SUPREME COURT OF NOVA SCOTIA

Citation: *Kaehler v. SystemCare Cleaning & Restoration Ltd.*, 2018 NSSC 219

Date: 2018-09-13
Docket: *Annapolis Royal*, No. SD#411067
Registry: Digby

Between:

Dale Kaehler and Josee Desjardins

Plaintiffs

v.

SystemCare Cleaning & Restoration Limited

Defendant

-and-

3100835 Nova Scotia Limited

Third Party

Judge:	The Honourable Justice Pierre L. Muise
Heard:	June 19, 2018, in Annapolis Royal, Nova Scotia
Final Written Submissions:	July 11, 2018
Counsel:	Greg Barro, Q.C. and Kiel Mercer, for the Plaintiffs Philip Chapman, for the Defendants Cheryl Canning, for the Third Party, not participating

INTRODUCTION

[1] The Plaintiffs commenced an action against the Defendant seeking damages for work negligently performed, overcharging and misappropriation of property, by its agent, Craig Hubley. The Defendant, SystemCare Cleaning & Restoration Limited ("SystemCare"), contests the claim on the basis that: Mr. Hubley was an employee of 3100835 Nova Scotia Limited ("the Numbered Company"); the Numbered Company is an independently owned and operated SystemCare franchisee; and, Mr. Hubley had no authority to contract on behalf of SystemCare.

[2] The Defendant brought this motion for summary judgment on the evidence, advancing the ground that the Plaintiffs "have sued the wrong company".

ISSUE

[3] The broad issue to be determined is whether summary judgment should be granted.

[4] Determining that issue involves addressing various questions.

[5] Prior to setting out the relevant questions, I will reproduce the current version of the applicable Civil Procedure Rules and jurisprudence interpreting, or which assists in interpreting, them.

LAW AND ANALYSIS

TEST FOR SUMMARY JUDGMENT ON THE EVIDENCE

[6] *CPR* 13.04, with the February 26, 2016 amendments, states:

> **"13.04 (1)** A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> **(2)** When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> **(3)** The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> **(4)** On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> **(5)** 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.
>
> **(6)** A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> a) determine a question of law, if there is no genuine issue of material fact for trial;
>
> b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence."

[7] *CPR* 13.08 (1) states:

> "A judge who dismisses a motion for summary judgment on evidence must, as soon as is practical after the dismissal, schedule a hearing to do either of the following:
>
> (a) give directions for the conduct of the action, if it is not converted to an application;
>
> (b) on the motion of a party or on the court's own motion, convert the action to an application in court, set a time and date for the hearing of the application, and give further directions as called for in Rule 5 - Application."

[8] The Court in ***Shannex Inc. v. Dora Construction Ltd.***, 2016 NSCA 89, at paras 32 to 42, provided the principles and questions applicable to a motion for summary judgment on the evidence under the Rule as most recently amended. It stated, among other things, the following:

> "[34] I interpret the amended Rule 13.04 to pose five sequential questions:
>
> • **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [Rules 13.04(1), (2) and (4)]
>
> If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.
>
> The analysis of this question follows *Burton*'s first step.
>
> 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: … .
>
> 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. [Rules 13.04(4) and (5)]
>
> *Burton*, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary

judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.

• **Second Question**: If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**

If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). …

• **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: **"Does the challenged pleading have a real chance of success?"**

Nothing in the amended Rule 13.04 changes *Burton*'s test. …

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

• **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

… Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, will play a role.

A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. …

[35] **"Discretion":** The judge's "discretion" under the amended Rule 13.04(6)(a) governs the option *whether or not to determine the full merits – i.e.* the Fourth Question. I disagree with Mr. Upham's factum that Rule 13.04(6)(a) gives the judge "unfettered" discretion to just dismiss Shannex's summary judgment motion. The Civil Procedure Rules do not authorize judges to allow or dismiss summary judgment motions on an unprincipled or arbitrary basis.

[36] **"Best foot forward":** Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all

> these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton*, para. 87.
>
> [37] **Conversion to an application:** Lastly, the judge and counsel "must" bear in mind Rule 13.08(1)(b):
>
> ….
>
> [42] Rule 13.08(1) says that a judge who dismisses the motion for summary judgment "must" schedule a hearing to consider conversion or directions. Accordingly, a dismissed motion under Rule 13.04 triggers the supplementary question:
>
> • **Fifth Question**: If the motion under Rule 13.04 is dismissed, **should the action be converted to an application** and, if not, what directions should govern the conduct of the action?"

[9] The Court in ***Shannex***, at para 33, also noted that: The amended Rule 13.04 frames, but does not materially change *Burton's* tests.

[10] Therefore, it is useful to reproduce the summary of principles listed at paragraph 87 of ***Burton Canada Company v. Coady***, 2013 NSCA 95, as follows:

> "1. Summary judgment engages a two-stage analysis.
>
> 2. The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied its evidentiary burden of proving that there are no material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.
>
> 3. If the moving party satisfies the first stage of the inquiry, then the responding party has the evidentiary burden of proving that its claim (or defence) has a real chance of success. This second stage of the inquiry engages a somewhat limited assessment of the merits of the each party's respective positions.
>
> 4 The judge's assessment is based on all of the evidence whatever the source. There is no proprietary interest or ownership in "evidence".
>
> 5. If the responding party satisfies its burden by proving that its claim (or defence) has a real chance of success, the motion for summary judgment is dismissed. If, however, the responding party fails to meet its evidentiary burden and cannot manage to prove that its claim (or defence) has a real chance of success, the judge must grant summary judgment.

6. Proof at either stage one or stage two of the inquiry requires evidence. The parties cannot rely on mere allegations or the pleadings. Each side must "put its best foot forward" by offering evidence with respect to the existence or non-existence of material facts in dispute, or whether the claim (or defence) has a real chance of success.

7. If the responding party reasonably requires disclosure, production or discovery, or the opportunity to present expert or other evidence in order to "put his best foot forward", then the motions judge should adjourn the motion for summary judgment, either without day, or to a fixed day, or with conditions or a schedule of events to be completed, as the judge considers appropriate, to achieve that end.

8. In the context of motions for summary judgment the words "genuine", "material", and "real chance of success" take on their plain, ordinary meanings. A "material" fact is a fact that is essential to the claim or defence. A "genuine issue" is an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded. A "real chance of success" is a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation.

9. In Nova Scotia, CPR 13.04, as presently worded, does not create or retain any kind of residual inherent jurisdiction which might enable a judge to refuse to grant summary judgment on the basis that the motion is premature or that some other juridical reason ought to defeat its being granted. The Justices of the Nova Scotia Supreme Court have seen fit to relinquish such an inherent jurisdiction by adopting the Rule as written. If those Justices were to conclude that they ought to re-acquire such a broad discretion, their Rule should be rewritten to provide for it explicitly.

10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.

11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.

12. Where, however, there are no material facts in dispute, and the only question to be decided is a matter of law, then neither complexity, novelty, nor disagreement surrounding the interpretation and application of the law will exclude a case from summary judgment.”

[11] ***Shannex*** interprets the amended Rule 13.04 by adjusting the approach in ***Burton*** to conform to the new wording and, as directed in ***Hryniak v. Mauldin***,

2014 SCC 7, by “broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims". That general approach was confirmed in ***Fougere v. Blunden Construction Ltd.***, 2014 NSCA 52, at paragraph 7, as being the proper approach.

[12] I will now turn to the application of the amended Rule 13.04 and the jurisprudence interpreting it to the case at hand. The first question to address is whether there is a genuine issue of material fact, either pure or mixed with a question of law.

IS THERE A “GENUINE ISSUE OF MATERIAL FACT, EITHER PURE OR MIXED WITH A QUESTION OF LAW”?

Material Fact

[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.

[15] Determining whether there was apparent authority to act as agent, such that agency by estoppel can arise, is often treated as a question of fact mixed with a question of law: ***Winnipeg (City) Assessor v. Licharson***, 2005 MBCA 95, at paras 100 and 101; and, ***Royal bank of Canada v. 1277520 Ontario Inc.***, [2001] O.J. No. 144 (S.C.J.), at paras 26 and 27.

[16] Either way, there is a question of fact involved.

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

Genuine Issue

What Constitutes a Genuine Issue?

[18] As stated at para 87 of ***Coady***, "a 'genuine issue' is an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded".

[19] The Court in ***Irving Ungerman Ltd. v. Galanis*** (1991), 4 O.R. (3d) 545 (C.A.), defined "genuine issue for trial" as follows:

> "It is safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing the meaning of the term ... If the evidence on a motion for summary judgment requires a trial for its resolution, the requirements of the rule have been met ... the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists."

Factors Relevant to Assessing Whether Genuine Issue Exists

Elements Required for Agency by Estoppel

[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."

[21] This outline conforms with the approach in the passages cited by the Defendant from ***Deer Valley Shopping Centre Ltd. v. Sniderman Radio Sales & Services Ltd.***, 1989 CarswellAlta 88 (Q.B.), and ***4414790 Manitoba Ltd. v. Nelson***, 2003 MBQB 183.

What Inferences May be Drawn?

[22] The Defendant correctly points out, based on paragraph 29 of ***Globex*** and on ***Guarantee Co. of North America v. Gordon Capital Corp.***, [1999] 3 S.C.R. 423, that the judge on a summary judgment motion may "make inferences of fact based on the undisputed facts before the court".

[23] It argues that the "fact" that Mr. Kaehler did not know of the existence of the Defendant until after the work and acts complained of leads to an inference of fact that is fatal to a finding of apparent authority and agency by estoppel. That suggested inference is that, since the Plaintiffs did not know of the Defendant's existence, the Defendant could not have represented to them that Mr. Hubley was

acting on their behalf and the Plaintiffs could not have relied on such a representation. Thus, it is argued, there is no genuine issue of material fact for trial; and, the Court should apply the law relating to agency by estoppel, which is clear, conclude there is no evidence on those essential elements, and grant summary judgment.

[24] The argument that it is an undisputed "fact" that Mr. Kaehler did not know of the existence of the Defendant blurs the distinction between "evidence" and "facts".

[25] Mr. Kaehler's response to questioning on cross-examination is not disputed. He was asked whether he had heard of SystemCare before the fire. He responded "no". That was followed up with the suggestion that he only found out when he made the claim. He answered "yes".

[26] There is, however, a dispute over how that evidence, in the circumstances, and considering of all of the evidence, ought to be interpreted. The Plaintiffs argue that it should be interpreted as being that, though it was not clear to them what SystemCare was (eg. a partnership, corporation, Franchise, etc.), and they did not know of the contractual arrangement between the Defendant and the Numbered Company, in their mind, they were dealing with SystemCare as one entity and Mr. Hubley was its agent.

[27] Given the context and other evidence, a trier of fact could reasonably take that evidence as meaning Mr. Kaehler only found out after-the-fact about SystemCare Cleaning & Restoration Limited existing as a separate company from the one that employed Mr. Hubley; and, thought that Mr. Hubley did represent SystemCare as one entity. To find that Mr. Kaehler's answers on cross-examination establish he gave no thought to the existence of SystemCare as a business entity of some sort, a trial judge would have to reject his affidavit evidence that he believed Mr. Hubley when he held himself out to be a representative of the Defendant. That would involve: interpreting and weighing the evidence; and, accepting Mr. Kaehler's answer on cross-examination at face value, to the exclusion of the remainder of his evidence on the identity of the Defendant.

[28] On the one hand, as stated in ***Guarantee Co. of North America v. Gordon Capital Corp.***, at paragraph 31, "a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence".

[29] On the other hand, skillful cross-examiners can often get witnesses to agree with their suggestions in ways that distort what the witness is really communicating. That was recognized in ***Coady***. In that regard, paragraph 52 states:

> "Warner, J. also declined to accept Burton's characterization of Mr. Coady's level of proficiency as a snowboarder. As the judge noted:

> [103] The defendants rely heavily upon the plaintiff describing himself as an advanced snowboarder. The term 'advanced' was not defined, and was not the plaintiff's word, but the word of the cross-examiner. …"

[30] Also, when evidence renders an answer or document ambiguous, and it remains unclarified, a judge may reasonably find it does not establish what it would seem to establish in isolation. That occurred, for example, in ***4187440 Canada Inc. v. Physio Clinic Ltd.***, 2014 NSSC 214, where the Court, at paragraph 59, stated:

> "Mr. Sutton's reference to 'my shell company' by itself is ambiguous at best. He was not cross-examined as to what he meant thereby. Moreover, the Plaintiff's evidence via the May 12, 2014, Affidavit of Andrea Isabelle, para. 4, Exhibit 'A' contains the 'Income Statements' for TPL and Sutton Holdings for the fiscal years 2010, 2011 and 2012. I would not draw an adverse inference that TPL is a 'shell' company such as was concluded in *Globex, supra.*"

[31] That case dealt with a summary judgment motion. That, and other suggested inferences, may have resulted in a material fact being in issue, and the Plaintiff's claim having a real chance of success. The judge refused to draw those inferences and granted summary judgment.

[32] The Defendant in the case at hand, is urging the court to make the inferences noted.

[33] So, I will consider what inferences I can draw on a summary judgment motion generally, and what inferences I can draw on this motion, based on the fact that the Plaintiffs had no prior knowledge of the Defendant's specific identity.

[34] An inference cannot be based on one single undisputed fact or piece of evidence. It must be based on the totality of the undisputed facts or evidence.

[35] On a summary judgment motion, I can only make inferences of fact, at least those that result in a granting of the motion, if the inferences are "strongly supported" by undisputed facts, as the bar on such a motion is high: ***Coady***, paragraph 28, quoting ***Canada (Attorney General) v. Lameman***, 2008 SCC 14.

[36] Determining which of competing inferences to prefer should be left to the trial judge: ***Coady***, paragraphs 65 to 67.

[37] The dissenting judge in ***Coady***, at paragraph 212, was prepared to draw an inference that would result in summary judgment being granted, stating it was the "only reasonable inference on the undisputed facts before the court". That approach is the same as that relating to a standard of proof beyond a reasonable doubt. However, it is consistent with the need to establish, on a summary judgment motion, that there is no genuine issue of material fact. It is consistent with having to avoid deciding amongst competing inferences. It is not inconsistent with the

need for inferences to be strongly supported by undisputed facts. In my view, it is a proper approach.

[38] In ***Guarantee Co. of North America***, at paragraph 65, the Court concluded that the summary judgment motion judge was "correct in concluding, pursuant to section 3 of the Bond pertaining to discovery of loss, that it could reasonably be inferred from the record the loss of the type covered by the policy was or would be incurred". Therefore, it reinstated the granting of summary judgment. Standing alone, that would appear to suggest that an inference of fact may be made if the fact could reasonably be inferred. However, the wording of section 3 of the Bond informs the interpretation of the wording used by the Court.

[39] The relevant issue was the date the plaintiff discovered the loss. At paragraph 29, the Court stated:

> "Under section 3 of the Bond, all that is required for discovery of loss are sufficient facts to cause a reasonable person to assume that a loss of a type covered by the Bond will be incurred. A loss need not be conclusively determined to be covered in order for discovery to occur. Having accepted that Gordon knew its employee had acted fraudulently before July 16, 1991 and that Gordon had already incurred interest charges in respect of a $90,000,000 loan to meet its regulatory capital obligations, O'Brien J. inferred that it could reasonably be assumed that a loss of the type covered by the policy was or would be incurred."

[40] The wording of section 3 provides an explanation for why the expressions "could reasonably be inferred" and "inferred that it could reasonably be assumed"

were used in that case. In my view, the only reasonable inference to be drawn from the fact that Gordon knew the employee had acted fraudulently and had incurred interest charges, was that there were "sufficient facts to cause a reasonable person to assume that a loss of the type covered by the Bond [would] be incurred". Therefore, those expressions are not to be taken as expressions of the test for drawing of inferences in summary judgment cases in general.

[41] Except in circumstances, such as those in ***Guarantee Co. of North America***, allowing the drawing of any inference that could reasonably be drawn, and permitting that inference to be used to grant summary judgment, would be setting too low a bar for summary judgment.

[42] If there is another arguable and realistic inference (ie. another reasonable inference), that finds support in the evidence, and that would defeat a summary judgment motion, the inference leading to summary judgment should not be drawn. It should be left to the trial judge to determine which fact to infer.

[43] In determining whether the inferences suggested by SystemCare should be drawn in the case at hand, one must consider all of the undisputed facts / evidence, in light of factors which inform the assessment of whether the facts required to establish the elements of agency by estoppel are made out.

Whether There Is Sufficient Evidence to Infer Facts Covering the Required Elements of Agency by Estoppel

[44] The Defendant in the case at hand emphasizes that it is a franchisor and Mr. Hubley was employed by the Numbered Company which was a franchisee. The Defendant submits the following concerning its relationship with its franchisees:

> "It has no direct involvement in franchises operations, but instead focuses on business development of the "SystemCare" trademark, performs quality control, and supplies equipment and other materials to its franchisees. All individual franchisees operate independently and are owned independently."

[45] It highlights clause 20(6) of the franchise agreement between it and the Numbered Company which states:

> "The parties hereby acknowledge and agree that each is an independent contractor, that no party shall be considered to be the agent, representative, master or servant of any other party for any purpose whatsoever, and that not {sic} party has any authority to enter into any contract, assume any obligations or to give any warranties or representations on behalf of any other party."

[46] ***Ismail v. Treats Inc.***, 2004 NSSC 16, involved a franchise agreement with a similar exclusionary clause. Similar to the case at hand, the main franchisor / licensor, Treats, had contracted with another company to operate and, as regional franchisor, sell franchises within a specified territory. However, Treats was found liable for the representations of that company and the individual who was its owner/operator.

[47] Paragraphs 93 to 98 of the decision in ***Treats*** discuss the factors which led it to find the franchisor liable despite the exclusionary clause. They include the following:

1. The plaintiffs had no knowledge of the exclusionary clause. They had not been provided a copy of the Regional Franchise Agreement, despite becoming owners of a local franchise.

2. The defendant, by words or conduct, represented or allowed to be represented that the third party was its agent, and the plaintiff dealt with the third party on the faith of that representation.

3. The third party was the defendant's exclusive representative in the area.

4. The third party was authorized to use the defendant's system, trademarks and other materials.

5. The defendant's relationship with the third party was based on a shared revenue stream.

6. The defendant periodically audited the third party's performance.

7. The information and documentation, including the business card, provided by the third party to the plaintiffs contained the defendant's logo.

8. The plaintiffs were unaware of the relationship between the defendant and the third party.

9. The defendant benefited from the arrangement between it and the third party.

10. Public policy demands that a defendant be responsible for acts done apparently in its name.

[48] The Court, at paragraph 93, emphasized that reliance on agency was more important than the fact of agency itself; and, at paragraph 96, noted that where such reliance exists, agency cannot be denied even if the third party was not in fact an agent of the defendant.

[49] In the case at hand, the Defendant and the Plaintiffs provided evidence of points which they see as relevant to the determination of whether a relationship of agency or apparent authority resulting in agency by estoppel existed. That evidence, which was, unless otherwise indicated, undisputed, includes the following:

1. The Defendant is a franchisor company which licenses its tradename and trademarks to companies wishing to provide restoration services, and markets those restoration services.

2. The Defendant is not directly involved in the franchised operations. It "focuses on business development for the 'SystemCare' trademark in general, performs quality control, supplies equipment to its franchisees, as well as other materials such as uniforms, stationery, etc."

3. The franchisees operate independently of the Defendant; but, the Defendant exercises control over them "through the development of operational standards". Clause 10 of the Franchise Agreement states, among other things: "The Franchisee acknowledges that, in order to maintain uniformity and quality consistency, it is necessary for the Franchisor to exercise a degree of control over the operation of each and every SystemCare Franchisee."

4. The Numbered Company was required to follow the Defendant's system and meet its "uniform standards of quality and quantity". Pursuant to Clause 10, the Defendant could change its system and the Numbered Company would have to promptly implement such change.

In addition, pursuant to Clause 12, the Numbered Company had no discretion to deviate from the Defendant's operating manual.

5. The Defendant was paid an initial franchise fee, as well as a royalty of 7% of the Numbered Company's gross sales. In that way, it benefitted from the work in question performed for the Plaintiffs.

6. The Numbered Company was the franchisee with exclusive right to operate in the area from Saulnierville to Granville Ferry, Nova Scotia, which encompasses Digby. It operated as "SystemCare Digby".

7. Mr. Hubley was the general manager of SystemCare Digby. He had no shares in the Numbered Company. All of Mr. Kaehler's dealings were with Mr. Hubley.

8. The Numbered Company was owned by Bernard Dunlap, who was the President, Director, and Recognized Agent of the Defendant and the Numbered Company. Mr. Dunlap owned the Numbered Company along with one other individual. He was 50% shareholder of both companies.

9. Mr. Dunlap signed the Franchise Agreement as guarantor for both the Defendant and the Numbered Company.

10. Mr. Dunlap signed the affidavit verifying the claim of lien against the property of the Plaintiffs upon which the work in question was performed. That claim is described as being that of the Numbered Company, "otherwise known as SystemCare". He confirmed that any lawsuit commenced by the Numbered Company would require his authorization.

11. Mr. Dunlap did not have any "day-to-day involvement in the operation" of the Numbered Company. Mr. Hubley was responsible for that and reported to the other individual shareholder.

12. The franchise agreement between the Defendant and the Numbered Company contains the exclusionary clause reproduced above.

13. The Defendant purchased some specific assets for use by the Numbered Company under the franchise agreement. Otherwise, the Numbered Company owned all of the assets at the "SystemCare Digby" location.

14. The Numbered Company: maintained its own finances; purchased its own insurance policies; and, operated bank accounts separate from the defendant.

15. Mr. Dunlap gave evidence that the numbered company's clients made cheques payable to "SystemCare Digby". The Plaintiffs did not provide general evidence to the contrary. However, the initial restoration work on the Plaintiffs' property was done at the request of their insurer, Wawanesa. Mr. Kaehler understood that work to have been completed by the Defendant, SystemCare. The cheques written to pay for that work were made out to three parties: the Plaintiffs, SystemCare (ie. not Systemcare Digby) and the Bank of Nova Scotia. The Numbered Company was not indicated on those cheques. Therefore, there is some level of dispute in relation to who cheques were generally made to. It is a factor to be considered. However, it is unlikely to be so significant as to alter the result following a trial. Nevertheless, Mr. Kaehler said, based on who that particular cheque was made out to, that he was not aware the insurer had hired SystemCare Digby (ie. as a separate entity).

16. Written estimates provided by Mr. Hubley had, at the top of the printed pages "SystemCare – Digby".

17. Mr. Hubley held himself out to the Plaintiff, Mr. Kaehler, to be a representative of the Defendant. Mr. Kaehler believed him and assumed that he was.

18. Mr. Hubley never informed Mr. Kaehler that he was associated with the Numbered Company.

19. Mr. Hubley did not mention that SystemCare had different offices throughout Nova Scotia. Mr. Kaehler did not give any thought to whether SystemCare had any office other than in Digby.

20. During his initial meeting with Mr. Kaehler, Mr. Hubley wore a shirt with the SystemCare logo.

21. The labourers who performed the work as well as the on-site supervisor wore attire with the SystemCare logo.

22. The trucks used displayed the name “SystemCare” and bore the SystemCare logo.

23. When Mr. Kaehler visited Mr. Hubley’s office in Digby, in July 2006, the sign on the front door read “SystemCare” and bore the SystemCare Logo.

24. The plaintiffs were pleased with the restoration work performed at the request of their insurer. They needed additional work done. They obtained an estimate for that additional work prepared by Mr. Hubley. It bears the same "System Care – Digby" heading on the printed pages. It was lower than another estimate they obtained; and, they had become familiar with SystemCare as a result of the initial work, giving them a level of comfort. Also, Mr. Hubley presented himself as a master carpenter and highlighted that he did work with SystemCare in Annapolis Royal where the customer was extremely satisfied. Those are the reasons that they agreed to the performance of the additional work.

25. Had Mr. Kaehler known they were contracting with the Numbered Company he would "have thought twice about" the decision. He only knew Mr. Hubley worked for SystemCare. When dealing with Mr. Hubley he thought Mr. Hubley was representing SystemCare.

26. Mr. Kaehler stated: "At no point did I enter into a separate agreement with Mr. Hubley or the Numbered Company." He said he had no idea there was a numbered company, and what he referred to as a "parent

company", until he was served with the lien claim. He was not aware of the Franchise Agreement.

27. He had not heard about SystemCare before the fire at his property. He said he only found out about SystemCare when a claim was made.

28. All invoices Mr. Kaehler received carried the name "Systemcare" and bore the SystemCare Logo. Like the estimates, the top of each printed page, with the exception of the first page, stated "SystemCare – Digby".

29. The Plaintiffs also provided evidence of the wrongs and damages suffered. However, whether there is evidence of those is not contested in this summary judgment motion.

[50] This evidence that I have listed includes evidence of numerous factors which formed grounds to find the franchisor in ***Treats*** liable.

[51] In ***Treats***, the plaintiff was a local franchisee who dealt with the third party company, as regional franchisor, to obtain the franchise. Arguably, that could be seen as strengthening the connection between the actions of the third party and the business of the defendant who was main franchisor / licensor. However, in that case, the name of the independent contractor company was on the franchise

agreement that the plaintiffs signed. That, arguably, was clear notice to the plaintiffs that they were not dealing with the main Treats company. In addition, the parties in that case were parties to a commercial contract. The plaintiffs had received advice from an accountant, but let themselves be convinced by the regional franchisor not to consult a lawyer. In a commercial contract, there is more of an onus on the parties to make any necessary inquiries. Despite that, Treats Inc. was still found liable.

[52] There would appear to be even more reason in the case at hand to find liability because the Plaintiffs are merely ordinary individuals who were hiring SystemCare services without any knowledge they were dealing with anyone other than the main company.

[53] In the case at hand, there is evidence of connections between the actions of the Numbered Company and the business of the Defendant franchisor, that are similar to those in ***Treats***.

[54] For instance, there is evidence that the Defendant: provided the Numbered Company with exclusive authorization to sell SystemCare services in the territory; received fees and royalties on gross sales; exercised some control over the Numbered Company's operations to ensure it complied with SystemCare standards; and, marketed the SystemCare name. More likely than not, that

marketing would seek to highlight the positive aspects associated with that name and encourage potential customers to hire SystemCare franchisees. That can more effectively be done if the potential customer is made to perceive they are receiving services from SystemCare.

[55] Also, in the case at hand, as was the case in ***Treats***, all the Plaintiffs' dealings were with a representative of the local company.

[56] A portion of the Defendant's website is attached as Exhibit 1 to the affidavit of Bernard Dunlap. Mr. Dunlap testified it was possible that the website content was different in 2006, when the events upon which the within action is based occurred. However, according to the current evidence of the website content, it does nothing to alert customers to completely independent operation by the franchisees. It makes reference to the location of its head office in Dartmouth. It lists "Our Locations" one of which is Digby. It states:

> "SystemCare Cleaning & Restoration is a Nova Scotia grown Cleaning and Restoration company that has been franchising since 1991.
>
> SystemCare Cleaning & Restoration services include: remediation of damages from water, fire, smoke, wind, and mould. SystemCare provides contents cleaning, carpet and upholstery cleaning, duct cleaning, and all carpentry and painting services.
>
> Solid partnerships depend on communications and a base of goodwill. SystemCare Cleaning & Restoration places great emphasis in ongoing support to our franchisees. We offer training manuals, courses, videos, safety policies, group buying power, business development, Head Office support on large jobs, group advertising, and promotional support.

> A franchise should provide the franchisee with five key elements: a successful track record, a strong brand, operational support, training programs and last but not least, risk avoidance.
>
> Being a member of the IICRC (Institute of Cleaning & Restoration) SystemCare has the most up-to-date equipment and techniques to handle any challenge that might confront us. We portray a professional image to our customers, from our vehicles and equipment, to our uniformed employees. SystemCare services all of Nova Scotia and regions of New Brunswick with its 10 Restoration franchises."

[57] Those portions of the website could easily be interpreted by a trier of fact as constituting an implied representation that the Defendant is closely connected with and heavily involved in the operations of its franchisees.

[58] Although there is no evidence that the Plaintiffs visited the website before entering into the agreement for the services in question, it is available to anyone in the general public. Many members of the public considering hiring SystemCare services, more likely than not, would consult the website. They would then deal with a local representative, in a local franchise office. As such it is a representation to the general public who would be likely to do business with Mr. Hubley, or others in the position he was in at the material time. Although the website refers to franchisees, it does not specify that they are independent and cannot contract on behalf of SystemCare. The reference to "our locations" suggests otherwise. The content as a whole suggests significant involvement with, and control of, the franchises.

[59] Similar to the situation in ***Treats***, in the case at hand, there is also evidence that: the Plaintiffs had no knowledge of the exclusion clause; the Numbered Company was authorized and required to use the Defendant's systems, trademarks, logo and other materials; the Numbered Company was effectively the Defendant's representative in the Digby area; and, the Defendant's name and logo were pervasively displayed. They were on: the clothing worn by Mr. Hubley and the personnel who worked on the site; Mr. Hubley's business card; the trucks used; the estimates and invoices submitted; and, the door of the office used by Mr. Hubley.

[60] Another franchise case with which it is useful to compare the case at hand is ***Beuker v. H&R Block Canada Inc.***, 2000 SKQB 584. Mr. Beuker had his income tax returns prepared by an employee of the local H&R Block office, which was a franchise independently owned by an individual. That employee was negligent in the preparation of the tax returns.

[61] At paragraph 91, the court stated:

> "H&R Block Canada Inc. took the position that their involvement in this matter was only as a supplier of training materials and standard forms and provider of advertising and promotional material. The Melfort office was not a company run office but an independently owned franchise."

[62] H&R Block Canada Inc. also raised, in defence, the clause in the Satellite Franchise Agreement between them and the Melfort franchisee that they were not to be construed as agents of each other and could not bind or obligate each other.

[63] The plaintiff was not privy to that agreement and would not have been aware of the agreement that the person who prepared his tax returns was not an agent of H&R Block Canada Inc.

[64] The Court held H&R Block Canada Inc. liable. Its reasons included the following articulated at paragraphs 82 and 104:

> "The corporation's actions - it's advertising, it's documents, it's presentation to the public - would lead any reasonable person in the plaintiff's position to believe that the people operating the Melfort office were acting as agents of H&R Block Canada Inc.
>
> ….
>
> H&R Block Canada Inc. set up its franchises as 'H&R Block'. The natural assumption would therefore be that clients would be dealing with an agent of the parent company, H&R Block Canada Inc. nothing was done to disabuse them of this assumption."

[65] The circumstances of the case at hand are very similar. Though the Plaintiffs in the case at hand did not know of the specific identity of the Defendant, like Mr. Beuker, they knew, or assumed, there was a main or parent company and did not realize that it was separate from that operating the local SystemCare office.

[66] Therefore, the findings of representation and reliance in ***Beuker v. H&R Block Canada Inc.*** support the reasonableness of an inference of representation and reliance in the case at hand.

[67] These points demonstrate how there are reasonable inferences that may be drawn from the Plaintiffs not knowing the specific identity of the Defendant, nor the franchise arrangement with the Numbered Company, other than the inferences suggested by the Defendant. The evidence as a whole leaves open reasonable inferences, that: the Defendant's conduct, in the manner it controlled the franchises and promoted the SystemCare name and services, represented, or allowed Mr. Hubley to represent, that he had authority to act on the Defendant's behalf; and, the representation was relied on as a representation made specifically to the Plaintiffs and the general public.

[68] Though it was not raised, there is a potential argument that the Defendant's conduct, as described in the evidence, would not be found to be a sufficiently "clear and unequivocal" representation. In response, for the purposes of this motion, I note that the representation by conduct is very similar to that in ***Treats*** and ***Beuker***, where, at least impliedly, it was found to be sufficiently clear and unequivocal.

[69] No issue was raised in relation to whether there was evidence of the detriment element of agency by estoppel. However, the Plaintiffs did provide clear evidence that they only agreed to engaging the services in question because they had become familiar with the SystemCare reputation and level of service when the fire restoration work organized by their insurer was conducted, and would have thought twice about doing so if they had known they were dealing with a separate numbered company. In addition, their claim shows their dissatisfaction with the services rendered and Mr. Hubley's conduct. Consequently, there is evidence of detriment.

[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.

[71] There is some evidence of, or relating to, other factors that would militate in favour of a conclusion that the facts are insufficient to establish liability based on agency or agency related principles. However, it is for the trial judge to assess the effect of that evidence.

Conclusion on Genuine Issue

[72] Based on the points I have highlighted, I conclude that a trial is required to determine which of the competing inferences to draw.

[73] Ultimately, it is up to the trier of fact to determine: what weight to attach to the individual pieces of evidence; and, what factors and inferences they support.

[74] It is not for the judge on the summary judgement motion to weigh the evidence and the weight to be given to evidence is itself, a question of fact: ***Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.***, 2017 NSCA 61, at paras 24 to 31.

Conclusion on First Question

[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.

[76] As a result, the matter is not one which may appropriately be dealt with by summary judgment, and it is unnecessary to consider the second or subsequent questions.

CONCLUSION

[77] For these reasons, I dismiss the Defendant's summary judgment motion.

[78] Having done so, pursuant to Rule 13.08, I must schedule a hearing to consider whether the action should be converted to an application and, if not, what directions should be given to govern the conduct of the action.

[79] I ask counsel for both parties to contact my Judicial Assistant, Josée Doucette, as soon as practicable, to advise her of their availability for such a hearing, so that we can schedule it.

COSTS

[80] If the parties are unable to agree on costs, I ask that briefs be filed on the issue within 45 days of the receipt of this decision

ORDER

[81] I ask counsel for the Plaintiffs to prepare the order dismissing this summary judgment motion.

Muise, J.