

Lost trust deed: Trustee seeks judicial advice

4 September 2015

Karin Ottesen

Introduction

1. The question of what a person should do if they are aware that they hold trust property but are not sure of the terms of the trust because the trust deed cannot be found is not a question that comes before the courts very often.
2. However, the question did come up recently in *Porlock Pty Ltd*¹ where an application was made under s 63 of the *Trustee Act 1925* (NSW) for advice as to whether a trustee would be justified in managing and administering a trust pursuant to terms contained in an accountant's letter which had been written many years after the trust was created. In the circumstances of that case, Young AJA of the Supreme Court of New South Wales was prepared to make orders under s 63 that the trustee would be justified in managing and administering the trust in that way.

Relevant provision

3. Section 63 of the *Trustee Act* provides as follows:

"(1) A trustee may apply to the Court for an opinion advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.

(2) If the trustee acts in accordance with the opinion advice or direction, the trustee shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the application, provided that the trustee has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion advice or direction."

4. Section 63 further provides that rules of court may provide for the use, on an application under the section, of a written statement signed by the trustee or the trustee's legal practitioner, or for the use of other material, instead of evidence (s 63(3)) and that it shall not be necessary to serve notice of the application on any person, or to adduce evidence by affidavit or otherwise in support of the application unless the rules of court otherwise provide, or the Court otherwise directs (s 63(4)).²

¹ [2015] NSWSC 1243.

² A number of rules of court specifically deal with applications for judicial advice under s 63 (see *Uniform Civil Procedure Rules 2005* (NSW) rr 55.1 to 55.4). However, these must be considered in the broader procedural framework provided by the *Civil Procedure Act 2005* (NSW) and the UCPR generally: see *Re Estate Late Chow Cho-Poon; Application for judicial advice* [2013] NSWSC 844 at [14].

5. Section 63 also provides that, where the identity of the beneficiaries or the rights of the beneficiaries as between themselves are in question, the trustee before conveying or distributing any property in accordance with the Court's opinion advice or direction, must, unless the Court otherwise directs, give notice to any person whose rights as beneficiary may be prejudiced by the conveyance or distribution (s 63(8)). Such a person may then apply to the Court for such order or directions as the circumstances may require (s 63(10)).
6. The High Court of Australia has stated that a trustee who is in doubt as to a contemplated course of action should first seek advice under s 63 before taking the action.³

Porlock Pty Ltd

Background

7. The plaintiff ("**Trustee**") was the trustee of the JDB Carr Trust No 2 which had been created in about 1957. It was unclear who the settlor was. The trust had some substantial assets.
8. The Trustee wished to be confirmed in its belief as to how it held the trust property but a copy of the trust deed could not be found. The Trustee accordingly made an application to the Supreme Court of New South Wales under s 63 of the *Trustee Act* for judicial advice.

Decision

9. The application was heard by Young AJA who said that the Court did not have power to recreate a trust deed.⁴ His Honour then went on to say:

*"What the court is doing is advising the trustee as to whether it would be justified in dealing with the trust property in the way in which it proposes. It is clear that the trustee recognises that it does not hold the trust property beneficially."*⁵

10. His Honour noted that there was secondary evidence as to the trust on which the property was held in the form of a letter that had been written in 1984 by an accountant. That letter, after stating that "the Trust Deed provides that ..." contained a statement that the income derived from the trust was to be paid to James DB Carr

³ See *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] HCA 42; (2008) 237 CLR 66 at [36]. This case also sets out the general principles governing an application under s 63 at [54]-[76]. The usual procedure to be followed in a s 63 application can be found in *Application of Gnitekram Marketing Pty Limited* [2010] NSWSC 1328 at [17] and *Application by Marilyn Joy Cottee; Estate of Gwentyth Shirley Smith* [2013] NSWSC 47 at [42]; see also *Re Estate Late Chow Cho-Poon; Application for judicial advice* [2013] NSWSC 844 where the usual practice of providing counsel's opinion was not followed.

⁴ Above, n 1, at [2].

⁵ Above, n 1, at [2].

during his life and that after his death the property was to be held as to both capital and income for any of his children living at his death or attaining the age of 21 and if more than one in equal shares as tenants in common.⁶

11. The since retired accountant had also sworn an affidavit in support of the application which contained the following evidence:
 - The trust deed had been stored at his office up until his retirement in 1985.
 - He believed that the letter accurately set out the assets and terms of the trust at the time, in part because it was written in a form which suggested that he had been quoting the actual trust deed.⁷

12. It seems that his Honour also had material before him indicating that the Trustee's solicitors had made a diligent search for a copy of the trust deed, but without any success.⁸

13. After noting that there were few authorities as to what a trustee did when a trust deed could not be found, Young AJA referred to the case of *Hewitt v Farrell*.⁹ That was a case in which a suit had been brought to establish certain trusts respecting land. It had been alleged that the trust deeds were last seen in the possession of the settlor (since deceased) about a month after execution but that they had not been seen since, nor could they be discovered by the plaintiffs. Young AJA noted that the Supreme Court had declined to make the order sought in that case due to concern about the Statute of Frauds in holding that there was a trust when it was not clear that there was an actual trust deed in existence and also concern about the absence of any secondary evidence of the terms of the trust.¹⁰

14. Young AJA, however, said that the case before him differed in a number of ways from *Hewitt v Farrell*:
 - It involved an application for judicial advice.
 - There was secondary evidence.
 - There was evidence that the deed actually existed and so no problem arose with the Statute of Frauds.¹¹

15. His Honour then referred to advice which had been provided by the Trustee's counsel on the matter, advice which his Honour considered to be correct.¹²

16. His Honour then concluded that the Trustee did not hold the property beneficially and that the best evidence as to what the trusts were was the accountant's letter and that the Trustee would be justified in acting on that letter. His Honour added that, if at

⁶ Above, n 1, at [3].

⁷ Above, n 1, at [5]-[6].

⁸ Above, n 1, at [6].

⁹ (1874) 12 SCR (NSW) (Eq) 94.

¹⁰ Above, n 1, at [7].

¹¹ Above, n 1, at [8].

¹² Above, n 1, at [9].

some future time, the trust deed was located and a claim was made against the Trustee, then the advice would provide some protection to the Trustee.¹³

17. Accordingly, his Honour made orders that pursuant to s 63 of the *Trustee Act*, the Trustee was justified in managing and administering the trust pursuant to the terms contained in the accountant's letter.

K Ottesen

4 September 2015

Copyright

© This paper is subject to copyright which is retained by the author. Apart from any use as permitted under applicable copyright law, this paper may be reproduced in whole or in part for study or training purposes, subject to the inclusion of an acknowledgment of the source. Reproduction for commercial use or sale requires prior written permission from the author.

Disclaimer

This paper is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive and is not to be relied upon as legal advice. Readers should obtain their own legal advice.

¹³ Above, n 1, at [9].