

Guernsey foundations

Natasha Kapp

Abstract

The Foundations (Guernsey) Law, 2012 came into effect on 9 January 2013, providing for the establishment of Guernsey foundations from that date. This article identifies the main features and characteristics of the Guernsey foundation and explains its establishment and governance. It also details the practical experience of the uses of Guernsey foundations in practice.

Establishment

A Guernsey 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.

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

Every Guernsey foundation must have a registered office in Guernsey.

A Guernsey foundation has legal personality, separate from its founder, foundation officials, and beneficiaries. The assets of a foundation belong to the foundation, both legally and beneficially, it may sue and be sued in its own

name and may exercise all the functions of a legal person, including the power to hold land

Constitution

The foundation's Constitution consists of two core documents: the Charter and the Rules.

The Charter must contain the name (which must include the word 'Foundation' or 'Fdn.')

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.

The Rules set out the operative provisions of the foundation and detail the functions of the councillors, the procedures for the appointment, and retirement and remuneration of councillors and any guardian, and also identify the default recipient who will be entitled to any surplus assets upon the termination of the foundation.

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.

Purpose

A Guernsey foundation can have any purpose, the only restriction being that it cannot have as its pur-

pose the carrying out of any commercial activities. It can, however, carry out commercial activities that are ancillary or incidental to its purpose.

Firewall provisions

Section 37 of the Foundations (Guernsey) Law, 2012 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 will be recognized or enforced in respect of a Guernsey foundation where it is inconsistent with the Foundations (Guernsey) Law, 2012 or if 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.

Founder

The founder of a Guernsey foundation will 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 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.

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

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 guardian will be named in the public register.

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.

Unique to Guernsey foundations, there are two types of beneficiary; an enfranchised beneficiary or a disenfranchised beneficiary.

Unique to Guernsey foundations, 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 comprising 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.

There is no requirement for a Guernsey licensed fiduciary to serve on the council. 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. Although it is not required that a licensed fiduciary sits on the Council, 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 have a duty to the foundation to act in good faith in the exercise of their functions

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 three 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 authorized to do so by the terms of the Constitution, or as permitted under the Foundations (Guernsey) Law, 2012 or with the approval of the Royal Court.

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.

Dealings with third parties

The Foundations (Guernsey) Law, 2012 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).

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 pursuant to the Foundations (Guernsey) Law, 2012. Part B of the Register is not public, save for the disclosure of information with consent or in the circumstances prescribed in paragraph 5(2) of schedule 1 to the Foundations (Guernsey) Law, 2012, such as by court order.

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.

In addition, the foundation is subject to the reporting obligations pursuant to Part 1 of 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. The Guernsey Financial Services Commission has also issued a Code of Practice for Foundation service providers.

A Guernsey Private Trust Foundation (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.

Tax position

A Guernsey foundation is taxed domestically as a company under the Income Tax (Guernsey) Law, 1975 at the company standard rate of 0% (provided it has no income from a regulated business carried out in Guernsey or from the ownership of land in Guernsey).

Practical experience

Guernsey foundations have been established for purposes including private wealth planning, traditional charitable purposes, as well as wider philanthropic purposes, to act as power holder, to act as Trustee, and as 'orphan' vehicles in the funds industry.

On the third anniversary of the Foundations (Guernsey) Law, 2012 having coming into force some 46 foundations had been registered in Guernsey. The relatively low number of foundations registered belies the success of the introduction of foundations in Guernsey.

On the third anniversary of the Foundations (Guernsey) Law, 2012 having coming into force some 46 foundations had been registered in Guernsey. The relatively low number of foundations registered belies the success of the introduction of foundations in Guernsey

Conclusion

Guernsey foundations have proven to be an attractive alternative vehicle for bespoke planning and holding of assets of very significant value which are being administered in the Island.

Natasha Kapp is a partner in the trusts and private wealth group at Carey Olsen, Guernsey. She deals with all aspects of fiduciary law and regulation, contentious and non-contentious trusts, as well as insurance regulation. Natasha has advised on the establishment of a significant number of the foundations established in Guernsey to date. E-mail: natasha.kapp@careyolsen.com; www.careyolsen.com