

Foundations in Practice – Some Issues for Professional Trustees

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Appleby has recently advised upon the establishment of a foundation to be used for charitable and philanthropic purposes outside of Jersey, in respect of which a local trust company has agreed to act as the Qualified Member. This process threw up a number of practical issues which would need to be considered by any professional trustee considering taking on this kind of business. The purpose of this article is to outline some of these considerations.

Sufficient Level of Control

The most obvious issue was one of control of the activities of the foundation. In this particular case, the plan was to establish a Jersey law foundation (whose business address would, in accordance with statutory requirements, be that of the Qualified Member), which would then establish a branch in the jurisdiction in which the majority of its activities were to be carried out. Decisions would need to be

taken about day-to-day activities at the branch office and, naturally, it would have been neither practical nor desirable for the Qualified Member to have to have been involved in all such decisions. Nevertheless, in order to comply with its responsibilities, the Qualified Member needed to maintain a sufficient level of control and oversight of the foundation's activities. The solution eventually reached included the following elements:

- (i) no meeting of the foundation's council could be quorate without the Qualified Member being in attendance;
- (ii) no resolution could be carried at a meeting of the council (nor could any resolution of the council be adopted in writing) without the agreement of the Qualified Member;
- (iii) a manager would be employed by the foundation to run the operations of the branch office; and
- (iv) full power would be delegated to the

manager to exercise the powers of the foundation through its branch office subject to:

- (a) limits on the value of individual transactions to which the foundation could be committed.
- (b) an obligation to follow general policy as made by the council; and
- (c) an obligation to report to the council on a regular basis.

It was felt that this provided the correct balance between the flexibility required to operate successfully, on the one hand and the need for the council (and, in particular, the Qualified Member) to ensure that the foundation was operating in accordance with its purposes and that its assets were being properly used on the other. This is a crucial exercise for any Qualified Member to carry out in order to make a success of running an active foundation.

Verifying Donations

Another key issue to consider was the source and flow of funds for the foundation. As a charitable and philanthropic organisation, the foundation would be looking to raise funds for its activities. This, of course, raised the issue of compliance with anti-money laundering rules and regulations. Clearly, the Qualified Member would be taking an unacceptable risk if it simply left this to the manager of the branch office. Equally, however, it would be logistically almost impossible for the Qualified Member to verify each and every donation on an on-going basis, particularly as it was anticipated that sums would

come in from a number of sources in the same jurisdiction as that of the branch office.

In this particular case, the foundation was to be a part of a wider world-wide network of similar charities which all shares had the same aim and had a head-office situated in the United States. Accordingly it was agreed that this matter could be adequately addressed by:

- (i) having all outside donations being made directly to the US headquarters who would, as part of their normal procedures, run full source of funds checks on such donations;
- (ii) have the foundation's Jersey bank account **only** accept funds **directly** from the US head office; and
- (iii) have the account held by the foundation's branch office **only** accept funds **directly** from the foundation's Jersey account;

thus enabling the Qualified Member to be comfortable about the source of all funds for the foundation going forward, and also be able to monitor funds going in to the branch office and subsequently reconcile these against expenditure reports from the branch office.

Employment of Staff

The other significant practical issue to be dealt with was, as touched upon above, the issue of employment. The foundation was going to employ the branch office manager and, quite possibly, further branch office staff in due course. This raises the issues

of tax rules, national insurance rules, employment law rules and regulations in the relevant jurisdiction, all of which were outside of the scope of the Qualified Member's expertise.

In this particular case, the issue was dealt with through a combination of a scheme run by the authorities of the jurisdiction in question (which effectively involved a local government agency dealing with issues such as sponsorship, work permits and visa requirements) and legal advice from a locally qualified lawyer on an appropriate form of employment contract.

If a professional trustee in this situation did not want to take this approach, however, an alternative might

be to look into the possibility of appointing a corporate third party in the relevant jurisdiction to provide individuals on a secondment basis, but where that third party retained the various employer's responsibilities.

These are just a few of the practical issues arising out of an actual piece of foundation business, but as can easily be seen, there are a number of things which a professional trustee looking to do this kind of work will need to consider. Provided the importance of the balance between flexibility and responsibility is kept in mind, however, none of these concerns need be insuperable.

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