BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 23

READT 033/15

IN THE MATTER OF	an appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	**MARK F GUNNING** of Palmerston North, Real Estate Agent
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 306)**
	First respondent
AND	**SUZANNE BARNABY, DEBBIE WHITE, and IAN JENSEN**, Complainants
	Second respondents

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms N Dangen - Member

HEARD at PALMERSTON NORTH on 7 December 2015

DATE OF THIS DECISION 14 March 2016

APPEARANCES

The appellant, on his own behalf
Ms Usha B Keller, counsel for the Authority
Mrs S M Barnaby, for the complainant trustee landlords

DECISION OF THE TRIBUNAL

Introduction

[1] The appellant appeals the decision of Complaints Assessment Committee 306 finding him guilty of unsatisfactory conduct by releasing a deposit after only five working days, in breach of s 123 of the Real Estate Agents Act 2008 which requires that a deposit paid to an agent be held for at least 10 working days.

Factual Background

[2] On 19 June 2013 the complainants, as trustees of the Lorna Jensen Trust No 2, engaged Property Brokers Palmerston Ltd to find a tenant for the Trust's commercial property at 641 Tremaine Avenue, Palmerston North.

[3] The appellant was a licensed agent and manager of Ms Lynette Love (listing salesperson) engaged by the said complainant landlords to find a tenant for the property. At the relevant time, both she (the listing salesperson) and the appellant were employed by the said Property Brokers Palmerston Ltd.

[4] Ms Love found a prospective tenant and, on 14 March 2014 after months of negotiations the landlords counter-signed a form of lease agreement, which had been changed by them in various respects including by deleting its clause 9 (relating to rental subsidy from landlords to tenant with regard to the tenant's existing lease of other premises). There is evidence that both parties had executed the agreement to lease about five weeks earlier but had been negotiating, by ongoing counter-offers, over alterations to be initialled.

[5] Special clauses in the lease document dealt in detail with works to be completed by the lessors, compliance with fire rating requirements, and the said clause 9 which, prior to deletion by the lessors as at 14 March 2014, had read:

> *"**9.0 903 Tremaine Avenue, Palmerston North***
>
> *9.1 The landlord shall reimburse the Tenant for the costs the Tenant actually incurs in respect of its tenancy at 903 Tremaine Avenue, Palmerston North as follows:*
>
> *a) From the commencement of this lease to 4/5/2015 2/3rds rent (to a maximum contribution of $50,000 plus GST for that 12 month period), 2/3rds rates and 2/3rds insurance.*
>
> *b) For the period 5/5/2015 to 4/5/2016 2/3rds rent (to a maximum contribution of $30,000 plus GST for that 12 month period), 2/3rds rates and 2/3rds insurance.*
>
> *c) For the period 5/5/2016 until lease end 2/3rds rent (to a maximum contribution of $13,333.33 plus GST for that 8 month period), 2/3rds rates and 2/3rds insurance.*
>
> *Provided that:*
>
> - *The Landlord and the Tenant shall both use their best endeavours to locate a suitable to sublease the property at 903 Tremaine Avenue. Sub-lease to be mutually agreed.*
> - *The reimbursement payable by the Landlord to the Tenant noted above shall be reduced by the mount of any rent/rates/insurance payable by the subtenant to the Tenant during the relevant period noted above.*
> - *Both parties shall act in good faith in respect of any sub tenancy of 903 Tremaine Avenue, Palmerston North.*

9.2 For the avoidance of doubt the Tenant is responsible for all end of lease obligations in respect of the tenancy at 903 Tremaine Avenue, Palmerston North."

[6] On 19 March 2014 the tenant signed the lease without initialling all the changes that the landlords had made and paid the deposit to the agency on the same day. The tenant says that it was only expecting an amendment to the rent review clause which it approved and initialled.

[7] The landlords maintain that there was a binding agreement on 19 March 2014 and that the listing salesperson was to supply a signed copy of it to their lawyers but this was not done. The tenant says that the rental contribution clause was absolutely fundamental to the agreement and the *"basis of the entire negotiation process"*.

[8] On 20 March 2014 the tenant, realising that changes had been made to the lease agreement by the landlords, advised that it did not wish to proceed with the lease and ripped up the lease agreement. It considered that the negotiations were at an end and it was clear there was to be no reconciliation between the parties over the terms of a lease of the property.

[9] On 24 March 2014, the appellant refunded the tenant's deposit without the landlords' permission. The deposit was not held for ten working days as required by s 123 of the Act (set out below).

[10] It transpired that the landlords renegotiated the lease with the tenant a few months later with the assistance of a private negotiator.

Evidence to us from the Appellant

[11] Mr Gunning is a very experienced real estate agent. Over 20 years he has worked in very senior roles specialising in commercial realty and, at material times, was the manager of Property Brokers Palmerston Ltd commercial sales team in Palmerston North.

[12] The following paragraphs from his evidence-in-chief encapsulate the heart of the present dispute, namely:

"7. On 19 June 2013, PBL was instructed by the trustees of the Lorna Jensen Trust No 2 ("the Trustees") to act for them in finding a new tenant for the trust's property at 641 Tremaine Avenue, Palmerston North ("the property"). One of the members of the commercial sales team, Lynette Love, was the listed agent.

8. I am not sure exactly when the tenant (Huntfish New Zealand Cooperative Ltd) ("the tenant") approached Lynette about possibly leasing the property, but I believe this was sometime in July 2013. From that point until March 2014, the tenant and the trustees engaged in extensive negotiations as to the lease. I was never directly involved with these negotiations, but I was used by Lynette as a sounding board for ways to make it work.

9. From the outset the tenant was very specific in the requirement of the new landlord taking over the balance of its existing lease (at 903 Tremaine Avenue) as part of any deal on a new building. This was the only way the

Tenant's Board would sign off on any relocation. The trustees were made aware of this requirement from the beginning.

10. *I would estimate that, during the months of negotiations, there were probably 5 or 6 heads of agreement drawn up between the parties. However, these agreements were never finalised, as one party would always have an issue.*

11. *I understand that on 14 March 2014 a lease agreement countersigned by the trustees (but with the existing lease clause deleted) was presented to the tenant. The trustees had not drawn the deletion to the attention of Lynette or the tenant. The tenant signed without realising the deletion had been made. The tenant paid a deposit of $19,000 plus GST.*

12. *On 20 March 2014, the tenant realised the deletion had been made. It said it did not want to proceed with the lease as a result."*

[13] Mr Gunning then stated how Ms Love had received a telephone call from the tenant on either 19 or 20 March 2014 instructing her to refund the deposit on the basis that the deal was dead. The agency was also written to by the lawyer for the tenant who wrote that negotiations were at an end and that his client tenant requested that the deposit be repaid. Mr Gunning then stated:

"14. Lynette informed me of the tenant's request for the deposit to be repaid. I went to our controller of the Property Brokers Trust Account ("PBLTA"). Joanne Skilton told her that the proposed lease transaction with the trustees had fallen over and that the tenant had requested the return of their deposit. I asked Joanne to deal with this.

15. From my point of view, there was no binding agreement between the parties. The tenant had thought there was, and this is why they paid the deposit. However, as stated above, the tenant did not realise that clause 9 had been deleted. The tenant did not initial the deletion (as you would usually expect where an agreement is altered in negotiations) which supports the view that they were not aware of it and that the negotiations had failed."

[14] We accept that Mr Gunning thought there was no binding agreement between the parties but the tenant thought there was, which is why it paid the deposit. Mr Gunning took the view that, because the tenant did not realise that clause 9 had been deleted and it had not initialled that deletion, there is no binding agreement and negotiations between the parties had failed. We observe that the tenant had received a form of agreement with all amendments initialled by the landlords who had signed the document and the lessee seemed to accept all that by signing the document also. At the time the tenant company signed the form of lease, the deletion existed and, prima facie at least, the lessee seemed to accept the then form of the agreement. Apparently, it did not advert to the deletion of concern to it until about six days later.

[15] Under cross examination from Ms Keller (counsel for the Authority), Mr Gunning added that in the course of negotiations the agreement to lease had been signed by both parties for the previous five weeks and initialled from time to time as amendments were made to it in the course of negotiation. He maintained that the landlords knew that the signed agreement was not binding and he is of the view that

there had been no completed transaction at any time in terms of the tenant leasing the property. He took the view that, at all material times, the tenant was making a counter-offer to the landlords. There is conflicting evidence as to whether that form of lease had been signed by both parties for the previous five weeks but we accept that to have been so.

[16] Mr Gunning made it clear that the agency decided to release the deposit back to the tenant because he and the agency thought it was clear that there was no contract to lease in existence and that the parties were still negotiating. He emphasised, under cross-examination, that he felt he did not need to hold the deposit for 10 days because there had been no transaction as an issue between the parties had not been agreed to, namely, that of the landlords reimbursing the tenant for the costs the tenant would incur in respect of its lease of other premises fairly nearby at 903 Tremaine Avenue, Palmerston North over particular periods.

Evidence from Ms S Barnaby (a Complainant)

[17] Ms Barnaby asserted to us that the landlords considered they held a signed contract as at 14 March 2014 when it was presented to the tenant countersigned by the landlords with the particular clause deleted. She said that the tenant then signed without realising the deletion had been made and also paid the deposit. Ms Barnaby said the landlords also received an email advising that the tenant had signed.

[18] Under cross-examination from the licensee, Ms Barnaby accepted that the contract had been signed prior to 14 March 2014 but put it that the parties were still negotiating and making counterclaims by making changes to the original form of the agreement document and submitting such changes for initialling by the other party. Ms Barnaby stated that document was signed by all parties on the front page but they were negotiating over whether to initial various changes in other parts of the document and there had been quite some negotiation over the actual term or duration of the lease and about the type of rent review clause. On 14 March 2014 the parties had agreed over the rent review clause but it was left open that, if the tenant would only lease for eight years, then it would not receive a rent subsidy for its said nearby premises so that clause 9 was crossed out and initialled by the landlords. Mr Gunning maintains that the tenant never agreed to clause 9 being crossed out.

[19] Ms Barnaby maintains that the tenant or lessee knew that the landlords had crossed out clause 9 and, while the tenant had not initialled that change, it had paid the deposit subsequently and sent an email confirming that the document was complete.

[20] Simply put, Mrs Barnaby and later her husband (Mr Barnaby) put it that the landlord trust required the tenant to take a 10 year term and, if so, it could have the rental subsidy sought, but it insisted on an eight year term there could be no such subsidy.

[21] It was clear from the evidence of Mr and Mrs Barnaby that, as at 19 March 2014, they thought there was a clear agreement by the tenant to lease on their terms such that they would never have agreed to release the deposit back to the tenant as was done by the lessee and his agency.

Issues on Appeal

[22] The primary issue is whether the appellant released the deposit in breach of s 123 of the Act set out below.

[23] In written submissions the appellant submits:

[a] That there was no *"transaction"* for the purpose of s 123 such that it is not in breach of s 123;

[b] That he did not release the deposit as he did not direct the return of the deposit and was not involved in the agency's decision to return the deposit to the complainant lessors;

[c] That he has no authority over the agency's account;

[d] The agency's trust account team do not take instructions from him;

[e] Ultimately, it was the agency's trust account team which made the decision to release the deposit.

The Committee's Decision of 29 January 2015

Issue 1: Deposit released early in breach of s 123

[24] The Committee considered that the appellant refunded the deposit on 24 March 2014 without the second respondents' permission.

[25] The basis of the appellant's submissions to the Committee was that he refunded the deposit because there was no deal, the tenant had walked away, and *"there was no way in the world this could have been sorted in 10 days"*.

[26] The Committee noted that the second respondents' evidence was that, by the appellant refunding the deposit prior to ten days, they were denied the opportunity to negotiate the problems. The CAC also noted that, after hiring a negotiator at the cost of $10,000 some three months later, a renegotiated lease was signed by all parties and a deposit paid.

[27] The Committee found that the tenant had requested the listing salesperson to refund the deposit, which request she then referred to the appellant. The Committee noted that the appellant had given evidence of his disgust with the actions of the second respondents (in crossing out clause 9 which (it was put) indicated a deliberate attempt to *"hoodwink"* everyone).

[28] Upon considering the evidence, the Committee found that the appellant had engaged in unsatisfactory conduct because, at the time of refunding the deposit, ten days had not yet elapsed, and the appellant had no authority to do so.

Issue 2: Responsibility for the release of the deposit

[29] The appellant did not raise this argument (that he was not responsible for the refund) directly with the Committee. In any event it is submitted for the Authority that the Committee had sufficient information in front of it to determine the extent of the appellant's role and was satisfied that the appellant had, in fact, authorised the release of the deposit.

[30] In a decision of 13 May 2015 dealing with penalty, the CAC censured the appellant and fined him $3,000.

Relevant Provisions of the Act

[31] The word *"transaction"* is defined in s 4 of the Act as follows:

> *"**Transaction** means any 1 or more of the following:*
>
> *(a) the sale, purchase, or other disposal or acquisition of a freehold estate or interest in land;*
>
> *(b) the grant, sale, purchase, or other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies):*
>
> *(c) the grant, sale, purchase, or other disposal or acquisition of a licence that is registrable under the Land Transfer Act 1952;*
>
> *(d) the grant, sale, purchase, or other disposal or acquisition of an occupation right agreement within the meaning of the Retirement Villages Act 2003;*
>
> *(e) the sale, purchase, or other disposal or acquisition of any business (either with or without any interest in land).*
>
> ***122 Duty of agent with respect to money received in course of business***
>
> *(1) All money received by an agent in respect of any transaction in his or her capacity as an agent must be paid to the person lawfully entitled to that money or in accordance with that person's directions.*
>
> *(2) Despite subsection (1), if an agent is in doubt on reasonable grounds as to the person who is lawfully entitled to the money, he or she must take all reasonable steps to ascertain as soon as practicable the person who is entitled and may retain the money in his or her trust account until that person has been ascertained.*
>
> *(3) Pending the payment of any such money, the money must be paid by the agent into a general or separate trust account at any bank carrying on business in New Zealand under the authority of any Act and may not be drawn upon except for the purpose of paying it to the person entitled or as that person may in writing direct.*
>
> *…*
>
> ***123 Money to be held by agent for 10 working days***
>
> *(1) When an agent receives any money in respect of any transaction in his or her capacity as an agent, he or she must not pay that money to any person for a period of 10 working days after the date on which he or she received it.*
>
> *(2) Despite subsection (1), a Court order or an authority signed by all the parties to the transaction may require the agent to pay the money before the expiry of the period specified in that subsection.*

> *(3) If at any time while holding any money on behalf of any party to the transaction, the agent receives written notice of any requisitions or objections in respect of the title to any land affected by the transaction, the agent must not at any time pay that money to any person except in accordance with a court order or an authority signed by all the parties to the transaction."*

Submissions

[32] To cover the issues from the aspect of each party, it is only necessary to set out the essence of the submissions from Ms Keller on behalf of the Authority which we now refer to.

Was an Agreement Concluded?

[33] Section 123 provides that money is to be held by the agent in respect of any transaction for a period of 10 working days after the date on which it is received. An agent may release the money prior to the statutory minimum if all parties to the transaction give permission.

[34] Ms Keller submits there is no doubt that the grant of a lease interest in land is capable of being a *"transaction"* which is defined in s 4 of the Act and set out above. We agree.

[35] The central issue is whether the lease agreement was concluded so as to engage s 123 of the Act.

[36] The appellant submits that the parties did not intend to enter into the lease agreement on the terms they did, such that there was no contract and, therefore, no *"transaction"* for the purposes of the Act.

[37] Counsel for the Authority submits that the agreement to lease was clearly concluded as both parties had signed that agreement; as a matter of law the written agreement had been concluded such that s 123 was engaged; and, in order to release the deposit before the minimum 10 day period had expired, the appellant needed both parties' permission.

[38] It is put that the appellant did not contact the second respondents prior to the release of the deposit and, as such, no permission was obtained from those prospective landlords. Accordingly, there was a breach of s 123 of the Act, in the Authority's submission.

[39] It is noted for the Authority that, if the appellant had contacted the second respondents before releasing the deposit, he would have ascertained that they considered that they did have a binding agreement and he would at least have adverted to the fact that he should exercise caution before releasing the deposit.

[40] Ms Keller submits for the Authority that the agreement was concluded and permission was not obtained from both parties (for the release of the deposit) so that the appellant breached s 123 of the Act by releasing the deposit before 10 days had expired.

Were Reasonable Steps Taken to Ascertain Entitlement to Money?

[41] Section 122 of the Act details the duties of an agent with respect to money received in the course of business. This section places positive obligations on the agent to ensure that all money received by an agent in respect of a transaction be paid to the person lawfully entitled to that money. Where there is doubt as to entitlement, an agent must take reasonable steps to ascertain who is entitled to the money and retain it in their trust account until they have done so.

[42] Ms Keller submits that putting the contractual status to one side, the real issue is whether, in all these circumstances, the appellant ought to have taken reasonable steps to ascertain who was entitled to the money.

[43] It is submitted that at the time the appellant released the deposit he was aware that the agreement had been signed by both parties, albeit that some of the clauses had not been executed. Of course, he maintains that he did not authorise the release of the deposit. The appellant considered that the second respondents' actions in deleting the rental subsidy clause was a deliberate attempt to *"hoodwink"* everyone, as he put it. There was clearly a question of who was lawfully entitled to the money. Ms Keller submits that, in light of his obligations pursuant to the Act, the appellant should have made appropriate enquiries to ascertain who was entitled to the funds before releasing the deposit (refer s 122(2)); and the appellant was under an obligation to take reasonable steps to ensure that the money was being paid to the correct party and with strict adherence to the timeframes; and this accords with the purpose of the Act to promote and protect the interests of consumers in respect of transactions and public confidence in real estate agency work.

[44] The Authority submits that it was open to the Committee to determine that upon considering the evidence, the appellant had engaged in unsatisfactory conduct by releasing the deposit before the statutory timeframe had lapsed and without the parties' permission.

Responsibility for Release of the Transaction

[45] Ms Keller referred to the appellant's submission that he did not have any authority or control of the agency's decision-making process to release the deposit. He submits that he was not involved with the decision-making process so that he was not responsible for the release of the deposit. Indeed, he submits that he had no involvement other than pass on the request of the tenant to appropriate staff at the agency. This argument was not raised with the Committee where the appellant appeared to accept the fact he had authorised the deposit on the basis that it was permitted under the Act because the agreement was at an end.

[46] The Authority submits that the appellant was ultimately responsible for the release of the deposit, either in fact or because of his obligations as a licensee under the Act; and the fact that the appellant passed on the request for the deposit to be released (apparently without undertaking any steps to ascertain the appropriateness of that occurring) is central to the issues.

[47] Counsel for the Authority puts it that the appellant's position at the Committee stage is consistent with the statement of Joanne Skilton, the financial controller at the agency. She stated that she has no reason or authority to question requests made by senior managers and she relied upon the knowledge of the appellant in this situation.

[48] Ms Keller submits that the extent of the appellant's involvement and responsibility is a question of fact; that, importantly, the appellant appeared to be the day to day manager at the agency; he was the direct manager of the listing salesperson, who asked the appellant (on behalf of the tenant) to action the release of the deposit.

[49] Ms Keller submitted that the appellant was held out in the evidence as being responsible for the release of the deposit, had the experience and authority to affect the release of the deposit, and assumed responsibility for the transaction. She put it that the following evidence, which was before the Committee, points to the appellant's involvement with the transaction:

[a] The appellant was the Commercial Sales Manager;

[b] The appellant was the listing salesperson's direct manager;

[c] The appellant was considered by the General Manager of the agency to have actioned the release of the deposit based on the fact that there was no agreement in place between the two parties;

[d] The appellant met with the second respondents in response to their complaint;

[e] The appellant responded to the second respondents' complaint in writing;

[f] The second respondents considered that the appellant was *"too close to the situation"* to be able to address their concerns appropriately.

[g] The listing salesperson considered that the release of the deposit was *"not applicable"* to her, save for her discussion with the tenant in respect of the request for the deposit and her discussion with the appellant regarding the same;

[h] The appellant was adamant in his views on the status of the agreement, namely, that *"there was no deal and the potential lessees had walked away and therefore the deposit was refunded. There was no way in the world this could have been sorted in 10 days"*.

[50] It is submitted for the Authority that it was open to the Committee to determine on the evidence that the appellant had in fact authorised the repayment of the deposit. Indeed, the Authority submits that this was the correct analysis on the available evidence. Even if that is not accepted by us, the Authority submits that the appellant was ultimately responsible for the trust accountant's actions, in light of the duties placed on the licensee pursuant to ss 122 and 123 of the Act; and it is not open to a licensee to abdicate responsibility for compliance with the Act to an unlicensed employee.

[51] It is put for the Authority that, at a minimum, the appellant should have monitored the agency's trust account team as the appellant was the licensed agent with ultimate responsibility. The appellant says he was *"not even aware if the money had been returned or not, till much later"*. Ms Keller submits this clearly falls short of conduct expected of a reasonable licensee.

Emails Between the Agency and Authority

[52] It is put that the appellant has sought to rely on an email chain of advice received from the Authority. Ms Keller notes that the email chain in question was not before the Committee at the time of its substantial decision. However, the email chain did form part of the appellant's submissions on penalty.

[53] The question posed to the Authority by the agency's auditor was:

> *"A real estate agent rec'd a deposit on a house prematurely (i.e. before the contract was signed). The sale never went ahead so the money was returned. Is the agent correct in that the 10 day rule would not apply."*

[54] The response was as follows:

> *"Section 123 requires fund received in respect of any transaction to be held for 10 working days. If this contract was not signed the funds there is no transaction so the funds can be released prior to the 10 working days. [sic]."*

[55] The Authority submits that, ultimately, the email chain is not relevant to the matters in this case because, first, the exchange is dated 5 August 2014 (the deposit was on 24 March 2014), and second, the question posed has no application to these facts. We agree.

[56] Also, Ms Keller repeats her submission in that the appellant had a duty to ensure that the money was paid to the correct person so that, at a minimum, the appellant should have been adequately monitoring the progress of the release of the deposit with the agency's trust accountants and taking steps to confirm the release was appropriate. It is put that, if he had monitored the trust account team (assuming the request had been made at the relevant time), the appellant would have been aware that the trust account team had asked the wrong question to the Authority when they sought advice regarding the legal status of the contract and release of the deposit.

[57] It is submitted that it was open for the Committee, on the evidence before it, to determine that the appellant had released the deposit; that the appellant's delegation of responsibility to an unlicensed employee to effect a transaction does not release the appellant from his obligations under the Act; and, given the lack of reasonable steps taken by the appellant to ascertain the correct entitlement to the deposit, the appellant did not act in accordance with the Act.

Discussion

[58] We can understand the parties focusing on whether there has been a *"transaction"* as defined in the Act. If there has been no transaction then the agent (Mr Gunning) would not be in breach of s 123 of the Act. If the parties were still in negotiation at material times so that the agreement to lease document was never binding, then there has been no transaction.

[59] However, the evidence from Mr Gunning to us was that a lease agreement was completed between the parties on 14 March 2014 but that the tenant did not realise until 20 March 2014 that the said clause 9 had been deleted. In the meantime the tenant had accepted the agreement its form of 14 March 2014, paid the deposit, and emailed its acceptance to the landlords. The tenant did not realise that its apparent,

mistake, in accepting that the form of agreement was in order on 14 March 2014, does not abrogate from the agreement having been agreed to by each party. It may be that the tenant could have had the agreement set aside at law for the mistake, or misrepresentation, or whatever but such a legal course was not pursued.

[60] As it happens, the tenant's reaction of ripping up the agreement seemed to be accepted by the landlords as a termination of any agreement, and the parties went into mediation and, sometime later, entered a new such leasing agreement.

[61] For all that, it seems to us that the tenant accepted the form of the agreement for lease document as it stood at 14 March 2014 so that there was then an agreement and, of course, a transaction. That meant that s 123 applied. There is no dispute that, if s 123 applied, it was not complied with by the agent Mr Gunning.

[62] In his submissions the licensee states that the agreement to lease document signed by the trustees was handed to Ms Love on 14 March 2014. He stresses that she was not advised by the landlord trustees that they had deleted clause 9 relating to the balance of the tenant's lease of other premises even though that was an important feature of the new lease negotiations. He said that the tenant then initialled other terms to the agreement relating to rent reviews without realising that the clause 9 had been deleted.

[63] As Ms Keller pointed out, the fact that the clause 9 deletion was not initialled by the tenant does not indicate that the tenant had not accepted the agreement as at 14 March 2014. She put it that initialling amendments to a document is a convention rather than a rule. We agree that, while initialling an amendment is helpful proof that a party accepted it, the fact that the amendment was not initialled may create a need for proof of when the amendment was made.

[64] As indicated above, we are conscious that the definition of *"transaction"* requires there to have been a final agreement to lease between the parties. We find that there was as we explain above. Had the tenant not overlooked the deletion by the landlords of clause 9, a transaction would not have existed at material times because the tenant would not have agreed to that deletion. The short point was that the landlords had conceded a term of eight years rather than requiring ten years and, therefore, deleted clause 9; but the tenant being pleased at achieving a term of eight years (rather than 10 years) failed to notice that clause 9 had been deleted.

[65] In his submissions the appellant also emphasised that it was the team at his agency which refunded the deposit to the tenant. He maintains that he could not be responsible because he had no authority over the firm's trust account and the team responsible for the operation of that trust account at the agency would not take instructions from him, and he simply passed on to that team the request from the tenant for refund. He says that team then took that issue over and sought advice from an external auditor but he was unaware of all that. He maintains that he simply passed on a request of the tenant for refund of the deposit to the team at the agency responsible for operating the trust account, and that he had no involvement in the decision to refund that deposit.

[66] Ms Keller also points out that the agency was holding the tenant's deposit in its trust account on trust for both parties when the licensee sought successfully to have that paid back to the tenant without the knowledge or approval of the landlords. She submits there is no dispute that s 123 of the Act required a deposit to be held in a trust account for ten days and that was not done.

[67] We consider that the appellant was responsible for the tenant being paid back its deposit by the agency. The agent's protestations to the contrary are not credible and his own evidence shows that he was responsible for the office staff at the agency paying the deposit back to the tenant as the tenant had requested.

[68] Accordingly we confirm the findings and penalty of the Committee.

[69] Pursuant to s 113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s 116 of the Act.

_____
Judge P F Barber
Chairperson

_____
Mr J Gaukrodger
Member

_____
Ms N Dangen
Member