New (financial) year, same story: Avoid lost SMSF trust deeds

- by Matthew Burgess, Director, View Legal

One of the key trustee duties of any form of trust is to know the terms of the trust deed and keep the original wet (not electronically!) signed trust instrument safe and secure. This duty is very difficult to discharge however if the trust deed is lost.

The case of *Jowill Nominees Pty Ltd v Cooper* [2021] SASC 76 (“**Jowill”**) provides a recent insight into the issues a court will consider where a trust deed has been lost. Court application being the only pathway to achieve a solution that is binding on beneficiaries and third parties such as revenue authorities, as well as protecting the trustee where an original trust deed has been lost.

While Jowill involved a discretionary trust, many of the principles are applicable for self-managed superannuation funds (**SMSFs**).

Factual matrix

Broadly, the factual matrix involved a trust that was established in 1976 and for many years had as its substantive asset shares in Coopers Brewery Limited. The original trust deed was unable to be located and there was also no copy of the document.

There was however an advice letter from a lawyer in 2007, based on a review of the original trust deed that explained a number of key provisions including the range of beneficiaries. Other aspects were also able to be reverse engineered, such as the probable perpetuity period and the fact that the deed likely permitted capital distributions.

The capital distribution power was assumed to exist by the court on the basis of the lawyer’s evidence that if it did not, this would have been flagged in the advice letter, particularly because the lawyer confirmed no trust deed read in 45 years of practice failed to contain such a provision.

Decision

The court confirmed that under the relevant state-based *Trustee Act* it could vary the trust deed (effectively adopting a new deed here), so long as the following tests were met (all of which were, primarily due to the evidence of the lawyer that provided the 2007 advice letter):

- there is good reason to make the proposed exercise of powers;
- the proposed exercise of powers is in the interests of beneficiaries;
- the proposed exercise of powers will not result in 1 class of beneficiaries being unfairly advantaged to the prejudice of another class (here it was critical that all beneficiaries were represented before the court);
- the proposed exercise of powers accords as far as reasonably practicable with the spirit of the trust;
- the proposed exercise of powers will not disturb the trust beyond what is necessary to give effect to the reasons for the revocation or variation; and
- the application is not substantially motivated by a desire to avoid or reduce the incidence of tax.

The deed approved by the court was based on a precedent as at 1978 of the firm that had likely drafted the trust deed, adjusted to align with the advice from 2007.

While the court did consider a request to simply revoke the trust, it ultimately confirmed its preference to approve the, varied, adopted trust deed as it was the least disruptive approach. The court confirmed the trustee could choose to exercise its discretion to make a capital distribution of the assets of the trust (which was its intention) and subsequently vest the trust, relying on the terms of the court approved deed.

Vesting issues

If a trust deed cannot be found, commercially with discretionary trusts it can often be the case that the most responsible approach is for the trustee to wind up the trust. Indeed, there may be disgruntled beneficiaries or third parties that essentially force a trustee to adopt this course.

Any vesting of a trust and subsequent distribution of assets, with or without court approval, is likely to trigger a range of revenue consequences, particularly taxation and stamp duty.

Most of these can generally be ignored however in relation to SMSFs as a result of the leading case in relation to trust resettlements, namely *FCT v Commercial Nominees of Australia Ltd* (2001) 47 ATR 220 and subsequent Tax Office statements (for example, see Private Ruling Authorisation Number 14613, which confirmed that amendment of an SMSF deed, that was not lost, by deleting all the operative provisions and inserting the terms of an updated trust deed did not cause a CGT resettlement).

Adopting a new deed

In the context of SMSF trust deeds (and indeed other forms of fixed trusts with a narrow range of known beneficiaries, who can be proved via other evidence), a court application for adopting a new trust deed is generally seen as being unlikely to be necessary from a trust law perspective.

That is, the trustee and interested beneficiaries can simply adopt a new deed.

However the federal court decision in *Kafataris v DCT* [2008] FCA 1454 highlights that even for trusts with an ostensibly narrow range of potential “beneficiaries” care must be taken.

In this case a husband and wife established separate SMSFs appointing themselves as sole members. They declared a property owned by them as property of their respective SMSFs.

In considering who the “beneficiaries” of each SMSF were, it was held that upon construction of the SMSF deeds, the class of beneficiaries was broader than each single member.

This was because the trust deed allowed the trustee to pay benefits to the member’s dependants and even relatives (if there were no dependants, as defined under the superannuation legislation) of the member.

As such, in this case, the potential class of beneficiaries included 21 different people.

Best practice therefore dictates that each person who can enforce the due administration of the trust should be a party to and sign a deed of variation that seeks to implement a replacement for a lost SMSF trust deed (see also *Re Bowmil Nominees Pty Ltd* [2004] NSWSC 161, which confirmed that where all potential beneficiaries agree to a variation, there is no need for the court approval).

Other approaches

Alternatively, a conservative approach (that may be appropriate if a court application is not commercially viable) can be to adopt a replacement deed and then establish a new SMSF and immediately the roll assets of the fund that had the lost deed into the new structure. The heritage SMSF would then be wound up.

Regardless of which approach is adopted, other than court application, if an SMSF trustee is adopting a new deed without any evidence as to the original terms, specific specialist advice should be obtained as to whether this will amount to a CGT resettlement.

Fortunately, from a stamp duty perspective, most states have a concessional regime that any variation of an SMSF trust deed (even if it causes a duty resettlement) will be liable for only nominal stamp duty.

Conclusion

While it is possible to reconstitute the terms of a lost SMSF trust deed, the process is generally time consuming, commercially difficult and unnecessarily costly.

As with many similar areas, despite the potential triteness of the statement, when considering the implications of lost trust deeds, prevention is the best cure.