NOVA SCOTIA COURT OF APPEAL

Citation: ***Canadian Imperial Bank of Commerce v. CNH Capital Ltd.***, 2013 NSCA 35

Date: 20130312
Docket: CA 396242
Registry: Halifax

Between:

Canadian Imperial Bank of Commerce

Appellant

v.

CNH Capital Canada Ltd.

Respondent

Judges:	Oland, Fichaud and Beveridge, JJ.A.
Appeal Heard:	January 25, 2013, in Halifax, Nova Scotia
Held:	Leave to appeal granted, appeal allowed, summary judgment overturned and motion for summary judgment dismissed with costs of $3,000 inclusive of disbursements for the appeal, per reasons for judgment of Fichaud, J.A.; Oland and Beveridge, JJ.A., concurring
Counsel:	John A. Keith and Andrew Sowerby, for the appellant Colin D. Piercey and Tipper McEwan, for the respondent

Reasons for judgment:

[1] Starting in 1992, Tractors Plus Limited retailed tractors and agricultural equipment. The Bank of Commerce financed its operations. Ford Credit financed its acquisition of inventory. Both took security from Tractors Plus. In 1992 the Bank and Ford Credit signed an Inter-Creditor Agreement stating that Ford Credit would have priority to the Bank over the inventory financed by Ford Credit. CNH later succeeded to Ford Credit following a multi-stepped corporate reorganization. From then on, CNH financed Tractors Plus' acquisition of inventory. The 1992 Inter-Creditor Agreement had not mentioned CNH. There was no novation agreement between the Bank and either Ford Credit or CNH that substituted CNH for Ford Credit under the Inter-Creditor Agreement. In 2005, Tractors Plus defaulted to its creditors, including the Bank and CNH.

[2] In a proceeding filed with the Supreme Court of Nova Scotia, the Bank and CNH each claimed priority to Tractors Plus' proceeds. The Bank's Defence pleaded that CNH was not a party to the Inter-Creditor Agreement, and that CNH could not use that Agreement's subordination provisions. CNH moved for summary judgment on the evidence to dismiss that provision of the Bank's Defence. The chambers judge ruled that, in 1992 when Ford Credit signed the Inter-Creditor Agreement with the Bank, Ford Credit's undisclosed principal was a partnership named "Ford New Holland (Canada) Credit Company" and, in 2005 when Tractors Plus defaulted, CNH was the sole remaining partner. Accordingly, the judge struck the challenged provision of the Bank's Defence, and his Order declared that CNH "is in contractual privity with the CIBC under the Inter-Creditor Agreement".

[3] The Bank appealed, and CNH filed a Notice of Contention. Both parties' submissions turned on agency law governing undisclosed principals. The Bank says that the judge's conclusion offended the principles that govern summary judgments. A pivotal issue is whether there is a genuine dispute of material fact that must be resolved by a trial, rather than by summary judgment.

Background

[4] The evidence consists of affidavits of Messrs. Louis Trudelle and Brett Davis, a supplementary affidavit of Mr. Trudelle, all filed by CNH Capital Canada

Ltd., and of Messrs. Ben Tucci and Robert Bayne, filed by the Bank of Commerce, the cross-examinations of those four deponents, and further exhibits introduced during their testimony.

[5] As context, one must appreciate the corporate restructuring surrounding Ford Credit Canada Limited that bracketed the August 1992 Inter-Creditor Agreement signed by Ford Credit Canada Limited and the Bank of Commerce.

[6] In 1991, Mr. Trudelle was employed by Ford Credit Canada Limited ("Ford Credit") as the Branch Manager of Ford Credit's office in Guelph, Ontario. The Guelph office was responsible for the financing of agricultural tractors and construction equipment ("T&E" in Ford Credit parlance) in Eastern Canada, including Nova Scotia.

[7] Mr. Trudelle's affidavit explains the corporate re-organization that occurred in mid-1991:

> 6. In or about June of 1991, I was the Branch Manager in Guelph. In or about that time, the employees of FCCL [Ford Credit] dedicated to T&E were advised that FCCL had entered into a partnership with FNH Canada Holdings Ltd. and formed a new entity called Ford New Holland (Canada) Credit Company (the "Partnership").
>
> 7. The employees of FCCL dedicated to T&E were further informed that thereafter the Partnership would carry on the business of wholesale and retail financing of T&E in Canada.

[8] Mr. Trudelle's affidavit attaches a copy of the Joint Venture Partnership Agreement dated June 30, 1991 ("Partnership Agreement") between Ford Credit and "FNH Canada Holdings Inc.". Mr. Trudelle's affidavit says that "[t]he Partnership had been created to split the agricultural and construction equipment financing division from the automobile financing division" of Ford Credit, and that "[t]he Partnership would carry on the wholesale and retail financing of T&E after June 30, 1991".

[9] Mr. Davis is the Senior Director of Commercial Lending of CNH Capital America LLC and an officer of the respondent CNH Capital Canada Ltd.. His affidavit says that the June 30, 1991 transaction, described by Mr. Trudelle,

established a partnership between Ford Credit, with a 51% interest in the Partnership, and "Ford New Holland Canada Holdings, Inc.", with a 49% interest in the Partnership. He says that Ford Credit was a wholly owned subsidiary of Ford Motor Company, and that Ford New Holland Canada Holdings, Inc. was an "indirect, wholly-owned subsidiary of Fiat, S.p.A., an Italian entity". He states that the June, 1991 Partnership was directed by Ford Motor Company. Though nothing turns on it, I assume that "Ford New Holland Canada Holdings, Inc.", mentioned in Mr. Davis' affidavit, and "FNH Canada Holdings Ltd.", mentioned in paragraph 6 of Mr. Trudelle's affidavit, are the same entity as "FNH Canada Holdings Inc." which is that partner's name in the Partnership Agreement.

[10] Mr. Davis' affidavit says the "joint venture partnership" created by the June 30, 1991 Partnership Agreement was named "Ford New Holland (Canada) Credit Company". That is the defined name of the Partnership, or Joint Venture, in the Partnership Agreement.

[11] The Partnership Agreement attached an Employee Secondment Agreement also dated June 30, 1991, between Ford Credit and Ford New Holland (Canada) Credit Company ("Secondment Agreement"). The Secondment Agreement defines Ford New Holland (Canada) Credit Company as the "Canadian Joint Venture", and states that Ford Credit "shall during the term of this Agreement make available to the Canadian Joint Venture the full-time exclusive services of the Employees" who are listed in the Annex to the Secondment Agreement. Mr. Trudelle's name was listed in the Annex.

[12] Mr. Trudelle's affidavit says that from June 30, 1991 onward, which includes the period pertinent to the issues in this case, he acted on behalf of the Partnership, *i.e.* Ford New Holland (Canada) Credit Company:

> 12. From June 30, 1991, onward I provided my services as a seconded employee to the Partnership. I was the manager of Eastern Canada and was dedicated to T&E operations on behalf of the Partnership. ...
>
> 13. At all material times it was my understanding I was acting on behalf of the Partnership in entering into agreements with T&E dealers relating to the financing of agricultural equipment and accessories, and entering into agreements relating to and in support of the financing of agricultural equipment and accessories.

...

> 16. Throughout 1991 and 1992, I continued to generate documents, correspondence and agreements under the FCCL letterhead although at all material times I understood that those documents, correspondence and agreements were for the benefit of the Partnership and accrued to the benefit of the Partnership.

[13] Later (para 22), I will return to the more recent changes in the Partnership. First, the debut onto the scene of Tractors Plus and the Bank of Commerce.

[14] Tractors Plus Limited ("Tractors Plus") was an extra-provincial company that operated an agricultural equipment dealership in Amherst, Nova Scotia.

[15] Beginning in 1992, Tractors Plus operated as a dealer to sell the Ford New Holland brand of tractors and agricultural equipment. Mr. Trudelle's affidavit attaches the documentation to establish the dealership. On April 20, 1992, Tractors Plus signed a Security Agreement providing that, in connection with the wholesale financing of merchandise by "Ford Motor Credit Company of Canada, Limited", Tractors Plus gave "Ford Motor Credit Company of Canada, Limited" security over all such merchandise, including after-acquired merchandise, and a purchase money security interest in that merchandise and its proceeds.

[16] One of Ford Credit's requirements for Tractors Plus' dealership was that Tractors Plus obtain bank financing for its working capital. Tractors Plus arranged financing with the Canadian Imperial Bank of Commerce ("Bank"). The Bank addressed to "Ford New Holland" a letter of April 29, 1992, confirming that the Bank had authorized a $100,000 operating line of credit for Tractors Plus.

[17] The Bank's security for the operating line included Tractors Plus' General Assignment of Accounts dated June 17, 1992. Moving forward for a moment, according to a credit agreement of June 14, 2002 between the Bank and Tractors Plus, the Bank also would hold a General Security Agreement over Tractors Plus' existing and after acquired personal property, including inventory, equipment and receivables. Mr. Tucci testified that this credit agreement was in place in 2005 when Tractors Plus defaulted.

[18] Returning to 1992, during the establishment of Tractors Plus' Ford New Holland dealership, Ford Credit and the Bank signed an Inter-Creditor Agreement to prioritize their security over Tractors Plus' collateral and proceeds. This is a pivotal document in this proceeding. According to Mr. Trudelle's affidavit: (1) on August 25, 1992 Mr. Trudelle signed what he described as a standard Ford Credit Inter-Creditor Agreement, (2) he then forwarded it to Tractors Plus' president, Mr. Thomas Trueman, who (3) signed it and arranged for its signature by Mr. Bayne on behalf of the Bank on August 31, 1992, according to the document, and (4) on August 31, 1992 Mr. Trudelle received the Inter-Creditor Agreement so executed by Ford Credit, Tractors Plus and the Bank. Mr. Trudelle deposed that he had no discussion with Mr. Bayne on the matter, and had no subsequent dealings with the Bank or Tractors Plus respecting the Inter-Creditor Agreement.

[19] This August 1992 Inter-Creditor Agreement is on "Ford Credit Canada Limited" letterhead, and says:

> Ford Credit Canada Limited ("Ford Credit") supplies credit to Tractors Plus Ltd. to purchase and hold tractors and equipment and other property for sale or lease ("Ford Credit Financed Inventory").
>
> We understand the Canadian Imperial Bank of Commerce ("Bank") supplies Dealer with credit for working capital purposes.
>
> We wish to agree on our respective rights in the collateral an [*sic*] receivables as follows:
>
> 1. Ford Credit consents to the grant of any security interest in or assignment of the following to bank by Dealer and Ford Credit hereby postpones any claim that it may have to them or in the proceeds of them to any security interest in or assignment of them in favour of Bank:
>
>   a) accounts receivable arising from the sale of parts, accessories or service by Dealer; and
>
>   b) proceeds of or accounts receivable arising from or in substitution of accounts receivable covered by (a) above
>
> 2. Bank consents to the grant of any security interest in or assignment of the following to Ford Credit by Dealer and Bank hereby postpones any claim it may have in them or assignment of them in favour of Ford Credit:

a) Ford Credit Financed Inventory;

b) accounts receivable and non-monetary proceeds arising from the sale or lease of any item of Ford Credit Financed Inventory;

c) account receivable relating to any item of Ford Credit Financed Inventory due to Dealer from a manufacturer or distributor;

d) amounts due to Dealer from Ford Credit; and

e) proceeds of or accounts receivable arising from or in substitution of items covered by (a) through (d) above.

Please indicated [*sic*] your agreement by signing the duplicate copy of this letter enclosed and returning it to us.

Yours truly,

FORD CREDIT CANADA LIMITED

[signed]
Per: Louis Trudelle
Branch Manager

Tractors Plus Ltd. Consents to the above arrangement. Dated this 31 day of August, 1992.

[signed by Mr. Thomas Trueman]

The Canadian Imperial Bank of Commerce agrees to the above arrangement with Ford Credit. Dated this 31 day of August, 1992.

[signed by Mr. Bob Bayne for the Bank]

[20] The Inter-Creditor Agreement spoke only of "Ford Credit Canada Limited", the "Canadian Imperial Bank of Commerce" and "Tractors Plus Ltd." as parties. The Agreement did not mention Ford New Holland (Canada) Credit Company, FNH Canada Holdings Limited, the respondent CNH Capital Canada Ltd., any partnership to which Ford Credit Canada Limited belonged or any principal for whom Ford Credit Canada Limited acted as agent. Nor did the Inter-Creditor

Agreement mention that Mr. Trudelle was seconded to, was agent for, or represented any party other than Ford Credit Canada Limited.

[21] Mr. Bayne's affidavit deposes:

> I had no knowledge of Ford Credit's corporate structure or its relationship to other corporations prior to signing this agreement [*i.e.* the Inter-Creditor Agreement].

[22] Mr. Davis' affidavit brings forward the chronology of changes to the corporate structure surrounding Ford Credit and the Partnership. He says:

> (1) "Ford New Holland Canada Holdings, Inc." (the 49% partner in the 1992 Partnership) "became known as New Holland Canada, Ltd.".
>
> (2) In January 1997, Ford Credit sold its 51% interest in the Partnership to "New Holland (Canada) Credit Holding Ltd.".
>
> (3) These two partners - New Holland Canada, Ltd. and New Holland (Canada) Credit Holding Ltd. - signed an amended Joint Venture Partnership Agreement dated January 1, 1997.
>
> (4) In May 2002, New Holland Canada, Ltd. sold a 1% interest in the Partnership to Flexi-Coil Ltd., and Flexi-Coil Ltd. was made a party to the Partnership by an agreement among New Holland Canada, Ltd., New Holland (Canada) Credit Holding Ltd. and Flexi-Coil Ltd.
>
> (5) New Holland Canada, Ltd. and New Holland (Canada) Credit Holding Ltd., the holders of 99% of the Partnership interest, merged into "Case Canada Corporation".
>
> (6) Case Canada Corporation changed its name to "CNH Canada Ltd.", which held 99% of the Partnership.
>
> (7) In December 2002, Flexi-Coil Ltd. sold its 1% interest in the Partnership to Case Credit Ltd., and Case Credit Ltd. was made a party to the Partnership by an agreement among CNH Canada Ltd., Flexi-Coil Ltd. and Case Credit Ltd.

(8) Case Credit Ltd. "became known as CNH Capital Canada Ltd.", the respondent in this appeal ("CNH Capital Canada").

(9) In May 2005, CNH Canada Ltd. sold its 99% interest in the Partnership to CNH Capital Canada, after which the respondent CNH Capital Canada owned 100% of the Partnership.

(10) The Partnership was dissolved and its registration cancelled by the Ontario Ministry of Consumer and Business Services, on May 4, 2005.

(11) Following the dissolution of the Partnership, the respondent CNH Capital Canada carried on the business of wholesale and retail financing of tractors and equipment, that previously had been undertaken by the Partnership.

[23] In 2005, Tractors Plus defaulted to its creditors, including CNH Capital Canada and the Bank. CNH Capital Canada's receivables from Tractors Plus included amounts owing for equipment purchased by Tractors Plus and financed by CNH Capital Canada, without any involvement of Ford Credit. The realized proceeds of that equipment are subject to this dispute.

[24] In 2007, CNH Capital Canada sued the Bank. Its Statement of Claim pleads:

(1) CNH Capital Canada "is the successor to Ford Credit Canada Ltd. and New Holland (Canada) Credit Company".

(2) In November 1997 "New Holland (Canada) Credit Company", described as "a predecessor company" of CNH Capital Canada, entered into an Inventory Financing Security Agreement with Tractors Plus. This 1997 Agreement gave New Holland (Canada) Credit Company security over Tractors Plus' personal property collateral and its proceeds.

(3) The Bank "received the proceeds of disposition of CNH collateral and wrongfully applied them to the balance owing to it by" Tractors Plus.

> (4) With respect to the 1992 Inter-Creditor Agreement, CNH Capital Canada pleads that "CIBC breached the Inter-Creditor Agreement, in which it granted priority to CNH over those proceeds".
>
> (5) CNH Capital Canada claimed damages of $889,866.83, interest and costs.

[25] The Bank's Defence, filed July 10, 2007, denied the claim and, for various reasons, asserted that the Bank was entitled to the funds. Of particular relevance to this appeal, para 3(a) of the Defence discussed the Inter-Creditor Agreement of August 1992:

> 3(a) CIBC denies that it has a contractual relationship with (or owes any contractual obligations to) the Plaintiff, CNH Capital Canada Ltd. ("CNH") The letter agreement dated August 31, 1992 (the "Ford Credit Letter Agreement") was between CIBC and Ford Credit Canada Ltd., not CNH. The Ford Credit Letter Agreement did not include or extend to any affiliates, merger partners or other third parties. Nor did the Ford Credit Letter Agreement extend to either the inventory supplied by unknown third parties or the proceeds from the disposition of such inventory. CIBC was neither aware of or privy to whatever transactions led to the creation of CNH and, as well, has no knowledge of the relationship between CNH and Ford Credit Canada Ltd. There is no contractual privity between CIBC and the Plaintiff, CNH.

[26] In January 2011, CNH Capital Canada moved under *Civil Procedure Rule* 13 for summary judgment, requesting orders:

> (1) "striking paragraph 3(a) of the Defence ... as it fails to raise a genuine issue for trial", and
>
> (2) "declaring that CNH Capital Canada Ltd. is the successor to Ford Credit Canada Ltd. and New Holland (Canada) Credit Company under the Inter-Creditor Agreement dated August 31, 1992, and therefore is in contractual privity with the Canadian Imperial Bank of Commerce under the Inter-Creditor Agreement dated August 31, 1992".

[27] Justice Haliburton of the Supreme Court of Nova Scotia heard the motion on February 7, 2012. The judge issued a written decision on May 7, 2012 (2012

NSSC 149), followed by an Order on May 30, 2012. The judge granted the motion, struck paragraph 3(a) of the Bank's Defence and, in his Order, declared:

> CNH is the successor to Ford Credit Canada Ltd. and New Holland (Canada) Credit Company under the Inter-Creditor Agreement dated August 31, 1992, and therefore is in contractual privity with the CIBC under the Inter-Creditor Agreement dated August 31, 1992.

[28] Later I will review the judge's reasons.

[29] The Bank appealed to the Court of Appeal.

Issues

[30] The Bank's grounds of appeal claim that the judge erred, in several respects that I will consider together, by granting summary judgment and striking paragraph 3(a) of the Bank's Defence.

[31] By its Notice of Contention, CNH Capital Canada submits that the judge erred by admitting inadmissible evidence of the Bank's subjective view that was irrelevant and extrinsic to the Inter-Creditor Agreement.

Standard of Review

[32] In *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, this Court recently said:

> [22] As Justice Matthews said in *MacCulloch* [*MacCulloch v. McInnes, Cooper & Robertson* (1995), 140 N.S.R. (2d) 220 (C.A.)] (para 56), the standard of review for patent injustice applies only to discretionary rulings. Non-discretionary rulings, including those that are interlocutory, are subject to the Court of Appeal's normal standard of review: correctness for extractable issues of law, and palpable and overriding error for issues of either fact or mixed fact and law with no extractable legal error.

[33] *Innocente* involved a motion for summary judgment on the pleadings, governed by *Civil Procedure Rule* 13.03. Rule 13.03 says that a judge "must" set aside the pleading and grant summary judgment if the prerequisite conditions are shown. This Court (para 23), noting this mandatory language, said that the motion

for summary judgment on the pleadings is not discretionary, and the standard of review is correctness or palpable and overriding error, without consideration of patent injustice.

[34] This appeal involves a motion for summary judgment on the evidence under Rule 13.04. Rule 13.04(1) says:

> A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial ***must*** grant summary judgment. [Emphasis added]

Once the judge has assessed the merits of the summary judgment motion and has determined that the conditions for summary judgment have been established, Rule 13.04(1)'s remedial power is not discretionary. For reasons analogous to those stated in *Innocente*, the Court of Appeal's standard of review should be correctness for extractable issues of law and palpable and overriding error for issues of either fact or mixed fact and law with no extractable legal error.

[35] There are authorities that have applied "error in law causing an injustice" to an appeal from a summary judgment on the evidence. But those authorities acknowledge that a summary judgment ruling based on an error of law automatically constitutes an injustice: *e.g. Gilbert v. Giffin,* 2010 NSCA 95, para 13, and *Globex Foreign Exchange Corporation v. Launt*, 2011 NSCA 67, para 11, cited by the parties in this appeal. As Chief Justice MacDonald noted in *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, para 15, effectively this is the same as stating that the appellate standard of review for errors of law on summary judgment appeals is correctness.

[36] Accordingly, I will apply correctness to assess whether the motions judge erred in law in his application of the test for summary judgment.

[37] CNH Capital Canada's Notice of Contention claims that items of the Bank's evidence were inadmissible. This submission involves legal issues respecting rules of evidence and the interpretation of the *Civil Procedure Rules*. These issues attract a correctness standard.

[38] Both parties acknowledge that the effective standard of review is correctness for the legal issues that arise on this appeal.

The Summary Judgment Test

[39] Rule 13.04 governs summary judgments on the evidence:

> **Summary judgment on evidence**
>
> **13.04** (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
>
> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
>
> (6) The motion may be made after pleadings close.

[40] The seminal authority on summary judgments is *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423. Justices Iacobucci and Bastarache for the Court prescribed a two-fold test:

> 27. The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. [citations omitted] Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success. [citation omitted]"

Justices Bastarache and Iacobucci drew these principles from *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para 15.

[41] Central to *Guarantee v. Gordon*'s two-fold test is the proposition that, if the first branch of the test displays a genuine and disputed issue of material fact requiring trial, then that issue is sent to trial. Justices Iacobucci and Bastarache said that only "when the applicant has shown that there is no genuine issue of material fact requiring trial" is "summary judgment ... a proper question for consideration by the court". So the judge on the summary judgment motion does not enter the factual fray to make a finding which determines that genuine issue of material fact. If the motions judge could determine that genuine issue of material fact, then the first branch of the two-fold test would be pointless. Rather than a two-fold test, there would only be a single step where the motions judge directly grants or denies summary judgment based on his assessment of the chances of success of every disputed issue, factual and legal.

[42] In *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372, the Court *per curiam* reiterated the two-fold test from *Guarantee v. Gordon*:

> 11. For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial:" [citing *Guarantee v. Gordon*, para 27]. The defendant must prove this; it cannot rely on mere allegations or the pleadings: [citations omitted]. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: [citations omitted]. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: [citations omitted]. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: [citing *Guarantee v. Gordon*, para 30].

[43] This Court repeatedly has adopted *Guarantee v. Gordon*'s two-fold approach to summary judgments.

[44] *Eikelenboom v. Holstein Canada*, 2004 NSCA 103 is an example of a motion that satisfied the first branch of *Guarantee v. Gordon*'s two-fold test. Justice Saunders said:

> [30] ... The material facts, as found by the Chambers judge, were not in dispute. The record as to what occurred prior to and in the presence of the panel is evident from the transcript of the hearings and the answers to interrogatories of Mr.

> Kestenberg. This is not a case where the motions judge had to reconcile competing affidavits from opposing sides. The only disagreement between the parties concerned the application of the law of waiver to undisputed facts in order to decide whether waiver had in fact occurred. This is precisely what occurred in **Gordon Capital**, supra, where the only dispute concerned the application of the law, a point with which the Court quickly dispensed in rather terse prose:
>
> > The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding.

[45] *AMCI Export Corporation v. Nova Scotia Power Incorporation*, 2010 NSCA 41, and *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69 explain the consequences of the moving party's failure to satisfy the first branch of *Guarantee v. Gordon*'s two-fold test. In *AMCI*, Justice Saunders said:

> [14] ... As the moving party, NSPI had the burden of establishing that there was no genuine or arguable issue in dispute with respect to paragraph 8 which would necessitate a trial, and that therefore entitlement to summary judgment could be properly considered by the Chambers judge. Provided NSPI met this initial burden, then the responding party, AMCI, was required to show a real chance of success in its defence. [citation omitted]
>
> [15] ... Only if he were persuaded that NSPI had satisfied this initial threshold, would he then go on to ask himself the second question, whether AMCI had demonstrated that it had a real chance of success in advancing the pleading set out in paragraph 8 of its amended defence.

Similarly, in *Brill*, this Court said:

> [173] ... The applicant must show there is no genuine (or arguable) issue of material fact requiring trial. If the applicant does not show this, the application is dismissed. If the applicant shows this, then, to defeat the application, the responding party must show, on the undisputed facts, that his claim or defence has a real chance of success: [citations omitted] ...

[46] The question on this appeal is whether the motions judge erred in law in his application of the summary judgment test, as defined by these authorities.

Analysis of Bank's Appeal

[47] The judge described the issues as follows:

> **Issues**
>
> [16] In order to grant this summary judgment application two issues must be resolved in favor of the applicant:
>
> (1) I must be satisfied that the ICA [Inter-Creditor Agreement] was entered into by Ford acting as agent for an undisclosed principal, namely, the Partnership. Incidental to that, I must decide that CIBC is bound to honour the ICA when the identity of the other creditor was not disclosed.
>
> (2) I must be satisfied that CNH is the legal successor to the Partnership and is entitled to all the rights and claims thereof including its claim against Tractors Plus and CIBC under the ICA.

[48] On the second point, the interpretation of the exhibits to Mr. Davis' affidavit led the judge to conclude that CNH Capital Canada was the legal successor to the Partnership. On the appeal, the Bank says there are gaps in the path of succession. To resolve this appeal, it is unnecessary to determine successorship, and I make no comment on the issue.

[49] This appeal turns on the judge's analysis of the first issue, which is the subject of the remainder of these reasons.

[50] The judge characterized CNH Capital Canada's submission on the first issue:

> [17] On behalf of CNH, it is argued that when the ICA was signed by Louis Trudell [*sic*] as an officer of FCC he was in fact seconded to the Partnership; that his activities were for the benefit of the Partnership; and it, FCC, was effectively the face of, or the agent of, the undisclosed principal, namely the Partnership. ...

CNH Capital Canada's position on the appeal rested on the same proposition, *i.e.* that, under agency law, in August 1992 the Partnership was an undisclosed principal of Ford Credit, and the Partnership thereby became a party, in its own right, with the Bank to the Inter-Creditor Agreement. There was no submission that CNH Capital Canada became a party to the Inter-Creditor Agreement by some

other legal avenue, such as a subsequent assignment from Ford Credit with notice to the Bank, or novation.

[51] As to the law of agency governing undisclosed principals, the judge said:

> [30] ... The law with respect to enforcing a contract notwithstanding the nondisclosure of the principal seems to be pretty clear. ... This concept, and some limitations on its application, is discussed in the text *The Law of Contract*, 5th ed. GHL Fridman, at p. 192:
>
> > "An important distinction is drawn between a disclosed and an undisclosed principal. An undisclosed principal is one whose existence is not made known by the agent of [*sic* - the word "to", not "of", is in Professor Fridman's text] the third party; the latter therefore is contracting with the agent under the belief that the agent is the other party, that is, a principal in his own right. While, exceptionally, the common law permits an undisclosed principal to acquire rights and be subjected to liabilities as a consequence of a contract made by his agent on his behalf, in some circumstances this will not be so. ***If the identity of the contracting party is important to the third party transacting with the agent, if the agent was unauthorized in what he did***, ***if the existence of some other principal is expressly or impliedly excluded by the contract between agent and third party,*** the undisclosed principal is precluded from being a party to the contract." [Emphasis added]

The same passage appears in G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed., (Toronto: Carswell/Thomson Reuters, 2011), p. 193.

[52] According to the emphasized passage from Fridman's, *The Law of Contract in Canada*, the Partnership may not join the Inter-Creditor Agreement as an undisclosed principal (1) if Ford Credit's identity as a party to the Inter-Creditor Agreement was "important" to the Bank, or (2) if Ford Credit lacked authority to enter the Inter-Creditor Agreement on behalf of the Partnership, or (3) if the Inter-Creditor Agreement "expressly or impliedly excluded" the intervention of the Partnership as an undisclosed principal. I will first touch on Ford Credit's authority, and then discuss the other two points together.

[53] The judge dealt with Ford Credit's authority to act for the Partnership by stating (para 32) "I have already noted that the authority of the FCC to enter into contracts on behalf of the Partnership was expressly provided within the Partnership Agreement". The judge earlier had said:

> [22] The Partnership Agreement which is in evidence is unambiguous in creating Ford Credit Canada Limited as the agent for the Partnership which was to be known as Ford New Holland Canada Credit Company. The agreement specifically authorizes Ford Credit to enter into credit arrangements for the benefit of the Partnership. While it is true that the document does not name the function of FCC to be that of "agent" or agency, it is clear that such was the intent of the contracting parties.

[54] On the appeal, the Bank contests the existence of that authority. The Bank says, among other things, that the Partnership Agreement contemplated that the Partnership act in its own name, not as an undisclosed principal in contracts that named Ford Credit. CNH Capital Canada responds that the provisions cited by the Bank do not pertain to this matter.

[55] I make no comment on the judge's ruling that there was authority or the Bank's submission that there was not. That ruling would involve the second branch of the two-fold summary judgment test - whether the Bank has a real chance of success in its challenge to Ford Credit's authority. As I will discuss, in my view the appeal should be allowed because there are material and genuinely disputed issues of fact for trial under the first branch of the two-fold summary judgment test. So it is unnecessary to consider the merits under the second branch. The trial judge will have to grapple with the entire undisclosed principal matter. The trial judge should not feel constrained by advance comments about the merits from the Court of Appeal.

[56] I will turn to the other two qualifications, mentioned in Fridman's, *The Law of Contract in Canada*, to the undisclosed principal doctrine - the importance to the Bank of Ford Credit's identity and whether the Inter-Creditor Agreement expressly or impliedly precludes an undisclosed principal.

[57] The judge's reasons on these issues comprise:

> [32] ... CIBC also seeks to exclude the doctrine on the basis that the identity of the contracting party was important as a condition of entering into the ICA. That position likewise does not accord with the facts.
>
> [33] Robert Bayne was the local manager of CIBC and was the representative of the Bank who signed the ICA. He testified on the

> hearing of the application as to his recollection of circumstances existing at the time the ICA was signed. Tractors Plus was his client and he exchanged correspondence, if minimal, with New Holland Canada and specifically with Louis Trudell [*sic*] of FCC who was the other signatory to the ICA. On cross-examination he was asked specifically about the fact that Ford New Holland was not named as the other principal when he signed the ICA. When asked if he had any concern about the fact that FNH was not the other signatory his response was "no not at all". There is no evidence that the identity of the party who would have primary claim on the "Ford Credit financed inventory" was of any concern to the Bank, as represented by Mr. Bayne.
>
> [34] I accept as a correct conclusion that "who" shared a security interest with the Bank was not "front of mind", rather the interest of CIBC was on "which assets" in possession of the debtor would accrue to the bank in the event of insolvency, and which assets would accrue to the party that financed the "whole goods".
>
> [35] For these reasons the application for summary judgment is granted and it is ordered that paragraph 3(a) of the defence is struck as failing to raise a genuine issue for trial.
>
> [36] I find that CNH Capital Canada Limited is the successor to Ford Credit Canada Limited and is in contractual privity with CIBC under the Inter-Creditor Agreement.

[58] On the appeal, neither party is satisfied with the judge's approach. The Bank says that whether the identity of Ford Credit was "important" to the Bank was a material issue of fact, squarely in dispute, meaning that CNH Capital Canada's motion failed the first branch of the two-fold test for a summary judgment. CNH Capital Canada says that the "importance" issue should have been determined from an objective interpretation of the Inter-Creditor Agreement in the context of surrounding circumstances known to both parties, and that evidence of the subjective view of Bank officials was inadmissible, extrinsic and violated the parol evidence rule.

[59] To assist the analysis, I will turn from the brief summary in Fridman's, *The Law of Contract in Canada*, quoted by the motions judge, to Professor Fridman's other text, *Canadian Agency Law* (Markham, Ont: LexisNexis Canada Inc., 2009), which more expansively discusses the qualifications to the undisclosed principal

doctrine. Under the heading "Undisclosed Principals" (pages 157-164) Professor Fridman states:

> **§6.40** An undisclosed principal, as explained earlier, is one of whose existence the third party is unaware, so that the third party does not know that the person with whom he is dealing is somebody's agent. To the third party that person is a principal, dealing on his own behalf, and in his own name. In such situations the third party may find that he or she has contracted with someone else, not the person with whom the third party believed the contract was being made. This is because, by virtue of an anomalous doctrine that may be considered to be inconsistent with elementary principles of the law of agency, a person who is not overtly a party to a contract can acquire rights and be subjected to liabilities under it. In other words, ***subject to several important qualifications considered in due course,*** an undisclosed principal can sue and be sued in his own name on any contract duly made on his behalf.
>
> ...
>
> **§6.45** ***Subject to what is said later about identification*** and the agent's authority, an undisclosed principal can sue in his own name on any contract duly made on his behalf, as long as the agent intended to act on the principal's behalf in entering into the contract, ***and as long as the contract does not expressly or by implication exclude the principal's right to sue and his liability to be sued.*** ...
>
> (A) IDENTIFICATION
>
> **§6.46** ***The first qualification*** involves a consideration of the circumstances in which parol evidence may be admitted to prove the existence of, and to identify the undisclosed principal, so as to enable that principal to sue and be sued. The issue in such cases is whether the evidence would contradict a written contract, which, under the general law of contract, is not allowed. English and Canadian cases appear to be inconsistent, in that sometimes such evidence is admitted and in others it is not. [Emphasis added]

Fridman's *Canadian Agency Law* next discusses, at some length, the English decision in *Humble v. Hunter* (1848), 12 Q.B. 310, which held that parol evidence was not admissible to show that the agent had contracted for an undisclosed principal. Fridman's *Canadian Agency Law* then continues:

> **§6.48** ... The various Canadian decisions discussed above raise the question whether *Humble v. Hunter* [(1848), 12 Q.B. 310] is still good law in Canada. If it

is, and is not restricted in its scope as suggested in the Manitoba case in 2001, the admissibility of parol evidence to identify an undisclosed principal may depend on the type of description in the documents, if any, that contain the relevant contract. The position may be explained as follows. Where the description used by the agent in making the contract is so ambiguous that it is capable of being interpreted as showing either that the agent contracts as principal or that he contracts as agent, parol evidence will be admissible, since, in such circumstances, the admission of the evidence would explain the contract, not vary or contradict it, and would not produce a result that was inconsistent with the terms of the contract. Where the contract makes it plain on the face of the document that the party signing is the party who is the principal, there would be no room for admission of evidence to establish another principal. ***An alternative formulation of this is that proof of the existence of an undisclosed principal is inadmissible where the circumstances indicate that the other contracting party believed, and had reasonable grounds for believing, that he was contracting only with the signatory of the document and not, either actually or possibly, with someone else whose identity had not been disclosed.*** Such was the decision not only in the *Vancouver Equipment Corp,* case [*Vancouver Equipment Corp. v. Sun Valley Contracting Ltd.,* [1979] B.C.J. No. 1183 (B.C.S.C.)], in which the undisclosed principal wished to sue, and was not permitted to do so, but also in a New Brunswick case, *Storey v. Price* [(1981), 36 N.B.R. (2d) 317 (N.B.Q.B.)] ...

(B) PERSONALITY

§6.49 ***The second qualification relates to the personality of the principal***. If an undisclosed principal, when identified in accordance with what has been said above, sues a third party on a contract made with the principal's agent, ***the third party may argue that the contract was made with the agent for personal reasons which induced the third party to contract with the agent to the exclusion of his principal or anyone else***. ... The Ontario Court of Appeal [in *Campbellville Gravel Supply Ltd. v. Cook Paving Co. Ltd.*, [1968] O.J. No. 1218, per Laskin, J.A. as he then was], however, while agreeing with the lower court on the issue of set-off, held that the defendants had a personal reason for contracting with the Western company, which they believed they were doing under the circumstances. They knew nothing of the plaintiffs, and had no intention of contracting with them. Hence the plaintiff was not a party to any contract with the defendants and could not make them liable.

§6.50 ***The rationale for this doctrine is that, because the third party is relying on something personal*** about the agent with whom the contract is made, such as the agent's solvency or a debt owed by the agent or someone believed to be the agent's principal, when, in fact, that party is not, it would be unfair to the third

> party to permit somebody else to be introduced as a party to the contract as an undisclosed principal. ...
>
> ...
>
> (C) THE AGENT'S AUTHORITY
>
> **§6.53** The third qualification involves the authority of the agent acting for an undisclosed principal. ... [Emphasis added]

[60] In *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R 842, Justice Bastarache for the Court said:

> 18. Regardless of the criticism of the rule, it is firmly established that undisclosed principals may sue or be sued on simple contracts entered into by their agents. Parties are presumed to be aware of the possibility that those with whom they are bargaining are acting on behalf of an unnamed principal. The parties to a contract can avoid the application of the rule, either by including an express term in the contract which limits liability to the parties named in the contract itself, or by executing the contract under seal.

[61] I do not read *Friedmann* as rejecting the qualifications to the undisclosed principal rule that are discussed in the passages I have quoted from Fridman's *Canadian Agency Law*. *Friedmann* focussed on whether a sealed contract should remain as a qualification to the undisclosed principal rule. The Supreme Court neither reviewed nor purported to re-state exhaustively all the detailed principles that govern the other qualifications to the undisclosed principal rule. Professor Fridman's 2009 text, from which I have quoted, postdated *Friedmann* by nine years. In my view, the qualifications to the undisclosed principal rule, quoted above from Fridman's *Canadian Agency Law,* remain on the current menu of governing principles.

[62] What does this mean for the summary judgment that is under appeal?

[63] It is apparent that material facts are genuinely in dispute. Under Professor Fridman's "Personality" qualification, the undisclosed principal may not be forced on a third party who contracted with the agent for the third party's "personal reasons" - *i.e.* because the third party was "relying on something personal" about the agent, which "induced" the third party to contract with the agent. The Bank alleges that its

subordination to inventory financed by Ford Credit, an entity known to the Bank, involved a different risk assessment than would subordination to inventory financed by an unknown party, such as CNH Capital Canada. CNH Capital Canada disagrees, and alleges that the Bank cared only about realizable value of the secured assets, not the identity of the competing security-holder. The determinations of which allegation is correct, whether the Bank had personal reasons to contract with Ford Credit, and whether the Bank relied on or was induced by those reasons, clearly are questions of fact.

[64] Those issues of fact are material, as they may determine the undisclosed principal issue. The facts are genuinely disputed - this isn't an artificial dispute staged to avoid a summary judgment. So, under the first branch of the two-fold summary judgment test, those facts are for trial. In my view this is sufficient to defeat CNH Capital Canada's motion for summary judgment.

[65] Instead of sending the material and genuine factual dispute to trial, the motions judge resolved it with a finding as to what was in the Bank's "front of mind", as the judge termed it. The passages from the judge's decision are quoted above (para 57). The judge referred to the Bank's position that Ford Credit's identity on the Inter-Creditor Agreement was "important" to the Bank. The judge said that position "does not accord with the facts". The judge supported his finding by referring to Mr. Bayne's cross-examination:

> When asked if he had any concern about the fact that FNH was not the other signatory his response was "no not at all". There is no evidence that the identity of the party who would have primary claim on the "Ford Credit financed inventory" was of any concern to the Bank, as represented by Mr. Bayne.

[66] There are several difficulties with the judge's approach.

[67] First, contrary to the judge's statement, there was evidence that the matter was of concern to the Bank. Messrs. Bayne and Tucci each filed an affidavit that said, in identical language (Bayne, para 5 and Tucci, para 6):

> I have always understood that CIBC considered the following matters essential to understanding the nature and purpose of any subordination or postponement agreement:

(a) The identity of the specific party (or lender) whose interests are taking priority over CIBC; ...

[68] Second, the judge relied on Mr. Bayne's answer at the end of this passage from his cross-examination:

Q. Now this document refers to Ford Credit financed inventory, correct?

A. Apparently.

Q. It doesn't refer to Ford New Holland Credit financed inventory, correct?

A. Well, it says what it says.

Q. Well, it says what it says. So, on its face, it doesn't say Ford New Holland Credit financed inventory, right?

A. No, it doesn't say that. No.

Q. You were aware of the existence of a company called Ford New Holland, right?

A. They were a supplier.

Q. They were a supply —

A. Or a manufacturer, I guess.

Q. They were the company that supplied the equipment, the tractors and equipment, the whole goods to Tractors Plus, correct?

A. Yes, and would have financed that for Ford New Holland, or whoever that entity happens to be.

Q. Right.

A. The supplier.

Q. So it doesn't say Ford New Holland Credit Canada Limited on this Intercreditor Agreement, correct?

A. That's right.

Q. And I take it that was not of particular concern to you?

A. No, not at all.

[69] The judge read this testimony as meaning that Mr. Bayne was unconcerned whether or not the Inter-Creditor Agreement subordinated the Bank's security to the security of Ford New Holland, or to the security of CNH Capital Canada. The Bank says Mr. Bayne's testimony means something entirely different: that the Inter-Creditor Agreement "says what it says", in Mr. Bayne's words; so the Bank's subordination is only to inventory financed by "Ford Credit", as stated in the Agreement, and the Bank was content with that arrangement of priorities.

[70] It is not for me to choose between Mr. Bayne's affidavit and cross-examination, to prefer one or the other interpretation of Mr. Bayne's cross-examination, to draw an inference or make a finding. But neither was it the function of a judge on a summary judgment motion to make a determinative finding on a material and disputed issue of fact by discounting the weight of one item of evidence (the affidavits), assigning more weight to another (the cross-examination), and then choosing between competing inferences from that cross-examination evidence. Those are fact-finding functions.

[71] The motions judge should have dismissed the summary judgment motion, on the first branch of the two-fold summary judgment test, and left the resolution of the material and genuinely disputed issue of fact for trial. By not doing so, in my respectful view, the motions judge erred in law.

[72] It is unnecessary that I consider the second branch of the summary judgment test - *i.e.* whether either party has a real chance of success with its respective position on the undisclosed principal issue. Those merits cannot be determined until the trial judge makes findings on the material facts.

[73] I should not be taken to suggest that, at the trial, the only material facts genuinely in issue on the undisclosed principal matter are those that I have identified (above. para 63). Issues of fact may arise to explain ambiguities or flesh out gaps in the documents, or respecting the surrounding circumstances. At the hearing in the

Court of Appeal, for example, it was noticeable that counsel supported their submissions by referring to relevant business practices that were not explicit from the evidence in the appeal record. The versions of these practices cited by counsel for the Bank sometimes differed from those cited by counsel for CNH Capital Canada.

[74] In my respectful view, the decision of the motions judge errs in a second respect. The judge's reasons (above para 57) did not address whether wording of the Inter-Creditor Agreement expressly or impliedly precludes the participation of an undisclosed principal as a contracting party. The judge appeared to treat that topic as overtaken by the issue of whether the identity of Ford Credit was subjectively important, or "front of mind" to the Bank.

[75] The passages from Fridman's, *Canadian Agency Law*, quoted earlier say that the undisclosed principal's intervention is allowable "as long as the contract does not expressly or by implication exclude the principal's right to sue and his liability to be sued". Other authorities confirm that principle: Cameron Harvey, *Agency Law Primer*, 3rd ed., (Toronto: Thomson Carswell, 2003), page 82, and authorities there cited; F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 17th ed., (London: Sweet & Maxwell, 2001), para 8-081 (pp. 352-3).

[76] The Inter-Creditor Agreement states that the Bank subordinates its security to "Ford Credit Financed Inventory", but says nothing about Bank subordination to security for inventory financed by CNH Capital Canada, the Partnership or anyone else. It follows, says the Bank, that the Inter-Creditor Agreement expressly or impliedly excludes the notion of an undisclosed principal whose security may enjoy the Bank's subordination by reason of the Bank's signature on the Inter-Creditor Agreement. The Bank's brief to the motions judge included this submission. The judge's reasons (para 19) recite that the Bank made a submission on the point. CNH Capital Canada, for its part, asserted that the Inter-Creditor Agreement pivoted on the assets, not the identity of the secured creditor, and the assets here simply were those that had been wholesaled to Tractors Plus.

[77] The motions judge's reasons neither analyse the Inter-Creditor Agreement on this point, nor comment on whether or not the existence of an undisclosed principal was expressly or impliedly excluded by its provisions. The judge nonetheless upheld the intervention of an undisclosed principal and his Order declared that CNH Capital Canada "is in contractual privity with the CIBC under the Inter-Creditor Agreement".

[78] In my respectful view, the judge erred in law by reaching this conclusion without first addressing the application of a legally recognized qualification on the attainment of status as an effective undisclosed principal.

[79] I express no view whether or not the Inter-Creditor Agreement's terms expressly or impliedly exclude the involvement of an undisclosed principal. As explained earlier, the summary judgment should be overturned because of the misapplication of the first branch of the summary judgment test respecting a material issue of fact. So the entire matter will go to trial. The trial judge's interpretation of the Inter-Creditor Agreement should be unfettered by a prior editorial comment from the Court of Appeal.

Analysis of CNH's Contention

[80] I have quoted the statements in the affidavits of Messrs. Bayne and Tucci [above, para 67(a)] that the identity of the other party to the subordination is "essential" to the Bank. At the hearing before the motions judge, CNH Capital Canada objected that these statements were inadmissible. The motions judge dismissed the objection and allowed those paragraphs to stand as evidence. In the Court of Appeal, CNH Capital Canada's Notice of Contention challenges the admissibility of the statements on two bases.

[81] **First:** CNH Capital Canada says that the statements are a "submission" or "plea" which must be excluded under *Civil Procedure Rule* 39.04(2):

> **39.04** (2) A judge must strike a part of an affidavit containing either of the following:
>
> (a) information that is not admissible, such as an irrelevant statement or a submission or plea;

CNH Capital Canada submits that Rule 39.04(2) codifies Justice Davison's statement in *Waverley (Village Commissioners) et al. v. Nova Scotia (Minister of Municipal Affairs) et al.* (1993), 123 N.S.R. (2d) 46:

> **[20]** It would be helpful to segregate principles which are apparent from consideration of the foregoing authorities and I would enumerate these principles as follows:
>
> > 1. Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea a summation.

[82] I agree with Justice Davison's statement from *Waverley*. But I disagree that the challenged statements in the affidavits of Messrs. Bayne and Tucci are a "submission" or "plea". What is objectionable under Rule 39.04(2)(a) is a conclusory statement that embodies or assumes a point of law. Whether, how, and the degree to which Ford Credit's identity was important to the Bank are questions of fact, as I have explained earlier (para 63).

[83] CNH Capital Canada submits the impugned statements are objectionable because they address "the very conclusion that CIBC asks the Court to draw" - *i.e.* the importance of identity to the Bank. I disagree that this renders the evidence inadmissible. If the evidence addresses a fact - and here it does - it does not become inadmissible just because the evidence is targeted and the fact is central. The impugned evidence is no more objectionable, in this respect, than is the affidavit of Mr. Trudelle, (quoted above, para 12) which says, in paras 12 and 13, "[f]rom June 30, 1991, onward I provided my services as a seconded employee to the Partnership" and "[a]t all material times it was my understanding I was acting on behalf of the Partnership". Mr. Trudelle's statements directly address the very conclusion CNH Capital Canada asks the Court to draw on the "authority" issue.

[84] CNH Capital Canada observes that the statements in the affidavits of Messrs. Bayne and Tucci do not contain particulars or examples to bolster or corroborate their statements of what was "essential" to the Bank. The absence of particulars may, or may not, affect the weight to be given to the evidence by the trial judge. But the statements remain evidence of a fact, and embody neither a conclusion of law, nor a submission and plea.

[85] **Second:** CNH Capital Canada submits that the impugned paragraphs are evidence of irrelevant subjective intention. CNH Capital Canada's factum summarizes its point:

> 53. To conclude on this point, CNH Capital submits that the identity exception to the undisclosed principal rule only applies when as a *matter of contractual interpretation* the identity of the parties is vital to the parties. Since there is no express term on this allegedly vital point in the ICA, the Court must examine the circumstances surrounding the contract. This is an objective exercise. What CIBC considered essential is not admissible as part of this inquiry. [Emphasis in factum]

In oral argument to this Court, CNH Capital Canada's counsel cited the parol evidence rule to support the exclusion of the statements in the affidavits.

[86] I respectfully disagree. Earlier (para 59) I quoted the principles from Fridman's, *Canadian Agency Law*. Under what Professor Fridman describes as the "Personality" qualification, the questions will include whether the Bank had "personal reasons" to contract with "Ford Credit", whether the Bank was "relying on something personal" and whether that factor "induced" the Bank to contract with Ford Credit, to the exclusion of others. No doubt the wording of the Inter-Creditor Agreement, and an objective examination of the circumstances surrounding that contract will play a significant role in the analysis. But internal Bank evidence also is relevant to whether the Bank was "relying" on, or "induced" by "personal reasons".

[87] The judge made no error in dismissing CNH Capital Canada's objection to the impugned passages from the affidavits of Messrs. Bayne and Tucci. I would dismiss the submissions in CNH Capital Canada's Notice of Contention.

Conclusion

[88] I would grant leave to appeal, allow the appeal, dismiss the Respondent's Contention, overturn the summary judgment and dismiss CNH Capital Canada's motion for summary judgment with costs of $3,000 inclusive of disbursements payable by CNH Capital Canada to the Bank for the appeal.

Fichaud, J.A.

Concurred: Oland, J.A.

Beveridge, J.A.