



In the matter of the [AAA] Children's Trust

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

Location / [Guernsey and Jersey](#)

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In the matter of the [AAA] Children's Trust (Royal Court, 8 January 2014, Sir Richard John Collas, Esq., Bailiff) the Royal Court of Guernsey gives important guidance to trustees on the decision-making process when reaching a "momentous decision".

This judgment will be of interest to the trust industry and legal practitioners alike as the Court addresses what documents it would expect to see when considering whether or not to bless a decision. Throughout the judgment there are two recurring issues. The first was that it was unclear from the papers lodged by the Trustees whether or not a decision had in fact been made and/or what factors the Trustees took into account if they had made a decision. This led to the second issue relating to the duty of disclosure as it had become apparent during the course of the hearing that the Trustees had not given full and frank disclosure to the Court or the opposing parties. The Trustees' failure was described as unforgivable. The Court was left with only one option - which was to decline to bless the "transaction".

Carey Olsen (Advocate John Greenfield and senior associate Kelly Walton) acted for a joint protector (referred to as "P1" in the judgment) in the successful opposition of an application brought by the Trustees to bless a momentous decision. The application was brought under the second category of cases as identified in *Public Trustee v Cooper [2001] WTLR 903*, that is "...where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers". The Court held that

it had jurisdiction under section 4 of the Trusts (Guernsey) Law, 2007 to consider the application, as whilst the Trust was governed by Jersey law, it was administered in Guernsey and two of the three Trustees were companies incorporated and based in Guernsey.

The momentous decision related to the sale of a property which comprised a substantial part of the Trust assets (the "Property"). The money required to purchase the Property (and to carry out alterations and remedial work) was advanced by the Trustees to a company (which owned the Property via a nominee share arrangement) by way of secured and unsecured promissory notes (the "Loan Notes"). Therefore, the Trustees were a creditor of the company. The Settlor had left meticulous and detailed wishes, which were, unusually, incorporated as a Schedule to the Trust Deed itself. A separate memorandum setting out his wishes was finalised after the Settlor's death. It was accepted that the memorandum recorded the wishes communicated by him during his lifetime. He described the Property as a unique property, the "finest jewel in the jewel box" and said that it was only to be sold in "exceptional circumstances" and then "at an appropriately extraordinary price such that the news will reach [him] even in heaven". So steadfast was the Settlor in his wish that the Property be retained that he said that he did not want his two children (who were minors) (the "Children") to dispose of their interest in the Property until they reached the age of 40 and, even then, he did not want them to dispose of the Property as it had been acquired to "protect their long term interests and security ..." in a particular area.

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The hearing took five days and was held in camera. The joint protector, P1, was not formally convened as a party to the proceedings because there was no need for her to be bound by the decision of the Court but she was permitted, with the agreement of all of the parties, to adduce evidence and make submissions. The sale was supported by the Trustees and the other joint protector, P2, who was a long term business associate of the Settlor and involved with the running of the Settlor's business. It was opposed by all family members, namely P1, R1 (the widow of the late Settlor and the Children's mother) and the Advocate representing the Children together with the unborn and unascertained beneficiaries (jointly referred to in this note as the "Opposing Parties").

One of the problems faced by the Court was that it was difficult to identify clearly the reasons relied upon by the Trustees in reaching their decision to sell the Property. The Court expressed concern regarding the lack of documents produced by the Trustees and noted that this was in part because there was not a clear-cut decision by them to accept the proposed offer to purchase the Property, supported by a dossier of relevant factual information and fully recorded in a comprehensive minute of the Trustees' deliberations. Indeed, the Bailiff adopted the Opposing Parties' submission that it was surprising that a professional trust administrator (charging substantial fees for its services) had not prepared a dossier as described above. The Trustees were unable to point to a single document that listed all of the factors that they took into account. The principal document referred to by the Trustees was a minute of their meeting held on 10 July 2012, which was considered by the Court in some detail. The Court noted that:

- The Trustees had not disclosed to the Court a copy of the agenda for the meeting on 10 July 2012 or the documents that would have been circulated prior to that meeting;
- The proposed sale was not a specific agenda item and instead had been considered as part of the Trustees' deliberations regarding the investment portfolio held by the Trust;
- There was no reference to the memorandum of wishes referred to above or the wellbeing of the Children;
- There was no discussion or consideration of other steps that could be taken to preserve capital;
- There was no consideration of the possibility of deferring the decision until the Children had attained the age of majority nor was there any attempt by the Trustees to ascertain their present views (Counsel, having met with the Children, found them to be intelligent as well as being advanced intellectually and mature for their age); and
- The minutes suggested that the decision was taken as if the Trustees were discussing a simple investment.

The Court concluded that it was impossible to pinpoint a meeting of the Trustees at which the momentous decision was taken. In fact, it was unclear whether a decision was taken at all. What emerged during the hearing was that it was a "rolling decision" taken over a long period of time, discussed by telephone and by email, of which no file notes or records were disclosed to the Court or the Opposing Parties. The Court said that the Trustees' failure to produce such records was unforgivable, especially as the Opposing Parties' Counsel had pressed the Trustees' Advocates on a number of occasions to ask whether there had been full disclosure. It is important to note that the Trustees submitted further information after the application was made to the Court on 20 June 2013. The Court noted that information was "elicited" in a number of affidavits (six in total) with the last being sworn on 30 October 2013. The Trustees also lodged expert evidence which post-dated their application, designed to support the Trustees' decision to sell the Property in the current market. In terms of the weight placed on that evidence the Court remarked that "as the application has evolved, the opinions are less relevant than they might have been". By this stage, the Trustees' momentous decision should have already been made and all factors that they took into account should have already been before the Court. Therefore, if expert evidence or advice was required this should have been obtained prior to the decision being made in order to avoid having to submit further evidence to justify the decision after the event.

When facing a momentous decision, a trustee should ensure that the decision made is able to withstand scrutiny. Some of the lessons to be learned from this case include:

- A trustee should hold a meeting specifically to consider all relevant factors in relation to the momentous decision.
- Prior to the meeting, a trustee should consider whether or not it is necessary to obtain any independent professional advice (financial, legal, valuation etc).
- A trustee, and in particular, a paid professional trustee, should prepare a full dossier of information to include:
 - a. the agenda and supporting documents circulated prior to the meeting (including any advice obtained);
 - b. a comprehensive minute of the meeting, which sets out the trustee's deliberations as well as the factors that it took into account when reaching its decision;
- Full and frank disclosure should be provided to the Court and the opposing parties; and
- A trustee would be unwise to try and bolster its application after the event by way of supplementary expert opinion or lay evidence. Good preparation for both the decision and the application is essential.

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