

A Ltd v B and C Ltd and D and E

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Le Cornu, Olsen
Judgment Date:	17 April 2013
Neutral Citation:	[2013] JRC 75
Reported In:	[2013] JRC 75
Court:	Royal Court
Date:	17 April 2013

vLex Document Id: VLEX-792856409

Link: <https://justis.vlex.com/vid/ltd-v-b-and-792856409>

Text

[2013] JRC 75

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Commissioner**, and Jurats Le Cornu and Olsen.

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

AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE ROYAL COURT

Between

A Limited
Representor
and
B
First Respondent

and

C Limited
Second Respondent

and

D
Third Respondent

and

E
Fourth Respondent

Advocate P. G. Nicholls for the Representor.

Authorities

Foundations (Jersey) Law 2009.

Financial Services (Jersey) Law 1998.

Companies (Jersey) Law 1991.

Lewin on Trusts 18th Edition.

The Jersey Law of Trusts, 3rd Edition.

Public Trustee -v- Cooper [\[2001\] WTLR 901](#) .

Re S Settlement [2001] JLR N 37 .

Alhamrani -v- J P Morgan Trust Company (Jersey) Limited [\[2007\] JLR 527](#) .

Jersey Evening Post -v- Al Thani [\[2002\] JLR 542](#) .

Companies — reasons for directions under Article 46 of the Foundations (Jersey) Law 2009.

THE COMMISSIONER:

- 1 On 22nd March, 2013, the Court gave certain directions to A Limited in its capacity as the qualified member of the council of the F Foundation and we now set out our reasons. As far as we are aware, this was the first occasion on which the Court had given directions under Article 46 of the Foundations (Jersey) Law 2009 ("the Foundations Law"). Furthermore Mr Nicholls, for A Limited, had been unable to find any example of the courts of any other common law jurisdiction giving directions under analogous powers to those contained in the Foundations Law.

The F Foundation

- 2 The F Foundation was incorporated under the Foundations Law on 5th July, 2010. The founders were two BVI registered companies originally owned by two Russian nationals, namely the first respondent, B and G. The council of the F Foundation has three members, comprising A Limited as the qualified member (the person registered under the Financial Services (Jersey) Law 1998 to carry on trust company business) and two lawyers from the Cyprus law firm I (which acts for B), namely the third respondent D and the fourth respondent E. The guardian of the F Foundation is another BVI registered company, namely the second respondent C Limited ("the Guardian").
- 3 The original beneficiaries of the F Foundation were B and C but the latter disclaimed his interest on 20th December, 2010, and the current position is that B is the sole beneficiary. He also beneficially owns the two founding companies and the Guardian, all of which are administered by the administrative arm of I in Cyprus namely J Limited.
- 4 The object stipulated by the F Foundation's charter and regulations is essentially that its assets be administered and applied for the benefit of the beneficiary, i.e. now B. By clause 10 of the Regulations, the council is directed to accumulate any income from the F Foundation's assets and hold such income as an addition to capital, subject to a general power contained in clause 8, exercised at its discretion (but with the consent of both the Guardian and A Limited as the qualified person) to distribute the F Foundation's assets or part thereof to B.
- 5 The F Foundation wholly owns a Cyprus incorporated company known as K Limited which in turn owns a number of BVI and Cyprus companies under which are held substantial real estate and other assets in Russia and Eastern Europe. K Limited had acquired these assets from the F Foundation which had in turn acquired them from another BVI company L Limited. K Limited is also administered by J Limited which provides its only director M.

The Jersey Proceedings

- 6 A Limited sought directions in relation to proceedings brought by a company known as N

Limited in Jersey against B, the F Foundation, L Limited and K Limited. N Limited is a Cyprus company owned by a Russian bank P. In essence, N Limited alleges that:–

- (i) From 2006 onwards P lent money in Russia to companies owned by B.
- (ii) B executed personal guarantees to secure those loans.
- (iii) The loans were not paid and the personal guarantees not honoured.
- (iv) The right to sue on the personal guarantees was assigned by P to N Limited.
- (v) On 26th May, 2010, N Limited obtained judgment from a Russian court against B for over US\$44M, having sued on the personal guarantees.
- (vi) The corporate structure and real estate and other assets currently held under K Limited originated with a structure of which B was the ultimate beneficial owner.
- (vii) Prior to and following N Limited obtaining judgment from the Russian court, B orchestrated a reorganisation of the those underlying assets, whereby they passed initially to L Limited and then from L Limited to the F Foundation and then from the F Foundation to K Limited, in each case for no, or no proper consideration, and in each case in order to try to hide such assets or shield them from the enforcement of the judgments held by N Limited.
- (viii) N Limited seeks to enforce the Russian judgments in Jersey against the assets in the F Foundation on two bases. Firstly, it is pleaded that the whole corporate structure of the F Foundation and K Limited “ *was established as a façade to disguise [B's] beneficial ownership and control of the companies and underlying assets within the structure*”. This appears to be a claim that the veils of incorporation of the F Foundation and K Limited should be lifted or pierced, such that the assets held by them are to be treated as assets held by B against which N Limited can enforce the Russian judgments. Secondly, it appears to be pleaded that pursuant to the Pauline action under Jersey law, a material purpose of the chain of (gratuitous) transfers by which ultimately K Limited has come to hold the underlying assets was to prejudice P and N Limited (as its assignee) such that the Court should order K Limited and the F Foundation to transfer those assets to N Limited in satisfaction of B's liability to it.
- (ix) No allegation is made that the F Foundation has failed to perform any duties under its charter and regulations and no allegations of personal wrongdoing are made against the F Foundation, its council members or the Guardian. N Limited's claim does not seek, as pleaded, to establish any personal liability on their parts save that it seeks to make the F Foundation subject to any orders the Court may make in relation to its assets.

7 To date, the F Foundation has pleaded a defence of the claims in which it actively denies them. It has also given discovery. K Limited has done likewise.

- 8 A Limited itself and the F Foundation's council as a body have had no involvement in the management of the many subsidiary entities owned by K Limited, which in turn own the valuable underlying real estate and other assets. Under Article 40 of the Regulations, council members are not obliged to have any such involvement. When A Limited attempted to secure the F Foundation's compliance with Court orders for disclosure by the F Foundation of documentation and information in relation to the underlying assets, it was simply unable to provide it and it discovered that neither the other council members nor M were able to do so either. This led to a finding in March 2012 that the F Foundation and K Limited were in contempt of Court.
- 9 As a consequence of injunctive relief obtained by N Limited in Cyprus and elsewhere, the F Foundation found itself with no funds to retain its lawyers in Jersey. The parties were due to have exchanged witness statements of fact by 21st December, 2012, but none of the defendants did so. On 22nd January, 2013, N Limited obtained an order that unless the F Foundation and K Limited exchanged witness statements or provided confirmation in writing that they did not intend to rely on any witness evidence at trial by 4pm on 30th January, 2013, their answers would be struck out and they would be debarred from defending the proceedings at trial. Both have formally indicated pursuant to this direction that they do not intend to call witness evidence at the trial of the Jersey proceedings. Unlike the F Foundation and K Limited, B has filed witness evidence for the purpose of the trial of the Jersey proceedings.
- 10 A Limited has instructed Jersey lawyers at its own cost (subject to its right to seek indemnification from the F Foundation in due course). In a detailed email of 23rd January, 2013, A Limited gave notice to its fellow council members of its intention to apply to the Court for directions that the F Foundation adopt a neutral stance in the Jersey proceedings. Similar notice was given to the Guardian on 22nd February, 2013. All three responded with one-line emails on 26th February, 2013, to the effect that they had no comments on the proposed application and were happy to support the same.
- 11 A Limited brought its application before the Court on 1st March, 2013, when the Court convened B, the Guardian, D, and E. The Court also ordered that N Limited be given notice of the representation and granted liberty to appear if it so wished. Whilst it was a stranger to the F Foundation, it was asserting an interest in its assets and it was thought appropriate to do so.
- 12 By letter dated 21st March, 2013, Collas Crill, acting for B, wrote to the Court indicating that he neither supported nor opposed A Limited's application and did not consider it appropriate for him to express a view either way in relation to it. In those circumstances, he would not be attending the hearing, as he had nothing to contribute to it.
- 13 On 12th March, 2013, Baker & Partners, acting for N Limited, gave notice that it did not intend to seek leave to attend the hearing of the application but made a number of

observations on the application to be brought to the attention of the Court.

- 14 The Court received no communication from the Guardian, D or E and they did not appear at the hearing.
- 15 Whilst the position is not wholly clear, such is the novelty of the Foundations Law, it seems likely that the persons whose knowledge is attributable to a foundation itself will be principally, perhaps exclusively, its council members. None of the council members have a detailed knowledge of the background to the donation made to the F Foundation and therefore as to the merits of N Limited's claim. B is actively defending those claims and is the person best able to do so.
- 16 A Limited have been advised that in the circumstances it would be appropriate for the F Foundation to adopt a neutral stance in the Jersey proceedings. That advice has been given by Mr Giles Richardson, a Chancery barrister practising from Serle Court in Lincoln's Inn, in a very clear and helpful opinion from which we have drawn extensively for the purposes of this judgment.

Jersey Foundations — Overview

- 17 Jersey foundations are relatively new legal entities. They are distinctive and novel in important respects to the eyes of a common law company and trust lawyer, notwithstanding that aspects of their architecture have a clear inheritance from both company law and trust law learning.
- 18 In at least some civilian legal systems, legal persons called foundations are well known and of long standing. They have historically performed charitable, investment and estate planning functions that are somewhat analogous to those of trusts. Trusts operate by distinguishing between the legal and the beneficial ownership of assets and imposing onerous fiduciary and other obligations on trustees, owed to the beneficial class of the trust. As is well known, civilian systems do not recognise divisions of 'ownership' in assets in this way and require that 'full' ownership (i.e. in common law terms, both legal and beneficial) of an asset is held by the same legal person. A civilian foundation, therefore, has its own legal personality and owns all the assets held by it absolutely.
- 19 Nonetheless, and rather like a trust, a foundation is established so that a donor can dedicate assets to a specific purpose. Dedicating assets to a purpose (which may at least in certain jurisdictions include the benefit of specific individuals) means that the assets may only be applied towards that purpose. Foundations therefore achieve a segregation of assets from those of the original donor, which typically, by virtue of their dedication, cease to be comprised in his estate, but will be applied according to the directions or wishes of that person as identified by the foundation's constitution.

- 20 The arrival of private foundations in offshore common law jurisdictions has been a recent but notable trend. Foundations in common law jurisdictions share some of the essential characteristics of the traditional civil law foundation, to a greater or lesser degree, but are governed by specific domestic legislation, of which the Foundations Law is an example.
- 21 In the case of foundations incorporated under the Foundations Law, the following appear to be the basic and salient points:—
- (i) A Jersey foundation is defined no more definitively in the Foundations Law than as an entity **‘incorporated under this Law’** (Article 1). Hence, Jersey foundations are creatures of statute. Equity has no role to play in the formation of a Jersey foundation, as it may in a trust: one cannot arise, therefore, because the conscience of a person is affected by the nature of their receipt or holding of assets, as a trust may. The Foundations Law is the only source of law that provides for the formation of a Jersey foundation and for the governing of such entities thereafter.
 - (ii) There is no requirement under the Foundations Law for there to be any initial endowment of assets (Article 7(1)). Incorporation is the sole and key event in bringing into existence a Jersey foundation. There cannot, of course and by contrast, be a valid trust without certainty of the subject matter which has been settled upon trust. Since a trust is, essentially, a relationship of obligation about an asset, there must be some asset — some subject matter — upon which that obligation can fix. A foundation does not bring about any obligations of this nature owed by the foundation to a beneficiary or to anyone else.
 - (iii) Once an endowment has been made, such assets, if any, as a Jersey foundation has are owned, both beneficially and legally, by the foundation itself. It has no shareholders and no capital.
 - (iv) Article 25(1) provides that a person who is designated as a beneficiary under a foundation has no interest in the foundation's assets. A beneficiary may become entitled to some benefit at a certain time by virtue of the foundation's regulations or by a decision made by the foundation. However, it is only then that a foundation beneficiary has any claim in respect of that benefit, and his or her claim is still not a proprietary one but, in essence, a claim in debt or specific performance personally against the foundation. The Foundations Law contains a specific enforcement mechanism at Article 25(2) whereby a beneficiary who has become entitled to foundation property may seek an order of the Court ordering the foundation to provide the relevant benefit. The position is, therefore, similar to a shareholder's right to specific performance of a company's resolution to pay a dividend, which arises after (and only if) a (valid) resolution to do so has been passed. Hence, in short, a beneficiary has no interest in foundation property merely by virtue of it being foundation property.
 - (v) Following on, perhaps, from foundation beneficiaries' lack of proprietary interests, Article 25(1)(b) provides that a foundation beneficiary **‘is not owed by the**

foundation or by a person appointed under the regulations of the foundation a duty that is or is analogous to a fiduciary duty. The duties of those appointed under a foundation's regulations are owed to the foundation itself, and it is the foundation's property that they administer. Again, the position can be compared to that under company law, where directors do not owe duties to the company's shareholders, but to the company itself.

(vi) Moreover, Article 26 provides that, unless specifically provided for in the foundation's constitution, there is no general requirement on a foundation to provide a beneficiary with any information about the foundation.

22 The objects and governance arrangement of a Jersey foundation are largely determined by regulations which the founders themselves choose to make but certain features are mandated including the following:—

(i) The foundation must have a council to 'run' the foundation: that is, to administer its assets and carry out its objects. The council can be made up of one or more council members, but must always include a 'qualified person' (Article 21). The functions of the council must be set out in the foundation's regulations, along with any rules on whether those functions may be delegated. The foundation's regulations will also provide for the appointment, retirement, removal and remuneration of the foundation council members, and set out how decisions of the council are to be made (Article 12).

(ii) The formation of a foundation requires the involvement of a person registered under the Financial Services (Jersey) Law 1998 to carry on trust business (Article 2(4)). This 'qualified person' will sponsor the application for incorporation and will then become an initial member of the foundation's council. If the qualified person retires or is removed from the foundation's council, another qualified person must be appointed in replacement.

(iii) The regulations of a foundation must provide for the appointment of a guardian. Although the powers of the guardian will be defined in the foundation regulations, the Foundations Law provides a general obligation on guardians to take such steps as are reasonable in all the circumstances to ensure that the council is carrying out its functions (Article 14(4)) including a power to require the council to account to it (Article 14(5)). Unless otherwise specified by the regulations, a guardian may sanction or authorise any action that the council wishes to take, even if that action would not otherwise be permissible under the foundation charter (Article 14(7)), provided the guardian is satisfied that it will be in the best interests of the foundation to do so and that the council is acting in good faith (Article 14(8)).

(iv) A founder may appoint himself as guardian of the foundation or as a member of the council, or, indeed, as both. A qualified person may also be both guardian and council member, but no other person may hold the two positions simultaneously (Article 14(3)).

23 Hence, it can be seen that the Foundations Law provides a founder with a very great deal of control both as to the constitutional arrangements of his foundation and, if he so wishes, as to its on-going administration thereafter, whether directly by appointing himself to various offices or indirectly by appointing nominees or persons he controls. It is further expressly provided that pursuant to Article 18(1), the founder may retain powers for himself, to whatever extent he desires.

24 Perhaps as a balance to the factors of (a) founder flexibility and control and (b) lack of duties owed directly to “beneficiaries”, Part 5 of the Foundations Law confers a very wide supervisory jurisdiction on the Court, which under Article 43(1) can be invoked by a “**person with standing**”.

25 Article 1(1) defines a “**person with standing**” as follows:—

“person with standing”, in respect of a foundation, means –

(a) the foundation

(b) a founder of the foundation

(c) a person, other than a founder of the foundation, who has endowed the foundation;

(d) if any rights a founder of a foundation had in respect of the foundation and its assets have been assigned to some other person, that other person;

(e) a person appointed under the regulations of the foundation;

(f) a beneficiary of the foundation;

(g) a creditor of the foundation;

(h) in respect of a specified purpose mentioned in Article 5(3)(b), a person who, in the view of the Royal Court, can reasonably claim to speak on behalf of that purpose; or

(i) the Attorney General;”

26 With reference to Article 1(1)(e) a “person appointed under the regulations of the foundation” will include a member of the council or the guardian.

27 In summary the Court's jurisdiction under Part 5 is as follows:—

(i) By Article 44, the Court has power to order compliance by a person who has failed

to comply with a requirement or obligation imposed on that person by the Foundations Law, the foundation charter or the foundation regulations. So too a foundation may be ordered to comply with its charter. Any order made by the Court may specify what action it requires the person or foundation to take.

(ii) Article 45 gives the Court power to propose amendments to a foundation charter or regulations if ***'the change will assist the foundation to administer its assets or to attain its objects; or ... those objects are no longer attainable and that the change will assist the foundation attain objects as near as reasonably possible to those objects.'*** Once proposed, it is for the Registrar to enter such amendments in the register in accordance with Article 38. The scope of this power appears necessarily to include the Court reaching a determination as to the proper construction of the original objects as expressed by the founder.

(iii) Article 46(1) provides the Court with the power to give directions, if it is satisfied that a direction will assist a foundation to administer its assets or carry out its objectives, or ***'that it is otherwise desirable for the Court to give a direction'***. Article 46(2), sets out a list of those specific matters upon which a direction may be given, which, because this application was brought under Article 46, it is helpful to set out in full:–

“The Court may give a direction as to –

(a) the meaning and effect of a provision or term in the charter or regulations of the foundation;

(b) the manner in which the council of the foundation is required to carry out the administration of the foundation's assets or the carrying out of its objects;

(c) the functions of the council of the foundation or of any of its members;

(d) the functions of any other person appointed under the regulations of the foundation;

(e) whether a person is a beneficiary;

(f) the rights of beneficiaries under the foundation as between themselves or as between themselves and the foundation; or

(g) such other matters as the Royal Court considers relevant to the foundation, its charter, its regulations, the administration of its assets or the carrying out of its objects.”

(iv) Article 46(3), provides that the Court may make such order alongside its direction as it thinks fit to give effect to the direction.

(v) Articles 47 to 49 set out the Court's powers to take steps more directly in relation to

the management of a foundation. Article 47 provides for the appointment by the Court of a person to protect the interests of a beneficiary who is unable to act on his or her own behalf. Article 48 allows the Court to remove and appoint a qualified member as it sees fit. Article 49 goes further and allows the Court to comply with a requirement or obligation on behalf of a person who has failed to comply with such requirement or obligation. Where the Court does so, its order shall have the same effect as if it were an action taken by the person required to comply with the requirement or obligation (Article 49(4)).

(vi) The Court has a power to appoint or remove a person appointed under the foundation regulations (Article 50(1)) and on such terms or under such conditions as the Court sees fit (Article 50(2)).

28 Given the extensive and detailed provisions contained within the Foundations Law relating to the Court's supervisory power, we conclude that the legislature envisaged that that jurisdiction should be of more than academic or theoretical interest, but rather that it should be a live and potentially readily exercised jurisdiction, when appropriately invoked.

29 There are a number of matters to highlight arising from these provisions:—

(i) A general point is that the *sui generis* nature of these statutory creations has to be recognised, and legal issues arising from the existence of a Jersey foundation and the uses to which it is put must be addressed from first principles derived from the Foundations Law, with analogous reasoning that has developed in relation to other legal relationships and entities being cautiously deployed.

(ii) As the provisions discussed above make clear, there are very significant differences between a foundation and a trust. A foundation probably owes no duties to the “**beneficiaries**” of it unless and until they become entitled to compel it to transfer to them some particular asset. Whilst Article 25(1) does not in terms state that a beneficiary is not owed any duties at all by a foundation, by providing that he has no interest in its assets and is not owed “**any duty that is or is analogous to a fiduciary duty**”, this would appear to be the logical position. The immediately obvious general duty that might be owed is a duty of care. But it is not at all clear how or why one could or should arise. The beneficiary has no interest in the foundation's assets; they belonging to the foundation alone. Just as a company owes its shareholders or guarantors (if incorporated by guarantee) no duty of care in relation to its own assets, so too a foundation is unlikely, in our view, to be regarded by the Court as doing so. And it is difficult to see to what else any duty of care could attach, absent, analogously with company law, those unusual situations where a company does enter into a specific relationship with a particular shareholder which gives rise to a duty of care upon it. The question is, however, an open one, which does not fall upon this Court to resolve.

(iii) The foundation's “officers” in the form of the council members owe duties to the foundation itself, not to the beneficiaries, which are articulated in Article 22(1) and (2)

in a manner analogous to the duties owed by directors to their companies. In particular there is both a fiduciary obligation of loyalty whereby they must act “**honestly and in good faith with a view to the best interests of the foundation**” (Article 22(2)(a)) and a duty to exercise reasonable care, diligence and skill (Article 22(2)(b)). The Court will doubtless have to consider, in an appropriate case, precisely how conceptually “**the foundation**” is to be understood in relation to these duties. Does it, for instance, mean the beneficiaries or purposes of the foundation “**as a whole**”, such that the fiduciary obligation is to act “**with a view to the best interests of the foundation**” in the sense of the beneficiaries as a whole, as in company law, where directors' duties to the company are owed to the members of the company “**as a whole**”? And how is that to be assessed if, for instance, the foundation's constitution identifies a mix of charitable purposes, non-charitable purposes and human beneficiaries as its objects, who have conflicting interests? Again these are issues which do not fall upon this Court to resolve.

(iv) It is clear that the regime which is to apply to foundations is radically different from that which applies to companies incorporated under the Companies (Jersey) Law 1991 (“the Companies Law”) when it comes to the Court's jurisdiction to intervene in their affairs. Directors or shareholders have no power to seek directions from the Court requiring the board or the company to undertake specified actions, still less to seek the suspension or reformation of its Articles on terms dictated by the Court.

A Limited's Application

- 30 Within this framework and on these facts the Court had to consider whether its jurisdiction under Article 46 of the Foundations Law was one which was properly invoked by A Limited as a council member of the F Foundation.
- 31 As a starting point, it could be argued that the F Foundation, as an incorporated person owning all of its assets absolutely (subject to the claims now made against those assets), should act as any company incorporated under the Companies Law would act. The council members, like directors, should determine whether it has a sufficient defence to the claim to justify its funds being utilised in the defence of the claim. In the absence of liquid funds to enable it to conduct that defence, a company incorporated under the Companies Law would ordinarily look to its shareholders to procure that funding or face the consequences. A foundation has no shareholders to whom it can turn in that sense. A foundation could look to its beneficiaries, who, whilst having no interest in its assets, could be regarded as having an economic interest in it and having as they do the standing to invoke the Court's supervisory jurisdiction.
- 32 The report attached to the draft Foundations Law makes it clear that it was the expectation of the legislature that foundations would be used primarily for wealth management and estate planning purposes for clients and authorities originating in jurisdictions not familiar with the concept of a trust to whom a foundation “**can be a more acceptable offering**”. A foundation will therefore ordinarily be a wealth structuring entity to which pre-acquired

wealth has been donated for the purposes selected by the founders. It will not ordinarily be a commercial enterprise trading on its own account with council members engaged in its business. If so its assets will not be the product of contractual relationships it has entered into over time and about which it has knowledge itself.

- 33 As a wealth structuring entity, a foundation resembles economically the role of a modern professional trustee accepting donations and assets from a settlor to be held on the terms of the trust instrument agreed between it and the settlor. In both cases, assets are donated to a person — foundation or trustee — who then legally owns them. And in each case, necessarily, they are less likely to know what claims to the assets donated to them may exist or what their merits may be than is a trading company in relation to assets it has acquired contractually and in the course of its business.
- 34 In the case of a trust, where the trustee is holding assets to which there are rival claimants, the proper course for the trustee is to seek a direction that it remains neutral in those proceedings on the basis that there is some *sui juris* beneficiary who can defend the interests of all of the beneficiaries (see generally Lewin on Trusts 18th Edition at 21–110 to 112).
- 35 In the case of the F Foundation, the position can be summarised as follows:–
- (i) The F Foundation holds the underlying assets through K Limited in circumstances in which they were donated to it and neither it nor its council members have detailed knowledge of the background to their donation or, therefore, as to the merits of N Limited's claim;
 - (ii) N Limited's claim does not, as pleaded, appear to involve any allegations of personal wrongdoing on the part of the F Foundation or its council members (or the Guardian) and no such allegations are necessary to make out its claim. It does not seek, as pleaded, to establish any personal liability on their parts, save that it seeks to make the F Foundation subject to orders of the Court as to the fate of the assets held by it (through K Limited);
 - (iii) Despite the substantial value of its underlying assets, the F Foundation had no liquid funds to finance the conduct of an active defence in the Jersey proceedings;
 - (iv) B is a co-defendant to the claims and is well able (and indeed better able than the F Foundation or its council members) to articulate whatever proper defences to the claims exist;
 - (v) It is not, therefore, necessary in order to for the relevant issues to be fully aired and argued at trial, for the F Foundation to participate in the proceedings other than to be neutral and to comply with court orders, in relation in particular to discovery, as necessary.

- 36 For these reasons, Mr Richardson has advised and we agreed that on the facts and circumstances of this case, it would be appropriate for the F Foundation to be neutral in the litigation going forward.
- 37 It is clear that A Limited as a council member is “ **a person with standing**” entitled to apply to the Court for the Court to take any of the actions specified in Part 5 of the Foundations Law and in particular to give directions under Article 46.
- 38 In our view, the Court's jurisdiction under Article 46 of the Foundations Law had been properly invoked by A Limited for the following reasons:—
- (i) The Part 5 provisions of the Foundations Law are intended in our view to give the Court a supervisory jurisdiction in relation to foundations incorporated under the Foundations Law. The jurisdiction is clearly an important one and one which is to a significant extent *suigeneris*. There is no equivalent in company law. Analogies that can be drawn with trust law principles are important but not exact.
 - (ii) It is nothing like the Court's well established Beddoe jurisdiction (see The Jersey Law of Trusts, 3rd Edition at paragraph 18.7) whose function is to predetermine the question of recovery of the costs of proceedings from the trust fund by way of indemnity to the trustee as between the trustee and the beneficiaries, since there is no issue as to a foundation's entitlement to spend its own funds as it sees fit. It is the beneficial owner of all its assets. No question arises, therefore, as to its right to indemnification from its own funds.
 - (iii) It is, in our view, more like (in particular Article 46) the Court's general supervisory jurisdiction in relation to trusts to assist in the interpretation of trusts and to bless (or not) momentous decisions the trustee wishes to take or to take decisions where a trustee surrenders discretion to the Court as analysed in *Public Trustee -v- Cooper* [2001] WTLR 901 and as applied in *Re S Settlement* [2001] JLR N 37.
 - (iv) The draftsman is likely to have had this jurisdiction in mind in formulating Part 5 generally and Article 46 in particular, given the express provision within Article 47 for the appointment by the Court of a person to represent any unborn persons or other persons “ **unable to act on his or her own behalf**”.
 - (v) The architecture of the Foundations Law and in particular Part 5 of it suggests strongly, in our view, that the legislature intended that applications to the Court concerning important administrative and governance issues to be, if not commonplace, at least fairly readily available, as they are in a trust context in the case of, for instance, the blessing of momentous decisions by trustees.
 - (vi) In part, the wide jurisdiction given to the Court under, for instance, Article 46, is intended to enable council members to bring appropriate issues before the Court. Whilst the duties of a foundation to its beneficiaries may be non-existent, council members clearly owe fiduciary duties and duties of care and skill to their foundation,

and they are therefore liable to be sued by the foundation for breach of those duties. Such an action could arise for example following an application for their replacement or a declaration of the foundation *en désastre*.

(vii) Whilst the position of council members is analogous to that of directors of a company, it is also the case that it may well be more challenging in some senses than that of a director of a typical trading company for the reasons canvassed above.

(viii) The directions being sought by A Limited came within Article 46(2)(b) namely directions as to the manner in which the council is required to carry out the administration of the F Foundation's assets and in any event came within the catch all provisions of Article 46(2)(g).

- 39 After some discussion with Mr Nicholls, we were persuaded that the proposed change in the stance of the F Foundation in the Jersey proceedings to one of neutrality would be a momentous decision. The change would be made very late in the proceedings (the substantive hearing was due to start on the 8th April, 2013), in respect of a claim which extended, if successful, to the entirety of the very substantial assets held by the F Foundation. We were persuaded that such a decision was of sufficient importance to justify invoking the Court's supervisory jurisdiction.
- 40 There were additional features of the case, which in our view justified A Limited invoking the Court's supervisory jurisdiction. A Limited was acting responsibly as the qualified member of the council in difficult circumstances. Those difficulties were illustrated by the position it found itself in when the F Foundation was faced with orders for the production of documents and information in relation to the underlying assets, which led it to being found in contempt. The transcript of the evidence given by Q, a director of A Limited, in the contempt proceedings shows what little assistance A Limited was getting from its fellow council members in Cyprus and from M the sole director of K Limited, to the point that the F Foundation was, in her words, "*hamstrung*".
- 41 The F Foundation itself has no funds to retain legal representation in the Island and A Limited has sought advice on its behalf out of its own funds (initially). From what we can see of the correspondence, there seems to have been very little interest on the part of its fellow council members and the Guardian in this process. None had taken the trouble to communicate directly with the Court and none had entered an appearance and thus submitted themselves to the Court's jurisdiction. We could see no good reason for the Court to offer protection by way of directions to council members who have not come to the Court to seek that protection, choosing instead to remain at arm's length.
- 42 We were conscious that D and E are lawyers whose firm act for B, and which firm, through its administrative arm J Limited, administers the Guardian, which B beneficially owns. It would seem that B was in a position in the background to pull all the strings.

- 43 On the facts presented to us, it could not be said that the council members had made a decision that the F Foundation should adopt a neutral stance in the Jersey proceedings, which they were asking the Court to bless. There was no evidence of D and E applying their minds to the advice given by Mr Richardson and of the council resolving to accept that advice. Their involvement appeared to be limited to one line emails supporting the application by A Limited. It was A Limited that had obtained that advice at its own cost and had proposed, in our view rightly, that it should be accepted by the F Foundation.
- 44 A Limited, as the qualified member seeking to act responsibly in the matter and receiving little co-operation from its fellow council members who had not submitted themselves to the jurisdiction of the Court, was in our view in need of the assistance and protection of the Court and that was best given by directing A Limited to use its reasonable endeavours as a council member to procure that the F Foundation adopt a neutral role in the Jersey proceedings, complying with any orders the trial court may make in the course of those proceedings. If the Guardian (to the extent that its consent is required under the regulations for the F Foundation to do so) and the other council members do not cooperate with A Limited in this process, then A Limited at least will be protected by the direction given to it.
- 45 Mr Nicholls sought A Limited's costs from the F Foundation on what is known as the trustee basis, following *Alhamrani -v- J P Morgan Trust Company (Jersey) Limited* [\[2007\] JLR 527](#). It is somewhat academic at this stage because the F Foundation has no funds with which to discharge any order as to costs, but the Court wished to be addressed on whether it was appropriate for an order to be given to A Limited as a council member of the F Foundation on that basis. Mr Nicholls was not in a position to address us on the law, and the application was therefore adjourned.
- 46 Finally the Court agreed to sit in private to hear this application. The F Foundation was a wealth structuring entity resembling economically the role of a trust, for which confidentiality was important, particularly here where the matter under consideration was its role in the Jersey proceedings, and the Court was exercising a supervisory jurisdiction similar to that exercised by the Court in relation to trusts. A Limited was seeking assistance in the administration of the F Foundation and it was appropriate for the Court to adopt the same approach as it would when hearing an application for directions by trustees, following the principles set out in *Jersey Evening Post -v- Al Thani* [\[2002\] JLR 542](#).