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Trust Deeds: What to do when all is lost?

For lawyers and other advisors who regularly deal with trusts, the golden rule is to always "read the deed". However, what can be done if the deed has been lost?

For lawyers and other advisors who regularly deal with trusts, the golden rule is to always "*read the deed*". Commonly, trustees continue to administer trusts (sometimes for many years) on the basis of mistaken assumptions about the terms of the trust, which could have been avoided by properly reading the trust deed.

However, what is a trustee to do if the original executed deed has been lost? This can cause many issues for a trustee, including being unable to:

- determine the proper classes of income and capital beneficiaries;
- produce the original or certified copy of a deed to banks and other institutions when opening or operating accounts;
- produce the original deed during litigation or upon request by a beneficiary; and
- ensure that any variations to the deed and any retirements / appointments of trustees or appointors are valid.

Replacing a lost trust deed

The trustee simply executing a new or replacement trust deed is generally not an option. This is highly likely to result in the resettlement of the trust. Resettlement occurs where the trust formed under the lost trust deed is considered to have ended and been replaced by a new trust, formed under a new trust deed. A resettlement will generally amount to a deemed disposal of the trust assets, potentially triggering significant capital gains tax and stamp duty implications.

Deed of Ratification

If the trustee can locate at least a copy of the executed deed and the matter is uncontentious, then the trustee can consider entering into a deed of ratification.

A deed of ratification records the agreement of the trustee and all other relevant parties that the copy of the deed accurately records the terms of the trust, and indemnifies the trustee for administering the trust on that basis. Ideally, such a deed is be signed by all persons concerned with the trust, including the trustee, settlor, appointor / guardian, and all primary beneficiaries and other discretionary beneficiaries.

This is not a perfect solution for the trustee. It may not be accepted by all third parties (such as banks) as sufficient to replace a lost original, and may still be open to challenge by beneficiaries, particularly any beneficiaries who were not parties to the deed. Additionally, there is also a risk that a deed of ratification will be considered to be a resettlement with adverse tax implications for the trust.

Applying for advice and directions from the Court

The safest course for a prudent trustee is to apply for judicial advice and directions in relation to the lost deed.[1] This enables the trustee to obtain the protection of the Court in relation to a proposed course of action.

In particular, if the trustee has been administering the trust on the basis of certain terms or a copy of a deed, it can seek advice and directions from the Court that those are the correct terms of the deed and the trustee would be justified in continuing to administer the trust on that basis. If the Court gives that advice, the trustee is then protected from liability for the subsequent administration of the trust in accordance with the Court's advice.

In order to obtain this advice from the Court, the trustee must establish:

(a) that an original, executed trust deed existed;

(b) that the original deed has been lost; and

(c) that the original deed was in the form proposed by the trustee.

(a) Determining if original trust deed existed

Where a copy of what is asserted to be the executed deed is available, it will generally be uncontroversial to establish that an original deed existed.

However when the trustee is unable to locate a copy of the executed deed, the trustee will need to produce evidence from persons involved in the drafting and execution of the trust deed. The Court will then determine, on the balance of probabilities, whether an executed trust deed ever existed.

If the Court concludes that an executed deed did not exist, the Trust will fail.[2]

(b) Determining whether the trust deed has been lost

To establish that the trust deed has been lost, the trustee is required to make reasonable enquiries and searches for the original copy of the deed.

This will generally require a trustee to undertake a substantial exercise. For example, in the recent decision of *Re Cleeve Group Pty Ltd* (*Cleeve*),[3] the Supreme Court of Victoria was satisfied that a trustee had made reasonable inquiries and searches for an original trust deed after the trustee contacted:

- relevant members of the family;
- the accountants who were retained to incorporate the company trustee and prepare the trust deed;
- the lawyers who were engaged by the family accountants to draft the trust deed;
- the person who was listed as the settlor of the deed on a draft copy;
- the bank with whom the trustee had a bank account and granted a charge, guarantee and indemnity;
- the ATO;
- various law firms which provided advice to the family across the relevant period; and
- three other major Australian banks in case the trustee ever held a bank account at those institutions, despite the trustee not being aware of any such accounts.

(c) Ascertaining the terms of the original trust deed

If a trustee has a photocopy of the executed trust deed and the parties have always acted on the basis that the copy contains the terms of the trust, the Court will readily find that those are the terms of the original deed.[4]

However if no copy of the executed deed can be found, the Court will need to hear secondary evidence from the trustee and any contradictor contesting the terms of the deed. That may include testimony from persons involved in the drafting and execution of the deed. Proving the terms of the original trust deed requires 'clear and convincing' evidence.[5] However, the type and cogency of proof will vary in any given case.[6]

After assessing the evidence provided, the Court will determine whether, on the balance of probabilities, the terms of the original deed were in the form proposed by the trustee.

Applying for advice and directions from the Court can be a costly process. However, it is the only avenue which provides proper protection for a trustee in carrying out their duties in the absence of an original trust deed.

Conclusion

If an original trust deed has been lost, then the appropriate course of action for a prudent trustee is to seek advice and directions from the Court. However, as is evident above, in many cases this means a complicated and costly application, particularly if it is disputed. It is much preferable to avoid that situation entirely by taking proper care in storing the original trust document.

If you are in need of assistance in this area, please feel free to contact us to discuss. We have specialised knowledge in advising trustees on the proper management and administration of trusts, and also offer services including the storage of original documents (such as trust deeds) in safe custody.

[1] Under the various state and territory trust legislation. In South Australia, an application is made pursuant to the *Trustee Act 1936* (SA) s 91 and the *Administration and Probate Act 1919* (SA) s 69.

[2] *Re Cleeve Group Pty Ltd* [2022] VSC 342.

[3] [2022] VSC 342.

[4] *Application of NBT Pty Ltd* [2023] NSWSC 919.

[5] Ibid; *Maks v Maks* (1986) 6 NSWLR 34.

[6] Above n 4, at [26].