

UPDATE

# Not in my house: Jersey Court refuses to bless a trustee's decision

Update prepared by Christopher Edwards (Partner) and Chris Duncan (Senior Associate)

---

In an unusual case, the Jersey Royal Court has refused to bless the decision of a trustee to sell the trust's sole asset under *Public Trustee v Cooper* principles.

---

## Background

The trust was a conventional discretionary trust governed by Jersey law, the sole asset of which was a property in London held through a company (the **Property**). The settlor (who has passed away) and his family resided in Kenya and the Property had been used by them when they visited London. However, the trust structure did not have any funds to pay for its outgoings and the expectation had been that family members who used the Property would pay for the upkeep. That did not happen and the Property's condition had deteriorated. At the same time, the trustee had accrued unpaid fees of £120,000.

As the trust was 'cash flow insolvent' (noting that technically there is no such thing as an insolvent trust), the trustee could not discharge its liabilities. Given this illiquidity, the trustee indicated to the beneficiaries that the Property might have to be sold. This caused a divergence of opinion between the beneficiaries of the trust, with the elder son supporting the liquidation of the trust's asset and the younger son (supported by the daughter) strongly resisting the sale. Instead, the younger son had made several differing proposals to purchase the elder brother's interest in the trust however none of those proposals got 'off the ground' (with the beneficiaries engaged in separate litigation in multiple jurisdictions).

Given the disagreement between the beneficiaries, the trustee applied to the Jersey Court for a blessing of its decision to sell the Property and to apply the proceeds to: (1) the costs of selling the Property and winding up the trust structure, (2) discharging the outstanding liabilities of the trust and (3) distributing the balance equally amongst the four beneficiaries

## The applicable test

For the Jersey Court to approve an application of this type, it must be satisfied that:

- The decision is 'momentous';
- The trustee's decision has been formed in good faith;
- The decision is one which a reasonable trustee properly instructed could have reached; and
- The decision has not been vitiated by any actual or potential conflict of interest.

The Court had little difficulty (despite the elder brother arguing otherwise) concluding that the decision to sell the Property was momentous, it being the trust's sole asset. The other elements of the test proved more problematic.

## The Court's decision

The Court decided not to bless the trustee's decision and identified three main factors in reaching that conclusion.

1. Conflict of interest

The Court noted that "*it is patently obvious that the trustee has a conflict of interest*" in relation to its decision to sell the Property because this was the most obvious way for it to recover its outstanding administration fees. While this alone did not prevent the Court from blessing the decision, the Court held that "*it is of fundamental importance that the trustee address the conflict issue and be seen to do so*" (emphasis added). Significantly, the trustee's application was completely silent about the conflict of interest. The Court said that it would have expected to have seen minutes in which, when reaching its decision, the trustee acknowledged the existence of the conflict but went on to explain why, despite the conflict, it was nevertheless in the interests of the beneficiaries and the trust estate that the Property be sold.

## 2. Failure to take tax advice

Because the trust was illiquid, the trustee had not taken (or incurred the costs of) tax advice on its proposed sale. Rather, it proposed to use the sale proceeds to obtain tax advice prior to distributions to the beneficiaries being made. The Court held that the illiquidity of the trust was no excuse as the trust held a substantial asset in the form of the Property and there was no question that the trustee will at some point be able to obtain reimbursement for its reasonable fees and expenses from that property (whether that be from the Property's income or its sale proceeds).

## 3. Reasonableness

The Court was not satisfied that it was reasonable for the trustee to insist on the sale of the Property at this stage. Whilst acknowledging the difficulties under which the trustee was acting, the Court felt that it had adopted "a rather passive stance" instead of proactively trying to establish whether there was any means by which the Property could be retained for the benefit of the younger brother and sister, who wished it to be retained. This did not mean that the trustee could not, in the future, reasonably come to the decision to sell the Property. However, before doing so, the court recommended that a clear deadline should be given to both the younger brother and the sister to come up with concrete proposals by which the Property could be retained, which the trustee and the elder son could then consider.

We expect that the Guernsey Royal Court, if presented with an application couched in similar terms, would adopt a consistent approach.

## Lessons for trustees

This decision serves as an important reminder to professional trustees that their obligations to beneficiaries do not end with the trust's apparent insolvency. Discharging those obligations may require them to incur costs without immediate recourse to the trust's assets in order to fulfil these obligations.

It also highlights the need to take good advice in early course to avoid the risk of a failed Public Trustee v Cooper application. All of the issues which the Court identified could have been remedied. Some, such as the need to clearly identify a conflict and deal with it appropriately in the decision making, could have been dealt with relatively easily indeed. The decision making process should be viewed as a continuum (albeit, the trustee must ultimately be able to evidence when the decision was made). Trustees who only engage advisers once a decision has been made risk jeopardising the outcome if it transpires that the process leading up to their decision was flawed – even if a proper process might have led to the same or similar decision.

## Contacts

---



**Christopher Edwards**  
Partner, Mourant Ozannes  
Guernsey  
+44 1481 739 322  
christopher.edwards@mourant.com



**Chris Duncan**  
Senior Associate  
Guernsey  
+44 1481 739 373  
chris.duncan@mourant.com

---

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED