STEP
Society of Trust and Estate Practitioners

ADELAIDE

LOST TRUST DEEDS - A SOUTH AUSTRALIAN PERSPECTIVE

~~8 MARCH 2011~~

Presented by Rod Luker LLB TEP Registered Tax Agent
Partner of Hume Taylor and Co Solicitors Adelaide

ALSA

LOST TRUST DEEDS – A SOUTH AUSTRALIAN PERSPECTIVE

By Rod Luker LLB TEP Registered Tax Agent

Partner of Hume Taylor and Co Solicitors Adelaide

'Wise men never sit and wail their loss, but cheerily seek how to redress their harms.'

- *William Shakespeare*[1]

Introduction

In its overview for the 2007-08 income year the Australian Taxation Office revealed the following taxation statistics:-

- 660,324 trusts lodged returns representing an 8.3% increase from 2006-07.
- 117,647 trusts had income in the rental, hiring and real estate services industry, representing the largest proportion (at 17.8%) of all industry identified trusts.
- Trusts purported total business income of $291.1 billion, a 7.5% increase from 2006-07.
- Total trust business expenses were $282.0 billion, a 15.1% increase from 2006-07.[2]

[1] William Shakespeare. *Great – Quotes.com*, Gledhill Enterprises, 2011. http://www.great-quotes.com/quote/25673.
[2] Australian Taxation Office, Australian Government, *Taxation Statistics 2007-08* http://www.ato.gov.au/corporate/content.asp?doc=/content/00225078. htm&page = 41&H41.

Trusts which lodged returns included deceased estates, various fixed trusts, hybrid trusts, discretionary trusts, fixed unit trusts, cash management trusts and public unit trusts. It would seem from those statistics that trusts and importantly businesses conducted through trusts play a very significant role in Australia. I suspect that many of those trusts would have been established by deeds prepared by legal practitioners in private practice. Like many legal practitioners involved in commercial work, estate and succession planning and private business client work I have prepared many trust deeds in order to establish a trust. From my experience I know that my job may not end there. Supplementary deeds are often required during the life of a trust. These may include:-

- Deed of Retirement of Trustee
- Deed of Appointment of Additional Trustee
- Deed of Appointment of New Trustee
- Deed of Variation of Powers of Trustee
- Deed of Revocation of Powers of a Trust Deed
- Deed of Retirement of Appointor
- Deed of Appointment of New Appointor
- Deed of Determination of Trustee
- Deed of Release.

I point out that superannuation entities are not included in those statistics I have referred to. Nevertheless trust deeds are involved with those funds. In my observations Self Managed Superannuation Fund deeds are being prepared in significant numbers for use by private business clients.

Routinely I have seen fit to prepare trust deeds and supplementary deeds as triplicate originals. I have supervised the establishment of trusts. In particular I

have supervised the appropriate execution and where appropriate stamping of deeds. I have wanted to be sure that what I create is a valid subsisting trust. We are all aware that since 1 July 2006 it has not been necessary to stamp deeds. I point out however that when assessing trust documentation we need to be sure that stamp duty issues were correctly addressed at the relevant time.

The fact that trust deeds and/or supplementary deeds do not now need to be stamped arguably makes the deeds appear less formal than if stamped. Moreover, if a corporate trustee is a party it is now common place for execution of the deed to be attended to pursuant to S127 of the Corporations Act 2001 Cwth without using a common seal. This too may make the deed appear less formal. I question if the greater informality lessens the apparent importance of the relevant deed as a valued document.

From my point of view it is nearly always the case that I have forwarded the fully executed triplicate originals of any such deed to the trustee of the trust or the authorised representative of the trustee. This representative has often been the accountant for the trustee. Whilst my law firm quite readily stores clients' wills securely it has been rare that we have stored or have been asked to store an original trust deed or an original supplementary trust deed. We do not see it as our duty to store these bulky client documents indefinitely. Even where scanning is an optional way of storing a copy of the trust deed I do not accept the view that we should take responsibility of storing a copy of the trust deed on a hard drive. That is not to say that we would not keep a copy until such time as the file may be destroyed. Moreover that is not to say that we would not keep original documents for certain clients for when we have a long term

relationship. It may well be prudent for any solicitor preparing a trust deed or a supplementary trust deed to reduce to writing the extent of the instructions received and the level of professional responsibility taken when acting in a matter involving trust deed preparation. In particular a letter to the trustee (care of the trustee's representative if need be) confirming that the trustee should ensure the security and preservation of the trust deed is perhaps worthwhile. Arguably any supplementary trust deed should annex a copy of every relevant preceding deed. In any event any trustee for whom I act should be left in no doubt as to the key responsibilities of a trustee and especially the need to be able to access the very deed or deeds comprising the trust.

It goes without saying I would hope no professional gives advice on the particulars of a deed without reading and considering the actual deed or a satisfactory copy of the deed. My view in this regard extends to the preparation of any resolution by a trustee or trustees when that document has not been specifically checked against the deed.

What can or should be done with the deed or deeds?

I refer to the Registration of Deeds Act 1935 South Australia and in particular S31. It is worthwhile me reproducing that section in its entirety.

31 – Deposit of documents affecting land

(1) Any person may deposit in the registry office and the registrar shall receive, for safe and perpetual custody and reference, any original or duplicate original deed, agreement, writing, assurance, map, or plan which relates to or affects or may affect land within the State or by which any legal or equitable title to such land may be manifested.

(2) The registrar shall immediately after the receipt of any such instrument number it with a distinguishing number and the year in which it is

deposited, as, for example, “No. 1 of 1935”, and shall give to the person depositing the instrument a memorandum of deposit in writing signed by the registrar, and in the form in Schedule 7.

(3) The registrar shall carefully and securely keep every instrument deposited under this section in the registry office placed in numerical progressive order according to the year in which it was received.

(4) The registrar shall produce, at the registry office, any instrument deposited under this section to any person requiring such production, and allow him to inspect such instrument.

(5) The registrar shall, when required, give to any person an attested or unattested copy of or extract from any instrument deposited under this section.

(6) Nothing in this Act shall interfere with or prevent the registrar or any special agent of the registrar from producing in any Court any instrument deposited under this section, when required by law to do so.

The current (GST exempt) fee for depositing a deed under the Registration of Deeds (Fees) Regulations is $18.00.

I have had the benefit of speaking with a Deputy Registrar - General of Deeds namely Mr Ian Gant who has read this part of my paper. He has acknowledged that if a deed (original or duplicate original) fits the criteria of S31(1) then the General Registry Office must accept the deposit of that document. S31 is drafted broadly. It allows any deed which ‘affects or may affect land within the State or by which any legal or equitable title to such land may be manifested’ to be registered. Put simply with land or land and buildings being such traditionally strong forms of investment for trusts it raises the very real question:

Why not deposit the relevant deed for safe and perpetual custody and reference?

At present the procedure under Part 5 of the Trustee Act 1936 South Australia is commonly used in SA to register at the Lands Titles Office the Appointment of New Trustees. In *Jessup's Lands Titles Office Forms and Practice*[3] the author sets out the efficacy of Part 5 saying:

'One reason is that the Memorandum of Appointment can be registered, thereby effectively disclosing the trusteeship and perpetuating the evidence of the trust'.

This is a clear example of a public register being used as a place for disclosure of interests (albeit in land) and perpetuating evidence of the trust. Again why not use a public register for the documents comprising the trust deeds so as to perpetuate evidence of the trust?

The usual position

So what usually happens to the multiple original documents after they are disseminated? In years gone by the Australian Taxation Office required one of the multiple originals when the initial trust estate tax return of the trust was lodged. To the best of my knowledge this has not been the case for some time. Others requiring any relevant trust deed or a relevant supplementary deed include the following:

- Financiers and finance brokers
- RevenueSA
- Beneficiaries – all classes
- Creditors

[3] *Mackintosh*, *Jessup's Lands Titles Office Forms and Practice* (Thomson Lawbook Co) 3502.

- Centrelink
- Accountants for the trust
- Solicitors for the trust
- Parties to the deed
- The Settlor may want the deed although in my experience this is unlikely.
- Those with powers as guardians, nominators and/or appointors may also want the deed if not otherwise in possession of the document or documents.

All in all this means that a trust deed or a relevant supplementary deed may be sent to any one of a number of interested parties.

It seems to me that over time it is not uncommon for trust deeds and supplementary deeds to get lost. I have been instructed on occasions that a relevant deed has been destroyed.

Consequences of lost deed

The purpose of today's discussion is to explore the consequences of loss or destruction whilst considering the options open to those concerned including solicitors, accountants, financial planners, trustees, beneficiaries, settlors and appointors and others with powers from the relevant deed.

There are times when I am asked to advise on matters relating to a trust when the deed establishing it is lost or destroyed. Careful advice is required in this situation. We should be aware of a trustee's duties in this situation. We should be aware of what action is required in an attempt to attempt to remedy the situation. There remains a trust, but what of its provisions? As to trustees'

ongoing duties perhaps reference to Chapter 22 of *Equity And Trusts in Australia*[4] is adequate for today. Those duties may be summarised as including:-

- The duty to account[5]
- The duty to administer the trust personally[6]
- Fiduciary duties[7]
- The duty to act impartially[8]
- The duty to invest[9]
- The duty to pay correct beneficiaries[10].

These common law duties must be weighed up against our statutory provisions which I will briefly discuss later.

I choose to identify an example of the need to rely on a trust deed. It can be found in a letter from RevenueSA written to me for the purposes of this session.

> Generally you need to prove that the provisions and in particular the range of beneficiaries/objects of the trust, materially confirm the provisions of the trust deed that was lost … On the other hand if the stamp duty liability is minimal this Office might again accept the submission without any other substantial evidence.
>
> The lodging party is the best person to determine the nature and type of evidence required. For example, without restricting the scope of evidence required it may constitute copies of income tax returns of the trust for the past 5 years, the financial accounts of the trust for the past 5 years and the trustees'

[4] GE Dal Pont and DRC Chalmers, *Equity And Trusts in Australia* (Thomson Lawbook Co, 4th ed, 2007) 563.
[5] Ibid 565.
[6] Ibid 566.
[7] Ibid 570.
[8] Ibid 575.
[9] Ibid 580.

minutes for the past 5 years. These might establish the nature of the trust (discretionary trust or otherwise), the identity of the trust beneficiaries/objects etc.

This is a practical approach specific for the purpose. This points us to what level of certainty as to terms may have to be achieved.

If a legal estate is vested in a trustee then that trustee is entitled to the custody of the deed or deeds.[11]

However the beneficiaries of the trust are entitled to inspect those deeds at all reasonable times. [12]

It is the duty of the trustee to ascertain the terms of the trust.[13] That said it becomes the obligation of the trustee to make all reasonable enquiries to ascertain the trust's terms should a trust deed be lost. It may as well be said perhaps the primary duty of the trustee is to secure and preserve the trust deed.

Consider for a moment the Lands Titles Office requirements concerning a lost (or destroyed) instrument[14]. A statutory declaration as to loss (or destruction) and non-deposit, lien, or as to any pledging or other deposit by way of security is required. From a practical view point should it appear that a trust deed or any relevant supplementary document is lost the trustee should make all appropriately diligent enquiries and conduct or cause to be conducted all appropriately diligent searches to try locate the missing document.

The lack of certainty created by the loss or destruction of a trust deed can mean

---

[10] Ibid 586.
[11] *Evans v Bicknell* (1801) 6 Ves 174.
[12] *Wynne v Humbertson* (1858) 27 Beav 421.
[13] *Hallows v Lloyd* (1888) 39 Ch D 686.
[14] Mackintosh, above n 3, 3502.

that it is not possible to conduct the business of the trust. The Supreme Court has been and still is in a position to assist. I refer to Rule 206 and the power of the Court to determine questions without an order for administration. I will return to the position of the Court later.

Options

Options available to those concerned where a trust deed or a relevant supplementary deed is lost or destroyed may include the following:

- Roll over. This could occur if with a self-managed superannuation fund there is proof of power to transfer assets to another superannuation fund. However it is likely that specific legislative requirements must be met. In addition it is likely that stamp duty and tax implications occur.

- Deed of adoption of a trust deed. To validly achieve the intention the following matters must be successfully attended to. Recitals would have to cover the details of the lost or destroyed deed including its establishment and the details of the diligent enquiries and searches as to its whereabouts.

  Care would have to be taken as to what the lost or destroyed deed would have stated as to the vesting date and variation powers.

  The class of beneficiaries would have to be defined with utmost care.

  Every effort would have to be made to avoid a resettlement. After all there will be Capital Gains Tax and stamp duty consequences if it is deemed that there is a transfer of assets to a new trust that has been established.

Moreover any tax losses capable of being carried forward could not be carried forward if there is a resettlement.

- Deed of confirmation or deed of restatement. Both deeds of confirmation and deeds of restatement must be very carefully considered so as to avoid triggering adverse tax consequences. The resettlement concerns are of paramount importance. These types of deeds should rely upon a true and correct copy of the initial deed that is lost if a true and correct copy exists. That copy should be annexed. Even then there is no certainty that all of the terms were in that deed. There are risks of resettlement occurring especially if the copy is not a copy of all of the terms. The risk of resettling should not be watered down because of the High Court's decision in *FCT v Commercial Nominees of Australia Ltd* [15] where it was held that despite a superannuation fund undergoing substantial changes it still constituted the same trust. Importantly in that matter the Court was able to compare old and new terms in reaching its decision.

- Vest and start again. This would more than likely result in tax consequences including CGT given that the assets of the trust would be transferred to a new trust.

Where beneficiaries of the lost or destroyed trust deed are ascertained I would recommend that they reduce to writing an appropriate form of consent to the method used.

[15] (2001) 179 ALR 655,661-2.

With the ability to access so much material on the internet I am concerned that quick fix options available from the internet may fall short of the required mark.

Certainty of terms

Where issues arise in relation to a trust the very existence of the relevant deed is the first issue to consider. The terms are of paramount importance.

Perhaps there is no greater indication of the importance of a trust's terms than looking at the following recent (or relatively recent) significant decisions:-

- *FCT v Bamford*[16]
- *Clark v Inglis*[17]
- *Dunston v Irving*[18].

For instance, in *Dunstan -v- Irving* a dispute occurred involving two business partners. They were members of the same small superannuation fund. The dispute involved how the entitlement between the members or partners should be split. In making its decision the Court relied heavily on the express provisions of the relevant trust deed which was available to the Court. In the absence of trust documentation it is not possible to be certain how the trust is meant to determine issues relating to the treatment of capital and income.

Trustee Act

What does the Trustee Act have to offer where the relevant documentation is lost or destroyed? Can it save the trustee whose trust deed is lost or destroyed?

[16] [2010] HCA 10.
[17] [2010] NSWCA 144.
[18] [2000] VSC 488.

The Trustee Act 1936 South Australia sets out a range of relevant powers. I would like to dwell on them somewhat. In *Trust Structures Guide 2010* written by Harwood Andrews Lawyers and published by Taxation Institute of Australia there is a section **Lost trust deeds**. Under the heading 'Minimum **residuary terms**'[19] the author state:

> *Where the trust deed is lost, trust law and the relevant state-based legislation Trustee Act* 1958 (Victoria), *Trustee Act* 1925 (New South Wales), *Trusts Act* 1973 (Queensland), *Trustee Act 1962* (Western Australia), *Trustee Act 1936* (South Australia), *Trustee Act 1925* (ACT), *Trustee Act 1898* (Tasmania) and *Trustee Act 1893* (Northern Territory) (collectively referred to in this chapter as Trustee Acts) will *provide minimum obligations on and limited powers to a trustee. Although the enactments of the Trustee Acts were to provide powers in the absence of alternate or adequate powers in a trust deed, those powers are an effective default position when the trust deed is lost. Accordingly, where the trust deed has been lost, the trustee's powers will effectively be limited to those provided under the relevant Trustee Act.*

The authors then point to 'Trustee Act statutory powers'[20] and add the Trustee Acts 'each provide varying powers to assist in the administration of a trust'[21]. I am concerned that we should focus on our legislative position in SA intently.

The very first issue appears in S6. It is entitled 'Power of trustee to invest'. This is a fundamentally important duty in relation to a trust. Yet in this short

[19] Taxation Institute of Australia *Trust Structures Guide* 2010 *43.*
[20] Ibid 44.
[21] Ibid.

section we are confronted with our problem if the relevant trust deed is lost or destroyed. The section reads:-

> A trustee may, unless expressly forbidden by the instrument creating the trust -
>
> (a) invest trust funds in any form of investment; and
>
> (b) at any time, vary an investment or realise an investment of trust funds and reinvest money resulting from the realisation in any form of investment.

It could be seemingly impossible to determine whether a trustee is expressly forbidden from doing something by the instrument creating the trust if it is lost or destroyed.

In the very next section the duties of the trustee in respect of the power of investment are set out. The trustee is bound to comply according to S7(2) which reads:-

> A trustee must, in exercising a power of investment, comply with any provision of the instrument creating the trust that is binding on the trustee and requires the obtaining of a consent or approval or compliance with any direction with respect to trust investments.

For the purposes of this discussion I would urge anyone who in this State contemplates exercising powers as a trustee knowing that the deed establishing the trust is lost or destroyed to be exceedingly careful of the provisions of the Trustee Act.

I do not propose to work my way through the entire Act. That can be for another day. However I further emphasise my point referring to Part 2 Division 4 - ‘Miscellaneous powers and liabilities’.

The section headings are as follows:

S24 Power to authorise receipt of money by banker or solicitor.

S25 Powers of trustee as to insurance.

S25A Repairs to trust property.

S25B Power to Court to authorise alterations and repairs.

S25C Power of trustee as to granting leases.

S26 Power of trustees of renewable leaseholds to renew and raise money for the purposes.

S26A Power to surrender leases with onerous covenants.

S27 Power of trustee to give receipts.

S28 Power for executors and trustees to compound etc.

S28A Power to release equity of redemption in satisfaction of mortgage debt.

S28B General power of trustee to raise money.

S28C Application of income by trustee-mortgagee in possession.

S29 Distribution of estate after notice by representative or trustee.

S30 Liability of trustee in respect of rents, covenants etc.

S31 Shares with contingent liability.

S32 Powers of two or more trustees.

S33 Powers of trustees as to maintenance and accumulation.

S33A Power to apply capital towards advancement and benefit.

S34A Notice where trustee acts in two or more trusts.

S35 Liability of trustee.

S35A Investment of pecuniary bequest.

S35B Variation of employees' benefit fund.

This appears to be a comprehensive set of powers. A trustee whose deed is lost or destroyed may initially be comforted by being made aware of them.

It might seem possible for a trustee to continue to administer a trust whilst relying on the miscellaneous powers of the Trustee Act without recourse to the Court.

However I point out the following subsections:-

S24(6) It reads:- Nothing in this section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

S25(12) It reads:- This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provision therein contained.

S25B(5) It reads:- This section applies to trusts created either before or after the commencement of the *Trustee Act Amendment Act 1941* ; but nothing in this section shall authorise the trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

S25C(6) It reads:- This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

S26(3) It is a repeat of S25B(5).

S28(3) It is a slight variation of S25C(6).

S28B(3) It reads:- This section shall apply notwithstanding anything to the contrary contained in the instrument, if any, creating the trust but shall not apply to a trustee of property held for charitable purposes.

S32(1) It reads:- Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument (if any) creating the power or trust, the power or trust may be exercised or performed by the survivor or survivors of them for the time being.

S33(8) It is a repeat of S28(3) except for a comma.

S33A(6) It is essentially a repeat of S28(3).

S35A(4) It reads:- This section applies only if or to the extent a contrary intention is not expressed in the instrument (if any) creating the trust.

Given the requirement for the instrument creating the trust to be considered so extensively, the Act can not necessarily be relied upon to save a trustee from an application to the Court.

Court remedies

I return to the position of seeking the assistance of the Court. I suggest that with the loss of a trust deed and with any lack of certainty as to its terms a trustee is in real strife. It would seem that unless the trustee can work with appropriate authority and absolute certainty through the consequences of loss then the only recourse is to the Court. It is open to the trustee to seek an order from the Supreme Court to confirm the terms or certain terms of the deed. I point out that the High Court has confirmed the Courts do have wide powers to

provide guidance to trustees in these sorts of applications which are non adversarial[22].

Any application to the Court will require significant effort, time and expense. However it is the course of action to take if redress is not otherwise available. To not seek appropriate directions or orders is potentially much more risky than not applying to the Court. The expense is likely to be well worth it.

Initially before making any application the following matters should be attended to:

Affidavits should be completed as to:-

- Loss or destruction of the trust deed
- The validity and subsistence of the trust and the certainty as to the terms, appropriately substantiated.

Proof

In considering the approach of our Supreme Court it is worthwhile considering specifically *City of Burnside v Attorney-General of South Australia*[23] where *Maks v Maks*[24] was applied. *Maks v Maks* was a constructive trust case where McLelland J referred to the provisions of the Statute of Frauds legislation in England and Victoria adding:

> …that the statutory requirement may be satisfied by secondary evidence of existence and contents of the writing when the original has been lost or destroyed… The same principle must, I think, apply to the *Conveyancing Act* 1919 (NSW), s23c(1)(b). Nevertheless, bearing in mind the object of these statutory requirements ('for the prevention of frauds and perjuries' – see the title

[22] *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 249 ALR 250, 267.
[23] 61 SASR 107.
[24] (1986) 6 NSWLR 34.

> and preamble to the Statute of Frauds) I am of the opinion that where the original is not produced and secondary evidence is relied on, there must be clear and convincing proof not only of the existence, but also of the relevant contents, of the writing, of the same order as the proof required to establish an entitlement to rectification of a written instrument.

As to what is clear and convincing proof it would seem that the decision of *Sugden v Lord Saint Leonards*[25] is relevant in as much as the Court stated 'if the evidence of the contents of a long and complicated [document] were given by a professional man who had himself drawn the instrument or upon one or repeated occasions had had the opportunity of reading, that would, under ordinary circumstances, be more satisfactory than the evidence of a non-professional person …'.[26]

In the South Australian decision of *Burnside v Attorney General* the Trial Judge had found that the Council had the power to execute a deed of trust and that it did so but that the deed had been lost. The Trial Judge found that it was a term of the trust that there was no power of sale over the subject land, that it constituted a charitable trust and that the subject land was in any event a park which precluded sale. The Council also applied for a declaration that the Court had the power to authorise sale of the land pursuant to either section 59(b) or 69(b) of the Trustee Act 1936.

On appeal the Supreme Court held that there was sufficient proof that the Council executed a deed of trust as contained in the minutes and actions of the

[25] (1876) 1 PD 154.
[26] Ibid 177.

Council, contemporaneous documents and newspaper articles in respect of the relevant land leading up to the purchase and transfer of that land.

Duggan J expressed the view that there were a number of reasons why in that case secondary evidence as to the contents of a trust, as opposed to its existence, required a cautious approach. He said [27]

> *Wigmore* expresses the view that "clear and convincing proof" is commonly required when secondary evidence is called in aid to establish the existence and contents of a lost deed or will: *Wigmore on Evidence*, Vol IX, par 2498; Vol VII, par 2106. In the case of a deed, rights and duties are not to be found lightly (Vol VII, par 2105). *Wigmore* also refers to the dangers of allowing a witness who has not read the entire contents of a document to speak to its terms. In addition the learned author points out that a witness is not to express an opinion as to the legal effect of a document.
>
> More often than not secondary evidence is given by a witness who has perused the document. The witness can then be questioned as to his or her knowledge of the document and the basis upon which the statements as to its effect have been made.

The modification of the best evidence rule is set out in S45c of the *Evidence Act* 1929 South Australia. I do not propose to dwell on that section. It is sufficient to close by saying that even where an original trust deed no longer exists an accurate reproduction of its contents is admissible in accordance with that section. All in all, where an original trust deed no longer exists and true and correct copy is not available the trustee or trustees are at grave risk of

[27] *City of Burnside v Attorney General of South Australia,* above n 24, 146.

challenge if the business of the trust is conducted without an appropriate Court order.