

# focus

on

## Insolvency Law

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The logo for Fraser Milner Casgrain LLP, consisting of the letters 'FMC' in white on a dark blue square background.

FRASER MILNER CASGRAIN LLP

### TRI-PARTITE SET-OFF THROUGH AGENCY?

The relationships in this case must be understood in order to understand the arguments put forward. The plaintiff, NRF, is a distributor of wood and other flooring products based in Maine. Starwood is a manufacturer of wood flooring based in Mississauga. Korca was a milling company that manufactured and sold wood products in Wisconsin.

NRF had a purchasing relationship with Korca, whereby NRF would order through Korca. The logs were turned into planks by Korca then sent to Starwood for finishing. The prefinished wood was then sold by Korca to NRF.

Korca had outstanding debts to Starwood. In August, 2007, a new arrangement was made where the wood was still ordered by NRF through Korca, however, NRF would send cheques to Starwood. Three purchase orders were issued from NRF to Korca outlining that NRF was to pay Starwood for this order, and corresponding invoices were issued by Starwood confirming the details of the order. NRF wired the money to Starwood. Five days later, Starwood advised NRF that it would not provide the wood and would be using the funds to set off the debts of Korca.

Starwood claimed that Korca was NRF's agent and because of the agency relationship, NRF was responsible for Korca's debts. The main question was whether Korca was acting as an agent for NRF, which would justify using the payment to set off the debts owed by Korca.

Both parties put forward evidence regarding the relationships between the parties. On a balance of probabilities, Belobaba J. found the following:

45 It is trite law that an agency relationship can be created where there is actual or apparent authority. Here there is no evidence of any manifestation of actual authority - that is, there is no evidence that NRF ever authorized Korca to act as NRF's agent in purchasing the pre-finished

hardwood from Starwood. Starwood has not produced any documentary evidence of such manifestation; nor has it provided affidavit evidence from Korca's principals that NRF ever expressed or conveyed such manifestation.

46 There is also no evidence of apparent authority. In order to establish apparent authority (sometimes referred to as ostensible authority) the law requires at a minimum, that an agent's representation of authority be based on some level of actual authority and that the affected third party relied on this representation to enter into the contract in question. Neither of these prerequisites is satisfied here.

47 Finally, even if Starwood sincerely believed (contrary to its own internal billing practices and its efforts to negotiate payment agreements directly with Korca) that an agency relationship existed between NRF and Korca, this belief would be irrelevant. As noted by the Alberta Court of Appeal in *Dioron v. Manufacturers Life Insurance Company* "a mere belief on the part of a third party that he or she is contracting with the principal, absent some representation to that effect, express or implied, cannot support a claim of ostensible authority so as to bind a principal."

48 In sum, the assertion by Starwood that one or both of the Korca principals told them that Korca was an agent for NRF, without more, raises no genuinely triable issue. The uncontradicted evidence of NRF and the way that Starwood itself viewed the parties is that Korca was a buyer of product from Starwood, a vendor of product to NRF and a company that remained independently responsible for the payment of its debts. Starwood's own billing and debt collection practices regarding Korca are totally in accord with this characterization. And, even if these documented realities could be trumped by Korca's principals saying otherwise, i.e. that Korca really was NRF's agent, these statements, standing alone, would not satisfy the prerequisites for actual or apparent authority.

## **Conclusion**

49 In the result, there is no basis for Starwood's agency claim or for its claim that it was entitled to apply the NRP monies to pay down Korca's indebtedness. Neither of these claims would have any chance of success. Nor are there any genuine issues for trial.

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