

# JERSEY FOUNDATIONS: HOW ARE THEY BEING USED?

## OCORIAN BRIEFING

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The Jersey foundation was introduced in July 2009 as a new form of incorporated vehicle. From the beginning, three broad categories of use for the Jersey foundation - for succession planning, as orphan structures for specified purposes, and for philanthropy - have been clearly identified and continue to grow and develop, utilising the flexibility offered by the Foundations (Jersey) Law 2009 (the "Law"). Before looking at these, it is perhaps helpful to highlight some of the key features of the Jersey foundation and to outline the principal components of its structure, recognising that it is not an exact equivalent or copy of a foundation established in any other jurisdiction.

### Key Features

Some of the key features of the Jersey foundation are as follows:

- **Incorporated vehicle:** Differing from a trust, a foundation is an incorporated vehicle which is brought into existence following the completion of a registration process.
- **Legal personality:** A foundation is a separate legal entity which holds assets, and enters into contracts, in its own name. By contrast, as a trust is not an entity in its own right, transactions in relation to a trust are entered into in the names of the trustees, rather than in the name of the trust.
- **Public record:** A foundation's existence can be determined as a matter of public record, by conducting a search of the register of foundations. The entry of a foundation's name in the register is conclusive evidence that the foundation has been incorporated and that the requirements of the Law in that regard have been complied with.
- **No ultra vires:** The doctrine of ultra vires does not apply and a foundation can exercise all the functions of a body corporate, save only that it cannot directly (a) acquire, hold or dispose of immovable property in Jersey or (b) engage in

commercial trading that is not incidental to the attainment of its objects. However, both of these restrictions can be overcome by interposing an underlying company, so that the relevant activity is not undertaken directly by the foundation.

- **Orphan vehicle:** A foundation does not have shareholders or any other form of owner.
- **Indefinite existence:** As with Jersey trusts, foundations can continue to exist for an indefinite period.

### Structure

The principal components of a foundation's structure are as follows:

- **Founder:** The founder is the person upon whose instructions a foundation is incorporated. A founder need not endow assets upon the foundation and (unlike a trust) it can come into existence without assets.
- **Constitutional documents:** A foundation's constitutional documents are its charter (which is registered and open to public inspection) and its regulations (which are not registered and are therefore private). The Law prescribes certain information which must appear in the charter and regulations. However, anything required to appear in the regulations can instead be included

in the charter (and so be open to public inspection if that is desired) and additional material can be included in both the charter and the regulations to accommodate particular structuring objectives.

- **Objects:** A foundation's objects can be charitable or non-charitable (or a combination of both), and can be either to benefit a person or class of persons, or to carry out a specified purpose (or to do both).
- **Council:** A foundation has a council, which is similar to a company's board of directors. The council's function is to administer the foundation's assets and to carry out its objects. The council can have one or more members, with one member being a "qualified person" with the appropriate regulatory licence pursuant to the Financial Services (Jersey) Law 1998: this member is known as the qualified member. Council members are required to act honestly and in good faith with a view to the foundation's best interests, and to exercise the care, diligence and skill that reasonably prudent persons would exercise in comparable circumstances. These duties are similar to the statutory duties of a Jersey company's directors, but are narrower than the duties owed by the trustees of a Jersey trust.
- **Guardian:** Every foundation has a guardian whose role is to take such steps as are reasonable in all the circumstances to ensure that the council carries out its functions. The founder and the qualified member (but not others) may fulfil a dual role as both council member and guardian. There is no regulatory requirement in relation to the office of guardian and there is considerable flexibility as to who should be the guardian. The guardian can be an individual or a corporate entity, and there is no requirement for the guardian to be resident in Jersey.

### Which clients are using foundations?

There are two principal categories of clients who are using foundations:

- **Clients familiar with foundations rather than trusts:** Increasing numbers of the Island's clients (such as those from civil law jurisdictions in Europe and Latin America and from Russia and the Middle East) are more familiar with foundations than with trusts and are using the Jersey foundation for that reason.
- **Clients for whom particular features are important:** Clients are also using foundations, not because of reasons of familiarity or inherent

preference over trusts, but because particular features of the Jersey foundation suit their specific structuring requirements.

### What are foundations being used for?

In view of the Law's flexibility, foundations are being used for a wide variety of reasons and, as noted above, three broad categories of use stand out.

#### Succession and estate planning

Significant numbers of clients are incorporating foundations for succession and estate planning and, in addition to inherent preference of a foundation over a trust on the part of some clients, there are several features of the Jersey foundation which can be important in influencing this choice.

- **Disclosure of information:** Save to the extent expressly required by the Law or by its constitutional documents, a foundation is not required to provide beneficiaries (or others) with information about the foundation. In relation to express statutory requirements, the Law provides for copies of the regulations to be supplied to those appointed under the regulations (viz. council members, the guardian and anyone else appointed under the regulations to carry out a function in relation to the foundation). This feature of the Law can be very important as it allows for a tailored and individual approach to be taken in relation to the topic of disclosure. For some, it may be desirable that there should be no disclosure whilst, for others, it may be considered that beneficiaries should be given information, but not until a predetermined age or in pre-defined circumstances. The ability to make such decisions can often be very helpful particularly, for example, where younger family members are concerned and efforts are being made to encourage them to develop their own careers and independence.
- **Fiduciary duties:** Another feature which can be important is that, where a foundation's objects are to benefit a person or class of persons (either exclusively or in conjunction with the carrying out of a purpose), the beneficiaries have no interest in the foundation's assets and are not owed a duty (by the foundation, or by the council, the guardian or anyone else appointed under the regulations to carry out a function in relation to the foundation) that is, or is analogous to, a fiduciary duty. However, where a beneficiary becomes entitled to a benefit pursuant to the foundation's constitutional documents, and that benefit is not provided, the beneficiary can apply

to the courts in Jersey for an order that the foundation should provide the benefit. A beneficiary is also a "person with standing" and therefore able to apply to court for directions or other orders in accordance with the provisions of the Law.

- **Legal personality:** The fact that, unlike a trust, a foundation is an incorporated vehicle with a separate legal personality is an important factor for some clients, influencing their choice of structure.
- **Separate existence:** For some clients, it is important that assets will be held in the name of the newly created foundation and will continue to be held in that name throughout the foundation's existence. By contrast, where a trust is created, the assets will typically be held in the name of a professional services provider (with whom the client may not be wholly familiar at the time of the trust's creation) and will be transferred into the names of new service providers as and when trustees change during the lifetime of the trust.
- **Nature of assets:** In some cases, the nature of the assets to be held will influence the choice of structure. A foundation can be established with the express object of holding specified assets and this (coupled with the absence of fiduciary duties being owed to beneficiaries) can make it an attractive choice where, for example, wasting assets (such as boats or aeroplanes) or "family silver" assets (such as shares in a family business) are concerned. The use of a foundation to hold such assets can be helpful to manage or avoid some of the tensions that can arise between different groups of family members, with some being keen for a particular asset to be retained whilst others would prefer it to be sold in order to maximise investment returns.
- **Family Governance:** A foundation's regulations, whilst required to contain certain information, can also incorporate additional material as required. They can therefore be used as a key document in a client's consideration of family governance issues. Regulations are private documents which allow for considerable flexibility in drafting and can, for example, detail an approach in relation to the future operation and retention of a family business and/or the involvement of future generations (whether as council members or otherwise).

- **Reservation of powers:** A founder can be both a council member and a guardian, and can also have such rights (if any) in respect of the foundation and its assets as the constitutional documents provide. These features can be important for clients who wish to retain a significant degree of control in relation to the structure which is being created.

#### **Orphan structures for specified purposes**

Significant numbers of foundations have been incorporated as orphan structures for specified purposes, whether to own certain assets, or to perform particular roles.

- **PTCs:** A particular example to note is that of a foundation being used to hold the shares in a private trust company ("PTC") which acts as trustee of one or more family trusts. Prior to the introduction of the Law, PTCs in Jersey were typically owned by charitable or non-charitable purpose trusts. The foundation can be an attractive alternative for those clients who are not comfortable with the prospect of a professional services provider acting as trustee of a family trust and have incorporated a PTC for that reason. If a trust is used to own the PTC, the question will again arise as to who is to be the trustee of that trust: with a foundation owning the PTC, this issue does not arise. A foundation can also be incorporated to act as the trustee itself, in place of (or as) the PTC. The private trust company business exemption from registration under the Financial Services (Jersey) Law 1998 (pursuant to which PTCs are able to operate) is equally available to foundations. This option simplifies the structuring as it involves just one vehicle (the foundation) rather than two (the PTC and the vehicle which owns the PTC).
- **Other examples:** Other examples to mention are of foundations being incorporated to hold the shares in a company which acts as a protector of a trust, an enforcer of a non-charitable purpose trust, a council member of a foundation, or a general or limited partner of a limited partnership. Alternatively, a foundation can also be incorporated to discharge any of these roles itself.

## Philanthropy

One of the most important uses for Jersey foundations identified to date is in relation to philanthropy.

- **Choice of objects:** A foundation can be incorporated to pursue a client's chosen causes - causes that he or she is passionate about - whether or not they are technically charitable. The Law allows a foundation to be established for purposes which may be charitable, non-charitable or a combination of both. It is also possible to structure a foundation so that its objects combine both the pursuit of altruistic causes and benefit to people. This flexibility is clearly attractive and significant numbers of Jersey foundations have been incorporated with philanthropic objects, either alone or in conjunction with objects for the benefit of people. Some examples to mention of foundations incorporated for philanthropic purposes are those incorporated with objects to hold heritage assets (such as artworks or buildings), to protect the environment, to provide funds for medical or scientific research, and to support education.
- **Incorporated vehicle:** A foundation exists as a legal entity which holds assets, and enters into contracts, in its own name. The ability to refer to a foundation as such - and, for example, to use the foundation's name when distributions are made - can be important for clients when considering how their philanthropic giving will work in practice.
- **Ongoing involvement:** One of the attractions of Jersey foundations for philanthropy is that they allow opportunities for ongoing involvement. For example, the founder can choose to be a council member (and so might participate in a giving committee, distributing the foundation's assets) or might be the guardian (with a monitoring role, to ensure that the council administers the assets and carries out its objects as required by the constitutional documents).
- **Open profile:** For some clients, it will be important that a foundation's existence is a matter of public record and that its charter can

be viewed by conducting a search of the register of foundations. Where a structure is being established for philanthropic purposes, it can often be appropriate to establish and maintain an open profile and relevant information can be included in a foundation's charter (in addition to the mandatory provisions) to satisfy a client's objectives in this regard.

- **Choice of name:** Another important factor is that there is considerable flexibility as to the choice of name for a foundation, provided that it ends with the word "Foundation" or a foreign language equivalent. It is therefore possible to use a family name, or other name of personal significance, for a philanthropic foundation if that is desired or, alternatively, to choose a name which preserves the anonymity of the client.

## Conclusion

The number of incorporations and variety of uses seen to date show that the Jersey foundation adds significantly to the structuring opportunities available to clients selecting Jersey as a jurisdiction. Three broad categories of use have become well established and these continue to grow and develop, utilising the flexibility offered by the Law.

It is clear that the Jersey foundation is of interest to clients familiar with foundations and those wishing to take advantage of the features and flexibility offered by the Law, together with the other factors (such as political, economic and geographic stability; a robust and highly regarded regulatory regime; a well-respected judicial system with adherence to the rule of law; a depth and breadth of experience amongst its professional advisers; and proximity to London and its financial markets) which combine to make Jersey an attractive choice of jurisdiction for private wealth management purposes.

## KEY CONTACTS

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### GLOBAL



**GRANT BARBOUR**  
**Managing Director**  
 T +44 (0)1534 507343  
 E grant.barbour@ocorian.com



**PAUL BUTEL**  
**Managing Director**  
 T +44 (0)1534 507341  
 E paul.butel@ocorian.com

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