



In the matter of the Arasbridge Unit Trust
Royal Court
14th August, 2015

JUDGMENT
39/2015

Supplemental judgment to the judgment handed down on 15 January 2015 (02/2015) regarding an application by a trustee to the Court, seeking directions in relation to a number of matters that have arisen in connection with a multi-class open-ended unit trust.

Approved Text
14.08.2015

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

IN THE MATTER OF THE ARASBRIDGE UNIT TRUST (“the Trust”)

Between: **KLEINWORT BENSON (GUERNSEY) LIMITED**
as Trustee of the Trust

and

ARAS INVESTMENT MANAGEMENT LIMITED
as Manager of the Trust

ACTIVE FUND SERVICES LIMITED
as Administrator of the Trust

and

JEREMY LE TISSIER
as representative of the Representative Group

Judgment handed down: 14 August 2015

Before: Sir Richard Collas, Bailiff

Advocate for the Trustee: Advocate J P Greenfield
Advocate for the Administrator: Advocate A M Ozanne
The Representative: Advocate J T Le Tissier
The Manager did not appear

JUDGMENT

1. This Judgment is supplemental to the judgment I handed down on 15 January 2015 (“the 15 January Judgment”) and relates to those parts of the Application dated 23 June 2014 (“the

Application”) which were not dealt with by the 15 January Judgment but were adjourned for hearing at a later date. The resumed hearing was held on 20 January when I delivered my reasoned decision which I said I would confirm in a written judgment. In this Judgment, I adopt the same definitions as I used in the 15 January Judgment.

2. One of the reasons for the adjournment was to enable Advocates Carey Olsen, acting on behalf of the Trustee, to attempt to serve notice of the Application on the former administrator of the Trust, Aras Investment Management Limited (“AIML”). The directors of AIML have all resigned which is an event that could have caused AIML to be struck off the Register of Companies but the Registrar has not done so pending the outcome of this litigation. AIML is therefore in the unusual situation of being in existence but having no directors or management and thus no one who can formally represent AIML or give instructions on its behalf. At the resumed hearing on 20 January, I was advised that notice of the Application had been served at the registered office of AIML and on the Advocates who formerly acted for it. Carey Olsen had also corresponded with Mr Philip Lane, a former director. The former directors were not present at the resumed hearing but Advocate Greenfield, acting for the Trustee, produced a letter dated 19 January 2015 from Mr Lane and another former director of AIML, Darran Ayres. The letter commented on certain aspects of the Application to the best of the recollection of the former directors who were writing without the benefit of access to AIML’s records.
3. There was one particular matter in the letter which Advocate Greenfield drew to my attention as it related to the Order I made in the 15 January Judgment. On page 4 of the letter, the former directors wrote that *“we understand that Paul Christopher of Ozannes, [the Trust’s] Advocate advised that the Fund was a Class B collective investment scheme and hence all investors in [LLF], whether they invested before or after the suspension of Puritan, had equal participation in the assets and liabilities of LLF and the later investors should not be given preferential redemption treatment.”* I was told that neither the Trustee nor any of the other parties present in Court had previously known about that legal advice. They informed me that there was no documentary evidence within the papers held by them or exhibited to the Court to indicate whether the former directors’ recollection was correct. Furthermore, if Mourant Ozannes had given such advice, no one present knew what instructions or information had been made available to the Advocates on which to base such an opinion. In those circumstances, I saw no reason to revise the earlier decision I had given in relation to LLF.
4. In the 15 January Judgment I ordered that the monies received from the Interim Investors and the Last Investors in the LLF (their subscriptions) should be repaid to them. (In this judgment, I will refer to the monies initially subscribed by each investor as a “subscription” and to the assets held in the Trust representing the units allocated to each investor as “investments”). The first issue I was asked to address at the resumed hearing on 20 January was the question of how to treat the establishment fee that had been deducted at source from the subscriptions of the Interim and Last Investors in LLF. 12% of each subscription received from the Interim and Last Investors was deducted by AIML before any of the investors’ monies were paid to the Fund or into the LLF. Under the scheme particulars the Fund was responsible for paying establishment charges and thus, I was advised, all the subscriptions should have flowed through the Fund in the first instance. That opinion was confirmed in a report prepared by KPMG and labelled “Project Tulip” dated 14 October 2011, (CM1, page 141).
5. It was on that issue that I was most interested to have the comments of the former directors of AIML because the scheme documentation appears to suggest that the establishment fees should have been taken at a rate of 0.375% per quarter over an 8 year period. The letter from the former directors recited provisions of the scheme particulars and other scheme documentation but did not give any other explanation for having deducted the whole 12% at the date of subscription. The letter did not assist me in coming to a view as to whether it was correct that AIML had deducted such fees in an initial lump sum before the Interim and Last Investors were allocated units in the LLF.

6. I was advised that the total amount of the establishment charges deducted from subscriptions made by the Interim and Last Investors amounted to €210,047. The common view of all the parties in Court was that the fee should not have been deducted in a single amount and I see no reason to depart from that view although I express no formal decision without having heard formally from AIML. Even if the full 12% should not have been deducted, AIML might argue that one or more quarterly payments later became properly due and payable. Hence the amount of any overpayment to AIML may well be less than €210,047.
7. (I was informed that a similar issue might require investigation in respect of other sub-funds of the Fund but had not, at this point, been investigated by the parties.)
8. It was suggested that whatever amount might have been overpaid to AIML, it might have to be offset against other management fees which accrued but were not paid to AIML. It is impossible for me to form a view as to whether any unpaid management fees should be deemed payable. Or if there are such fees, for what period they should be deemed to have been earned. There can be no suggestion that AIML was entitled to receive any fees in respect of the period after April 2013 when it surrendered its licence to the GFSC. It was not known whether AIML might seek to claim fees for all or part of the period prior to that date or if it did attempt to make such a claim, whether such fees would be due. I cannot decide what amounts, if any, might be due to AIML and do not know whether there is a net balance due either to AIML or to LLF or to the Fund.
9. Having ordered that, in principle, the Interim and Last Investors shall have their subscriptions returned to them, the issue is whether they will receive the full amount of the monies sent by them for investment in the LLF or the net amount after deduction of either the full amount of the establishment charge (12% of their subscriptions) or such proportion of the establishment charge as should have accrued over the period that their monies were held by the Fund. That is to say do they receive 100% of their subscriptions, 88% of their subscriptions or some other figure in between the two? The difficulty is that the monies ring-fenced for them is the net amount, 88%, of their subscriptions; any amount they might receive in excess of 88% will reduce the amounts payable to other investors. If AIML were held liable to repay all or part of the establishment charge, it would not be in a position to do so as it does not have funds available (and it has no directors). The only source of funds would be money that would otherwise be payable to other investors when the Fund is liquidated.
10. Without knowing the quantum involved and without knowing what might be due to or from AIML, it was impossible for me to come to a fair and just decision on the issue.
11. I was told that the parties who were appearing before me will, in due course, make an application for the Fund to be formally liquidated. I consider it is likely (without expressing a definitive view) that it will be some form of compulsory liquidation where the liquidator will be supervised by the Court. The question of how to deal with any fees owed either by or to AIML will be an issue on which the liquidator is likely to take directions from the Court.
12. It was suggested by Advocate Le Tissier that it might be appropriate to defer any decision concerning the establishment fee deducted from the Interim and Last Investors in LLF until such time as the liquidator is able to form a view or apply to the Court for directions. Advocate Le Tissier believed that such a delay would be unlikely to delay final payments to investors as there are other matters that cannot be finalised until the liquidation is carried out. Neither Advocate Greenfield nor Advocate Ozanne raised any objection to the idea of further adjourning the issue to a later date.
13. I therefore adjourned the question of the treatment of the establishment charges deducted in respect of subscriptions received from the Interim and Last Investors in the LLF. The matter can be brought back to the Court by any of the parties or dealt with by the liquidator in the course of liquidation, most likely in accordance with the Court's directions.

14. Another issue I was asked to address at the adjourned hearing was the treatment of investments made by persons referred to in the application as the Fairbairn Six (an expression I have adopted even though Mr Schram has identified that there may be nine investors in a similar position). Each of the Fairbairn Six intended to make a leveraged investment in two parts: the first part of the investment, the subscription monies, were to be used as collateral for a loan from the Fairbairn Bank of the Isle of Man; and the borrowed monies were to form the second part of the investment. As I understand it, the proposal for leveraging was suggested by the marketing agent, Arasco. The leveraging was never possible because loans were never advanced by Fairbairn. The lack of leveraging would not have caused any difficulty in liquidating the investments if it were not for the fact that due to some misunderstanding, the Fairbairn Six' subscriptions were not placed in the sub-fund to which the investors had intended to subscribe.
15. The intention was that the subscriptions would be invested in the Enhanced Return Fund (“ERF”) with the additional borrowed monies being invested in a basket of sub-funds chosen on an individual basis by each investor. The basket of sub-funds was described, in some cases, as the “**Dynamic Fund**” and for ease of reference I adopt that expression in this judgment. What happened was that, contrary to the original intentions of the Fairbairn Six, the subscriptions were invested in Dynamic Funds rather than in the ERF.
16. Members of the Fairbairn Six became aware of the error at different times, some of them before trading in the Fund was suspended and others at a later date. In some cases representations were made to investors that the problem would be corrected but in no case was it corrected. The question I was asked to resolve is how to deal with their investments. Three options were put before me:
 1. To leave the investments as currently invested;
 2. To return to each of the Fairbairn Six the original value of their subscriptions on the basis that the Dynamic Funds in which the Funds had been placed were not what they had agreed; or
 3. To unwind the investments in the Dynamic Funds and treat the subscriptions as if they had originally being invested in the ERF.
17. Advocate Greenfield advised me that the Trustee prefers option 2 because the other options involve some element of double guessing what the investors intended or of recreating historic decisions. I understand why that argument applies to option 3 but, in my view, it carries less weight in relation to option 1. Advocate Le Tissier explained that he and Mr Schram had different views as to which option should be pursued. Mr Schram preferred option 2 and Advocate Le Tissier preferred option 1.
18. The arguments in favour of option 3 include that it is consistent with the logic behind my decision in relation to the LLF; namely that it would involve doing that which should have been done in the first place. A further argument is that some of the Fairbairn Six had been told that the mistake would be corrected by unwinding their investments in the Dynamic Funds and reinvesting in the ERF. However, Advocate Le Tissier said that a number of difficulties would arise if Option 3 were pursued, including that if the Fairbairn Six were to receive back the original value of their subscriptions in the Dynamic Fund, it would be at the expense of other investors in those sub-funds because the value of the investments in some (possibly all, I know not) of the sub-funds have reduced in value. Furthermore, a view would have to be taken as to how those sub-funds would have been invested originally, involving some hypothetical decisions and it would be difficult now to form a view as to what decisions would have been taken in 2008 if the subscriptions had been correctly allocated. A further problem is that costs would be incurred in re-running the investments and all the net asset value calculations necessarily involved. A further complication identified by Advocate Le Tissier and noted by the Trustee, is that in some cases the original intentions of the Fairbairn Six cannot be ascertained. Some of them retained a copy of their initial application forms and where they have done so, it can be seen that their copy of the application form differs from the copy received in Guernsey. The difference seems to be that after the Fairbairn Six had

completed their forms, someone (possibly at Arasco) inserted the names of the sub-funds to be included in each Dynamic Fund and the percentage of the investment to be allocated to each sub-fund. There is yet another potential problem in that the amounts to be withdrawn from some of the sub-funds (to enable the Fairbairn Six to receive the cash value of their subscriptions) would cause one or more of the sub-funds to become insolvent. For those purely practical reasons, Advocate Le Tissier does not consider that option 3 is viable.

19. The advantage of option 2, as I have said, is that it would be consistent with the approach taken in respect of the LLF. However, in the case of the LLF, the subscriptions received from the Interim and Last Investors had been ring fenced and had not been invested in the LLF. Whereas the subscriptions received from the Fairbairn Six were invested and placed in sub-funds that have fallen in value. Therefore if they were to have their subscriptions returned to them in full, it would be at the expense of other investors. If they were to receive the full value of their subscriptions the Fairbairn Six would, in effect, obtain a windfall. If their subscriptions had been allocated correctly at the time of the investment (in the ERF), they would have suffered a fall in value because of the performance of that sub-fund. There would also be issues regarding the establishment charges which may have been deducted in the amount of 12% at the outset. There are further complications with which I was not asked to concern myself such as the fact that certain investors were given an enhanced allocation of units in a greater amount than the value of their subscription.
20. Option 1 has the advantage that all the investors know where they stand at present. Investors other than the Fairbairn Six know the current value of their investments and it would be unfair to them if their values were reduced as a result of any preferential treatment to be given to the Fairbairn Six.
21. Mr Schram favours option 1 *inter alia* because AIML was aware of the fact that monies had been incorrectly invested and offered to correct at least some of the mistakes but did not do so before the Fund ceased trading. It later made further errors by incorrectly allocating other monies invested subsequently.
22. Advocate Ozanne expressed no view as to which option is preferable.
23. In my view, the legal test that I must apply is to act as a reasonable trustee could be expected to act having regard to all the material circumstances, for the reasons I gave in 15 January Judgment.
24. Option 2 is superficially attractive not least because there is a similarity between the approach behind option 2 and the decision I took in respect of the LLF. However, there is a significant difference between the Interim and Last Investors in the LLF whose monies remained ring-fenced in a bank account and the Fairbairn Six whose subscriptions were invested in sub-funds which in some, and perhaps all, cases have subsequently reduced in value. If option 2 were to be pursued, the Fairbairn Six could only recover the full value of their subscriptions at the expense of other investors who (in my opinion) should in no way be held responsible for the mistakes that occurred.
25. An additional factor is that some of the Fairbairn Six may be able to seek compensation from the person or persons responsible for the error made when their subscriptions were incorrectly invested in Dynamic Funds rather than the ERF. I can form no view as to whether any such claims would succeed or indeed whether any judgments that might be obtained could be enforced. Nor can I form a view as to whether some claims (which relate to investments made in 2008) may now be time barred. However, it is possible that if the Fairbairn Six investors' instructions were not correctly carried out, they may have a remedy. Whereas, if I were to favour option 2 to the disadvantage of other investors, those other investors would have no remedy against anyone.
26. In my decision, the balance of fairness and justice required that I balance the losses between the different investors and that the Fairbairn Six should not receive a benefit at the expense of

other investors. I considered that a reasonable trustee acting in this situation would not prejudice one group of investors in order to benefit another group. I therefore came to the conclusion that the Fairbairn Six should be treated in accordance with option 1. They shall recover whatever is the current value of the sub-funds in which they have been (mistakenly) invested.

27. I add a cautionary note that the Fairbairn Six would be well advised to take legal advice to decide whether there are any steps or protective measures they could or should be taking now in order to pursue any alternative remedies that may be available to them.

Costs

28. I reserved the question of costs. Normally in an application of this nature, costs of all parties would be borne by the trust fund. I form no decision as to whether that would be the appropriate order. The parties wish to give further consideration to costs and, in particular, to whether any one or more parties should be bearing the costs. If costs were ordered to be paid from the Fund, there would be a question as to whether the costs should be borne equally by all creditors of the Fund in proportion to their investments or whether, for example, the costs incurred in relation to the LLF should be borne only by the Interim and Last Investors being the persons who have benefitted from the decision of the Court.
29. I agree with the parties that the appropriate order is to reserve costs either for one or more of the parties to bring back before or the Court or to be addressed by the liquidator if and when a liquidator is appointed to wind up the Fund in due course.

Sir Richard Collas
Bailiff

Postscript. I sincerely apologise to the parties, to their advisors and to those they represent for the delay in finalising this written judgment. I hope that as I had previously announced my decision, any prejudice they may have suffered will be minimal.