

QUESTIONS WE'VE BEEN ASKED | PĀTAI KUA UIA MAI

Income tax – Bare trusts and mortgages

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QB 26/04

Under s YB 21, if a person holds something or does something as a nominee (including as a bare trustee) for another person, the other person is treated as if they hold or do that thing, and the nominee is ignored for tax purposes. Where a bare trust exists, the trustee's only duties are to transfer the trust property as the beneficiary directs and, in the meantime, to take reasonable care of the trust property. This question we've been asked (QWBA) considers whether a bare trust can exist where the property held has a mortgage over it.

Key provisions | Whakaratonga tāpua

Income Tax Act 2007 – s YB 21

REPLACES | WHAKAKAPIA

- **IS 23/02: Income tax – Application of the s CZ 39 5 year bright-line test to certain family and close relationship transactions** to the extent the interpretation statement is not consistent with this QWBA. This is discussed in more detail at [19].

Question | Pātai

Can a person be a bare trustee under s YB 21 where there is a mortgage over the property held in trust?

Answer | Whakautu

Yes - A bare trustee is a trustee of a trust under which the trustee's only duties are to transfer the trust property to the beneficiary (or to another person in line with the beneficiary's directions) and, in the meantime, to take reasonable care of the trust property. A bare trustee's role will be limited to mechanical matters relating to holding, maintaining, protecting and transferring the property as the beneficiary directs. A bare trustee may also act as an agent for the beneficiary. The role of a bare trustee as agent may involve active duties beyond those duties involved in the role of a bare trustee alone. However, those actions as agent can only be taken at the direction of the beneficiary.

Case law confirms that a bare trust can exist where the bare trustee is a borrower on a loan used to acquire property that is subject to a bare trust. In those cases, the parties clearly agreed that the property was held by the bare trustee for the beneficiary, that the bare trustee sought the loan and executed the loan documents on the instructions of the beneficiary and the bare trustee did not have any independent power, discretion or responsibilities related to the property. Where a bare trust exists, s YB 21 will apply, and the beneficiary will be treated as if they had obtained the mortgage and held the property for tax purposes.

The situation is different where the trustee's role includes exercising independent power, judgement, discretion, responsibility or a duty of active management (other than to maintain or protect the property), and they exercise that independent power or discretion to obtain a mortgage and acquire a property, without direction from the beneficiary. In such cases, that trustee will not be a bare trustee and s YB 21 will not apply.

Explanation | Whakamāramatanga

1. Under s YB 21, if a person holds something or does something as a nominee for another person, the other person is treated as holding or doing that thing and the nominee is ignored for tax purposes. A nominee is a person that acts on the other person's behalf and includes a bare trustee (but not an ordinary trustee) (s YB 21(2)). An agent is also a nominee.

Bare trusts

2. A bare trust is a trust under which the trustee holds legal title to the property on behalf of another and has no duties other than to convey the property to the beneficiary, or to another person in line with the directions of the beneficiary. A bare trustee also has a legal duty to take reasonable care of the property in the meantime (*Herdegen v FCT* 84 ALR 271). The bare trustee holds the property for the absolute benefit and at the absolute disposal of persons who are of full age and *sui juris* (ie, have full legal rights or capacity) in respect of it (*The Laws of New Zealand: Trusts* (online ed, LexisNexis at [131])). A bare trustee has no independent power, discretion or responsibility in connection with the property (*Paragon Development Corporation v Sonka Properties Ltd* (2011) 103 OR (3d) 48).
3. Determining whether a trustee is a bare trustee involves considering the nature and extent of the trustee's obligations and discretions. It is necessary to ask whether the trustee's role includes exercising judgement and discretion or whether it is limited to mechanical matters only (*Burns v Steel* [2006] 1 NZLR 559, *Body Corporate 185960 & Ors v North Shore City Council & Ors* (2008) 2 NZTR 18-032; *Eden Refuge Trust v Hohepa* (2010) 3 NZTR 20-009).
4. The obligations and discretions of the trustees are determined from the terms of the instrument establishing the trust, the surrounding circumstances and the obligations that the general law or statute impose on trustees (*Burns v Steel*). While nomenclature is not decisive it can indicate the parties' intentions (*Body Corporate 185960*).

Evidentiary requirements for a bare trust

5. No particular form of words is required to establish a bare trust. Nonetheless, in whatever way the intention is expressed, it must satisfy the three certainties (*Foreman v Hazard* [1984] 1 NZLR 586; *Knight v Knight* (1840) 3 Beav 148), as follows:
 - certainty of intention - there should be evidence that the parties intended to create a trust;
 - certainty of the subject matter of the trust – it must be easy to identify the property subject to the trust relationship; and
 - certainty of object - there must be identifiable beneficiaries who are able to receive the benefits of the trust.
6. While it is usually unnecessary to express a bare trust in writing, if there is a bare trust that relates to land s 25 of the Property Law Act 2007 requires the bare trust relationship be in writing and signed by the settlor at the time the bare trust is entered into (see also *Halliday v Hannah* [2024] NZHC 1747 at [45]).

7. Given the onus is on taxpayers to prove that a bare trust exists, the Commissioner recommends creating and keeping contemporaneous records even when no land is involved.

Agency

8. Agency is the relationship which exists when one person has the authority or capacity to create legal relations between another person, called the principal, and a third party. The essence of the agent's position is that he or she is only an intermediary between two other parties (*LC Fowler & Sons Ltd v St Stephens College Board of Governors* [1991] 3 NZLR 304, *Dowsing v State Insurance Ltd* [1996] 3 NZLR 622). An agent acts on the instructions of the principal.
9. A bare trustee may be both an agent and a trustee. This will occur where a person is a trustee because they hold the legal title to the trust property, but in addition they have undertaken to act for the beneficiary and are under the control of that beneficiary (*The Laws of New Zealand: Agency and other legal relationships, Trident Holdings Ltd v Danand Investments Ltd* (1988) 49 DLR (4th) 1 (Ont: CA), *Collins v The Queen* (2002) GTC 314). For example, in the *Trident Holdings* case, Danand held land as a bare trustee, and entered into contracts to construct buildings on the land as agent. In this case, the trustee is still not exercising any power or discretion but is merely carrying out the mandate of the beneficiaries (*Trident Holdings*).
10. For an agency relationship to exist, there need not be a formal express agency contract. An agency agreement can be implied from the circumstances (*Papalia v Romeo* [2011] NSWSC 696). Implied agency arises when it is the objective intention of the parties that one would represent the other.
11. In determining whether such an objective intention exists, the court looks primarily at what the parties did at the time when they allegedly created the agency. The principal must intend that the agent shall act for them, and the agent must intend to accept the authority and act on it (*Field v Shoalhaven Transport* [1970] 3 NSW 96). Where the parties have a written agreement, the "labels" used to express a relationship do not necessarily determine the nature of the relationship (*Commerce Commission v Harmony Limited* [2018] NZHC 1107). Instead, it is necessary to consider all the facts and circumstances.
12. While there is no legal requirement for an agency relationship to be recorded in writing, the Commissioner recommends creating and keeping contemporaneous records given the onus is on taxpayers to prove that an agency relationship exists.

Bare trusts and mortgages

13. Case law confirms that a bare trust can exist where the bare trustee is a borrower on a loan used to acquire property that is subject to a bare trust. In both *Weise v Weise* (2023) ONSC 5227 and *Halliday v Hannah*, the parties entered into a formal bare trust agreement clearly stating the intention that the bare trustee would hold the property on behalf of the beneficiary. Both bare trust agreements satisfied the three certainties.
14. Consistent with the general rules stated above, in *Wiese* the court expressly noted that the bare trust agreement provided no independent rights, powers or responsibilities to the bare trustee. The court also noted the bare trust agreement expressly stated that the bare trustee could not convey or encumber the property without the written consent of the beneficiary, and that the only duties of the bare trustee were to execute any deeds, mortgages or other documents to do with the land at the request of the beneficiary. In *Halliday v Hannah*, the court found that the bare trustee's duty was merely to hold title for the beneficiary and comply with his other express obligations (including transferring the property to the beneficiary as and when she required).
15. The fact that the bare trustee has personal obligations under the mortgage does not appear to be relevant to the question of whether a bare trust exists. In *Halliday v Hannah*, the court noted that the bare trustee was unable to borrow funds for his own purposes because of his commitments as bare trustee. In *Wiese*, the bare trustee was required to stand as guarantor and on three occasions had money withdrawn from her bank account to make mortgage repayments. Those individual liabilities did not prevent the existence of a bare trust.
16. However, the bare trustee has a right to be indemnified for any reasonable debts and liabilities that they incur as a bare trustee (s 81(2) of the Trusts Act 2019).¹ In both cases above, the bare trust agreement expressly stated that the beneficiary was responsible for all payments and provided an indemnity for the bare trustee.
17. In both cases, the bank required the bare trustee to be a borrower as a term of the loan. In *Wiese*, the court stated that the bare trustee was named joint tenant at the request of the lender because the beneficiary would not otherwise be approved to borrow, and that the bare trustee's assistance was sought for the sole purpose of securing financing. In *Halliday v Hannah*, the court stated that it was impossible for the beneficiary and her partner to borrow on their own, but the bare trustee's involvement as borrower and guarantor made financing possible because of his good

¹ There will be no liability to pay RWT on any reimbursement payments made by the beneficiary to the trustee. RWT is only payable on amounts of interest (see ss RE 1 and RE 2). For more information on RWT see [IR283](#) Resident withholding tax on interest (RWT) payer's guide.

income. However, whether or not a bare trustee can enter into a mortgage on behalf of the beneficial owner will always depend on the terms and conditions of the lender.

18. Therefore, a person can be a bare trustee under s YB 21 where there is a mortgage over the property held in trust.

Previous IR statements

19. **IS 23/02: Income tax – Application of the s CZ 39 5 year bright-line test to certain family and close relationship transactions** also discusses the nature of bare trusts and agency. Statements made at [144] and [145] and the third paragraph in Example | Tauira 5 of IS 23/02 could be said to be inconsistent with this QWBA. The IS 23/02 comments were intended to refer to situations where there was no bare trust or agency because the property was held for the benefit of its legal owners who had independent power, discretion and responsibility in respect of the property, and were not acting on any instructions. However, to the extent those comments could be read as being inconsistent with this QWBA, this QWBA clarifies the Commissioner's position.
20. In addition, the Commissioner no longer considers the statements made at [67] of IS 23/02 on undisclosed principals represents the law. An agent for an undisclosed principal will be a person that acts on another person's behalf for the purposes of s YB 21. For further discussion on undisclosed principals, see **IS 21/01 GST and agency**.

Examples | Tauira

21. The following examples illustrate the concepts discussed above.

Example | Tauira 1 – Bare trust

Thomas and Juliet want to buy a house. However, Thomas does not satisfy the requirements for lending by himself. The bank agrees that it will provide a loan if Juliet's friend, Robin, is named as co-owner and borrower along with Juliet, on the basis that Robin will hold his interest as bare trustee for Thomas.

Thomas, Juliet and Robin enter into a written and signed bare trust agreement (as required by s 25 of the Property Law Act). The agreement clearly states that Robin will hold his interest in the property on behalf of Thomas. It specifies that Robin's duties are limited to holding the title to the property, executing any documents necessary for the mortgage as Thomas directs (in his capacity as agent), and transferring the title to Thomas when requested. Robin has no independent powers, discretion or

responsibilities. The agreement also states that Thomas and Juliet will be liable for all outgoings for the property and that Robin is indemnified against any costs.

Robin holds his share of the property as bare trustee for Thomas. Robin also acts for Thomas as agent in executing the documents necessary for the mortgage. Therefore, Robin is acting as a nominee for Thomas under s YB 21. On that basis, Thomas is treated as holding the share in the property and doing the things Robin does as agent, and Robin is ignored for tax purposes.

Example | Tauira 2 – Ordinary trust

Gordon establishes a trust for the benefit of himself, his wife Beth and his son Denis. He names Rick and Theo as trustees. Rick and Theo are given full independent power, discretion and responsibility in respect of the trust funds.

Rick and Theo decide to invest the trust funds by acquiring a rental property. They arrange for a mortgage over the property, execute all the relevant documents and arrange for a property manager to deal with the rental activities.

Rick and Theo hold the property as ordinary trustees, not bare trustees. They have independent power, discretion and responsibility in respect of the property. On that basis, s YB 21 does not apply.

Example | Tauira 3 – No bare trust

Joy finds her dream home and wants to buy it. However, she does not have sufficient savings to pay the deposit. She talks to her parents, Rick and Suzie, about her plans.

Rick and Suzie have already decided independently that they are interested in purchasing a second property as an investment. They agree with Joy that they will buy the house for their own benefit, but Joy can live in the house.

Rick and Suzie hold the property for their own benefit and not as bare trustees or ordinary trustees. They have exercised their own independent power, discretion and responsibility in respect of the property. They have not acted on any instructions from Joy. Given there is no bare trust, s YB 21 does not apply.

Example | Tauira 4 – Property subdivision

The Higgins Family Trust (the Trust) finds a large property with a house on it that would be appropriate for use by the beneficiaries of the Trust. However, the property is too large for the Trust's needs. It is decided that a related company, Higgins Co, will agree to acquire half the property to develop and sell on its own behalf.

The parties agree in writing (as required by the Property Law Act) that the Trust will purchase the whole of the property on the basis that the Trust will own the half of the property with the existing house, and the other half of the property (the Company's half) will be held by the Trust as bare trustee for Higgins Co. The parties agree that the Trust will obtain a mortgage over the property, acting as agent for Higgins Co in relation to the Company's half of the land. The parties also agree that the Trust will undertake the work in subdividing the property, acting as agent for Higgins Co as required. Higgins Co agrees that it will reimburse the Trust for its half of the costs, including the mortgage repayments. Once the property is subdivided, the title to the Company's half will be transferred to Higgins Co and Higgins Co will proceed with developing the land independently from the Trust.

The Trust holds the Company's half of the property as bare trustee. The Trust also acts as agent for Higgins Co in obtaining the mortgage and undertaking the subdivision work. Therefore, the Trust is acting as nominee for Higgins Co under s YB 21. On that basis, Higgins Co is treated as holding the Company's share of the property and doing the things the Trust does as agent, and the Trust is ignored for tax purposes.

References | Tohutoro

Legislative references | Tohutoro whakatureture

Income Tax Act 2007 – s YB 21

Property Law Act 2007 – s 25

Trusts Act 2019 – s 81

Case references | Tohutoro kēhi

Body Corporate 185960 & Ors v North Shore City Council & Ors (2008) 2 NZTR 18-032

Burns v Steel [2006] 1 NZLR 559

Collins v The Queen (2002) GTC 314

Commerce Commission v Harmony Limited [2018] NZHC 1107

Eden Refuge Trust v Hohepa (2010) 3 NZTR 20-009

Field v Shoalhaven Transport [1970] 3 NSW 96

Foreman v Hazard [1984] 1 NZLR 586

Halliday v Hannah [2024] NZHC 1747

Herdegen v FCT 84 ALR 271

Knight v Knight (1840) 3 Beav 148

Papalia v Romeo [2011] NSWSC 696

Paragon Development Corporation v Sonka Properties Ltd (2011) 103 OR (3d) 48

Trident Holdings Ltd v Danand Investments Ltd (1988) 49 DLR (4th) 1 (Ont: CA)

Weise v Weise (2023) ONSC 5227

Other references | Tohutoro anō

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About this document | Mō tēnei tuhinga

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