



Court cases involving lost trust deeds

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A lost trust deed can be very inconvenient for the trustee or administrator of the Trust. It can make the role of the Trustee and the administration of the Trust itself very difficult (and sometimes impossible), to undertake. In this article, we look at some recent cases involving a lost Deed, the impact of that loss and the considerations and/or orders of the court in each matter.

Re Thomson [2015] VSC 370 (31 July 2015)

A superannuation fund was established by Deed in 1986 and updated by Supplementary Deed in about 1990. The Supplementary Deed was lost. An update by Deed occurred on 25 June 2000 but that copy was unsigned.

The 1986 Deed appointed Mr T and Mr C as trustees. The 2000 Deed had Mr T and Mrs T as trustees.

The bank had accepted the 2000 Deed as giving authority.

Mr T died and his executor wished to terminate the Superannuation Fund and pay the balance to his estate. A presumption of regularity applied; Mr T and Mrs T had signed financial statements from at least 2006 to 2013.

The court ordered that the operative Deed was the 2000 Deed and that the Fund property be vested in the executor and the Fund be wound up.

Re Porlock Pty Ltd [2015] NSWSC 1243 (28 August 2015)

An application for judicial advice was sought. A trust was established in 1957 and the applicant was the trustee. The trust deed was missing and the trustee sought advice as to the terms on which it holds trust property.

The court (in NSW) had no power to recreate a trust deed.

A former but now retired accountant had written a letter referring to some terms of the Trust. The court commented that there were very few authorities on what one does when they cannot find a trust deed.

On the basis of the secondary evidence of the accountant's letter, the court ordered that the trustee was justified in managing and administering the Trust in terms of that letter.

D.R. McKendry Nominees Pty Ltd [2015] VSC 560 (26 September 2015)

A trust deed was executed in 1980 and was subsequently lost. Detailed evidence of searches, including an enquiry to the ATO, was given.

The solicitor who prepared the Deed gave evidence of establishing the trustee company and he produced a copy of the proforma deed he used at that time, stating that would be the same as the trust deed in this matter. A family tree of potential beneficiaries was produced and all had consented to orders.

A declaration was made that a Deed in the form produced by the former solicitor was duly executed and stamped and that the assets held in the name of the applicant company were held upon the terms of the family trust.

Sutton v NRS (J) Pty Ltd [2020] NSWSC 862 (28 June 2020)

A photocopy of a Deed of Trust dated 17 August 1972 was produced. This Trust was dormant for many years but activated when the principal took over the business. In June 2007, in accordance with that trust deed, there was a change in trustees to three (3) companies.

The banks for the Trust wanted to sight the original documents under a "know your customer" or "KYC" policy. Unless produced, the bank facilities would be withdrawn. A search for documents had only produced an identical photocopy.

The court did not have to rely on the presumption of regularity but could act on the photocopy Deed. The court was not prepared to make a declaration as all those interested were not before the court.

But the court would give judicial advice that the trustees of the Trust, settled by Deed dated 23 October 1972, were justified in administering the Trust on the basis of that document.

Chase v Chase [2020] NSWSC 1689 (20 November 2020)

An applicant sought an order that a now deregistered company held land purchased in 1981 on trust for himself and other family members. No written document establishing the Trust could be produced. There was secondary evidence that a Trust existed and that the land was held by the company on trust.

The court found that the secondary evidence was contradictory and unclear and did not amount to "clear and convincing proof" of the terms of the missing Deed.

Because of the lack of certainty on a number of relevant topics, the court refused the application.

Application by Brian McMahon Nominees Pty Ltd [2021] VSC 351 (18 June 2021)

A company was registered in January 1976, presumably as trustee of a family trust. The Deed could not be found nor could any copy. All that was located was a Deed of Variation dated 23 July 1997 which purported to recite some of the provisions of the original Deed including a power of amendment.

There was very little evidence of the execution or terms of the original Deed. Barry McMahon had died in 2011. A search then of his office and shed produced no original Deed or copy and enquires were made of solicitors in 2013. These were renewed in 2018.

Real estate was purchased in 1991 by the company.

The court found that there was a dearth of evidence about the original Deed and its terms. It gave the applicant further time to address matters raised in the ruling and return to court.

Jowill Nominees Pty Ltd v Cooper [2021] SASC 76 (24 June 2021)

South Australia is unique in having the provisions of Section 59C of the *Trustee Act 1936*; the power of a Court to authorise variations of a Trust.

On 10 February 1976, a Trust was created by the execution of a Deed. No original nor any copy of the original trust deed could now be found despite extensive searches.

In 2007, a letter was written by an accountant providing advice after reviewing the trust deed.

A solicitor who was in the firm in 1976 and who took over conduct of the family's affairs in 1990 produced a copy of his own family trust deed, prepared in 1978 using the firm's precedent at that time.

The family wished to wind up the Trust and distribute the assets. They applied for such an order. The court was satisfied that the criteria of Section 59C were made out.

It was not prepared to wind up the Trust, however, it would make an order varying the terms of the Trust to those contained in the solicitor's family trust deed, with parties substituted in place of the original trust deed as this involved less disturbance.

The Trustee could then proceed as it proposed.

Mantovani v Vanta Pty Ltd (No 2) [2021] VSC 771 (25 November 2021)

This was a contested case in contrast to the other matters which were ex parte applications.

The result of the dispute within the family would determine whether assets in a Trust remained in the Trust or were to go to the estate of the deceased mother to be dealt with under her Will.

The trustee company had been incorporated on 19 May 1976 and in 1976, the Family Trust was established.

No trust deed or copy could be located despite extensive searches.

The only document was a Schedule which set out some information. The parents had transferred a number of properties to the Family Trust and rental income and management were shown in the Trust financial statements. Distributions were made to two of four sons.

Six questions were asked and answered by the Judge:

1. Is the Deed lost? – **Yes**
2. Is there secondary evidence of the existence and contents of the Deed? There has to be “clear and convincing evidence” of both the existence and contents of the document. There was evidence of its existence but the secondary evidence as to its contents was insufficient for “clear and convincing” evidence and would involve guesswork – **No**
3. Could the presumption of regularity be relied upon to save the Family Trust – **No**
4. Did the Family Trust fail for uncertainty? - Vanta's action in administering the Trust without knowing its terms was a breach of trust. The court could not sanction it continuing – **The Trust fails for uncertainty.**
5. Was there a resulting Trust for the settlor or the settlor's estate? – **Yes.** In this case the Settlor, now deceased, was the father of the mother of the four children and the mother was the sole residuary beneficiary of her father's estate. The Trust assets were held on a resulting Trust for the now deceased mother.
6. Should an order for the taking of accounts and payments of amounts found to be due to the deceased mother's estate be made? – **Yes, limited to 6 years.** The children who had received benefits by way of distributions in that period would have to repay.

Note in this judgement a number of further cases concerning lost deeds were referred to:

1. Maks v Maks [1986] 6 NSWLR 36;
2. Barp Nominees Pty Ltd [2016] NSWSC 990;

3. Brailey Holdings [2018] NSWSC 1493;
4. South Melbourne Continental [2018] VSC 398;
5. M &L Richardson Pty Ltd [2021] NSWSC 105; and
6. Yap v Lee [2019] VSC 743.

Get help

If you are unable to locate the original trust deed or any copy of it, or for further assistance about any issue to do with your trust deed, please contact us.

Contact Daenke Lawyers

08 7477 8440

reception@daenkelawyers.com.au

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