

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

FIREPOWER DEBT GP INC., AS AGENT

Applicant (Respondent on Appeal)

- and -

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

**JOINT FACTUM OF THE APPLICANT (RESPONDENT ON APPEAL)
AND TRILOGY GROWTH FUND, L.P.**

CHAITONS LLP

5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton (LSO No. 21592F)

Tel: (416) 218-1129
Fax: (416) 218-1849
Email: harvey@chaitons.com

Sam Rappos (LSO No. 51399S)

Tel: (416) 218-1137
Fax: (416) 218-1837
Email: samr@chaitons.com

**Lawyers for the Applicant
(Respondent on Appeal)**

FASKEN MARTINEAU DuMOULIN LLP

333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6

Aubrey E. Kauffman (LSO No. 18829N)

Tel: (416) 868-3538
Fax: (416) 364-7813
Email: akauffman@fasken.com

**Lawyers for Trilogy Growth Fund LP, by
its general partner, Trilogy Growth Inc.**

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

FIREPOWER DEBT GP INC., AS AGENT

Applicant (Respondent on Appeal)

- and -

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

**JOINT FACTUM OF THE APPLICANT (RESPONDENT ON APPEAL)
AND TRILOGY GROWTH FUND, L.P.**

PART I - OVERVIEW

1. The issue to be determined on this appeal is whether the Motion Judge made palpable and overriding errors in reviewing the evidence and concluding, on a balance of probabilities, that TRP Realty did not intend to hold the Third-party Commissions in trust for the TRP Agents.¹
2. The Secured Lenders respectfully submit that it was open to the Motion Judge to reach such conclusion on the evidentiary record and he made no palpable and overriding errors in so doing. Accordingly, this appeal should be dismissed with costs.

¹ Capitalized terms used in Part I and not defined therein shall have the meanings ascribed to such terms in the remainder of this Factum.

PART II - FACTS

FACTS WITH WHICH THE SECURED LENDERS AGREE

3. FirePower Debt GP Inc. acting as agent for FirePower GAP Debt LP and FirePower GAP Debt II LP (collectively, “**FirePower**”), and Trilogy Growth Fund LP (together with FirePower, the “**Secured Lenders**”) agree with the facts contained in paragraphs 11, 12, 14, 15, 22-26, 33-36, and 39-43 of the factum of the TRP Agents.

FACTS WITH WHICH THE SECURED LENDERS DISAGREE

4. The Secured Lenders disagree with the facts contained in the remaining paragraphs of the factum of the TRP Agents.

ADDITIONAL FACTS RELIED UPON BY THE SECURED LENDERS

TRP Realty

5. TheRedPin.com Realty Inc. (“**TRP Realty**”) was a real estate brokerage operating in Ontario and regulated by the Real Estate Council of Ontario (“**RECO**”) pursuant to the Ontario *Real Estate and Business Brokers Act, 2002* (“**REBBA**”) and associated regulations.

Exhibit Book, Volume 1, Tab 1, Second Report of the Receiver dated September 20, 2018 (the “**Second Report**”), paras. 10, 14, 16 and 20.

6. TRP Realty’s revenues were primarily derived from real estate commissions generated from the closing of leasing, or purchase and sale transactions of real estate.

Second Report, para. 16; Exhibit Book, Volume 2, Tab 11, Affidavit of Jared Kalish sworn October 9, 2018 (“**Kalish Affidavit**”), para. 3.

7. TRP Realty generally acted either for a buyer, where it was the “co-operating brokerage”, or for a seller, where it was the “listing brokerage”. TRP Realty was the co-operating brokerage in over 96% of the approximately 730 pending transactions to be settled by the Receiver.

Second Report, para. 17.

8. Where TRP Realty acted as the listing brokerage, it was required, pursuant to the terms of the Agreement of Purchase and Sale and the Confirmation of Co-operation and Representation, to hold all monies it received in trust with respect to the commission payable to the co-operating brokerage.

Second Report, para. 23(e) and (f) and Appendices “G” and “H”.

9. Upon the closing of a transaction where it was a listing brokerage, TRP Realty would transfer the deposit to its Commission Account (as defined below) and pay the co-operating brokerage its share of the commission.

Second Report, para. 30.

TRP Realty Bank Accounts

10. As of June 14, 2018, TRP Realty maintained three (3) bank accounts:

- (a) a designated real estate trust account, as required to be maintained pursuant to section 27(1) of *REBBA* (the “**Real Estate Trust Account**”);
- (b) a bank account opened by TRP Realty in January 2018 with Royal Bank of Canada (“**RBC**”) (the “**Commissions Account**”); and

- (c) a general operating account, from which TRP Realty paid its operating expenses.

Second Report, paras. 1 and 27.

11. Keith McSpurren, the chief executive officer of TRP Realty from June 2017 to June 2018, advised the Receiver that the Commissions Account was not a trust account.

Second Report, para. 27(b).

12. RBC confirmed that the Commissions Account was a standard operating account and was not opened as a trust account, as an RBC trust account required specific documentation to be completed by the account holder. TRP Realty did not complete any such documentation.

Exhibit Book, Volume 1, Tab 4, Third Supplementary Report to the Second Report of the Receiver, dated October 19, 2018, Appendix “A”.

TRP Agents

13. Each TRP Realty salesperson or agent (collectively, “**TRP Agents**” and individually a “**TRP Agent**”) entered into an independent contract agreement with TRP Realty (the “**Contractor’s Agreement**”), pursuant to which the TRP Agent agreed to provide real estate services to TRP Realty.

Second Report, para. 25(c) and Appendix “N”.

14. The Contractor’s Agreement is a comprehensive 11-page agreement dealing with all aspects of the legal relationship between TRP Realty and a TRP Agent. The Contractor’s Agreement deals specifically with entitlement to commissions and the precise mechanics for the payment of commission. There is no provision in the Contractor’s Agreement which, expressly

or impliedly, provides that commissions are to be held in trust by TRP Realty for the benefit of TRP Agents.

Second Report, Appendix “N”.

15. Section 5 of the Contractor’s Agreement sets out the commission to be paid to TRP Agents upon completion of a sale or transaction milestone. Section 5 provides that:

“5. Commission

The Company will pay out the commissions listed in this section on all transactions executed through the Company provided the Company receive a minimum of \$500 per executed transaction to cover administration costs. The Contractor agrees that the Company will receive the greater of \$500 or the Company portion of the listed commission split, unless otherwise indicated in this section. The Company shall issue commission cheques each Wednesday for transactions closed where final payment was received the previous week. Commissions for pre-construction transactions will be paid in accordance with the builder’s payment schedule. Commissions payable in this section are net of rebate on all firm transactions. In the event of a non-successful or adjustment of transaction, commissions will be adjusted accordingly.”

16. Section 17 of the Contractor’s Agreement contained an entire agreement clause, which provides that:

“This Agreement including the attached Schedule “A” contains the entire agreement between the parties hereto with respect to matters herein **and supersedes and replaces all prior agreements and understandings, oral or written, between the Contractor and the Company relating to such matters...**” [**emphasis added**]

17. Tarik Gidamy (“**Tarik**”), a former officer and director of TRP Realty and TheRedPin, Inc. (collectively, the “**Debtors**”) and the broker of record of TRP Realty until May 2017, filed an affidavit in connection with the motion. Tarik is a creditor of TRP Realty for unpaid commissions.

Exhibit Book, Volume 1, Tab 5, Affidavit of Tarik Gidamy sworn September 19, 2018 (“**Gidamy Affidavit**”); Exhibit Book, Volume 1, Tab 6, Transcript of cross-examination of Tarik Gidamy, taken October 11, 2018 (“**Tarik Transcript**”), qq. 88-90.

18. Despite the fact that the central issue in this case is whether Third-party Commissions (as defined below) paid to TRP Realty were intended to be held in trust for TRP Agents - at no time does Tarik expressly state in his affidavit that TRP Realty intended to hold commissions in trust for the benefit of TRP Agents. Rather, his evidence was that the Contractor’s Agreement created a contractual obligation on TRP Realty to pay a TRP Agent a commission in connection with a completed sale transaction.

Gidamy Affidavit, paras 9-10; Tarik Transcript, qq. 128-130.

Commissions

19. There are commissions receivable due to TRP Realty totalling approximately \$6.5 million (the “**Commissions Receivables**”), of which approximately \$3.7 million relates to commissions owed by TRP Realty to third parties (the “**Third-party Commissions**”), including TRP Agents.

Second Report, paras. 32-33.

20. Certain TRP Agents sought advances on their commissions and entered into commission sale agreements with 1834176 Ontario Inc. o/a Agent’s Equity (“**Agent’s Equity**”). In the commission sale agreements, TRP Realty and the TRP Agent represented and warranted to Agent’s Equity that the TRP Agent’s portion of the commission on a sale transaction was “a valid receivable of the Broker [TRP Realty]”.

Second Report, paras. 35 and 46 and Appendix “U.

brokerWolf

21. A *REBBA* regulation requires brokerages to produce a trade record sheet for each transaction with prescribed information. TRP Realty used a real estate back office software called brokerWolf to generate trade record sheets. The standard form of trade record sheet used by TRP Realty stated that “it is understood between all parties that this agreement shall constitute a Commission Trust Agreement as set out in the contract.”

Second Report, para. 25 and Appendix “J”.

22. brokerWolf’s standard report it provides to brokerages has the “Commission Trust Agreement” language as its default pre-set option and was not inserted into the trade record sheet used by TRP Realty at its insistence or direction.

Second Report, para. 25; Exhibit Book, Volume 1, Tab 2, Supplementary Report to the Second Report of the Receiver dated September 28, 2018 (“**Supplementary Report**”), paras. 19-20.

23. Tarik confirmed that the reference to “Commission Trust Agreement” on the trade record sheet was to the agreement between TRP Realty and the other brokerage, and not to an agreement between TRP Realty and the TRP Agents.

Tarik Transcript, qq. 234-244.

24. The trade record sheet and electronic funds transfers used by TRP Realty and generated by brokerWolf contained references to “Rbc-Commision Trust Activity”. The developer of brokerWolf has confirmed that, when TRP Realty established a bank account to be used by brokerWolf, they were required to select from one of three available types of accounts – general, trust, or commission trust. They were pre-set in the program and could not be changed by TRP

Realty. TRP Realty was then required to create a “short name” associated with the chosen bank account.

Second Report, para. 25; Exhibit Book, Volume 1, Tab 3, Second Supplementary Report to the Second Report of the Receiver dated October 11, 2018, para. 11.

TRP Realty Financial Documentation and Audited Financial Statements

25. Prior to FirePower advancing credit to the Debtors pursuant to the Loan Agreement (as defined below), TRP Realty provided a number of financial documents to FirePower as part of its due diligence process, including the following:

- (a) a PowerPoint slide deck prepared by TRP Realty (the “**Slide Deck**”) showing the gross commission receivables of TRP Realty and identifying “sales commissions and bonuses” as a “Cost of Sales”;
- (b) a profit and loss summary tab prepared by TRP Realty (the “**P&L Summary**”), where the total gross commissions to be received was identified as consolidated income for the Debtors and amounts to be paid to TRP Agents and others was reflected as a cost of sales; and
- (c) an accounts receivable analysis, which (i) reflected the full gross commission amounts as accounts receivable of TRP Realty with no deduction for agent commissions, and (ii) referred to “restricted cash” as purchaser deposits received by TRP Realty, where it acted “as custodian until the property closes” and TRP Realty “[did] not have access to... at any time”. No similar distinction was made with respect to commissions payable to TRP Agents.

Kalish Affidavit, paras. 11-16 and Exhibits “B”, “C” and “D”.

26. The Slide Deck was used by Tarik in delivering a presentation to FirePower on February 10, 2017. The P&L Summary was prepared by the Debtors' Director of Finance.

Kalish Affidavit, para. 7.

27. The Debtors also provided their audited financial statements to FirePower during the due diligence process. KPMG LLP ("**KPMG**") audited the Debtors' consolidated statements of financial position as at December 31, 2015 and as at December 31, 2016, the consolidated statements of income and comprehensive income, changes in shareholder equity (deficiency) and statements of cash flows for the year then ended.

Supplementary Report, para. 15 and Appendix "A"; Kalish Affidavit, para. 8 and Exhibit "A".

28. The consolidated statements of income and comprehensive income show "Revenue" amounts and "Cost of Revenue" amounts. Note 12 to the statements indicate that the Revenue amount reflects the total commission revenue. Note 4(c) to the statements provides that:

Cost of revenue:

Cost of revenue consists of agent salaries, bonus, **commissions**, direct selling costs, direct advertising costs and referral fees. **Agent commissions are generally paid at a time of closing on resale units and at time the Company receives the first instalment on new units. [emphasis added]**

29. The consolidated statements of financial position and consolidated statements of cash flow each included amounts identified as "Restricted Cash". Note 4(d) of the statements provides that:

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. [emphasis added]**

30. Tarik, as a member of the board of the Debtors, approved the financial statements.

Tarik Transcript, qq. 215-216.

31. Tarik executed a letter to KPMG dated October 11, 2016 in connection with KPMG's audit of the financial statements for the year ended December 31, 2015. In the letter, Tarik, on behalf of the Debtors, represented and confirmed that:

“15) **[The Debtors have] satisfactory title to all assets...**

18) There are no liens or encumbrances on the [Debtors'] assets, except for those that are disclosed in Notes to financial statements.

19) We have no knowledge of any liens or encumbrances on assets and/or assets that have been pledged or assigned as security for liabilities, performance of contracts etc. not disclosed in the financial statements...

22) **We have no knowledge of side arrangements (contractual or otherwise) with any parties that have not been disclosed to you.**

23) We have no knowledge of material unrecorded assets or liabilities or contingent assets or liabilities...” **[emphasis added]**

Tarik Transcript, qq. 217-218 and Exhibit “3”.

32. The audited financial statements and the information provided to KPMG as auditor all confirm that gross commissions are assets of TRP Realty and that commissions owed to agents is a debt of TRP Realty. The audited financial statements recognize that purchaser deposits held by TRP Realty, as listing brokerage, in the Real Estate Trust Account are “restricted cash” held in trust. There is no such designation for agents' commissions.

FirePower Loan and Security Documents

33. In connection with the credit facilities provided to the Debtors, FirePower and the Debtors entered into a loan agreement dated as of February 15, 2017 (the “**Loan Agreement**”). As security

for the loan, TRP Realty executed a general security agreement dated February 15, 2017 (the “GSA”). Tarik signed the Loan Agreement and the GSA on behalf of the Debtors.

Tarik Transcript, qq. 163-164 and 195 and Exhibits “1” and “2”.

34. The Debtors were represented by legal counsel when they negotiated and entered into the Loan Agreement and GSA with FirePower.

Tarik Transcript, qq. 178-182.

35. Pursuant to section 29 of the Loan Agreement, Tarik, signing on behalf of the Debtors, represented and warranted as follows to FirePower:

“Each of the Obligor represents and warrants as follows to the Agent [FirePower Debt GP Inc.] and acknowledges and **confirms that the Agent and the Lenders are relying upon such representations and warranties in granting the Loan and making any Advances hereunder**...”

(g) Subject to the Permitted Encumbrances and the permitted Indebtedness referred to in Section 30(c) of this Agreement, each Obligor has, and when it executes and delivers the Security will have, **good and unencumbered title to the assets and property described therein and included in the Security, free and clear of all assignments, liens, charges and encumbrances whatsoever**...”

(j) ... Any and all representations and warranties made by the Obligor pursuant to any Credit Documents are true, accurate and correct in all material respects, and **any and all other applications, books, records, financial statements or other documents delivered to the Agent or any Lender by or on behalf of the Obligor prior to the date hereof, in connection with the Agent’s or any Lender’s due diligence review or otherwise do not contain any material misrepresentation as to the matters set out therein**.” [emphasis added]

Tarik Transcript, Exhibit “1”.

36. Pursuant to the GSA, TRP Realty granted security in favour of FirePower over all of its property and assets (defined thereunder as “Collateral”), including:

“Accounts – all present and future debts, demands and amounts due or accruing due to the Borrower whether or not earned by performance, including without limitation its book debts, accounts receivable, and claims under policies of insurance”.

Tarik Transcript, Exhibit “2”.

37. Pursuant to section 8(c) of the GSA, Tarik, signing on behalf of TRP Realty, represented and warranted as follows to FirePower:

“The Guarantor hereby represents and warrants as follows to [FirePower Debt GP Inc.] and acknowledges that to [FirePower Debt GP Inc.] and the Lender are relying thereon: ...

(c) **except for the Security Interest, the Comerica Security Interest, the Permitted Encumbrances, and other liens explicitly permitted pursuant to the terms of the Loan Agreement, the Collateral is owned by the Guarantor free from all mortgage, lien, charge, encumbrance, pledge, security interest or other claim whatsoever...** [emphasis added]

Tarik Transcript, Exhibit “2”

38. The term “Permitted Encumbrances” in the GSA and the Loan Agreement did not include any reference to an agent’s interest in commissions.

Tarik Transcript, qq. 200-205 and Exhibits “1” and “2”.

Comerica Borrowing Base Compliance Certificate

39. During the time FirePower was a lender to the Debtors, Comerica Bank had provided secured operating credit facilities to the Debtors, which was margined against accounts receivable.

The Debtors represented to Comerica Bank and FirePower that the gross receivables it was scheduled to receive was entirely their property and available to be margined.

Kalish Affidavit, para. 17.

40. In connection with the Comerica Bank credit facilities, the Debtors completed and delivered borrowing base compliance certificates. In a compliance certificate signed by Tarik for the period ending May 31, 2017, the accounts receivable listed on the certificate were the gross commissions to be received by the Debtors, and did not provide for any deduction for the agents' share of the commissions.

Tarik Transcript, qq. 219-227 and Exhibit "D".

No OREA, REBBA or RECO Document Provides that Agents' Commissions Held in Trust

41. There are a number of standard form documents that are utilized by real estate brokerages in connection with transactions related to the sale or lease of residential real estate. Such forms have been created by the Ontario Real Estate Association ("OREA") and/or RECO. *REBBA* places no statutory or other requirement on real estate brokerages to hold commission amounts in trust for agents.

42. Not one of the documents used by TRP Realty in connection with real estate transactions completed during the course of carrying on business provided that TRP Realty holds any portion of the commissions it earned in trust for its agents.

Receiver's Motion

43. MNP Ltd., in its capacity as Court-appointed receiver of all of the assets, undertakings and properties of the Debtors (the "**Receiver**"), brought a motion for advice and directions concerning

whether any or all of Third-party Commissions collected and to be collected by the Receiver are held and to be held in trust for the benefit of the TRP Agents. The Receiver's motion was necessary, as both the TRP Agents and the Secured Lenders had taken the position that they had priority over the other to the Third-party Commissions.

Second Report, paras. 35, 40-45 and 55-57.

44. The Receiver's motion was heard by The Honourable Mr. Justice Penny (the "**Motion Judge**"), who released his decision on November 30, 2018 (the "**Motion Judge's Decision**") declaring that none of the commissions receivable due to TRP Realty were held in trust for the benefit of the TRP Agents.

Appeal Book and Compendium, Tab 2, Order dated November 30, 2018, para. 1, and Tab 3, FirePower Debt GP Inc. v. TheRedPin, Inc. 2018 ONSC 7182 (the "**Motion Judge's Decision**").

45. The parties agreed, and the Motion Judge noted, that there was no definitive document which established an express trust in favour of the TRP Agents, and that the existence of a trust would have to be implied from surrounding circumstances, transaction documents and TRP Realty's conduct. The Motion Judge further noted that the Court must act on a:

"preponderance of evidence as to show whether the conclusion the Agents seek to establish is substantially the most probable of the possible view of the facts [citation omitted]. 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."

Motion Judge's Decision, paras. 5 and 46.

46. The Motion Judge completed a thorough review of the evidence before the Court, including information and documentation regarding TRP Realty's bank accounts, the Contractor's Agreement, the audited financial statements of the Debtors and other financial presentations, and representations made by TRP Realty to FirePower. The Motion Judge held that:

“[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 clear 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)?

[53] [i]n 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.”

Motion Judge's Decision, para. 53.

PART III - STATEMENT OF ISSUES, ARGUMENT, AND LAW

STANDARD OF REVIEW

47. As noted by the Supreme Court of Canada in *Housen v. Nikolaisen* ("**Housen**"), the standard of review for all factual conclusions made by a judge is "palpable and overriding error". Where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent such error. Questions of mixed fact and law, which involve the application of a legal standard to a set of facts, is also subject to a standard of palpable and overriding error. A palpable error is an error that is readily or plainly seen.

Housen v. Nikolaisen, 2002 SCC 33, paras. 5-6, 10 and 25-36.

48. Absent palpable and overriding error, an appellate court may not upset a fact-finder's findings of fact. It is not the role of an appellate court to second-guess the weight assigned to evidence. An appellate court errs if it interferes with a factual finding where its objection stems from a difference of opinion over the weight assigned to the evidence by the lower court.

Nelson (City) v. Mowatt, 2017 SCC 8, para. 38.

49. In *Re Sally Creek Environs Corp.*, this Court noted that the Supreme Court has made clear that the term palpable and overriding error "was not intended to displace the earlier formulations of 'unreasonableness', 'clearly wrong', or 'unsupported by the evidence'."

Re Sally Creek Environs Corp., 2010 ONCA 312, para. 69, citing *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 (S.C.C.), para. 56.

50. In the present case, the burden of proof establishing an intention to create a trust rests with the TRP Agents. The Motion Judge carefully reviewed and weighed the unique facts of this case and concluded that the burden of proof had not been satisfied by the TRP Agents. There is no palpable and overriding error – to the contrary, the determination is eminently reasonable.

ISSUES, ARGUMENT AND LAW

No Conflation of Indicia of Express Trust and Implied Trust

51. In reaching the conclusion that the Third-party Commissions were not intended to be held in trust for the TRP Agents, the Motion Judge noted that there was no provision in the Contractor's Agreement that commissions were to be held in trust by TRP Realty for the benefit of the TRP Agents, nor any language that could reasonably be construed as having this meaning or intent.

Motion Judge's Decision, paras. 23 and 49.

52. The TRP Agents argue that the Motion Judge erred in law in relying on the absence of language in the Contractor's Agreement in reaching his conclusion, since the fact that there was no contractual language was not relevant to the issue of the existence of an implied trust and was only relevant to the existence of an express trust. The parties had agreed that there was no express trust.

53. For a trust to come into existence, it must be established that the settlor intended to create a trust in favour of the beneficiary.

54. In *Waters' Law of Trusts in Canada, 4th ed.*, the learned authors note that express and implied trusts are of the same species and are only distinguished by the character of the evidence of the intention to establish a trust. An express trust exists where the settlor uses clear and specific

language that satisfies the three certainties. An implied trust exists where indirect and ambiguous language has to be construed in order for the intention to create a trust to be discovered.

Waters Law of Trusts in Canada, 4th ed.

55. Canadian courts have considered documentation entered into between the parties and the language used in such documentation when determining whether an implied trust exists.

56. In *Citizens Bank of Rhode Island v. Paramount Holdings Canada Company*, the issue before the Court was whether accounts receivable were property of the debtor in receivership or subject to an implied trust in favour of a third-party. As in this case, the parties agreed that there was no express trust. Justice Hoy (as she then was) noted that, in the absence of formal trust documentation, the Court must consider the circumstances and evidence as to what the parties intended, what was actually agreed to and how the parties conducted themselves to determine if the requisite clear intention to create a trust is present. The factors the Court would consider included “the content of any agreements between the parties”. Justice Hoy’s decision was affirmed by this Court on appeal.

Citizens Bank of Rhode Island v. Paramount Holdings Canada Company, 2008 CarswellOnt 1615 (S.C.J.), paras. 19-21; affirmed 2008 ONCA 891.

57. The Secured Lenders submit that the Motion Judge did not ground his decision solely upon the absence of trust language in the Contractor’s Agreement. It was merely one of the many factors he considered in determining there was no intention to create a trust.

Motion Judge Correctly Interpreted 2016 Audited Financial Statements

58. The TRP Agents argue that the Motion Judge made a palpable and overriding error in his review and assessment of the audited financial statements. The Motion Judge held that the

statements supported that there was no intention to hold the Third-party Commissions in trust for the TRP Agents, since they listed commissions as “cash and cash equivalents” and “gross revenue”, as opposed to “restricted cash”, which was defined to refer to amounts held in trust pursuant to purchase and sale agreements (i.e. purchaser deposits).

59. The TRP Agents’ allege that the audited financial statements make no specific reference to amounts that TRP Realty would have held in trust for a co-operating brokerage as part of “restricted cash”, and thus such amounts would have been included in “cash and cash equivalents” as opposed to “restricted cash”.

60. The audited financial statements make clear that “amounts held in trust as required by various purchase and sale agreements” is restricted cash. The agreements of purchase and sale require the listing broker to hold in trust all funds received by it for the benefit of the co-operating broker, to the extent of the commission payable to the co-operating broker. Accordingly, restricted cash includes purchaser deposits and funds held in trust for co-operating brokers.

The Motion Judge Correctly Distinguished *Eu* and *Midland*

61. The TRP Agents argue that the Motion Judge erred in distinguishing the case at bar from the decision in *Eu v. Rosedale Realty Corp.* (“**Eu**”) and that he should have applied *Eu* and the decision of the British Columbia Supreme Court in *Midland Pacific Properties Corp. (Trustee of), Re* (“**Midland**”). In both cases, the Court concluded that the commissions were held in trust by a brokerage in favour of certain agents. Both cases, of course, turn on their own peculiar facts.

62. The Motion Judge correctly distinguished *Eu* from the case at bar. In *Eu*, five agents originally worked as independent contractors with First District Realty Ltd. (“**FDR**”) (the “**FDR**”

Agents”) under terms of agreements which the Court held were clear that the agents’ share of commissions were held by FDR in trust for the FDR Agents’ benefit.

Eu v. Rosedale Realty Corp., 1997 CarswellOnt 2519 (S.C.J.) (“**Eu**”), paras. 2-3

63. FDR intended to sell its assets to Rosedale Realty Corporation (“**Rosedale**”), but the transaction was never completed. In the meantime, the FDR Agents became agents with Rosedale. Rosedale did not adopt the agreements the FDR Agents had entered into with FDR, nor did they sign a new agreement with the FDR Agents. However, the Court held that “the terms of their relationship with Rosedale were essentially the same as they had been with FDR. They remained as independent contractors, they were responsible for the same expenses, they earned the same commission ‘split’, and their commission income was received and held by Rosedale for them in a specific commission trust account.”

Eu, paras. 4-7.

64. Rosedale had also entered into agreements with certain of its independent contractors that specifically provided that commissions were to be held in trust by Rosedale for their benefit. In determining that Rosedale held commissions in trust for the FDR Agents, the Court relied on the fact that Rosedale treated FDR Agents in the same manner as the independent contractor agents which had express trust provisions in their contracts. The Court also noted that the competing secured creditor was a company owned by the former President of Rosedale – not a third party lender as in this case.

Eu, paras. 11 and 27-28.

65. The Motion Judge correctly distinguished *Eu* on the basis that, unlike this case, there was trust language in their agreements with the FDR Agents and no evidence of representations made to the secured lenders in various agreements, loan and security documents and audited financial statements that the gross commissions belonged to the brokerage and were therefore available as security for the loans.

66. In *Midland*, the independent contractor agreements and the brokerage's policies and procedure agreement specifically provided that the agents were entitled to "100% of the gross commission". Additionally, the evidence before the Court was that the brokerage charged fees for services to the agents and acted only as a conduit for the transfer of commissions to the agents. There were no provisions in the agreements with the brokerage that stated that the commissions were the property of the brokerage.

Midland Pacific Properties Corp. (Trustee of), Re, 1999 Carswell BC (SC).

67. The Motion Judge was correct in not adopting the reasoning in *Midland*, as it was readily distinguishable from the case at bar.

68. The Secured Lenders submit that the TRP Agents have failed to show that the Motion Judge's Decision was unreasonable, clearly wrong, or unsupported by the evidence, such as to constitute a palpable and overriding error that would require appellate intervention.

PART IV - ADDITIONAL ISSUES

69. The Secured Lenders raise no additional issues with respect to the appeal of the Motion Judge's order by the TRP Agents.

PART V - RELIEF REQUESTED

70. The Secured Lenders respectfully request that the appeal be dismissed with costs.

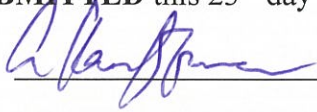

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of August, 2019.

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton (LSO No. 21592F)
Tel: (416) 218-1129
Fax: (416) 218-1849
Email: harvey@chaitons.com

Sam Rappos (LSO No. 51399S)
Tel: (416) 218-1137
Fax: (416) 218-1837
Email: samr@chaitons.com

**Lawyers for the Applicant
(Respondent on Appeal)**



FASKEN MARTINEAU DuMOULIN LLP
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6

Aubrey E. Kauffman (LSO No. 18829N)
Tel: (416) 868-3538
Fax: (416) 364-7813
Email: akauffman@fasken.com

**Lawyers for Trilogy Growth Fund LP, by
its general partner, Trilogy Growth Inc.**

SCHEDULE “A” - LIST OF AUTHORITIES

Case Law

1. *Housen v. Nikolaisen*, 2002 SCC 33
2. *Re Sally Creek Environs Corp.*, 2010 ONCA 312
3. *Nelson (City) v. Mowatt*, 2017 SCC 8
4. *Citizens Bank of Rhode Island v. Paramount Holdings Canada Company*, 2008 CarswellOnt 1615 (S.C.J.)
5. *Citizens Bank of Rhode Island v. Paramount Holdings Canada Company*, 2008 ONCA 891
6. *Eu v. Rosedale Realty Corp.*, 1997 CarswellOnt 2519 (S.C.J.)
7. *Midland Pacific Properties Corp. (Trustee of), Re*, 1999 Carswell BC (SC)

SCHEDULE "B" - TEXT OF STATUTES, REGULATIONS & BY - LAWS

Nil

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

FIREPOWER DEBT GP INC., AS AGENT

Applicant (Respondent on Appeal)

- and -

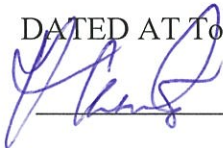
THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

CERTIFICATE

We estimate that 50 minutes will be needed for oral argument of the appeal. An order under 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 23rd day of August, 2019.



CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton (LSO No. 21592F)
Tel: (416) 218-1129
Fax: (416) 218-1849
Email: harvey@chaitons.com

Sam Rappos (LSO No. 51399S)
Tel: (416) 218-1137
Fax: (416) 218-1837
Email: samr@chaitons.com

**Lawyers for the Applicant
(Respondent on Appeal)**



FASKEN MARTINEAU DuMOULIN LLP
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6

Aubrey E. Kauffman (LSO No. 18829N)
Tel: (416) 868-3538
Fax: (416) 364-7813
Email: akauffman@fasken.com

**Lawyers for Trilogy Growth Fund LP, by
its general partner, Trilogy Growth Inc.**