Most Negative Treatment: Distinguished
Most Recent Distinguished: Dyck, Re | 2003 ABQB 191, 2003 CarswellAlta 309, [2003] A.W.L.D. 164, 121 A.C.W.S. (3d) 19, [2003] A.J. No. 281, 41 C.B.R. (4th) 47 | (Alta. Q.B., Feb 25, 2003)

1979 CarswellOnt 184
Ontario Supreme Court, In Bankruptcy

Allan Realty of Guelph Ltd., Re

1979 CarswellOnt 184, 24 O.R. (2d) 21, 29 C.B.R. (N.S.) 229, 6 E.T.R. 50, 97 D.L.R. (3d) 95

RE ALLAN REALTY OF GUELPH LIMITED

Anderson J.

Heard: February 1, 2, 1979
Judgment: February 19, 1979

Counsel: *W. J. Meyer, Q.C.*, for trustee applicant.
C. H. Morawetz, Q.C., for unsecured creditors.
R. D. Grant, for real estate brokers.
T. Kerzner, for Cy Ingram Realty Ltd. and Davies-Beaver Real Estate.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts; Property

Related Abridgment Classifications
Bankruptcy and insolvency

VIII Property of bankrupt
VIII.8 Property in hands of bankrupt agent or broker
VIII.8.c Real estate agents

Headnote
Bankruptcy --- Property of bankrupt — Property in hands of bankrupt agent or broker — Real estate agents

Creditors — Assets available to creditors — Real estate broker — Claims of sub-brokers — Trust funds — Representation in court proceedings.

It was submitted that the moneys received by a real estate broker by way of deposit and by way of balance of commissions, where a co-broker sold the property; moneys received by the listing broker or by the trustee since the bankruptcy on account of commissions; and moneys held by a solicitor, acting for a party to a transaction which had been completed, are impressed with a trust in favour of the selling broker.

Held:

None of these funds were available to the selling brokers as a trust fund but the selling brokers were entitled to rank only as ordinary unsecured creditors for a dividend. Any balance of commission to be received was payable to the trustee in bankruptcy as representing the listing broker. However, a selling broker was entitled to set off, as

against the listing broker, moneys owed to the selling broker on a different transaction as against moneys owed by the selling broker to the listing broker.

There was no fiduciary relationship between the listing and the selling brokers. There was, at most, a contractual obligation. The provisions of s. 31 of the Real Estate and Business Brokers Act made clear that they were designed for the protection of the vendors and purchasers, and they were the "other persons" named in the section.

The rules and regulations of the local real estate board affect only the activities of its members but have no further effect.

Held further:

Members of a group for which counsel has been appointed by the court are entitled to be present and represented by counsel of their own choice. The extent of participation by such latter counsel will always be in the discretion of the court, and it would not likely be attended by any award of costs.

Table of Authorities

Cases considered:

Distinguished:

Re Condon; Ex parte James (1874), 9 Ch. App. 609.

Re McDonald, [1972] 1 O.R. 363, 16 C.B.R. (N.S.) 244,23 D.L.R. (3d) 147.

Followed:

Re Ridout Real Estate Ltd. (1957), 36 C.B.R. 111 (Ont.).

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 47(*a*), 50(5), 75(3).

Real Estate and Business Brokers Act, R.S.O. 1970, c. 401, s. 31.

Words and phrases considered:

FIDUCIARY RELATIONSHIP

I am not prepared to conclude that there was a fiduciary relationship between the listing and the selling broker. There is not that element of trust and reliance which creates a fiduciary relationship as, for example, that which exists between solicitor and client. Again, I say that there was, at most, an expression of a contractual obligation and certain provisions calculated to assure the performance of that obligation. Indeed, one might conclude from the web of contractual provisions, and the stipulations in the Rules and Regulations relating to receipt and payment of commission, that trust and reliance were patently lacking.

OTHER PERSONS

> Dealing for a moment with s. 31 of the *Real Estate and Business Brokers Act* [R.S.O. 1970, c. 401] it is, in my view, clear that its provisions were designed for the protection of vendors and purchasers, and that they are the "other persons" named in the section. Such accounts received, largely, the deposits on real estate transactions paid by the purchasers for the usual purposes served by a deposit, and those purposes in no way include assuring the payment of real estate commission. It may be that the deposits are seen and utilized by real estate brokers for that purpose, but that is an incidental result and is not, so far as the source of the funds is concerned, an object of the payment.

Application for directions as to disposition of funds held by trustee of real estate broker and funds receivable.

***Anderson J.*:**

1 This is an application pursuant to s. 16 of the Bankruptcy Act, R.S.C. 1970, c. B-3, for directions.

2 At the opening of the argument, the participation of counsel for Cy Ingram Realty Ltd. and Davies-Beaver Real Estate, by their own counsel rather than by counsel appointed by the court to represent brokers as a group, was objected to by counsel for the trustee and by counsel for the unsecured creditors. In my view, it is clear that members of a group for which counsel has been appointed by the court are entitled to be present and represented by counsel of their own choice. The extent of participation by such latter counsel will, of course, always be in the discretion of the court, and it would not likely be attended by any award of costs. I can quite see that in cases where counsel had been appointed to represent a group, very large in numbers, the insistence by each member of the group upon individual representation might create practical problems. In my view, the possibility of such practical problems does not affect the basic rights to which I have referred. In any event, it is not a practical problem in the case before me and I have proceeded on the basis that these individual brokers were entitled to be separately represented and, to the extent which I deemed proper, I have received the representations made by counsel on their behalf. It was agreed at the outset that they were not asking costs.

3 Counsel and the trustee are to be commended for their successful efforts in putting together an agreed statement of facts, which greatly facilitated the argument of the motion.

4 The agreed statement of facts deals with the following, among other matters, in the following terms:

> 1. Allan Realty of Guelph Limited, (hereinafter referred to as 'Allan Realty') was incorporated on the 10th day of January, 1973, as a private corporation under the provisions of The Business Corporations Act of Ontario [R.S.O. 1970, c. 53].
>
> 2. Allan Realty carried on business at the date of bankruptcy at 15 Yarmouth Street in the City of Guelph, in the Province of Ontario.
>
> 3. The sole director and shareholder of the company was John Maxwell Allan and the company carried on the business of a real estate broker and was duly licensed and qualified under the provisions of The Real Estate and Business Brokers' Act of Ontario, 1970 R.S.O. c. 41 [sic: see c. 401] and the attendant regulations thereto.
>
> 4. That on the 28th day of October, 1977, Allan Realty filed an Assignment in Bankruptcy naming therein Lloyd L. Youngman as Trustee, (hereinafter referred to as 'the Trustee'), whose appointment was duly affirmed at the first meeting of creditors held on the 21st day of November, 1977.
>
> 5. That in pursuance to instructions received from the Inspectors, Lloyd L. Youngman, the Trustee, by application to the Supreme Court of Ontario, applied for directions as to the entitlement, if any, of himself as Trustee or other brokers to certain deposits and commissions received by Allan Realty prior to bankruptcy and by Lloyd L. Youngman, the Trustee, subsequent to bankruptcy. By Order of the Honourable Mr. Justice Anderson dated March 7th, 1978, William J. Meyer, Q.C., was appointed to represent the interests of Lloyd L. Youngman, the Trustee of the Estate of Allan Realty; C. H. Morawetz, Q.C. was appointed to represent the interests of the unsecured creditors

of the Estate of Allan Realty, a bankrupt, and R. D. Grant was appointed to represent the interests of the real estate brokers as debtors and creditors to Allan Realty.

6. At the date of bankruptcy and for some time prior thereto, Allan Realty in accordance with the generally accepted and established practice of the members of the Real Estate Board, maintained two types of bank accounts relating to its affairs. The first account was known as Allan Realty — Trust Account, bearing number 1018/889 with the Bank of Montreal in Guelph, Ontario. In all cases where Allan Realty acted as a listing broker, all deposit monies paid by purchasers were paid to the order of Allan Realty in accordance with the requisite Rules and Regulations covering Real Estate and Business Brokers. All monies received by Allan Realty as deposits respecting sales of property were deposited into that account. The second account maintained by Allan Realty was known as Allan Realty of Guelph — General Account, with the Bank of Montreal, Guelph, Ontario. Deposited into this General Account were transfers of monies out of the Trust Account which had been received as deposits and additional amounts received by way of commissions. These monies represented monies received from transactions that had closed. In the end result all monies payable to other brokers and all appropriations of monies to which Allan Realty was entitled, came out of the General Account.

7. In its business as a Real Estate Broker, Allan Realty acted as both a listing and selling broker; Allan Realty acted as a listing broker only; and Allan Realty acted as a selling broker only with another broker acting as a listing broker. All real estate transactions in which Allan Realty was involved were carried on under the rules and regulations set forth by the Real Estate and Business Brokers' Act, R.S.O. 1970, c. 401 and any amendments thereto. The transactions were also carried forth under a 'Photo Multiple Listing Service — Guelph & District Real Estate Board — Agreement and Exclusive Authority to Sell'. Attached hereto and marked as Schedule 'A' is a specimen Agreement and Exclusive Authority to Sell.

7A. The Guelph & District Real Estate Board Rules and Regulations under which the various brokers, including Allan Realty operated included a section dealing with commission as follows:

7. Commission

(a) The closing date of the sale on all M.L.S. listings shall be reported to the Board immediately by the listing broker when the Agreement of Purchase and Sale has been executed by the Purchaser and Vendor. The commission earned by the selling broker is due and payable on the closing date of the sale or when the commission has been received. The listing broker shall not use any part of the commission prior to paying the selling broker the amount then due and available for disbursement to him.

(b) In the event a full commission is not received within thirty (30) days of closing, the listing broker shall distribute the available commission pro-rated in accordance with the M.L.S. regulations governing the division of commission in effect at the time of the sale and the listing and selling brokers shall jointly endeavour to collect the balance of the commission which also shall be distributed pro-rated as above.

(c) In the event of any commission being paid as a result of the holdover clause in the M.L.S. listing, such commission shall be divided among brokers concerned in the proportion applicable at the time of closing of such transaction.

(d) A selling broker may not communicate with the Vendor for the purpose of collecting commission without permission in writing from the listing broker or the Board of Directors of the Guelph & District Real Estate Board. If commission due to the selling broker is not paid within three (3) days of receipt of commission by the listing broker, M.L.S. service shall be withdrawn. Listing brokers with out-of-town offices will be allowed 7 days to pay commission to selling broker.

(e) An M.L.S. listing is in full effect upon signature by the Vendor. In the event the property is sold before the listing reaches a Board Office, the listing broker shall notify the Board that the property is sold. The complete Rules and Regulations are set out in Appendix I.

8. A typical Agreement of Purchase and Sale wherein Allan Realty acted as listing broker, and another broker acted as selling broker is attached hereto and marked as Schedule 'B'.

9. A typical Agreement wherein Allan Realty acted as selling broker and another broker acted as listing broker is attached hereto and marked as Schedule 'C'.

10. In the situation involving Allan Realty, the practice of the company has been to upon completion of a transaction or entitlement by other real estate selling brokers to a commission, to in fact transfer the full deposit monies held in the Trust Account to its, Allan Realty's General Account and out of that General Account to disburse and credit the rateable shares of both the listing broker, in the case of Allan Realty as such, and the selling broker.

11. The monies in the General Account represented monies received by Allan Realty from commissions received, sundry income and transfers of deposits received from its Trust Account. The deposits from the Trust Account became mixed with other general income.

12. In one isolated transaction Allan Realty, one day prior to its assignment in bankruptcy, transferred only its share of the deposit from its Trust Account into its General Account after closing, leaving the selling broker's share of the deposit in its, Allan Realty's Trust Account.

13. In the books and records of Allan Realty and in particular the General Account ledger, a separate column was set up and identified by the caption 'Paid to Others', and in that column was entered that portion of the commission paid to other brokers as selling agents. It was the usual course of action of Allan Realty to make such payments to other brokers on the date or shortly thereafter the day that Allan Realty became entitled to the share of the commission as agreed upon.

14. That at the date of the filing of the Assignment by Allan Realty (October 28, 1977), the Trustee was faced with the following multiple situations involving Allan Realty upon which an application was directed to be made to the Supreme Court of Ontario in Bankruptcy for directions: ....

5 The agreed statement of facts contains also the following additional information which is relevant:

15. ...

(c) The Trustee reports that at the date of the bankruptcy there was an amount of TEN THOUSAND, EIGHT HUNDRED AND FIFTY TWO DOLLARS ($10,852.00) in the Allan Realty of Guelph Trust Account;

(d) The Trustee reports that the funds on hand in the General Account at the date of bankruptcy amounted to Nil;

(e) The Trustee further reports that the total commissions received to date (December 5, 1978), amount to FORTY THOUSAND AND THIRTEEN DOLLARS AND SEVENTEEN CENTS ($40,013.17) of which amount the sum of NINETEEN THOUSAND FIVE HUNDRED AND EIGHTEEN DOLLARS AND TWENTY SEVEN CENTS ($19,518.27) relates to the situation where Allan Realty was both the listing and a selling broker and received a commission. The balance of the sum of TWENTY THOUSAND FOUR HUNDRED AND NINETY FOUR DOLLARS AND NINETY CENTS ($20,494.90) is the amount where Allan Realty was the listing broker and another separate and distinct broker was the selling broker;

(f) The Trustee reports that the anticipated commissions to come to the Estate are FOURTEEN THOUSAND, NINE HUNDRED AND FORTY SEVEN DOLLARS AND SEVENTY EIGHT CENTS ($14,947.78) and

represent by and large contras or set offs attempted to be exercised by various selling brokers on sales where Allan Realty was the listing broker.

6 As indicated in the text of the agreed statement of facts it had, as schedules, copies of certain documents, the nature and terms of which were deemed to be relevant.

7 The first of these is a specimen agreement and exclusive authority to sell, designated "Photo Multiple Listing Service — Guelph & District Real Estate Board". This document is directed to Allan Realty and contains the following provisions which are material to the arguments put to me and the questions which I must decide. After conferring on Allan Realty "sole and exclusive authority ... to offer for sale or exchange", the agreement provides:

> ... you are authorized to distribute this listing through the photo M.L.S. (Multiple Listing Service) and to send it to all members in good standing of The Guelph & District Real Estate Board, and all Broker members may act as your Sub-Brokers ...
>
> (iii) you or any member of the Multiple Listing Service shall present to me for acceptance an offer to purchase in accordance with the terms listed below from a purchaser ready, willing and able to complete such purchase ...
>
> My liability for commission attaches whether or not the acceptance of an offer, sale or exchange resulted from your efforts or the efforts of any member of the Guelph & District Real Estate Board.
>
> The listing broker herein shall pay all sub-broker's commission.

8 Contained in the "boxes" at the foot of the document is one headed,

> Comm.
>
> 50-50
>
> Split.

9 A typical agreement of purchase and sale wherein Allan Realty acted as listing broker and another broker acted as selling broker is also attached. That document contains the following provisions which are material to this matter:

> A. J. Youngblood Real Estate Ltd. and Allan Realty of Guelph Ltd. ...
>
> [opposite the word, "Agent"]
>
> 1. Purchaser submits with this offer TWO THOUSAND Dollars ($2,000.00) cheque payable to Vendor's Agent Allan Realty of Guelph Ltd. as a deposit to be held by him in trust pending completion or other termination of this Agreement and to be credited towards the Purchase Price on completion. ...
>
> The undersigned accepts the above Offer and agrees with the Agent above named in consideration for his services in procuring the said Offer, to pay him on the date above fixed for completion, a commission of 5- $^{1}/_{2}$% of an amount equal to the above mentioned sale price, which commission may be deducted from the deposit. I hereby irrevocably instruct my Solicitor to pay direct to the said Agent any unpaid balance of commission from the proceeds of the sale.

10 There is also a typical agreement wherein Allan Realty acted as selling broker and another broker acted as listing broker. There do not appear to me to be any differences between these latter documents which are material to the questions before me.

11 In the administration of the estate, these facts give rise to three situations concerning which the directions of the court are sought. These are contained in the agreed statement of facts in the following terms:

Situation A

Allan Realty is described as the listing broker and at the date of bankruptcy held in its Trust Account the full deposit as received when the Offer to Purchase was executed. A separate and completely distinct selling broker sold the subject property and is claiming from both the deposit and commission as received by the Trustee in Bankrupty.

The parties hereto request that this Honourable Court answer what the entitlement of the selling broker is.

Situation B

Allan Realty is described as the listing broker and at the date of bankruptcy held in its Trust Account the full deposit as received when the Offer to Purchase was executed. A separate and completely distinct selling broker sold the subject property. The balance of the commission is being held by the solicitors for either the Vendor or Purchaser pending a determination of the issues as to who is entitled to the balance of the commission.

The parties hereto request directions as to who is entitled to the balance of the commission — being Allan Realty now represented by the Trustee, or in the alternative the selling broker.

Situation C

Allan Realty is described as the listing broker and a separate and distinct selling broker has effected a sale of the subject property. This selling broker wishes to set off as against Allan Realty monies owed to it, the selling broker, on a different transaction as against monies owed by it, the selling broker, to Allan Realty in the situation where Allan Realty was the selling broker and that separate and distinct broker was the listing broker.

The parties hereto request the advice and direction of this Honourable Court as to whether or not the selling broker is entitled to exercise the right of set off.

12 Situations A and B share a common consideration in that both involve a question whether, and to what extent, commission received or receivable by a listing broker is impressed with a trust in favour of the selling broker. Situation C involves entirely separate considerations related to the application to a trustee in bankruptcy of the ordinary law of set-off.

13 I propose first to address myself to the trust argument which underlies the position as put for the brokers in both situation A and situation B. This argument has, as its cornerstone, s. 47 of the Bankruptcy Act which reads in part as follows:

47. The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person, ...

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

14 Although not, of course, relied on by the brokers, it is necessary to a resolution of the matters before the court to bear in mind the concomitant provisions of s. 50(5) of the Bankruptcy Act, which reads as follows:

(5) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and subject to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

15 It is submitted on behalf of the brokers that moneys received by Allan Realty by way of deposit and by way of balance of commissions where a co-broker sold the property; moneys received by the trustee since the bankruptcy on account of commissions; and moneys held by a solicitor acting for a party to a transaction which has been completed are all impressed with a trust in favour of the selling broker. This trust is to be distilled from the contractual documents to which I have referred and from the provisions of the Guelph & District Real Estate Board Rules and Regulations ("the rules and regulations"). Without reviewing again in detail the various provisions of the contractual documents and the rules and regulations, particular attention is drawn to provisions which may be paraphrased in the following terms:

16 (a) The listing agreement makes it clear that at the inception of the transaction, it is contemplated that the sale may be effected by a broker other than the listing broker. The liability of the owner to pay commission attaches whether acceptance of an offer results from efforts of the listing broker, or any other member of the board. The listing broker is to pay all sub-broker's commissions. It is at least arguable that a division of the commission is to be inferred from the "box" referred to above and setting out, in the case of that transaction, a 50-50 split.

17 (b) The agreement of purchase and sale contains, in the description of "Agent" the names of both listing and selling brokers. At least in the typical case in which Allan Realty acted as listing broker, the provision dealing with the payment of deposit provides that the cheque is payable to the agent described as listing broker as "a deposit to be held by him in trust pending completion or other termination of this agreement and to be credited toward the purchase price on completion".

18 (c) The agreement to pay commission which is comprised in the agreement of purchase and sale, runs in favour of "the agent above named" and contains a direction by which the vendor instructs his solicitor, "to pay direct to the said agent any unpaid balance of commission from the proceeds of sale".

19 Such provisions of the rules and regulations as are relevant to this matter are, for the most part, set out in the agreed statement of facts. The following additional provisions were relied upon by counsel for the brokers:

5. Submission of Offers

(a) Offers to Purchase must include the names of both listing and selling brokers and the listing broker's name to be specified first ...

6. Deposits

(a) All deposits must be made payable to and turned over to the listing broker with the Offer to Purchase.

20 In order to highlight the argument on behalf of the brokers, it is useful to say that special reliance was placed on the provisions of No. 7 of the rules and regulations set out in the agreed statement of facts, and particularly on the following:

(a) ... The listing broker shall not use any part of the commission prior to paying the selling broker the amount then due and available for disbursement to him.

(b) In the event a full commission is not received ... the listing and selling brokers shall jointly endeavour to collect the balance ... which also shall be distributed pro-rated ...

(d) ... If commission due to the selling broker is not paid ... M.L.S. service shall be withdrawn.

The latter is said to be a significant sanction by reason of its effect on the business of the listing broker.

21 The submissions on behalf of the brokers may be summarized in the following terms:

22 (a) Upon the facts as disclosed, it should be found that the moneys received by Allan Realty, as listing broker, on account of commissions, were subject to an express trust in favour of the selling broker to the extent of the entitlement of the latter to commission. This trust should be held to apply equally to moneys received by Allan Realty prior to the date of bankruptcy and moneys received by the trustee after the date of the bankruptcy.

23 (b) In the alternative, and if the court should be of the view that no express trust was disclosed by the facts, and in particular by the contractual documents and the rules and regulations, the moneys should be impressed with an implied or constructive trust to the same result.

24 (c) Any moneys received by the trustee on account of commission were subject to an obligation to account to the selling broker for its share of the commission and that obligation should be enforced against the trustee by the court.

25 In discussing the law of trusts counsel for the brokers referred to Waters, Law of Trusts in Canada (1974). As to the nature of a trust he referred to p. 5, where two frequently quoted and generally acceptable definitions are set out [quoted from G. W. Keeton, The Law of Trusts, 9th ed. (1968), p. 5]:

> All that can be said of a trust, therefore, is that it is the relationship which arises whenever a person called the trustee is compelled in Equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed *cestuis que trust*) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.

26 And [quoted from Underhill's Law of Trusts and Trustees, 12th ed. (1970), p. 3]:

> A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and anyone of whom may enforce the obligation.

27 At p. 18 of the same work appear the following comments:

> In very large measure, therefore, whether a trust is to be called express, implied, resulting or constructive is only of academic importance; practitioners in the field are prepared to adopt the generally adopted current meaning of those terms, and leave it at that...
>
> In the common usage of today the terms 'express' and 'implied' refer to the intention of the alleged settlor. If he clearly and specifically says that certain property is to be held on trust, then he has created an express trust. Similarly, if his language has to be construed in order for its legal meaning to be discovered, and it is found that the maker of the statement intended a trust, then he has created a trust arising by implied intent.

In a footnote to the last of the foregoing comments, the learned author says:

> It is also possible to say, however, that once the trust obligation has been construed as the intention of the transferor, that gives rise to an express trust.

28 At p. 99, under the heading, "The Three Certainties", we find the following:

> 1. Certainty of Intention
>
> 2. Certainty of Subject-Matter

> 3. Certainty of Objects
>
> For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight* (1840), 3 Beav. 148, 49 E.R. 58, affirmed (sub nom. *Knight v. Boughton*) 11 Cl. & Fin. 513, 8 E.R. 1195 (H.L.), in words adopted by Barker J. in *Renehan v. Malone* (1897), 1 N.B. Eq. 506, and considered fundamental in common law Canada, first, the language of the alleged settlor must be imperative; secondly, the subject matter or trust property must be certain; thirdly, the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transfering property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must secondly be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained. Thirdly, the objects of the trust must be equally clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.
>
> The principle of the three certainties has been fundamental at least since the days of Lord Eldon, and no one today could seek to challenge the principle; the problems that exist concern the issue of what constitutes certainty.

At p. 100, we find this:

> The words employed to set up a trust, therefore, must show that the transferee is to take the property not beneficially, but for objects which the transferor describes. The words which nearly always reveal the intention are 'in trust', or 'as trustee for', but it is well established in common law courts, including those of Canada, that these words are neither conclusive nor indispensable. In the context of all the language of a bequest, Garrow J.A. came to the conclusion in *Re Rispin* (1912), 25 O.L.R. 633, 2 D.L.R. 644, affirmed *(*sub nom. *Can. Trust Co. v. Davis)* 46 S.C.R. 649, 8 D.L.R. 756, that the words 'in trust', though used, did not have controlling importance, and that no trust had been created. On the other hand, in a series of Canadian cases courts have made the point that there is no magic in the word 'trust' and that other words may convey the same intention.

29 Before embarking on the application of these principles to the facts and arguments before me, it is useful to set down a few of the basic elements of the transaction or transactions, in the course of which it is said the trust arose. Under the agreement of purchase and sale, the deposit moneys are paid by the purchaser, and, as already observed, are by the terms of the contract to be held by the agent "in trust pending completion or other termination of this agreement and to be credited to the purchase price on completion". On completion, therefore, the vendor is entitled to the deposit. Likewise, the vendor, under the contract, is liable for the payment of commission, and resort may be had by the broker to the deposit for the purpose of satisfying, to the extent possible and appropriate, the claim for commission.

30 The broker is required by the terms of the Real Estate and Business Brokers Act, R.S.O. 1970, c. 401, s. 31, to place the deposit moneys in a trust account. The agreed statement of facts indicates that it was the normal practice of Allan Realty, after the closing of a transaction, to transfer the relevant deposit from the trust account to its general account, and out of its general account to make payment to the selling broker of the portion of commission to which the latter was entitled.

31 It will be at once apparent that this is not a case in which the source of funds can be described as the settlor. It is clear that at the time the contract of purchase and sale comes into existence and the deposit is paid, neither the purchaser, who is the source of the deposit, nor the vendor, upon whom ultimately the obligation to pay commission will rest, has the intention of creating a trust in favour of either listing or selling broker. If, therefore, a trust is to be found, it is not at that stage of the transaction, nor with respect to the deposit.

32 Rather, it must be in some way imposed upon the listing broker as a result of the facts and circumstances in which the transaction is carried out, including the application to those facts and circumstances of the rules and regulations.

33 For this and other reasons, in my view, any possibility of finding an express trust is ruled out. A further consideration in this regard is the complete absence of any language directly referable to anything in the nature of a trust. If anything is to be found, it must be in the mutual interests of the listing and selling brokers in obtaining payment of the commission, in the entitlement of the latter to a portion, in the inhibition imposed by the rules and regulations on the use by the listing broker of the commission moneys until the selling broker has been paid, and in the provision for joint effort to recover an unpaid commission.

34 Of the funds in dispute, a significant amount flows from commissions either received by the trustee since the date of bankruptcy or to be received on that account by the trustee in future. Since these funds were not in the hands of the bankrupt at the date of the bankruptcy to be impressed with the trust, it would be necessary to the substantial success of the broker's case to find that the moneys were impressed with the trust when received by the trustee.

35 In an effort to accomplish this result, it was submitted that there was a trust of the chose in action comprising the right of the listing broker to recover commission from the selling broker. It was contended that when the proceeds of the chose in action were received, either by the listing broker or by the trustee, they were likewise impressed by the trust, or at the very least they were received by the trustee subject to an obligation to account, which in equity the court would enforce in order that the trustee not be in a better position with respect to the property than the bankrupt itself would have been. Various refinements of this argument were put to the court as the motion proceeded. For example, it was contended that there was a fiduciary relationship between the listing and the selling brokers, which of itself constituted the listing broker a trustee of the commission for the benefit of himself and the selling broker.

36 In my view, all of these arguments must be rejected. Even assuming, and I think the assumption generously favourable to the brokers, that one could ignore the fact that there is no settlor, and that a trust would have to be found in which the listing broker had, by way of acknowledgment or otherwise, been in a position where a trust could be imposed, I do not find in the language of the documents and of the rules and regulations anything which expresses such an intent or from which such an intent could properly be inferred. I have already alluded to the portions of the documents and of the rules and regulations relied on by the brokers. As I read these, they create nothing more than, at most, contractual obligations. The application of the rules and regulations, in the circumstances, is a bit anomalous and I shall have more to say about that shortly. In reading the various documents and the rules and regulations, and in considering what effect should be given them, I have been mindful of the fact that, obviously, the rights and interests of selling brokers have been the subject of direct consideration by the draftsman. It is apparent that the documents and the rules and regulations have been prepared with legal advice and, no doubt, with consideration directly applied to the rights and interests to which I have just referred. Viewed in that light it is the more apparent, in my view, that nothing in the way of an express trust can be found. Had there been the intention to create a trust such as is now contended for, a trained legal draftsman would not have left it to be arrived at by vague inference. That certainty or imperative language referred to by the authorities is, in my view, totally lacking. These considerations also militate against a finding of constructive trust.

37 I am not prepared to conclude that there was a fiduciary relationship between the listing and the selling broker. There is not that element of trust and reliance which creates a fiduciary relationship as, for example, that which exists between solicitor and client. Again, I say that there was, at most, an expression of a contractual obligation and certain provisions calculated to assure the performance of that obligation. Indeed, one might conclude from the web of contractual provisions, and the stipulations in the rules and regulations relating to receipt and payment of commission, that trust and reliance were patently lacking.

38 Nor would it be easy to find that certainty of subject matter which is fundamental. What was the subject matter? Was it the deposit, or the commission when paid by the vendor, or a combination of these, or was it the chose in action?

The argument on behalf of the brokers opened up all these questions and, in my respectful view, concluded none. I would be very hesitant to declare a trust with respect to subject matter so amorphous.

39 Some of the elements of this case were the object of judicial consideration in *Re Ridout Real Estate Ltd.* (1957), 36 C.B.R. 111 (Ont.), a judgment of the late Smily J. In it, the court was concerned with priorities for payment out of the trust fund maintained by the bankrupt pursuant to the provisions of what was then s. 35 of the Real Estate and Business Brokers Act, R.S.O. 1950, c. 332, and is now s. 31:

> 31. — (1) Every broker shall maintain an account designated as a trust account in a chartered bank, loan or trust company or Province of Ontario Savings Office in which shall be deposited all moneys that come into his hands in trust for other persons in connection with his business, and he shall at all times keep such moneys separate and apart from moneys belonging to himself or to the partnership, in the case of a partnership, and shall disburse such moneys only in accordance with the terms of the trust.

Among those claiming were vendors and purchasers claiming deposits or balances of deposits; salesmen employed by the bankrupt claiming a portion of commissions received by the bankrupt; and brokers claiming a portion of commissions received by the bankrupt. To this latter extent, the court was concerned with a question the same as one of the questions that falls to be determined in this case. On the documents and the rules and regulations before the court in that case, it was decided that a co-operative selling broker was not a person referred to in s. 31 of the Real Estate and Business Brokers Act, and that there was no trust. Instead, the court found that it was a debt as between creditor and debtor.

40 Counsel for the brokers sought to distinguish *Ridout*, principally on the differences which existed between the rules and regulations of the Toronto Real Estate Board which were there under consideration, and those with which this application is concerned. In particular, counsel drew attention to the concluding words of cl. (a) of s. 7 of the rules and regulations, reading:

> (a) The listing broker shall not use any part of the commission prior to paying the selling broker the amount then due and payable for disbursement to him.

And also to cl. (b) dealing with the situation where full commission is not received within 30 days and providing in such case that: "the listing and selling brokers shall jointly endeavour to collect the balance of the commission."

41 While I agree that there are differences between the rules and regulations dealt with in *Ridout* and those before me, I do not find the differences material to the result. In my view, what was said by Smily J. of the rules and regulations with which he was concerned is equally true of those with which I am concerned. They may give rise to a relationship of debtor and creditor, but not that of trustee and cestui que trust. Had the draftsman set out to establish, by express language, a trust relationship, it would have been relatively simple to do so, although it might have given rise to practical difficulties and this contemplation may, in turn, have accounted for the fact that it was not done.

42 Dealing for a moment with s. 31 of the Real Estate and Business Brokers Act it is, in my view, clear that its provisions were designed for the protection of vendors and purchasers, and that they are the "other persons" named in the section. Such accounts received, largely, the deposits on real estate transactions paid by the purchasers for the usual purposes served by a deposit, and those purposes in no way include assuring the payment of real estate commission. It may be that the deposits are seen and utilized by real estate brokers for that purpose, but that is an incidental result and is not, so far as the source of the funds is concerned, an object of the payment. It is to be noted that in the case at bar it was the practice of Allan Realty, upon completion of a transaction, to transfer the full deposit to its general account and from it to disburse to the listing broker. An isolated transaction to which reference was made, in which only the portion to which Allan Realty was entitled was so transferred, can have little weight as against the general practice.

43 I have determined this case as though the rules and regulations are relevant and material for consideration in determining the question of whether or not a trust exists. This was the submission of counsel for the brokers, and was not seriously disputed by counsel for the unsecured creditors. Smily J. appears to have proceeded on a similar premise,

although in view of his conclusions it was not necessary for him, any more than it is for me, to decide that question. The rules and regulations are enacted by a trade association for governing the activities of its members. I do not wish to be taken as deciding that they have any further or other effect.

44 In view of the conclusion at which I have arrived on the basic trust question, it makes no difference whether commissions remaining to be paid are receivable direct from vendors or out of funds in solicitors' trust accounts.

45 In my view, the argument on behalf of the brokers for a trust. fails on all counts.

46 It was submitted that, in aid of the brokers, the principles enunciated in such cases as *Re Condon; Ex parte James* (1874), 9 Ch. App. 609, and in *Re McDonald*, [1972] 1 O.R. 363, 16 C.B.R. (N.S.) 244, 23 D.L.R. (3d) 147, should have some application to this case. In the assertion by the trustee of the rights which, in my view, he has, I see no such hardship or inequity as moved the court in those cases. Nor do I see any reason why the brokers should be treated differently than any other creditors.

47 I turn now to the position of the brokers with respect to set-off.

48 Section 75(3) of the Bankruptcy Act provides:

> (3) The law of set-off applies to all claims made against the estate and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off is affected by the provisions of this Act respecting frauds or fraudulent preferences.

This, in turn, calls for a consideration of the relevant provisions of the Judicature Act, R.S.O. 1970, c. 228:

> 131. Where there are mutual debts between the plaintiff and defendant or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other.
>
> 132. — (1) Mutual debts may be set against each other, notwithstanding that such debts are deemed in law to be of a different nature, except where either of the debts accrue by reason of a penalty contained in any bond or specialty.

In the circumstances of the case at bar, I should have thought there was little doubt that the mutuality contemplated by s. 131 and s. 132(1) existed with respect to the debts under consideration here, and that there was clearly a right of set-off.

49 On behalf of the unsecured creditors, it was contended that because the trustee was now involved, and the debts of the brokers to Allan Realty had passed to the trustee as property of the bankrupt, mutuality was lacking, with the result that a debtor of Allan Realty would be required to pay in full any such debt, and in respect of a claim against Allan Realty, would be entitled to set-off only to the extent of any dividends to which he might be entitled otherwise in the estate. Counsel for the unsecured creditors was frank to say that he knew of no judicial authority for that proposition. Its acceptance, in my view, would make a mockery of s. 75(3), and would fly in the face of its plain language, which is to the effect that the law of set-off applies "in the same manner and to the same extent as if the bankrupt were plaintiff or defendant".

50 It must follow that in the circumstances under consideration, the brokers are entitled to a full right of set-off.

51 As an incident of this question, there was some argument addressed by counsel for the unsecured creditors to the possibility that set-off would involve one or more fraudulent preferences. Without conceding this, counsel for the brokers took the position that this question had not been raised by the agreed statement of facts, nor did it arise on the questions before me. For them it was contended that the question of the right of set-off should be finally resolved on this application and without regard to that incidental question.

52 With due respect to that argument, I do not think that can be the case. That question is not before me, but it is plainly one which is involved in any individual case where set-off is sought by reason of the concluding words of s. 75(3), which read:

> (3)... except in so far as any claim for set-off is affected by the provisions of this Act respecting frauds or fraudulent preferences.

53 A consideration of that question would involve an examination of each individual's claim to set-off. There is no such examination involved in the motion before me, and no question relating to that aspect of set-off is to be taken as having been decided in this case.

54 In the result, the three situations are dealt with by way of directions in the following terms:

Situation A

55 None, save to rank as an ordinary creditor.

Situation B

56 Allan Realty, now represented by the trustee.

Situation C

57 The selling broker is entitled to the right of set-off.

58 In addition to their admirable accomplishment in the agreed statement of facts, counsel were also able to agree on one other vital issue, namely, that the fees and disbursements of all parties, including the fees and disbursements of the trustee, should be paid out of the funds at issue, and it will be so ordered. As already indicated, counsel for the two individual brokers sought no costs and they will not be included in the foregoing disposition.

Directions given.