

Will foundations in Jersey draw upon jurisprudence in civil law countries, or will they develop separately, drawing parallels with the law and practice relating to trusts and companies?

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Abstract

Foundations were introduced in Jersey pursuant to the Foundations (Jersey) Law 2009, providing an alternative to trusts for the increasing numbers of the Island's clients who are more familiar with the concept of a foundation rather than that of a trust. The Jersey foundation is not an exact equivalent to foundations in other jurisdictions, and is an entirely new statutory creation, albeit it does have certain similarities with both trusts and companies. This article looks at two recent cases for guidance as to whether the courts in Jersey will draw upon the jurisprudence in civil law countries or will develop separately, drawing parallels with the law and practice relating to trusts and companies.

Introduction

Foundations were introduced in Jersey in 2009 pursuant to the Foundations (Jersey) Law 2009 (the 'Foundations Law'), providing an alternative to

trusts for the increasing numbers of the Island's clients who are more familiar with the concept of a foundation than that of a trust.

Foundations have a long history in certain jurisdictions, having existed in Europe since the Middle Ages, when they were originally used for charitable or religious purposes. Private or family foundations were first introduced in Liechtenstein in 1926,¹ as a continental European equivalent to an Anglo-Saxon trust.

When the introduction of the Foundations Law was being considered in Jersey, the common law jurisdictions of St Kitts, the Bahamas, and Nevis had recently introduced their own forms of foundation, and other jurisdictions (such as Guernsey and the Isle of Man) have subsequently followed suit. The result is that it is now possible to establish a foundation in a number of jurisdictions, some of which are civil law and others of which are common law.

In relation to Jersey foundations, it is interesting to consider what the approach of the courts will be, and whether they will draw upon the jurisprudence in civil

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1. The Law on Persons and Companies 1926 (PGR: Personen- und Gesellschaftsrecht).

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The Jersey foundation is not an exact equivalent to a foundation established in any other jurisdiction (whether civil or common law), and there are clearly certain similarities to be identified between foundations and both companies and trusts. Although there have not as yet been many cases brought before the courts in Jersey, the Royal Court has provided an indication on two occasions as to the approach to be taken with regard to issues relating to Jersey foundations and the interpretation of the Foundations Law.

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Re A Limited

In *Re A Limited*,² the qualified member (being the council member with a regulatory licence pursuant to the Financial Services (Jersey) Law 1998) of the F Foundation applied for directions under Article 46 of the Foundations Law.

B was the only beneficiary of the F Foundation and also the beneficial owner of the companies which had established the F Foundation and the beneficial owner of its guardian. Alongside the qualified member, there were two other council members who were lawyers from the law firm which acted for B. The F

Foundation owned the shares in an underlying company which was itself the owner of various companies which held substantial assets.

N Ltd had obtained judgments in Russia against B and was seeking to enforce those judgments against the F Foundation's assets. There were no allegations that the F Foundation had failed to perform its duties and nor were there any allegations of personal wrongdoing against it, the council members or the guardian.

Having initially defended the claim, the F Foundation had insufficient liquid funds to continue to do so and the qualified member applied to court for directions to the effect that it should adopt a neutral stance as the proceedings continued. When notified of the proposed application to court, the other council members and the guardian made no comments but gave brief indications of their support for the application: none of them appeared at the hearing.

The judgment records that, so far as the court was aware, this was the first time that directions had been given under Article 46 and that counsel for the qualified member had not been able to find 'any example of the courts of any other common law jurisdiction giving directions under analogous powers to those contained in the Foundations Law'.

The Royal Court noted that, while foundations in common law jurisdictions share some of the characteristics of the traditional civil law foundation, they are governed by domestic legislation and the Foundations Law is the only source of law that provides for the formation and governance of Jersey foundations. Jersey foundations are 'distinctive and novel in important respects in the eyes of a common law company and trust lawyer' and legal issues should be 'addressed from first principles derived from the Foundations Law, with analogous reasoning that has developed in relation to other legal relationships and entities being cautiously deployed'. While the Foundations Law clearly draws in certain respects upon trusts and company law learning, the court noted that there are nevertheless

2. *Re A Limited* 2013 (1) JLR 305.

significant differences between Jersey foundations and both trusts and companies.

Part 5 of the Foundations Law confers a supervisory jurisdiction on the courts which is important and to a significant extent *sui generis*. The jurisdiction can be invoked by a 'person with standing' (such as a foundation's qualified member) and allows for directions to be given pursuant to Article 46 where the court is satisfied that a direction 'will assist a foundation to administer its assets or to carry out its objects' or is 'otherwise desirable'.

Company law does not contain an equivalent jurisdiction to that conferred by Part 5 and, although there are certain similarities between council members and company directors, the court recognized that a council member's position could be more challenging than that of the directors of a trading company. As a wealth structuring entity, a foundation's role is similar to that of a trustee accepting donations and assets from a settlor to be held on the terms of a trust. Both trustees and foundations were 'less likely to know what claims to the assets donated to them may exist or what their merits may be than is a trading company in relation to assets it has acquired contractually and in the course of its business'.

Moving on to look at trust law, the court considered that the powers conferred by Part 5 are quite different from the well-established Beddoe jurisdiction which allows for the pre-determination of questions relating to the recovery of costs from a trust fund as between the trustee and beneficiaries. However, there are closer parallels with the general supervisory jurisdiction in relation to trusts which is exercised to assist in their interpretation and to determine whether or not to bless momentous decisions or to take decisions where a trustee surrenders its discretion.³

The court was satisfied that A Ltd's application fell within the scope of Article 46 and that the proposed change to a position of neutrality in relation to the Jersey proceedings was momentous: it would be made

at a late stage in respect of a claim which could extend to the whole of the F Foundation's assets. Noting also that the qualified member was acting responsibly in difficult circumstances, with limited co-operation from its fellow council members, the court concluded that the qualified member required assistance and court protection, which could best be given by the court directing the qualified member to use its reasonable endeavours to procure the F Foundation to adopt a neutral stance in the proceedings and to comply with any orders which might be made during those proceedings.

Re C Trust Company Limited

Some three years after A Ltd's application, the qualified member of another foundation sought to invoke the Royal Court's jurisdiction pursuant to Part 5 of the Foundations Law, in *Re C Trust Company Limited*.⁴ This time, the qualified member (as the only council member) asked the court to declare that it had the power to make changes to the regulations of five foundations which would result in their dissolution, and to bless the qualified member's proposal to do so. The changes included amendments to the definition of excluded persons and to allow for disclosure of information and documentation. An alternative application was also made to the effect that, if the qualified member did not have the necessary powers, the court should itself make the proposed changes.

The court referred to *Re A Limited* and agreed that, when considering Part 5 of the Foundations Law and the power to give directions under Article 46 in particular, it is appropriate 'to have regard to the similar jurisdiction to be found within the law relating to trusts' and that the principles set out in *Re S Settlement* are helpful. The court applied those principles and concluded that the qualified member, supported by the guardian, had the power to act as it proposed to do; its opinion had

3. *Public Trustee v Cooper* [2001] WTLR 901; *Re S Settlement* UJ2001/154; 2001 JLR Note 37.

4. *Re C Trust Company Limited* [2016] JRC 144.

been formed in good faith and was one which a reasonable council could take and had not been vitiated by conflict of interest. The qualified member was not surrendering its discretion but was asking for the blessing of a momentous decision, which the court was prepared to give pursuant to Article 46.

The court also observed that, if it had decided that the regulations did not confer the necessary powers to enable the proposed actions to be taken, it would have exercised its jurisdiction under Article 45 to change the foundation's regulations itself.

Conclusion

While the jurisprudence in relation to Jersey foundations is at an early stage of development, the Royal Court has already provided helpful guidance as to the approach to be taken with regard to issues relating to foundations and the interpretation of the Foundations Law. Although the foundation has its origins in civil law, the fact that the Jersey foundation is a statutory creation is recognized to be important and issues should be 'addressed from first principles derived from the Foundations Law, with analogous reasoning that has developed in relation to other legal relationships and entities being cautiously deployed'.⁵

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The court has so far drawn comparisons with trusts and companies — recognizing both similarities and

differences — and has applied principles in relation to the exercise of its supervisory powers pursuant to Article 46 which are equivalent to those used to assist in the interpretation of trusts and to decide whether or not to bless momentous decisions or to take decisions where a trustee surrenders its discretion to the court.

There is also a suggestion to be drawn from *Re A Limited* that it may be appropriate to refer to decisions of the courts of other common law jurisdictions relating to analogous powers to those contained in the Foundations Law, as and when such decisions become available.

The approach that the court has taken in these two cases, and its confirmation that judicial assistance will be available in appropriate cases, is important and one of the key factors to consider when choosing a Jersey foundation, together with other factors such as:

- the flexibility of the Foundations Law, allowing for the creation of foundations to suit clients' specific structuring requirements;
- Jersey's stability (politically, economically, and geographically);
- Jersey's robust and highly regarded regulatory regime;
- the depth and breadth of experience among the Island's professional advisers; and
- accessibility from the UK so that, for clients with family connections or business interests in the UK, choosing Jersey makes logistical and practical sense.

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5. *Re A Limited* (n 2), para 29(i).