

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	In the matter of Kinver Holdings Pty Ltd
Citation:	[2025] ACTSC 90
Hearing Dates:	29 November 2024, 21 February 2025
Decision Date:	19 March 2025
Before:	McWilliam J
Decision:	Orders made appointing applicant as trustee of a family trust and giving judicial advice.
Catchwords:	TRUSTS – family trust – lost trust deed – evidence of contents – judicial advice as to basis for management and administration of trust – whether trustee justified in managing and administering trust in accordance with terms set out in another deed of settlement concerning a different trust which was executed at the same time for a similar purpose – whether trustee justified in treating as valid the appointment of Kinver Holdings Pty Ltd as trustee – where deed of appointment missing, the terms of the trust are silent as to mode of appointment, and the appointment deed was not registered in accordance with statutory requirements – applicant appointed as trustee pursuant to <i>Trustee Act 1925 (ACT)</i> , s 70 for abundant caution
Legislation Cited:	<i>Registration of Deeds Act 1957 (ACT)</i> <i>Trustee Act 1925 (ACT)</i> ss 6, 12, 59(4), 63, 70 <i>Trustee Act 1925 (NSW)</i> s 86A
Cases Cited:	<i>Advanced Holdings Pty Limited as Trustee for The Demian Trust v Commissioner of Taxation</i> [2021] FCAFC 135 <i>Application of DEK Technologies Pty Ltd atf DEK Technologies Unit Trust</i> [2023] NSWSC 544 <i>Application of Gnitekram Marketing Pty Limited</i> [2010] NSWSC 1328 <i>Australian Conservation Services v Liladel Holdings</i> [2017] ACTSC 162; 12 ACTLR 124 <i>Castle Hill Joinery and Interiors Pty Ltd (as trustee for the Gladstone Road Trust)</i> [2013] NSWSC 1525 <i>Dixon v Todd</i> (1904) 1 CLR 320 <i>In the Application of Nyasa No. 19 Pty Ltd</i> [2023] NSWSC 578 <i>In the Estate of Margaret Anne Cervo (administrator pendente lite appointed)</i> [2024] ACTSC 253; 21 ACTLR 226 <i>In the Estate of Stanley George Mizon (deceased)</i> [2021] ACTSC 240 <i>Jones (Liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq)</i> [2018] FCAFC 40; 260 FCR 310 <i>Kendell v Sweeney & Ors</i> [2005] QSC 64 <i>Korda v Australian Executor Trustees (SA) Ltd</i> [2015] HCA 6; 255 CLR 62 <i>Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox</i>

Diocese of Australia and New Zealand [2008] HCA 42; 237 CLR 66
NSW Masonic Youth Property Trust v Attorney-General (NSW) [2010] NSWSC 333; 5 ASTLR 211
Plummer v Attorney General of NSW [2018] NSWSC 869
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355
Raftland Pty Ltd v Commissioner of Taxation [2006] FCA 109; 227 ALR 598
Re Application of Perpetual Trustee Company Ltd [2003] NSWSC 1185
Re BTA Institutional Services Australia Ltd [2009] NSWSC 1294; 3 ASTLR 207
Re Estate of Chow Cho-Poon [2013] NSWSC 844; 10 ASTLR 251
Re Porlock Pty Ltd [2015] NSWSC 1243
Statewide Developments Pty Ltd (in liquidation) (receivers and managers appointed) v Azure Property Group (Holdings) Pty Ltd [2012] NSWSC 616; 84 NSWLR 133
SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; 262 CLR 362
Vanta Pty Ltd v Mantovani [2023] VSCA 53; 72 VR 19
Youyang Pty Ltd v Minter Ellison Morris Fletcher [2003] HCA 15; 212 CLR 484

Parties: Kinver Holdings Pty Ltd (Applicant)

Representation:

Counsel

G Blank (Applicant)

Solicitors

Westbourne Legal (Applicant)

File Number:

SC 306 of 2024

McWILLIAM J:

1. Rodger Swan and Bartholomew Crowe were business partners who ran a successful menswear business in Canberra, ultimately known as “Rodger Bartholomew menswear”. To manage their business partnership interests, including a property portfolio, they set up a joint trading trust in the 1970s. The beneficiaries of the trading trust were two family trusts, one for each of the Swan and Crowe families. This proceeding concerns the former of the two, namely the R. L. Swan Family Settlement (**Swan Trust**).
2. Over time, the original trust deeds establishing the family trusts were lost. In respect of the Crowe family, a copy of the deed establishing the B. Crowe Family Settlement (**Crowe Trust**) was able to be located, and a Deed of Confirmation of Trust was executed in 2016. However, in respect of the Swan family, only copies of single pages of what appears to be the original trust deed were able to be found.
3. The applicant in this proceeding is Kinver Holdings Pty Ltd (**Kinver**), the directors of which are Rodger Swan and his wife, Julie Swan. Since 1984, Kinver has been acting as the corporate trustee for the Swan Trust. The lost trust deed establishing the Swan Trust is what brings Kinver to court.

The present application

4. Kinver has applied *ex parte* for judicial advice pursuant to s 63 of the *Trustee Act 1925* (ACT) (**Trustee Act**). Section 63(1) provides:

A trustee may apply to the Supreme 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.

5. Kinver sought advice as to the following:
 - (a) Whether the trustee (Kinver) is justified in managing and administering the Swan Trust in accordance with the terms of a deed of settlement creating the Crowe Trust (said to be in identical terms to the missing deed in respect of the Swan Trust) (**question 1**); and
 - (b) Whether the trustee (Kinver) is justified in treating its appointment, pursuant to a resolution of appointment of new trustee made on 17 August 1984, as valid (**question 2**).

Issues

6. In order to provide the advice on the two questions set out above, the Court will need to consider:

- (a) Whether the Swan Trust was validly established, and if so:
- (b) What were its terms (so as to advise whether Kinver is justified in proceeding to administer the Swan Trust in the course it proposes); and
- (c) Whether there is sufficient evidence to establish the validity of Kinver's appointment as trustee in accordance with the terms of the Swan Trust (in order to answer whether Kinver can proceed on the basis that it was validly appointed).

Evidence before the Court

7. In support of the application, Kinver relied upon two affidavits. The first was affirmed by Mr Craig Painter, solicitor for the applicant trustee, on 5 September 2024.
8. The second affidavit was affirmed by Rodger Swan, on behalf of both directors, on 16 August 2024. There was no affidavit from Mrs Swan. The reason for that (I infer) is that elsewhere in the evidence there was reference to Mr Swan now acting as Mrs Swan's attorney, pursuant to an enduring power of attorney that has been activated.
9. In accordance with usual practice, the Court also had the benefit of an opinion of counsel directed to the substance of the questions identified for the Court's consideration. The utility of such opinions was discussed in *In the Estate of Margaret Anne Cervo (administrator pendente lite appointed)* [2024] ACTSC 253 at [24]-[29], drawing heavily on *Re Estate of Chow Cho-Poon* [2013] NSWSC 844; 10 ASTLR 251 (**Cho-Poon**) and the cases cited therein. I am indebted to counsel for the thoroughness of the opinion provided. I respectfully agree with its contents, and it has enabled delivery of judgment in a timelier manner than may otherwise have been the case.

The Court's power to give advice

10. For the Court's jurisdiction to be enlivened under s 63 of the *Trustee Act*, the applicant for judicial advice must point to the existence of a question with respect to the management or administration of trust property or a question regarding the interpretation of the trust instrument: *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42; 237 CLR 66 (**Macedonian Church**) at [58].
11. The phrase 'management or administration of property' is not a term of art. It refers to both the manner in which the trust property is managed or administered and the actual carrying out of those functions: *Application of Gnitekram Marketing Pty Limited* [2010] NSWSC 1328 at [13].

12. Here, if the original trust deed is unable to be located, that creates uncertainty about the terms of the Swan Trust. The most important duty of a trustee is to obey the terms of the trust: *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15; 212 CLR 484 at [32]. This requires the trustee to know the terms of the trust. The nature of the advice sought by the first question (set out at [5] above) squarely raises an issue with respect to how the property of the trust is to be managed and administered, in that it concerns whether the trustees should administer the Swan Trust by reference to terms that concern a different trust deed relating to the Crowe Trust. By seeking advice on that question, the trustee is effectively seeking to definitively know the terms of the trust.
13. I have said effectively because the Court's power under s 63 of the *Trustee Act* is limited, in that it does not extend to recreating the trust deed: see *Re Porlock Pty Ltd* [2015] NSWSC 1243 at [2]. What the Court is doing is advising the trustee as to whether it would be justified in administering the trust in the way in which it proposes.
14. In other jurisdictions, such as New South Wales, cognate legislation enables a court to approve a variation of an original trust deed so as to produce a definitive form of the trust deed and bring about a binding and final outcome by way of a declaration. An example of where this has occurred is *In the Application of Nyasa No. 19 Pty Ltd* [2023] NSWSC 578, applying s 86A of the *Trustee Act 1925* (NSW). No statutory equivalent exists in the Territory.
15. The second question for judicial advice is linked to the first, in that it concerns the identity of the trustee and the validity of its appointment. That is, there is broadly a question about who should carry out the function of trustee.
16. In *Application of DEK Technologies Pty Ltd atf DEK Technologies Unit Trust* [2023] NSWSC 544, Henry J made findings at [73] (citing a number of authorities where judicial advice was provided in similar circumstances) that where doubts emerge as to the terms of a trust in circumstances where the trust deed cannot be located, such matters concern the management and administration of the property held by the trust. Consistent with that established position, I find that the jurisdiction of the Court is properly enlivened in this proceeding.

Statutory dispensation of notice

17. Under s 63(4) of the *Trustee Act*, unless the Supreme Court otherwise directs, it is not necessary to serve notice of the application on any person.
18. On the evidence before the Court, the persons interested in the application are Rodger and Julie Swan, the two directors of Kinver, as their funds were used to acquire the property of the Swan Trust and they are beneficiaries under that Trust.

19. Other potentially interested persons are the four adult children of Mr and Mrs Swan, Nicole, Simon, Michael and David. They are also shareholders of Kinver, and beneficiaries of the Swan Trust. The trustee did not formally serve a copy of the originating process and all the supporting evidence on those potentially interested persons. However, the Court was informed that they were each informally on notice of the application and did not seek to be heard.
20. Former corporate trustees of the Swan Trust, which potentially may have been interested in the validity of appointment question, have been wound up.
21. This is not a case involving advice about beneficiary entitlements. It is a case about the existence and contents of the trust deed; specifically, whether the terms of the trust and mechanism of trustee appointment can be identified with sufficient certainty that the trust does not fail for uncertainty, and similarly, whether the evidence is sufficient to establish the valid appointment of the present trustee. In those circumstances, there was no reason to direct formal service of the originating application and supporting material on any other person.

Is it appropriate to give judicial advice here?

22. The Court has a discretion under s 63 of the *Trustee Act* whether to give judicial advice. As observed in *Cho-Poon* at [43], the Court is not bound to give judicial advice merely because a trustee has a right to apply for it: *Re Application of Perpetual Trustee Company Ltd* [2003] NSWSC 1185 at [8]-[9].
23. In exercising the discretion, the Court should be guided by the scope and purpose of the section: *Macedonian Church* at [196]. The section's primary purpose is to protect the interests of the trust. The cardinal purpose in giving advice is to determine what should be done in the best interests of the trust: see *In the Estate of Stanley George Mizon (deceased)* [2021] ACTSC 240 at [14] and the authority there-cited; *Castle Hill Joinery and Interiors Pty Ltd (as trustee for the Gladstone Road Trust)* [2013] NSWSC 1525 at [18] per Darke J.
24. A practical motivation may also be the protection of the trustee (here, Kinver as the applicant) who acts upon the advice: *Macedonian Church* at [196] per Kiefel J (as her Honour then was).
25. An application for judicial advice is primarily for the purpose of enabling the trustee to be advised as to the nature or extent of their powers and duties of management or administration of the trust property: *Re BTA Institutional Services Australia Ltd* [2009] NSWSC 1294; 3 ASTLR 207 at [6].

26. Here, the interests of the trust will be best served by confirming the validity of the trustee of the trust and the terms of the trust. This will remove doubt about the administration of the trust, the recipients for income and capital distributions and the trust's vesting date. This will also avoid any taxation issues arising on resettlement of the trust. It is therefore appropriate to exercise the discretion of the Court to provide an opinion on the questions asked.

Was the Swan Trust validly established?

27. For reasons explained below, the evidence establishes that there was a trust deed in existence establishing the Swan Trust.

Applicable principles

28. For a trust to be valid, there must be certainty of intention, of subject matter and of object: *Korda v Australian Executor Trustees (SA) Ltd* [2015] HCA 6; 255 CLR 62 at [7].
29. In light of the advice provided below in respect of the second question, it is worth also stating that it is a clearly established principle of equity that it will not allow a trust to fail for want of a trustee: *Raftland Pty Ltd v Commissioner of Taxation* [2006] FCA 109; 227 ALR 598 at [66] per Kiefel J (when sitting in that Court). Thus, if Kinver was not validly appointed, that alone would not deprive the trust itself of validity.
30. The principle to be applied in relation to lost trust deeds is that set out in *Vanta Pty Ltd v Mantovani* [2023] VSCA 53; 72 VR 19, which discussed (at [68]-[91]) the civil standard of the balance of probabilities in the context of lost trust deed documents and concluded (at [92]) that the real question to be determined was whether there was sufficient proof of the essential terms of the deed such that the trust did not fail for uncertainty. The Victorian Court of Appeal went on to state at [92]:

... In the absence of the Deed, proof of the relevant facts and inferences (to be drawn from those facts) was to be established on the available secondary evidence. Those facts and inferences were, in turn, to be determined on the balance of probabilities applying s 140(1) of the Evidence Act, and if necessary, the criteria set out in s 140(2).

The evidence establishes the existence of the trust deed and of the Swan Trust

31. The evidence has been considered as a whole. There are a number of indicators in the evidence that, when taken together, establish the existence of the deed. Those that are of most significance are:
- (a) Mr Swan deposed that the Swan Trust was established by deed in about 1976. His evidence is sourced from his personal involvement in seeking professional accounting and legal advice in conjunction with Mr Crowe and acting upon that advice.

- (b) Mr Swan's affidavit set out the history of the legal and accounting advice Mr and Mrs Swan took, which caused them to bring about the Swan Trust. In the affidavit, Mr Swan deposed to the execution of the Swan Trust by himself and his wife, and also deposed to his understanding of the terms of the trust – who the beneficiaries were, who the settlor was, how the income of the trust was to be distributed and how it was in fact distributed. Importantly, that is evidence from a person who has sighted the original trust deed at the time of its creation.
- (c) The previous solicitor located two pages of what appears to be a copy of the original deed: pages 6 and 17 (pages 123 and 124 of the exhibit to Mr Swan's affidavit). These pages were either given to her by Mr Swan or found in the safe custody packet that was located. Critically, page 17 is the schedule to the deed creating the Swan Trust. It identifies the date of execution as 5 August 1976, the settlor, the trustee, and the beneficiaries.
- (d) Mr Swan further deposed to the trust deed being in mirror form to a trust deed executed by the Crowe family at the same time. That first-hand recollection is corroborated by the documentary evidence. A true copy of the document executed by the Crowe family is in evidence via the Deed of Confirmation of Trust. Page 6 of the Crowe Trust is identical to the page 6 held by the Swan family. The schedule of the Crowe Trust is also numbered page 17. The schedule for the Crowe Trust is in the same format, style and terms as the page 17 schedule held by the Swan family, save that there are different people inserted for the settlor and the family beneficiaries. The handwritten date on each schedule is 5 August 1976. The handwriting for the date of execution matches that of the handwritten date on the schedule for the Swan Trust deed, from which I infer that the lawyer involved filled in the date on the two documents.
- (e) There is also a resolution of Kinver (set out below) which makes reference to the Swan Trust "in accordance with the terms and conditions of that trust as prescribed in the Deed of Settlement".

32. On that evidence alone, I consider that a trust deed establishing the Swan Trust did exist.

33. Further, there is sufficient certainty of intention to create the trust, through the written deed that was dated 5 August 1976, Mr Swan's evidence and the documentary evidence available in respect of the Crowe Trust. There is sufficiency of subject matter in the schedule referring to the initial sum of money paid as being \$25. There is also sufficient evidence to find the object of the trust being to provide for the stated beneficiaries, as

they are defined in the schedule. These matters are reinforced by the evidence discussed below when considering the terms of the Swan Trust. This is a clear case where the creation of a trust – the Swan Trust – is established.

What are the terms of the Trust?

34. As a preliminary matter, it is necessary to consider the evidence establishing that the trust deed is lost.
35. The history of the searches that have been undertaken to find the original trust deed is contained in the evidence of Mr Painter, and Mr Swan also deposed to the searches he had undertaken. Without setting out that combined history in detail, the evidence traces through the various law firms and solicitors who either held the trust deed for safe keeping or may have been provided with a copy of the trust deed for the Swan Trust. Mr Painter communicated with a former principal of the original law firm that prepared the trust deed and with Minter Ellison, the firm that later held the deed register for the law firm that originally created the deed. Communications with those solicitors disclosed when their files were destroyed in accordance with record-keeping requirements. He also sought assistance from a former solicitor who advised the Swan and Crowe families at the time the Crowe family executed the Deed of Confirmation of Trust in 2016.
36. Mr Painter has also contacted Mr Peter Beames, the former accountant for Mr and Mrs Swan, who retired in 2022. Mr Beames provided significant assistance in confirming the affairs of the Swan Trust.
37. The evidence establishes that the searches undertaken by both the directors of Kinver and their legal representatives over the years have been thorough and that all known avenues of enquiry have been exhausted. I accept that the original deed is lost and no complete copy of it has been located.

Evidence establishing the terms of the Swan Trust

38. Having found that the original trust deed is lost, there is no conclusive primary evidence of what the complete terms of the Swan Trust are. Unlike the Crowe Trust, there is no complete copy of the original trust deed which can simply be confirmed.
39. However, there is sufficient secondary evidence available to establish to the civil standard that the terms for the Swan Trust would have been identical to the Crowe Trust, save for the settlor and particular beneficiaries. The following matters emerge from the evidence:

- (a) Mr Swan and Mr Crowe received the same legal and accounting advice in establishing the respective trusts which were to be the recipients of income and distributions from the unit trust established to facilitate their business.
- (b) Mr Swan deposed to having been present when the initial instructions were given for the Swan and Crowe families to set up trusts to operate their partnership. No instructions were given that the trusts were to be done differently for each family.
- (c) The documents were prepared and executed at the same time, for similar purposes, by the same solicitor. Mr Swan deposed to having seen the Crowe Trust deed at the time and that it looked the same as the deed prepared for him.
- (d) Knowing that the same law firm was engaged to prepare each trust document, the content and style of the two pages of the copy of the Swan Trust strongly indicate that the same template deed was used as that used for the Crowe Trust. In addition to the other similarities discussed, the page containing the clauses of each trust deed (page 6) is in identical form for each deed.

40. For completeness in considering the evidence, I note the following:

- (a) The income tax returns for the Swan Trust for 2014 to 2022 were before the Court, disclosing that in each of those years, all trust distributions have been to Mr and Mrs Swan equally. The evidence established that the trust has always distributed all its income, and so has not had a taxation assessment issued. It has never been registered for GST and thus has not been required to lodge a Business Activity Statement. The financial evidence is not of great significance in this case, but the tax returns complete the evidentiary picture, recording Kinver as the trustee every year. The tax returns otherwise demonstrate regularity and compliance.
- (b) Mr Swan also deposed to his lack of amendment to the terms of the Swan Trust, other than to change the corporate trustee over the years, which he and his wife did on advice.

41. In short, it is clear that the trust that was established for the Swan family was created at the same time, upon the same instructions, following the same advice, for the same purpose, and in respect of property derived from the same business partnership as the Crowe Trust. Those matters are sufficient for the Court to conclude that the terms of the Swan Trust that were drafted and executed were the same as the terms for the Crowe Trust, save as to the beneficiaries and settlor.

42. Without recreating the Swan Trust, but for the purpose of ensuring validity and considering whether the course proposed by Kinver is justified, the terms of the Crowe Trust provide the following:

- (a) Clause 1 defines the trustee and the trust fund. Clause 1(c) identifies the vesting day. Relevantly, it is 50 years from the date of the execution of the settlement (4 August 2026). That clause also provides for words in the singular to be read as including the plural (and vice versa).
- (b) Clause 2 provides for the powers and obligations of the trustee in terms of income distribution. It confers absolute discretion upon the trustee, and provides that, failing any effective determination by 27 June of any particular year, the income is to be held in trust in equal shares for such of the children and grandchildren of the husband and wife as are then living.
- (c) Clause 3 provides that any decision by the trustee under clause 2 is irrevocable with respect to the income of the year to which it relates.
- (d) Clause 4 provides for arrangements as to the proportions in which the trustee shall stand possessed of the Trust Fund on the vesting day.
- (e) Clauses 5 and 6 provide for powers of the trustee, including for investment, purchase and leasing of land or real property, arrangements for providing capital or income towards the maintenance, education, advancement or benefit of minor beneficiaries, guarantees and indemnities, payment of insurance, entering into partnerships and raising of funds (borrowing money).
- (f) Clause 7 prevents the settlor from receiving a benefit.
- (g) Clause 8 is set out in full below as it is material to the consideration of question 2. In summary, it is the clause conferring power to appoint a new trustee in place of, or in addition to, any existing trustee. The power of appointment is vested in the husband and the wife jointly during their joint lifetime (relevantly to the Swans and the second question discussed below), or, on the death of one of them, the survivor during their lifetime and thereafter in the legal personal representative of whoever was the survivor (husband or wife).
- (h) Clause 9 permits the trustee to be remunerated out of the income or capital for services to the trust.
- (i) Clause 10 indemnifies the trustee for loss other than due to its own dishonesty or wilful commission of a breach of trust. This indemnity is restricted to the assets capital and income of the trust fund.

- (j) Clause 11 confers power on the trustee to vary the trusts.
 - (k) Clause 12 provides for consequences in the event of failure as to capital or income.
 - (l) Clause 13 provides for discretionary recordkeeping.
 - (m) Clause 14 provides for the exercise of the trustee's discretions as to payment of income or capital to beneficiaries to be subject to a restriction so as to comply with the rule against perpetuities on or before the vesting date.
43. Otherwise, the terms of the schedule to the Crowe Trust are consistent with, but overtaken by, the copy of the schedule that exists in respect of the Swan Trust, which names Mr Swan's sister (now deceased) as the settlor and sets out the Swan family members as beneficiaries.
44. It will be apparent from the summary of the terms of the Crowe Trust deed that they fulfill the requirements of the essential terms for the creation of a trust, such that if the Swan Trust were to be administered in accordance with those terms, the trust would not fail for uncertainty.

The current trustee's appointment as trustee of the Swan Trust

45. This second issue for advice arises because any document that directly records Mr and Mrs Swan appointing Kinver as trustee of the Swan Trust is also missing from the company records of Kinver. The consideration that follows is on the basis that Kinver is justified in relying on the mirror terms contained in the Crowe Trust.

The power of appointment in the trust instrument

46. The people having the power to change the trustee are those set out in clause 8 (underlining in original):

8. The power of appointing a new trustee in place of a trustee or in addition to any existing trustee and also the power to remove any trustee shall be vested:

(a) in the husband and the wife jointly during their joint lifetime and on the death of one of them then in the survivor during his lifetime;

(b) on and from the death of the survivor of the husband and wife in the legal personal representative of the survivor of the husband and the wife

PROVIDED ALWAYS that notwithstanding anything to the contrary herein contained the settlor or any beneficiary shall not at any time be eligible for appointment as a trustee hereof.

47. Here, 'the husband and the wife' are Mr and Mrs Swan.

48. Of significance to the present issue, although clause 8 of the trust instrument provides a power of appointment, it does not specify a method or mode of appointment. On that matter, the terms of the trust instrument are silent.

History of trustees for the Swan Trust

49. The evidence establishes that Kinver is not the original trustee. There have been two earlier trustees:
- (a) The first trustee of the Swan Trust, according to the copy of the schedule of the Swan Trust deed, was the original corporate trustee, R. Swan Pty Limited. The ASIC search of that company in evidence shows that a liquidator was appointed to the company on 18 April 1984 and the company was deregistered on 14 February 1987.
 - (b) The second (as deposed to by Mr Swan) was Nicsim Pty Limited (**Nicsim**), but it was removed on 17 August 1984 and was later deregistered in 1986.
 - (c) Kinver is the third trustee. The company was established on 24 July 1984.

The evidence relevant to Kinver's appointment

50. The evidence relevant to the appointment of Kinver (including the supplementary affidavit affirmed by the applicant's solicitor on 18 February 2025) is as follows:
- (a) Clause 8 of the trust deed does not prescribe any particular method by which a new trustee is to be appointed.
 - (b) A resolution of Nicsim on 17 August 1984 at 3:30pm at the location of Barker & Barker Solicitors in Canberra City records the following under the heading 'Trust' (emphasis added):

The Chairman tabled a notice addressed to the company informing the company that it had been removed from the position as Trustee of a trust named the R. Swan Family Settlement. Attached to the notice was **a copy of a document under the hand of the Appointor of the Trust** removing the company as trustee **and appointing in its stead Kinver Holdings Pty. Ltd.**

RESOLVED: -

That the notice and fact of the removal of the company as trustee of the said trust be accepted and noted.

That authority be given for the company to execute such documentation under its common seal as may be necessary to effect the transfer from the Company to the new trustee of any assets held by the company in its capacity as Trustee of that trust.

- (c) A resolution of Kinver dated 17 August 1984 at 3:30pm, again at Barker & Barker Solicitors, records the following (emphasis added):

The Chairman tabled a notice addressed to Nicsim Pty. Limited stating that Kinver Holdings Pty. Ltd. had been appointed Trustee of a trust named the R. Swan Family Settlement instead of Nicsim Pty. Limited the former trustee. Attached to the Notice was **a copy of a Deed of Removal of Trustee and Appointment of New Trustee under the hand of the Appointor of the Trust.**

Resolved: -

That Kinver Holdings Pty. Ltd. accept appointment to the position of Trustee of the said trust in accordance with the terms and conditions of that trust as prescribed in the Deed of Settlement.

That Kinver Holdings Pty. Ltd. accept the transfer from the old trustee of any assets belonging to the Trust.

- (d) Mr Swan did not depose to any recollection about the Deed of Removal of Trustee and Appointment of New Trustee (**Appointment Deed**). He does not have the Appointment Deed (either the original or any copy of it).
- (e) Mr Beames, the former accountant and the current solicitor for Kinver have each searched for the Appointment Deed among the records they have and not located any original or copy.
- (f) A search has been made of the general register and no registered deed was found.

What is the consequence of the missing record of Kinver's appointment as trustee?

51. The missing deed appointing Kinver as trustee of the Swan Trust creates some uncertainty as to whether Kinver was appointed in accordance with the terms of the trust instrument, and in particular, whether the document records the power of appointment being exercised jointly by Mr and Mrs Swan.
52. Ultimately though, the outcome of this advice is not affected by the fact that the record of appointment itself is missing. That is because the terms of the trust instrument were as set out in the Crowe Trust, and such terms do not specify any mode of appointment of trustee. As will be explained, the statute fills the gap by specifying a method, namely by registered deed. It is a moot point what the Appointment Deed of Kinver said, or whether it was properly executed by each of Mr and Mrs Swan, because the evidence established that no deed of appointment was ever registered.

Statutory methods of appointment under the Trustee Act

53. Sections 6(1) and 6(15) of the *Trustee Act* provide (emphasis added):

- (1) A new trustee **may by registered deed** be appointed in place of a trustee, either original or substituted, and whether appointed by the Supreme Court **or otherwise**.

...

- (15) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

54. Under s 12 of the *Trustee Act*, any instrument by which a new trustee is appointed will only be “registered” if it has been registered under the *Registration of Deeds Act 1957* (ACT).
55. Supplementary submissions were received from the applicant as to the proper construction of these provisions and their interaction with the terms of the Swan Trust. Kinver submitted that s 6(1) did not provide the exclusive means by which an appointment of a new trustee may be carried out. The word “may” in the section is permissive. Accepting that in some circumstances, that language is also capable of use in a mandatory way, the context of the legislation tells against such a construction. The words “shall” and “may” are used elsewhere in the section and it is clear from their context that “shall” is used where the intention is mandatory and “may” is used where the intention is permissive or facilitative.
56. The court’s approach, and the principles applying, to the task of statutory construction have been discussed in cases such as *Dixon v Todd* (1904) 1 CLR 320 at 326-7; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [78]; and more recently, in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 (**SZTAL**) at [14]. That task was largely undertaken in cases cited by the applicant, discussed below. As submitted by counsel for the applicant at a further hearing, s 6 of the *Trustee Act* does not codify appointments of substitute trustees.
57. However, as seen from the plain words of s 6(15), the section operates in the absence of any “contrary intention” in the trust instrument. Here, where there is no method of appointment specified in the terms of the deed itself and therefore no “contrary intention”, the provisions of the *Trustee Act* operate to supply the method. In that way, they supplement the trust instrument.
58. Kinver submitted that s 6 was facilitative and did not override the trust instrument, relying on *Statewide Developments Pty Ltd (in liquidation) (receivers and managers appointed) v Azure Property Group (Holdings) Pty Ltd* [2012] NSWSC 616; 84 NSWLR 133 (**Statewide**) (a case dealing with cognate provisions in New South Wales). It argued that the common law provides a freedom for trustees to be appointed and to determine the manner in which such appointment is to occur. That freedom should not be interpreted as being curtailed by legislation without clear intention. Accordingly, it was

submitted that the failure to register a deed of appointment made pursuant to the terms of a trust instrument did not affect the validity of Kinver's appointment.

59. *Statewide* was concerned with whether the statutory method supplemented or overrode any power to appoint that may be contained in the trust instrument. Pembroke J found that the power was supplementary and that the words of the section ("may") were facilitative. In the course of explaining his reasoning for that finding, his Honour stated at [15]:

The statutory power to appoint a new trustee only supplements any power to do so that may be contained in the trust instrument. It does not override it. That may explain why there is no mention of the *Retravisio* decision, or the particular observations of Young J, in *Jacobs' Law of Trusts in Australia*, 7th ed, 2006. Instead, the authors state at [1504]:

Appointment of New Trustees

New trustees may be appointed in accordance with the provisions made in the trust instrument *or statutory enactment* conferring a power to appoint. In most jurisdictions, the trust instrument is of primary importance, *with statutory powers only relevant if the instrument is silent or if the provisions of the trust instrument do not apply*.

(emphasis added)

60. In adopting that interpretation, Pembroke J also referred to *Kendell v Sweeney & Ors* [2005] QSC 64 (***Kendell***). There, consideration was given to the interpretation of s 6 of the NSW legislation and a similar interpretation was given (at [41]) to that adopted in *Statewide*.
61. Insofar as the statutory power is viewed as a supplementary power, I do not disagree with the interpretation given to the section. It is unnecessary to go further for the purpose of providing the judicial advice that is sought, which concerns simply whether Kinver is justified in proceeding on the basis that it was validly appointed (in the absence of the Appointment Deed). The Court does not need to consider, for example, whether registration of a deed of appointment under s 6 is required for a valid or legally enforceable transfer of trust property.
62. Where I differ from Kinver's submissions is not so much on the interpretation of s 6(1) of the *Trustee Act*, but on the scope of the power to be implied from the terms of the trust instrument under consideration here. In light of a statutory provision such as s 6(15) of the *Trustee Act*, where no mode is chosen by the express terms of the trust instrument and an implied mode of appointment is not otherwise discernible from reading the terms of the instrument as a whole, I do not accept that the appointors are free to choose any

method of substitution that they consider appropriate. Rather, I consider that s 6(1) performs its intended supplementary function and provides the method.

63. In *Statewide* and *Kendell*, the instruments under consideration each specified the method or mode for appointment of a new trustee. In *Kendell*, the terms of the instrument were discussed at [34]-[35], where removal was permitted by notice in writing, but appointment was permitted by deed. Similarly, in *Statewide*, Pembroke J explained (at [6]) that the trust instrument under consideration permitted a change of trustee in the manner that had been carried out. The instrument contained detailed provisions prescribing the requirements and consequences of such a change. Thus, neither case was dealing with a circumstance where the trust instrument was silent on the method of changing the trustee.
64. A case having closer similarity to the circumstances under consideration here is *Plummer v Attorney General of NSW* [2018] NSWSC 869, where Slattery J dealt with a trust instrument which did not contain a method of appointment. His Honour said at [141] (emphasis added):

The 1971 Trust Deed does not specify a formal procedure for the appointment of a new trustee. The *Trustee Act*, s 7(1) provides that a new trustee may be appointed by registered deed in addition to any existing trustee or trustees. Section 7(1) applies only if and as far as a contrary intention is not expressed in the instrument creating the trust and has effect subject to the terms of that instrument: s 6(13) read together with s 7(7). The 1971 Trust Deed, **clause 22 provides that new trustees may be appointed but says nothing about the mode by which they are to be appointed. There is no relevant contrary intention to displace *Trustee Act*, s 7(1), which applies, such that new trustees may be appointed only by registered deed.**

65. In this jurisdiction, in *Australian Conservation Services v Liladel Holdings* [2017] ACTSC 162; 12 ACTLR 124 (**ACS**), Mossop J said at [18] (emphasis added):

For the purposes of considering this argument both parties accepted that the power to appoint and remove trustees was contained within the Trust Deed **and did not require supplementation** by the statutory powers set out in s 6 of the *Trustee Act 1925* (ACT).

66. Again, the trust instrument in that case provided that the power to appoint or remove a trustee “may be exercised by written instrument or by deed signed by the Appointor(s) at that time”: *ACS* at [10].
67. It may be accepted that the common law permits various ways by which a new trustee may be appointed. The *Trustee Act* does not curtail that freedom. But where the trust instrument is silent on which of those methods are to be followed, the method supplied by statute cannot be ignored. To find otherwise would create uncertainty as to that

aspect of the trust and arguably give no work to s 6(15) to do. None of the authorities to which Kinver referred are inconsistent with that interpretation of s (6) of the *Trustee Act*.

Validity of Kinver's appointment

68. Putting the evidence at its highest, the contents of the resolution recording Kinver's acceptance of appointment permit an inference that the Appointment Deed had been properly executed by both Mr and Mrs Swan. Even so, it was not an appointment made pursuant to any express mode of appointment under the trust instrument and it was also not an appointment made pursuant to the statutory requirements set out in s 6(1) of the *Trustee Act*. That calls into question the validity of Kinver's appointment.
69. However, even if I were to adopt Kinver's submissions, which were to the effect that s 6 of the *Trustee Act* had no impact upon the chosen method of Kinver's appointment as trustee, there remains some doubt about the contents of the Appointment Deed and whether it was properly executed by both Mr and Mrs Swan.
70. The terms of the Swan Trust do not refer to or define "Appointor". While the words of clause 8 make it clear that both the husband and the wife constitute "the appointor", the resolution of acceptance does not, in terms, make it clear that Mr and Mrs Swan jointly approved the appointment (that is, it is unclear whether they jointly signed the deed). The difficulty in not having the relevant Appointment Deed is that there is no primary evidence confirming that the reference in the minutes to "the Appointor" was a reference to both Mr and Mrs Swan executing the said Deed, and there is really no other evidence that those two people signed the Appointment Deed. Understandably, given that it was so long ago, Mrs Swan did not provide any affidavit stating that she recalled executing the Appointment Deed. Taken as a whole, the minutes of the meeting do not confirm any appreciation that the appointor was in fact two people. The word "appointor" could equally have been a short-hand reference solely to Mr Swan.
71. In *Advanced Holdings Pty Limited as Trustee for The Demian Trust v Commissioner of Taxation* [2021] FCAFC 135 (***Advanced Holdings***), the Full Court of the Federal Court of Australia had cause to consider a situation where the minutes of a company resolution to accept an appointment as trustee were relied upon as proof of validity of the appointment. The company minutes recording the resolution in that case were in terms similar to those contained in the minutes of the resolution made by Kinver, in that a document entitled "Deed of Retirement and Appointment of Trustee" was recorded as having been tabled at the company meeting, but the deed itself was not included in the evidence. The primary judge found that the reference to the existence of the deed did not prove the appointment of the trustee was effective. On appeal, the Full Federal Court

held that the minutes and the reference to the deed did not prove the validity of the appointment (see [157]-[158]), with the Court stating at [169] that the need to establish the efficacy of all the underlying transactions recorded in a company's minutes may present a sobering bookkeeping reminder to directors of small companies.

72. The consideration of the evidence in that case was in the context of a taxation dispute and allegations of a sham trust. As the applicant submitted, the evidence in that case indicated that the new trustee had not undertaken any acts in its capacity as trustee, including trust distribution resolutions: *Advanced Holdings* at [140]. Further, there were shifting positions as to who was the trustee of the trust, and the creation of false documents supplied to the Australian Taxation Office: *Advanced Holdings* at [141].
73. On an application for judicial advice, the court is not required to make any factual findings as to whether the evidence would be sufficient to discharge an onus of proof in any contested hearing about the validity of the trustee's appointment. But the consideration of the evidence demonstrating validity is a relevant matter here, where the question for the court is whether the trustee is justified in proceeding on the basis that it was validly appointed.
74. While the evidence and surrounding circumstances here are such that the inference may readily be drawn that an Appointment Deed existed in respect of Kinver, and Kinver appropriately accepted the appointment by company resolution, *Advanced Holdings* highlights the very problem the trustee faces. That is, without seeing the contents of the Deed, it is difficult to draw an inference that in addition to Mr Swan, Mrs Swan also signed or in any other way authorised the Deed of Appointment of Kinver.
75. As Mrs Swan was a director of Kinver, and Mr Swan was not only a director but was the director present at the meeting where the resolution was made, they may both be taken to have known about Kinver's subsequent performance of duties as trustee of the Swan Trust. In those circumstances, an inference that Mr and Mrs Swan acquiesced or consented to Kinver's appointment is justified. However, that is not enough to draw an inference of validity.
76. What the trustee is left with is an apparently regular resolution of Kinver accepting an appointment as trustee under a document which ultimately cannot be found. Kinver therefore cannot confirm that the Appointment Deed itself was prepared in accordance with the trust instrument (signed by Mr and Mrs Swan), quite apart from the requirement for registration of the deed in circumstances where the trust instrument is silent as to mode of appointment (applying s 6(1) of the *Trustee Act*).

77. Taking all of this into account, I have ultimately formed the view that the trustee is not justified in proceeding on the basis that it was validly appointed.
78. On further hearing, Kinver submitted that, if the court found it was not justified in proceeding on the basis that it was validly appointed as trustee, then there may be a need for Kinver to first apply to the court (or otherwise attend to formal appointment) before any application for judicial advice could be competently made under s 63 of the *Trustee Act*. In contemplation of this, as part of the originating application, Kinver sought such further orders as the court considered appropriate.
79. Counsel for Kinver submitted that the appointors (Mr and Mrs Swan) are available, have capacity and can each take the additional step to execute a fresh deed of appointment in favour of Kinver (which could then be registered). However, the Supreme Court may also appoint a trustee on application by an interested person or on its own initiative: s 70 of the *Trustee Act*.
80. An order may be made under s 70 only if the court is satisfied the order is appropriate in the interests of the people who are to benefit from the trust, or to advance a purpose of the trust. This brings to the fore the principle stated earlier at [29], that equity will not permit a trust to fail for want of a trustee. Where there is a doubt about a validly appointed trustee, it is plainly in the interests of beneficiaries of the trust to have any uncertainty going forward resolved by an order under s 70. Putting to one side the difficulty created by the missing document of its appointment and the operation of s 6(1) of the *Trustee Act* in the manner I have found above, Kinver has otherwise performed the duties of trustee of the Swan Trust in an entirely orthodox and regular manner. The validity of Kinver's appointment has been assumed for many years. It is undesirable and unnecessary to dissolve Kinver and appoint a different entity. Accordingly, and for abundant caution, it is appropriate to exercise the power given to the court under s 70 and appoint Kinver as trustee of the Swan Trust along with a vesting order. Although such an order is not available on a retrospective basis (as to which, see *NSW Masonic Youth Property Trust v Attorney-General (NSW)* [2010] NSWSC 333; 5 ASTLR 211 at [77]), that will achieve certainty for Kinver in the administration of the Swan Trust going forward.

Costs

81. Under s 59(4) of the *Trustee Act*:

A trustee may reimburse himself or herself, or pay or discharge out of the trust property, all expenses incurred in or about the execution of his or her trusts or powers.

82. This reinforces the common law principle that, subject to any express terms of a trust, a trustee is entitled to be indemnified against debts and liabilities incurred in the proper execution of its duties and powers under the trust out of the assets of the trust: see *Jones (Liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* [2018] FCAFC 40; 260 FCR 310 at [35] per Allsop CJ, with whom Siopis and Farrell JJ agreed.
83. The legislation removes the need for Kinver to obtain a specific order about costs. For abundance of caution, it should be recorded that this proceeding seeking judicial advice was properly and prudently brought.

Conclusion

84. It will be apparent from the above reasons that the advice of the Court is that the trustee is justified in administering the Swan Trust according to the terms of the Crowe Trust, but that, due to the operation of s 6(1) as well as the fact that the critical document appointing it has been lost through the effluxion of time, the trustee is not justified in proceeding on the basis that the appointment of Kinver was valid.

Orders

85. The Court provides the following advice:
- (1) Pursuant to s 70(1) of the *Trustee Act*, Kinver Holdings Pty Ltd is appointed as trustee of the R. L. Swan Family Settlement (**Swan Trust**), with such appointment to take immediate effect.
 - (2) Pursuant to s 63 of the *Trustee Act*, Kinver Holdings Pty Ltd is justified in managing and administering the Swan Trust in accordance with the Deed of Confirmation of Trust for the B. Crowe Family Settlement dated 6 May 2016 and the schedule dated 5 August 1976 identifying the settlor as Margaret Leonard Spurr.
 - (3) Pursuant to s 70(2) of the *Trustee Act*, any property held by Kinver Holdings Pty Ltd on behalf of the Swan Trust is taken, by this order, to have vested in Kinver Holdings Pty Ltd as trustee for the Swan Trust.

I certify that the preceding eighty-five [85] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Justice McWilliam

Associate:

Date: