

# NT

The trusted solution in wealth structuring

## A comparison between trusts and foundations

### Feature

#### Legal personality

### Trust

The trust has no separate legal personality and so cannot sue or be sued - that right vests in the trustees.

### Foundation

Foundations have separate legal personality and it is the foundation itself that can sue and be sued.

#### Registration

There is no requirement or facility to register a trust in most trust jurisdictions, including Guernsey. Accordingly, no registration fees are payable on establishment or annually.

All jurisdictions that permit foundations require that a foundation must be inscribed on a public register.

The details of the founder are not normally a matter of public record. The Guernsey law will require that the following items be recorded on the register:

- Names and addresses of council members
- Registered office
- Purpose of the foundation

Fees are payable to Registry on registration and annually.

#### Who establishes the entity?

Either the settlor together with the trustees, or the trustees alone, by way of a declaration.

The founder.

#### How is entity funded?

Assets are settled by a settlor and accepted into the trust by the trustees. A trust cannot exist unless there are trust assets settled/retained.

A foundation is "endowed" with assets by its founder. In some jurisdictions, such as Jersey and the Bahamas, this can be after the foundation is registered. That will not be the case in Guernsey where there will have to be an initial endowment.

Civilian lawyers form the view that this is preferable under civil law to ensure separation between the founder and his other assets and the foundation.

## Feature

**Can the settlor/founder reserve powers?**

## Trust

This is certainly possible under Guernsey law and many offshore jurisdictions, although there is a concern if this goes so far as to raise concerns about whether this is a trust or a nominee relationship

## Foundation

Yes, but Guernsey limits this in key areas to the lifetime of the founder, or 50 years if the founder is a corporate entity.

**What “purposes” are permissible?**

Generally, trusts exist for the benefit of their beneficiaries, but in most offshore jurisdictions it is possible to have charitable and non-charitable purpose trusts.

Foundations can be established for whatever lawful purposes – private, charitable or non-charitable – that the founder specifies in the charter.

A Guernsey foundation must have a purpose.

**Who runs the entity and on what basis?**

The trust is administered by the trustees who have a fiduciary responsibility to the beneficiaries or, for purpose trusts, to the purpose (enforceable by the enforcer).

The foundation is administered by the council of members. Council members have contractual duties to the foundation itself.

**What happens in the event of a default?**

Trustees are liable for fraud, wilful misconduct or gross negligence. The right to sue trustees in this respect will be vested either in the current trustees (i.e. a co-trustee or successor trustee) or the beneficiaries themselves.

Beneficiaries rights are essentially contractual - similar to a company, the right to sue will belong to the foundation itself, so actions would have to be taken against the defaulting council member by the other or successor members. In Guernsey's law, where there are disenfranchised beneficiaries (see below) the guardian will be able to sue the council members in the name of the foundation, and will have a fiduciary responsibility to do so.

The nature of the duties owed by the council members to the foundation will be fiduciary.

The guardian has a more trustee-like duty to enforce the purpose, owed to the founder and the beneficiaries

**Who has a right to information?**

In principle, any beneficiary has a prima facie right, but trustees may decide on balance to limit this right in certain circumstances. For purpose trusts, this right is vested in the trust enforcer.

Under Guernsey law, there will be “enfranchised” beneficiaries with a right to information about the foundation or “disenfranchised” beneficiaries with no such rights. If there are disenfranchised beneficiaries, then a guardian must be appointed.

**What are the core documents?**

The trust deed, plus any supplemental deeds. This is the only binding document, but in most cases, there will be a letter of wishes provided by the settlor to provide non-binding guidance to the trustees. Trustees will also keep financial records, and a record of all decisions they have made – be that in the form of deeds or resolutions.

There will be number of constitutive documents:

- Incorporation certificate
- Charter (public document)
- Rules (private document)

The council will keep financial records and a minute book – closer to a company minute book than the trustee's equivalent.

## Feature

**What formalities are there in terms of the entity's residence/governance?**

**Can the entity be established by a corporate entity?**

**What duties do the trustees/council owe?**

**How is the entity treated for tax purposes?**

## Trust

It is not necessary for a trustee of a Guernsey law trust to be based in Guernsey or to be licensed or regulated there or anywhere else, although it is clearly an advantage to be familiar with the law. Similar considerations apply in other common-law jurisdictions.

Yes, provided it is able to do so under its constitution, there is no issue under trust law. Employee Benefit Trusts are an obvious example.

Trustees have a range of duties, but essentially these are to:

- Preserve and enhance the trust assets
- Act in good faith
- In Guernsey, act "en bon pere de famille"

The terms of the trust may restrict the trustees' duties so far as consistent with the law.

Very much depends on which tax code is involved. The UK has specific set of taxing provisions for trusts and trustees, depending on the residence and domicile of the settlor and/or beneficiaries as the case may be.

## Foundation

The foundation has to have a registered office in the place where it is registered. Under the draft law, it will be necessary for a Guernsey foundation to have at least one council member who is resident in Guernsey and who is licensed by the Guernsey Financial Services Commission as a fiduciary services provider.

This is generally possible, but most jurisdictions restrict or remove entirely the right of a corporate founder to vary or revoke the foundation. In Guernsey's law, this right lapses after 50 years.

The primary duties of the council will be closer to those that a director owes to a company and will to an extent derive from the regulations. The Guernsey law sets a high standard, which appears to be attractive to UK-based advisers.

Taking the UK as an example, there is some uncertainty given "hybrid" features. Liechtenstein foundations are taxed as companies. For many UK practitioners, this remains a cause for reservation where UK tax is in play.