



WEEKLY TAX BULLETIN

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Lost trust deeds – a good news story (as long as you ignore all the costs)

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Arguably one of the most critical duties of a trustee of any trust is to know the terms of a trust deed and keep the original, and at least before November 2021, wet (that is, not electronically) signed trust instrument safe and secure.

This trustee duty is very difficult, and indeed often impossible, to discharge if the trust deed is lost.

The case of *Mantovani v Vanta Pty Ltd (No 2)* [2021] VSC 771 starkly demonstrated 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, a decision explored in this Bulletin following its release (see 2021 WTB 49 [1171]).

In many respects the appeal decision in *Vanta Pty Ltd v Mantovani* [2023] VSCA 53 (“Vanta”) further reinforces the serious consequences that arise from lost trust deeds – at least from a costs perspective. This is despite the fact that in relation to all key questions the decision in *Vanta* reverses the conclusions reached in the initial judgment.

Key questions considered

As set out in the previous article, the factual matrix in *Vanta* centred around a trust that where, despite extensive searches, only the schedule of key details could be located.

Both at the initial trial and on appeal the court in *Vanta* considered the following 6 key issues - with the conclusion also noted briefly, before being explored in more detail below in relation to the appeal decision:

- 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 – although this conclusion has now been reversed on appeal
- Question 3: Could the presumption of regularity be relied upon to save the trust from failing? Answer: No



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- Question 4: Did the trust fail for uncertainty? Answer: Yes – although again this conclusion was reversed on appeal
- 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 - although this conclusion was essentially made irrelevant due to the appeal decision determining that the trust had not failed for uncertainty
- 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 – again however this was a conclusion which was reversed on appeal given the trust was held to have not in fact failed

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 in *Vanta* concluded both in the initial decision and on appeal that 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 remains *Maks v Maks* (1986) 6 NSWLR 34 (“Maks”).

In *Maks* 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 the previous article), 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 (i.e. whether fixed or discretionary).

Historically, to satisfy these tests, the successful cases have been those where the text of the missing document has been able to be reproduced in full.



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In *Vanta*, the court in the initial trial therefore 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. Thus, the trust necessarily failed for uncertainty.

On appeal however the court concluded that the adoption of the 'clear and convincing' proof test explained in *Maks*, can produce 2 anomalies which meant it can be misconceived, namely:

- it imposes too high a burden on the party endeavouring to prove the existence of the relevant facts, rather than respecting the reality that there can be a range of secondary evidence (oral and written) which assists in establishing the contents of a missing document, provided the facts and inferences to be drawn are established on the balance of probabilities; and
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- in a number of cases (including the initial trial judgment in this case) the emphasis on the strictness of this test conveys that, in the case of a missing document, only a facsimile or duplicate of the original document in its entirety will suffice in establishing sufficient proof of the terms of the document, which is incorrect given it essentially implies that almost all (if not all) of the terms of the deed need to be proven to avoid a finding that a trust has failed for uncertainty.

Instead therefore the key question is whether there is sufficient proof of the essential terms of the deed such that the missing deed does not cause the trust to fail for uncertainty. In the absence of a full copy of the deed, proof of the relevant facts and inferences (to be drawn from those facts) can be established on the available secondary evidence.

Failure of trust due to uncertainty

In what arguably remains a timely reminder for all trust advisers, the trial judge 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, there is – despite the appeal decision in *Vanta* - a material risk that a trustee will be held to be unable to discharge this overriding obligation and will be held to be acting in breach of trust.

At the initial trial it was concluded 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.

On appeal however, in direct contrast to the trial judge, the court in *Vanta* confirmed that:



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- there was sufficient evidence available as to the essential provisions of the trust to hold that it subsisted and remained valid;
- the court has the power to make orders or give directions as to the further administration of a trust, including adducing of further evidence, determining the likely duration of the Trust and making orders as to the scope of the trustee's management powers;
- the court can also make any other orders to ensure that the trust is administered as intended;
- a conclusion that a trust remains validly in existence is a far more preferable approach if it is consistent with the accepted evidence of the key parties (eg the settlor and trustee) and the court should generally be reluctant to declare a trust as failing for uncertainty.

Arguably however, the fact that the lost trust deed caused both the initial trial and appeal case, with each reaching radically different conclusions on the key issue, it should be a stark warning to all trustees and their advisers. Indeed, the what would in all likelihood have been material costs of the court cases further reinforces the adverse consequences that can flow from lost trust deeds.

The following key conclusions (each explore in more detail in the previous article) from the initial trial decision were essentially undisturbed on appeal in *Vanta*, noting that following the appeal decision the trust was held to be in existence meaning that strictly these issues were no longer relevant for this particular case:

- Presumption of regularity (that is the presumption 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');
- Resulting trust (that is, 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, which means that the trustee holds the trust property on trust for the settlor or the settlor's estate;
- Duty to account (whereby trustees have a duty to account to the beneficiaries of a trust, including a resulting trust, from the date of establishment of the trust if a trust deed has been lost).

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; and also read - and complied with.



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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 explored in many previous articles in this Bulletin.

The appeal decision in this case does however seem to provide some comfort for those that are involved with lost trust deeds, particularly given analogous cases such as:

- Re Cleeve Group Pty Ltd [2022] VSC 342, where it was confirmed that if there is a fully copy of the deed (even if unexecuted), there is either no need to prove the terms through 'clear and convincing' evidence, or, if there is, the terms of the draft documents provide that 'clear and convincing' evidence; and
- D R McKendry Nominees Pty Ltd [2015] VSC 560, where a lost trust deed was accepted as being in the form of a solicitor's usual pro forma deed from the relevant era.

