

**Jersey & Guernsey Law Review – October 2012**

**MISCELLANY**

**Whether foundations are shaky or solid may depend on the architect**

1 The Foundations (Jersey) Law 2009 (the “Foundations Law”) has been in force for three years and although nearly 200 foundations have been created since its inception, the law has only recently been subject to judicial scrutiny. In *Dalemont v Senatorov*,<sup>1</sup> the Deputy Bailiff criticised the Law in the following terms—

“The consequence of the Foundations Law and the regulations which have been adopted in this particular case is that a foundation can be established with a council where the qualified member is in a minority, and where in practice the qualified member does not have any information regarding the Foundation’s assets liabilities or business . . . the relevant authorities might want to revisit with a degree of urgency the structure of the Foundations Law and the requirements that are imposed upon qualified members, because the current position seems to us to be quite unacceptable”.

2 At first sight these comments would suggest that Jersey’s Foundation Law is in urgent need of revision. However the court’s comments have to be viewed against the circumstances of the particular case and against the rules applicable to other types of structure such as trusts and limited companies.

3 The context of the court’s remarks in the *Dalemont* case was an application by the plaintiff, Dalemont Ltd, alleging contempt of court by three of the defendants, one of which was a Jersey foundation, Helios Investments Foundation. The court had previously ordered the defendants to disclose to the plaintiff details of all their assets worldwide in connection with the enforcement of a Russian judgment debt. The council of the foundation comprised two individuals resident outside Jersey and, as required by Jersey’s Foundations Law, a Jersey regulated entity as the qualified member. It transpired that the officer of the qualified member responsible for the foundation had never met

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<sup>1</sup> [2012] JRC 061A.

her fellow council members, council meetings taking place by written resolution. Until shortly before the court proceedings the qualified member had little information about the underlying structure of the foundation. The information that the court required to be disclosed was not within the Island and the qualified member was not in a position to compel its fellow council members to produce it. The court found that all three defendants, including the foundation, were in contempt of the court's order for disclosure.

4 Whilst it is true that where the council of a Jersey foundation comprises a majority of members outside the jurisdiction the Jersey qualified person may not be in a position to compel its fellow council members to provide information the position is not so different from that of a Jersey company with a majority of non-Jersey board members (or indeed with all directors being non-resident) or a Jersey trust where all or a majority of the trustees are non-resident. In neither case is there a statutory requirement for any of the directors or trustees to be resident within Jersey.

5 The Deputy Bailiff's criticism essentially raises two issues: first, the ability of the Jersey court to enforce its orders, and secondly, the ability of those running a structure, whether it be a trust, company or foundation, to make themselves aware of the nature and performance of any underlying assets.

6 In relation to the first issue the court is in fact in a slightly better position with a Jersey foundation than it is with a Jersey trust or company. As has been seen, a Jersey foundation has to have a Jersey resident qualified member on its council, and accordingly there is someone amenable to the court's jurisdiction who can be compelled to comply with its orders. That is not the case with a Jersey trust or company (a position that is not dissimilar to the position with equivalent structures in many other jurisdictions). In the case of a Jersey company where there are no officers amenable to the court's jurisdiction within the Island, the court has on at least once occasion found the power to appoint a court officer as administrator of the company (see *Rumasa v W & H Trademarks*<sup>2</sup>). However, if the qualified member of the council is not in a position to enforce the provision of information from outside the Island, the presence of an officer of the foundation in the Island may be of little value.

7 In relation to the second issue, the remedy surely lies in ensuring that when a structure is set up the appropriate governance arrangements are put in place. This might include ensuring that the

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<sup>2</sup> 1985–86 JLR 308.

qualified member is represented at all council meetings, requiring regular reports from underlying entities, or ensuring that there is at least one conference call or face-to-face council meeting each year. If one compares the position in relation to trusts, the trustee's duty to obtain information is quite clear and was summarized by Brightman, J in the English decision of *Bartlett v Barclays Bank Trust Co.*<sup>3</sup>—

“The purpose to be achieved is not that of monitoring every move of the directors, but of making it reasonably probable, so far as circumstances permit, that the trustees or . . . one of them will receive an adequate flow of information in time to enable the trustees to make use of their controlling interest should this be necessary for the protection of their trust asset, namely the shareholding.”

However it should be borne in mind that in some trust structures trustees are under a positive duty not to interfere with the running of underlying entities, through the use of what are known as “anti-*Bartlett*” clauses whereby the trust specifically provides that the trustees are under no duty to interfere in the management or conduct of an underlying entity. However such clauses arguably cannot exclude the trustee's overriding duty to exercise its powers to safeguard beneficiaries' interests and therefore there will be occasions where, notwithstanding such a clause, a reasonable trustee should nevertheless exercise its powers to obtain information.

8 Accordingly, the focus of the court's criticism in the *Dalemont* case should perhaps have been the way in which the particular structure was set up and run rather than the provisions of the Foundations Law itself. As is the case with trusts there may be perfectly legitimate reasons why a settlor or founder does not wish his trustee or qualified member to interfere in the running of underlying companies. However a service provider taking on the position of trustee or qualified member needs to understand the reason why that stance is being taken and to satisfy itself that it is both legitimate and in the interests of the foundation itself. Where the underlying asset is a family enterprise it may well make sense for the existing management team, possibly including family members, to continue to run it. Where the underlying assets are more traditional investments, the rationale may be less obvious. Furthermore, a Jersey regulated service provider, whether a trustee or the qualified member of a foundation's council, should also bear in mind their duties under the Money Laundering (Jersey) Order 2008 to have appropriate procedures in place to “prevent and detect money laundering”.

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<sup>3</sup> [1980] Ch 515.

9 Although Jersey's Royal Court was, in the *Dalemont* case, properly concerned at its inability to enforce an order for disclosure and the lack of information available as to the foundation's assets, this does not necessarily mean that Jersey's Foundations Law is defective. Indeed the requirement to have a Jersey qualified member provides a safeguard that is not present in trusts or companies. What is, however, important is that those who draft a foundation's charter and regulations ensure that appropriate governance arrangements are in place to ensure that a proper balance is maintained between the founder's wishes and the responsibility of council members to ensure that the foundation's assets are properly managed. If one uses a building analogy it is not necessarily the materials that are at fault but the way in which they have been put together.