



FLEXIBLE FRIEND

ZILLAH HOWARD LOOKS AT USING JERSEY TRUSTS AND FOUNDATIONS FOR PHILANTHROPIC PURPOSES

Philanthropy is increasingly important for many people. In strict terms, it focuses on the wellbeing of humankind, although the term tends to be given a wider meaning, encompassing a broad range of giving initiatives. Some of those will be characterised as charitable in the relevant jurisdiction, others – albeit altruistic and benevolent in nature – may not. Here, the term philanthropy includes all giving initiatives, whether intended to promote human wellbeing or not.

Jersey can be an attractive jurisdiction for philanthropic structures. It offers stability (politically, economically and geographically), a robust regulatory regime, a respected judicial system, and a depth and breadth of experience among its professional advisors. It also provides legislation that places a strong emphasis on the importance of flexibility, allowing for the creation of structures designed to meet an individual client's requirements.

Trusts

The *Trusts (Jersey) Law 1984 as amended* (Trusts Law) allows for the creation of both charitable and non-charitable purpose trusts, but it does not define 'charity'. Therefore this position is covered by case law. The leading case¹ on the topic establishes:

- (1) There must be a clear intention on the part of the settlor to devote the whole of the property to charitable purposes.
- (2) The purpose must be enforceable by the court.
- (3) The purpose should be within the express terms or the 'spirit and intendment' of the preamble to the *English Charitable Uses Act 1601* (also known as the *Statute of Elizabeth*). Four principal categories have been derived from this:
 - the relief of poverty
 - the advancement of education
 - the advancement of religion, and
 - other purposes beneficial to the community.
- (4) The purpose must be for the public benefit.
- (5) The trust must be exclusively charitable.

Non-charitable purpose trusts are expressly provided for by the Trusts Law and can be used where particular purposes, while philanthropic, may not be categorised as strictly charitable. Examples would be trusts for humanitarian, ecological or research purposes.

With a trust established under Jersey law, the following are key points to note:

- (1) **Duration:** the trust can be established for an unlimited period.
- (2) **Registration:** there is no public registration of trusts on the island.

- (3) **Restrictions:** the Trusts Law prevents a trust directly holding immovable property situated on the island. A separate piece of legislation, the *Loi (1862) sur les teneures en fideicommis et l'incorporation d'associations*, allows trusts of Jersey-situated immovable property in certain circumstances.
- (4) **Enforcement:** there is no Charity Commission in Jersey with a supervisory role in relation to charities. It is the duty of the Attorney General on the island to enforce charitable trusts.

The Trusts Law imposes the duty of enforcement in relation to non-charitable purpose trusts on an enforcer. The enforcer's statutory duty is to enforce a trust in relation to its non-charitable purposes.

The enforcer of a non-charitable purpose trust cannot also be a trustee of the trust, but there are no other limitations on the choice of enforcer. An individual or a corporate entity can be appointed, and the enforcer need not be resident in Jersey.

The Trusts Law imposes a duty on the trustee of a non-charitable purpose trust to secure the appointment of a new enforcer whenever there is none, and to apply to the Royal Court for the removal of the enforcer and the appointment of a replacement where the trustee has reason to believe that

the enforcer is unwilling or refuses to act, or is unfit or incapable of acting. To facilitate this, the enforcer is entitled to see trust accounts and can apply to the Royal Court for orders and declarations.

- (5) **Amendments:** the Trusts Law provides that a trust can be varied in any manner provided by its terms. There is also a statutory *cy-près* provision that allows the Royal Court, in certain specified circumstances, to declare that the trust property is to be held for such other charitable or non-charitable purpose, as the case may be, as the court considers to be consistent with the settlor's original intention. This jurisdiction can operate, for example, where a trust's stated purpose has been fulfilled, no longer exists, or provides for only a partial use of the property.
- (6) **Taxation:** for charitable trusts, the *Income Tax (Jersey) Law 1961 as amended* (Income Tax Law) provides an exemption from income tax for income derived from the property of a trust established in Jersey for the advancement of education, the relief of poverty, the furtherance of religion, a purpose beneficial to the whole community, or the service of any church or chapel or any building used solely for the purpose of divine worship.

A Jersey-resident trustee of a non-charitable purpose trust would usually be chargeable to income tax on all income arising to the trustee in that capacity. However, a concession is available for non-charitable purpose trusts under which no resident of Jersey (other than a charity) has an interest, whether during or at the end of the trust period.

Foundations

The *Foundations (Jersey) Law 2009* (the Foundations Law) is flexible and allows the creation of a foundation for purposes, known as objects, which are charitable, non-charitable, or both charitable and non-charitable. The Jersey foundation can therefore be ideal where an individual is keen to pursue particular philanthropic initiatives, some or all of which may not be strictly charitable.

With a Jersey foundation for philanthropic purposes, the key points are:

- (1) **Duration:** as with charitable and non-charitable purpose trusts, the foundation can be established for an unlimited period.
- (2) **Registration:** unlike a trust, a Jersey foundation is an incorporated body that has its own legal personality, can hold assets and can sue (and be sued) in its own name. A foundation exists after the completion of an incorporation process, and an entry made in the register of foundations is a matter of public record and conclusive evidence that a foundation has been incorporated and that the requirements

of the Foundations Law in relation to incorporation have been complied with.

The constitutional documents of a foundation are its charter and its regulations. A foundation will be incorporated on the founder's instruction, and will have a council (similar to a board of directors) to administer its assets and carry out its objects, and a guardian. One council member must be a 'qualified person' with the appropriate regulatory licence under the *Financial Services (Jersey) Law 1998 as amended*; this member is known as the qualified member.

In terms of publicly available information, the register of foundations contains:

- (a) the foundation's name, registered number and charter (but not its regulations), and
(b) the qualified member's name and business address in Jersey.

The charter must specify its objects and, where the objects are to carry out a purpose – whether charitable,

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non-charitable or both – this must be specified in the charter.

The charter requires only limited information, and it is not necessary to include the names of the founder, council members and guardian. The identities of the founder and of those office holders (other than the qualified member) need not, therefore, be on public record. However, for those who would prefer to maintain an open profile, additional information, which is prescribed by the Foundations Law, can be incorporated into the charter and thereby made a matter of public record.

Unlike a trust, a foundation can be incorporated without an initial endowment. If endowments are to be permitted after a foundation's incorporation, this has to be made clear in the foundation's charter.

- (3) **Restrictions:** as with trusts, a Jersey foundation cannot directly hold immovable property on the island. A foundation is also prohibited from directly engaging in commercial trading that is not incidental to the attainment of its objects. However, the doctrine of *ultra vires* does not apply to a foundation and its capacity will not be limited by its constitutional documents.
- (4) **Enforcement:** a Jersey foundation must have a guardian whose duty is to take such steps as are reasonable in the circumstances to ensure that the council carries out its functions. The guardian can also have such

other powers and duties as the foundation's constitutional documents provide.

The founder and the qualified member may fulfil a dual role as council member and guardian. As with the enforcer of a non-charitable purpose trust, the guardian can be an individual or a corporate entity, and does not have to be resident in Jersey.

The guardian can require the council to account for the way it has administered the foundation's assets and acted to further its objects, and can apply to the Royal Court for orders and directions. Among its powers, the Royal Court can order a foundation to carry out its objects where it has failed to do so.

A guardian can be empowered, in certain circumstances, to sanction or authorise actions taken by the council that would not otherwise be permitted by the foundation's constitutional documents.

- (5) **Amendments:** the foundation's constitutional documents can allow amendments to the charter and regulations, including alterations to the foundation's objects or purposes. When any such changes are made, an updated charter must be filed with the registrar of foundations.

The Foundations Law also permits the Royal Court to propose amendments to a foundation's charter or amend its regulations if the court is satisfied that the change will assist the foundation to administer its assets or attain its objects, or that the stated objects are no longer attainable and that the proposed change will help the foundation to attain objects as near as reasonably possible to those stated.

- (6) **Taxation:** while the exemption in the Income Tax Law for charitable trusts does not expressly apply to foundations, the Comptroller of Taxes will nevertheless grant an exemption from Jersey income tax, by concession, to a foundation established solely for charitable purposes.

Where a foundation is established for philanthropic purposes that are not strictly charitable, its income chargeable to tax under schedule D to the Income Tax Law will be taxed at 0 per cent. Accordingly, such a foundation will not be liable to pay Jersey income tax, with the proviso that, where Jersey residents have an interest (e.g. as founders or beneficiaries), the Comptroller of Taxes may deem it appropriate to apply the statutory anti-avoidance provisions.

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1 Meaker v Picot (1972) JJ 2161