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To heed the deed, read the deed ... and therefore ensure it is not lost

- by Matthew Burgess, Director, View Legal

The decision in *Jowill Nominees Pty Ltd v Cooper* [2021] SASC 76 ("Cooper") discussed by the author in an earlier article (see 2021 WTB 28 [626]) underlined the importance of one of the key trustee duties of any form of trust. That is, the duty of a trustee to know the terms of the trust deed and keep the original, and at least before November 2021, wet (not electronically) signed trust instrument safe and secure.

As flagged in the previous article, this trustee duty is very difficult to discharge if the trust deed is lost.

The recent case of *Mantovani v Vanta Pty Ltd (No 2)* [2021] VSC 771 ("Vanta") starkly demonstrates the serious consequences that can flow from a failure of a trustee to maintain, and be familiar with the terms, of the full original trust deed.

Key questions considered

In a factual matrix that centred around a trust that where, despite extensive searches, only the schedule of key details could be located, the Court considered the following 6 key issues – with the conclusion also noted briefly, before being explored in more detail below.

- Question 1: Was the trust deed lost? Answer: Yes
- Question 2: Could secondary evidence be relied upon to prove the existence and contents of the lost trust deed? Answer: No
- Question 3: Could the presumption of regularity be relied upon to save the trust from failing? Answer: No
- Question 4: Did the trust fail for uncertainty? Answer: Yes
- Question 5: Should a declaration be made that the trustee held the trust property on a resulting trust for the settlor (or their estate)? Answer: Yes
- Question 6: Should an order for the taking of accounts and payment of monies by the trustee owed to the settlor be made? Answer: Yes

Lost trust deed

On the basis of evidence showing that reasonable searches and inquiries had been made with all relevant persons, legal and accountancy firms and 3rd party authorities that could have been expected to hold a copy of the trust deed, without success, the Court concluded the deed was lost.

Secondary evidence

Although a number of cases were discussed in relation to the secondary evidence requirements, arguably the leading case for where a trust deed has been lost is *Maks v Maks* (1986) 6 NSWLR 34. In this case, the Court concluded that where secondary evidence is being relied upon to prove the existence of a trust, there must be clear and convincing evidence not only of the existence, but also the terms of the trust.

In particular (as explained in *Chase v Chase* [2020] NSWSC 1689), there needs to be evidence to satisfy the "3 certainties of a trust", that is:

- the identity of the beneficiaries;
- the property the subject of the trust; and
- the nature of the trust (ie whether fixed or discretionary).

Generally, to satisfy these tests, the successful cases are those where the text of the missing document has been able to be reproduced in full (see, for example, *Barp Nominees Pty Ltd* [2016] NSWSC 990). Furthermore, the court must be "vigilant, being fully cognisant of the dangers of error and fraud, and the gravity of the consequences flowing from any finding made" (see *Orifici v Orifici & Ors* [2007] WASC 74).

Here, the Court confirmed that while the schedule provided some basic information about the trust, it fell well short of providing clear and convincing proof of the contents of the trust deed.

Presumption of regularity

This presumption states that where "an act is done which can only be legally done after the performance of some prior act, the proof of the latter carries with it a presumption of due performance of the prior act".

In rejecting the potential application of this presumption, the Court confirmed:

- the issues arising from the loss of a trust deed clearly extend beyond mere adherence to formal requirements – and instead extend to encompassing substantive issues;
- here the issue was not whether the formal steps to execute the trust deed had been taken – rather the issue was to the underlying substance and terms of the lost trust deed;
- the presumption of regularity cannot be relied upon to overcome a lack of evidence as to the content of a lost trust deed.

Failure of trust due to uncertainty

In what is arguably a timely reminder for all trust advisers, the Court confirmed that the obligation to act in strict conformance with the terms of a trust deed is "perhaps the most important duty" of a trustee (see *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15).

Where, as here, the deed has been lost, a trustee cannot discharge this overriding obligation and will be, again as the trustee was here, held to be acting in breach of trust.

Therefore, it was held that the trust must be held to have failed due to the lack of certainty of its terms. Indeed the Court confirmed that any decision by it that permitted the trustee to continue to deal with trust assets and administer the trust would effectively have amounted to sanctioning further breaches of trust.

Resulting trust

The Court confirmed that where a trust "fails ... or is ineffectually declared, or becomes incapable of taking effect", including due to uncertainty (due to a lost trust deed), an automatic resulting trust arises by

operation of law. This means that the trustee holds the trust property on trust for the settlor or the settlor's estate (see *Morice v Bishop of Durham* (1805) 10 Ves 522 and *Re Vandervell's Trusts (No 2)* [1974] EWCA Civ 7).

In other words, where a trust fails, the trustee holds all property, rights and assets it acquired in its capacity as trustee, as well as any further income arising from the trust property, on a resulting trust for those who contributed property to the trust.

In particular, the trust property "revests" in the settlor an equitable interest in the trust property, to ensure that the failure of the trust does not see the trustee retain any beneficial interest in the assets of the trust.

Here, the evidence supported a conclusion that a key beneficiary was responsible for establishing the trust and transferring property to the trustee. This provider of the trust property was the person in whom the equitable interest was held to vest and in whose favour the resulting trust arose. This was despite the fact that the settlor of the trust deed was in fact this beneficiary's father.

While the Court confirmed its view that at law the resulting trust that arises is not a "new trust" (because it arises "automatically"), it seems probable that revenue authorities would conclude that there is both a taxable and dutiable event at the time of the resulting trust (that is the point in time that it is determined the trust deed was lost).

Duty to account

Trustees have a duty to account to the beneficiaries of a trust, including a resulting trust, from the date of establishment of the trust.

The duty of a trustee to account is not contingent on establishing any breach of trust by the trustee.

Where a resulting trust arises due to a lost trust deed there will normally, as was the case here, be some difficulty in determining a precise point in time when the resulting trust is "established" (and the duty to account enlivened).

Here the Court confirmed that the making of distributions by the trustee, in the absence of a trust deed, was a clear breach of duty. Therefore, the trustee was ordered to account to the beneficiary of the resulting trust, from the point in time it was determined the trust deed had been lost.

There was however a cap on this accounting due to the impact of the statute of limitations, which meant that accounts were only ordered for the period commencing six years before proceedings in the case were instituted.

Conclusion

As is the case in every lost trust deed situation, all of the issues that arose in *Vanta* would have been avoided had the trustee discharged its duty of ensuring not only was the original trust deed kept securely, but also read; and complied with.

In other words, in addition to securely storing constituent trust documents; the trustee (and its advisers) should also have embraced both the "read the deed" and "heed the deed" mantras