

Knowing your client could be the difference between winning or losing lost deed case

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

The 'know your client' rule can become instrumental in lost trust deeds if they end up before the courts, a legal expert says, as decisions continue to evolve around the ever-increasing problem.

Matthew Burgess, director of View Legal, said there has been a huge rise in the number of court cases involving lost trust deeds for SMSFs driven mainly by the banking sector.

"There have been more cases [of lost trust deeds] this calendar year than in the past 20 years," Mr Burgess said. Although there has been more flexibility in many of the judgements passed regarding lost trust deeds, the cost involved in having to seek legal action can impact an SMSF significantly, he said.

Mr Burgess said a useful decision in this space is the case of *Sutton v NRS(J) Pty Ltd* [2020] NSWSC 826.

"In this case, the trustee provided the court with what appeared to be a full photocopy of a trust deed, dated on establishment in 1972," he said.

"At all times all relevant parties had acted on the assumption that the photocopy was indeed a true and full copy of the original deed (which had been misplaced).

"A financier for the trust operating under the 'know your customer' policy mandated production of the original trust instrument for sighting, to ensure the trust's constituent documents were in order.

"Given the trustee was unable to produce the original deed, the application to court was made, with part of the evidence also including a further photocopy of the deed that was located with the law firm who originally drafted the trust deed."

The court confirmed:

- Generally, in the absence of evidence to the contrary, it can be presumed from the taking of the action that the formalities have been complied with. That is, a presumption of regularity may apply to the effect that where an act is done which can be done legally only after the performance of some prior act, proof of the later act carries with it a presumption of the due performance of the prior act. See for example *Harris v Knight* (1890) 15 PD 170, and the case of *Re Thomson* [2015] VSC 370 where an unsigned SMSF trust deed was assumed to have been properly adopted, even though the relevant trustee had subsequently died.
- In this case however, there was no need to prove by inference that any formality had been complied with. The photocopy of the deed was signed and the evidence established directly that the parties concerned had always acted on the basis that it set out the terms of the trust.
- In this type of situation it was held that the Court should assist those responsible for the administration of the trust by ensuring that they can continue to administer it as if the photocopied deed was the trust's constituting document.
- The way this was achieved here was for the Court to formally order that the trustees of the trust were justified in administering the trust on the basis that the photocopy of the deed that was annexed to the Court order was a true copy of the original trust deed.

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A similar outcome, based on a similar factual matrix, was also reached in the decision of *The application of M & L Richardson Pty Limited* [2021] NSWSC 105.

“Similarly in *Re Cleeve Group Pty Ltd* [2022] VSC 342, it was confirmed that where 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,” Mr Burgess said.

“*D R McKendry Nominees Pty Ltd* [2015] VSC 560 provides another example of where a lost trust deed was accepted as being in the form of a solicitor’s usual pro forma deed. In contrast, however, in *Mantovani v Vanta Pty Ltd (No 2)* [2021] VSC 771 in the absence of any evidence as to the terms of the deed, the schedule alone was held to be insufficient.”

Mr Burgess said in *Sutton* case, the court had to be certain the photocopy produced was of the original deed, but the trustee was still forced to go to court and pay the costs with no guarantee that it would accept the photocopy.

“As is set out, the courts are obliged to consent as to whether they are satisfied it is fact a true representation of the original deed, then they will recreate it,” he said.

“The court’s decision will be final and I think in all these cases that have come through all key parties have supported the application.

“If there appears to be a true photocopy, it’s a relatively easy process to get through the court, but if the trustee only has one to two pages of a 40-page deed no one has any idea what the rest of the deed may say.

“In fairness to the banks that is why we are seeing so many more cases coming through the courts as the banks want to be able to enforce their own security.”

