Substituting your SMSF when off-the-plan is off-the-rails

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Bob and Susan can't afford to complete their off-the-plan purchase unless they use their super.

Bob and Susan signed a contract and placed a deposit in their personal capacity some time ago to acquire an off-the-plan apartment which is now nearing completion. The bank has valued the property lower than the original contract sale price which means their loan is less and they've got to put more in themselves.

Bob and Susan are struggling to secure finance before settlement and want to use their superannuation by setting up an SMSF to acquire the property and rolling over their super into that SMSF. The fund would then use a limited recourse borrowing arrangement but would not need to borrow as much as Bob and Susan personally. They want to know what potential issues may arise in doing so.

Issue 1: Investment strategy

Before Bob and Susan's SMSF starts making investments, it must have an investment strategy. The investment strategy of a fund sets out the fund's investment objectives and specifies the types of investments that the fund can make. It should take into account the specific financial goals of the members and their non-super assets as well in order to put into context their retirement planning.

Bob and Susan will need to ensure that the acquisition of the property through their SMSF is in line with the investment strategy of their SMSF and that it reflects the purpose and circumstances of their SMSF. The strategy needs to be reviewed regularly.

Issue 2: Setting up an SMSF

In order for Bob and Susan to establish their SMSF assets must be set aside for the benefit of members. A nominal contribution amount (for example, $10) must be allocated to at least one member of the fund.

Bob and Susan, as directors of the corporate trustee, will also need to open a bank account in their SMSFs name once the trust deed has been signed.

Rollovers from public offer funds can sometimes take time and require material paperwork so they should leave plenty of time to effect the rollover.

Issue 3: The sole purpose test

Is it possible that by engaging in this re-structure of the purchase the fund is breaching the sole purpose test? That test requires that a fund only be used for members' retirement. Getting a member out of a financial hole is not part of that purpose. So, the investment strategy is again crucial in documenting the likely retirement benefits for the members that would flow and the goal of maximising the efficacy of their retirement planning.

Issue 4: Purchaser named on the contract of sale and deposit

Bob and Susan will need to rescind the previous contract that they entered into with the vendor as purchasers. A purchaser named on the new contract of sale will need to be the holding trustee (i.e. the entity that is acting as custodian). The new contract should be signed after the trust deed has been signed, the fund's bank account has been opened, and the rescission documents have been prepared.

As Bob and Susan have already paid the initial deposit they will also need to seek a refund from the vendor for the deposit that has already been paid and the SMSF will then be required to pay the deposit from its bank account.

This is because in order to apply for concessional stamp duty on the bare trust deed, the SMSF must be able to provide and satisfy the local duties office that the SMSF or its lender provided all the money to acquire the property (including the deposit and the balance of the property paid at settlement).

If Bob and Susan's SMSF cannot provide evidentiary documents such as bank statements to show this then the bare trust deed may be assessed with full ad valorem (i.e. full stamp duty).

Similarly, if the vendor is unwilling to provide a refund for the deposit already paid and Bob and Susan seek to treat the deposit as a contribution, this could affect the SMSFs chances in applying for concessional duty on the bare trust deed.

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