COLLAS CRILL

Guernsey property unit trusts

MARCH 2019

A Guernsey Property Unit Trust (**GPUT**) is a type of Guernsey trust which is usually used as a vehicle to hold UK commercial real estate assets.

A GPUT is a trust and so, unlike a company, it does not have separate legal personality under Guernsey law. The assets of the GPUT are held on trust by a trustee on behalf of unitholders, who will hold units in the GPUT which correspond to a beneficial interest in the underlying assets. Therefore, whilst the unitholders will be the beneficial owners of the GPUT's assets, the trustee will be the legal owner.

Establishing a GPUT

A GPUT is formed by a trust instrument which will be executed by the trustee and will set out the terms on which the GPUT will operate and the assets that will be held. To be validly formed, a GPUT is required to hold trust property on establishment. This can either be in the form of existing assets that are already held by the proposed unitholders and are transferred into the GPUT in exchange for units or, if the GPUT is to be used as an acquisition vehicle after it is established, this requirement can be met by having one or more 'founder' investors subscribing for units for a nominal amount on establishment.

The GPUT will constitute a collective investment vehicle (**CIV**) for UK tax purposes if it is a collective investment scheme under the Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended (the "**POI Law**"), which is in this instance, broadly any arrangement which enables investor participation in profits or income from the holding of a spread of underlying property, involving a pooling of the contributions of investors and the profits or income from the CIV and which is managed by a third party such that investors do not have day to day control of the management of the property. This briefing has been drafted on the basis that the GPUT will constitute a collective investment scheme under the POI Law and an alternative investment fund (AIF) under the Alternative Investment Fund Managers Directive (AIFMD), in which case regulatory approvals will be required.

Because a GPUT is not a legal entity, it does not appear on the publically available register published by the Guernsey Registry. A GPUT's trust instrument and register of unitholders are also not publicly available.

Who can act as trustee?

The trustee can either be a pre-existing regulated Guernsey trust company or, more commonly, a special purpose vehicle established to act as trustee of the GPUT (**SPV Trustee**). An SPV Trustee will typically be administered by a regulated Guernsey administrator, who will, for example, provide directors, a company secretary and registered office.

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Guernsey has a very well established trust company industry with most administrators offering trust company services alongside their administration services. Generally, however, most GPUTs are established with an SPV Trustee. There are several reasons for this which largely depend on the objectives and sensitivities of the relevant investors, but the key advantages are:

1. it may (subject to tax advice) offer unitholders a greater degree of control over the trustee (and by extension the GPUT) by allowing them to appoint directors to the board of the SPV Trustee;
2. limited liability status for the trustee; and
3. it allows for a smoother transition where there is a change of administrator (for example following a sale).

An SPV Trustee can be owned by a foundation or a charitable or non-charitable purpose trust. Collas Crill is able to advise on the establishment of foundations or trusts for this purpose.

A GPUT must have at least one trustee, but there is no Guernsey law requirement for it to have more than one trustee. In practice a GPUT will often have two trustees if the structure requires the GPUT to directly hold UK real estate. This addresses certain English law considerations, in particular it allows for any overriding interests to be overreached.

Duties of the trustee

Acting as a trustee of a GPUT collective investment scheme is a regulated function in Guernsey which may be covered by a Guernsey licensed administrator providing trustee services. The trustee will also be subject to Guernsey's trust law regime and in particular the Trusts (Guernsey) Law 2007.

Under Guernsey law trustees have an obligation to act with the utmost good faith, as would a prudent person, in accordance with the terms of the trust instrument and to use their powers as trustees only in the interests of unitholders.

Other Appointments

As mentioned, a GPUT collective investment scheme will have a manager and we would generally expect it to be party to the trust instrument and to take on some of the management responsibilities that would otherwise be undertaken by the trustee. A trustee may also appoint a property manager to manage the properties it holds.

There is generally no requirement for a GPUT to appoint an auditor or produce audited accounts, but an auditor can be appointed if it is commercially desirable, for example if required by a third party lender providing finance to the GPUT.

Rights of Unitholders

The rights of unitholders and their relationship with the trustee will largely be governed by the terms of the trust instrument. The trust instrument will contain the commercial terms that govern the GPUT and will

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generally contain provisions to cover points such as voting thresholds, redemption rights, transfer rights, rights to remove a trustee or the right to terminate the trust.

The trustee will be independent of the unitholders, but unitholders are able to maintain a degree of control over the trustee by, for example, including limitations on what the trustee can do under the terms of the trust instrument or ensuring that the manager is a party to the trust instrument and has power to exercise control of key areas of the GPUT's management.

Borrowing, security and guarantees

Subject to any restrictions that may be imposed by the trust instrument, the trustee of a GPUT is able to borrow money, give guarantees, give indemnities and grant security over the assets of the GPUT.

Subject to any restrictions in the trust instrument, security may also be created over units of a GPUT and in our experience most international banks are familiar with GPUTs and are willing to lend on a secured basis using units in a GPUT as collateral. For the purposes of the Security Interests (Guernsey) Law 1993, units in a GPUT constitute collateral for the purposes of a security interest agreement and for securing a loan.

Term and Winding up

The trust instrument will generally contain a provision setting out the term of the GPUT. This can either be a set period of time, or it can have an indefinite term, subject to any process set out in the trust instrument for the winding up of the GPUT.

The trust instrument will usually set out a procedure to wind-up the GPUT and typically all of the unitholders acting together will be able to require the trustee to terminate the GPUT. On termination, the assets held by the GPUT will be distributed to the unitholders by the trustee within a reasonable time.

Baker Trust

GPUTs are often structured as "Baker Trusts" (a reference to the English law case Baker v Archer Shee upon which the principle is founded). In practice this means that any income that is generated by the underlying assets accrues for the benefit of the unitholders, rather than forming part of the trust assets that the trustee must then distribute. As well as offering the practical benefits of reducing the burden on the trustee to have to make distributions of income, this feature also often forms an important part of the tax planning that underpins the structure of the GPUT.

UK Tax Treatment

From April 2019 the UK tax treatment for offshore CIVs (which includes GPUTs) invested in UK land is changing. Direct or indirect disposals of UK land by non-residents will be subject to UK tax on chargeable gains and CIVs will be treated as companies for these purposes. This expansion of the UK tax net has led to concerns that exempt investors could suffer tax which they would not suffer were they to hold the asset directly and there could be multiple charges suffered in CIV structures. This default position can therefore be modified where the

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CIV makes either a transparency election or an exemption election – in either case the effect of which is broadly to move the tax charge to the ultimate investor.

Transparency election

A Guernsey tax resident GPUT CIV which is:

1. UK property rich (i.e. at least 75% of its value is derived from UK land); and
2. transparent for Guernsey income tax purposes,

may elect to be treated as transparent for the purposes of the new rules.

If the GPUT makes this election no tax would accrue at the level of the GPUT, but each individual investor would be liable for UK capital gains tax on their share of any disposal by the GPUT.

Exemption Election

The exemption election is aimed at widely held investment funds. Where the exemption is available it exempts the CIV entirely from UK tax levied on the disposal of the underlying asset. CIVs that make this election will be subject to additional annual reporting requirements aimed at assisting HMRC with collecting tax due from non-residents.

Regardless of whether an election is made, investors will be subject to UK tax on any gains made when they dispose of their interest in a CIV. So investors in a UK property rich GPUT would be subject to a UK tax liability on any gains when they dispose of their units.

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