**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *SystemCare Cleaning and Restoration Limited v. Kaehler*, 2019 NSCA 29

**Date:** 20190412
**Docket:** CA 480730
**Registry:** Halifax

**Between:**

SystemCare Cleaning and Restoration Limited

Appellant

v.

Dale Kaehler and Josee Desjardins

Respondents

and

3100835 Nova Scotia Limited

Third Party

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|---|---|
| **Judge:** | The Honourable Justice Cindy A. Bourgeois |
| **Appeal Heard:** | March 13, 2019, in Halifax, Nova Scotia |
| **Subject:** | Summary judgment on evidence; Agency by estoppel |
| **Summary:** | In January 2013, the respondents commenced a legal action against SystemCare Cleaning and Restoration Limited ("SCRL"). Located in Dartmouth, Nova Scotia, SCRL markets restoration services and has granted a licence to a number of franchisees to use its trademark "SystemCare". The respondents alleged they had entered into a contract with SCRL to carry out restoration work at their home in Digby. They further alleged that SCRL's agent, Craig Hubley, did not perform the work as agreed and what work he did do, was done inadequately.<br>SCRL filed a defence to the respondents' claim in May 2013, in which it denied entering into a contract with the |

respondents. Rather, it asserted that any contract that existed was with a franchisee, 3100835 Nova Scotia Limited ("835NSL"), which was Mr. Hubley's employer.

In July 2017, SCRL brought a motion for summary judgment pursuant to Civil Procedure Rule 13.04. In essence, SCRL argued that the respondents had sued the wrong company. In particular, it alleged that it was 835NSL, operating as "SystemCare Digby", with whom the respondents had contracted. The motion was heard on June 19, 2018. After having considered the matter, the chambers judge concluded there was a genuine issue of material fact and, as such, summary judgment could not be granted. The motion was dismissed.

SCRL appealed and asked that summary judgment be granted against the respondents.

**Issues:**

1. Should leave to appeal be granted?
2. Did the chambers judge err in concluding there was a material fact in dispute?
3. If the chambers judge did err, should this Court grant summary judgment?

**Result:**

Leave granted and appeal allowed. The chambers judge erred in concluding there was a material fact in issue, given the factual context before him. Given the respondents' claim of agency by estoppel had no real chance of success, summary judgment was granted.

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Respondents

and

3100835 Nova Scotia Limited

Third Party

| | |
|---|---|
| **Judges:** | Beveridge, Bourgeois and Derrick, JJ.A. |
| **Appeal Heard:** | March 13, 2019, in Halifax, Nova Scotia |
| **Held:** | Leave to appeal allowed and appeal allowed with costs, per reasons for judgment of Bourgeois, J.A.; Beveridge and Derrick, JJ.A. concurring |
| **Counsel:** | Matt McEwen, for the appellant<br>Kiel Mercer, for the respondent<br>Cheryl Canning, Q.C., for the third party (watching brief) |

**Reasons for judgment:**

[1] In January 2013, Dale Kaehler and Josee Desjardins (the "respondents") commenced a legal action against SystemCare Cleaning and Restoration Limited ("SCRL"). Located in Dartmouth, Nova Scotia, SCRL markets restoration services and has granted a licence to a number of franchisees to use its trademark "SystemCare". The respondents alleged they had entered into a contract with SCRL to carry out restoration work at their home in Digby. They further asserted that SCRL's alleged agent, Craig Hubley, did not perform the work as agreed and what work he did do, was done inadequately.

[2] SCRL filed a defence to the respondents' claim in May 2013, in which it denied entering into a contract with the respondents. Rather, it asserted that any contract that existed was with a franchisee, 3100835 Nova Scotia Limited ("835NSL"), which was Mr. Hubley's employer.

[3] In July 2017, SCRL brought a motion for summary judgment pursuant to *Civil Procedure Rule* 13.04. In essence, SCRL argued that the respondents had sued the wrong company. In particular, it alleged that it was 835NSL, operating as "SystemCare Digby", with whom the respondents had contracted. The motion was heard on June 19, 2018 by the Honourable Justice Pierre L. Muise. After having considered the matter, he concluded there was a genuine issue of material fact and, as such, summary judgment could not be granted. The motion was dismissed.

[4] SCRL appeals to this Court and asks that summary judgment be granted against the respondents. For the reasons that follow, I would grant leave, allow the appeal, and order that summary judgment be issued as requested.

## Background

[5] I will set out the background as it appears in the record and, in particular, the undisputed evidence presented in the court below.

[6] This matter has its genesis in a fire at the respondents' residential property in March 2006. Two legal actions have been commenced in relation to the events flowing from the fire. The summary judgment motion in question arose in the context of the second action. However, the first claim and, in particular, the acknowledgments made by the respondents therein, provide relevant context.

[7] Following the fire, the respondents' insurer, Wawanesa Mutual Insurance, arranged for remediation services to be undertaken by "SystemCare". The central person who managed that work was Mr. Hubley. The policy in place did not cover all of the necessary repairs. The respondents requested and received a quote from Mr. Hubley to perform additional renovation and restoration services. The written estimate provided was from "SystemCare – Digby".

[8] The respondents accepted the estimate presented by Mr. Hubley and work commenced. The relationship subsequently deteriorated. The respondents were dissatisfied with the quality of work being performed. They refused to pay a number of the invoices issued by "SystemCare – Digby".

[9] A Claim for Lien was filed by 835NSL on March 6, 2007 against the respondents' property, claiming a sum in excess of $90,000. A Statement of Claim subsequently followed. The first three allegations in the Statement of Claim were:

> 1. The Plaintiff is a body corporate with head office at Marshalltown, in the County of Digby and Province of Nova Scotia, and at all times material hereto was registered to do business in the Province of Nova Scotia and **was engaged in the business of supplying building materials and labour for the construction and renovation and improvement of the home of Dale C. Kaehler and Josee Desjardins**, the property of the Defendants.
>
> 2. The Defendants are husband and wife and at all times material hereto were the registered owners of the said land situate at Digby, in the County of Digby and Province of Nova Scotia… .
>
> 3. **By agreement between the Plaintiff and the Defendants**, the Plaintiff agreed with the Defendants to the construction, renovation and improvement of the home and the supply of building materials and labour for the same at the home of the Defendants which is located on the said lands. (Emphasis added)

[10] The respondents filed a Statement of Defence and Counterclaim on June 8, 2007. They specifically admitted paragraphs 1, 2, and 3 of the Statement of Claim as set out above. They further plead:

> 4. The Defendants state that the work supplied by the Plaintiff was sub standard, poor and not of good quality.
>
> 5. The Defendants state that the Plaintiff has charged an amount in excess of the agreed upon contract between the Plaintiff and the Defendants.
>
> 6. The Defendants state the Plaintiff has charged for work not performed and material not supplied to the Defendants' home, or in the alternative, over-charged for what material was supplied to the home.

[11] In their counterclaim against 835NSL, the respondents claimed:

> 10. The Defendants (Plaintiffs by Counterclaim) repeat the foregoing paragraphs and claim against the Plaintiff (Defendant by Counterclaim) for the cost of the remedial work to restore the home to a condition that it should have been left in as a result of the Plaintiff performing the completed contract work.

[12] Although the lien was discharged, the above claim and counterclaim have yet to be heard or dismissed. The appellant, SCRL, is not a party to that matter. As noted earlier, its motion for summary judgment arose out of a second action commenced by the respondents.

[13] In January 2013, the respondents filed a Notice of Action against SCRL seeking damages arising from the restoration activities undertaken at their home. 835NSL, the party they had previously counter-claimed against for the same alleged workmanship issues, was not named as a defendant. In the Statement of Claim, the respondents assert:

> 2. The Defendant, SystemCare Cleaning & Restoration Limited is a Provincially registered body corporate with its registered office located in the Halifax Regional Municipality, Halifax County, Nova Scotia.
>
> 3. On or about March 23, 2006, the Plaintiffs' home was extensively damaged as a result of an electrical fire. The Plaintiffs' home experienced not only fire damage, but water and smoke damage.
>
> 4. Subsequent to the loss**, the Plaintiffs contracted with the Defendant by way of the Defendant's agent, Craig Hubley**, to carry out the restoration work required at the Plaintiffs' home as a result of the aforementioned fire.
>
> 5. **Subsequent to the Plaintiffs reaching an agreement with the Defendant's agent, Craig Hubley**, and the restoration work commencing, the Plaintiffs received an invoice from the Defendant's agent, Craig Hubley, which suggested that the work was being carried out by a limited company, 3100835 Nova Scotia Limited, who had an undisclosed relationship with the Defendant. The Plaintiffs state that at all times prior to contracting with the Defendant's agent, Craig Hubley, the Plaintiffs believed they were contracting with the Defendant and were not advised otherwise.
>
> 6. In the alternative, the Plaintiffs state that the Defendant's agent, Craig Hubley, misrepresented, negligently, innocently, or otherwise, to the Plaintiffs that the work would be carried out by the Defendant and the Plaintiffs entered into the aforementioned agreement on the understanding and belief they were contracting with the Defendant and not an undisclosed numbered company. (Emphasis added)

[14] SCRL filed a Notice of Defence in May 2013, in which it asserted:

> 2. As to the whole of the Statement of Claim, the Defendant Systemcare [*Note*: defined as SCRL] states that the events and restoration/repair work referred to in the Statement of Claim were not performed by the Defendant Systemcare but by a franchisee, 3100835 Nova Scotia Limited, which is independently owned and operated and is a separate entity from the named Defendant Systemcare. Accordingly there is no liability to the Defendants for any failure to perform work agreed to be performed in the contract.
>
> 3. **It is further stated that Craig Hubley was an employee of the franchisee, 3100835 Nova Scotia Limited and not of the Defendant Systemcare, and therefore was not authorized or able to enter into a contract on behalf of the Defendant Systemcare.** (Emphasis added)

[15] To round out the pleadings, SCRL also filed a Third Party Claim against 835NSL seeking indemnity in the event that it was found liable to the respondents.

## The Summary Judgment Motion

[16] As noted earlier, SCRL brought its motion for summary judgment in July 2017. In support thereof, it relied upon the affidavit of Mr. Bernard Dunlap, President of SCRL. His evidence included the following unchallenged facts:

- SCRL is a franchisor company that licences its tradename and marks to companies that wish to provide restoration services in specific regions of Nova Scotia. It has nine franchisees in Nova Scotia, including in Digby;
- SCRL has no involvement in any of the franchised locations, which are owned and operated independently;
- SCRL does not undertake restoration services;
- 835NSL was incorporated in May 2005 and was the SCRL franchisee operating in the Digby area under the business name "SystemCare Digby";
- During the material time, Craig Hubley was the manager of "SystemCare Digby" and an employee of 835NSL;
- The written franchise agreement between SCRL and 835NSL provided, amongst a number of other things, that neither party would be considered an agent representative, nor master or servant of the other for any purpose; and
- 835NSL was responsible for hiring and firing its own employees.

[17] In response to the motion for summary judgment, the respondents filed an affidavit of Mr. Kaehler in which he swore:

- Immediately following the fire at his home, his insurer, Wawanesa, hired SCRL to do the initial cleanup and tear out work;
- Around late March or early April of 2006 he met with Craig Hubley, who he assumed was a representative of SystemCare [*Note*: in the affidavit, "SystemCare" is defined as being SCRL];
- Mr. Hubley held himself out to be a representative of SystemCare (SCRL), and he believed him;
- Mr. Hubley never informed him that he was associated with 835NSL;
- He had noted the use of the "SystemCare" logo on employee clothing, vehicles, and at Mr. Hubley's business office;
- Once the initial cleanup covered by Wawanesa was complete, additional restoration work was required. He and his spouse decided to "go with SystemCare" because of its "cheaper estimate" and due to their familiarity with its work from the initial cleanup work undertaken;
- At no point during his conversations with him did Mr. Hubley mention that "SystemCare" had different offices throughout Nova Scotia; and
- At no point did he enter into a separate agreement with Mr. Hubley or 835NSL.

[18] In its pre-motion brief, SCRL argued the respondents' Statement of Claim was based on the faulty premise that the respondents had entered into a contract for restoration services with it. It submitted the evidence was clear that Mr. Hubley did not work for SCRL and had no legal authority to contract on its behalf. He was an employee of the independently operating franchisee 835NSL. As such, there could be no contractual claim against SCRL and the respondents had sued the wrong party. It was further submitted that the former lien claim brought by 835NSL, and the respondents' admissions made in the course thereof, amply demonstrated the proper identity of the contracting parties (835NSL and the respondents).

[19] In reply, the respondents narrowed the basis of SCRL's alleged liability to a single principle – agency by estoppel (also known as apparent authority). In their pre-motion brief to the chambers judge, they wrote:

> 18. To affect a principal's position, an agent must have the proper authority. 3 types of authority are recognized in Canadian law. Those relationships are actual, implied or apparent. …
>
> 19. **In the case at bar, it is the Plaintiffs' position that Hubley had apparent authority to affect the legal position of Systemcare. As a result, for the purposes of this Brief only apparent authority will be discussed.** (Emphasis added)

[20] At the motion hearing, Mr. Kaehler was cross-examined on his affidavit. He confirmed that:

- In his dealings with Mr. Hubley, he believed "SystemCare" was located only in Digby;
- He was not aware of the existence of SCRL until after his relationship with Mr. Hubley deteriorated;
- He was aware that "SystemCare" was a trademarked logo, but never gave any thought to who owned the trademark.

[21] In post-hearing written submissions, SCRL argued that the respondents' lack of knowledge as to its identity was fatal to any finding of an agency by estoppel. They wrote:

> 19. My Lord, we are dealing with a simple situation: the Kaehlers maintain that an agency exists because they thought they were dealing with "Systemcare". As stated, "Systemcare" is simply a trademark that happens to be owned by Systemcare Cleaning & Restoration. When the Kaehlers say that they thought that they were dealing with "Systemcare", in a sense they were, as 3100835 Nova Scotia Limited had been licensed the right to use that trademark. At no time did the Kaehlers deal with Systemcare Cleaning & Restoration Limited as a corporate entity. **Indeed, they didn't even know that the defendant existed. None of this is in dispute**.
>
> 20. In *Globex*, our Court of Appeal held that a finding of whether an agency exists is a finding of fact. But here, all of the material facts are on the table. There is no need to weigh evidence. There is no need to assess credibility. The parties agree on the basic facts. The only question is: what conclusion or inference can be drawn from these facts? . . .

> 21. **We say that an agency could not have existed because the Kaehlers didn't deal with or even know about the existence of "Systemcare Cleaning and Restoration Limited"**. That company is based in Dartmouth. To the contrary, the Kaehlers thought they were dealing with a company based in Digby. They dealt exclusively with Craig Hubley, an employee of the numbered company. Indeed, they had never even heard of "Systemcare" or the corporate defendant before they began to deal with Mr. Hubley. It was only after the fact that they discovered the existence of the Defendant. In the absence of an actual grant of authority to bind the Defendant (which doesn't exist), how can this undisputed collection of facts possibly create an agency so as to establish a contract between the Kaehlers and the Defendant? (Emphasis added)

[22] In their post-hearing submissions, the respondents framed the issue before the chambers judge as follows:

> 5. It is respectfully submitted that there is a clear question of mixed fact and law. That question is whether "**on the undisputed material facts** did Craig Hubley have apparent authority to establish agency by estoppel?" (Emphasis added)

[23] They further asserted that whether they knew of SCRL's existence while dealing with Mr. Hubley was irrelevant to their claim of agency by estoppel.

## Decision under review

[24] In his written decision, the chambers judge set out *Civil Procedure Rule* 13.04 as governing the motion. He further reviewed the principles articulated by this Court in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 and *Burton Canada Company v. Coady*, 2013 NSCA 95. There is no suggestion that the chambers judge erred in his statement of the legal principles that govern a motion for summary judgment on evidence.

[25] The chambers judge then proceeded to determine the central point in question on the motion:

> [13] The central point in contention in this motion is whether there is evidence that Mr. Hubley, in his dealings with the Plaintiffs, had apparent authority to act as agent for the Defendant, such that agency by estoppel can arise and result in the Defendant being liable for the work and acts in question.
>
> [14] Determining whether an agency relationship exists is a question of fact which involves a contextual analysis: ***Globex Foreign Exchange Corp. v. Launt***, 2011 NSCA 67, paras 19 and 23.
>
> …

> [17] As it is a central point in dispute, it involves determination of a material fact.

[26] In considering whether a genuine issue in dispute existed, the chambers judge next considered the legal principles relating to agency by estoppel. He wrote:

> [20] The requirements of agency by estoppel are outlined at pages 61 to 65 of G.H.L. Fridman, *Canadian Agency Law, Third Edition* (Toronto: LexisNexis Canada Inc. 2017), as follows:
>
> > "**§2.31** The requirements for agency by estoppel are: (a) a representation; (b) a reliance on a representation; and (c) an alteration of a party's position resulting from such reliance. However, if the issue of agency arises in an application for summary judgment, it will not be necessary to prove all these requirements: the party alleging an agency must prove only enough to show that the issue is live and must be resolved by a trial.
> >
> > *Representation*
> >
> > There must be some intentional statement or conduct on the part of the principal which can amount to a representation that the agent has authority to act on behalf of the principal. … The representation must come from the principal: it cannot come from the agent. However, if the principal 'allows' the agent to hold himself out to the world at large as an agent capable of doing what the agent is doing, … this may suffice. Whether it is a statement or conduct that is cited as justifying the operation of the doctrine of agency by estoppel, it must be clear and unequivocal.
> >
> > *Reliance*
> >
> > The representation in question must be made to a person who relies upon it. This means that it must be made either to the particular individual who transacts business with the agent, or to the public at large, in circumstances in which it is to be expected that the general public, or members of the general public, would be likely to do business with the agent.
> >
> > *Detriment*
> >
> > The representation must be the proximate cause of leading the party to whom it is made into the mistake that caused loss or injury to that party. It must be proved that the third party seeking to rely on the doctrine of agency by estoppel was induced, by reliance on the representation, to change his or her position, by acting or refraining from acting, so as to suffer some detriment. Hence, a third party with notice of want of authority, whether the third party was actually aware of the situation, or, in the circumstances ought to have been so aware, will mean that the third

> party cannot succeed in establishing, and therefore relying on, an agency by estoppel."

[27] The chambers judge considered what inferences could be drawn "based on the fact that the Plaintiffs had no prior knowledge of the Defendant's specific identity" (para. [33]) and whether the possible inferences established the required elements of agency by estoppel.

[28] The chambers judge reviewed the evidence as well as two decisions in which an agency by estoppel was established in a franchise context (*Ismail v. Treats Inc.*, 2004 NSSC 16 and *Beuker v. H & R Block Canada Inc.*, 2000 SKQB 584). He found there were many similarities in the case before him and the facts of the other franchise cases. Based on his review of those cases, he concluded there were a number of possible inferences that could be drawn "from the Plaintiffs not knowing the specific identity of the Defendant" (para. [67]). He said:

> [70] These points, and the reasonable inferences that they support, could all be interpreted by the trier of fact as satisfying the factual requirements of agency by estoppel.

And further:

> [75] Whether agency by estoppel based on apparent authority should arise, is a question of fact, combined with a question of law. It is a material question of fact as it would affect whether or not the Defendant can be held liable for wrongful actions by Mr. Hubley or the Numbered Company. Consequently, the answer to the first question regarding whether there is a "genuine issue of material fact", either pure or mixed with the question of law, is yes.

[29] As a result of the above conclusion, SCRL's motion for summary judgment was dismissed.

**Issues**

[30] After having considered the parties' written and oral submissions, the issues that arise on this appeal can be stated as follows:

1. Should leave to appeal be granted?
2. Did the chambers judge err in concluding there was a material fact in dispute?
3. If the chambers judge did err, should this Court grant summary judgment?

[31] The issue of leave can be dealt with quickly. In *Shannex*, Justice Fichaud wrote:

> [27] This is an appeal from an interlocutory motion, for which leave is required. In *Burton Canada Company v. Coady*, 2013 NSCA 95, Justice Saunders, for the majority, set out the test for leave to appeal:
>
> > 18. … The question of whether leave to appeal ought to be granted is one of first instance. The well-known test on a leave application is whether the appellant has raised an arguable issue, that is, an issue that could result in the appeal being allowed. [citations omitted]

[32] It is clear there is an arguable issue.

## Standard of Review

[33] The standard of review is not in issue. In *Burton Canada Company v. Coady*, Justice Saunders wrote:

> [19] The standard of review applicable to summary judgment motions in Nova Scotia is settled law. The once favoured threshold inquiry as to whether the impugned order under appeal did or did not have a terminating affect, is now extinct. There is only one standard of review. We will not intervene unless wrong principles of law were applied or, insofar as the judge was exercising a discretion, a patent injustice would result. See for example, ***AMCI Export Corporation v. Nova Scotia Power Inc.***, 2010 NSCA 41; **Innocente v. Canada (Attorney General)**, 2012 NSCA 36 at ¶21-29; **WBLI Chartered Accountants, supra**; and **Nova Scotia v. Roué**, 2013 NSCA 94.

## Analysis

*Did the chambers judge err in concluding there was a material fact in dispute?*

[34] In *Shannex*, Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to Rule 13.04 (paras. [34] through [42]):

1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?

4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?

5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?

[35] With respect to the first question, Justice Fichaud noted " a 'material fact' is one that would affect the result. A dispute about an incidental fact – *i.e*. one that would not affect the outcome – will not derail a summary judgment motion" (para. [34]). And further:

> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes.

[36] As referenced earlier, the chambers judge found there was a genuine issue of material fact, namely whether the evidence could satisfy "the factual requirements of agency by estoppel".

[37] With respect, the chambers judge's identification of a genuine issue of material fact was in error. In my view, he was sidelined by delving into a consideration of the factual similarities in this matter and others where an agency was found to exist. Further, his consideration of the principles of agency by estoppel was incomplete. Determining whether there is a genuine issue of material fact must be founded in the pleadings and the evidence presented in the matter under consideration. Case authorities may be helpful for identifying issues of law, but the material facts which will govern the outcome will be determined based on each unique context.

[38] Here, the respondents' claim against SCRL was based on an allegation that Mr. Hubley, in his interactions with them, ought to be considered its agent. In its defence, SCRL denied that Mr. Hubley was its employee and "therefore was not authorized or able to enter into a contract on [its] behalf". Mr. Dunlap's unrefuted evidence established that Mr. Hubley was an employee of 835NSL, not SCRL, that the franchise agreement precluded 835NSL from acting as an agent for SCRL, and that in the earlier lien claim, the respondents had acknowledged the contract

negotiated with Mr. Hubley (on which they were basing their action against SCRL) was with 835NSL. In response, the respondents narrowed their allegation of agency to one solely based on the principle of agency by estoppel.

[39] The chambers judge, appropriately in my view, looked to the legal principles governing agency by estoppel to assist in determining whether there was a genuine issue of material fact. Here, the legal issue in question was the application of the principle of agency by estoppel to the evidence relating to the pre-contractual discussions between Mr. Hubley and the respondents.

[40] The chambers judge's articulation of the law was not challenged. Both parties agree he accurately set out the required elements for the establishment of an agency by estoppel. For ease of reference, they are:

- A clear and unequivocal intentional statement or conduct by the principal (allegedly SCRL) that the agent (Mr. Hubley) has authority to act on its behalf;
- The representation of the alleged principal must be made to a person who relies on it; and
- The representation must have been the proximate cause of leading the respondents into a mistake from which they suffered loss.

[41] In its submissions to the chambers judge, SCRL asserted the above test could not be satisfied if the respondents were unaware of its existence and identity. Its counsel argued, in the factual context of the matter before the court, that lack of knowledge was the critical genuine issue of material fact. I agree.

[42] Unfortunately, SCRL did not provide the chambers judge with legal authority for its view. I am satisfied the chambers judge accepted that Mr. Kaehler, in his discussion with Mr. Hubley which led to the contract for restoration services, was unaware of the existence of SCRL. This was the critical material fact. It was not in dispute. The chambers judge erred in concluding otherwise.

*If the chambers judge erred in concluding there was a material fact in issue, should this Court issue summary judgment?*

[43] There was no material fact in dispute. As such, the chambers judge ought to have proceeded to consider the second question in the *Shannex* formulation. This Court, possessed with the full record from below, is now able to do so.

[44] The second question asks whether the pleadings require the determination of a question of law, either pure or mixed with a question of fact. In my view, the answer is Yes, namely, are the requirements for an agency by estoppel met?

[45] That leads to the third question, which squarely addresses the strength of the claim. The crucial question to be posed at this juncture is: given that Mr. Kaehler was unaware of the identity and existence of SCRL (the alleged principal) during his interactions with Mr. Hubley, does his claim based on agency by estoppel have a real chance of success?

[46] The chambers judge asked himself what inferences could be drawn based on the fact that the respondents had no prior knowledge of SCRL. The only relevant inference which can be drawn from that unrefuted fact is that the respondents' claim has no real chance of success. Indeed, it is fatal to a claim based on agency by estoppel.

[47] Knowledge of the alleged principal's identity is a necessary pre-condition to establishing an agency by estoppel (also referred to as apparent authority). In *Agency and Partnership Law Primer*, 5th ed. (Toronto: Thomson Reuters Canada Ltd., 2016) Cameron Harvey and Darcy MacPherson write at pages 72-73:

> Recapping the law regarding a representation and reliance thereon of apparent authority:
>
> - while routinely agents naturally represent their authority to third parties without having actual authority to do so, ordinarily a third party can only rely on a representation which emanates from the principal, although extraordinarily an agent can have express actual authority which includes authority to represent her authority, or, perhaps, apparent authority to represent his authority;
> - the representation can be made by a principal either expressly or impliedly by conduct, appointing the agent to a position, etc., by standing by, and by course of dealing;
> - the representation must be unequivocal, and, perhaps, intentional, not negligent;
> - the representation must be one on which it is reasonable for the third party to rely;
> - **it is almost unnecessary to state that a third party cannot argue that she relied on a representation of apparent authority of a "principal" of whom the third party did not know when the third party dealt with the "agent."**
>
> (Emphasis added)

[48] See also F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 17th ed. (London: Sweet & Maxwell, 2001) wherein the author states "[i]t is obvious that if the third party does not know of the existence of any principal, this doctrine cannot apply …".

[49] In argument before this Court, counsel for the respondents concedes that Mr. Kaehler had no knowledge of SCRL, and in his dealings with Mr. Hubley at the material time, he "did not know who or what he was dealing with".

[50] I am satisfied the respondents' claim of agency, narrowed to an alleged agency by estoppel, has no real chance of success. Given that the answer to the third *Shannex* question is No, the remaining questions need not be posed. Summary judgment should be granted.

**Disposition**

[51] I would grant leave to appeal. I would allow the appeal, overturn the chambers judge's order, and allow SCRL's motion for summary judgment against the respondents.

[52] In the court below, costs of the motion were set at $850.00, subject to the outcome of the appeal. SCRL is entitled to those costs. With respect to the costs on appeal, I would order the respondents pay SCRL costs of $1,500.00 inclusive of disbursements.

Bourgeois, J.A.

Concurred in:

Beveridge, J.A.
Derrick, J.A.