

# SMSF BORROWING – MULTIPLE TRUSTS OR MULTIPLE TRUSTEES?

Can a single trustee act as trustee of more than one bare trust? This article considers the arguments over this question and provides our opinion on the matter.

Confusion exists, and differing opinions prevail, regarding the possibility of a single bare trustee acting as trustee of multiple bare trusts and holding assets acquired by SMSFs under limited recourse borrowing arrangements.

This relates to the scenario of the SMSF acquiring a second asset under a SMSF borrowing arrangement, either:

- in conjunction with the first asset; or
- at a later date.

Can each asset be held by the same trustee, under separate trusts, or are separate trustees required to each act as trustee of a single bare trust?

## Example - 2 titles

For this example, we will assume the trustee of an SMSF purchases, under a SMSF borrowing arrangement, a property - an apartment with a car park - on two titles, whereby the titles may be dealt with separately.

That will constitute 2 separate SMSF borrowing arrangements and, therefore (depending on the differing points of view) will require either:

- 2 separate bare trusts under the single trustee; or
- 2 separate bare trusts under separate trustees.

## Example - 2<sup>nd</sup> acquisition

In this instance, an asset - assume a residential property - was acquired 12 months ago under a SMSF borrowing arrangement. At that time, the bare trust was established, with a trustee incorporated for that purpose.

A new property is now being purchased, also financed through a SMSF borrowing arrangement.

Can the trustee established for the 1<sup>st</sup> SMSF borrowing arrangement act as trustee of the 2<sup>nd</sup> acquisition, or must a 2<sup>nd</sup> trustee be established for the asset acquired under the new borrowing?

## Opinions

Differing opinions exist not only over:

- whether a single trustee **may** act as trustee for multiple trusts;
- but also whether it **should**.

Some of the arguments against multiple trusts under a single trustee include the suggestion that a default by the SMSF under one SMSF borrowing will provide the lender recourse to **all** assets held in the various bare trusts by the (single) bare trustee.

## Example – Default

Anthony and Angela have decided their SMSF will borrow, using a SMSF borrowing arrangement, to invest in a few parcels of blue chip shares. It is their intention to invest in shares in blue chip companies, Company A, Company B and Company C.

They decide to apply a form of dollar cost averaging, with the investment in each company being in two lots, spread one month apart, so that they have a staggered entry into the market.

Anthony and Angela have established 6 separate lines of credit with their SMSF's bank and have established 6 separate SMSF borrowing arrangements - 2 for each of the separate holdings in the 3 selected companies.

A single company has been incorporated to act as trustee of the 6 SMSF borrowing arrangements.

Some time later, an adverse event causes the value of the shares in Company C to become almost worthless. As a result, Anthony and Angela decide to have their SMSF 'walk away' from the 2 SMSF borrowing arrangements under which the shares in Company C were acquired.

The takes control of the shares in Company C following default on the loan and sells the shares for a minimal amount. The bank has not

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recovered the amount of the loan made in respect of the two holdings in Company C. It attempts to transfer the unpaid loan amounts to the loan in respect of Company A and Company B, on the basis that the same bare trustee acts in respect of the loans supporting the investment in those companies as well as the holdings in Company C.

What would your advice to Anthony and Angela (or to the bank) be, in that instance?

Those suggesting that multiple trustees are required suggest that it is possible for the lender to attach other assets held by the trustee in order to recoup its losses.

Countering that argument is a range of suggestions, including:

- recourse is at the individual bare trust level, rather than at the trustee level (i.e. each particular loan and the asset the loan helped acquire are clearly linked and stand alone);
- as a separate SMSF borrowing arrangement exists for each asset, access to assets will depend on whether that particular borrowing arrangement has defaulted;
- default in respect of any particular loans clearly results in the lender having recourse to the assets acquired under the defaulted loans; and
- if default occurs across all loans, whether a single trustee or multiple trustees exist is of little relevance.

## Guidance

Neither the ATO Q & As, nor the relevant SMSFRs, provide any direct guidance on the matter. If we refer to the SIS Act, s 67A(1)(b) requires that 'the acquirable asset is held on trust so that the ... trustee acquires a beneficial interest in the acquirable asset'. The legislation is silent on whether or not a trustee may hold multiple trusteeships.

In the ATO Q & As, a distinction is made between 'holding trust' and 'holding trust trustee' which may be the point some are missing.

## Common law

In the absence of any binding guidance from either the superannuation legislation or the ATO, we need to turn to common law principles.

Under common law, the scenario of one trustee regularly acts as trustee for a number of separate trusts.

## Conclusion

Having concluded that a single trustee **may** act as trustee for multiple trusts, is there any reason why it **should not** do so?

In our opinion, there is no particular need for multiple bare trustees when more than one SMSF borrowing arrangement exists. Although there must be one trust for each single acquirable in the asset, there is no reason, in our opinion, why the one entity cannot be trustee of multiple bare trusts.

## More information

Should you have any queries or require more information, please contact the team at Topdocs on 1300 659 242.

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