

Lost deeds can destroy the trust

Trusts are most commonly established by a deed. Those deeds contain the terms or rules that control how the trust can be used, and the rights and duties the various parties to the trust have or owe. In our experience, trust deeds are regularly misplaced and lost.

A lost deed poses numerous problems, two of which are particularly worth noting.

First, the trustee of a trust is under an equitable duty to know the terms of the trust that they manage. This may not sound like an issue for the pragmatic investor who simply uses their trust as an investment mechanism or for concessional tax outcomes. But Courts have shown little reluctance in concluding that a trustee does not know the specific terms of the trust when the deed has been lost.

A recent example can be seen in the case of *Jowill Nominees Pty Ltd v Cooper* [2021] SASC 76. The Court held that it is very difficult for a trustee to discharge their duty to know and manage the trust when they don't have a copy of the governing rules of the trust.

Second, and perhaps even more problematically, if the original deed is lost then it may be difficult to prove that the trust exists at all. This was the case in *Mantovani v Vanta Pty Ltd (No 2)* [2021] VSC 771. In that case, the trust deed had been lost and there was not enough secondary evidence to show that the trust was in existence. By secondary evidence, we mean documents and dealings that clearly showed the identities of the beneficiaries, the property of the trust, and the nature of the trust (i.e. fixed, discretionary, SMSF, etc).

The Court held that the trust failed due to uncertainty, which means that without the trust deed the terms of the trust, and the parties to the trust, were unknown. This was arguably the better outcome for the trustee; had the court found that there was a trust then, pursuant to *Jowill* above, the trustee might have been found to have breached their duty to the trust by not knowing the terms of the trust.

In *Vanta*, the Court then confirmed that a failed trust automatically gives rise to a resulting trust. A resulting trust means that the trustee holds the property on trust for the settlor. This means that the property of the trust 'reverts' (effectively returns) to the person who contributed that property (i.e. an equitable interest returns to the settlor), rather than the beneficiaries.

This probably wouldn't be a problem if the settlor still wanted to establish a trust with that property for the beneficiaries; but if the settlor had passed away, for example, then that property would go into their estate and be dealt with by the executor. There is material risk that the executor would not consider the trust

beneficiary's interest as relevant. And that's not to mention the catastrophic tax consequences that could flow as a result of such a re-vesting.

The importance of safely keeping the original establishment deed of a trust cannot be overstated, and yet deeds are lost with surprising regularity. Losing the deed can have deleterious consequences for both the trustee and the beneficiaries.

All deeds should be scanned as those electronic copies may be invaluable if the original is misplaced.

We can offer advice and services relating to lost deeds and an independent vault for scanned copies.

If you've suddenly broken out into a cold sweat because you're not sure which of those boxes in the attic contains the original deed, go have a look - and call us if you need a solution.

For more information on any aspect covered in this article, please call SUPERCentral on 02 8296 6266 or email info@supercentral.com.au.