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Implications for missing trust deeds in recent court case

by Miranda Brownlee, Deputy editor, SMSF Adviser

A recent case handed down by the Supreme Court of Victoria offers some important lessons on lost SMSF trust deeds.

Speaking to SMSF Adviser, View Legal director Matthew Burgess said issues relating to lost trust deeds appear to be coming before the courts increasingly regularly, possibly in part driven by the 'know your client' regime.

“Arguably there is also an increasing awareness of advisers of the risks for trustees in adopting non-court sanctioned remedies such as simply signing a 'deed of confirmation' where an original - and wet signed - SMSF trust deed can not be located,” stated Mr Burgess.

“The increase in court cases is despite the fact that in the context of SMSFs, a court application for adopting a new trust deed is sometimes seen as being unlikely to be necessary from a trust law perspective.”

Mr Burgess noted that just last week, the Supreme Court of Victoria handed down yet another court case involving a lost SMSF trust deed.

The recent decision, *Application by Ellasil Pty Ltd [2023] VSC 69*, involved an application by the corporate trustee of an SMSF, Ellasil Pty Ltd, seeking orders and directions as to the validity of the deed of the fund and the validity of death benefit nominations made by members of the fund.

While there was evidence that the fund was first established in 1979, the original deed to the fund from 1979 could not be located.

Several amending instruments, the earliest of which is dated 9 October 1989, as well as a later document purporting to be a deed of trust in respect of the fund, likely prepared in 2015, were however available.

Several other documents relating to the conduct and administration of the fund were also available. This included minutes of meetings, financial statements and a deed of appointment dated 1 July 1996 which purported to appoint Ellasil as trustee of the fund. In addition, various death benefit nominations purportedly made by the members of the fund over the course of its operation were in evidence.

Given that the original trust deed for the fund could not be located, Mr Burgess said the court was faced with a “relatively complex factual matrix”.

“There were also numerous gaps in the chain of deed updates over the years, and questions as to the validity of certain deed changes that were before the court due to apparent errors in signing and failures to date the documentation,” he stayed

In her decision, Justice Kate McMillan referred to the decision *Orlanski v Spiegel [2015] VSC 662,* which appears to accept that deeds of confirmation are a valid solution in circumstances where original trust deeds are thought to be lost.

“However critically in that case, the original trust deed was found five years after the deed of confirmation was executed and did in fact contain sufficient powers for the adoption of the deed of confirmation,” noted Mr Burgess.

“This proven provision of the original trust deed was critical in supporting the decision by the court to accept the validity of the deed of confirmation.”

Mr Burgess noted that in *Ellasil*, the original deed was not before the court, and therefore the court had to rely on threads of evidence to firstly establish that there was in fact a trust deed that had validly established the SMSF.

The court also found that it is only in cases where the original trust deed is available, but supplementary deeds are missing, that “the presumption of regularity is of any relevance”, he said.

“The presumption of regularity states ‘where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act,” explained Mr Burgess.

“In *Ellasil*, based upon the references in the 1989 deed, the 1996 deed and the 2015 deed, it was accepted by the court that in or around 25 June 1979 a deed of trust establishing the fund was validly executed and that despite a number of questionable aspects to the validity of its purported adoption, the 2015 deed of variation was able to be relied on by the trustee as the trust deed for the SMSF,” he said.

In terms of death benefit nominations, in Ellasil there were various undated nominations, nominations dated 3 December 2005, a nomination dated 7 December 2006 and a nomination dated 2017.

There were doubts expressed by the court as to the validity of nominations made in 2006 as the deed in force at that time did not permit BDBNs, Mr Burgess said.

“However, given that the 2015 deed was held to be effective and the 2017 BDBN was valid in accordance with that deed of variation, and otherwise at law, the trustee was justified in relying on it,” he explained.

Mr Burgess noted that the factual matrix in Ellasil is analogous to one of the specific situations explored in his workshop at the SMSF Association National Conference last week.

“Namely [that] multiple BDBNs with uncertainty as to the validity of trust deed updates, and indeed the fact that the original trust deed was lost, might ultimately mean each BDBN was invalid,” he stated.

With disputes over the validity of trust deeds and other documents now becoming more frequent, Mr Burgess warned there will be "no slow down in work for specialist SMSF advisers".

“The litigation lawyers running matters disputing aspects of SMSF arrangements such as trust deed provisions and BDBNs [are also] becoming increasingly busy,” he said.