

# COURT OF APPEAL FOR ONTARIO

CITATION: Firepower Debt GP Inc. v. TheRedPin, Inc., 2019 ONCA 903  
DATE: 20191115  
DOCKET: C66336

Lauwers, Fairburn and Zarnett JJ.A.

BETWEEN

Firepower Debt GP Inc., as Agent

Applicant (Respondent in Appeal)

and

TheRedPin, Inc. and TheRedPin.Com Realty Inc.

Respondents (Appellants)

Jordan Goldblatt, for the appellant Agents

Jeffrey S. Klein, for the appellant, Certain Underwriters of Lloyd's of London

Harvey Chaiton, for the respondent, Firepower Debt GP Inc.

Aubrey E. Kauffman, for the respondent, Trilogy Growth Fund LP

Harry Fogul, for the receiver, MNP Ltd.

Heard: September 27, 2019

On appeal from the order of Justice Michael A. Penny of the Superior Court of Justice, dated November 30, 2018, with reasons reported at 2018 ONSC 7182.

## REASONS FOR DECISION

[1] At issue in this appeal is whether certain real estate sales commissions collected by the receiver of an insolvent brokerage firm are trust funds for the real

estate salespersons who effected the sales, or form part of the assets of the insolvent firm available to its creditors.

[2] Prior to its insolvency, TheRedPin.Com Realty Inc. ("TRP Realty") operated a real estate brokerage business registered under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sch C. TRP Realty's registration entitled it to effect trades in real estate and earn and be paid commissions. An important focus of its business was the new and future condominium market.

[3] TRP Realty engaged real estate salespersons (the "Agents") to perform the listing and selling activities that generated trades in real estate and TRP Realty's entitlement to commissions. Under agreements with each of the Agents, TRP Realty was required to pay a specified portion of the commissions it earned and received to the Agents.

[4] In June 2018, MNP Ltd. was appointed receiver of TRP Realty as a result of its insolvency. The respondents, Firepower Debt GP Inc. and Trilogy Growth Fund LP, are secured creditors of TRP Realty.

[5] At the time of the appointment of the receiver, there were commissions to be received by TRP Realty on transactions in new and future condominium projects that were scheduled to close at various times through 2023. The Agents are owed a portion of those pending commissions (approximately \$3.7 million).

[6] The receiver brought a motion for advice and directions as to whether these commissions, when collected, are to be held in trust for the benefit of the Agents to the extent of TRP Realty's obligation to pay a portion of them to the Agents. If the amount is required to be held in trust, it would be excluded from TRP Realty's available assets which are subject to the claims of creditors, including the claims of the respondent secured creditors. If the amount is not required to be held in trust for the Agents, the Agents' claims to their share of commissions would be as unsecured creditors in the insolvency, ranking behind those of secured creditors.

[7] Before the motion judge, the parties agreed, as they did before us, that: (i) there is no statutory or regulatory requirement to hold the Agents' commissions in trust; (ii) there is no definitive document that unambiguously establishes a trust in favour of the Agents; (iii) a trust may be implied from surrounding circumstances, including transaction documents and TRP Realty's conduct; (iv) the existence of a trust requires three certainties to be present: subject matter, object, and intention; and (v) in the circumstances here, certainty of subject matter (the commissions themselves) and certainty of object (TRP Realty and the Agents) were present.

[8] The disagreement between the parties was about certainty of intention – whether TRP Realty intended to establish a trust in favour of the Agents over commissions payable to TRP Realty from condominium transactions.

[9] The motion judge rejected the claim that there was a trust. He concluded that “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 [secured creditors’] security”: at para. 53.

[10] The Agents and their insurer appeal.

[11] The appellants do not dispute the legal test the motion judge articulated at paras. 15-16 of his reasons:

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.

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 (CanLII), at para. 18 and *Waters’ Law of Trusts in Canada* (4th ed.) at para. 5.1.

[12] Rather, the appellants attack the motion judge's conclusion of mixed fact and law that certainty of intent had not been established. They do so on two interrelated bases. First, they submit that the motion judge made errors which led him to attach significance to evidence which weighed against the existence of the requisite intention on the part of TRP Realty. Second, they submit that the motion judge made errors which led him to attach insufficient significance to evidence which supported a finding of the requisite intention.

[13] Turning to the appellants' first basis of appeal, the motion judge considered the agreements between TRP Realty and the Agents, and TRP Realty's financial statements, to be evidence that TRP Realty lacked the intention to create a trust.

[14] The appellants argue that the motion judge erred when he placed weight on the fact that the agreements between TRP Realty and the Agents did not contain a provision that commissions are to be held in trust by TRP Realty for the benefit of the Agents. This, they submit, was an error of law, since a formal agreement to hold funds in trust is not necessary for an implied trust to arise.

[15] We do not accept the appellants' argument. It is one thing to say that a trust may arise without a formal agreement. It is quite another to say that where there is a formal agreement that does not provide for a trust, it must be ignored when considering whether an intention to create a trust existed. No authority for the latter proposition was provided.

[16] As is apparent from para 15 of his reasons referred to above, the motion judge was clearly alive to the point that a formal trust agreement was not required. In our view he was entitled to consider, as evidence of whether TRP Realty intended to create a trust, the fact that the agreements with each of the Agents neither created a trust, nor required that one be created. This was especially so given that the agreements specified that they contained “the entire agreement between the parties”. It was for the motion judge to decide what weight to put on that evidence.

[17] The appellants also argue that the motion judge erred when he found that TRP Realty’s audited financial statements were a clear statement of its intention that the pending commissions are not held in trust, and that the Agents’ split of the commissions represented an unsecured debt owing to them.

[18] The motion judge viewed the financial statements as indicating that TRP Realty knew how to say it was holding funds in trust, and that, importantly, it made no such statement in the financial statements about the Agents’ commissions.

[19] The financial statements showed deposits TRP Realty was holding on transactions in which it was the listing broker as “Restricted cash”; notes to the financial statements explained these were “amounts held in trust as required by various purchase and sale agreements”. In contrast, balances in TRP Realty’s commission account – the bank account into which commissions earned by TRP

Realty were paid and out of which the Agents' portion of the commissions were paid – were shown as “Cash and cash equivalents” assets of TRP Realty with no indication the funds were held in trust. Moreover, the Agents' portion of commissions was included on the financial statements as part of TRP Realty's “Revenues” without any indication that any portion of them were held for someone else's benefit, and the amounts payable by TRP Realty to Agents for commissions were grouped with their salaries and bonuses as TRP Realty's “Cost of revenue”, not as a disbursement of trust funds.

[20] According to the appellants, the flaw in the motion judge's approach was that he contrasted only two relevant categories of entries: Agent's commissions, which were not indicated to be held in trust, and purchasers' deposits, which were expressly noted as being held in trust. However, there was a third relevant category, namely, amounts that were to be paid by TRP Realty to Cooperating Brokerages, which the appellants say were unambiguously required to be held in trust by TRP Realty, but were not shown in the “Restricted cash” category on the financial statements as amounts being held in trust. The appellants argue that it was a palpable and overriding error for the motion judge to have overlooked this as it undermines his inference that the financial statements were a reliable indicator of what were and were not intended to be trust funds.

[21] We do not accept this argument, for two reasons.

[22] First, the parties before us did not agree about what TRP Realty's financial statements show concerning commissions owed to Cooperating Brokerages. The respondents did not agree that such amounts were included in the financial statement category of "Cash and cash equivalents", that is, as amounts shown as TRP Realty's assets rather than as trust funds. Nor were we pointed to any breakdown showing an amount representing commissions payable to Cooperating Brokerages included in the "Cash and cash equivalents" category.

[23] Second, even if the appellants are correct that amounts in TRP Realty's hands that were to be paid to Cooperating Brokers were not shown on the financial statements as held in trust, this would not materially detract from the motion judge's point. TRP Realty's financial statements reflected certain amounts as held in trust in the "Restricted cash" category. It did not include Agents' commissions in that category, and instead showed them as assets of TRP Realty in the "Cash and cash equivalents" category. The financial statements were represented by TRP Realty management to its auditors as accurate and not misleading. The auditors opined that the statements fairly presented TRP Realty's financial position. They were approved by its Board of Directors. The motion judge properly treated the financial statements as supporting an inference inconsistent with the existence of a certainty of intention that the Agents' commissions were to be held in trust.

[24] It may be that a similar inference from a failure to record amounts owed to Cooperating Brokerages as being held in trust on the financial statements could



be overcome, because the evidence that could be mustered to show the intention that those funds were held in trust would outweigh the inference. But the motion judge's essential point here was that the inference was not outweighed for Agents' commissions, when the evidence that was proffered to show the requisite intention that the Agents' commissions were to be held in trust was considered. He stated, at para. 51:

When weighed against the ambiguous inferences sought to be drawn from standard form documents provided by someone else (brokerWolf, 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.

[25] The weighing of evidence is the province of the motion judge. We see no palpable and overriding error in his conclusion that would justify appellate intervention.

[26] We turn to the appellants' second basis of appeal, that the motion judge did not give appropriate significance to the evidence that was said to support a conclusion that TRP Realty intended that the Agents' commissions be held in trust. This primarily consisted of evidence of the existence and history of a separate commission account at TRP Realty's banks, entries on various transaction documents, and evidence of TRP Realty's founder given in the proceedings below

in which he stated his understanding about to whom the Agents' commissions belonged.

[27] The motion judge considered this evidence. He concluded it was essentially ambiguous.

[28] The motion judge looked at the history of the bank accounts into which commissions were deposited and from which they were paid. He noted that bank statements on commission accounts TRP Realty had operated in the past had used the term "Commission Trust". But, he also noted that the commission account in existence most proximate to the receivership had not been opened or named as a trust account.

[29] The motion judge also considered trade record sheets provided to Agents by TRP Realty once an agreement and purchase and sale had "gone firm". He noted these trade record sheets showed the Agents' commission split with TRP Realty and stated that it constituted a commission trust agreement "as set out in the contract". The motion judge found that the reference to the contract was to the agreements between TRP Realty and the Agents, and that these agreements contained no mention of a trust, did not include any requirement to hold Agents' commissions in trust, and used no language from which a trust obligation or intention could reasonably be inferred.

[30] The motion judge also reviewed an affidavit sworn by TRP Realty's founder, Mr. Gidamy. He noted that the affidavit described Mr. Gidamy's understanding of to whom the Agents' commissions belonged, but that this after the fact description was inconsistent with objective behaviour at the relevant time, including what Mr. Gidamy had represented to TRP Realty's auditors and Board of Directors about the financial statements, and what he represented to TRP Realty's secured creditors about financial information provided to them, which also did not show the Agents' commissions as held in trust.

[31] The motion judge concluded that the ambiguous evidence in favour of the trust provided "relatively weak indicators of an inference of TRP Realty's intention": at para. 48. He concluded that the evidence in favour of the trust was outweighed by the absence of a mention of a trust requirement in the agreements with the Agents and the representations in TRP Realty's financial statements, which were inconsistent with a trust. That weighing of evidence is entitled to deference. In our view it involved no palpable and overriding error.

[32] This conclusion is not altered by the appellants' argument that the motion judge engaged in speculation when he stated that there were "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": at para. 52. The appellant argues that there was no evidence that these were the reasons for a separate commission account. However, as we read the

motion judge's reasons, he was simply drawing a common-sense inference from facts he properly found about the importance of commissions to TRP Realty's business and the need to properly account for the Agents' commission split, which was their remuneration for the services they performed for TRP Realty. A separate account does not necessarily imply a trust account, and in our view the motion judge did not commit a palpable and overriding error in considering the commercial context for a separate account, especially in light of the main grounds for his decision as noted above.

[33] Accordingly, we dismiss the appeal.

[34] The respondents are entitled to their costs of the appeal which we fix in the following amounts: Firepower Debt GP Inc., \$20,000; Trilogy Growth Funds LP, \$6,000. Both amounts are inclusive of disbursements and applicable taxes.

*Pham JA*  
*Luh JA*  
*B. Bennett J.A.*