

Guernsey Foundations

Angus Kemp MA(Hons) CA MBA MEd

What is a Foundation

- It is an incorporated entity with separate legal personality
- Unlike a company it does not have shareholders
- It holds assets in its own name on behalf of beneficiaries or particular purposes or both
- It operates in accordance with a constitution comprising of a charter and a set of rules
- It is, therefore, a legal entity similar to a company
- However, it operates more like a trust

Why were Foundations introduced?

- There are many places which do not recognise the trust concept
- In many emerging markets, including Brazil, Russia and China, a foundation is much easier to adopt than a trust
- If there is a dispute in respect of assets held in the structure a civil law court is more likely to recognise and uphold the rights of a foundation than those of a trustee of a trust
- In order to make it clear that the foundation is an entity with a separate legal personality, the foundation has to be registered at the Guernsey Registry, have a registered office and a certificate of incorporation
- A foundation does not fail if it has no assets (unlike a trust)

Parties to a Foundation

- The **Founder** can be an individual or a corporate entity and includes anyone who has contributed assets to the foundation without consideration
- The **Council** is the executive body that deals with the administration and disposition of foundation assets
- **Beneficiaries** can be enfranchised or disenfranchised
- **Enfranchised beneficiaries** have a right to information about the foundation
- **Disenfranchised beneficiaries** have no rights to information. They might benefit from the foundation, but they cannot hold the council to account

Parties to a Foundation (2)

- Where there are disenfranchised beneficiaries or where the foundation only has a purpose a **guardian** must be appointed
- The **guardian** has a fiduciary responsibility to the founder and the disenfranchised beneficiaries to hold the council to account in the conduct of its duties
- The foundation must have a **registered office** in Guernsey
- A licensed Guernsey fiduciary must act as **registered agent** if the council does not include a Guernsey licensee

Foundation documents

- The Charter is in two parts
- Part A is public and includes basic details of the foundation, such as its name, number, details of the council and the registered office
- Part B is confidential to the Guernsey Registrar and includes a statement of the purpose of the foundation
- The Rules of the foundation are not registered at the Guernsey Registry and are confidential. They must set out the functions of the council and the procedures for the appointment, resignation and removal of the councillors and any guardian

Similarities with companies

- The foundation has a separate legal personality from the council and the founder. It can contract in its own name and it can sue and be sued in its own name
- The assets belong to the foundation
- It is managed by a council (like a board of directors)
- Councillors owe duties to the foundation and the duties are similar to those owed by a director to a company
- It must have a constitution (like the Memorandum and Articles of a company)
- Must be registered at the Guernsey Registry

Similarities with companies (2)

- Certain information is publicly available
- Only comes into existence upon registration at the Guernsey Registry
- It must have a registered office in Guernsey
- A foundation doesn't fail if it has no assets
- Further capital can be added after inception
- On establishment a foundation will receive a certificate of incorporation

Similarities with companies (3)

- Like a company a foundation can migrate to and from Guernsey
- Like a company, foundations have continuity of existence
- Foundations can be wound up and have detailed provisions on dissolution (similar to company law)
- There is an annual filing at the Guernsey Registry

Dissimilarities with companies

- There are no shareholders
- There are no shares
- There is no share capital

Similarities with trusts

- Foundations are used to hold assets for the benefit of someone else
- Like trusts, foundations are used in succession planning
- The assets of the foundation are separated from the estate and assets of the founder
- Where a trust has a settlor, a foundation has a founder. In both cases, the definition includes anyone who provides an economic benefit without any consideration
- Founders can provide the council with a letter of wishes
- Can be used for charitable or non-charitable purposes

Similarities with trusts (2)

- Founder must subscribe to and sign the constitution
- Guardian owes similar duties to the beneficiaries as a trustee owes to the parties in a trust
- The Founder provides the initial consideration
- The Foundation must keep proper accounting records
- There is no public filing of accounts

Dissimilarities with trusts

- Must be registered with certain publicly available information
- Beneficiaries can not terminate the foundation
- Beneficiaries are not beneficially entitled to the assets of the foundation, and only have the rights provided for in the constitution

Duty to maintain records

- Under section 22 of The Foundations (Guernsey) Law 2012, the Council shall ensure that a foundation shall keep the records of the foundation or a copy at its registered office
- The accounting records must be:
 - sufficient to show and explain the foundation's transactions
 - such as to disclose with reasonable accuracy, at any time, the foundations' financial position at that time
 - Such as to enable the foundation officials to ensure that the foundation's accounts are prepared properly and in accordance with any relevant enactment for the time being in force

Accounting records

- The accounting records shall in particular contain day to day entries of all sums of money received and expended by the foundation, the matters in respect of which the receipt and expenditure takes place and a record of the assets and liabilities of the foundation
- The guardian and resident agent shall be entitled to inspect the documents upon 2 working days' notice in writing to the Council