

## Family Unit Trusts in Jersey

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A unit trust provides high net worth families with a flexible vehicle for acquiring and holding a variety of investments and family assets.

Unlike a discretionary trust, the unit trust enables beneficiaries to participate in any profits or income arising from the underlying trust fund pro rata according to the number of units they hold. At the same time the trust instrument can be drafted to ensure that certain specified family investments remain held by the trustee and are thereby preserved for future generations.

Where appropriate, the unit trust can be structured so that the units are held by the settlor during his lifetime but then pass to his heirs in a pre-determined manner on his death or incapacity.

A key advantage of the unit trust is its flexibility. The trust instrument can be drafted to meet a family's requirements in relation to:

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The unit trust can also provide a mechanism for enabling family members to become involved in the management of the family's wealth. Where the unit trust has a private trustee company as trustee it is possible for family members to populate the board of that company. Another option is to give certain investment powers to a committee which the family can populate and to include drafting in the trust instrument which obliges the trustee to action such committee's directions in relation to certain matters.

### **How is a Unit Trust structure established?**

A Jersey Unit Trust (JUT) will come into existence on the execution of a trust instrument by a trustee and the transfer of the initial property to the trustee to be held in accordance with the terms of the trust.

In consideration for the client vesting property in the trust, the trustee will issue units in the unit trust to the client and enter the client's name in a register of unitholders. Each unit issued represents an undivided share of the underlying trust fund and carries the rights attaching to such unit as set out in the trust instrument.

Where the JUT is to be used as an acquisition vehicle and there is a structural requirement for the trust to exist prior to the acquisition taking place, the initial transfer of assets to the trust can be of a nominal cash sum. Further capital can subsequently be introduced by way of equity injection through subscription for additional units and, if required, by way of debt leverage, to enable the trustee to finance the acquisition of investments. Lending can be arranged on a secured basis by having the trustee grant a legal charge over the underlying investments in favour of the lender.

Alternatively, where the client wishing to establish a JUT already owns the investments and simply wants to settle those assets in the trust, the JUT can be established by transferring the title to the investments direct to the trustee. Such a transfer would usually be effected by a contribution or subscription agreement together with execution of such transfer forms and such other registration formalities as may be required to transfer legal title to the investments to the trustee or its nominee.

A further option for establishing a JUT is for a nominal amount of assets to be settled on the trust in consideration for the issue of initial units in the trust.

If the JUT is a private vehicle with no more than 15 investors and there is no offering memorandum, the only Jersey regulatory requirement for establishing the trust will be to obtain consent from the Jersey Financial Services Commission (the "JFSC") to the raising of money by the issue of units under the Control of Borrowing (Jersey) Order 1958. Subject to the terms of the trust instrument being agreed and customer due diligence being provided, a JUT can be established and the necessary regulatory consent obtained within around 5 working days. There is no public register of unit trusts in Jersey and the trust instrument and register of unitholders are not open to public inspection. Where units in the JUT are to be offered to more than 15 investors it will be necessary to consider which of Jersey's fund regulatory regimes will be applicable to the structure.

### **Who should act as trustee?**

The majority of JUTs are established with a newly incorporated Jersey special purpose company appointed to act as trustee. Whilst it is possible to appoint a professional trust company to perform this role, using a private trustee company has two main advantages. Firstly, it provides the unitholders with a greater degree of control over the JUT by enabling them to populate the board of directors of the trustee with nominated individuals. Secondly, if in the future there was a requirement to move the administration of the trust structure to a new administrator this can be achieved with minimal effort (and without disturbing the legal ownership of the underlying trust assets) by means of a transfer of the shares in the private trustee company. By contrast, where a professional trust company is trustee of the JUT and the unitholders subsequently wish to appoint a new trustee in its place, it would be necessary for the legal title to the trust assets and all contracts entered into by the professional trust

company in relation to the underlying property to be assigned or novated to the new trustee.

Another advantage of using a private trustee company is that it ring fences the potential liabilities that might otherwise attach to the professional trust company. Where a professional trust company is used assets which might give rise to liabilities should be held indirectly using underlying corporate entities.

### **Who will own the trustee?**

If a private trustee company is established to act as trustee of the JUT and it is commercially desirable to keep this entity "off balance sheet", its shares can be held by a foundation or purpose trust. Alternatively, the shares in the trustee could be held by the client directly.

### **Does a JUT require more than one trustee?**

There is no Jersey legal or regulatory requirement for a JUT to have more than a sole trustee.

Where however the JUT is being established to hold English real estate in order to avoid technical difficulties arising under the doctrine of overreaching, it will frequently be preferable for the UK real estate to be held by two trustees. The use of joint trustees will enable a lender or purchaser transacting with the trustees to deal with them without being obliged to have regard to the equitable interests of the beneficiaries. Where there is a sole trustee, the overreaching problem can be avoided by arranging for title to the English real estate to be held by the trustee and by a nominee (or, alternatively, by two nominees) on trust for the sole trustee.

### **What duties do trustees owe unitholders ?**

In addition to being regulated by the JFSC under the Financial Services (Jersey) Law 1998 (the "FS Law"), Jersey trustees are required to act in accordance with the Trusts (Jersey) Law 1984.

Under Jersey law, trustees have an obligation to act with due diligence, as would a prudent person, to the best of their ability and skill and in accordance with the terms of the trust instrument. Depending on the nature of the trust assets, the trustee may appoint a property manager or investment manager to deal with day-to-day management activities. In addition, trustees must observe the utmost good faith and exercise their powers solely for the benefit of the unitholders as beneficiaries.

There is no Jersey regulatory requirement for a manager to be appointed by the JUT, although one can be appointed if this is commercially desirable. Where a manager is required it will usually be made a party to the trust instrument to undertake management responsibilities and the trustee will tend to take on a more passive, custodian role.

### **Role of the unitholders**

The relationship between the unitholders and the trustee will, to a large extent, be determined by the terms of the trust instrument. The trust can be structured to take into account any particular

requirement a client may have in relation to interests in the trust and may, for example, determine the extent to which unitholders are able to take actions such as redeeming or transferring their units, removing an existing trustee or resolving that the trust be terminated. The trust may provide, for instance, that the prior consent of all unitholders is required to sanction such actions.

It should be noted, however, that where all of the unitholders are in agreement on a particular course of action and have full legal capacity, the *Saunders v Vautier* principle will apply, meaning that irrespective of the terms of the trust instrument, the unitholders may be able to alter the terms of the trust.

### **Unitholder control rights**

There are various ways in which unitholders are able to control the actions of the trustee, although specific advice needs to be taken to ensure that any control rights reserved to the unitholders do not jeopardize any tax structuring objectives.

Common techniques include:

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### **What is a Baker Trust?**

A JUT is often required to be a "Baker Trust". Named after the UK case *Baker v Archer-Shee*, this simply means that the trust instrument is drafted such that the income generated by the trust assets accrues directly to the unitholders as it arises, rather than forming part of the trust fund for later distribution by the trustees. This will generally result in a "pass through" investment vehicle and a tax transparent structure for most unitholders. The benefit of a Baker Trust is that the income of the JUT will be directly attributable to the unitholders pro-rata and they should be able to set off any expenses of the JUT against that income.

### **Are there any restrictions on making distributions ?**

In comparison to UK corporate investment vehicles, JUTs are extremely flexible. There are no Jersey legal or regulatory limitations on the exercise of the trustee's power to distribute trust assets to unitholders or the source from which such distributions may be made. For example, there are no restrictions requiring distributions to be made out of the realised profits of the trust fund and distributions may be made from the capital of a JUT without the need to satisfy a solvency or other

test. Where there is more than one unitholder, the trust instrument will usually provide for distributions to be made in proportion to the units held.

### **Can security be granted over units?**

It is possible to create security over units in a JUT and most UK banks are familiar with lending to JUTs on a secured basis. For the purposes of the Security Interests (Jersey) Law 2012, a unit is treated as being equivalent to a share in a limited company and, as such, is qualifying collateral for the purposes of a security interest agreement and securing a loan.

### **What are the regulatory considerations?**

JUTs are extremely flexible in comparison to investment vehicles available elsewhere. For example, there are no leverage limitations or concentration restrictions, so that the trust portfolio may consist of a single asset. There are no restrictions on the percentage interests of a unitholder in the JUT nor on the number or type of classes of unit that may be issued.

Where there are fewer than 15 investors, a JUT will be treated as a very private structure and will not be regulated by the JFSC. If there will be more than 15 investors, it is likely that Jersey regulatory consents will be required, however, the level of regulatory supervision of the JUT will depend upon the sophistication of the investors and the minimum subscription required to be made under the terms of the trust instrument.

Where the minimum investment to be made by each unitholder exceeds US\$1 million (or the currency equivalent) or the unitholders are professional or institutional investors, the JUT can be established as an "Eligible Investor Unregulated Fund" and will qualify for exemption from regulation in Jersey. As an Eligible Investor Unregulated Fund, the JUT will need to include a prescribed form of investment warning and a statement that the trust is unregulated. It will also require a notice to be filed with the JFSC but, subject to these conditions being met, the JFSC will not exercise any regulatory or supervisory powers in relation to the JUT's establishment or operation.

Where the minimum investment to be made by each unitholder exceeds US\$100,000 (or the currency equivalent), the JUT may qualify as a Jersey "Expert Fund". Expert Funds are subject to a light regulatory touch and subject to certain conditions being met can be approved within three days of an application being made. These conditions include the trust instrument complying with prescribed content requirements, the board of the trustee company including two Jersey resident directors and the JUT appointing a Jersey administrator or manager as a "monitoring functionary".

For more detail on the regulatory treatment of funds in Jersey please see our briefing on Jersey Investment Funds – Regulatory options [\[insert link\]](#).

### **Does the Trustee need to be regulated?**

The trustee of a JUT will need to either be regulated to carry on trust company business pursuant to

the FS Law, or to fall within a relevant exemption pursuant to such Law. Where the client wishes to use a private trustee company in the structure, the company will usually be able to bring itself within the "private trust company exemption" pursuant to the FS Law.

If the trust assets comprise more than cash and real estate, it is likely that the assets will fall within the definition of "Investments" for the purposes of the FS Law. This can result in the trustee being regarded as carrying on investment business under the FS Law in addition to trust company business.

Provided each unitholder makes a minimum subscription of £250,000 (or the currency equivalent) or is a professional investor it is possible to structure the JUT as a so called "professional investor regulated scheme" pursuant to the Investment Business provisions of the Financial Services (Investment Business (Restricted Investment Business-Exemption)) (Jersey) Order 2001. This enables the trustee to avoid the need to be regulated to carry on investment business under the FS Law provided each investor in the scheme has received and signed an investment warning in the prescribed form.

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