huphman filed a joint affidavit, Exhibit 4. She corrected one point in that affidavit, namely paragraph 6, to confirm that the engagement called for crushed rock, not a concrete, pad for the mini-home.

[63] She disputes certain central parts of Mr. Delaney's testimony, most notably the purpose behind the January 8, 2016 visit. Her testimony was that it was to obtain payment, "not for further inspections nor to prepare for further work."

[64] She confirmed on cross-examination that the contract was verbal; that the septic system had been changed on Delaney's recommendation; and that they were in a "rush to get in" to the property. She expressed dissatisfaction that the initial contact was in September and work did not begin until October. They moved in at some point around the end of October 2015, but she did not know the exact date of occupancy, or of the occupancy permit.

[65] The verbal quote, according to Mrs. Huphman, was "15 to 18 thousand."

[66] Her testimony was that, due to Mr. Huphman's physical limitations, they wanted "an extra wide driveway" that would be "good and safe." She didn't know the size. They have not had it changed since the work in issue, because they "have no money."

[67] They did get more gravel for around the mini-home.

[68] She testified that there was no discussion about additional work in the January 2016 meeting "because we were not happy with the quality of the work." The total time spent in this meeting was 60-90 minutes and focused on the terms of payment ("so much per month") and that in reviewing the bill they "found a lot of discrepancies." She testified that "we agreed to pay him what we thought it was worth, not what we were billed." She estimated this as fifteen to twenty thousand dollars, "maximum."

[69] As noted, the quality and value of the work is not before me to decide, except for the purposes of determining whether there was or was not a continuing contract.

RANDALL (RANDY) HUPHMAN

[70] Mr. Huphman testified at the proper insistence of the Appellant. He sought not to testify due to health limitations, which were placed before me in the form of an unsworn, and quite generic, doctor's note. The doctor was not present to testify, nor apparently was much if any notice provided to the other parties of this request.

[71] A party who places sworn evidence before the Court should expect, absent very exigent circumstances, to be called upon to testify and have his or her evidence challenged in cross-examination. Leave under BIA Rule 14 to cross-examine on an affidavit will almost be a matter of course. With a caution to Appellant's counsel to take reasonable care while pursuing properly vigorous advocacy, Mr. Huphman was duly sworn.

[72] Although he had both physical and cognitive limitations (the latter of which he described as a "learning disability,") he had no obvious difficulties in delivering his testimony. He was offered opportunities to break or recess if needed, but none arose. He, as with two others, was provided with hearing amplification earphones and had no problem in following the proceedings, or the questions put to him.

[73] He confirmed that the contract was verbal and that a rock, not concrete, pad was part of the transaction.

[74] He claims that he told Delaney that he wanted a 15-20 foot wide driveway, but got 12 feet (actually 11' 5" according to his measurements), and that Delaney "just went ahead and did whatever he wanted."

[75] He testified that the estimate was $15-$18,000, that the invoice was over $27,000 and that he "took it up" with Delaney the day he got the bill. He didn't say anything when Mr. Delaney brought the bill, but called instead.

[76] He claims that in the January meeting he told Mr. Delaney that he didn't "want him back any more," outlining what he, Huphman, saw as the defects in the width of the home pad (which he said should be two feet all around the footprint of the mini-home), drainage issues, and the aforementioned driveway width.

JEFFREY DELANEY - REBUTTAL

[77] On rebuttal, Mr. Delaney testified that driveways are 10-12 feet "unless otherwise specified," except for 20 feet at the point of intersection with the road; he further said that aside from noticing an existing interceptor ditch at the time of his work, the hearing was the first time he had heard about a drainage problem. Finally, he testified that the pad perimeter must have been adequate as the municipality issued the relevant occupancy permit. He denied giving a price estimate but again emphasized the savings effected by the septic system redesign.

[78] In general terms, this re-direct goes to the quality of work and quantum of claim, not the timeliness of the Claim for Lien.

ANALYSIS

[79] So, one contract or more? And complete or in progress?

[80] There was general agreement on the relevant principles – if this was a work in progress, a single uncompleted contract, the Claim for Lien is valid. If there was a completed contract, or one requiring only repair work, with work that ended on November 8 or November 18, 2015, it isn't.

[81] In argument, Mr. Power conceded that "repair" work, versus "new work in the same engagement yet to be done" does not extend the time for filing a Claim for Lien. He also conceded that if the Huphmans had written a cheque to pay the Delaney invoice, Delaney "would have cashed it," without regard to whether any amount of this represented prepaid labour and materials, or not.

[82] Both of these admissions are quite correct.

[83] I listened carefully to all of the witnesses, and reviewed the affidavits and briefs with care.

[84] I found Mr. Delaney's testimony to be self-serving and, at times, argumentative. In particular, he seemed to be of the belief that because you "don't plant grass in November," and that he went by to see the state of his work to date,

the contract was not at an end but simply on hiatus until the Spring of 2016; and that he was "on the job" until the January 8, 2016 meeting at least.

[85] I disagree.

[86] It is clear that Mr. Delaney considered his work to be done, and the invoiced amount to be due and owing, on November 9. I can accept that he did further work on November 18, and that he intended to bill for that as well. The fact he did not do so does not extend the project beyond November 18 and certainly not on an open-ended basis until January 8, 2016.

[87] Neither do "drive by" inspections; it is clear from Mr. Delaney's own testimony that these were follow-ups to determine the state of work done. There was no agreement to pay for these, and it appears these were *ad hoc* as were convenient when Mr. Delaney happened to be in the area.

[88] It is incredible to believe that from November 2015 to January 2016 there was an outstanding bill; that Delaney knew the Huphmans lacked both the financial resources and willingness to discharge it; that they were "grumbling" about both the bill and the quality of the work; and that yet Delaney was still "on the job" and would not only be remediating any legitimate defects, but would keep calm and carry on with new and further work.

[89] I consider the "you don't plant grass in November" argument that the contract was still on-the-go to be a canard at best. First, there was some evidence that the work was delayed; second, there was no evidence that the pad and driveway work was to include this seeding or sodding. I find that this is Mr. Delaney's attempt to do an end-run around an expired limitation period by saying "I wasn't done yet." In the alternative, I repeat that it is incredible to think that he would proceed with new (as opposed to repair) work in the spring of 2016 when he knew that his $27,000 bill was still outstanding and in dispute.

[90] The fact that Mr. Delaney considered any widening of the driveway or pad footprint to be "extras" that would be billed separately, and that he considered both to be adequate as-is, speaks to his consideration that this work was complete and satisfactory and not a work in progress. Frankly, I consider his assertion that this is a continuing contract to be a position adopted out of convenience and *ex post facto*, to attempt to come within the Builders' Lien period.

[91] It does not appear that the Huphmans took the position that "we haven't paid you because you're not done" or that they wanted Delaney to "finish the job" (as opposed to remedying perceived or real defects) before getting paid.

[92] The very best that can be said is that the job was either complete to Delaney's thinking (aside from any remediation which, as stated, would not extend the Builders' Lien period) or abandoned pending payment of work to date.

[93] Where the evidence of Delaney and Huphman diverge, I accept that of the Huphmans. I do so despite my misgivings that they "bit off more than they could chew," not for the first time, and may not always have been clear on their specifications and expectations. For the purposes of this appeal, such issues go to the quantum of Delaney's legitimate net claim, not to when was the "last day worked" for the purposes of calculating the Builders' Lien period.

[94] For all of these reasons, although the specific date (November 9, 2015) in the Notice of Disallowance is incorrect, the conclusion as it pertains to priority is valid. I dismiss the appeal insofar as it pertains to priority.

CONCLUSION

[95] The appeal is dismissed. The Trustee shall prepare the form of order. It should provide that the parties are at liberty to effect the removal of recorded interests in the parcel register either pursuant to the Order or by operation of law.

[96] Nothing in this decision affects the quantum of the claim, or any claim of setoff or abatement, as an unsecured creditor.

[97] If the parties cannot agree, I will hear them on costs. In such instance, each party may submit a brief not less than 15, nor more than 45, days from the date of release of this decision, each consisting of no more than ten single-spaced (or 20 double-spaced) pages, exclusive of copies of authorities.

Balmanoukian, R.