SMSFAdviser

KYC principle important to avoid legal consequences of lost trust deeds, advises lawyer

By Keeli Cambourne, Deputy Editor SMSF Adviser and Matthew Burgess, Director, View Legal

Advisers need to adhere to the KYC (Know Your Client) mantra in light of a rash of court cases in relation to lost trust deeds.

Matthew Burgess, director of View Legal, said case law in relation to lost trust deeds appears to be growing at an exponential rate in recent years.

He emphasised while the KYC principle has a material impact on the increase in court cases, there is more at play in the issue.

Mr Burgess said a recent decision illustrates how there is a convergence of issues presently that are seeing more cases come before the judiciary.

In just one week there were two cases before different courts which highlighted separate lost trust deed issues, he said, but also showed how important it is for advisers to be aware of their clients' wishes and history when administrating an SMSF.
The two cases – Application of DEK Technologies Pty Ltd as trustee for DEK Technologies Unit Trust & Ors [2023] NSWSC 544 and BAGI Pty Ltd trading as atf Nick Ristevski Family Trust v Marka Ristevski [2023] NSWSC 567 – consider different aspects of a trust deed, he explained.

"In this first decision, the key data retained by the deed provider (such as type of trust, trust names, establishment dates, settlement sums, applicable laws and details of the settlors, trustees and beneficiaries) was combined with the likely base deeds from the relevant era maintained by the deed provider to allow the court to approve the trustees managing and administering multiple trusts pursuant to the relevant terms," he said.

The case also highlighted some other areas of which advisers must be aware, including an increased awareness of advisers about the significant risks associated with relying on anything other than a wet (not electronically signed) original trust deed.
Mr Burgess said trustees must also be more aware of the single most important trustee duty of any form of trust: to know the terms of the trust deed and keep the original trust instrument safe and secure.

"Another related issue is that beneficiaries and their advisers, must be increasingly aware of their rights against trustees and advisers for a failure to discharge trustee duties, arguably fuelled by widely reported decisions including in this publication involving high net wealth families such as Rinehart, Smorgon, Twigg (Cleanaway), McLaren (Jalna yoghurt) and Cardaci – as well as many other similar cases involving families not with as high public profile, such as Mantovani, Re Owies and Cleeve," he said.

"There is also the issue of the intergenerational wealth transfer from the baby boomer generation – many of whom were the first to embrace trust structures in modern Australia, and the, anecdotal, focus on controllers of trusts wanting to limit benefits being provided to lineal descendants or bloodline family members, and needing to know the exact terms of the original trust deed in order to achieve their objectives."
Although revenue consequences of lost deeds are not generally mentioned in the court's decision, they do flow on from lost trust deeds, Mr Burgess said, and can be seen as a further element of the convergence causing the increasing number of cases.

The decision in BAGI Pty Ltd trading as atf Nick Ristevski Family Trust v Marka Ristevski [2023] NSWSC 567however illustrates the commercial complications that can arise from a lost trust deed that also can have stamp duty consequences.
In the facts of the case, a trust deed for a discretionary trust was lost, then (partially) found.

The court head that the trust deed of the Nick Ristevski Family Trust was executed in 1989 but the original signed deed went missing sometime in the early 2000s.

When neither the original nor a copy of the deed could be found in 2015, the trustee arranged for the original deed to be replaced with a new trust deed (titled as a 'confirmation deed') without any knowledge of what the original terms of the trust deed were. The case does not explore whether the approach was even permissible at law, nor the tax or stamp duty consequences of the approach.

However, in 2020 an incomplete copy of the 1989 deed was found, which contradicted the 2015 confirmation deed in a number of areas, including the definition of the beneficiaries of the trust.

Mr Burgess said fortunately the copy of the original deed did contain a power of variation that in essence validated the ability under the deed to enter into the 2015 confirmation deed.

The ruling confirmed the court would rectify the erroneous terms of the 2015 confirmation deed, but it also confirmed the trustee was justified in acting in the administration of the trust on the basis of the confirmation deed.
While the court made no comments on the stamp duty consequences of the decision to the extent any of the trust property was dutiable, it does appear that there is an exposure to duty in most states with the adoption of a confirmation deed, particularly in NSW, Mr Burgess said.

"That is, any deed of confirmation approach could be seen (depending on the location of trust assets) as a resettlement, trust acquisition or (at least under the NSW duty regime) a declaration of trust," he said.

"For example, even where a full photocopy of the original trust deed is held, there is a risk in NSW that based on the accepted interpretation of the definition of a 'declaration of trust' any declaration (a very broadly defined term in this context) which meets the statutory description is in turn a 'declaration of trust' for stamp duty purposes.

"Thus, a confirmation deed, even if it, in fact, has no legal effect, as may well have been the situation with the 2015 confirmation deed in this case, will still cause a duty event, based on the unencumbered market value of the dutiable property of the trust at the date of the deed (see DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties (NSW) (1982) 149 CLR 431).

"While there are cases that conclude that a merely confirmatory declaration is not dutiable, these decisions are arguably irrelevant as they focus on the concept of a 'settlement of trust' rather than the broader concept of a 'declaration of trust' (see Wedge v Acting Comptroller of Stamps (Vic) [1941] HCA 1).

"That is, confirmation deeds clearly should not amount to a settlement (as long as there is sufficient evidence to prove up the existence of the trust), however there is also clearly a declaration which arguably meets the statutory description under section 8(1)(b)(ii) of the NSW Duties Act [1997], which does not require there to be a declaration of 'new' trust."

There is a counter argument, in NSW at least, that the 'double duty' exemption in section 18(6) might apply to confirmation deeds.

"That is 'the duty chargeable on a declaration of trust that declares the same trusts as those upon and subject to which the same dutiable property was transferred to the person declaring the trust is $10 – if ad valorem duty was paid on the initial transfer'," Mr Burgess said.

“Furthermore, if the terms of the original trust are unclear, the prospects that a tax resettlement are triggered by confirmation deeds must also be considered. “

Mr Burgess said it is important for advisers and trustees to consider that with trusts that hold dutiable property there are a number of steps that should be followed.

First, they should make it clear that the underlying beneficial interests of the beneficiaries of the trust remain unchanged, despite the provisions of the deed of confirmation or rectification.

And second, that including clauses in any deed of confirmation or rectification to nullify anything that otherwise triggers stamp duty, noting that the validity of such provisions, from a trust law perspective at least, is questionable.