

CITATION: Firepower Debt GP Inc. v. TheRedPin, Inc. 2018 ONSC 7182
COURT FILE NO.: CV-18-599644CL
DATE: 20181130

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Firepower Debt GP Inc., as Agent, Applicant

AND:

TheRedPin, Inc. and TheRedPin.com Realty Inc., Respondents

BEFORE: Penny J.

COUNSEL: *Harry Fogul* for the Receiver, MNP Ltd.

Harvey Chaiton for Firepower Debt GP Inc.

A. Kauffman for Trilogy Growth Fund LP

J. Goldblatt and I. Graham for the Agents

J.S. Klein for Certain Underwriters at Lloyds

HEARD: October 22, 2018

ENDORSEMENT

Overview

[1] TheRedPin Inc. and TheRedPin.com Realty Inc. operated a technology assisted real estate brokerage that provided an online platform to consumers which included listings for new and pre-construction projects. These companies will be referred to as TRP and TRP Realty.

[2] In June 2018, MNP Ltd. was appointed Receiver of TRP and TRP Realty. In this motion, the Receiver seeks the advice and direction of the Court about whether certain third party commissions to be collected by the Receiver are held in trust for the benefit of TRP Realty's agents (the "Agents"), outside brokers and certain assignees and "cashback" buyers.

[3] The parties agree that commissions of approximately \$3.7 million are owing to the Agents. TRP and TRP Realty, however, are insolvent. TRP Realty is indebted to Firepower Debt GP Inc. and Trilogy Growth Fund LP in an amount exceeding \$6.4 million; this is a secured obligation. If the Agents' commissions are not subject to a trust, these funds will form part of the debtors' assets subject to Firepower and Trilogy's security, leaving the Agents with unsecured claims against TRP Realty's estate, *Ontario Ministry of Consumer and Commercial Relations v. Safeguard Real Estate Ltd.*, (1994) 114 D.L.R. (4th) 546 (Gen. Div.) [Commercial List], at paras. 13-14.

[4] The parties also agree that there is no statutory or regulatory requirement to hold the Agents' commissions in trust. The Real Estate Council of Ontario confirmed to the Receiver that all registrants are, however, required to maintain a group insurance program that includes commission protection coverage. Coverage against this type of loss is not dependent upon the existence of a commission trust account, although the insurer says that it encourages the use of commission trust accounts as a prudent claims management tool.

[5] The parties further agree there is no definitive document which unambiguously establishes a trust in favour of the Agents. Rather, the existence of a trust, the Agents submit, must be implied from surrounding circumstances, transaction documents and TRP Realty's conduct. The parties agree that the determination of whether there is a trust depends on the application of the "three certainties:" certain of subject matter, certainty of object and certainty of intention.

[6] Finally, the parties agree that, of the three certainties, it is the certainty of intention that is in issue in this case. In other words, the parties agree there is certainty of subject matter (the commissions themselves) and certainty of object (TRP Realty and the Agents). The parties disagree about whether TRP Realty intended to establish a trust over the commissions on behalf of the Agents.

[7] Thus, the issue for determination on this motion for directions is whether TRP Realty intended to establish a trust in favour of the Agents over commissions payable to TRP Realty from purchasers of condominiums, most of which are scheduled to close in the future over a period that will run from 2018 until 2023.

Background

[8] The *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30 Sch. C, establishes the rules which all real estate salespersons, brokers and brokerages must follow. The Real Estate Council of Ontario is the body responsible for the administration of *REBBA* and regulates the activity of trading real estate in Ontario. All brokerages, brokers and real estate salespersons must be registered and meet all the requirements for registration. In particular:

- (a) the brokerage is the entity authorized to trade in real estate, not the salesperson or the broker of record;
- (b) every brokerage must designate a broker as its broker of record to ensure that the brokerage complies with the *REBBA*; and
- (c) it is the brokers and salespersons who perform the listing and selling activities that generate the trades.

[9] TRP Realty's revenues are primarily derived from real estate commissions generated from the activities of its licensed salespersons, or "agents." As of the date of the Receiver's appointment, there were 63 active Agents and 43 former Agents who still had pending commissions owing. Because TRP Realty dealt heavily with the new and future condominium market, these pending commissions are in respect of real estate deals that are scheduled to close anywhere between 2018 and 2023.

[10] TRP Realty acted either for a buyer, in which case it was the co-operating brokerage, or for a seller, in which case it was the listing brokerage. Of the 730 pending transactions to be settled by the Receiver, only 28 trades relate to transactions where TRP Realty was the listing brokerage. In all the rest, it was a co-operating brokerage.

[11] Where TRP Realty is the listing brokerage, it received deposits from the buyers under the agreements of purchase and sale. These deposits were required by regulatory rules to be deposited into the brokerage's real estate trust account. This meant the commission on these sales were also paid into the trust account because, as a practical matter, the deposit was used to satisfy the seller's obligation to the brokers to pay the commission. For this reason, most of the commissions due from TRP Realty to third parties (co-operating brokers who were not TRP Realty Agents) were lodged in the real estate trust account. This is because TRP Realty only dealt with third party brokerages on the relatively small number of occasions when it was the listing (or selling) agent.

[12] Some of the documents used by TRP Realty were standard forms developed by the Ontario Real Estate Council. These were commonly used in connection with re-sales. However, in connection with pre-construction deals, the transaction documents were usually specific to the builder or particular project. For example, of the over \$6.6 million in pending commissions as of the date of the receivership, 21% or \$1.4 million, were for resales, whereas 79%, or about \$5.2 million, were future commissions owing to TRP Realty relating to pre-construction or new development transactions where the OREC forms were typically not used.

Certainty of Intention

Legal Framework

[13] A trust is a relationship which arises whenever a person (called the trustee) is compelled in equity to hold property for the benefit of some other person (called the beneficiary) in such a way that the real benefit of the property accrues not to the trustee but to the beneficiary.

[14] As noted above, a valid trust exists where there the three certainties are satisfied: certainty of intent, certainty of subject matter and certainty of object. The issue in this case is certainty of intent.

[15] Certainty of intent requires that it be clear that the donor or settlor intended to create a trust; i.e., that the settlor intended for the property in question to be held for the benefit of another. No formal document evidencing the creation of a trust is required. Nor is it necessary that the settlor use any specific language - even the use of the word "trust" is not necessarily dispositive one way or the other. The question is one of substance - did the settlor evidence an intention that the property be held by one person for another person's benefit? This intention may be express or implied and may be determined from words or acts.

[16] Where a trust is to be implied, however, effect must be given to inferences as to the intention of the parties which a reasonable person would draw from the words or conduct of the parties and not to any subjective or other intention which was not made manifest at the time. Certainty of intention cannot solely derive from a "moral obligation as to what is to be done with the property," *Bank of Nova Scotia v. Atcon Group Inc.* 2012 NBCA 57, at para. 18 and *Waters' Law of Trusts in Canada* (4th ed.) at para. 5.1.

The Bank Accounts

[17] TRP Realty maintained three bank accounts:

- (1) a real estate trust account which is where TRP Realty deposited buyer deposits, as required under s. 27(1) of *REBBA*;
- (2) a commission account which is where all commissions earned by TRP Realty on transactions were ultimately deposited and from which commissions belonging to TRP Realty and third parties such as cooperating brokers and the Agents were paid; and
- (3) an operating account into which TRP Realty transferred the commissions it earned on transactions from the commission account and from which it paid its operating expenses such as payroll and overhead.

[18] Neither the real estate trust account nor the commission account bore interest. Service fees for these accounts were always paid from TRP Realty's operating account.

[19] Prior to August 2014, the commission account was held at TD Bank. Statements from this account contained the reference "TRUST ACCT" on the mailing line of the statement.

[20] From March 2014 to March 2018, TRP Realty banked with Comerica Bank (through the facilities of the Royal Bank of Canada). Bank statements from Comerica stated "COMMISSION TRUST" on the mailing line. Similarly, cheques drawn on the commission account contained the notation "COMMISSION TRUST" on them. When TRP Realty paid commissions to Agents through electronic transfers, it did so through an account described as "RBC – Commission Trust." This notation on the account was changed by RBC in 2018 to read only "RBC – Commission."

[21] According to information obtained by the Receiver from the Royal Bank, TRP Realty's commission account was provided with a description, on opening, of "Realty Commission." Most likely, this nomenclature was requested by the client, TRP Realty, since the bank does not normally assign nomenclature of this kind to any account. In any event, from the bank's perspective, the account is a standard operating account, not a trust account. According to the Royal Bank, among other things a Trust "know your client" form and a Trust Agreement are typically required to open and operate a trust account. No such documents were provided to or held by the Royal Bank in relation to TRP Realty's commission account.

[22] The Agents rely on an affidavit filed by Tarik Gidamy, who is a founder of TRP Realty and served as its broker of record until May 2017. Mr. Gidamy has sworn that he set up the commission account on the basis that the commissions TRP Realty was obliged to pay out to others did not belong to TRP Realty and that TRP Realty could only use money that was to TRP Realty's credit in the commission account when transferring funds to its operating account. He claims that TRP Realty had no expectation that it could use funds in its commission account owing to others, such as Agents, in the ordinary course of its business.

The Transaction and Other Documents

[23] Each TRP salesperson (Agent) entered into an 11 page contract with TRP Realty under which the Agent agreed to provide real estate services to TRP Realty (the "Contract"). Each Agent specifically agreed that his or her relationship with the company is that of independent contractor. In this Contract, TRP Realty agreed to pay commission on all transactions executed through the company provided the company received a minimum of \$500 per executed transaction to cover administrative costs. The Agent agreed that the company will receive the greater of \$500 or the company portion of the listed commission split. The company agreed to issue commission cheques each Wednesday for transactions closed where final payment was received the previous week. Commissions for pre-construction transactions were to be paid in accordance with the builder's payment schedule. The Contract contained an entire agreement clause which, among other things, provided that the Contract superseded all prior agreements. There is no provision in the Contract that commissions are to be held in trust by TRP Realty for the benefit of the Agents, nor is there any language that could reasonably be construed as having this meaning or intent.

[24] The Agents point to a number of transaction documents which, they argue, show that the commission account was intended to be a trust account. First, when an agreement of purchase and sale had "gone firm," TRP Realty provided the Agent with a trade record sheet setting out information about the transaction and the specific commission split between TRP Realty and the TRP agent.

[25] The trade record sheet is a standard form document provided through a "back office" software provider called "brokerWolf." The trade record sheet is required by regulation to contain certain specified information. The particular form of trade record sheet provided by brokerWolf included the following language (which is not prescribed by regulation): "It is understood between all parties that this agreement shall constitute a commission trust agreement *as set out in the contract*" [emphasis added]. BrokerWolf confirmed to the Receiver that this wording is in one of the "default lines that are part of the original set up/install of brokerWolf."

[26] The Agents argue that "the contract" in this report means the Contract between the Agents and TRP Realty. As noted above, however, the Contract makes no mention of, and no provision for, holding Agents' commissions in trust, nor does it contain any language from which an intention or obligation to do so could reasonably be inferred.

[27] It is common ground that certain "cooperating" broker agreements expressly contemplate TRP Realty holding commissions for cooperating brokerages in trust. The Agents reason that, if TRP Realty's commission account contained cooperating broker commissions that were held in trust, then all commissions, including TRP Realty's and the Agents', must also be held in trust.

[28] There are two difficulties with this argument. First, the documents employed in the limited number of transactions involving cooperating brokers specifically contemplated that cooperating broker commissions will be held in trust pending payment out to the cooperating brokerage. There is no similar explicit language regarding the Agents. The second problem with this argument is that it is only when TRP Realty is the listing broker that there are any cooperating brokers. The buyer's deposit, which is intended to cover agents' commissions following the closing of the transaction, is, by statute, required to be held by the listing brokerage in trust. The circumstances

of a cooperating brokerage, therefore, are simply not relevant to the treatment of Agents' commissions where, in the cases in dispute in this proceeding, TRP Realty was not the listing brokerage and did not receive any deposit on the trade.

The Flow of Funds

[29] In the 3% of cases where TRP Realty was the listing broker acting for the seller, TRP Realty received a deposit which was placed in TRP Realty's real estate trust account. When the deal closed, if the amount of the deposit was less than all of the commissions due, the whole of the deposit was transferred from the real estate trust account into the commission account. The remaining payment for the balance of the commission due to the brokerage was also deposited to the commission account once received from the seller.

[30] If the amount of the deposit was more than all commissions due, the portion of the deposit associated with the total commissions was transferred from the real estate trust account into the commission account and a cheque for the portion representing the balance due to seller was dispersed to the seller within 10 days.

[31] In either case, within 10 days of closing, cheques or electronic transfers with respect to the parties' respective split of total commissions were dispersed to the outside brokerage, the TRP salespersons and TRP Realty in accordance with the agreed commission split. TRP Realty's portion of the commission was transferred from the commission account into TRP's operating account.

[32] Where TRP Realty was the cooperating brokerage and acted for the buyer (as it was in about 97% of cases), when the trade closed a cheque payable to TRP Realty was received from the listing broker or (in most cases) the builder and then deposited into the commission account. This represented the commissions due on the transaction to TRP Realty and the Agents.

[33] Within 10 days of closing, cheques or electronic transfers with respect to the parties' respective split of the cooperating brokerage commission were dispersed from the commission account to the Agent and to TRP Realty in accordance with the agreed commission split. As with the first scenario, TRP Realty's portion of the cooperating brokerage commission was transferred from the commission account and deposited into TRP Realty's operating account.

The Audited Financial Statements and Other Financial Presentations

[34] KPMG LLP audited TRP and TRP Realty's consolidated financial statements. The last audited financial statements are for the year ended December 31, 2016. KPMG's audit opinion was signed July 10, 2017 for that year and expresses the opinion that the consolidated financial statements present fairly, in all material respects, the consolidated financial position as at December 31, 2016.

[35] The notes to the financial statements provide the basis on which the consolidated financial statements were presented, including TRP Realty's revenue recognition policies and the basis on which it disclosed its cash and cash equivalents and restricted cash.

[36] Cash and cash equivalents are defined to include “cash on hand, demand deposits that can be withdrawn without penalty, and short-term highly liquid securities, such as debt securities with an initial maturity date of not more than three months from the date of acquisition that can be readily converted into known amounts of cash and are subject to an insignificant risk of change in value.” Balances on deposit in TRP Realty’s operating account and commission account are included as cash and cash equivalents in the audited financial statements.

[37] Excluded from cash and cash equivalents are “amounts held in trust as required by various purchase and sale agreements, which are separately disclosed as restricted cash.” This category was identified as comprising only TRP Realty’s real estate trust account.

[38] To similar effect, the consolidated statements of income and comprehensive income show “Revenue” amounts and “Cost of Revenue” amounts. Note 12 to the statements indicates that the “Revenue” amount reflects the “total commission revenue.” Note 4(c) to the statements provides that “Cost of Revenue” includes agents’ “salaries, bonuses and commissions.” Note 4(c) goes on to stipulate that “agent commissions are generally paid at the time of closing on resale units and at the time the Company receives the first instalment on new units.” It is clear from the amounts in issue that total commission income included in TRP Realty’s revenue includes the Agents’ commissions. This is distinguished from “Restricted Cash.” Note 4(d) states that excluded from cash “are amounts held in trust as required by various purchase and sale agreements, which are separately disclosed as restricted cash.” Again, it is clear from the amounts in issue that “restricted cash” includes only the amounts representing buyer deposits where TRP Realty is the listing brokerage.

[39] Firepower and Trilogy point out that Mr. Gidamy, as a member of the Board of TRP and TRP Realty, not only approved the financial statements but executed management’s letter to KPMG in October 2016. The management letter signed by Mr. Gidamy represented and confirmed that:

- (a) the debtors have satisfactory title to all assets indicated;
- (b) there are no liens or encumbrances on the debtor’s assets except those disclosed in notes to the financial statements;
- (c) there are no side agreements with any parties that have not been disclosed; and
- (d) management had no knowledge of any material unrecorded assets or liabilities or contingent assets or liabilities.

[40] The applicant’s loan documentation, signed by Mr. Gidamy on behalf of TRP and TRP Realty, contains similar representations and warranties.

[41] The evidence also contains a presentation made by Mr. Gidamy to the Board of Directors regarding the fourth-quarter performance of the 2016 year, which was also delivered to Firepower and Trilogy in February 2017. That presentation reflects “gross receivables” of \$11 million (that is, a figure which included all of the amount credited to the commission account, not just the TRP Realty portion) securing Comerica debt of \$1.5 million and the Firepower debt of \$3.5 million.

Agents' commissions are show as a "cost of sales," in other words, as an unsecured debt obligation of TRP Realty.

[42] Firepower and Trilogy thus argue that the audited financial statements, the information provided by management to KPMG as auditor, as well as the information provided to the Board of Directors and to the secured creditors when negotiating the terms of their loans, all confirm that gross commissions are assets of TRP Realty and that commissions owed to the Agents are simply an unsecured debt of TRP Realty. The audited financial statements recognize that purchaser deposits (where TRP Realty is the listing brokerage) are 'restricted cash' held in trust. Nothing in the presentation of TRP Realty's financial statements or other financial presentations reflects a similar designation for Agents' commissions.

[43] The Agents rely heavily on the decision of Mr. Justice Cameron in *Eu v. Rosedale Realty Corp. (Trustee of)* (1997), O.R. (3d) 666 (Gen. Div.) [Commercial List] and a decision from the B.C.S.C., *Midland Pacific Properties Corp. (Trustee of), Re*, (1999), 69 B.C.L.R. (3d) 187, which followed *Eu*.

[44] In *Eu*, the agents had an agreement with the predecessor brokerage, First District, which specified that monies received on account of commissions earned by a salesperson "shall be paid by the Broker in trust." There was an agreement requiring First District to hold all commissions it received in a "commission trust account" in which it would hold the commissions for various persons or entities, including the employed and independent salespersons "under trust arrangements" other than the statutory real estate trust account. When the First District business was transferred to a new brokerage, Rosedale, the agents carried on as they had before. It appeared that neither the sale of assets from First District to Rosedale nor the contractual relationship between Rosedale and its agents was formalized to any great extent. In these circumstances, Cameron J. found that it made no business sense to place commissions into the commission trust account if they were not intended to be held in trust. Cameron J., therefore, found as a fact that the agents' relationships with Rosedale were "essentially the same as they had been with" First District, i.e., the explicit agreement between First District and its agents continued when Rosedale became the brokerage such that Rosedale held all pending commissions in a commission trust account explicitly designated and used for the benefit of Rosedale's agents.

[45] There are, in my view, three critical elements which distinguish the case at bar from the circumstances before Cameron J. in *Eu*:

- (1) the absence of any obligation on TRP Realty under its Contract with the Agents to hold commissions beneficially for the agents. Here, the Contract is clear that the relevant split of commissions earned are *owing* to the Agents once the deal closes but is conspicuously silent on how those funds will be held by the brokerage before becoming due and payable;
- (2) the absence of evidence that the commission account at TD/Comerica/RBC was, in fact, a trust account. The evidence is that the word "trust" appeared in the address line of the bank statements for a period of time but the evidence from RBC is that, as a matter of substance, the commission account was not, in fact, a trust account; and

- (3) the audited financial statements and other financial presentations made to the Board of TRP Realty and to commercial third parties unambiguously classify the commissions owing to TRP Realty and the Agents as gross revenues of TRP Realty and the Agents' split of those commissions as a cost of sales, that is, an unsecured debt owed to the Agents. This is clearly distinguished in the audited financial statements and other presentations from the treatment of purchaser deposits which are categorized as "restricted cash" and subject to a trust in favour of third parties.

[46] The court must act on such a preponderance of evidence as to show whether the conclusion the Agents seek to establish is substantially the most probable of the possible views of the facts, *Clarke v. The King* (1921), 61 S.C.R. 608 at p. 616. The question of the intention of TRP Realty in this case is a question of fact to be determined on the basis of the objective evidence, not subjective intentions formulated with the benefit of hindsight now that an unforeseen problem has arisen.

[47] Supporting the Agents' argument that the commissions were held in trust is:

- (a) the commissions were placed in a separate account which earned no interest and in respect of which there were no bank charges or fees;
- (b) statements of this account sent to TRP Realty had the words "commission trust" in the address line for a period of time; and
- (c) some of the standard form transaction documents contained reference to commissions being in a trust as provided in the Agents' agreement (although the Contract does not provide for any trust).

[48] While there is arguably scope for some ambiguity around the standard form transaction documents and bank records used in the business, these are relatively weak indicators of an inference of TRP Realty's intention. The best evidence of TRP Realty's intention is to be found in the company's Contract with the Agents and in the company's audited financial statements.

[49] The Contract does not require TRP Realty to hold commissions in trust for the Agents.

[50] There is a gravity and a formality to the presentation of audited financial statements which transcends ambiguity or inference. TRP Realty's management (Mr. Gidamy) was required to represent and confirm to the auditors that the information provided was accurate and not misleading. The auditors performed a review of the books and records of TRP Realty and provided a professional opinion that the financial statements fairly represent the financial position of TRP Realty. These financial statements were approved by the TRP Realty Board of Directors.

[51] What could be a clearer statement of TRP Realty's intention than the representations to the world in its audited financial statements that all the pending commissions in respect of transaction in which TRP Realty was not the listing broker:

- (a) are not held in trust (in contrast to deposits where TRP Realty is the listing brokerage);

- (b) are included in TRP Realty's gross revenues; and
- (c) to the extent of the Agents' split of the commissions, represent an unsecured debt owing to the Agents (a cost of sales)?

When weighed against the ambiguous inferences sought to be drawn from standard form documents provided by someone else (broker Wolf, not TRP Realty), notations included on address lines in bank statements and Mr. Gidamy's after the fact characterization of the status of the commissions (a characterization totally at odds with the representations he made to the company's auditors, to the Board of Directors and to entities such as the applicant), I am unable to conclude that the requisite intention to hold the commissions in the commission account in trust has been established.

[52] Unlike the factual conclusion reached by Cameron J. in *Eu*, the operation of TRP Realty's commission account does not make "commercial sense" only if it is a trust account. Commissions are important – they are the lifeblood of the business of TRP Realty and its only source of revenue. Commissions are the basis for the Agents' remuneration for the services they perform for the business. There is no doubt that when deals closed, the commissions were "earned" and the relevant split of this money was owed by TRP Realty to the Agents. There were, therefore, in these circumstances ample commercial, accounting and cash tracking and management reasons to direct the commissions into a separate account, altogether apart from whether they were being held in trust.

[53] In all of the circumstances, based on the objective evidence, I am unable to agree with the Agents that the requirement for certainty of intention to create a trust has been established. I conclude that the commissions, while clearly a debt owing to the Agents, are not held in trust and are, therefore, not excluded from TRP Realty's available assets subject to the Applicants' security.

Costs

[54] The Agents submit that if they do not succeed on their motion, they will lose millions of dollars in commissions, commissions that they have clearly earned. Through no fault of their own, resulting only from TRP's insolvency, the amount of the purchase price allocated to commissions (both TRP Realty's commissions and the Agents' commissions) will accrue to the benefit of the secured creditors.

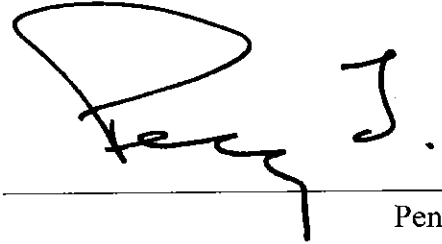
[55] The Agents further submit that they participated responsibly in advancing and pursuing their claims in a structured and orderly way. It was necessary, in any event, for this issue to be resolved for the benefit of all stakeholders, including affected persons not represented on this motion.

[56] As a result, the Agents ask that they be awarded their costs in any event.

[57] Neither the secured creditors nor the Receiver made any submissions on this point.

[58] I am in agreement with the Agents that an orderly, expeditious process for the resolution of this dispute was in the interests of all stakeholders. The Agents' participation has been responsible and of great assistance to the Court.

[59] In all of the circumstances, I find that costs shall be awarded to the Agents in the amount of \$45,000 to be paid out of the assets of TRP Realty. No costs are awarded against the Agents. The costs of the Receiver, and the allocation of the costs, shall be the subject of a subsequent application.

A handwritten signature in black ink, appearing to read "Penny J.", is written above a horizontal line. The signature is stylized with a large loop at the beginning and a vertical stroke at the end.

Penny J.

Date: November 30, 2018