

Acquiring an SMSF property without LRBA in place

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What happens when you inadvertently acquire a SMSF property in a holding trust without any limited recourse borrowing arrangement?

Bruce and Amy are individual trustees and members of their SMSF. They planned to buy a property in their SMSF using a loan and they paid the holding deposit from their superannuation account.

When the real estate agent asked for the name of the purchaser to pass on to the vendor's conveyancer, they gave the details of a company called 'Property Trustee Pty Ltd', which they had set up to act as the holding trustee for their SMSF. Bruce and Amy are the only directors of the company. They also advised their conveyancer that Property Trustee Pty Ltd will be the purchaser, and the contracts were exchanged accordingly.

A couple of weeks before the settlement, Bruce and Amy reviewed their investment strategy and the structure of the purchase and decided to complete the purchase without any borrowed money. Their conveyancer told them it was now too late to change the name of the purchaser. They weren't concerned as they saw little difference between them holding the property in their own name and them using this new company instead. What possible difference could that make, they thought.

Even though there was no holding trust deed signed by the new company, on settlement the property was transferred to and registered in the name of Property Trustee Pty Ltd.

No problem? Big problem.

When a fund trustee acquires a property with borrowed money, the superannuation laws require the property to be held on trust so that the fund trustee only acquires a beneficial interest in the property. The trust that holds the legal title to the property under a limited recourse borrowing arrangement is generally referred to as a holding trust.

We have seen a number of instances where fund trustees inadvertently acquired a property using this so-called holding trust without there actually being any borrowing arrangement in place. Not only is this unnecessary but it causes problems from a superannuation law compliance perspective.

The trustees cannot allow the holding trustee to continue to hold the property.

Bruce and Amy are directors of the holding trustee company, so the holding trust is considered to be a 'related trust' of the fund and the fund's beneficial interest in the property is an 'in-house asset' (i.e. as an investment in a related trust).

If the market value of the property exceeds 5% of the total value of the fund, Bruce and Amy would be in breach of the in-house asset rule and may be subject to civil and criminal consequences.

There is an exception to the in-house asset rule where the asset is subject to a limited recourse borrowing arrangement. But if there is no such borrowing then there is no exception and the in-house asset rule applies.

In these circumstances, Bruce and Amy should seek legal advice as soon as possible in relation to unwinding of the holding trust by transferring the property from Property Trustee Pty Ltd to themselves as the trustees of the fund.

The good news

The good news is that as the fund trustees have paid all the purchase monies from the fund's account, the property is held by Property Trustee Pty Ltd on trust for the fund trustees as the real purchasers under the principle of resulting trust.

Depending on the duties law of the state or territory in which the property is located, a concession for transfer duty on the transfer from the holding trustee company to Bruce and Amy as fund trustees may be available.

This could be where the local revenue law does not levy duty on a transfer by the apparent purchaser of the property to the real purchaser being the entity that provided all the money for the purchase. This will generally require evidence of the source of the funds, available from bank statements.

So if there's been a misstep and your fund's property is held by a holding trust where there is no loan arrangement you should arrange the transfer of the property into the fund trustee's name as soon as possible.

For more information on any aspect covered in this article, please call SUPERCentral on 02 8296 6266 or email info@supercentral.com.au.