

UNVEILING THE TRUST PROTECTOR

Dinesh Menon explores the ‘mysterious’ role of the trust protector and what, if any, its fiduciary responsibilities may be

KEY POINTS

WHAT IS THE ISSUE?

The widespread use of the trust protector has not always been accompanied by a corresponding understanding of the type of duties and responsibilities, particularly fiduciary, that the role holds.

WHAT DOES IT MEAN FOR ME?

This article explains the office of the trust protector and how various courts have interpreted its duties.

WHAT CAN I TAKE AWAY?

An appreciation of the type of duties a trust protector can potentially have, so that you are better placed to advise your clients when discussing the establishment or restructuring of a trust.

AS EARLY AS 1893, the Bahamas *Trustee Act* permitted a settlor to grant a person who was not a trustee the power to influence the actions of a trustee.¹ The term ‘protector’ was first employed in 1989, when the Cook Islands *International Trusts Act 1984* (as amended) expressly provided for trust ‘protectors’.² Subsequently, other Commonwealth jurisdictions, such as Belize,³ Anguilla,⁴ Nevis⁵ and the British Virgin Islands,⁶ adopted a more expansive view of the trust protector.

It is natural for settlors to wish to retain a degree of control over the administration of the trust’s assets; the office of the trust protector responds to this intention.

The use of a protector came to be viewed as a positive selling point, particularly when presenting trusts to conservative settlors. However, the widespread use of the trust protector has not been accompanied by a corresponding understanding of the type of duties and responsibilities the office attracts.

WHAT IS A PROTECTOR?

The concept of the protector, while familiar to trust practitioners, is not a

term of art and is not a concept that has a widely accepted definition.⁷ It is used in such a variety of situations that, absent specific context, it signifies little more than a person who is not the trustee, but who has been granted one or more powers affecting the operation of the trust. However, even that simple description can be misleading, since some statutory rules allow the protector to be a trustee,⁸ while, in others, trustees are explicitly prohibited from being protectors (e.g. domestic trusts based in St Kitts and Nevis).⁹

The label ‘protector’ generally refers to an office holder who has a veto over certain decisions of the trustee (e.g. trustee’s power of appointment) and/or who holds certain powers (e.g. powers to appoint and remove the trustee).¹⁰

Even where the statute provides a list of powers exercisable by protectors, these powers are not necessarily applicable to all trust protectors from that jurisdiction, since, as in the Bahamas,¹¹ the settlor has the option to allocate any combination of these powers to their protector under the trust deed, or, as in the Cook Islands¹² and Nevis,¹³ default powers that, prima facie, apply to protectors can be tailored by the trust deed. As such, the role can potentially exercise a wide range of powers that can be combined in a variety of ways, can significantly differ between protectors and are generally subject to being tailored according to the terms of the trust deed. Thus, in understanding the nature of a power and its potential implications, the protector ought to approach this issue on a case-by-case basis and in a confined way by enquiring whether a particular power exercisable by that protector is held in a fiduciary capacity.

A particular power may also be held in a limited fiduciary capacity where the protector is expected to consider whether to exercise the power on a regular basis and where the protector is entitled to benefit from the exercise of that power.¹⁴

Consequently, this results in a spectrum of possible ways in which powers may be

held by protectors, with a range of different combinations between the two extremes. At one end, a power is held purely for personal benefit and, at the other end, a true fiduciary power is held for the benefit of the trust’s beneficiaries.¹⁵

SPECTRUM OF POWERS AND THEIR DUTIES

The following have been identified as some of the usual points along the spectrum where a trust protector may find themselves:¹⁶

- (i) The protector holds a power exercisable wholly for their benefit that the protector is able to ignore, or even release, and can use for any purpose. While the power must be exercised within its scope, there are no other controls over how it is exercised.¹⁷
- (ii) The protector holds a power to be exercised for the benefit of a class of people, which can include the protector. The protector has a duty to consider whether to exercise the power, but is not required to exercise it.
- (iii) The protector holds a power to be exercised for the benefit of a class of people, which can include the protector. The protector has a duty to exercise the power, but can decide how they wish to exercise the power.
- (iv) The protector holds a power that may be exercised for the benefit of a class of people, excluding the protector.
- (v) The protector holds a power that must be exercised and, when it is exercised, must be exercised for the benefit of a class of people, excluding the protector.

The types of powers described under (ii) to (v) are generally exercised in a fiduciary capacity. The powers in categories (ii) and (iii) can be described as being exercisable in a limited fiduciary capacity.

A fiduciary is someone who agrees to act on behalf of another and who owes this person the duties of good faith, confidence and honesty. A fiduciary is expected to be loyal to the person to whom they owe a fiduciary duty and to always act in that person’s interest.

The following factors, which influenced the court’s decision in *Rawcliffe v Steele*,¹⁸ illustrate the types of indicator a court is likely to look at in determining that a protector held a power in a fiduciary, rather than a personal, capacity:

- the recitals to the trust deed referred to the protector as ‘protector of the trusts created by this Declaration’ and ‘protector of the settlement’;
- the terms envisaged that the position would be held by a succession of persons and provided the mechanism for this;

- they were entitled to receive information from the trustee and participate in meetings;
- the terms provided for the protector’s remuneration, which implies that, in the absence of such terms, the protector would not be entitled to remuneration; and
- some of the trustee’s powers were expressly stated as being unfettered, thus implying that the powers of control granted to the protector should be regarded as being held in a fiduciary capacity.

A similar approach was taken in *Re Freiburg Trust*.¹⁹

In *Re Circle Trust*, the Cayman Islands court relied on the following features in reaching its decision:

- the ‘office of protector’ was to be vacated if the protector was found to be bankrupt or of unsound mind;
- the protector was entitled to receive accounts from the trustee;
- they had a right of indemnification and the benefit of an exemption of liability clause for negligence; and
- they could remove and appoint trustees, but could not appoint themselves or any associate or entity controlled by them.

The Royal Court of Jersey (the Jersey Court) took a similar view in *Re Bird Trusts*,²⁰ relying on indicators identified above to conclude that the protector was intended to be a fiduciary.

In *Re VR Family Trust*,²¹ the Jersey Court started from the position that some of the powers of the protector would be fiduciary in nature. However, it had to address certain inconsistent language within the trust deed. One clause stated: ‘The trustee and the protector shall exercise the powers and discretions vested in them as they shall deem most expedient for the benefit of all or any of the persons actually

or prospectively interested under this settlement.’ Another clause stated: ‘For the avoidance of doubt it is hereby declared that no power is vested in the protector in a fiduciary capacity.’

The Jersey Court ruled that the earlier clause meant the protector’s powers were fiduciary in nature, and the latter clause only meant that, although the protector did not have an obligation to consider, from time to time, whether to exercise their powers, if they did, their powers had to be exercised in a fiduciary capacity.²²

CONCLUSION

In determining whether a protector has fiduciary duties, one’s ‘first port of call will always be the terms of the relevant trust instrument, the objects of the trust that can be gleaned from them and any relevant extrinsic evidence’.²³ This is because the primary consideration is the settlor’s intention, which is often derived from the construction of the trust deed. In addition to determining whether the protector is a fiduciary, it will also be helpful to determine the type of fiduciary role the protector has. As such, each trust must be considered based on its own facts and provisions, and this highlights the importance of settlors and their advisors actively turning their minds to the terms of the trust.

¹ Bahamas *Trustee Act* (1893), s.81 ² Cook Islands *International Trusts Amendment Act*, s.3(2) (1989) ³ Belize *Trusts Act*, ch.202, s.16(2)(a) (2000 rev. ed.) ⁴ Anguilla *Trusts Act*, ch.T70, s.15(2)(c) (2000 rev. ed.) ⁵ Nevis *International Exempt Trust Ordinance*, s.9(2) (1994) ⁶ British Virgin Islands *Trustee Ordinance*, s.86(2) (1961) ⁷ *Rawson Trust Co Ltd v Perlman* [1990] 1 Butterworths OCM 31, 50 ⁸ Belize (s.16(3) *Trusts Act* 1992), Cook Islands (s.20(3) *International Trusts Act* 1984) and Nevis (s.9(3) *International Exempt Trust (Amendment) Ordinance* 1995) ⁹ *Trusts Act* 1996, s.25(2)(a) ¹⁰ Matthew Conaglen and Elizabeth Weaver, ‘Protectors as Fiduciaries: Theory and Practice’, *Trusts & Trustees*, 18:1 (2012), p.3 ¹¹ *Trustee Act* 1998 (Bahamas), s.81(2) ¹² *International Trusts Act* 1984, ss.2(i) and 20(7) ¹³ *International Exempt Trust (Amendment) Ordinance* 1995, s.9(2)(a) ¹⁴ See above, note 10, p.4 ¹⁵ *Re Circle Trust* [2006] 9 ITEL 676 12 ¹⁶ See above, note 10, p.6 ¹⁷ *Rawson Trust Co Ltd v Perlman* (n. 8) 50-51 ¹⁸ [1993-95] Manx LR 426 ¹⁹ [2004] JRC 056, (2004) 6 ITEL 1078 ²⁰ *Re Bird Charitable Trust and Bird Purpose Trust* [2008] JRC 013 80-81 ²¹ [2009] JRC 109 ²² See above, note 10, p.16 ²³ *Kea Trust Company Ltd v Pugachev* [2015] NZHC 1960; [2015] NZHC 2218; [2015] NZHC 2412



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