

## Guernsey foundations and private trust foundations

Insights - 15/11/2023

The Foundations (Guernsey) Law, 2012 (as amended) (the **Law**) came into force on 8 January 2013.

While Guernsey is not the first jurisdiction to provide for foundations, the Law does provide a number of unique options for founders wishing to take advantage of the benefits provided by foundations. The purpose of this briefing is to provide both a general summary of the features of a Guernsey foundation, as well as a summary of these unique options that are offered by the Law. We will also particularly discuss one of the common uses for a foundation, the private trust foundation.

Since the Law came into force, we have assisted in all aspects of Guernsey foundations including migrations into and out of the jurisdiction, changes in foundation officials, variations, voluntary strike-offs and the winding-up of foundations.

### | Foundations: a civil law concept

The concept of a foundation has existed for centuries, primarily in civil law jurisdictions whose laws derive from Roman law. While Guernsey is a common law jurisdiction, the Law was drafted in such a way as to reflect legal drafting in civil law jurisdictions which do not usually recognise the concept of a trust, but which are familiar with foundations.

### | The basics

Foundations (which in some countries are referred to as private foundations or private interest foundations) have characteristics of both a company and a trust, providing sufficient corporate characteristics for civil law jurisdictions to recognise them, and sufficient trusts characteristics to make them an attractive option for succession and estate planning purposes. Most importantly, foundations are not a hybrid of companies and trusts, but are a legal concept all of

their own, with their own specific origin and purposes.

A table setting out some of the similarities and differences between foundations and companies and trusts is set out at the end of this briefing.

## General uses of a foundation

- Wealth protection and asset management
- Inheritance/succession planning and the circumvention of forced heirship rules
- Charitable and non-charitable purposes
- Orphan vehicle for funds, private securitisation etc
- Holding capital, income and specific assets
- As a trustee (as an alternative to a private trust company), which is considered in more detail below

## The fundamental elements

There are a number of provisions in the Law that may be of interest to those contemplating establishing a foundation, some of which are found in the laws of other jurisdictions but some of which are not. We set out the key features of Guernsey foundations below:

### Formation

A Guernsey foundation is formed by one or more founders, which could be one or more individuals or bodies corporate, who provide assets to the foundation, known as the initial capital, subscribe to the constitution of the foundation and comply with the provisions of the Law.

### Initial capital

The initial capital endowment may comprise any property, movable or immovable, tangible or intangible, wherever situated. Unlike in other jurisdictions, there is no minimum initial capital endowment required to set up the foundation. A foundation therefore could be set up without transferring much capital or a significant asset, which may be desirable in certain circumstances.

Further property can be endowed by any person subject to the constitution of the foundation.

In a recent Jersey case (which would be persuasive but not binding in the Guernsey Courts), *B and C v D, E, F and others* [2020] JRC 169, the Royal Court of Jersey considered whether a Jersey law foundation and the endowments made to such a foundation can be set aside ab initio on

the grounds of mistake. The Jersey Court concluded that although the endowments made to the foundation could be set aside, the foundation itself could not be set aside ab initio.

## Purpose and benefit

A foundation can be established for either a purpose/s or to benefit beneficiaries or both. The purpose/s can be charitable or non-charitable. However, a foundation cannot carry out any commercial activities except those necessary for, and ancillary or incidental to, its purpose.

This flexibility may be desirable for those founders wishing to set up a company like structure but with the flexibility of a trust.

## Separate legal personality

Foundations have separate legal personality, like companies, and therefore can contract, sue and be sued, in their own capacity. However, foundations provide an even more flexible structure to companies as they can be adapted to fit each bespoke situation.

Like a company, the assets of the foundation belong to the foundation and not to the beneficiaries (if any). Those used to the ownership of trust assets may feel initially uncertain about this, but this should be considered in light of the fact that the founder can retain certain powers over the foundation. In addition, because the beneficiaries (if any) are not the legal or beneficial owners of the assets, they have no say over the assets, which may appeal to some founders, particularly those with minor children or those with beneficiaries who may not all agree or have appropriate judgement as to what is to be done with the assets.

# Administration

## The Council

A foundation is administered by a council which acts like the board of a company, making the decisions on behalf of the foundation. A council is made up of councillors. The default position under the Law is that a foundation will require at least two councillors but the charter (as defined below) may specify a single councillor if the founder wishes.

## Foundation officials: Councillors and Guardians

A councillor can be an individual or a body corporate. Councillors must act in good faith in the exercise of their functions and have other duties, similar to a company director, such as duty not to profit, duty to provide information, duty to preserve assets, maintain records and act impartially. Their duties are owed to the foundation and not the beneficiaries (if any), like the duties owed by a company director are owed to a company (as confirmed by the Courts of Jersey).

Where a Guernsey foundation has been established for a purpose or has disenfranchised beneficiaries (those not permitted to receive information regarding the foundation, as below), the Law provides that a guardian must be appointed in either of these circumstances in order to act as an enforcer of the purpose/s or benefit/s. This ensures that the purpose/s or benefit/s are always capable of enforcement, minimising any risk that the foundation ends up having no object/s or means of enforcing the same.

The founder can be appointed as guardian, but a councillor cannot be a guardian at the same time as being a councillor.

A guardian owes a duty to act in good faith and *en bon père de famille* to the founder and beneficiaries to enforce the constitution. This is a novel feature of the Law and provides added comfort to founders of foundations for purposes or for the benefit of disenfranchised beneficiaries.

## Constitution

A foundation will be administered in accordance with its constitution which is made up of a charter and rules (if any), much like the memorandum and articles of a company. The charter will set out key information required to be included in the charter, including the name, purpose, duration, initial capital endowment, founder's powers and powers of amendment or revocation. The rules will include more detailed information, including the function of councillors, appointment of foundation officials, retirement and remuneration and default beneficiaries and can include bespoke provisions including application of assets, addition and exclusion of beneficiaries, conditions on benefitting, benefit termination provisions (such as if a beneficiary divorces or becomes bankrupt in order to avoid a Court granting an order to include any foundation benefits in the pool of assets).

Only the charter must be provided to the Registrar of Foundations (the **Registrar**) (see below) and so there remains a degree of privacy as the detailed operative provisions are not available publicly.

## Founder's powers and wishes

The founder is named in the constitution and must subscribe to it (individually or by the resident agent).

The fact that the founder can be a body corporate is useful where the individual behind the foundation may not want to act as founder (for whatever reason, including confidentiality) and so the body corporate would provide the initial capital endowment and would be named on the Register (defined below) and would sign the constitution.

A founder can determine certain matters and can retain certain powers in the constitution

(more so than a settler can retain trusts powers) while alive (if an individual) or for 50 years from the establishment of the foundation (if a body corporate) including the power to determine the purpose, appoint councillors and guardians, revoke or amend certain terms and terminate the foundation. In addition, if the founder is a body corporate, this avoids any problems that may arise if the founder were an individual and they were to die or become legally incapable of managing their affairs.

In addition, the council can delegate certain functions to the founder and/or the founder can be a councillor or guardian (and will have the responsibilities that come with either role), and can be a beneficiary of the foundation. This allows the founder to retain certain control over the foundation and supervise that the foundation is carrying on its actions as was envisaged by the founder, as well as benefit from the foundation. This may appeal particularly to a foundation owning a family run business.

Apart from the founder's powers under the constitution, we see no reason why a founder could not provide to the council a letter of wishes, like a settlor can provide to trustees of a trust, setting out additional matters the founder would like the council to consider. Such letter of wishes would have the same non-binding effect as a letter of wishes to a trustee.

While the founder must be careful not to retain too many powers, the Law provides founders with ample scope for involvement, but with the added certainty that the powers are limited in scope and duration, which has struck a good balance between ensuring a foundation is validly established and providing the founder with some say in the foundation.

## Resident agent

While previously a resident agent was only required where no foundation official was a Guernsey fiduciary licensee, since the introduction of the Beneficial Ownership of Legal Persons (Guernsey) Law, 2017 (the **Beneficial Ownership Law**) and related amendments to the Law, a resident agent is required for all foundations (save for in limited circumstances). Their duties include pre-registration duties and duties relating to records and information (including as referred to below).

# Information

## Confidentiality

A Guernsey foundation is required to make certain limited information public in a register maintained by the Registrar, being the name and registered number of the foundation, name and address of councillors and guardians and details of the registered office. However, importantly, the information provided to the Registrar is not all publicly available, as, while the charter and consents to act must be filed, they will not be publicly available (save for in certain

situations, such as criminal investigations). The Rules are not provided to the Registrar and are not public.

From 15 December 2023, Guernsey foundations must file particulars of governance in the form prescribed by the Registrar. Changes to this filing must also be notified to the Registrar within 21 days of the date of the change. No personally identifiable or commercially sensitive information should be included.

From said date, Guernsey registered foundations will be required to record details of each beneficiary's interest at their registered office, including whether each beneficiary is enfranchised or disenfranchised, any relevant benefits received by each beneficiary and whether the beneficiary has disclaimed or has any restrictions attaching to their interest. This information is not publicly available.

## Information to beneficiaries

Generally, information is available to the beneficiaries of a foundation. However, the Law is unique in that it provides for a class of beneficiaries, known as disenfranchised beneficiaries, who are not entitled to certain information and certain rights (see above section on guardians).

This was a welcome novelty of the Law and may appeal to those founders with minor children or where the founder does not want each of the beneficiaries to know their interests or the interests of other beneficiaries.

## Beneficial ownership

Resident agents are responsible for, amongst other duties, the collation and reporting of beneficial ownership information relating to the foundation pursuant to the Beneficial Ownership Law which must be filed with the Registrar and updated as necessary.

# Registration and regulation

## Registration and annual fees

Foundations must be registered (in accordance with Guernsey tradition that entities with limited liability require registration) with the Registrar, which can only be carried out by a Guernsey fiduciary licensee (see below), and is a straightforward process, with a standard fee payable upon registration.

The foundation only comes into existence upon registration, like a company. A foundation is required to renew its registration each year.

## Continuation

A foundation from another jurisdiction can apply to the Registrar to register in Guernsey. It is up to the Registrar to agree to such registration and the Registrar will consider such things as the jurisdiction from which the migrating foundation is migrating in, the founder and beneficiaries of the foundation and whether the registration of the foundation would be reputationally damaging to Guernsey. The process is not dissimilar to that for the migration of a company into Guernsey.

## Registered office

A Guernsey foundation must have a registered office in Guernsey.

## | Private Trust Foundations

Since the Law came into force, we have seen an increase in the use of foundations established specifically to act as trustee of one or more trusts. Similarly, to private trust companies (**PTCs**), private trust foundations (**PTFs**) can offer bespoke solutions to individual private client needs. However, as with PTCs, PTFs acting as trustees in Guernsey will often be carrying out a regulated activity if they are acting "by way of business". To avoid the need to apply for a full fiduciary licence with the Guernsey Financial Services Commission (**GFSC**) in respect of such PTFs, it is therefore often necessary to apply for a discretionary exemption (an **Exemption**) under section 3(1) of The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2020 (as amended) (the **Fiduciaries Law**).

The GFSC has issued guidance in relation to the exemption of PTCs which may be construed so as to apply mutatis mutandis to PTFs although we are not aware as yet of any plans for the GFSC to introduce a PTF specific discretionary exemption form. See our briefing [Guernsey foundations update](#).

## | Why Guernsey?

Guernsey is a well regulated and internationally respected offshore jurisdiction. Guernsey is a politically stable jurisdiction with its own autonomous government but with close ties to the UK.

Guernsey's finance industry has grown in size and expertise over the last 60 years and there are a significant number of financial experts based locally who can provide investment, accounting, legal and other advice.

In addition, the Guernsey judiciary is experienced in a wide variety of areas, including contentious private structures and trusts, and is capable of dealing with complex and high value cases. The judiciary is made up of a number of very experienced local judges and is supported by, both at first instance and in the Court of Appeal, senior and prominent members of the English Bar.

## Why Ogier?

Ogier is one of the largest offshore legal service providers in the world and is the only provider able to provide legal as well as fiduciary services in four different jurisdictions. Advising on Guernsey, Jersey, BVI, Cayman and Luxembourg law from across 13 different jurisdictions across three continents, Ogier is able to advise clients all over the world on a whole spectrum of legal and fiduciary issues.

## Comparison of foundations with companies and trusts

Companies		Trusts	
Similarities	Dissimilarities	Similarities	Dissimilarities
Separate legal personality	No shareholders	Used to hold assets for the benefit of someone else	Must be registered, with certain publicly available information
No separation of legal and beneficial title – assets belong to the foundation	No shares	Can hold assets legally separate from the original asset owners	Founder can be a councillor or guardian and/or a beneficiary without any risk that the foundation be invalid
Managed by council (like board of directors)	No share capital	Separate legal entity without any members or shareholders	Beneficiaries can be entitled to information or not, depending on the



**Councillors owe duties to the foundation and the duties are similar to those owed by a director to a company**

Constitution must set out information, including who will benefit and in what proportions and in what circumstances

Beneficiaries must be identifiable by name or class of beneficiaries or their relationship to someone else

Beneficiaries cannot terminate the foundation (without Court sanction)

**Must have a constitution (like a company must have a memorandum and articles of incorporation)**

Can be used for charitable or non-charitable purposes

Beneficiaries are not beneficially entitled to the assets of the foundation, and only have the rights provided for in the constitution

**Must be registered, with certain publicly available information**

Founder must subscribe to and sign the constitution or direct resident agent to sign

Retention of powers by way of drafting only.

**Only comes into existence upon registration**

Guardian owes similar duties to the founder and beneficiaries as a trustee owes to

parties to  
trust

**Has a registration number**

Founder  
must provide  
the initial  
endowment

**Can be perpetually in existence**

Retention of  
powers by  
settlor  
recognised  
statutorily

For more information on the use of foundations and a comparison of Guernsey foundations against those in Jersey, see our briefing [Jersey and Guernsey Foundations - what are they and how are they used](#).

## About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

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