

# Snapshot: 'Momentous Decision' Applications by Trustees

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It is well known that the Trusts (Guernsey) Law 2007 (the **Law**) provides Guernsey trustees with a wide array of powers to undertake various acts in their capacity as trustee.

More often than not, the terms of the trust deed will extend the powers conferred on trustees by the Law. When deciding to exercise these powers, trustees must consider all of their legal and fiduciary obligations. However it is not always that simple, at some point a trustee will be faced with a decision so important or so complex that, even though it is confident that it has the requisite power to make the decision and it has taken all of the relevant factors into account, the trustee wishes to seek the blessing of the Royal Court for the decision that it has taken (with the usual caveat that it is subject to the Court's approval).

In effect, the blessing of the Royal Court deters any future criticism by beneficiaries that the decision was made in breach of the trustee's legal and fiduciary duties.

In order for the trustee to obtain such strong protection, the Court will need to be satisfied that the decision is indeed a momentous one before it will entertain an application. It is difficult to distil what a momentous decision is, other than being a decision of real importance to the trust. By way of example, a trustee may receive an offer to sell the trust's sole asset to an interested buyer. This would likely be a momentous decision in any event but more so if there is evidence (for example, in the settlor's letter of wishes) that the settlor did not wish the asset to be sold, or if the beneficiaries oppose the sale in some way. The trustee may truly believe that the sale is in the best interests of the beneficiaries and it is then faced with a difficult decision as to how to proceed, as it will be concerned about the possibility of future claims that the asset should not have been sold, that the asset should have been sold for a higher price, or that the decision making process was in some way flawed.

## The Guernsey position

In Guernsey, such applications are known as 'momentous decision' or 'blessing' applications. The

Law provides a mechanism for the trustee to make such an application, though they are usually said to be brought under the 'category 2' rule in the English case of *Public Trustee v Cooper 2001*, as the trustee is not fettering its discretion to make the decision to the Royal Court, but rather it is asking the court to bless the decision which has, in effect, already been made.

The test that the Royal Court in Guernsey will use when deciding whether or not to bless a momentous decision was laid out in *Re AAA Children's Settlement 2014*, in that case the Court stated that it will consider:

1. Whether the trustee had the power under the terms of the trust instrument, any other relevant instrument and the Law to make the momentous decision
2. Whether the Court was satisfied that the trustee had formed the opinion to make the decision in good faith and whether it is was desirable and proper for it to make the decision
3. Whether the opinion formed by the trustee was one which a reasonable trustee in its position properly instructed and informed could have arrived at
4. Whether the court was satisfied that the opinion arrived at by the trustee had not been vitiated by any actual or potential conflict of interests which either had or might have affected its decision

This test was affirmed in the case of *In the matter of the LKM Discretionary Trust* in 2016, in which the trustee was considering making a substantial distribution to one beneficiary. In *LKM* the Royal Court stated, for the avoidance of doubt, that it will exercise caution with these types of application, and will not simply act as a rubber stamp.

In making these applications, the quality of the evidence put before the Court is, as always, crucial and the trustee must ensure that evidence as to all the relevant considerations is put before the Court, including disclosure of the trustee's reasons for the decision. Minutes, resolutions and any expert advice (such as professional valuations or tax advice) should be collated to show all of the matters that the trustee has taken into consideration in making the decision. The Court will consider all the evidence and will hear evidence from the representatives of the beneficiaries, either in support or opposing the application.

As the Court highlighted in *Re LKM*, each case put before the Court '*will need to be decided on its own facts, and the degree of detail that is required from the trustee cannot be uniform in all circumstances*'.

Further, it should be born in mind that the terms of each trust deed will differ and therefore advice may differ depending on the facts at hand. The Ogier Dispute Resolution team has a wealth of experience in advising on and making momentous decision applications and would be delighted to advise further as needed.

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