

Article

A Strong Foundation for Philanthropy: The use of Cayman Foundation Companies as Not-for-profit Enterprises

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Since the introduction of the Foundation Companies Act in 2017, Cayman foundation companies have been utilised in a variety of different structures. While their introduction was intended to attract clients from civil law jurisdictions (who may be more familiar with foundations as opposed to trusts), foundation companies are fast becoming the go-to structure for philanthropic and not-for-profit enterprises incorporated in the Cayman Islands.

This article will explore the unique advantages that a Cayman foundation company offers when establishing a philanthropic or not-for-profit enterprise, and how this structure compares to charitable trusts and companies limited by guarantee (which have historically been the preferred structures for not-for-profits).

When establishing a not-for-profit (“NFP”), it is understandable that the focus of its founders is on the mission that they have set out to achieve. How an entity is structured will invariably affect how it is governed, and therefore how successful it is in achieving its mission. Despite this, the structuring of NFPs is often overlooked or treated as an afterthought resulting in an organisational structure that is not well-placed to achieve its objectives.

Because NFPs have unique goals, questions pertaining to their legal structure and governing documents are often more complex than those applying to commercial-profit-maximising companies. Traditionally, NFPs in common law jurisdictions are often established as either a charitable trust or a company limited by guarantee, with each legal structure offering distinct advantages and disadvantages. The key distinction between the two is that unlike a company, a trust does not have separate legal personality and so cannot sue or be sued, or hold property in its own name.

Cayman Foundations may be viewed as a hybrid between a trust and a company, and have therefore emerged as an attractive structuring option for NFPs. While Cayman Foundations have separate legal personality, their governing documents may often have features which are more familiar to trusts. For example, Cayman Foundations can be established with a “Founder” whose role is similar to that of the settlor of a trust, with the Founder able to retain certain powers in relation to the entity (such as the power to amend governing documents, approve distributions or appoint/remove directors). Unlike a trust that may be susceptible to challenge should the settlor be seen to be exercising too much control and risk invalidating a trust as a “sham”, a Foundation, not being a trust but a creature of statute, may not be open to an attack on the same grounds.

While a Cayman Foundation is a company, a key feature which distinguishes it from an ordinary company (including a company limited by guarantee), is that a Cayman Foundation can cease to have members and ownership. This may be seen as a particularly attractive feature in light of recent English case law¹ (discussed further below), which has raised complex questions relating to the role and duties of members and ownership of a charitable company.

What is a Cayman Foundation?

In 2017, the Cayman Islands (“Cayman”) introduced a foundation vehicle to its structuring options founded on statutory and common law. Foundations, which broadly operate as a hybrid between a company and a trust, have a long history in civil law jurisdictions and their introduction offshore was initially intended to attract clients for whom a trust was not suitable (either because of the tax treatment in their home jurisdiction or because they were uncomfortable transferring legal ownership of assets to a trustee).

¹ *Lehtimäki and others (Respondents) v Cooper (Appellant)* [2020] UKSC 33

The Cayman Foundation Companies Act, 2017, provides for the incorporation of a new variation of Cayman company, known as a “foundation company” (“**Cayman Foundation**”).

Whereas other offshore jurisdictions have sought to establish an entirely new set of rules for their respective foundation offerings, the approach in Cayman was to build off the existing Companies Act framework. As such, the Cayman Companies Act applies to Cayman Foundations (save to the extent that it is excluded or modified by the Foundation Companies Act or otherwise inconsistent with its provisions). This means that the fundamental corporate structure of a Cayman Foundation is a tried and tested one and that legal jurisprudence in respect of Cayman companies will, to the extent it is relevant, also apply to a Cayman Foundation, therefore achieving a high level of familiarity and certainty in its legal treatment.

Features of a Cayman Foundation

Establishment

A Cayman Foundation may be formed for any lawful purpose and need not satisfy any restrictive definition as to what constitutes a ‘charity’. Indeed, a Cayman Foundation may have multiple purposes, including both charitable and non-charitable purposes, potentially avoiding the need to set up duplicate structures.

In setting up a Cayman Foundation, the drafter may choose to either convert an existing Cayman company to a Cayman Foundation, or incorporate a new Cayman Foundation. In all cases, it will be a body corporate with separate legal personality and limited liability.

While technically a company, there are aspects of a Cayman Foundation which more closely resemble a trust, and certain provisions of the Cayman Islands’ Trusts Act are extended to apply to Cayman Foundations. This includes section 48 of the Trusts Act which allows fiduciaries (including the Supervisor of a Cayman Foundation) to apply for the directions of the Cayman Court (often referred to as a “blessing” application). This is a remedy which can be useful to protect the Supervisor and other fiduciaries when making significant decisions, for example when making a major philanthropic gift or undertaking.

Furthermore, the fiduciaries of a Cayman Foundation (including its directors and any other fiduciary power holders) can make use of section 64A of the Trusts Act which provides the Grand Court of the Cayman Islands with explicit jurisdiction to set aside “*mistaken decisions by trustees and other fiduciaries*” (this broadly being a codification of a similar common law rule, known as the rule in *Re Hastings Bass*²).

The Foundation Companies Act is highly flexible and allows for bespoke governing documents tailored to the individual circumstances and requirements of the particular entity. Thus, while some of the key features of a Cayman Foundation are described in this article, it should be borne in mind that there is significant scope to adapt the roles and responsibilities of the various offices, and the applicable rules, as is appropriate to individual circumstances.

Key Roles

Ordinarily, a Cayman Foundation will have the following roles:

- **Founder:** similar to the settlor of a trust, this will generally be the legal person responsible for establishing the structure. As the Foundation Companies Act does not formally define the role of a “Founder”, the governing documents may specify what (if any) powers the Founder will retain, for example the Founder may reserve the power to appoint the directors, amend its governing documents or alternatively the Founder may have no ongoing role in relation to the Cayman Foundation.
- **Director(s):** as with an ordinary company, a Cayman Foundation is managed by its board of directors. By default, the role and powers of the directors will be the same as for an ordinary Cayman company (albeit that this may be shaped by any powers conferred on other officeholders such as the Founder). The directors will owe the same duties to a Cayman Foundation as applies in respect of an ordinary company.
- **Member(s):** While a Cayman Foundation must initially be incorporated with one or more members (in the same way as an ordinary company), one of the key features of a Cayman Foundation is that it can cease to have members at any time. The cessation or absence of a member will not affect the Cayman Foundation’s existence, capacity or powers.
- **Supervisor(s):** Where a Cayman Foundation ceases to have members, it must have one or more “Supervisors” (who may but need not be directors). As suggested by the title, such officeholder essentially fills the gap left by the lack of members in that

² [1975] Ch 25

they can enforce the rules of the Cayman Foundation as against the directors and would typically have the right to access the files, books and accounts of the company.

Members (or lack thereof)

A legal structure that has separate legal personality and limited liability but can cease to have members is an attractive option for NFPs. This is particularly apparent in light of *Lehtimäki and others (Respondents) v Cooper (Appellant)*,³ a recent decision of the UK Supreme Court which analysed the role of members of a charitable company limited by guarantee. The UK Supreme Court unanimously agreed that the members owe a fiduciary duty to further the company's charitable purposes (which contrasts with the ordinary position where a company's members are free to exercise their voting rights as they so choose). While the result is not altogether surprising, it does raise complex and novel questions as to the scope of the members' duties and the practicalities for how they should be exercised.

While similar questions may arise in relation to the Supervisor of a Cayman Foundation (as their duties are not exhaustively defined under the Act), there will arguably be less confusion as the scope of a Supervisor's role will be contractually defined in the Cayman Foundation's governing documents and should not overlap with the separate concept of membership.

Bylaws

Another feature which is distinct from an ordinary company is that the Foundation Companies Act provides for the making and amending "bylaws", which do not form part of the company's constitution and therefore do not need to be filed with the Register of Companies and can remain private. This affords Cayman Foundations a degree of privacy in its operations with further flexibility to set rules in relation to its own structure and management. Bylaws may relate to any aspect of the business or affairs of the Cayman Foundation, or any of the duties or powers of the directors and other officeholders, including the way of achieving the Foundation Company's objects. The amendment of bylaws or indeed the articles of association of a Cayman Foundation is arguably quicker and easier than amending a trust deed.

Overall, the easy adaptability of Cayman Foundations make them an ideal option for philanthropic and not-for-profit endeavours or even a combination thereof – a true hybrid in every sense of the word.

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³ [2020] UKSC 33