

# The Representation of the C Trust Company Ltd

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Bailiff
<b>Judgment Date:</b>	25 August 2016
<b>Neutral Citation:</b>	[2016] JRC 144
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<b>Court:</b>	Royal Court
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## Text

[2016] JRC 144

ROYAL COURT

(Samedi)

Before:

T. J. Le Cocq, Esq., Deputy Bailiff, and Jurats Nicolle and Ronge

In the Matter of the Representation of the C Trust Company Limited  
And in the Matter of Foundation A, Foundation B, Foundation D, Foundation E and  
Foundation F

And in the Matter of Articles 45 and 46 of the Foundations (Jersey) Law 2009

**Advocate J. P. Speck for the Representor.**

**Advocate M. P. Cushing for the Grandchildren.**

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**Advocate O. J. Passmore for Mrs B and Daughter 1 and Daughter 2.**

**Advocate A. M. Saunders for Grandson A.**

## **Authorities**

Foundations (Jersey) Law 2009.

*A Limited v B, C Limited, D and E* [\[2013\] 1 JLR 305](#) .

Trust — application by the representor for various declarations and directions pursuant to the Foundations (Jersey) Law 2009.

Bailiff

## **THE DEPUTY**

### **Introduction**

- 1 This is an application by the C Trust Company Limited (“the Representor”) in its capacity of the sole council member of Foundation A, Foundation B, Foundation D, Foundation E and Foundation F (hereinafter called the “Foundations”) for various declarations and directions pursuant to the Foundations (Jersey) Law 2009 (“the Foundations Law”).
- 2 In essence the Representor is seeking declarations from the Court that it has the power to make certain profound changes to the Foundations, the effect of which will be that ultimately the Foundations will be dissolved. Specifically, the Representation seeks a declaration that it is within the scope of the power of the Representor to amend the regulations as to the definition of excluded persons, to provide for permission to disclose information and documentation relating to the Foundations and to make other substantial changes. Alternatively, if the Court is not able to declare that the Representor has those powers then the Representor seeks an order from the Court making similar changes to the Foundations to achieve the end sought. The Representor also seeks certain other directions attendant upon the main purpose of the Representation.
- 3 Further, in the event that the Court finds that the Representor has the power to do the things that it wishes then it seeks the Court's blessing that it do so.
- 4 When the Representation was first brought before the Court on 24<sup>th</sup> June, 2016, the Court ordered that it should be served upon:-

(i) Mrs B, Daughter 1 and Daughter 2;

- (ii) Grandson A;
- (iii) the Grandchildren; and
- (iv) the Guardian.

5 In addition, the Court ordered that the Representation should be brought to the attention of Her Majesty's Attorney General.

## Background

6 The background to the application may be stated in the following general terms:-

- (i) The assets of the Foundations derive from the estate of Mr B (the deceased). On his death his estate devolved to his widow Mrs B and to his two daughters in equal shares.
- (ii) In 2011 Mrs B, Daughter 1 and Daughter 2 settled their respective shares in the estate into certain Jersey trusts. The beneficiaries of those trusts, in slightly varying combinations, included the children and remoter issues of Mrs B, Daughters 1 and 2, and general charitable purposes.
- (iii) Foundation A is charitable in nature and whilst its charitable purposes are broad any purposes carried out by a person resident in a certain foreign jurisdiction or providing for a benefit to any person resident in that foreign jurisdiction are expressly excluded.
- (iv) The other non-charitable foundations were established to benefit Mrs B and the named issue of Daughters 1 and 2. Daughters 1 and 2 were not named as beneficiaries. All of the named beneficiaries are adult and have been convened to this application.
- (v) The Foundations were established as a result of advice from Daughters 1 and 2's foreign tax adviser. The purpose of the establishment of the Foundations was to mitigate tax in the light of substantial changes to the law of the foreign jurisdiction relating to the taxation of trusts. It was understood that following the move from trusts to foundations, no tax filing or payment obligations would arise in the foreign jurisdiction.
- (vi) It appears that the advice that was received by the family was flawed and that a significant liability to tax may well have arisen in the foreign jurisdiction. It is the wish of the family members to ensure that they are fully compliant with all of their foreign tax obligations and to the extent necessary, would wish the assets of the Foundations to be used to discharge that tax liability.
- (vii) As matters presently stand, in fact only one of the family members, Grandson A

(who is not resident in the foreign jurisdiction) is actually a beneficiary of the non-charitable Foundations. Family members who are resident in a foreign jurisdiction are excluded from benefit for the duration of that residence.

(viii) The Representation is brought in order to assist the family in achieving compliance with their foreign tax obligations.

(ix) The wealth contained within the Foundations is very substantial. We are informed that it is some £77 million which derives entirely from the wealth of the deceased.

(x) Whilst the non-charitable Foundations have significant wealth this is not so for Foundation A which is entitled to an annual dividend which in effect covers expenses with the possibility of discretionary additional dividends. Such additional dividends have not been declared up until now. The current plan however, will be the payment of a substantial discretionary dividend to Foundation A prior to its dissolution which then will be applied to charitable purposes. It is intended that the sum of €200,000 will be paid to certain charities by Foundation A in accordance with its objects. The aim is that the charities will as a result receive a significant sum and more than they would likely have received had Foundation A not been wound up.

## 7 The Representor wishes to achieve the following:-

(i) The amendment or variation of the definition of excluded person so that beneficiaries resident in the foreign jurisdiction will no longer fall under that definition simply by reason of residence.

(ii) The amendment or variation of the confidentiality provisions of the Foundations so as to facilitate disclosure of information and compliance with reporting obligations in the foreign jurisdiction.

(iii) Continued co-operation amongst the parties to ensure compliance with reporting obligations in the foreign jurisdiction and payments by the Representor to the foreign Taxation Authority to satisfy any applicable liabilities to tax.

(iv) An order for the payment by the Representor of the legal costs incurred by it and the family members in and about the proceedings from the assets of the Foundations.

(v) The restructuring and subsequent dissolution of the Foundations and payment out of the assets in the case of Foundation A to charitable objects and in the case of the other Foundations to the beneficiaries thereof.

## The Law

## 8 The law applicable to this matter is to be found within the Foundations Law.

## 9 Article 43 of the Foundations Law is in the following terms:-

***“ Applications to Royal Court***

***(1) A person with standing in respect of a foundation may apply to the Royal Court for the Court to take, in respect of the foundation, any of the actions specified in this Part .”***

10 Under Article 1(1) of the Foundations Law, a council member is a ***“person with standing”*** and accordingly the Representer has standing to make the application before us.

11 Article 45 of the Foundations Law provides as follows:-

***“ Powers of Royal Court to order amendment of charter or regulations of foundation***

***(1) The Royal Court may, by order, propose amendments to the charter of a foundation or amend the regulations of a foundation if the Court is satisfied –***

***(a) that the change will assist the foundation to administer its assets or to attain its objects; or***

***(b) that those objects are no longer attainable and that the change will assist the foundation to attain objects as near as reasonably possible to those objects .***

***...”***

12 Article 46 of the Foundations Law, so far as it is relevant to the current application, is in the following terms:-

***“Power of Royal Court to give directions***

***(1) This Article applies if the Royal Court is satisfied –***

***(a) that if it gives a direction it will assist a foundation to administer its assets or to carry out its objects; or***

***(b) that it is otherwise desirable for the Court to give a direction .***

***(2) 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;***

...

***(e) whether a person is a beneficiary;***

...

***(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.”***

13 Article 14 of the Foundations Law deals with the position of the guardian and provides, at sub-paragraphs 7, 8 & 9, the following:-

***“ (7) Except to the extent that the regulations of a foundation provide otherwise, the guardian of a foundation may, if he or she considers that it is appropriate to do so, sanction or authorise any action taken or to be taken by the council of the foundation that would not otherwise be permitted by the charter or regulations of the foundation.***

***(8) However, the guardian must not do so unless he or she is satisfied –***

***(a) that it is in the best interests of the foundation to do so; and***

***(b) that the council, in taking the action, acted or will be acting in good faith***

.

***(9) If the guardian of a foundation, acting under paragraph (7), sanctions or authorizes any action of the council of the foundation, the council shall, in taking that action, be taken for all purposes to have acted in accordance with the charter and regulations of the foundation.”***

14 There is not a great deal of case law in Jersey relating to foundations but in the case of *A Limited v B, C Limited, D and E* [\[2013\] 1 JLR 305](#), the Court made a number of statements about the nature of a foundation. Insofar as is relevant to this application the Court, at paragraph 38 of its judgment, made the following observations:-

***“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 sui generis. 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 ... 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 art. 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 In re S Settlement [2001] JLR Note 37 .***

***(iv) The draftsman is likely to have had this jurisdiction in mind in formulating Part 5 generally and art. 46 in particular, given the express provision within art. 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 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 .***

...”

15 We respectfully agree. We believe that it is appropriate, in considering the jurisdiction of this Court under Part 5 and in particular art. 46 of the Foundations Law, to have regard to the similar jurisdiction to be found within the law relating to trusts. We also agree that a helpful approach is that to be found in *Re the S Settlement* (cited above) which, in the note of the report of that case, states as follows:-

***“The following matters should be considered by the Court when asked to approve a course of action proposed by a trustee...:***

***(a) Is the proposed action within the trustees' powers?*** This is a matter of construction of the trust instrument and/or statute, to be decided in open court after hearing argument from both sides .

***(b) If so, is it a proper exercise of that power?*** The trustees may prudently seek the approval of the Court, traditionally in chambers without adversarial argument, because of the momentous nature of the action. The Court must be satisfied that:-

***I The trustees opinion has been formed in good faith;***

***li The opinion is one of a reasonable trustee; and***

***lii It has not been vitiated by any actual or potential conflict of interest .***

***(c) Do the trustees wish to surrender their discretion to the Court?***

Genuine deadlock, or a conflict of interest, is sufficient reason for the ***Court to accept surrender.*** These proceedings are traditionally heard in chambers without adversarial argument, if the parties agree, or do not violently disagree, on a particular course of action .

***(d) Have the trustees already taken action which is being challenged?*** Hostile litigation should be decided in open court.”

16 This is not a matter in which the Representor is surrendering its discretion. This is rather an application to determine what the relevant powers are and whether or not what is proposed is a proper exercise of those powers. In that context, the Representor is seeking the approval of this Court and, at that stage, the Court must turn its mind to questions of good faith, reasonableness, or conflict of interest.

17 The first issue that the Court should consider is whether or not the Representor has the power to do the things that it wishes to do.

## **The Foundations**

### **Foundation A**

18 The charter and regulations of the Foundation A contain the following provisions:-

(i) At paragraph 2 of the charter it is stated:-

*“ The objects of the Foundation are to benefit such charities and charitable purposes as may be specified from time to time in or in accordance with the regulations of the Foundation.”*

(ii) In clause 1 of the regulations, which deals with definitions and interpretations, the following definitions are of relevance:-

*“ 1.1.D ‘Charitable purpose’ means any purpose which is recognised as exclusively charitable under the proper law of this Foundation;*

*1.1.E ‘Charity’ means any trust, foundation, organisation, institution, association or body of persons whether or not incorporated whose objects and purposes are charitable in accordance with the laws of the jurisdiction*



*under which the trust, foundation, organisation, institution, association or body of persons is existing;*

...

*1.1.1 'Excluded purpose' means any purpose which is carried out by any person resident in [the foreign jurisdiction] or provides any benefit to any person resident in [the foreign jurisdiction]."*

(iii) Clause 21 of the regulations prevents the Representor disclosing to any person (including any tax or fiscal authority) any information on any matter relating to the Foundation.

(iv) Clause 32 of the Schedule to the regulations contains a provision permitting the payment of taxes or any interest or penalty 'whether enforceable or not against and whether recoverable or not from the Foundation or any of the beneficiaries'.

(v) Clause 34.1 of the regulations provides:-

*" Subject to all legal and other requirements of the law and any other applicable law, regulations, codes of practice or otherwise of Jersey and any other jurisdiction, the council shall have the power at any time or times and from time to time during the foundation period to dissolve the foundation."*

(vi) Clause 33.1 of the regulations provides:-

*" Subject to all legal and other requirements of the law and any other applicable law, regulations, codes of practice or otherwise of Jersey, the council shall have the power at any time or times and from time to time during the foundation period to amend vary or delete any provision of the charter and / or these regulations or remove or declare any one or more of the provisions of the charter or these regulations to be suspended for such terms and for such period as it thinks fit."*

## **The non-charitable Foundations**

19 The remainder of the Foundations (which are non-charitable) are in identical terms and contain the following provisions:-

(i) Paragraph 2 of the charters provides that the objects of each non-charitable foundation are:-

*" To benefit such person or classes of persons as may be specified from time to time in accordance with the regulations of the Foundation."*

(ii) Paragraph 1.1(b) of the regulations defines beneficiaries as:-

*“ (i) All and any persons who are specified and identified (if any) at Clause 6.1 of these regulations and part 2 of the schedule hereto; and/or*

*(ii) All and any persons who have been added as beneficiaries under the terms hereof and who in either case are not and have not been declared to be an excluded person, and ‘beneficiary’ shall be construed accordingly.”*

(iii) Part 2 of the regulations lists the beneficiaries as Mrs B, the Grandchildren and Grandson A;

(iv) Part 3 of the regulations deals with the question of excluded persons in the following terms:-

*“ Save that any and all persons for the time being resident in [the foreign jurisdiction] or having for the time being their principal place of business or activity in [the foreign jurisdiction], no persons are declared to be excluded persons on the creation of this Foundation.”*

(v) Clause 4 of the regulations provides that the comprehensive powers to deal with the capital and income of the Foundation for the benefit of all or any one or more of the beneficiaries.

(vi) Clause 8 of the regulations permits, in effect, the Representor to add any person to the list of beneficiaries who is not otherwise an excluded person.

(vii) Clause 9 of the regulations deals with excluded persons. Specifically Clause 9.1 provides:-

*“ No excluded person shall be capable of being entitled to or of taking any benefit of any kind by virtue or in consequence of this Foundation and in particular without prejudice to the generality of the foregoing provisions of this Clause:-*

*(a) The foundation fund and the income thereof shall be enjoyed to the entire exclusion of any excluded person and of any benefit to him by contract or otherwise;*

*(b) No part of the capital or income of the foundation fund should be paid or lent or pledged or applied for the benefit either directly or indirectly of any excluded person in any manner or in any circumstances whatsoever; and*

*(c) No power or discretion hereby or by any appointment made hereunder or by law conferred upon the council or any member of the council should be capable of being exercised in such manner that any excluded person would become entitled either directly or indirectly to any benefit in any manner or in any circumstances whatsoever;*

*...”*

(viii) Clause 25 of the regulations prevents a disclosure to any person (including any tax or fiscal authority) of any information on any matter relating to the Foundations.

(ix) Clause 33 of the Schedule to the regulations contains a provision permitting the payment of taxes or interest or penalties 'payable by the Foundations or any other person... whether enforceable or not against and whether recoverable from the Foundation or any of the beneficiaries'.

(x) Clause 37 of the regulations gives power to the council at any time to amend, vary or delete any provision of the charter and/or the regulations or to remove or suspend any one or more provision of the charter or regulations as it thinks fit.

(xi) Clause 38 of the regulations gives the council power to dissolve the Foundation.

## The Guardian

20 Clause 28 of the regulations of the non-charitable Foundations deals with the power of the guardian. Specifically Clause 28.3, 28.4 and 28.5 provide as follows:-

*" 28.3 Subject to clauses 28.4 and 28.5 a guardian may, if he considers appropriate to do so, sanction or authorise action taken or to be taken by the council that would not otherwise be permitted by the charter and/or these regulations.*

*28.4 The guardian must only sanction or authorise such action if he is satisfied that:-*

*(a) it is in the best interest of the Foundation to do so; and*

*(b) the council in taking the action acted or will be acting in good faith;*

*Whereupon such action of the council will be taken for all purposes to have been in accordance with the charter and these regulations.*

*28.5 The guardian may not sanction or authorise any action taken or to be taken by the council that would be inconsistent with the law or any other enactment."*

The provisions relating to the guardian in the Foundation A are in identical terms.

21 It seems clear to us that those provisions, taken as a whole, provide sufficient power to the Representor to achieve the ends that it wishes to achieve. We were concerned at first examination whether Clause 9.1(c) of the non-charitable regulations which, as set out at paragraph 20(g) above, prevents any possibility of an excluded person achieving any form of benefit may prevent what is proposed. However, in our view, on a proper construction of that provision, there is no difficulty with what the Representor proposes because:-

(i) The power to amend the regulations is not limited, and *prima facie* clause 9 can be

amended;

(ii) What is proposed is an amendment to the regulations such that henceforth persons resident in the foreign jurisdiction will no longer in any event be 'excluded persons';

(iii) Mrs B and the Grandchildren, and indeed Daughters 1 and 2 when added as beneficiaries, will no longer be excluded persons but will simply hold the status of beneficiaries.

(iv) Even so, as beneficiaries, they will not be entitled to benefit, either directly or indirectly until the council has resolved by resolution that such a beneficiary is entitled to benefit from the Foundation.

(v) Clause 9.1(c) does not in terms apply to the guardian.

22 Accordingly, in our view, the powers of the Foundations are sufficient for the Representor to act as it wishes and specifically, provided it does so in the manner provided for within the respective regulations and the Foundation Law can make the amends that it proposes.

23 Should we, therefore, be prepared to consider giving a blessing? It is put to us that this is a momentous decision, as it clearly is, and therefore on first principles this is something on which a blessing may be sought.

### **Evidence and position of parties**

24 The Court had before it a number of affidavits setting out the factual background referred to above. In particular it had the affidavit of the current foreign tax adviser of 6<sup>th</sup> July, 2016, explaining the tax advice that has been given and explaining the tax consequences to the family if these changes are not made. It is clear that the foreign tax authority will look through the Foundations and treat them as belonging to Daughters 1 and 2.

25 Advocate Cushing for the Grandchildren confirmed that from his clients' perspective the assets of the Foundation have always been considered by them to derive from family wealth and indeed they have an expectation that significant assets will be distributed to them in the fullness of time. They have each signed a letter confirming their full support of the relief contained within the Representation.

26 Advocate Passmore for Mrs B, and Daughters 1 and 2, also indicates full support for what is proposed. Daughters 1 and 2 had not been named at any point as beneficiaries of the Foundations although they will, under what is proposed, become beneficiaries for the purposes of the distributions to be made.

- 27 Advocate Saunders for the Grandson A, the only current family beneficiary (he is not resident in a foreign jurisdiction) and the only member eligible to receive a benefit also agrees and sees the assets as family assets. He believes that it is the right thing to do and would benefit the family as a whole.
- 28 The Guardian also fully supports what is proposed.
- 29 It is clear that this is a close and mutually supportive family and that all of the members support what the Representor proposes. These are unusual circumstances in that the Representor, the Guardian, the adult beneficiary, the adults named as beneficiaries but excluded by reason of their residence in the foreign jurisdiction, and Daughters 1 and 2 all positively support the relief sought in the Representation. This to our mind is an important factor in considering whether or not to bless what is proposed by the Representor.
- 30 The Attorney General has not made any observations on what is proposed in the Representation.

## Conclusion

- 31 Applying the principles, set out above in *Re the S Settlement* we conclude:-
- (i) The proposed action is within the Representor's powers as sole council member supported by the Guardian;
  - (ii) In our view, the Representor's opinion has been formed in good faith and is one that a reasonable council could make. It has not been vitiated in any way by actual or potential conflict of interest. In our view what is proposed is a proper exercise of the powers available to the council as supported by the guardian.
  - (iii) This is not a matter where the Representor is surrendering its discretion to the Court. This is, rather, a request for a blessing to do something that the Representor has already resolved to do.
- 32 In our view this is an appropriate matter in respect of which we should give our blessing which we do.
- 33 Even had our view been that the regulations, taken as a whole, did not permit the Representor to make the change that it wishes, the Court would have been minded to exercise its powers under Article 45 of the Foundations Law.
- 34 It seems to us that the fundamental purposes of the non-charitable Foundations are to assist the members of the family but that, in reality, because of the erroneous advice as a result of which the Foundations were created, the opposite is true and the family generally,

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and Daughters 1 and 2 in particular, are facing a very substantial tax liability.

- 35 Whilst both Foundation A and the non-charitable Foundations expressly exclude from benefit persons resident in the foreign jurisdiction it is clear on the evidence that we have seen that the purpose for this exclusion was to mitigate the tax liabilities and such an exclusion would not have been contained but for the belief, based on erroneous advice, that such provisions would have that effect. The primary purposes, but for that, are with regard to Foundation A, broadly charitable, and with regard to the non-charitable Foundations, the benefit of family members.
- 36 It seems to us that the changes proposed, whilst they would ultimately lead to the end of the Foundations, will permit, in the interim, the Foundations to administer their assets in order to obtain their objects.
- 37 Similarly, with regard to Foundation A, the result would be a substantial charitable donation and it seems to the Court that making the variations sought would further its charitable purposes.
- 38 Accordingly the Court would have been minded, had it felt it necessary, to exercise its powers under Article 45 to achieve the same changes that we believe the Representor, together with the Guardian, are able to do.