



## TRUST MONEY DISPUTES AND DISBURSEMENTS

**Summary: Real estate and mortgage brokers are to act as trustees in the holding of trust funds. Acting as trustees requires that brokers hold monies for the parties to a transaction or deal and disburse money in accordance with the terms of trust. In acting in this manner, brokers have duties and responsibilities that, when fulfilled, limit the potential for trust disputes to arise. When a dispute does arise, however, brokers remain bound by the terms of trust and must endeavour to resolve trust disputes as quickly as possible. [See *Real Estate Act* s.18, s.25]**

Sections 18 and 25 of the *Real Estate Act* presume the role of the broker to be that of a trustee as it relates to the handling of trust funds. As a trustee, brokers normally have two duties. These duties are to:

- Hold the trust monies for the parties to the transaction; and
- Disburse money in accordance with the terms of trust.

Section 18(2) of the *Real Estate Act* prohibits industry members from accepting trust funds without express terms of trust. Section 25(2) of the *Real Estate Act* requires industry members to ensure that terms of trust governing the use of trust monies are in writing and agreed to by the industry member and all other parties to the trade or deal.

Often, one of the parties to a trade or deal will claim the deposit or object to the deposit being disbursed to the other party on the basis that they do not feel the other party took reasonable actions to meet the terms of the contract. Brokers acting as trustees cannot take these arguments into consideration. Brokers have a duty to make decisions solely based on the terms of trust. For example, a commercial contract may stipulate that trust funds be held in an interest-bearing account at a particular bank. The trustee would not have discretion to place the funds elsewhere, even at a higher return. Trustees must act only within the authority granted to them under the terms of the contract. Additionally, even though a brokerage is often representing one of the parties to the trade or deal, the broker, as trustee, cannot act on behalf of, or in favour of, either party.

Brokers acting as trustees cannot arbitrarily add or impose conditions on the terms of trust without the written consent of all parties for whom the trust funds are being held.

Brokers are responsible for ensuring that trust funds are disbursed in accordance with the terms of trust. Brokers may delegate this duty to associates or associate brokers registered with the brokerage provided that the delegation meets the requirements of sections 52 and 68 of the Rules made pursuant to the *Real Estate Act*. For more information, see RECA Information Bulletin: *Brokers - Delegation*. Brokers should require the brokerage's associates to report any issues associated with the disbursement of trust funds immediately.

RECA's experience suggests that brokers often have difficulty disbursing trust funds when the terms of trust are ambiguous.

The best way to prevent trust disputes is to ensure the brokerage has clear policies that require associates to:

- Clearly explain to their clients the terms of trust as proposed by the other party to the trade or deal and its implications. For example, an associate representing a vendor may want to explain that “subject to a home inspection satisfactory to the buyer” means that the buyer can choose not to proceed with the transaction if cosmetic defects or imperfections are present. In this situation the vendor may choose to accept the terms of trust as proposed knowing that the buyer can walk away with little reason or may choose to counter with new terms of trust.
- To use and draft clear, ascertainable and unambiguous conditions. The more precise the condition, the less likely that the broker acting as trustee will have difficulty disbursing the trust funds.
- Draft dispute resolution processes in case the broker acting as trustee can make no reasonable conclusion in regard to entitlement to trust monies.
- Advise their clients that the trustee must follow the terms stipulated in the contract. The funds deposited are for the benefit of all parties to the contract.

In order for brokers acting as trustees to ensure they disburse trust funds in accordance with the terms of trust, they should:

- 1) Review and understand the terms of trust.
- 2) Determine and obtain the information required to make a determination under the terms of trust. For example, if the terms of trust relate to purchase financing, the real estate broker will need to determine whether the buyer sought financing and the outcome of the application process.
- 3) Review the information. A mortgage broker may want to determine whether the lender provided a written commitment before the borrower backed out of the deal.
- 4) Make supporting inquiries if the information is unclear.
- 5) Have the parties to the trade or deal make submissions regarding the terms of trust if the determination is difficult.
- 6) Obtain legal advice from a lawyer if the broker is still unsure how to proceed. When pursuing this option, RECA recommends, along with the terms of trust and all relevant information, that the lawyer be provided with a copy of this article to ensure that he or she understands the responsibilities that the broker acting as a trustee has under the *Real Estate Act* and the *Trustee Act*.

Even if the circumstances appear to be straightforward, RECA still recommends that independent legal counsel confirm for the parties who is entitled to a disputed deposit.

Brokers acting as trustees will find that there will be situations where no reasonable conclusion can be made and a dispute therefore arises. In these situations, brokers have the following options:

- Brokers acting as trustees may exercise dispute resolution options contained in the terms of trust. For example, the Alberta Real Estate Association’s (AREA) standard residential purchase contract contains the following clause: *If no reasonable conclusion can be made in regard to #1 above, the brokerage shall notify the parties to the purchase contract in writing and pay the money into a lawyer’s trust account.*

Brokers are to keep all parties apprised of action being taken to resolve the trust dispute, including legal action.

- Negotiate the terms of trust dealing with the process of determining entitlement with all parties to the trade or deal. For example, the parties may agree to have the brokerage or another person hold the funds in trust until the matter can be litigated through the courts.
- Make an application to the courts requesting the brokerage be relieved of their trustee responsibility. See s.40 of the *Trustee Act* for more information.
- Consult a master in chambers in accordance with s.43 of the *Trustee Act*.

However, brokers acting as trustees should not be idle or hold a deposit in trust without letting the parties to the trade attempt to resolve the issue. Failure to take reasonable steps to disburse trust funds in accordance with the terms of trust may be considered conduct deserving of sanction. Brokers acting as trustees must not pay the money into to court or to a lawyers trust account when a reasonable determination can be made. Courts have the discretion to assess damages against industry members who abuse trust dispute resolution options.

Brokers acting as trustees sometimes need to decide whether they are entitled to receive remuneration from funds held in trust. These situations may relate to service agreement cancellations (i.e. a property management agreement) when improper notice is given or deposits are forfeited and a portion of the deposit is to be used as commissions. Brokers acting as trustees are advised to carefully consider the circumstances and to take proactive steps to discuss and explain the disbursement if any difficulties are anticipated.

RECA recognizes that acting as a trustee can be difficult and fraught with controversy. RECA does not consider it conduct deserving of sanction when a broker, acting as a trustee, follows these guidelines and performs due diligence in making a reasonable decision, even if the courts ultimately do not agree with the broker's decision.