



Guernsey Financial
Services Commission

Firm Foundations

A conference on Guernsey Foundations

Friday 1 March 2013

St James Concert & Assembly Hall

1 March 2013

Guernsey Financial Services Commission



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Opening Comments

Nik van Leuven
Director General

1 March 2013

Guernsey Financial Services Commission

FOUNDATIONS SEMINAR – ST JAMES

In December 1854 Guernsey's Chamber of Commerce petitioned the Royal Court for legislation establishing partnerships offering limited liability, on the basis that Guernsey law then only knew of the conventional partnership in which each partner was liable jointly and severally for the partnership's debts.

By mid-Victorian times Guernsey trade was primarily with England, and so Guernsey merchants were adopting, out of convenience if not necessity, English law and practice to regulate commercial transactions. Fear of further hostilities with the French – which had been such a feature of the 18th and early 19th centuries – were largely responsible for this 'Anglocentric' state of affairs.

It is interesting to note that when Guernsey's government addressed this request, it did so by reproducing into Guernsey law the French civil law species of limited partnership known as a *société en commandite*. It was only some 30 years later in 1883 that Guernsey first introduced the limited liability company along English lines, largely modelled on aspects of the 1862 English Act. By way of curiosity, I should mention that *sociétés en commandite* remained available until abolished as a form of incorporation in 1977, and this on the somewhat specious basis that the Law Officers' visa was not required for their formation. The Ladies College was first constituted as a *société en commandite*, but got into financial difficulty and eventually had to be rescued by the States; and the last to be incorporated was utilised in the financial planning of a 1979 film called 'The Eagle's Wing' starring Martin Sheen, which was not, it is thought, a box office success.

So, the introduction into Guernsey law by legislation of entities or structures familiar to continental practitioners and derived from civilian legal principles is not novel. But from a jurisprudential perspective it gives rise to challenges.

Whatever the more regressive members of the Guernsey Bar might desire, and despite the direction of travel in this area in Jersey towards preserving, perhaps anachronistically, French legal notions, and which has caused some concern there, the core of Guernsey commercial and mercantile law and practice remains resolutely and identifiably English.

Relevant for today's event is that the Guernsey *société en commandite*, which predated the English 1862 Act, found its origins in, and was based on, relevant provisions of the French *Code de Commerce*, of the early 19th century. Such *sociétés* are still available in France as a means of partnership, though they are but rarely used.

In the years following Guernsey's first companies legislation based on the English model, the conventional company limited by shares has predominated amongst the catalogue of corporate vehicles available, as recently reconfirmed by our Companies Law of 2008.

From about the early 1980s, the possibilities of providing locally for extending that catalogue were considered, and *inter alia* foundations were proposed, but their uses did not then appear to justify the means required to legislate for them. In recent times the emergence of Guernsey as a jurisdiction specialising in wealth management inevitably led to reconsideration of enabling foundations, and this given stimulus by Jersey's bold decision to have a go.

When this came under serious consideration here, I was able to lend encouragement and support to the project in its conceptual and legislative aspects as H M Procureur. It seemed to me that in order for foundations to be not only enabled under Guernsey law but also useful, they would better be

familiar to users and advisors, and so recognisable as foundations in the continental sense rather than as statutory incorporated trusts in an English sense. Here, the experience of other jurisdictions in this potentially tricky area proved helpful, particularly by avoiding what other jurisdictions, in balancing between conventional civilian concepts and anglo-saxon corporate and fiduciary principles, perhaps had not got quite right. Whilst this is not strictly a matter for the regulator, I feel the balance in our legislation is appropriate, and am confident that Guernsey foundations will become valuable tools in financial planning.

Unlike the *société en commandite* which was supplanted here by the limited liability company after about 30 years and which, in any event, was never much used, practitioners should be confident that foundations will prove more enduring and fashionable items from amongst Guernsey's catalogue.

The introduction of foundations brings not only opportunities but challenges. From the Commission's perspective it requires our gaining a full understanding of the legislation and developing appropriate regulation in unfamiliar territory, and this precisely because Guernsey foundations are not incorporated trusts. The very fact that foundations should prove popular with those with substantial fortunes of itself gives rise to issues which need no development by me in introduction– they will emerge during the course of today. I am pleased to see so many of you here, and the number attending bears adequate testimony to the need for this event. I greet you all warmly and sincerely.

Finally, I extend a particular welcome to our speakers, each an expert in his or her subject. My special thanks must go to John Goldsworth, who, having been unable to come to Guernsey unexpectedly earlier this year, is now able to share his expertise and insights into this fascinating field, full of beneficial possibilities for Guernsey.



Guernsey Financial
Services Commission

The Guernsey Law on Foundations, an International Perspective

Professor John Goldsworth



Some Observations on Guernsey Foundations

1. Foundations in non-civil law countries

Foundations are primarily a concept of the civil law. Legislation is the only practical method to introduce this form of legal entity into jurisdictions like Guernsey with its background of customary law with ancient French influences. There is no other way that legal personality can be acquired apart from a Royal Charter.

In civil law countries legal personality is acquired by a unilateral declaration. In the case of foundations, this is by a declaration by the founder. This is an unfamiliar event in common law. Creating a trust or partnership by such an easy and informal act seems to be different from creating a legal entity. This seems to be too liberal since, surely, separate legal persons require more formality and at least the consent of a government body to endorse the legality. And so, in common law and similar jurisdictions, some sort of registration process is installed before a foundation is given a separate personality. But then, it is not so different from the ability in a common law country to declare that assets already owned are henceforth to be held on trust. Anyway, in common or civil law systems these unilateral declarations call for some formality such as a deed as a record or as evidence.

The nature of a juristic person receives far more academic analysis by civil lawyers than by common lawyers. History is the origin of this difference (see Appendix for an early arrangement which has characteristics similar to a private foundation). In the civil law origins of foundations go back to Rome and perhaps before; whereas in English law, legal personality is now almost entirely created under the Companies Act by filling in forms and applying to the Registrar of Companies. The usual example is that religious houses were set up where residents had to maintain their allegiance to poverty by the religious house being set up as a separate body. This preserved the poverty or the incumbents. English law went the other way and put the ownership of religious premises in the hands of lay people who managed the property on behalf of the religious brethren, thus achieving the same objective. The concept of legal personality as a creation of a founder never took hold in the face of the alternative offered in English law.

This illustrates an apparent deficiency in English law from the viewpoint of a civil lawyer. In English law artificial or legal persons are either corporations aggregate (companies) or corporate sole (Archbishops). Maitland¹ suggests that a civil lawyer would consider that these two types of legal person hardly cover the whole ground and that, at all events, little good is obtained from corporations sole. In Maitland's opinion, Germans should ask where the English keep their *anstalts* or *stiftungen* (institutions and foundations). English law needs some 'second class of juristic persons'. It would be easy to agree with this if the growth and use of trusts is ignored. But the trust, charitable and private, played a crucial role in the development of English law and, as Maitland observes: "... we came by our own English *anstalt* and *stiftung* without bothering the

¹ 'The Uncorporate Body' in the Collected Papers of F. W. Maitland, Volume 3, Cambridge University Press, 1911.

state to concede or deny the mysterious boon of personality”. Perhaps now the nearest comparative body would be a partnership which two people can set up by a simple declaration but English law does not go so far as to endowing a partnership with legal personality.

So, in non-civil law countries, foundations obtain legal personality simply because the legislation says so. Each sovereign jurisdiction, in enacting such legislation, creates its own individual version of a foundation as an incorporated body. Fortunately, one country follows another and tries to improve upon the concept with one eye on the markets and the other on the latest traps for asset planning vehicles. This results in modern foundations having a similar appearance to the casual observer but not only is the mandatory substantive law of foundations created individually but existing procedural laws naturally subject each jurisdiction’s foundation to individual procedural laws. For example, although foundations almost seem to be independent of equity, they are, nevertheless, subject in common law countries to some equitable concepts. For example, if a foundation is set up and receives assets and later the objects of the foundation become impossible to achieve, the question arises of what happens to the foundation property? It is pretty certain that in common law countries a foundation council, who remain the legal owners of the property, will hold it on a resulting trust for the founder. Civil law jurisdictions probably have their own principles by which the same result is achieved; probably something to do with unjust enrichment.

This makes the point that there is no jurisprudential family connection between the Guernsey foundation law and the foundation law of any other country. The comparative study of foundation law is difficult. Or so it seems. Credit must be given here to

Liechtenstein which was an early developer of foundations for private use (after an earlier law in Monaco) and which created the first market for private foundations in 1926. The law there remained relatively obscure for 80 years, partly because of the complexity of the legislation and the incomplete regime which the Liechtenstein law instituted when looked at from a common lawyer's point of view. And, anyway, the foundation legislation was short and had to be supplemented by referring, not always happily, to other parts of the 1926 legislation, principally the law on trust enterprises. Panama realised the potential of foundations after probably confusing itself when it tried to introduce trusts. The adoption by Panama of foundations was intended to introduce a simpler law and regime on foundations than then existed in Liechtenstein. This inspired other countries to adopt the form and stimulated Liechtenstein to re-codify its law in a self-contained manner in 2009. This new law gains respect for its clarity on most issues and for the commercial success which it continues to have over its predecessor. Therefore, each piece of legislation on foundations is separately conceived.

In establishing a law on foundations, a jurisdiction's drafting committee decides what attributes they would like this new vehicle to have. The basic concept of a foundation is adapted to appeal to the existing market and therefore each jurisdiction has to assess what will appeal to potential clients and which will attract them away from other jurisdictions. This is not easy where a foundation is so different from the way trustees manage a trust and where the relationship with the beneficiaries is similar to the way a board of directors of a company remains aloof from the shareholders. The platform on which these innovations are made shows enormous variation and range from the multi-form foundations of Nevis to a very corporate-type of foundation in the Bahamas and to

Anguilla's intention to produce a law which mirrors what they anticipate investors from civil law countries will accept. To this one can add the modifications of a whole range of law in Malta to modernise their old law on foundations for private investment purposes and Malaysia's law with Islamic features.

2. Definition and nature of Guernsey foundations

Considering a recent foundation Act a sensible starting point is to examine how the foundation is defined in the legislation. However, it is dangerous to put too much significance on definitions; all definitions are inadequate and incomplete as one can see in the treatment of trusts in any text book! With foundations, some jurisdictions simply state that a foundation is what is created under that Act. Others give a more fulsome declaration. Guernsey legislation goes part way. But, in any case, no one reading the Act is left in any doubt of the nature of a Guernsey foundation.

The Act lays down the fundamentals by providing that one or more persons, by providing an endowment and subscribing the name of the founder, and otherwise by complying with the Act, creates a Guernsey foundation that, on establishment, has legal personality which is separate and independent from its founder (Section 1). This is supplemented by a further statement that upon establishment (that is, by entering its name in the Register) a foundation obtains its legal personality which is separate from the founder, foundation officials and the beneficiaries and that it has continuous existence until removed from the Register (Schedule 1, Paragraph 6(4)(a)).

Then the Schedule to the Act provides some practical characteristics; a foundation may sue and be sued in its own name, and can exercise all the functions of a legal person

including the power to hold land (Paragraph 6(5)(a)). Then, the ability of a foundation to exercise all the functions of a legal person is modified in Section 7 of the Act where the purpose (or object) of a foundation is restricted in that: "... it cannot carry out any commercial activities except those necessary for, and ancillary or incidental to, its purpose." So, gradually, we learn the nature of a Guernsey foundation and that its functions are equivalent to that of any other legal person but with a restriction that it cannot engage in commercial activities.

The Act provides for the setting up of foundations generally and is not restricted to private foundations. In other words, Guernsey foundations can be mixed foundations and that is a useful attribute. The Guernsey foundation is therefore compatible with the simple definition of an international foundation:

"The foundation is a legal entity without members and with its own organisation, the object of which is to achieve a certain specific purpose by means of the endowment made."

This can be expanded upon and the following definition has been proposed:

"A private foundation is a self-governing separate revocable or irrevocable legal entity, managed by a foundation council or similar body in conjunction with the founder or protector/guardian according to the foundation constitution and the law. A private foundation is set up by a declaration, registration or incorporation, by or on behalf of a founder, to hold, administer and distribute the foundation's endowment for the benefit of beneficiaries, or for a purpose, where the ownership

of the foundation assets rests with the foundation council, according to the charter and the law under which the foundation is set up.”

The words ‘private foundation’ creep in. This distinguishes them from public foundations which, in the wider world, are mostly charitable bodies which do not include in their practice benefitting individuals as part of an asset planning procedure.

Internationally, the terminology relating to foundations is imprecise; for example, private foundations in North America are foundations of a charitable nature set up by individuals who obtain some tax benefits in return for their philanthropy but cannot include individuals as beneficiaries. Other countries, including civil law countries, allow advantages to individuals when engaging in other structures which primarily are of a charitable nature.

It is interesting to note a similar stage in the development of modern trust law.

About a hundred years ago when trust law was more complicated than it is today there was a similar call for a straightforward definition of a trust. No such definition was available in the text books or in the court decisions. Maitland recognised that where judges and writers fear to tread, professors of law have to rush in. He said:

“I should define a trust in some such way as the following- where a person has rights which he is bound to exercise on behalf of another or for the accomplishment of some purpose, he is said to have those rights for that other or for that purpose and he is called a trustee”.

This definition of a trust could almost apply to a modern foundation. If Maitland had thought about foundations he would have distinguished the rights which a trustee is bound to exercise on behalf of another as a personal obligation. This contrasts with a foundation which has absolute title to the foundation assets and where the foundation officers are required to apply the assets according to the law of the foundation as embodied in the constitutional documents.

A member of a foundation council owes a duty to the foundation itself and is not connected with rights over the foundation property. This is unlike a trustee whose rights are derived from the legal ownership of the property and whose obligation towards beneficiaries is an integral recognition of the beneficial interests of the beneficiaries in the same property. But the two schools, common law and civil law, have become indistinct in the last twenty years with the adoption of trusts by many countries whose customary or civil law backgrounds do not have the property complications so beloved by the equity and where fiduciary duty towards the beneficiaries is not derived from a shared ownership of the assets. In both cases the description of the rights of beneficiaries is inchoate and best referred to simply as rights under the trust or under the foundation.

The Hague Convention on Trusts was introduced before the interest developed in foundations. The Convention does not define trusts but gives a practical description; other characteristics are apparent in the Articles. The Convention is concerned with the conflict of laws. This requires a trust to be established according to a domestic law before falling within the Convention's scope. The general description of a trust is broad

and allows vehicles to be included which do not even approximate to the accepted common law concept of a trust (e.g., South Africa and Quebec trusts).

Some of these ancillary vehicles are as distant from the common lawyer's concept of a trust as are foundations. Foundations at that time, when used for private asset management, were unique to Liechtenstein (and obscure) and were not even considered by the negotiators. Although not mentioned in the preparatory papers it appears that foundations would be dismissed from possible inclusion in the Convention because of their incorporated status. This conclusion was not explored and only featured in a relatively casual comment by Professor Hayton. The reason behind this is perhaps that an incorporated body is most likely to hold both the beneficial and legal titles to the property and thus prevent any interest being available to the beneficiaries before allocation of the assets by the council. In a foundation the beneficiaries' rights are solely rights under the foundation constitution and not proprietary rights. But some of the ancillary organisations sympathetically reviewed also place the property rights out of reach of the beneficiaries.

3. Demands on the legislation

From the above, it is apparent that devising legislation for modern foundations is not simple. Legislation does not codify principles which have grown up in a common law sense and which require drawing together. Legislation brings together principles which feature in other countries' laws, improves on them and puts them in a form which is acceptable to the practices of the home country. This can be approached in two ways: First, simply define what a foundation is or what it is meant to achieve and to leave the domestic law to work out what is required; the use of companies in Gibraltar and the

Isle of Man are examples of this. Second, provide a comprehensive Act which whilst not ignoring the individual nature of foundations at least puts them into a domestic legal context more comfortably.

The latter has been the approach in Guernsey and the Foundations (Guernsey) Law 2012 is a comprehensive piece of legislation.

4. Guernsey foundation law and the Royal Court

Conflict of law provisions

These provisions are somewhat complex.

Part IV of the Act on provisions of general application gives exclusive jurisdiction to the Royal Court and to Guernsey law. Section 37(1) excludes Guernsey rules on private international law in connection with the capacity of the founder, the foundation's constitution, the validity of any endowment, the administration of the foundation, the status of officials and the existence and extent of any functions in respect of the foundation including powers of variation, revocation and appointment and the validity of the distribution of the foundation property. Whether it is advisable to repeat this in a choice of law clause in a foundation's constitutional documents can be debated. However, by doing so, it may forestall an action being started elsewhere and perhaps thereby made subject to a different law.

Naturally, the *lex situs* governs transactions in real property outside of Guernsey, this is recognised in Section 37(2)(f).

Also, the above provisions do not validate the endowment of property which is not owned or at the disposal of the founder and does not affect the recognition of another jurisdiction's law in determining whether the foundation is the owner of the property. How this is subject to any express provision in the constitution (Section 37(2)(c)) is interesting. Any endowment of property to a foundation is not invalid (void, voidable, etc), as far as Guernsey is concerned, by the mere non-recognition by other jurisdictions' laws of a Guernsey foundation or by the reason that the endowment defeats the rights of other parties related to the founder or of those possessing forced heirship rights (Section 37(3)). Also, no foreign judgments of another jurisdiction shall be recognised which are inconsistent with the Guernsey law on foundations or if the Royal Court makes an order safeguarding the purpose or benefits under the foundation.

The insular nature of most foundation legislation is emphasised as it is in the Guernsey Act by providing that the Royal Court has jurisdiction in respect of a Guernsey Foundation and all matters relating thereto (Section 36). This clause endows the Royal Court with jurisdiction but makes no attempt to affect the jurisdiction of any other state. However, such a provision will provide comfort to many potential clients and is far more convincing than appears in many other laws.

In legislation on foundations in other states, sometimes the 'applicable law clause' is very brief. For example, in Anguilla, the law states:

“Every foundation shall be governed by the provisions of this Act as well as the declaration of establishment of that foundation and its by-laws.”

On the other hand, the Antigua and Barbuda provisions state that:

“The governing law of an international foundation shall be the law of Antigua and Barbuda unless the foundation charter specifies the law of a different jurisdiction, or the foundation council chooses a law of a different jurisdiction.”

These provisions continue by stating that:

“Where the law of Antigua and Barbuda is the governing law of the foundation, the foundation shall be the subject of the exclusive and continuing jurisdiction of the court which shall be the exclusive forum for the adjudication of all disputes relating to the foundation.”

Here there is a clear legislative indication of the governing law and forum. Normally these clauses appear in a foundation’s individual documents, charter or regulations. Such provisions are recognised because the choices show the intention of the founder.

Does the provision in the Act suggest that no choice of law/jurisdiction clause need appear in the charter? If no such clause is inserted how would a foreign court know that Guernsey had reserved the rights? Would a foreign court then recognise that clause?

In the absence of a provision such as appears in the Antigua and Barbuda law can a founder in a Guernsey Foundation make his own choice of another governing law? Would such a choice render the foundation unregistrable?

Reserved powers of the founder

The powers under the Act which may be reserved to the founder to amend, revoke, vary or terminate the foundation are examples of provisions which must be approached critically. Section 11 of the Act allows the founder to amend, revoke or vary the terms of the constitution subject to the presence of an express power for amendment (as required by Section 8) or to terminate the foundation. It is necessary that these powers are expressed in full in the charter. These powers only exist for the life of the founder if he is a natural person or for not more than 50 years if the founder is a legal person; thereafter the powers lapse (Section 11(2)(c)). Where there is more than one founder the powers are exercised unanimously. These reserved powers will be of interest to potential founders and one can expect the range of these powers to be examined closely.

Some jurisdictions are generous with the scope permitted to the founder. In the Bahamas the power is without limitation. Other jurisdictions do not permit reserved powers at all such as St. Kitts and Antigua and Barbuda.

The existence of such powers in contrast to the mere gentle influence that a settlor may have over a trust may give potential founders a feeling that they can do as they like.

The law of Guernsey generally denies this ability subject to the terms of the constitution but then resurrects them for the limited activities mentioned above. The scope of these reserved powers is considerable since the founder may revoke or vary the terms of the constitution in whole or in part. This gives the founder considerable scope to manipulate a foundation.

There are in other jurisdictions considerable variations in the nature of the powers given to founders. For example, in Seychelles, the power of the founder is merely one of approval or disapproval of initiatives of the foundation council, but even these powers are open to different interpretations. In the new law in Liechtenstein one interpretation is that the founder, or founders, may act directly or through a representative and may reserve powers to take part in the management and control of the foundation. The restriction is not on what the founder may do but on how he does it. The facility must be expressed in the foundation constitution but one authority,² writing on Liechtenstein foundations, states that:

“The documents of the foundation can confer rights on the founder as against the foundation or persons with a participating interest in it only to the extent that such rights do not constitute a continuous and exclusive power to exert influence over the organisation and management of the foundation.”

This is unexplained but is intended to restrain a founder from permanently taking over the entire management of the foundation.

A founder who is under the jurisdiction of another state could quite easily be ordered to exercise a retained power to suit the purposes of any foreign litigation being brought (such as in matrimonial causes or taxation) so as to return the foundation assets to the founder's patrimony. The fate of any property given to the foundation by a third party might be at risk.

² Dietmar Loretz. 'Liechtenstein trusts and foundations: creation and operation' in Alon Kaplan's, *Trusts in Prime Jurisdictions*, published by Globe Business Publishing, p312)

In addition to being at risk in respect of foreign tax or matrimonial claims to recover foundation property, the powers could also prove embarrassing where the founder could find himself in the position that the foundation is regarded as his alter ego because the founder retains the control of the assets.

These factors are relevant also where the founder can appoint himself a member of the foundation council if the result is that the founder has a dominant position over the council

The founder may also be a beneficiary and that may create similar problems depending upon the mix of how the foundation is organised and controlled. But the warning against 'a continuous and exclusive power to exert influence' given in connection with a Liechtenstein foundations is significant.

Any trust practitioner or judge will immediately be drawn to how far the reserved powers extend and to what extent has the founder put himself in complete control which could be construed if the assets of the foundation are still within his patrimony. The reserved powers must be exercised through the foundation council so as to be an official foundation activity. But this procedural step does not prevent the conclusion that if the power is substantial then the foundation becomes merely the alter ego of the founder. Such a conclusion most likely negates the whole intention of setting up the foundation. The concept of a sham foundation has not really been explored but one can see how this could develop. The reserved powers are a positive attraction of private foundations but liberties cannot be taken.



Guernsey Financial
Services Commission

The Guernsey Law on Foundations, a Guernsey Perspective

Advocate Hilary Pullum
Law Officers, St James Chambers

1 March 2013

Guernsey Financial Services Commission

The background of the slide features a large, faint, circular seal of the Bailiwick of Guernsey. The seal contains a central coat of arms with two lions and a central shield, surrounded by the text "BAILIWICK OF" at the top and "GUERNSEY" at the bottom.

The Foundations (Guernsey) Law, 2012

The footings
and a few footnotes

Advocate Hilary Pullum
St James Chambers

What is a Guernsey Foundation?

"...Creation of foundation.

1. Any one or more persons ("the founder(s)") may by -

(a) endowing the foundation with its initial capital (see section 2),

(a) subscribing his name, as the founder, to the Constitution of the foundation (see section 3(2)), and

(a) otherwise complying with the requirements of this Law in respect of establishment and registration (see Schedule 1),

create a Guernsey foundation which, upon establishment, has legal personality separate and independent from its founder...."

Overview

The footings

- The evolution of the Foundations Law
- The aims of the Foundations law
- Getting the balance right

A few footnotes

- Some topical issues
- Secondary legislation

Evolution of the Foundations Law

- States Resolution of 15th December 2006
 - the revision of the Trusts (Guernsey) Law, 1989
 - the introduction of a foundations law
- Policy considerations – what form?
 - Civil law model e.g. Lichtenstein, Austria?
 - Offshore model e.g. Bahamas, Jersey?
- Appointment of external foundations experts

Evolution of the Foundations Law cont'd

- April 2011: Department's Consultation

"...One of the key goals of the Department is to create legislation which would be treated as a foundation in a civil law jurisdiction. There has been academic criticism of foundations legislation in some competitor jurisdictions as being too similar to companies to be viewed as genuine foundations by a civil law court. That creates a risk that these entities could be treated as companies rather than as foundations in some civil law jurisdiction which would create uncertainty and undermine the rationale for using a Guernsey foundation. Addressing these concerns has led to the Guernsey legislation being significantly different to that which has been introduced elsewhere by competitor jurisdictions..."

Evolution of the Foundations Law cont'd

- States Resolution of 8th March 2012
 - set out the parameters of the law
 - adopting changes prompted by the consultation process
- 25th July 2012, Foundations Projet de Loi approved by the States
- 8th January 2013 Foundations (Guernsey) Law, 2012 came into effect

The aims of the Foundation Law

- Balanced
 - Recognisable as a foundations law by civil law practitioners
 - Flexible
 - Competitive
 - Well regulated

Getting the balance right

- Essential elements of a civil law foundation
 - Legal personality
 - Initial capital
 - Founder's rights
 - Beneficiaries rights
 - Registration

Getting the balance right cont'd

- Structure
 - Short law
 - Lengthy schedules
- Drafting
 - Introducing a new concept into Guernsey law

Topical issues

- A company or a trust?

"...one can simply say within civil law countries the foundation has developed whilst in common law countries the trust has developed, and both institutions have had the same functions and purposes and still do..."

Nikolaus Biedermann P.C.B. 1993, 4, p.288

"...2.1. Like trusts, just different

.... Like trusts, therefore, foundations enable the creation of a segregated pot of assets which (by virtue of their "dedication") cease to be comprised in the estate of the person who created the structure (settlor/founder) and do not form part of the estate of the person (trustee/foundation council) who is called to administer the funds in accordance with the terms of the constitutional documents (trust deed, foundation charter) and the law. In both cases, the assets should only be applied towards the purpose (whether a "pure" purpose or a purpose to benefit beneficiaries) set out by the creator of the structure...."

Filippo Nosedà, Jersey & Guernsey Law Review – February 2010

Topical issues cont'd

- Dalemont Limited v Senatorov [2012] JRC061A

"... 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.As a result, legal proceedings which have been commenced in this Island and which include a requirement from the Court that the Jersey registered foundation produce a certain amount of information have resulted in the Foundation not providing that information because it is not in the Island and there is no basis upon which the qualified member can compel fellow council members to produce it....if the result of the Foundations Law and the charter and regulations actually adopted in this case is as the Second Defendant contends, then the relevant authorities might want to revisit with a degree of urgency the structure of the Foundations Law and the requirements that are imposed on qualified members, because the current position seems to us to be quite unacceptable. ..."

Secondary legislation

- Foundations (Guernsey) (Fees) Regulations, 2013
- The Regulation of Fiduciaries Administration Businesses and Company Directors etc (Bailiwick of Guernsey) (Foundations Amendment) Regulations, 2013
- Yet to come
 - Income Tax (Guernsey) Law, 1975 amendment Ordinance
 - Annual renewal and strike off regulations

The Registry Process for Guernsey Foundations

Alan Bougourd, Registrar
Helen Proudlove-Gains, Deputy Registrar
The Guernsey Registry



Guernsey Registry

Foundations

1 March 2013



Guernsey Registry

- **How to Register a Foundation ?**
- **Fee Information**
- **Foundation Forms**
- **What does the Register Look Like ?**



Guernsey Registry

How to Register a Foundation ?

Email an Application Form to:

enquiries@guernseyregistry.com

N.B All foundation officials –natural and legal persons – need to pre-register with the Guernsey Registry

➤ **The Requirements are:**

1. a copy of the Charter
2. a declaration signed by the founder or the resident agent that the details contained within the Charter are correct and an accurate reflection of the purposes of the Foundation;
3. a declaration as to whether there are, or are intended to be, any disenfranchised beneficiaries;
4. the names and addresses of the proposed Councillors together with their written consent to act;
5. the name and address of the proposed Guardian (if appropriate) together with their written consent to act;
6. the name and address of the Resident Agent (if any);
7. the address of the registered office in Guernsey;
8. The necessary fee



- **Fee Information**

- Registration within 24Hours £100
- Registration within 2 Hours £350
- Annual Renewal £500
- Late Fees For Annual Renewal £100 per month
- Migration in £100
- Migration out £1,500
- Documents £10 (£25 if certified)



- Fee Information continued
 - Change of Name £25
 - Change of Charter £50
 - Change of Particulars £10
 - Late Fees £2 per day
 - Rectifications £10



Guernsey Registry

- **Foundation Forms**

**Foundation Official Registration
Applications**

Register a Foundation

Migration into Guernsey

Ongoing Administration

Change of:

- Charter
- Councillors
- Guardian
- Name
- Resident Agent
- Registered Office

cutting edge technology with historic integrity



- Things to consider
 - Enfranchised/disenfranchised beneficiaries
 - Licensed Fiduciary
 - Resident Agent
 - Annual Validation
 - Strike Off
 - Document Ordering

Foundations Register

The table below details the foundations that have been registered in the Guernsey and their current status.

The 'Foundation Officials' column contains a link to a PDF document detailing the the name and address of the Councillors and the name and address of the Guardian (if applicable).

Should you require any further information please call the office on +44 1481 743800 or email: enquiries@guernseyregistry.com.

Foundation registration no.	Foundation name and registered office	Link to Foundation Officials	Registered date	Status
1	The Male Uprising in Guernsey Charitable Foundation 1st Floor, Lefebvre Place, Lefebvre Street, St Peter Port, Guernsey, GY1 2JP	 Fdn. 1 [113kb]	09.01.2013	Normal
2	The Ogier Active Foundation Ogier House, St Julian's Avenue, St Peter Port, Guernsey, GY1 1WA	 Fdn. 2 [109kb]	09.01.2013	Normal
3	The Adyton Foundation P.O. Box 472, St Julian's Court, St Julian's Avenue, St Peter Port, Guernsey, GY1 6AX	 Fdn. 3 [110kb]	09.01.2013	Normal
4	The Falcon Foundation 2nd Floor, Elizabeth House, Les Ruettes Brayes, St Peter Port, Guernsey, GY1 6DU	 Fdn. 4 [110kb]	09.01.2013	Normal
5	The Atlantic Foundation 2nd Floor, Elizabeth House, Les Ruettes Brayes, St Peter Port, Guernsey, GY1 6DU	 Fdn. 5 [65kb]	25.01.2013	Normal



Guernsey Registry

Foundation name: The Male Uprising in Guernsey Charitable Foundation

Registration no: 1

Foundation Officials

Councillors

Name	Address
Daniel James Collins	6 Les Fontenelles Mews, Mount Hermon, St Peter Port, Guernsey, GY1 1JD
Tony James Tostevin	Mirus House, Rue de la Croix Creve Cocur, St Saviours, Guernsey, GY7 9NL
Trevor James Kelham	Albatross, The Citadel, Fort George, St Peter Port, Guernsey, GY1 2SX
Ian Michael Brown	High View, Dehus Lane, Vale, Guernsey, GY3 5EP

Guardian (if applicable)

Name	Address
Gavin Scott Ferguson	Les Quatre Vents, Route de Pleinmont, St Peters, Guernsey, GY7 9BW

Limited Companies

- ▶ What is a limited company ?
- ▶ How do I register a director ?
- ▶ How do I incorporate a company ?
- ▶ Obligations of directors/members to the Registry
- ▶ How do I make company submissions online ?
- ▶ Audit Waiver Resolutions
- ▶ Annual Validations
- ▶ Sample documents available online
- ▶ Fee information
- ▶ Consultation

Recognised Auditors

- ▶ What are Recognised Auditors ?
- ▶ How do I become a recognised auditor ?
- ▶ View the Register
- ▶ Fee information

Limited Partnerships

- ▶ What is a Limited Partnership ?
- ▶ How do I form a Limited Partnership ?
- ▶ What are my obligations to the Registry ?
- ▶ How do I make Limited Partnership submissions ?
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Intellectual Property Registers

- ▶ Intellectual Property Registers

Foundations

- ▶ Foundations Register
- ▶ What are Foundations ?
- ▶ How do I Register a Foundation ?
- ▶ Registration of Foundation Officials
- ▶ Foundation forms
- ▶ Fee information
- ▶ Useful links/articles
- ▶ Consultation
- ▶ Project Update

Limited Liability Partnerships

- ▶ Project Update
- ▶ Consultation

Annual Validation - Reminder

All Guernsey registered companies were due to make an annual validation submission by 31 January 2013. Companies that have failed to make this submission on time are liable to pay £100 per month late fees with effect from 1 February.

Alan Bougourd, Registrar, 13 February 2013

Register search

Find and purchase information ▶

News

Popular Pages

Intellectual property office ▶

Products & Services

The main functions of the Guernsey Registry are to examine and store information on various registers as required under Guernsey legislation. The Registry is required to make some of this information available for public inspection. Detailed below are the registers that are administered at these offices and those registers that will be administered in the future.

Limited Companies ▶

Foundations ▼

- ▶ Foundations Register
- ▶ What are Foundations ?
- ▶ How do I Register a Foundation ?
- ▶ Registration of Foundation Officials
- ▶ Foundation forms
- ▶ Fee information
- ▶ Useful links/articles
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- ▶ Project Update

Intellectual Property Registers ▶

Limited Partnerships ▶

Recognised Auditors ▶

Limited Liability Partnerships ▶

Make a submission

Make register submissions online ▶

Register search

Find and purchase information ▶

Intellectual property office ▶



Annual validation

You must complete by 31 January ▶


Foundation forms

Application forms for the registration and ongoing administration of a foundation are available to download below.

Please note: these forms are editable PDF documents. In order to be able to email them to enquiries@guernseyregistry.com you will need to either 'print to PDF' or physically print the form, scan the document and attach it as a PDF to an email.

If you need any further assistance please email the Registry.

Please also see links to the legislation and the fee schedule.

Service	Section of the Law	Download Form
Foundation Applications		
Application to register a foundation	Schedule 1 - section 7	 Foundation Registration [616kb]
Application to Migrate a foundation into Guernsey	Schedule 2, part 1 - section 4	 Migration In [760kb]
Ongoing administration		
Change of Charter - change of particulars	Schedule 1 - section 10	 Change of Charter [347kb]
Change of Councillors - change of particulars	Schedule 1 - section 10	 Change of Councillors [363kb]
Change of Guardian - change of particulars	Schedule 1 - section 10	 Change of Guardian [361kb]
Change of Name - change of particulars	Schedule 1 - section 10	 Change of Name [375kb]
Change of Resident Agent - change of particulars	Schedule 1 - section 10	 Change of Registered Agent [333kb]
Change of Registered Office - change of particulars	Schedule 1 - section 10	 Change of Registered Office [382kb]
Registration of Foundation Officials		
Person registration	-	 Person/Director [43kb]
Overseas Corporate registration	-	 Overseas Body Corporate [41kb]

Make a submission

Make register submissions online ►

Register search

Find and purchase information ►

Intellectual property office ►



Annual validation

You must complete by 31 January ►



Guernsey Financial
Services Commission

Foundation Service Providers Code

Philip Nicol-Gent
Director of Fiduciary Services

1 March 2013

Guernsey Financial Services Commission

Code

- Integrity
 - Know Your Client
 - Oversight of Foundations
 - Client Agreements
 - Competency and Effective Management
 - Adequate Resources
 - Co-operation with the Regulatory Authorities
-

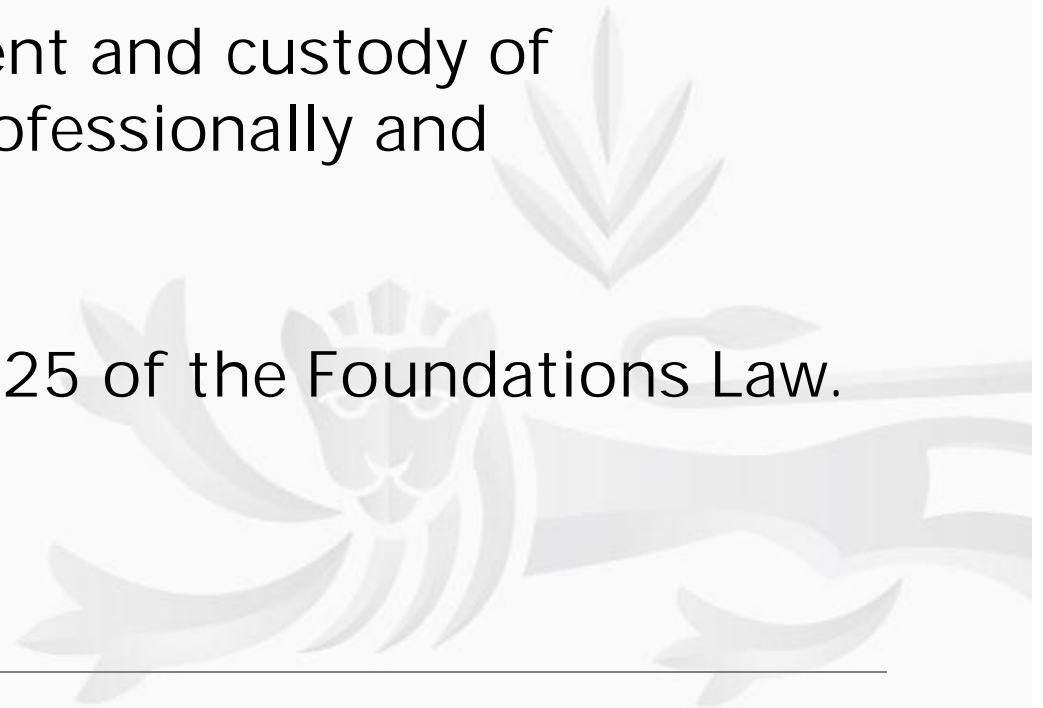


Training

- Holders of a full fiduciary licence should ensure that the responsibilities and authority of each member of staff are clear and appropriate to his or her qualifications and experience and that staff receive any training which is necessary for their roles.
 - Holders of a full fiduciary licence should formulate and keep up-to-date plans for staff training and development, including training in relation to anti-money laundering and countering the financing of terrorism, . . .
-

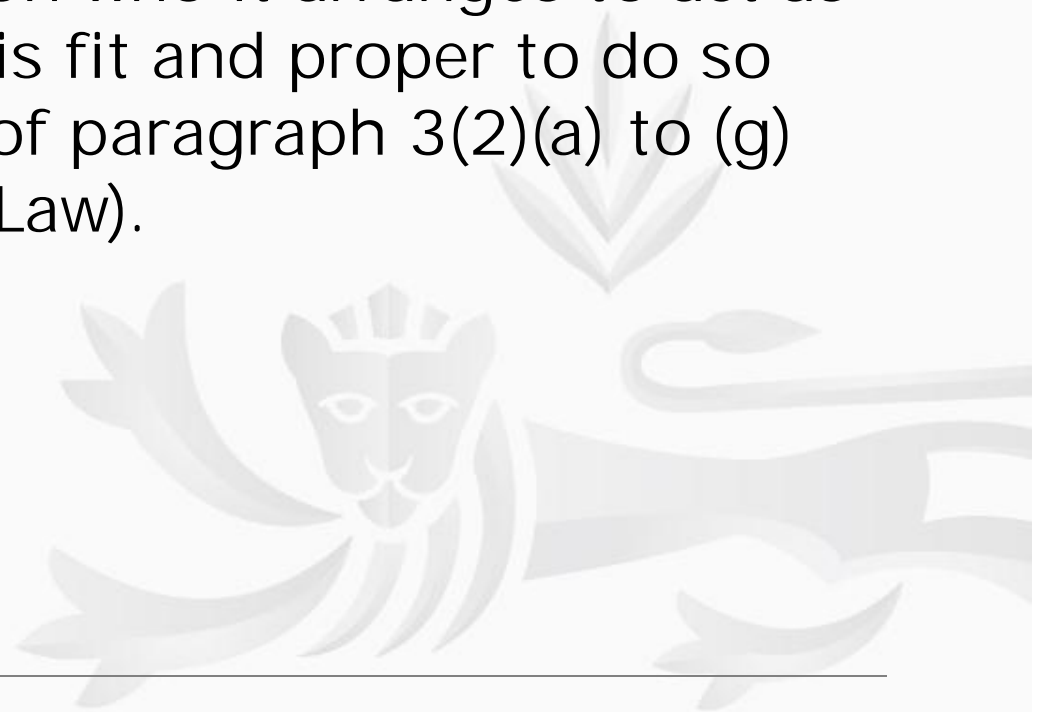
Oversight of Foundations

- Invest, distribute or otherwise manage each foundations' assets in accordance with the law and the foundation's constitutional documents.
- Manage the investment and custody of foundation assets professionally and responsibly.
- Sections 19, 24, and 25 of the Foundations Law.



Competence and Effective Management

- Understand and comply with its statutory, contractual and other legal obligations.
- Ensure that any person who it arranges to act as a foundation official is fit and proper to do so (within the meaning of paragraph 3(2)(a) to (g) of Schedule 1 to the Law).



Firm Foundations Conference

Friday 1 March 2013 at St James

Good Afternoon

I am here to talk to you today about the proposed Foundation Service Providers Code. The Code contains a number of key headings. Much as you would expect, these include Integrity, Knowing Your Client, the Oversight of Foundations, Client Agreements, Competence and Effective Management, Adequate Resources and of course naturally Co-operation with Regulatory Authorities.

The headings I've just rattled through will I'm sure all be familiar to you. The Code is not at this stage a re-invention, and those of you familiar with the existing Codes for both Corporate Service Providers and Trust Service Providers will recognise the headings.

I do not intend in this brief discussion to address all of the headings within the proposed Code, but rather to focus on 2 of them – the “Oversight of Foundations”, and “Competence and Effective Management”.

In putting together the proposed Code it became very clear, as I think we are all now learning and understanding, the hybrid nature of a Foundation sitting somewhere as it does between a trust and a company. Indeed the starting point for certain aspects of the Code were drawn respectively from both the Trust and the Corporate Service Providers Codes, and I will identify where that arose as we go through.

A word, however, before I go any further. I'm sure it doesn't need any greater emphasis by me than this, but it is crucial to the reputation of this Bailiwick that Foundations are administered properly. Foundations are a new and very different product. If foundations are to become successful they must be marketed responsibly which I'm sure we all hope they will be so that they can add to and complement existing business. Foundations will be of interest in particular in the jurisdictions of the emerging markets which Guernsey hopes to tap as part of its growth and diversification.

It is for these reasons that I felt it important to hold this Conference. With the Law coming I had reflected on what would be the correct regulatory approach. Should the Commission be prescriptive and prohibit generally Foundations being offered by fiduciaries until they were able to prove their knowledge and experience in the area, or would a lighter and more pragmatic approach be to ensure that appropriate training was in place and that it was taken up. I am aware that many people have attended the courses which have so far been organised by STEP, and I can see the sheer numbers here today by looking around.

That said, of course, I urge you all to ensure that there is appropriate training of staff this is a requirement of the Code; as this is a new product all training really should be cascaded through the organisation.

The Commission, as part of its on-site process, will be looking at training records to ensure that training is happening. We will also be looking to see who at Board level has taken responsibility for the introduction of Foundations to the business model because, as I said a moment ago, the reputation of Guernsey will suffer if Foundations are not administered well in the early years.

I must, of course, and I do recognise that there are many of you sitting here today who are already administering non-Guernsey Foundations. In that regard I should stress that this code is intended to apply to all Foundations wherever they were created and regardless of what is their proper law.

This is, as I have said before now, a mature sector and it was for that reason that I chose to take the pragmatic approach of ensuring the availability via STEP of appropriate training rather than imposing any greater restrictions on entry to this market. I am however obliged to point out that if it does come to the attention of the Commission that Foundations are being administered either inappropriately or in circumstances where sufficient training or understanding cannot be shown then I will look to impose conditions to that Licensee's licence either to require further training or in appropriate cases to prevent the undertaking of Foundations business until such time as the Commission is satisfied that standards have improved.

So, turning to the Foundation Service Providers Code. Oversight of Foundations – here the Law emphasises that when acting as a councillor, you must exercise the functions in good faith. Section 19 of the Law contains the general duties, but it is also important to be aware of the provision requiring the impartiality of councillors. Section 24 imposes the obligation of impartially clear where a Foundation has more than one beneficiary or purpose. The council shall not, subject to the terms of the constitution, execute the Foundation for the advantage of one beneficiary or the purpose at the expense of the other. The Section also makes it very clear that it does not prejudice the exercise of a discretion by the council conferred on it by the terms of the constitution.

Turning to the delegation of functions, this is provided for in Section 25, it is in terms not dissimilar to that within the Trusts Law. However, I would remind you all that that ability to delegate and obtain the benefit of exemption from liability within Sub-Section 3 is specifically subject to there having been no breach of duty by the council. In other words it is not simply enough to appoint investment advisors or other managers and leave them to it without having appropriate systems in place to reflect on the advice. It is also necessary to review the nature of the arrangements you have with those advisors and managers from time to time; you must remain prudent in ensuring that those who advise you are professional, competent and understand your clients.

Finally I hope it goes without saying the need, though of course the code will impose the requirement, to look at your professional indemnity insurance to ensure that you are covered for the provision of Foundation services.

Turning to that part of the Code that addresses competence and effective management whilst this, as I have said, involves a re-statement of those aspects which appear in both the Trust Service Providers and Corporate Service Providers Codes, the words perhaps take on a greater significance because of the very recent introduction of Guernsey Foundations and the fact that not all of you will have to date had day-to-day experience of their administration.

The first two aspects of Paragraph 6 of the Code that I am going to talk about are, I would hope, self-explanatory. The requirement to understand and comply with statutory, contractual and other legal obligations. This means getting to grips with the Constitution of a Foundation which, as you know, comprises its Charter and its Rules. There are clear legal obligations as to the contents of both the Charter and the Rules which are set out in Sections 4 and 5 of the Foundations Law respectively.

Foundation Service Providers have an obligation to ensure that any person who the licensee arranges to act as a foundation official is fit and proper to do so. In other words, has had the necessary training and is considered competent to undertake the roles which are reflected in the final bullet point on the slide.

Please bear in mind that the obligations of having a 4 eyes regime in place applies equally to the Foundations Service Providers Code and so those undertaking that responsibility must ensure they themselves are sufficiently attuned to the issues that operating Foundations will produce – this is set out in the guidance to part 6.

The two roles envisaged by the term foundation official are that of a councillor or a guardian. I have referred earlier on to the role of Councillor. The role of the guardian is an important one and of course a Foundation must have a guardian in circumstances where there are disenfranchised beneficiaries. That is, as you will appreciate, beneficiaries who have no entitlement to any information about the Foundation. Guardian's duties are set out more fully in Section 19(2) of the Law, to act in good faith and *en bon pere de famille*, to enforce the constitution of the Foundation. It can be seen that whilst there are some similarities to the role of the protector of a trust, the role of the guardian is somewhat different. A guardian cannot be a councillor at the same time.

It is important, as with any administered product, for there to be appropriate records that reflect the administration of vehicles and to show appropriate levels of governance. The Commission's proposed wording on this in the draft Code has been subject to some comment, which I am currently reflecting on. Given that the Foundations Law encompasses a resident agent regime which requires when a licensed fiduciary is not a councillor for them instead to fulfil the role of

resident agent this gives them the power to request copies of the records of the foundation and other documents necessary for them to comply with their duties as a licensed fiduciary.

What, however, must also be appreciated is that every foundation shall have, at all times, a registered office in Guernsey see paragraph 2 of schedule 1 to the law and that the requirement includes with it the obligation to keep at the registered office all records of the Foundation, or at least copies of them. Thus whilst some fiduciaries may believe that undertaking the resident agent role requires them to hold limited documents, in a situation where they are also the registered office, which is most likely to be the case, then the obligation is in fact significantly broader, as provided for by Section 22 of the Law and includes holding records sufficient to show and explain the foundations transactions and its financial position on a rolling basis.

There was a case in the Royal Court of Jersey last year involving a company called Dalemont Limited and issues arose around the Jersey Resident qualified member not having sufficient information regarding the Foundation's assets, liabilities or indeed business when required to answer information requests as part of on-going litigation, indeed that case produced some criticism. Being mindful of the clear obligations around holding information at the registered office in Section 22 of the law I would urge you all when entering into client agreements to ensure that terms are included in them that make it clear what you need and must be provided with when providing regulated services.

This has been a brief canter through the more important aspects of the draft Code. The other aspects which I haven't touched on this afternoon should not in any way diminish their importance. The area of Client Agreements I have briefly touched on, and the importance to understand the obligations such as

those just mentioned around record keeping and other matters to ensure that your client agreements put in place are bespoke rather than simply a find-and-replace for the word 'Trust'. Adequate resources is also an important one in terms of ensuring that your IT systems are appropriately modified. As I said at the beginning, these are neither a trust nor a company and therefore some form of hybrid which, no doubt, your IT systems can be adapted for.

Finally, all it remains for me to do is to wish you all well in your endeavours to market and develop Foundations as a new string to the fiduciary sector's bow, and to achieve that appropriate measure of risk versus reward.

I would like to thank you all for attending today's conference, which I hope you have found to be instructive and I am happy to take any questions, although I must apologise for the absence of Richard Walker from the panel who has had to go to attend another meeting.

Thank you.