

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

Judge: The Honourable Justice Joel E. Fichaud

Appeal Heard: January 25, 2013, in Halifax, Nova Scotia

Subject: Summary judgment - agency - undisclosed principals

Summary: Tractors Plus gave security to the Bank of Commerce for its operating line of credit and to Ford Credit for its inventory financing. The Bank and Ford Credit signed an Inter-Creditor Agreement that prioritized their security over Tractors Plus' assets. That Agreement named Ford Credit as the ostensible party and did not mention that Ford Credit might be agent for any other entity. Several years later CNH Capital Canada became the successor to Ford Credit after a corporate reorganization. CNH then financed Tractors Plus' acquisition of inventory. Tractors Plus defaulted. The Bank and CNH disputed priority to Tractors Plus' proceeds of inventory. The Bank pleaded that CNH was not a party to the Inter-Creditor Agreement and could not utilize its subordination provision. CNH moved for summary judgment on the evidence under Rule 13.04 to dismiss the Bank's pleading in that respect. The motions judge granted summary judgment, dismissed that

paragraph of the Bank's pleading and declared that CNH was in contractual privity with the Bank. The judge's reasons were that, when Ford Credit signed the Inter-Creditor Agreement, Ford Credit had been the undisclosed principal of a Partnership, and CNH was the sole remaining partner in that Partnership. The Bank appealed and CNH filed a Notice of Contention.

Issue: Did the judge's analysis offend the principles governing summary judgment on the evidence under Rule 13.04? On the Notice of Contention, was the Bank's evidence inadmissible?

Result: The Court of Appeal allowed the appeal. Material issues of fact were genuinely in issue respecting whether, under agency law, the Partnership was an effective undisclosed principal of Ford Credit. So the motion failed the first branch of the two-fold test for summary judgments on the evidence under Rule 13.04. The judge should have left the determination of those disputed facts for trial. Instead, the judge made factual findings on the summary judgment motion to resolve the material issue of fact. That was an error of law. The Court of Appeal dismissed the Notice of Contention because the Bank's evidence was admissible and relevant.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 29 pages.