

Guernsey foundations

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Introduction

The Foundations (Guernsey) Law, 2012 (the “Law”) came into effect on 8 January 2013 providing for the establishment of Guernsey foundations from that date. This note is a summary of the Law.

Creation

A foundation comes into being upon the founder endowing the foundation with its initial capital, subscribing his name to the Constitution of the foundation and registering the foundation with the Guernsey Registrar of Foundations.

The name of the foundation must contain the word “Foundation” or the abbreviation “Fdn.”. Every foundation must have a registered office in Guernsey at all times and the name, address of the registered office must be included in all correspondence sent on behalf of the foundation, together with its registration number.

The foundation’s Constitution is comprised of two core documents; the Charter and the Rules of the foundation. The Charter must contain the name and purpose of the foundation, a description of its initial capital or endowment (there is no minimum) and, if it is a foundation with limited duration, the duration must be stated. It may contain anything else that the founder wants to include. The Rules set out the operative provisions of the foundation and detail the functions of the councillors, the procedures for the appointment, retirement and remuneration of councillors and any guardian, and also identify the default recipient. The Rules may, and in practice do, specify other matters such as how the assets of the foundation should be applied and how beneficiaries may be added or excluded. They may also impose obligations on a

beneficiary such as a condition of benefitting or contain protective measures to terminate a beneficiary’s interest, for example if he becomes insolvent.

A Guernsey foundation must have a purpose, the only restriction being that it cannot have as its purpose the carrying out of any commercial activities. It can, however, carry out commercial activities that are ancillary or incidental to its purpose. Consequently, a Guernsey foundation can be established for a wide array of purposes including to administer assets for its beneficiaries or to act as trustee of a trust or trusts (“PTF”) or established as a charity with purely charitable purposes or for other philanthropic purposes. The purpose of a foundation may only be amended by the exercise of an express power to amend in the Charter or by order of the Royal Court.

The Law includes a “firewall provision” providing that all questions arising in relation to a Guernsey foundation are to be determined in accordance with Guernsey law. No judgment or order of a Court outside of Guernsey shall be recognised or enforced in respect of a Guernsey foundation where it is inconsistent with the Law or the Royal Court, for the purposes of safeguarding the purpose of the foundation or the interests of the beneficiaries or in the interest of the proper administration of the foundation, so orders.

Legal personality and duration

A Guernsey foundation has legal personality, separate from its founder, foundation officials and beneficiaries. A foundation may sue and be sued in its own name. The assets of a foundation belong to the foundation and it may exercise all the functions of a legal person, including the power to hold land.

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Unless otherwise limited in the Constitution, a foundation has a continuous existence until its removal from the Register.

Founder

The founder of a Guernsey foundation may determine the purpose of the foundation, craft the foundation's Constitution and must endow it with its initial capital. The founder (or his agent) must also subscribe his name, as the founder, to the Charter of the foundation by signing it. It is also the founder's role to appoint the initial councillors and any guardian and to seek to have it registered.

A founder does not have any interest in a foundation by virtue only of endowing it with its initial capital or further property. However, the founder can either be a councillor or a guardian (but not both simultaneously) in addition to being a beneficiary.

A founder can reserve the power to amend, revoke or vary the terms of the foundation's Constitution or its purpose and reserve the power to terminate the foundation but only if these powers are fully detailed in the foundation's Charter. Such powers can only be reserved by the founder for the duration of the founder's life (if he is a natural person) or for a period not exceeding 50 years from the date the foundation is established if the founder is a legal person and the reserved powers will thereafter automatically lapse.

Guardian

A Guernsey foundation needs to have a guardian only where there are either disenfranchised beneficiaries or where the foundation is not established for the benefit of individual beneficiaries but for some other purpose.

The Rules of the foundation must detail the procedures for the appointment, resignation and removal of a guardian. In the absence of a Constitutional provision for the appointment of a new guardian, or if such a provision has failed, or if the person who has the power to appoint is incapacitated, then the appointment can be made by the founder (his agent or personal representative), the Guernsey Registrar or the Royal Court.

Subject to the terms of the foundation's Constitution, a guardian may resign his office by delivering a written notice of his resignation to the Council. The Constitution can expressly provide that a guardian is removed from or ceases to hold office on the coming into effect of a particular circumstance (for example, becoming resident in a certain jurisdiction) or upon the exercise of a power of removal. The Council can apply to the Royal Court for the removal of a guardian where it has reason to believe that the guardian is unwilling or is refusing to act, is bankrupt or otherwise unfit to act, or is incapacitated.

The guardian has a duty to the founder and the beneficiaries to act in good faith and *en bon pere de famille* to enforce the Constitution and the purpose and in the exercise of his functions. To this end, in the exercise of his duty, a guardian may bring an action against the Council unless the

foundation's Constitution provides otherwise. The guardian is entitled to inspect the records and accounts of the foundation upon 2 working days' notice in writing to the Council.

A guardian is entitled to be paid and reimbursed by the Council from the foundation's property for all expenses and liabilities properly incurred in connection with the guardianship of the foundation, provided he is not liable for any loss of the foundation property resulting from his breach of duty.

Subject to the foundation's Constitution and the Law, a guardian who commits or connives in a breach of his duty is liable for any loss or depreciation in value of the foundation property resulting from the breach. The terms of the Constitution cannot relieve a guardian of liability for a breach of duty arising from his own fraud, wilful misconduct or gross negligence and neither can the Constitution grant a guardian any indemnity against the foundation's property in respect of any such liability.

The founder or any person (including a body corporate), but not a councillor, may be the guardian of a foundation. The guardian will be named in the public register and he must keep and maintain accurate accounts and records of his guardianship for its duration and for six years thereafter.

Beneficiaries

A beneficiary of a foundation is someone who is entitled to benefit from the foundation and is either identified in the foundation's Constitution by name, or whose identity is ascertainable as a member of a class or by their relationship to another person.

There are two types of beneficiary; an enfranchised beneficiary or a disenfranchised beneficiary. An enfranchised beneficiary is entitled to a copy of the foundation's Constitution, the records and accounts of the foundation and to apply to the Royal Court to change the foundation's purposes or to revoke or dissolve a foundation. A disenfranchised beneficiary is not entitled to any information about the foundation, subject to the terms of the foundation's Constitution. The foundation's Constitution may state whether, and if so in what manner, a disenfranchised beneficiary may become an enfranchised beneficiary. For example, a founder who wishes to protect younger members of his family from the potentially corrosive knowledge of substantial wealth endowed upon a foundation may expressly provide in the Constitution that any beneficiary under a certain age is disenfranchised but will become an enfranchised beneficiary on attaining a specified age.

Council and councillors

A Guernsey foundation is managed by a Council comprised of at least two councillors unless the Constitution permits a single councillor. The founder or any person (including a body corporate) may be appointed as a councillor but a councillor may not also be a guardian of the foundation.

The Rules of the foundation must detail the procedures for the appointment, resignation and removal of councillors. In the

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absence of a Constitutional provision for the appointment of a new or additional councillor, or if such a provision has failed, or if the person who has the power to appoint is incapacitated, then the appointment can be made by the Council, the last remaining councillor (or his personal representative/ liquidator), the Guernsey Registrar or the Royal Court.

Subject to the terms of the foundation's Constitution, a councillor may resign his office by delivering a written notice of his resignation to the Council. The Constitution can expressly provide that a councillor is removed from or ceases to hold office on the coming into effect of a particular circumstance (for example, becoming resident in a certain jurisdiction) or upon the exercise of a power of removal. The Council can apply to the Royal Court for the removal of a councillor where it has reason to believe that the councillor is unwilling or is refusing to act, is bankrupt or otherwise unfit to act, or is incapacitated.

If, at any time, none of the councillors nor the guardian of the foundation is a Guernsey licensed fiduciary, then the foundation will require a Guernsey resident agent to hold the foundation's records within the jurisdiction, but it is not required that a licensed fiduciary sits on the Council (although most licensed fiduciaries will insist on the same for governance and regulatory purposes).

The councillors have a duty to the foundation to act in good faith in the exercise of their functions. The councillors of the foundation must execute and administer the foundation only in accordance with the Law, and the terms of the foundation's Constitution and only in advancement of its purpose.

Councillors must act unanimously unless the Constitution provides otherwise. Subject to the terms of the Constitution, where a foundation has more than one beneficiary or purpose the councillors must act impartially, although this does not prejudice their exercise of a discretion conferred on the Council by the terms of the Constitution.

The Council is responsible for ensuring that the foundation keeps records and accounts that are sufficient to show and explain the foundation's transactions, the financial position of the foundation and also detail the day to day entries of receipts and expenditure, together with the assets and liabilities of the foundation. These records must be kept or be accessible in Guernsey.

The Council has a duty, at all reasonable times, to provide full and accurate information as to the state and amount of the foundation property within 3 months of receiving a written request from a guardian, any enfranchised beneficiary or, subject to the terms of the Constitution, the founder. Even if the terms of the Constitution restrict the provision of information, the founder may apply to the Royal Court for disclosure.

However, unless the foundation's Constitution provides otherwise or the Royal Court so orders, a councillor is not obliged to disclose documents which reveal the deliberations of a councillor as to the exercise of his functions, the reasons for any decision he has made or the material upon which such decision was or might have been based.

A councillor must not profit or cause any other person to profit from his appointment unless expressly authorised to do so by the terms of the Constitution, or as permitted under the Law or with the approval of the Royal Court.

Unless prohibited by the Law or the terms of the Constitution, the Council may delegate the management of foundation property, appoint competent and qualified managers and professional persons to act in relation to the foundation's affairs or hold foundation property (and may also authorise the retention of commission for services rendered). A councillor who makes or permits such delegation or appointment is not liable to any loss to the foundation which may arise provided he has not acted in breach of duty.

Subject to the foundation's Constitution and the Law a councillor who commits or connives in a breach of his duty is liable for any loss or depreciation in value of the foundation property resulting from the breach. The terms of the Constitution cannot relieve a councillor of liability for a breach of duty arising from his own fraud, wilful misconduct or gross negligence and neither can the Constitution grant a councillor any indemnity against the foundation's property in respect of any such liability.

The Law seeks to protect a person who deals with the foundation in good faith in that he is not bound to enquire as to any limitation on the powers of the councillors to bind the foundation and is presumed to have acted in good faith unless the contrary is proved (it does not constitute bad faith if the person knew the councillors were acting beyond the powers conferred upon them by the foundation's Constitution).

If the validity of a transaction is questioned on the basis of the power of the councillors to bind the foundation, the transaction is voidable by the foundation unless the restitution of the subject matter of the transaction is no longer possible, or the foundation has been accordingly indemnified, or rights acquired bona fide for value and without notice by a non-party to the transaction would be affected, or the foundation affirms the transaction, or the councillor in question discloses the issue to his co-officials and the transaction is not avoided within 3 months.

Whether or not the transaction is avoided the councillor in question, together with any other councillor who authorised the transaction, is liable to account to the foundation for any gain and to indemnify the foundation for any loss or damage resulting from the transaction.

The register of foundations

The Register of Foundations is in two sections; Part A and Part B. Part A of the Register is public and contains the name and registered number of the foundation, the name and address of the councillors and any guardian and the details of the registered office. Part B of the Register provides a statement of the purpose of the foundation and all declarations and other documents filed with the Registrar. Part B of the Register is not public, save for the disclosure of information with consent or in the circumstances prescribed in the Law, such as by court order.

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Confidentiality and disclosure

As already noted the Council has a duty to disclose information and enfranchised beneficiaries, the guardian (if any) and, potentially, the founder are entitled to request information and have sight of the foundation's records and accounts.

The foundation is subject to reporting obligations pursuant to The Disclosure (Bailiwick of Guernsey) Law, 2007, as amended, and, also, subject to the positive obligations created by the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, as amended, and other applicable legislation, agreements or conventions.

Regulation of foundations

The formation, management or administration of foundations is subject to regulation and licensing by the Guernsey Financial Services Commission under the Regulation of Fiduciaries, Administrative Business and Company Directors, etc (Bailiwick of Guernsey) Law, 2000, as amended. A PTF (a foundation established to act as a trustee) will also need to apply for an exemption from licensing where it is to receive fees, whether directly or indirectly, for acting as trustee.

The Guernsey Financial Services Commission has also issued a code of practice for Foundation service providers.

Tax position

A foundation is taxed as a company under the Income Tax (Guernsey) Law, 1975 at the company standard rate of 0% (provided it is not income from a regulated business carried out in Guernsey or from the ownership of land and buildings in Guernsey).



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