

The supervisory jurisdiction of the court and foundations

OCTOBER 2015

IN THE MATTER OF THE REPRESENTATION OF A LIMITED AND IN THE MATTER OF THE F FOUNDATION AND IN THE MATTER OF ARTICLES 43-46 OF THE FOUNDATIONS (JERSEY) LAW 2009 [2013] JRC 075

In what appears to be the first case of its kind in any common law jurisdiction, the Jersey Royal Court considered its powers under the Foundations (Jersey) Law 2009 (“Law”) to give directions to the qualified member of a foundation.

Facts

The Court, in considering its powers, highlighted that Jersey foundations are relatively new legal entities, distinctive and novel yet with aspects similar to both companies and trusts

The F Foundation was founded by two BVI companies, B and G, and B was the sole beneficiary of the Foundation. The Foundation’s Council comprised A Limited, the qualified member, and two lawyers based in Cyprus and the Guardian was another BVI company, beneficially owned by B. The object of the Foundation was to administer and apply its assets for the benefit of the beneficiary, i.e. B.N Limited, a company based in Cyprus owned by a Russian bank had successfully brought proceedings in Russia against B, the F Foundation and two underlying companies owned by the F Foundation, K Limited and L Limited, regarding various defaulted loans which B had guaranteed. N Limited applied to the Jersey Court to enforce the Russian judgment in Jersey against the assets of the F Foundation.

No allegations were made against the F Foundation or its Council for failing to perform their duties or for personal wrongdoing, but up until the date of the application the F Foundation had joined issue with N Limited by way of defence.

Injunctive relief was obtained by N Limited in Cyprus and elsewhere and consequently the F Foundation found itself without funds to instruct lawyers in Jersey. A Limited instructed Jersey lawyers, at its own cost, to apply to the Court for directions that the F Foundation adopt a neutral stance in the Jersey proceedings.

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The Supervisory Jurisdiction of the Court

Part 5 of the Law confers a very wide jurisdiction on the Court, and its provisions are very detailed and extensive suggesting that the legislature envisaged the Court’s jurisdiction would be live and readily exercisable.

When considering an application for directions concerning a foundation the Court confirmed that first consideration must be given to principles derived from the Law, with similar reasoning that has developed in relation to other legal

entities/relationships (companies, trusts etc) being used cautiously. There are significant differences between foundations and trusts (for example, a foundation's beneficiaries are not owed fiduciary duties by the foundation or its functionaries) and between foundations and companies (for example, the directors of companies cannot seek directions from the Court whereas Council Members of a Jersey foundation do have that ability).

When determining whether the Court's supervisory jurisdiction was properly invoked the Court noted:

- Part 5 of the Law gives the Court an important supervisory jurisdiction over foundations. There is no equivalent in company law and, whilst analogies can be drawn with trust law, these are not exact;
- The Court's jurisdiction under the Law is nothing like the Court's well established Beddoe jurisdiction in relation to trusts. A foundation owns its assets and so there is no question as to its right to be indemnified out of these assets;
- The Court's jurisdiction is more like the Court's general supervisory jurisdiction in relation to trusts which allows the Court to assist in the interpretation of trusts and bless momentous decisions of the trustee; and
- Whilst fiduciary duties are not owed to beneficiaries, council members owe fiduciary duties and duties of care and skill to the foundation and they could be sued by the foundation for any breach, stressing the importance of the Court's blessing for momentous decisions.

The Court recognised that a change in the F Foundation's stance to neutral at a late stage in proceedings would be a momentous decision and was of sufficient importance to invoke the Court's supervisory jurisdiction. Accordingly, the Court gave a direction to A Limited that the F Foundation should adopt a neutral stance.

Final thoughts

This is an important decision in the ever- growing area of foundations, confirming that, whilst foundations have similarities in their nature to trusts and companies, they are different legal entities with particular considerations of their own.

This judgment clarifies the existence and scope of the Court's supervisory jurisdiction, and may constitute relevant guidance for the administration of foundations in other jurisdictions. In particular, the recent Foundations (Guernsey) Law, 2012 confers a similar supervisory jurisdiction on the Guernsey Royal Court and so this decision will be useful for Council Members and their advisers in both Islands.

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