



CAREY OLSEN

Royal Court determines Guernsey's first Public Trustee v Cooper category 3 type application

Service area / [Dispute Resolution and Litigation](#)

Location / [Guernsey](#)

Date / [January 2015](#)

Carey Olsen's Guernsey litigation team achieved success in an application before the Royal Court of Guernsey recently in what is believed to be a first application of its kind to be determined in this jurisdiction.

The application was made on behalf of Kleinwort Benson (Guernsey) Ltd in its capacity as trustee of a major unit trust which had been promoted widely in the continent of Europe. There were over 360 investors represented in these proceedings by a Court appointed representative. The Application was one that is commonly known as a Public Trustee v. Cooper category 3 type, after the English decision of the same name, whereby a trustee surrenders its discretion to the Court which thereupon makes the actual decision affecting trust assets and beneficiaries.

Partner John Greenfield, Senior Associate Wendy Lewis and Associates Jamie Oldfield and Luke Sayer were the team from Carey Olsen's Guernsey office who successfully acted for the Trustee.

The facts

The Arasbridge Unit Trust (the "Trust") is a multi-class open-ended unit trust which was constituted by Trust Instrument dated 17 November 2006. The Trust was initially authorised by the Guernsey Financial Services Commission under the Protection of Investors (Bailiwick of Guernsey) Law, 1987 but following concerns regarding the accuracy of (inter alia) the Net Asset Value ("NAV") calculations, the Trust was suspended.

Prior to that, following the general worldwide economic downturn, certain of the sub funds had already been suspended. This, coupled with the concerns over the

accuracy of certain of the documentation, left three specific issues to be decided on as to the exact nature of certain of the investors' funds and in particular in which investment they should be deemed to have participated.

Carey Olsen, on behalf of the Trustee, filed an application on 23 June 2014 seeking directions under sections 68, 69(1)(a)(i) (iii) and (iv), 69(2)(b) and 71 of the Trusts (Guernsey) Law, 2007 and Rule 35 of the Royal Court Civil Rules 2007.

The application was filed on the basis that in each of the three residual issues to be resolved, whatever decision was reached would have the effect of favouring one group of investors of the Trust at the expense of another group. The Trustee could not therefore fulfil the fiduciary obligations owed by it to all the investors/beneficiaries.

The Judgment

The Judgment was handed down on 15 January 2015. The Court acknowledged that it is a well-established principle that a trustee faced with a conflict of interest that "disables" it from acting may surrender its discretion to the Court. The Court was satisfied on the facts that this was an appropriate case for the Trustee to surrender its discretion on the outstanding issues given:

- that any decision taken by the Trustee would have the effect of favouring one group of investors at the expense of another group, and
- that the Trustee was in a situation where, if it were to take a decision on these issues there would be a perception, or a real risk of a perception, that it was acting in its own interests.

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Further, the Court considered that the Court-appointed Representative of the investors of the Trust was faced with a similar dilemma given that he represented the entire body of investors and owed duties to each and every one of them such that he could not recommend a course of action that favoured one group of his constituents at the expense of another group.

Having decided that the Court itself was going to make the decision it then had to consider what guiding principles to apply in making it.

Overall, the Court took the view that it must reach a decision which was as fair as possible and certainly one that was “just and equitable” whilst recognising that it could not be fair to each and every investor.

At paragraph 25 of the Judgment, the Court cited with approval a passage from Lewin on Trusts (18th edition), as follows:

“Where the trustees surrender their discretion to the court, it acts in their place by giving directions. In doing so, the court will act as a reasonable trustee could be expected to act having regard to all the material circumstances and is not bound by the wishes of any beneficiary. The court has, however, no greater powers than the trustees have either under the trust instrument or under the general law.”

In arriving at its conclusions, the Court looked at what could be considered as the legitimate expectations of the different classes of investors and what should have happened in respect of their invested funds, noting any practical impediments such as the impossibility of carrying out the investors’ wishes in respect of their investments even if due to events outside the investors’ control – whether due to economic circumstances or otherwise.

Discussion

The acceptance of the surrender of the trustee’s discretion to the Court under the third category of case identified in the leading UK decision of *Public Trustee v. Cooper* is a first for Guernsey.

This decision will provide some comfort to professional trustees of the availability of a remedy in Guernsey when they are faced with the difficult situation where a decision needs to be taken in circumstances where there are beneficiaries (or the Trustees themselves) with conflicting interests.

The decision only serves to strengthen Guernsey’s reputation as a leading jurisdiction for being capable of resolving issues arising from trust and private client work.



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