FOUNDATIONS: THE NEW TRUSTS?[1]

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Are foundations the new trusts? You might ask, "What is wrong with old trusts?" After all, they have stood us very well. They were invented 800 years ago, when English nobles went off to fight in a foreign continent, communications were very poor, and they needed their estates to be looked after. So they literally entrusted them to persons who would be able to collect the rents and manage them. It was quickly discovered that trusts could have a spin-off. They were marvellous in avoiding Mediaeval taxes, so much so that King Henry VIII decided, in 1535, that he had had enough of trusts, and so Parliament – under his direction – passed the Statute of Uses. It is a marvellous Act. The actual content is very short, but there is a long rambling, ranting preamble about crafty, mischievous people (they would have been members of the ITPA if it had existed) who, to the great detriment of the King's revenue, had, through the use of trusts, discovered marvellous ways of avoiding taxes. The King had a simple solution: all trusts were to be abolished. And there it was. But I think you might know that it did not quite work. Henry VIII managed to wrest the control of the Church of England out of the power of the Pope after almost 1000 years, but when it came to abolishing trusts, vested interests were too great. It took us crafty, mischievous people no time at all to find a way round the Statute of Uses, and to find a new way of creating trusts which complied with it, and the judges said, "Yes, it worked". And trusts have been in business ever since.

Trusts have a great deal going for them but, in certain contexts, they may not be the best thing. One of the problems is the problem of success. Simply because they have been used so much, governments in various jurisdictions have brought in various anti-avoidance provisions aimed at trusts, and aimed to counter their beneficial tax effects. By contrast, foundations have not been used – in fact have been used hardly at all – certainly in those common law countries where the trust is used, and so you find there is very little anti-avoidance provision which is aimed at foundations.

1 This article is based on a talk given by the author to the International Tax Planning Association meeting in Amsterdam in November 2010.

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There may be anti-avoidance provisions which happen to catch foundations in certain contexts and in certain ways, but it is purely a "hit and miss" matter, so this gives us great scope for selective tax planning. And, while I am not running down the trust, I think there are many situations where we will find in the future that a foundation - particularly an offshore foundation - is going to be much more effective in tax terms that a trust.

In 2007, the ITPA produced a marvellous book, the *Private Foundations Handbook*. That was three years ago, but one of the great things about it was that it was ahead of its time. It included several Bills that had not yet gone through, so it is by no means out of date. There is one way, in particular, in which perhaps it is out of date, in that Jersey, in 2009, adopted a Foundations Law which I think could, in principle, be very important. The introduction to this book, by Milton Grundy, repays attention. The book is very useful indeed. The trouble is that there are many different types of foundation; the name is used to cover lots of different types of entity. There are also things which are, in substance, foundations, which are not called that. If you go to Liechtenstein, for example, you have something called a *Stiftung*, which is normally translated as "foundation". But you also have an *Anstalt*, often translated as "establishment" which – for all practical purposes – is the same. You even have a "trust enterprise with legal personality" which, again, is very similar. Simply because there are so many different types of foundation, there are so many different jurisdictions where you might want to use a foundation to avoid your own taxes, that I cannot do them all. So, what I am going to do is to take a leaf out of Milton's book. Those of you who were at the Venice meeting will know that he discussed certain strategies which could be particularly useful in a UK context, and that is what I am going to do. Then, in the discussion session, he invited delegates to discuss how these – or similar strategies – might be useful in saving tax in their own jurisdictions. I am not going to talk about the sort of foundations which are charitable or philanthropic; I am going to limit myself – as does this marvellous book – to the private foundation, that is, something which could be a substitute for a regular, bog-standard private trust that is meant for individuals – not a purpose trust. I am going to talk a little bit about the Jersey law, simply by way of illustration, because I think in many ways it is the most sophisticated, even though it is not quite perfect.

A key question which arises in the context of every foundation is this: it will have beneficiaries. But do not be misled by that term. The fact that somebody is a beneficiary of a foundation – somebody who can be benefited under the statutes of the foundation – does not mean that they are anything like a beneficiary of a conventional trust. They may have absolutely no rights whatsoever. They may have very limited rights, and those rights may be not at all the same. One of the problems which I have found is that, if you look at all the statutes under which foundations can be set up, this absolutely vital question, "What rights do the beneficiaries have, or what rights can they be given by the charter, statutes of the foundation?", you do not find an answer. Cyprus says absolutely nothing. The Bahamas says nothing, except it schedules a draft instrument to its Act and in that it kind of pre-supposes that you can confer rights on beneficiaries. Jersey has tried to addressed the question; I think they have failed. I have tried to persuade people in Jersey to amend their Foundations Law. What we, as tax planners, want is flexibility. Allow us to provide in the charter which beneficiaries have which rights to what. Or, alternatively, to say that no beneficiary has any right to anything. This way, the foundation will be the most useful, because we will be able to adapt our statutes to the particular circumstances. But, while you have got this huge question mark arising – *What exactly are the rights of the beneficiaries*? or *Do they have any rights at all*? – people are going to be reluctant to use them. I have had this time and time again. I have gone to lawyers in certain jurisdictions and said, "Do the beneficiaries have rights?" The invariable answer is, "What do you want us to say?" This is not very useful, if they then have to give evidence on a tax appeal and be cross-examined.

Let me look briefly at the Jersey foundation. First of all, let me make it absolutely clear that a Jersey foundation is a body corporate. I use the words "body corporate" rather than a company, because it is technically more accurate, because it has legal personality and it owns its own assets beneficially. That is going to be very important. Not surprisingly, it has to be established using an instrument. And Jersey is very helpful: it enables you to have two instruments. You have a Charter, which is absolutely essential. It is roughly the equivalent of the Memorandum of Association of an English-type company. The foundation also has Regulations. These, again, are approximately the equivalent of the Articles of Association. The great advantage of the Regulations is that they are a private document, and that the public do not need to know – and cannot know – what they contain.

What are the personnel of a foundation? Under Jersey law – which I think perhaps is the most sophisticated because it is the latest - you have to have a Council. We are familiar with that: it is like a board of directors. At least one of the members of the Council must be a "qualified person". This means that you have to pay somebody in Jersey who is duly qualified to sit on the board. Of course, it is put in terms of making sure of regulatory process, but it also ensures that a little work does come to Jersey, and that you cannot simply use a Jersey foundation without their getting some benefit from it.

Interestingly, it has to have a guardian. A guardian is a bit like – I suppose – the enforcer of a purpose trust. The guardian has certain powers and is under a duty to make sure that the Council behave themselves. But, of course, the old problem arises: who will guard the guardian? If the guardian does not, in fact, comply with his duties – if he does not enforce the obligations imposed on the Council, there is no fallback position. There is nothing like having beneficiaries - as in the case of a trust - who are there to sue and to say, "You have done something wrong, or you have not done something right. I've lost money and therefore you need to make it good."

Of course, a foundation has to have a founder, just as a trust has to have a settlor.

Then there are various options. A foundation can have – but does not need to have – beneficiaries. Unless it is going to be a purpose trust, it is always going to have beneficiaries.

Very importantly, a foundation does not have shareholders. It does not even have members, as does, for example, a company limited by guarantee. So there is no such thing as the general meeting of the company which can supervise the board of directors. Jersey has invented the concept of a "person with standing", who is somebody who is entitled, in certain circumstances, to apply to the Court for a declaration that the Council are not behaving themselves, but, again, it confers limited rights.

A foundation may have a "winder-up" – somebody who can put the whole thing into liquidation if, for whatever reason, it turns out to be undesirable. It may have an "amender" – that is, a person who is not on the Council and can amend the statutes. It may have a "sanctioner" – that is, somebody whose consent is needed, rather like the protector of a trust. And it can have one or more delegates; these are persons to whom the directors can delegate their powers.

Let us look at what would the consequences be, say, of the use of – by way of illustration – a Jersey foundation by somebody who is concerned with UK tax planning. I am going to look at the three principle UK taxes: inheritance tax, capital gains tax and income tax.

You might say that you do not really want to use a foundation for inheritance tax planning, but that does not mean that you can ignore inheritance tax. Our inheritance tax is misnamed: it is actually a combined tax on gifts and estates, and so – in principle – it can apply any time you do something as a result of which the value of your estate is reduced, and gifting a large sum of money to a foundation would be an example. The founder really has two choices. He can either make sure that he retains such extensive rights that, for all practical purposes, the foundation is "his", and that might work (although it might have other drawbacks), in which case he does not have an inheritance tax problem. More normally, that will not be desirable. If he does not retain such rights but simply gives a large sum of money to the foundation, he has made a chargeable transfer of value, and he is going to pay – beyond a certain threshold – 20% inheritance tax, and if he dies within five years he may have to pay up to 20% again. So this could seem to be not a good start. All I can say is that in this respect foundations are no worse than trusts in general, but no better than trusts either. Ever since changes which were made in 2006 to the taxation of trusts, the funding of a trust during one's life is highly problematic, and we need to resort to certain strategies.

The best situation by far is to take advantage of a start-up situation. Your client has a marvellous idea. He is setting up a new venture. He puts a minimal amount of money into the foundation. The foundation sets up the new business and owns it, and in due course the business is worth a fortune. This is the ideal position. But we know that clients seldom do that - at least first time round. They make their money first, and then they come and ask for tax advice. If the client is a foreign domiciliary, he will not be concerned – on the whole – with inheritance tax; he can get round that pretty easily. In the United Kingdom, certain assets are exempt from inheritance tax even in the hands of the UK domiciled client. I think the most important example is shares in a trading company which have been owned for two years. If the client does not fall within these categories, there are other devices, e.g. value-freezing and value-shifting exercises. They are complicated and take time to work, but they can be very effective. The client has, say, an asset which is already quite valuable – for instance, land which might get planning permission but does not have it yet. He could sell it to the foundation at market value, but leave the purchase price outstanding on credit. If and when the planning permission is forthcoming, the land will be worth a great deal more. The client has managed to get the whole of that increase in value into the foundation without any inheritance tax problems. If the client has shares in an investment company, which do not qualify for inheritance tax relief, then you are perhaps going to have to use more complicated strategies – e.g. with deferred or preferred shares, into which the value will slowly shift over time.

What about the ongoing inheritance taxation of the foundation's assets? Potentially, a foundation could have the worst of both worlds. It could be both a company for inheritance tax purposes, and a settlement for inheritance tax purposes, and it could, therefore, fall foul of two sets of charging provisions. So, if you do not know what you are doing, you may stumble into making the Revenue a gift. If you do know what you are doing, I think you should be able to make sure that you fall within neither sets of provisions. So, once you have your foundation funded, it should be inheritance tax-free. If it is, it can exist – unlike most trusts - in perpetuity, it can be there providing benefits for the family members without there ever being an inheritance tax charge on anybody's death.

How could a foundation be a settlement? The basic definition of a settlement looks to a trust. There are words in the definition (and you will see this in Appendix I below) whereby – under the law of any other country – the administration of the property is for the time being governed by provisions equivalent in effect to those which would apply if the property were held in an English trust. These words have given rise to great difficulties of interpretation. My view is that they cannot possibly apply to a foundation. However, it is something that you have to form a view on. I do not think that property held by a foundation will be settled property; it certainly will not be property held in trust, and I do not think it will come under these final extending words. Even if I were wrong, a foundation will not be exposed to worse charges to inheritance tax than if it were a regular trust.

What about the foundation as a company? A foundation is undoubtedly a company; it is very likely to be a close company. Close company rules were brought in in 1922, to stop people, in effect, accumulating profits in a company, the profits being taxed at a relatively low rate, whereas if the profits had come to them in their own hands, they would have had to pay the so-called "supertax" at very high rates. The definition of a "close company" is extremely complex. I have set out quite a lot in Appendix II. If you have a close company, and it makes a gift - and, after all, foundations are there to make gifts. They are going to be distributing, are they not, capital or income to various beneficiaries? - ff it makes a gift, then the way it works is that this gift can be apportioned to its various participators. In the context of a normal company, "participator" just means "shareholder". If it said "shareholder" there would be no problem because, of course, a foundation does not have shareholders. But "participator" is more widely defined. I have set out relevant provisions in Appendix III. "Participator" includes a person who has a share or interest in the capital or income of the company. I think there is a real risk that if, under your foundation, you try to replicate a conventional trust, such as the income to A for life, the remainder to B, that both A and B would be participators. And if, therefore, they were UK domiciled, they would be sitting ducks for huge inheritance tax charges.

There are two possible solutions: one is to try and make sure that your foundation is not a close company, but it is going to be very difficult indeed unless you are prepared to have – for a start – a board of directors of at least eleven people, and I think for most people it is going to be unmanageable. But, an easier way is to make sure that – although it has participators – none of them is domiciled in the United Kingdom. This you can do, in effect, by making the provisions as to who gets what under the foundation the equivalent of a discretionary trust rather than a fixed interest trust, because if everything is discretionary, even though the beneficiaries may have the same rights as the beneficiaries of a discretionary trust, they will not be participators under the definition.

The Revenue has various problems with the manner of apportionment: the provisions are in Appendix IV.

The upshot is that you need to be very careful that whatever benefit is provided from a foundation is not of property situate in the United Kingdom. You do not have a bank account of the foundation in London, and draw a cheque on that account to pay to a beneficiary. You make sure you pay it outside the United Kingdom. If you have done all this, it seems to me that you should have something that will hold a fund which will be there in perpetuity, which will be completely outside the inheritance tax charge for successive generation upon generation. The trust has been a "sitting duck" since 1893, simply because they have been used for centuries; the foundation has not, and there is not anything to counter it.

Let me look at capital gains tax. We have capital gains tax in the United Kingdom, as in most countries. A gift or a sale of an asset to a foundation could involve a charge to capital gains tax, and this could be a "show-stopper". It is the old question, "How do you get money and assets into the foundation?" If you happen to have a pile of cash, then of course it is dead easy: there is no capital gains tax. If you have assets which are exempt from capital gains tax, again there is no problem. If you are a foreign domiciliary – even though you are UK-resident – again there should be no problem. But we have this rule that a gift is taxed for capital gains tax purposes as if it were a sale at market value, so you might have a substantial problem. Of course, it is a problem you are going to face sooner or later when you sell, except that it is one thing to sell - to have the actual proceeds in your hand and be able to pay the capital gains tax out of that; it is another thing to have gifted an asset to a foundation, to have no proceeds and to find yourself left with a capital gains tax bill. A lot of clients are very unhappy about that. Oddly enough, this problem exists equally with transfers of assets to an offshore trust, but it is easier to deal with in the case of a foundation because, whereas the settlor of a trust is always connected with the trustees of a settlement, it is relatively easy to establish that somebody who makes a gift or, indeed, sells an asset to a foundation, is not connected; it is just the way the rules happen to work. And so there are devices, which I think are reasonably good. The reason I think they are good is that when I was Junior Counsel many years ago, the QC with whom I was then advising thought it worked a treat. That QC is now a Law Lord and I am sure if it came before him he would still think it worked a treat.

What about the liability of the foundation itself? You have got assets into the foundation. The foundation itself, we hope, starts making substantial capital gains. Would that be liable to tax? Under UK law, no. The foundation - I am sure you will take steps to ensure - is non-UK resident and therefore, unless it is carrying on a trade in the United Kingdom (which is most unlikely), the general rule is that non-residents do not pay UK capital gains tax when they dispose of assets, even real property situated in the United Kingdom. It is just the same as in the case of an offshore trust. Of course, there are anti-avoidance provisions. These were brought in with offshore trusts and companies in mind; they were not brought in, specifically, with foundations in mind.

The most difficult is s.86, which is a killer. If I set up an offshore trust and I, my wife, my civil partner, any of my children, any of my grandchildren or any of my children or grandchildren's spouses can benefit, then if the trustees realise any gains at all these are deemed to be mine and I am, in principle, liable to pay capital gains tax on them. There are defences which, I think, would be available under a suitably-worded double taxation agreement depending where the trustees are resident. There are also EU law defences, especially if the trust is resident in part of the European Union. But, it is really a big problem for people who would love to avoid capital gains tax, but do not actually want to cut out themselves and the next two generations down, which is quite a sweeping thing to have to do. The amazing thing about this dreadful s.86 is that it only applies to trusts in the strict sense. Whatever a foundation is, it is not a trust, and therefore you can merrily have the foundation realising gains, and s.86 will not apply to you. That, of itself, I would have thought is absolutely a fantastic reason for having a foundation.

Section 86 does not apply, but there is s.87, but it is not so bad. Section 87 says that you look at the gains the trustees have realised, and if and when some beneficiary – resident in the United Kingdom – gets a benefit which is not otherwise taxable, then you can, to that extent, attribute the gain of the trustee to the beneficiary, so the beneficiary has to pay capital gains tax. Even if s.87 does apply, it is still a pretty good situation because it means you defer capital gains tax unless and until somebody resident in the United Kingdom has to benefit. And if they are a foreign domiciliary, they have got further lines of defence as well. So, it is not the end of the world, and this of course applies to every conceivable offshore trust.

Unfortunately, the terms used in s.87 is not “trust” but “settlement”, and settlement is defined more widely to mean anything where there is gratuitous intent, whether there is a trust or not. So, it could potentially apply to a foundation. It seems to me the answer to this is to do it in two stages. You set up your foundation at stage 1; you retain enormous rights, such as there is no gratuitous benefit at all, there is no bounty. At a later stage, you re-jig things – after the foundation has been funded – so as to confer benefits on others, but your act of bounty at a subsequent stage has not actually been involved with the funding of the foundation, and is therefore not connected with the realisation by the foundation of capital gains. This, I accept, is trickier. It is not something you can do overnight; there has to be a decent interval of time, probably at least six months, maybe longer. Things do not have to be pre-ordained from the outset but merely foreseen as possibilities. But, the prospect of being able to avoid both s.86 and s.87 is fantastic.

There is a third layer of capital gains anti-avoidance. Is the foundation a non-UK resident close company? It will undoubtedly be a company. Let me assume – for present purposes – that it will be a close company. Then there is another section – s.13 of our Act – which says that the capital gains of such a company can be apportioned to its “participators”, not just to its “shareholders”. Moreover, they are to be apportioned on a just and reasonable apportionment. Of course, if any of those participators are UK-resident, then there is the potential of a charge to UK capital gains tax. I think we solve this problem in much the same way as we solve the similar inheritance tax problem. We make sure that the only people who are participators are people offshore, such as the members of the Council. We make sure that no beneficiary is a participator, and the best way to ensure that is to make sure that no beneficiary has any fixed right. In other words, we have the equivalent of a discretionary trust, rather than a fixed interest trust. And most people would not find that too difficult to deal with.

Next we need to come to income tax. Income tax is, perhaps, the most difficult. I do not think foundations are counter-productive in income tax terms, it is just that they may not give any income tax advantage. We have two main anti-avoidance provisions that can apply. One is the income tax settlement provisions which I think we can get round. The other is the transfer of assets abroad provisions. These apply where, as a result of a transfer of assets in effect, made with a tax avoidance motive (although the onus of proof is on the taxpayer) income arises to a person domiciled or resident outside the United Kingdom. There will certainly be a transfer of assets; it is very widely defined, and income will, of course, arise to the foundation, which will undoubtedly be both domiciled and resident outside the United Kingdom. So, the provisions can apply. You have two different types of situation. You have one where the person making the transfer – the equivalent of the settlor of the trust - or his spouse or civil partner can benefit, and there it is simply ineffective for income tax purposes because the income of the foundation is deemed to be his. Nevertheless, he might be very happy with that if what the foundation is holding is shares in a company no dividends on which are ever paid, and if what you are looking to is selling those shares in due course, making a huge capital gain which will be all tax-free. Another possibility is if the founder – "the settlor" as it were, is prepared to exclude himself and any spouse of his; then the provisions work in a much less draconian way and all that happens is that, if and when a beneficiary ordinarily resident in the United Kingdom receives a non-taxable benefit, then it can be treated as taxable income. So, you have still got the huge advantages of deferral, and they are very considerable.

One thing you need to watch with a foundation, assuming it to be a company which is closely held, are the provisions under UK law – and I am sure you have them in other jurisdictions – which extend the meaning of "dividend" or "distribution". Basically, if a private closely-held company in the United Kingdom incurs expense in providing a benefit for its shareholders, that is regarded in the same way as the payment of a dividend. So, the whole point about a foundation is it is going to be providing benefits; they may be in cash, they may be in kind, they may be the free use of property, yachts, aeroplanes, houses, etc. How do we get round that? The answer is very easy indeed.

I know there is a lot of technicality here, and most of it will be of very little interest to most of you, because you will not be advising clients with UK tax problems. But there will be, perhaps, comparable things in the jurisdictions where you are advising clients. Let us stand back and compare a foundation with a trust. What is the best method of tax planning by far? The best method of offshore tax planning is to make an absolutely unfettered gift of the legal and beneficial ownership of everything you possess to an individual offshore, who does not pay tax. Of course, it must be an individual who will never die, who will never become mentally incapacitated, who will never become insolvent, who will not suddenly find himself being divorced and his wife claiming these assets which now belong to him, and who will be an honourable man who, although he has no legally enforceable obligation whatsoever, will look after you in the way in which he is morally supposed to do. I think I have occasionally put this "tongue in cheek" to some of my clients, and – surprisingly enough – none of them find this particularly appetizing. It works excellently in tax planning terms, but of course nobody wants to take that risk. And so there is always a tension. On the one hand, we do not want the beneficiaries of the offshore structure to have too strong rights, because if they do they are going to find they are liable to tax back at home. On the other hand, if their rights are very weak indeed, they may find that they are in a very difficult position. This is one of my problems with foundations in certain countries where you have virtually no right – if you are a beneficiary – to get any information at all out of the people actually running the foundation. Contrast the position of beneficiaries of a trust. We have had trusts for centuries, we know that trustees have strong obligations, we know that even discretionary beneficiaries have rights. The *Rosewood* case[3] was a very interesting one from a few years ago about a Russian entrepreneur who made an absolute fortune. He put it in trust in the Isle of Man. Unfortunately, when he went back to Russia he was unaccountably murdered. Everything had worked a treat until his young son came to the trust company and said, "Father's now dead. Can you please give me details of what's in the trust and what benefits I'm likely to get?" The trustee company said, "No. We are not obliged to tell you anything." So he took them to the Privy Council, which is the Supreme Court of the Isle of Man, and the Court said, "No, that is not the case. Although this was a trust for a wide class of discretionary beneficiaries, as the deceased's settlor's son, we think it very likely indeed that you were intended to be a principal beneficiary, and you are entitled to a great deal of information." This then put him in a position to acquire that information and to make sure at least that the trust was being properly administered.

When I went to Jersey in 2009 shortly after the Jersey Foundation Law came into force, one of the local practitioners stood up and said, "Isn't it marvellous. The great thing about foundations is that it is very difficult to sue the people running it." I said, "That is great from your point of view in Jersey, but what about the people being asked to put their money in? There may be another side to this." So, something you need to consider. A foundation is not a complete answer to all one's tax problems. It is not the panacea, the magic wand, the magic bullet, but there are many situations in which - on a case-by-case basis - it could be highly advantageous, certainly in terms of UK tax planning. But, it is not "one size fits all"; you will need to look at what the demands and needs of the family are, the settlor, and to tailor-make your foundation - bespoke planning not "one size fits all".

I mentioned the huge advantage, from the UK point of view, of avoiding tax on capital gains. Certainly, s.86 is out; probably s.87 and – without too much difficulty – s.13. As to income tax planning, at the worst the foundation can be tax-neutral, but it can easily provide a tax advantage, so long as the founder is prepared to exclude himself and his spouse. And in inheritance tax terms, provided you can get over the initial funding problems (there are various methods of doing) you have got the

3 *Schmidt v. Rosewood Trust* [2003] UKPC 26.

prospect of a fund which can exist in perpetuity, which can be held for the benefit of your descendants and which will be entirely free from gift and estate taxes. That is not bad going. So, I think that old trusts are certainly going to be around for a long time, and they have their uses too, I think the foundation has its use as well.

If you would like to pursue this topic further, you can obtain my book *The Taxation of Foundations*, published in 2010, from Key Haven Publications Ltd, website www.khpplc.co.uk.

APPENDIX I

(2) "Settlement" means any disposition or dispositions of property, whether effected by instrument, by parol or by operation of law, or partly in one way and partly in another, whereby the property is for the time being –

(a) held in trust for persons in succession or for any person subject to a contingency, or

(b) held by trustees on trust to accumulate the whole or part of any income of the property or with power to make payments out of that income at the discretion of the trustees or some other person, with or without power to accumulate surplus income, or

(c) charged or burdened (otherwise than for full consideration in money or money's worth paid for his own use or benefit to the person making the disposition) with the payment of any annuity or other periodical payment payable for a life or any other limited or terminable period,

or would be so held or charged or burdened if the disposition or dispositions were regulated by the law of any part of the United Kingdom; *or whereby, under the law of any other country, the administration of the property is for the time being governed by provisions equivalent in effect to those which would apply if the property were so held, charged or burdened."*

APPENDIX II

"close company" means a company within the meaning of the Corporation Tax Acts which is (or would be if resident in the United Kingdom) a close company for the purposes of those Acts"

See in particular the enormously complex provisions of Corporation Tax Act 2010 Part 10 Chapter 2. These provisions were not enacted with foundations in mind and their application to foundations must be problematic.
By contrast, a trust will not normally be a "company".

APPENDIX III

Inheritance Tax Act 1984 section 102(1) provides:

> "“participator”, in relation to any company, means any person who is (or would be if the company were resident in the United Kingdom) a participator in relation to that company within the meaning given by section 454 or Corporation Tax Act 2010 other than a person who would be such a participator by reason only of being a loan creditor;

Corporation Tax Act 2009 section 454 provides:

“(1) For the purposes of this Part, “participator”, in relation to a company, means a person having a share or interest in the capital or income of the company.

(2) In particular, “participator” includes –

(a) a person who possesses, or is entitled to acquire, share capital or voting rights in the company,

(b) a loan creditor of the company,

(c) a person who possesses a right to receive or participate in distribution of the company or any amounts payable by the company (in cash or in kind) to loan creditors by way of premium on redemption,

(d) a person who is entitled to acquire such a right as is mentioned in paragraph (c), and

(e) a person who is entitled to secure that income or assets (whether present or future) of the company will be applied directly or indirectly for the person’s benefit.”

APPENDIX IV

“(1) Subject to the following provisions of this Part of this Act, where a close company makes a transfer of value, tax shall be charged as if each individual to whom an amount is apportioned under this section had made a transfer of value of such amount as after deduction of tax (if any) would be equal to the amount so apportioned, less the amount (if any) by which the value of his estate is more than it would be but for the company’s transfer; but for this purpose his estate shall be treated as not including any rights or interests in the company.

(2) For the purposes of subsection (1) above the value transferred by the company's transfer of value shall be apportioned among the participators according to their respective rights and interests in the company immediately before the transfer, and any amount so apportioned to a close company shall be further apportioned among its participators, and so on; but –

(a) so much of that value as is attributable to any payment or transfer of assets to any person which falls to be taken into account in computing that person's profits or gains or losses for the purposes of income tax or corporation tax (or would fall to be so taken into account but for section 208 of the Taxes Act 1988) shall not be apportioned, and

(b) if any amount which would otherwise be apportioned to an individual who is domiciled outside the United Kingdom is attributable to the value of any property outside the United Kingdom, that amount shall not be apportioned.

(3) ...

(4) Where the amount apportioned to a person under this section is 5 per cent or less of the value transferred by the company's transfer of value then, notwithstanding section 3(4) above, tax chargeable under subsection (1) above shall be left out of account in determining, with respect to any time after the company's transfer, what previous transfers of value he has made.

(5) References in section 19 above to transfers of value made by a transferor and to the values transferred by them (calculated as there mentioned) shall be treated as including references to apportionments made to a person under this section and to the amounts for the tax on which (if charged) he would be liable."