

A guide to Jersey Property Unit Trusts

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Background

Jersey Property Unit Trusts (JPUTs) are frequently used to acquire and hold interests in UK commercial real estate due to the ease with which they can be established and the fiscal advantages they can potentially bring.

These advantages may include transparency for income tax and exemption from UK capital gains tax on the sale of the underlying property. A further advantage associated with using the JPUT as an investment vehicle is that the underlying property may, in effect, be transferred free of any stamp duty or stamp duty land tax charges by structuring the transfer as a sale of units rather than as a conveyance of the underlying property.

These fiscal advantages, combined with the flexibility to tailor the terms of the trust instrument to meet commercial and operational requirements, are key to the JPUTs popularity and mean that it is a very familiar structure to principals, legal advisors, investors and lenders.

How is the structure established?

A JPUT 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 JPUT 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 JPUT is to be used as an acquisition vehicle and there is a structural requirement for the trust to exist prior to the property 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 the investment property. Lending can be arranged on a secured basis by having the trustee grant a legal charge over the underlying property in favour of the lender.

Alternatively, where the client wishing to establish a JPUT already owns the real estate asset, the JPUT can be established by transferring the title to the property directly to the trustee. Such a transfer would usually be effected by a contribution or subscription agreement together with execution of a land transfer form and such other registration formalities as may be required to transfer legal title to the trustee or its nominee.

If the JPUT is a private vehicle with no more than 15 investors and there is no offering memorandum and no marketing of units in the JPUT in the European Economic Area (the EEA), 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, the necessary regulatory consent can be obtained and a JPUT established within 5 business 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 JPUT are to be offered to the public, we are generally able to obtain the necessary Jersey regulatory consents within a few weeks.

Who should act as trustee?

The majority of JPUTs 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 JPUT 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 property) by means of a transfer of the shares in the private trustee company. By contrast, where a professional trust company is trustee of the JPUT and the unitholders subsequently wish to appoint a new trustee in its place, it would be necessary for the legal title to the property 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.

Who will own the trustee?

If a private trustee company is established to act as trustee of the JPUT and it is commercially desirable to keep this entity "off balance sheet", its shares can be held by a foundation or charitable or non-charitable purpose trust. Ogier is able to assist with the establishment of foundations or charitable or non-charitable purpose trusts for this purpose. Alternatively, the shares in the trustee could be held by the client directly.

Does a JPUT require more than one trustee?

There is no Jersey legal or regulatory requirement for a JPUT to have more than one trustee. From an English property law perspective, however, in order to avoid technical difficulties arising under the doctrine of overreaching, it will frequently be preferable for 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. As a practical consequence, JPUTs tend to have two corporate trustees. Where there is a sole trustee, the overreaching problem can instead be avoided by arranging for the trustee to hold title to the real estate jointly with a nominee (or, alternatively, arranging for title to be held jointly by two nominees) who would hold their interest in the real estate 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 (although exemptions from such regulation are available, particularly for private trustee companies where the unitholders are professional or sophisticated investors), 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 real estate, the trustee may appoint a property manager to deal with day-to-day management activities, such as rent collection and property maintenance. In addition, trustees must observe the utmost good faith and exercise their powers solely for the benefit of the unitholders as beneficiaries.

Does a JPUT require a manager?

There is no Jersey regulatory requirement for a manager to be appointed by the JPUT,

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. In summary this principle provides that a trustee must act in accordance with the directions of the beneficiaries of a trust (provided all of the beneficiaries of a trust are of full age, have capacity and are together absolutely entitled to all of the trust assets). This means that the unitholders may be able to alter the terms of the trust, irrespective of the terms of the trust instrument.

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 jeopardise the tax structuring objectives. Commonly used techniques are:

- including in the trust instrument a schedule of reserved matters in relation to which the trustee may not take any action without the prior consent of all (or a specified majority) of the unitholders;
- including within the trust structure an advisory committee to advise the trustee in relation to investment opportunities and other strategic decisions; and
- using a private trustee company as trustee of the JPUT with the unitholders nominating individuals to the board of directors.

What is a Baker Trust?

A JPUT is often required to be a "Baker Trust". Named after the UK case *Baker v Archer-Shee*, this term simply means that the trust instrument is drafted in such a way 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. In relation to UK real estate investments, 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 JPUT will be directly attributable to the unitholders pro-rata and they will be able to set off any expenses of the JPUT against that income.

Are there any restrictions on making distributions?

In comparison to UK corporate investment vehicles, JPUTs are extremely flexible. Subject to any restrictions being included in the trust instrument, 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 JPUT 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 JPUT and most UK banks are familiar with lending to JPUTs on a secured basis. For the purposes of the Security Interests (Jersey) Law 2012, a unit is treated as being an "investment security" and, as such, is qualifying collateral for the purposes of a security interest agreement and securing a loan.

Tax considerations

UK Stamp duty land tax

No stamp duty land tax arises on any sale of units in the JPUT. Stamp duty land tax would apply on a direct disposal of the asset by the JPUT.

UK Capital Gains Tax and Corporation Tax

The UK's Capital Gains Tax (CGT) and Corporation Tax (CT) regimes were revised in April 2019 resulting in non-UK investors being brought into scope on any direct or indirect gains in relation to investments in UK property. However, exemptions were introduced for non-resident collective investment vehicles (including JPUTs). To benefit from such exemptions, the JPUT is required to make either a transparency election or an exemption election. Both elections have the effect of preserving the tax neutrality of JPUTs for gains, shifting taxation of gains to the level of the investor.

What are the regulatory considerations?

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

Where there are 15 investors or less and no marketing of interests in the EEA, a JPUT will be treated as a very private structure and will not be regulated by the JFSC. If there will be more than 15 investors and/or marketing of interests in the EEA, it is likely that Jersey regulatory consents will be required, however, the level of regulatory supervision of the JPUT will depend upon the sophistication of the investors and the minimum subscription required to be made under the terms of the trust instrument.

For further information on fund vehicles available in Jersey please do not hesitate to contact us.

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