

SUPREME COURT OF NOVA SCOTIA

Citation: CNH Capital Canada Ltd. v. Canadian Imperial Bank of Commerce,
2012 NSSC 149

Date: 20120507

Docket: Hfx. No. 276006

Registry: Halifax

Between:

CNH Capital Canada Limited

Plaintiff

v.

Canadian Imperial Bank of Commerce

Defendant

Judge: The Honourable Justice Charles E. Haliburton

Heard: February 7, 2012, in Halifax, Nova Scotia

**Final Written
Submissions:** February 6, 2012

Counsel: Colin D. Piercey and Eric MacCrea (Articled Clerk), for the
plaintiff
John A. Keith, P. Robert Arkin and Andrew Sowerby, for the
defendant

By the Court:

[1] This is a motion for summary judgment on evidence pursuant to *Civil Procedure Rule 13.04*. By this motion the plaintiff seeks to have a portion of the defence struck, and an order issued providing that;

CNH Capital Canada Limited, is the successor to Ford Credit Canada Limited And New Holland [Canada] Credit Company under the Inter-Creditor Agreement [ICA] 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.

[2] *Civil Procedure Rule 13.04* states:

(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.

Evidence

[3] The evidence consists of two affidavits tendered by each of the plaintiff and defendant. The four affiants were each subjected to cross-examination.

[4] The dispute between the parties arises from what they have called an Inter-Creditor Agreement or ICA, which was signed by representatives of the respective

parties in August of 1992. “Tractors Plus Limited” took over the dealership for Ford New Holland tractors and equipment in Amherst. The dealership arranged financing with the equipment supplier, (Ford New Holland) and arranged an operating line of credit with CIBC. The evidence is that it was a standard practice for both Ford Credit Canada Limited (FCC) and CIBC to execute an ICA which would determine their respective rights to collateral assets, receivables, and other property in the event of the financial failure of the dealer.

[5] Tractors Plus did fail in September 2005. When it did CIBC is alleged to have been the recipient of the proceeds from the liquidation. CNH Capital Canada Limited (CNH), as successor to FCC, did not receive payment for those assets of the dealership over which it claims security pursuant to the ICA. In its lawsuit the plaintiff seeks to recover from the defendant its share of the proceeds from the liquidation of the dealership. The defendant denies the claim of CNH.

[6] The pleadings outline the dispute.

[7] In the statement of claim, CNH claims that CIBC breached the ICA by wrongfully applying the proceeds of disposition from the collateral to the balance owing to CIBC by Tractors Plus. In the statement of claim, CNH states it is the successor of a Partnership entered into between FNHCC.

[8] The statement of defence responds that CIBC had no contractual relationship with CNH. Paragraph 3(a) (the impugned section) of CIBC’s defence states:

CIBC denies that it has a contractual relationship with [any contractual obligations to] the plaintiff CNH capital. The letter agreement dated August 31, 1992 [Ford Credit letter agreement] was between CIBC and Ford Credit Canada Limited 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 Limited. There is no contractual privity between CIBC and the plaintiff CNH.

[9] The plaintiff claims to be entitled to the benefit of the ICA as the successor to the interest of an unnamed principal which was the beneficiary of the ICA.

[10] The history and the rights of CNH is the issue. The foundation of the claim is that it is the successor to a Partnership established in 1991 under the name or style of “Ford New Holland (Canada) Credit Company”, and is entitled to all claims and rights of that Partnership.

[11] In the documents is an agreement dated June 30, 1991 between Ford Credit Canada Limited (FCC) and FNH Canada Holdings Inc. (FNH) described as a “Joint Venture Partnership Agreement”. This agreement makes reference to an arrangement between Fiat (the parent company of New Holland) and Ford to market their tractors and farm equipment through Ford New Holland Inc. The object of this new Partnership appears to be encapsulated in one of the opening paragraphs:

Whereas FNHC holdings and Ford Credit Canada desire to enter into a joint venture relationship for the purpose of providing, from and after the date hereof, wholesale and retail receivables financing and servicing for the Canadian operations of the business ...

[12] Article 2.1 of this document describes the “scope and operation of business”:

The joint venture will engage in the business of providing in Canada.... Wholesale and other financing customarily provided in connection therewith to dealers in goods sold, distributed or manufactured by FNH Canada or any of their affiliates...

[13] Article 2.2(c):

... All applicable retail and wholesale receivables relating to T&E (tractors and equipment) shall be generated in Ford Credit Canada’s name and then immediately purchased by the joint venture from Ford Credit Canada on terms such that the economic benefit to the joint venture pertaining to such receivables shall be the same as would have been the case had such receivables been directly generated by the joint venture...

[14] This joint venture agreement goes on to provide that FCC would for two years provide the necessary administrative services and that FCC employees would be seconded to work exclusively for the Partnership; bringing with them access to software and accounting programs then being used by FCC. This joint venture agreement went so far as to name 51 particular FCC personnel who would be dedicated to its operation.

[15] The agreement goes on to make provision for dissolution of the Partnership and/or succession. Article 8.4 includes the following wording which I find to be relevant to the present application:

8.4 (a) the remaining partner shall have the right to purchase the withdrawing partner's partnership interest in the joint venture... (b) if the remaining partner shall exercise its purchase rights as set forth above, such remaining partner shall have the right to maintain and continue the business of the joint venture...

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 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.

Position of the parties

[17] On behalf of CNH, it is argued that when the ICA was signed by Louis Trudell 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. It should be noted that the Partnership was effectively a "finance company" engaged in financing farm equipment. The evidence discloses that in May of 2002 Case Canada Corp., another farm equipment manufacturer, acquired an interest in this finance company. The partnership name changed over the years as the partners bought and sold their interests culminating in May of 2005 when NHCCC (New Holland Case Credit Canada) sold its remaining interests to CNH Capital Canada Limited. CNH consequently became the sole remaining partner.

[18] The position of CIBC is set forth at paragraph 24 of its prehearing brief:

- (a) Ford Credit did not have authority to enter into the ICA on behalf of the Partnership;
- (b) Ford Credit's identity is integral to the ICA, therefore it cannot contract on behalf of of an undisclosed principal; and
- (c) CNH has not proven it is the legal owner of all assets of the Partnership including the ICA.

[19] The defendant's brief points out that the ICA does not "state" that Ford Credit acts as agent, and that in any event FCC exceeded its authority. Furthermore, it is said, the identity of the principal is important to the third-party thus restricting the application of the legal principle respecting undisclosed principals.

Findings

[20] The principles to be applied on applications for summary judgment on evidence have been reviewed in a number of recent cases. On such an application the judge hearing the matter is obliged to determine whether there is a genuine issue between the parties which is required to be dealt with by a full trial, with the hearing of evidence and a determination of the facts taking into account the credibility of the witnesses (see for example *Roscoe JA United Golf Developments Limited v. Iskandar* 2004 NSCA 35). The onus is on the applicant to establish that there is no genuine issue for trial. It is then for the respondent to show that their counter-arguments have a "real chance" of success (*Bowden v. Withrow Pharmacy Halifax 1999 Limited* 2008 and SSC 252).

[21] Having reviewed the extensive affidavits and the documentary evidence produced on this application I am forced to the conclusion that there is no genuine issue for trial with respect to the matters raised as issues on this application for partial summary judgment.

Agency

[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.

Succession

[23] The affidavit of Brett Davis “senior director for commercial lending” with CNH contains as an attachment an agreement conveying financing contracts from Ford Credit to the Partnership. There is produced a further agreement in 1997 which assigns Ford’s interest in the Partnership, together with successive documents tracing the corporate history and successive partners to May 1, 2005, when CNH became entitled to a 100% interest in the Partnership. At that time the Partnership was dissolved leaving CNH in possession of the Partnership assets including any interest which there may be accruing under the ICA. The nature and intent of these agreements being to convey or assign the interests of the “withdrawing partners” to the “remaining partners” is clear and proven. Such a transfer of interest was contemplated by the originating document. The plaintiff is the one remaining partner. There is no reason to conclude that it is somehow disqualified from enforcing the rights it has acquired.

[24] Once acquired for the benefit of the partnership all assets of property remain the property of the partnership until they are sold, or until the partnership is dissolved. I draw this position from *A Practical Guide to Canadian Partnership Law* (Canadian law Book, looseleaf) Vol. 1 set out at para. 1.370.

[25] The text makes the point that a partnership does not exist separate and apart from its partners, using as his authority *Dockrill v. Coopers & Lybrand Chartered Accountants* (1994), 111 D.L.R. (4th) 62 (N.S.C.A.) and quoting this relevant phrase from the judgment:

Each partner is an agent of the firm and its other partners with respect to the firm's business.

[26] It is for the parties to the partnership to decide how the partnership will be managed, how partners may withdraw or be replaced, and how assets are to be managed or distributed. Here there was a succession of partners and in the end all had sold or relinquished their interest to CNH. Section 44(3) of the *Partnership Act of Ontario* provides for dissolution. After making the payments (of debt) the ultimate

residues if any, is to be divided amongst the partners in the proportion in which profits are divisible.

[27] This is in full agreement with *Wong v. Fowler* (1984), 51 AR 347 at page 351 as quoted by Manzer:

It is trite law that, upon the dissolution of a partnership, each partner is entitled to his proportionate share of the assets....

[28] As the only remaining partner, CNH is/was entitled to the assets of this partnership, including its interest in the ICA.

[29] I find there are no issues of credibility raised by the defence nor arising from the evidence produced by the defendant.

Undisclosed Principal

[30] The defendant argues that it did not and would not have entered into an agreement, the ICA, with an unknown party. The law with respect to enforcing a contract notwithstanding the nondisclosure of the principal seems to be pretty clear. While it may be counterintuitive that a stranger to a contract could acquire rights to enforce a contract made by a third-party on their behalf; and in the absence of the contracting party knowing who they are contracting with; nonetheless that is the law. The concept of the undisclosed principal is acknowledged to be an exception to an older and stricter doctrine of privity. 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 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.

(my emphasis)

[31] Continuing at p. 193:

... By using someone to transact on one's behalf, even to the extent of concealing that interrelationship, it is possible for one person to be a party to a contract which he has not made. ... The true party is the principal; the agent is only a sort of amanuensis or instrument. ... commercially speaking, it may be stated categorically that without the development of the notion of agency, business would have been seriously hampered, the law might have been kept in an immature, undeveloped condition, and it would have been impossible for commerce, trade, and everyday life generally, to have emerged as we know it in modern times.

[32] The above quotation makes it clear that the rights of the undisclosed principal may be excluded for various reasons including the circumstances raised by the defence here. As noted and dealt with earlier it was argued that as agent FCC exceeded its authority. 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. 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 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.

Haliburton, J.