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Court rulings in lost trust deeds are no longer set in stone

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

1 Lost trust deeds are becoming a more frequent issue for SMSFs and the legal ramifications are no longer set by precedent, warns a legal expert.

2 Matthew Burgess, director of View Legal, said although the pre-eminent case that dealt with lost trusts deed – Maks v Maks (1986) 6 NSWLR 34 – is still important, in the past few months there have been other court rulings that have indicated the test which applied to the issue is perhaps too narrow.

3 "In the lead up to another 30 June, it is timely to consider one of the most important issues leading to potentially seeing trust distributions fail, that is the trustee having custody of the original trust deed," Mr Burgess said.

4 "Arguably the leading case in relation to when a court will allow a trustee to rely on secondary evidence where a trust deed has been lost is Maks v Maks (1986) 6 NSWLR 34."

5 In this case, both parties lived in a number of homes purchased by the defendant in his own name.

6 The plaintiff sought a declaration that the defendant in fact held a half share of the relevant property 'on trust'.

7 The plaintiff argued that a document had been signed by both parties which amounted to a declaration of trust. The alleged document was never produced at trial. On balance, the court considered a document did exist, however the judge was not prepared to make a finding as to the terms of the document.

8 "It seems apparent from the decision, there was no argument put forward as to the nature of the terms of the missing document," Mr Burgess said.

9 "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."

10 However, Mr Burgess said the more recent case of Vanta Pty Ltd v Mantovani [2023] VSCA 53 (Vanta) in which the only page of the trust deed that was available for the Mantovani Family Trust was the schedule containing minimal information for the trust, such as naming the trustee, settlor and some beneficiaries initially applied the ruling from the Maks case, but on appeal it was argued that it was too narrow and found that as long as there was certainty about the core issues of the deed it could not be overruled or changed.

11 In the appeal, it was held that the trust still existed, however, the trustee was directed to seek judicial direction on the continued administration of the trust.

12 "Although the starting line [in court cases dealing with lost trust deeds] is likely to still be the Maks decision, the last couple of cases around this issue show that the Maks ruling won't be applied quite as strictly," he said.

13 "The bottom line is that if there is a lost deed and you have to take court action, it is up to the court to interpret what happens and whether the judge may be lenient towards it.

14 “As an adviser it is a scary prospect. There have been five lost deed cases in the past view weeks and it is abundantly clear that you need to know your clients and demand a wet signed original deed.

15 “Whether the courts are softening their position on lost deed is not the key point. It is about people having to go to court and the decision is made at the whim of judges in any factual matrix.

16 “Maks is a classic example of building an argument but not being able to back it up with evidence, while Vanta was a bit different in that they had components of schedule but the court had to make up the other 30 pages of documents."