

TRUST MONEY DISPUTES AND DISBURSEMENTS

Purpose: This bulletin explains a broker's responsibilities to accept, hold, and disburse trust funds in accordance with the terms of trust, including potential dispute mechanisms.

This bulletin applies to all real estate and mortgage professionals that receive funds in trust.

Role of the broker in handling trust funds

The broker's role in handling trust funds is that of a trustee. As a trustee, the broker must:

- hold the trust monies for the parties to the transaction
- keep and disburse money only in accordance with the terms of trust

Real Estate Act requirements for trust funds

The *Real Estate Act* (Act) requires:

- industry members must not accept trust funds without express terms of trust
- the terms of trust must be in writing and all parties to the deal or trade must agree to those terms

Examples of broker acting as trustee

1. One of the parties to a trade or deal claims the deposit or objects to the brokerage disbursing the deposit. One party argues the other party did not take reasonable actions to meet the terms of the contract and the other argues they did. The facts of the situation will direct the trustee broker to disburse the funds. The broker has a duty to keep or disburse the deposit in accordance with the written terms of trust.
2. A real estate contract requires the brokerage to deposit the trust funds to an interest-bearing account at a specific bank. The interest rate is higher at another bank on the same type of account. The broker decides to deposit the trust funds at the other bank. The broker acting as trustee does not have the authority to deposit the trust funds at a bank other than the bank specified in the contract. Trustees must act only within the authority under the terms of the contract.
3. The broker represents one of the parties in the trade or deal. This party argues that the broker also represents them in dealing with the trust funds. The party is not correct. The broker acting as trustee does not act on behalf of, or in favour of, either party. Their duty is to receive and disburse funds according to the terms of trust.

Trust money disputes

When a dispute arises, brokers must comply with the terms of trust and attempt to resolve trust disputes as quickly as possible. Brokers are responsible to ensure they disburse trust funds in accordance with the terms of trust.

Changes to terms of trust

The broker acting as trustee must have the written consent of the parties to change the terms of trust.

Delegation of broker duties as trustee for terms of trust

The broker may delegate his duties as trustee for the trust account to associates or associate brokers of the brokerage. The broker must ensure the delegation meets the requirements of sections 52 or 68 of the *Real Estate Act* Rules (Rules). The broker is still responsible for the trust account and the delegated person should report any issues about the terms of trust to the broker immediately.

Broker fees from funds held in trust

Brokers acting as trustees may be entitled to receive fees from trust and could disburse funds to the brokerage. This may happen where there is improper notice to cancel a property management agreement that has cancellation fees for early cancellation or where a buyer forfeits a deposit. The broker must be proactive and explain why they will disburse trust money to the brokerage.

Tips to prevent disputes

Brokerages should have clear policies that require associates to:

- draft clear and explicit conditions. The more exact the condition, the less difficulty the broker acting as trustee will have on how to disburse trust funds. Real Estate Council of Alberta's (RECA) experience indicates that the majority of disputes arise when the terms of trust are not clear or specific
- ensure their clients understand the terms of trust
 - explain the condition "subject to the buyer doing their due diligence" to a seller means the deposit will return to the buyer unless they remove that condition
 - explain the condition "subject to a home inspection satisfactory to the buyer" to a seller means that the buyer can walk away from the deal for cosmetic defects or imperfections that are present. The buyer receives the return of the deposit
- include dispute resolution processes in the contract in the event the broker acting as trustee can make no reasonable conclusion concerning disbursing the trust monies.

Tips to help resolve disputes

The broker who acts as the trustee should:

- review and understand the terms of trust and the application of all the conditions in the contract
- obtain all information to determine if, the buyer or seller was able to satisfy the conditions or the terms of trust. If terms of trust are about financing, the real estate broker will need to determine if the buyer made application for financing and the outcome
- review the information. You may want to determine, did a lender issue a written commitment before the borrower backed out of the deal
- make inquiries if the information is not clear
- if the terms of trust are difficult, request each party to give submissions as to their understanding of terms of trust.
- obtain legal advice if terms of trust are unclear. RECA recommends, along with terms of trust and all relevant information that the lawyer receive a copy of this article to ensure they understand the responsibilities the broker has acting as a trustee has under the Act and the *Trustee Act*.

Next steps to resolve disputes

There will be times where there is no reasonable conclusion on how to disburse the trust funds. In these situations, the brokerage has the following options:

- brokers acting as trustees may exercise dispute resolution options contained in the terms of trust
- consult a Master in Chambers in accordance with s.43 of the *Trustee Act*
- negotiate with all parties the terms of trust dealing with the process to determine who will receive the trust funds. The parties may agree to have the brokerage or another person hold the funds in trust until any legal process through the courts is complete
- make an application to the courts to request the brokerage be relieved of their trustee responsibility

Reminders

Brokers acting as trustees must:

- keep all parties aware of any actions to resolve the trust dispute
- be diligent and take reasonable steps to disburse trust funds in accordance with terms of trust. Failure to act may be conduct deserving of sanction
- not hold a deposit in trust without letting the parties to the trade attempt to resolve the issue
- not pay the money into court or to a lawyers trust account when you can make a reasonable determination. Courts have the discretion to

assess damages against industry members who abuse trust dispute resolution options

Final word from RECA

It is a difficult and at times controversial task for brokers to act as trustees. RECA does not consider it conduct deserving of sanction when a broker, acting as a trustee, follows the guidelines and performs due diligence in making a reasonable decision, even if the courts ultimately do not agree with the broker's decision.

Related information

Legislation

- *Real Estate Act* - sections 18, s.25
- *Real Estate Act Rules* – sections 52, s.68
- *Trustee Act* - sections 40, s.43

Information bulletins

- Brokers - Delegation