SUPREME COURT OF NOVA SCOTIA
Citation: *Spidell v LaHave Equipment Ltd.,* 2014 NSSC 255

Date: 20140708
Docket: Bwt. 193703
Registry: Bridgewater

Between:

Laurie W. Spidell

Plaintiff

and

LaHave Equipment Limited, Case Credit Limited and Case Canada Limited

Defendants

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	in Bridgewater, Nova Scotia
Final Written Submissions:	January 28, 2014.
Written Decision:	July 8, 2014
Counsel:	G. F. Philip Romney, for the Plaintiff Colin D. Piercey and Christopher W. Madill, for the Defendants

By the Court:

[1] LaHave Equipment Limited was a dealer for Case Canada Limited. In 1997 Laurie W. Spidell approached LaHave Equipment to discuss the acquisition of a harvester for use in his forestry business. Mr. Spidell purchased a Case model 9030 B excavator with a Keto harvesting head. The purchase was financed by Case Credit Limited. Mr. Spidell states Robert Winters, an employee of LaHave Equipment, represented to him prior to his purchase of the equipment, the machine could cut an average of four cords per hour and could cut up to eight cords per hour. Mr. Spidell also states he was advised by George Kent, the chairman of LaHave Equipment, "They all kick out seven cord per hour," referring to the capacity of the equipment. Mr. Spidell confirmed all representation about the Case excavator he purchased came from either Mr. Winters or Mr. Kent. Mr. Spidell believed LaHave Equipment was a representative or agent or dealer for Case Canada. Mr. Spidell entered into a Purchase Order and Conditional Sale Contract with LaHave Equipment dated November 10, 1997. On December 24, 1997 Mr. Spidell entered into a Finance Lease Agreement with LaHave Equipment. Both documents were assigned to Case Credit Limited. Mr. Spidell did not make the required payments to Case Credit and the equipment was repossessed.

[2] Mr. Spidell sued LaHave Equipment claiming damages for alleged misrepresentations. LaHave Equipment defended the action. Subsequently LaHave Equipment made an Assignment in Bankruptcy. On December 19, 2002 Mr. Spidell amended his Statement of Claim adding Case Credit Limited and Case Canada Limited as defendants claiming LaHave Equipment was an agent for Case Canada Limited and Case Credit Limited. The defendants Case Credit Limited and Case Canada Limited move for an order for Summary Judgment.

[3] At the hearing of the Summary Judgment motion Mr. Spidell agreed that paragraph 13(b) of the Amended Statement of Claim should be struck and the claim against Case Credit Limited should be dismissed. Therefore, only the motion for Summary Judgment by Case Canada Limited is left to be determined.

[4] The defendant Case Canada submits Robert Winters' evidence of the alleged discussions between Keto and Case Canada regarding the use of a Keto

harvesting head on a Case Canada excavator is inadmissible as it is hearsay. The evidence to which Case Canada objects is the following:

Page 28 lines 13 to 17:

A. We had to get Case approval to put any extra item on their machine. So what we had to do first, when we first decided to take on the Keto head, was prove to Case that the Keto head and the Case matched together, and that the extra guarding package we put on the machine wouldn't defray from the machine doing a job as either/or a harvester or an excavator.

. . .

Page 30 line 13 to Page 31 line 18:

Q. Okay. So, when you first, for example, used a Keto 150 head, did you go to Case and say, look, we're going to put these two together?

A. No, Keto did.

Q. Keto did?

A. Mm hmm.

Q. Keto went to Case?

A. Keto went to Case and said we'd like to use our head on your machine.

Q. Yeah.

A. Between then, Case and Keto would get together. George White was the Keto rep. And I know he was there many times with Case before they looked at one another and said it's a good match and we can do it.

Q. O.K. And how would they put them together?

A. We actually put them together ourselves. I mean, how were they put together on the machine or...?

Q. Well, okay. Before you sold a combination..

A. The head comes in, in a box.

Q. Yeah.

A. We install it.

Q. Okay. Before you sold the first one, ...

A. Mm hmm.

Q. ...as I understand it, someone went to Case and say, look, we want to put a Keto 150 head on this Case excavator.

A. We, we went to Case and then Case went to Keto and Keto and Case worked it out to make sure that the hydraulic flow and that the head could be handled by the machine we were matching it up to.

. . .

Page 40 lines 2 to 14:

A. Case, Case would put the warranty through their system, and that's why we had to have them approve the head. Once the work was done, before it went to the woods, the Keto rep and our, our mechanic, whoever it might have been, would go over the machine, take all the flow ratings, get them off to Case to make sure they approved those, before it would even go in the woods.

Q. Okay. Did you...did LaHave obtain something from Case in writing to state that the combination of the Case excavator and the Keto head was approved by them and it didn't affect the warranty?

A. Could have. It would have gone through the service end of it.

Q. To your knowledge, you don't know anything?

A. No, I...

Q. Okay.

A. No, I didn't get involved in that end of it.

[5] Mr. Winters testified at the hearing of the Summary Judgment motion he was not part of the discussions between Keto and Case about which he testified at his discovery. He has no personal knowledge of the discussions. He was told of the discussions by George Kent.

[6] Only admissible evidence should be considered in a motion for Summary Judgment. (*Abbott and Haliburton Co. Ltd. v. White Burgess Langille Inman (c.o.b. WBL1 Chartered Accountants*) 2013 NSCA 66 at paragraph 159).

[7] *Civil Procedure Rule* 22.15(1) provides the rules of evidence apply to the hearing of a motion. Rule 22.15(2) provides hearsay not excepted from the rule of evidence excluding hearsay may be offered on certain motions. None of the motions set out in Rule 22.15(2) apply here.

[8] Is Mr. Winters' discovery evidence as it relates to discussions between Keto and Case admissible evidence?

[9] The analytical framework for hearsay was recently restated by Fish, J. in giving the majority judgment in *R. v. Baldree* 2013 SCC 35 where he stated at paragraph 34:

> "Beginning with *R. v. Khan*, [1990] 2 S.C.R. 531, the Court has moved away from a set of judicially created exceptions to the hearsay rule, and instead mandated a purposive approach, governed by a principled framework set out this way by McLachlin C.J. in *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358, at para. 15:
>
> (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
>
> (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
>
> (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire."*

[10] The evidence does not fall within the traditional exceptions to the hearsay rule. If it could be said to be an admission by LaHave Equipment it would not be admissible as an "admission" in a claim against Case Canada Limited. As stated in *Halsbury's Laws of Canada* - Evidence at HEV-86:

> "A party admission is admissible only against the party who made it and not against other parties, as the rationale for admission does not apply vis-à-vis other parties."

[11] Does the evidence meet the necessity and reliability indicia to be admissible?

[12] First, with regard to necessity. As George Kent is dead the necessity component in respect of hearsay evidence originating with Mr. Kent is established.

[13] In giving the Court's judgment in *R. v. Khelawon* 2006 SCC 57 Charron J. discussed the reliability element of the principled approach stating at paragraphs 61 to 63:

> 61 Since the central underlying concern is the inability to test hearsay evidence, it follows that under the principled approach the reliability requirement is aimed at identifying those cases where this difficulty is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule. As some courts and commentators have expressly noted, the reliability requirement is usually met in two different ways: see, for example, R. v. Wilcox (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; R. v. Czibulka (2004), 189 C.C.C. (3d) 199 (Ont. C.A.); D. M. Paciocco, "The Hearsay Exceptions: A Game of 'Rock, Paper, Scissors'", in Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence (2004), 17, at p. 29.
>
> 62 One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be

considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:

> There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. [s. 1420, p. 154]

63 Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested. Recall that the optimal way of testing evidence adopted by our adversarial system is to have the declarant state the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination. This preferred method is not just a vestige of past traditions. It remains a tried and true method, particularly when credibility issues must be resolved. It is one thing for a person to make a damaging statement about another in a context where it may not really matter. It is quite another for that person to repeat the statement in the course of formal proceedings where he or she must commit to its truth and accuracy, be observed and heard, and be called upon to explain or defend it. The latter situation, in addition to providing an accurate record of what was actually said by the witness, gives us a much higher degree of comfort in the statement's trustworthiness. However, in some cases it is not possible to put the evidence to the optimal test, but the circumstances are such that the trier of fact will nonetheless be able to sufficiently test its truth and accuracy. Again, common sense tells us that we should not lose the benefit of the evidence when there are adequate substitutes for testing the evidence.

[14] Mr. Spidell submits the evidence is reliable as Mr. Kent was chairman of LaHave Equipment and a dealer principal with Case Canada Limited.

[15] The information relayed to Mr. Winters by Mr. Kent involves information which was not within Mr. Kent's own direct knowledge as it dealt with communication between Keto and Case Canada to which Mr. Kent was not a party. This evidence raises double hearsay concerns - it is not only hearsay through Mr. Winters but also through Mr. Kent. The burden is on Mr. Spidell to establish the evidence of what certain representatives of Case Canada or Keto may have told Mr. Kent is necessary because it is otherwise unavailable. There is no

evidence before me to show the evidence is not available from other sources such as Keto or its representative George White.

[16] Mr. Spidell has failed to establish portions of the discovery evidence of Mr. Winters, to which Case Canada has objected, satisfies the reliability and necessity indicia to be admissible pursuant to the principled approach to admissibility of hearsay. The following evidence is not admissible.

Page 30 line 13 to Page 31 line 4:

Q. Okay. So, when you first, for example, used a Keto 150 head, did you go to Case and say, look, we're going to put these two together?

A. No, Keto did.

Q. Keto did?

A. Mm hmm.

Q. Keto went to Case?

A. Keto went to Case and said we'd like to use our head on your machine.

Q. Yeah.

A. Between then, Case and Keto would get together. George White was the Keto rep. And I know he was there many times with Case before they looked at one another and said it's a good match and we can do it.

Page 31 lines 14 to 18:

Q. ...as I understand it, someone went to Case and say, look, we want to put a Keto 150 head on this Case excavator.

A. We, we went to Case and then Case went to Keto and Keto and Case worked it out to make sure that the hydraulic flow and that the head could be handled by the machine we were matching it up to.

[17] *Civil Procedure Rule* 13.04 which deals with summary judgment on evidence provides:

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

[18] The test for Summary Judgment is well known. Recently, Saunders, J.A., in giving the Court's judgment in *Burton Canada Company v. Coady* 2013 NSCA 95 stated at paragraphs 27 and 28:

> [27] In **Guarantee** the Supreme Court enunciated the test for summary judgment. But because the Court's clear statement of the test is not always reiterated with precision, the Court's words bear repeating. The Court said:

> 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young,* [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc*. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra,* at para. 15).

[28] That statement was affirmed by the Supreme Court of Canada in **Canada (Attorney General) v. Lameman,** 2008 SCC 14 where the Court *per curiam* reiterated the test for summary judgment:

> [11] For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance* Co. (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: Guarantee Co. of North America, at para. 30.

[19] Case Canada must satisfy the court there is no genuine issue of material fact requiring a trial. The alleged representations were made by employees and officers of LaHave Equipment. Mr. Spidell claims against Case Canada on the basis LaHave Equipment was its agent. First, Case Canada must establish there is no genuine issue of material fact requiring trial with respect to Mr. Spidell's

allegation LaHave Equipment was an agent of Case Canada in connection with his purchase of the excavator with a Keto harvesting head.

[20] The claim against Case Canada is based on the premise LaHave Equipment, as an agent of Case Canada, made fraudulent and negligent misrepresentations to Mr. Spidell. Case Canada submits LaHave Equipment was not its agent and therefore there is no material fact requiring trial.

[21] In *Halsbury's Laws of Canada First Edition,* "Agency" paragraph HAY-2 the three essential ingredients of an agency relationship are:

> "1. The consent of both the principal and the agent.
>
> 2. Authority given to the agent by the principal, allowing the former to affect the latter's legal position.
>
> 3. The principal's control of the agent's actions."

And at Agency paragraph HAY -11 the manner in which an agency relationship may be created are set out:

> "1. the express or implied consent of principal and agent,
>
> 2. by implication of law from the conduct or situation of the parties or from the necessities of the case,
>
> 3. by subsequent ratification by the principal of the agent's act done on the principal's behalf, whether the person doing the act was an agent exceeding his authority or was a person having no authority to act for the principal at all,
>
> 4. by estoppel, or

5. by operation of the principles of law."

[22] The relationship between Case Canada and LaHave Equipment was governed by the Construction Equipment Sales & Service Agreement between J.I. Case Canada, the predecessor of Case Canada, and LaHave Equipment effective April 26, 1995 which provided in Articles 11 and 21:

> 11. COMPANY MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED (INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS), EXCEPT THOSE SET FORTH IN COMPANY'S CURRENT APPLICABLE PUBLISHED WARRANTY POLICIES AND PROCEDURES. Dealer agrees to deliver to purchasers at the time of retail sales the document containing the Case Express Limited Warranty to Retail Buyer prescribed by Company and in force at the time of such sales. Dealer is not authorized to assume for Company any additional obligations or liabilities in connection with the resale of Products covered by this Agreement, and Dealer agrees not to do so. Company and Dealer shall promptly fulfill their respective obligations with respect to any warranty claims.
>
> Company shall reimburse Dealer for all warranty service performed on Products in accordance with Company's warranty policies and Certified Service Program requirements in effect at the time warranty work is performed.
>
> 21 Dealer and the Company are independent businesses and neither has any fiduciary obligation to the other. Nothing in this Agreement shall be construed as constituting Dealer an employee, agent or legal representative of Company for any purpose whatever. Dealer has no right or authority to assume or create any obligation or responsibility, express or implied, on behalf of or in the name of Company, or to bind Company in any manner whatever, except to the extent provided for by this Agreement relating to warranties.

[23] The Agreement is clear - LaHave Equipment is not an agent of Case Canada. There is no evidence capable of establishing a contractual agency relationship between Case Canada and LaHave Equipment.

[24] There are other ways an agency relationship may be created. The basis for Mr. Spidell's claim against Case Canada is set out in his affidavit deposed to January 9, 2014 in paragraphs 15, 23 and 24 which provide:

> 15. That Robert Winters was the only person that I talked to in regards to the financing of the harvester and believe that he was a representative or agent of Case Credit Limited and was at least acting in some capacity on behalf of Case Canada Limited and Case Credit Limited.
>
> 23. That all representations made about the Case Harvester to me came from Robert Winters and George Kent from whom I believed that LaHave was a representative or agent or dealer for Case Canada and similarly for Case Credit in the financing of the sale of any Case equipment.
>
> 24. That Robert Winters advised me that he had been sent on courses for Case Equipment and won four (4) separate trips from Case Canada as a result of his sales performance.

And in Mr. Spidell's discovery evidence:

> A. Now, Mr. Winters is a, apparently he's an agent of Case, because he's the only finance man that I talked to. So what's his normal practice? He knows he has to come up with something like this before he can expect Case to finance it, don't he?
>
> . . .
>
> A. Who did I buy it from?
>
> Q. You, you bought it from LaHave.
>
> A. Right. But I thought I had a Case harvester. I thought they were a dealer for Case.

. . .

Q. Why, why would you think he's a Case man? On what basis do you say he's a case man.

A. Well he won a, he won a trip somewhere from Case.

Q. O.K. And when was that?

A. The same year he sold that machine to me.

Q. Alright. And other than that though, what, what would you base your understanding that he was a Case man on?

A. Well I just assumed he was because he done the paperwork.

Q. I see. Anything else?

A. Not as I recall.

Q. Did you understand him to be an employee of LaHave Equipment or...

A. Right.

Q. Yes? O.K. So you understood he was an employee of Case - LaHave Equipment...

A. Right.

Q. ...selling equipment...

A. Right.

Q. ...that included Case equipment?

A. Yeah.

Q. Right? O.K. You never understood him to be an employee of Case though?

A. No. More than, just thought he was, they must have been giving him something for filling them things out.

. . .

Q. Thank You. Did you ever speak to anybody at Case Credit or Case about the operation of the excavation and Keto head?

A. Not that I can remember.

Q. No. Your discussions about how this machine operated would have been exclusively with employees of LaHave, is that right?

A. Yeah.

. . .

Q. No? O.K. At any time you had discussions with the representatives of Case Credit, it would have been about the status of the account, not about how the machine is working or anything like that?

A. Right.

. . .

A. I know it wasn't used for harvesting.

Q. Right. And you knew that back in 1997 when you were, before you purchased it?

A. Right. But I didn't know they were going to do the stuff there in their shop. I thought that was all overseen by Case.

Q. I understand. So you, you had a discussion with somebody at the time about these modifications being made to the equipment, but you're saying your understanding was, is this would have been something done by the manufacturer as opposed to being done...

A. In my backyard.

Q. ...in the LaHave shop?

A. Yeah.

Q. I understand. 6(b) it says: (Referring to the Amended Statement of Claim.)

"That LaHave provided warranties of quality and fitness of the excavator and head to the plaintiff on behalf of itself and of agent Case Canada."

What does that refer to sir? (Pause) What warranties of quality and fitness did LaHave provide to you? Other than what you've already discussed, the representation by Mr. Winter that is could, machine could produce...

A. Nothing.

Q. ...four hours?

A. Nothing.

Q. Sorry, four cords per hour? Nothing.

A. Nothing.

Q. O.K. So this is in reference, the reference to warranties of quality and fitness is the representation by Mr. Winter as to how much this thing would produce?

A. Right.

[25] The conditions for an agency by ratification to be established were set out in *Halsbury's Laws of Canada, supra*, at Agency HAY-22 as follows:

> "**Three Conditions**. Actions by a principal after the agent has purported to act on the principal's behalf may amount to creation of agency by ratification. For this to occur, three conditions must be satisfied. First, the agent whose act is sought to be ratified must have purported to act for the principal; second, at the time the act was done the agent must have had a competent principal; and third, at the time of the ratification the principal must be legally capable of doing the act himself.

[26] Robert Winters did not purport to act as an agent for Case Canada stating in his affidavit deposed to December 11, 2013:

> 27. Other than being an employee of LaHave, a dealer of Case Canada equipment, I had no relationship whatsoever with Case Credit or Case Canada. All of my dealings with Mr. Spidell, as described in this Affidavit, were solely and exclusively in my capacity as a sales representative of LaHave. I never represented to Mr. Spidell that I was acting on behalf of Case Credit or Case Canada.

> 30. I have never held myself to any customers as having authority to speak for or on behalf of either Case Canada or Case Credit.
>
> 31. I have never represented myself as being authorized to act on behalf of Case Canada or Case Credit, whether to Mr. Spidell or anyone else.

[27] Mr. Spidell confirmed Mr. Winters never said he represented Case Canada.

[28] There is no evidence that Case Canada ever ratified any representations made by Robert Winters or LaHave Equipment.

[29] There is no evidence of agency by ratification.

[30] Agency by estoppel is described in *Halsbury's Laws of Canada, supra,* at Agency HAY-30 and HAY-32 as follows:

> 30. **Overview.** The essence of estoppel is that the person against whom it is asserted cannot be heard, because of that person's own acts, to deny that a certain thing is so, if the person asserting the estoppel has acted to his or her detriment by relying on the other's acts. Detriment is an essential ingredient. Agency may be created by estoppel, in which case an agent is said to have apparent or ostensible authority. An "apparent" or "ostensible" authority is established by a representation, made by the principal to such third party, intended to be and in fact acted on by the third party, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed on him by such contract. When acted upon by the third party by entering into a contract with the agent, the representation operates as an estoppel, preventing the principal from asserting that he or she is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract. The agent's authority is an authority that only "appears" to exist because the parties have behaved in a certain way. It does not exist in fact, but only as a matter of law, arising out of a factual position that is deemed to have conferred authority on the agent.

32. **Three forms of legal authority - actual, implied or apparent**. Three forms of legal authority will permit an agent's conduct to bind the principal: actual express authority, actual implied authority, and ostensible authority:

(1) "Actual authority" exists where the principal has made known to the agent that the agent may act on the principal's account and the agent has consented to so act. Actual authority may be created by express agreement or implied from the conduct of the parties or surrounding circumstances. It is a legal relationship established between principal and agent by a consensual agreement, expressed by words or writing, to which they alone are parties. The scope of such authority is ascertained by applying ordinary principles of construction and interpretation of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the third party with whom the agent deals is a stranger. The third party may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the "actual" authority, it creates contractual rights and liabilities between the principal and the contractor.

(2) Actual "implied authority" arises when the principal places another (the agent) in such a situation that, according to ordinary usage, that person would understand him or herself to have the principal's authority to act on the principal's behalf, or where the principal's words or conduct, coming to the knowledge of the agent, are such as to lead to the reasonable inference that the principal wishes or consents to the agent acting as so inferred. Where the principal's conduct leads to such an inference, the principal has effectively consented to the agent having authority to act as he or she did. Implied authority may exist where the course of dealing between the agent and principal shows that, with the knowledge and consent (express or implied) of the principal, the agent has been exercising the authority he or she assumed was granted. Both the existence and scope of implied authority are discoverable by reference to the conduct of the parties.

(3) In contrast, an "apparent" or "ostensible" authority is a legal relationship between the principal and the third party. It is created by an interpretation placed by the law on the relationship and dealings of the two parties as a consequence of a representation, made by the principal to the third party. Such representation must be intended to be and in fact acted on by that

> third party, to the effect that the agent has authority to enter on behalf of the principal into a contract of a kind that falls within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed by such contract. The agent is a stranger to this relationship. The agent need not be (although he or she generally is) aware of the existence of the representation. The representation, when acted on by the third party by entering into a contract with the agent operates as an estoppel, preventing the principal from asserting that he or she is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract."

[31] There is no evidence of any communication by Case Canada to Mr. Spidell concerning the alleged misrepresentation or LaHave Equipment's alleged agency relationship to Case Canada. There is no evidence of any words or conduct by Case Canada to support any allegation that an agency by estoppel relationship existed between LaHave Equipment and Case Canada.

[32] Agency by Operation of Law is described in *Halsbury's Laws of Canada, supra,* Agency HAY-34 as follows:

> **Agency by operation of law**. The foundation of agency lies in the express or implied assent of both the principal or agent to the existence of the relationship. There are exceptions to this principle, however, the foremost being "agency of necessity" which is an agency imposed on the parties by operation of law. This involves situations of emergency, without regard to any contract of agency that may exist between the parties, when a person honestly and in good faith for the purpose of protecting or preserving the interests, property or goods of another becomes compelled to act for such person in respect of that protection or preservation, but without authority to do so.

[33] Agency by Operation of Law does not apply in this proceeding.

[34] There is no evidence LaHave Equipment was an agent of Case Canada. Case Canada has established there is no genuine issue of material fact which would necessitate a trial. Therefore, Mr. Spidell must show on the undisputed facts his claim has a real chance of success.

[35] The basis upon which Mr. Spidell claims against Case Canada was set out above. There is nothing before the Court to show Mr. Spidell's claim against Case Canada has a real chance of success.

[36] The motion is allowed and Laurie Spidell's claim against Case Canada is dismissed.

[37] If the parties are unable to agree, I will hear them on the issue of costs.

Coughlan, J.