

THE CONSEQUENCES OF A TRUSTEE BEING DEREGISTERED

The recent matter of *Re Cooper Street Property Trust* [2016] VSC 756 is a reminder that a well drafted trust deed can protect the assets of a trust if something should happen to the trustee.

The Key Facts

1. Omer became bankrupt. Woods was his trustee in bankruptcy.
2. While investigating Omer's assets, Woods identified a trust deed (**Trust Deed**) that created the Cooper Street discretionary trust (**Trust**).
3. Omer was the only specified beneficiary of the Trust, together with other general beneficiaries.
4. The trustee of the Trust was Omer Property Group Pty Ltd (**OPG**). Omer was sole director and shareholder of OPG.
5. The appointor under the Trust Deed was "Omer and such other person as may be nominated in writing or by will but failing such appointment then on his death or her death the personal representative of such person".
6. OPG and DNP Constructions Australia Pty Ltd (**DNP**) were registered as joint proprietors of land (**Land**).
7. Woods argued OPG became registered proprietor of the Land in its capacity as trustee of the Trust.
8. Omer ceased as director/secretary/shareholder of OPG. He was replaced by Kanati. Kanati subsequently ceased as director/secretary of OPG. OPG was deregistered.
9. After OPG was deregistered, DNP applied and succeeded in becoming the sole registered proprietor of the Land in accordance with survivorship law.
10. DNP sold the Land.
11. Woods claimed that the Trust had an interest in the proceeds of the sale. Woods sought to appoint a new trustee to the Trust to make a claim for half of the proceeds.
12. Clause 22 of the Trust Deed stated:
 - 22.1 The Appointor has the power to
 - 22.1.1 remove any Trustee;
 - 22.1.2 appoint any additional trustee or trustees;

22.1.3 appoint a new trustee in the place of any trustee who is removed, resigns as trustee or ceases to be a trustee by operation of law or the provisions of this Deed.

...

22.5 If ... there is no person to act or entitled to act as Appointor ...:

22.5.1 the Appointor shall be:

22.5.1.1 on the death of the last surviving Appointor his or her legal personal representative; or

22.5.1.2 the liquidator of a corporate Appointor.

22.5.2 if no one is entitled to act as the Appointor then the Trustee or the legal personal representatives of the last surviving Trustee or the liquidator of a corporate Trustee shall become Appointor.

22.6 If the Appointor ... becomes ... declared bankrupt ... then from the time of that disability and while it continues, the powers vested in the Appointor will vest in any person named in this Deed to succeed the Appointor;

13. Section 48 of the *Trustees Act 1958* (Vic) (**Act**) states:

48 Power of Court to appoint new trustees

(1) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without the assistance of the Court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

In particular and without prejudice to the generality of the foregoing provision, the Court may make an order appointing a new trustee in substitution for a trustee who is convicted on indictment of any offence, or is a patient within the meaning of the Mental Health Act 2014, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved.

...

14. Section 64 of the Act states:

64 Persons entitled to apply for orders

(1) An order under this Act for the appointment of a new trustee or concerning any property, subject to a trust, may be made on the application of any person beneficially interested in the property, whether under disability or not, or on the application of any person duly appointed trustee thereof.

...

Woods' arguments

15. Woods argued that on the deregistration of OPG there were three ways of appointing a new trustee to the Trust:

- (a) **(First Argument)** by Omer exercising his powers under clause 22.1.3 of the Trust Deed;
- (b) **(Second Argument)** by reinstating OPG as a corporation, then deregistering OPG, with the power to appoint a new trustee vesting in the liquidator under clause 22.5 of the Trust Deed; or
- (c) **(Third Argument)** by the Court exercising its power under section 48 of the Act.

The Court's decision

- 16. The Court dismissed Wood's arguments.
- 17. The Court stated that the First Argument was ineffective because Omer could not exercise the power under clause 22.1.3 due to his bankruptcy and the application of clause 22.6. No person was named in the Trust Deed as a successor to Omer to step in as appointor. There was no liquidator of OPG that could be appointor.
- 18. The Court stated that the Second Argument was ineffective because it is unlikely Woods had standing to reinstate OPG as a company. This is because the shares in OPG had been transferred from Omer to Kanati prior to OPG being deregistered.
- 19. The Court stated that the Third Argument was ineffective because Woods had no standing under section 64 of the Act.
 - (a) To seek an order to appoint new trustees under section 48 of the Act, the applicant must be a "person beneficially interested" in the Trust property under section 64 of the Act.
 - (b) Omer was not a "person beneficially interested" in the Trust property because he was only a beneficiary of the Trust. As a beneficiary, he only had the right to due administration of the Trust and a mere expectancy that the trustee may make a distribution of the Trust property to him. This is not a proprietary interest in the Trust property.
 - (c) The fact that Omer was both appointor and beneficiary under the Trust Deed, and therefore had 'effective control' of the Trust, did not mean he had a contingent interest in the Trust property which satisfies section 64.
- 20. On the deregistration of OPG, the Commonwealth became the trustee of the Trust under the default provisions of the *Corporations Act 2001* (Cth).

Conclusion

This matter would not have needed court intervention if the Trust Deed had back-up trustees and appointors. Also those at risk of bankruptcy should obtain, and periodically update, advice in relation to trusts which may benefit them.

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