COLLAS CRILL

Mind the gap: Why the wider role prevails for protectors

MARCH 2026

On 19 March 2026, the Judicial Committee of the Privy Council ('**JCPC**') delivered its judgment in A and Ors (Appellants) v C and others (Respondents) [2026] UKPC 11, overturning the findings of the Court of Appeal of Bermuda and holding that the trusts which were the subject of the appeal (the '**X Trusts**') had conferred the wider role upon the protectors of the trusts.

The decision – which has been eagerly anticipated by trust practitioners – confirmed that whether protectors should provide their consent to a proposed exercise of trustee powers, in the absence of express provisions in the trust instrument, are ***not*** restricted to conducting a narrow review of the rationality and legality of the trustee decision-making process.

What are the practical implications of this ruling and on whom?

Whilst the office of protector is relatively rare in onshore trusts, protector appointments have become common in recent decades following an increase in the establishment of offshore trusts and the consequential need to appoint offshore trustees.

The appointment of a protector by a settlor in offshore trusts, together with suitable protector provisions, provides a settlor with comfort that there would be a person (natural or legal) of trust who has knowledge and an understanding of the settlor's family, the settlor's wishes and their approach to family matters.

Where necessary, it ensures that such matters are taken into consideration when trustees are considering the exercise of powers, particularly in major proposals relating to the appointment or distribution of trust assets.

Offshore trusts are typically silent on the steps to be taken by a protector when it is required to provide its consent to a trustee proposal. The issue has not only generated significant academic debate, but has caused difficulties in practice.

Until recently there was little jurisprudence addressing the issue and more recently, the courts of Bermuda and Jersey have produced conflicting decisions on the scope (wide or narrow) of a protector's role.

The JCPC's decision resolves this area of uncertainty for trust practitioners, leading to significant public interest in the case.

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Key facts

In 2017, the trustees of the X Trusts produced proposals, valued at billions of pounds sterling, concerning the future of the trusts. Certain aspects of such proposals required protector consent.

After consultation, the Protectors – two Jersey companies – formed the view that the proposals did not serve the best interests of the beneficiaries, so their approval would be unlikely. The Protectors approached the question on the assumption that theirs was the wider role.

On 22 June 2020, the Bermuda-based Trustees applied to the Supreme Court of Bermuda for the Court's blessing of their preliminary proposals as being, in principle, a proper exercise of their powers and for the continued development of the proposals.

One branch of beneficiaries opposed the application, as did the Protectors, on the basis that since they were unlikely to consent to the Trustees' proposals, the time and expense of further work would be unjustified.

The Court made the orders sought by the Trustees on 23 October 2020.

On 20 January 2021, the Trustees applied to the Supreme Court of Bermuda for declarations as to the basis on which the Protectors were entitled to withhold their consent. In particular, on the basis of the proper interpretation of the relevant trust instruments, the Trustees sought a declaration as to whether the protectors had a narrow or wider role when it came to providing their consent to the trustees' proposals.

One branch of beneficiaries argued in favour of the narrow role, and the other branch in favour of the wider role. The Trustees and the Protectors took a neutral stance.

On 22 November 2021, Kawaley AJ in the Supreme Court of Bermuda declared that the Protectors had a narrow role.
In a judgment delivered on 23 February 2023, the Court of Appeal of Bermuda dismissed an appeal of the Supreme Court's decision, and affirmed the first instance decision that the narrow role applied to the Protectors.

In doing so, Gloster JA, who delivered the judgment of the Court of Appeal, declined to follow the judgment of the Royal Court of Jersey in *In the matter of Piedmont Trust & Riviera Trust* [2021] JRC 248 ('**Piedmont**'), which was delivered a short time after the first instance judgment of the Supreme Court.

In *Piedmont*, Sir Michael Birt directly addressed whether the protector in that case had a narrow or wider role. He held, declining to follow the judgment of the Supreme Court of Bermuda, that:

a. such role was '*not confined to assessing the rationality of a proposed decision on the part of the Trustees*'; and
b. the decision was a fiduciary one that should be made in good faith in the interests of the beneficiaries.

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Crucially, the relevant provisions in the trust deed in *Piedmont* were not materially different from the relevant provisions in the X Trusts deeds.

The JCPC characterised the issue '*as a binary choice between two different default roles for protectors appointed under the provisions of a trust instrument which did not spell out their role in express words.*' [1]

The Board took issue with that approach and said they considered the correct approach to be somewhat different:

'*Where (as here) the settlor has made provision for one or more persons (calling them protectors) to exercise precisely defined powers, including powers to approve or disapprove steps being proposed by the trustees in the appointment and administration of the trust property, but remained silent about how those powers should be exercised, the question is not which of the two roles was specified (Narrow or Wider) but rather: what if any constraints did the trust settlement actually impose, construed in its context and with regard to any constraints imposed by the general law?*'[2]

Applying an iterative process, the JCPC held that the proper construction of the trust instrument arose from consideration of the '*natural meaning of the words in the protector provisions (including the absence of words) against the wider consideration of the contextual background and against considerations of business efficacy and common sense, but always mindful of the limits of that process.*'

Where there was a gap in the drafting, before there is a rush to fill that gap with an implied term, the question must be asked whether the apparent gap is deliberate. The Board cited with approval the judgment in *Attorney General of Belize v Belize Telecom Ltd.* [2009] UKPC 10 which held: '*...If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed...*'[3]

The JCPC concluded that there was no reason to confine that principle to arms-length negotiated contracts, because the express words contain the whole of the terms which have been agreed. '*An apparent gap may equally deliberately be left in a trust deed where the settlor decided, after due consideration and advice, to leave a trustee or other fiduciary free to act without constraint, trusting more in the good sense of the fiduciaries rather than shackling them with a set of rules.*'[4]

Provisions

In the case of the X Trusts, the JCPC unanimously reached a view that there were no terms in the trust deeds, including in the protector provisions, which supported an interpretation in favour of the narrow role.

There were, it held, terms which provided significant support for the wider role, and identified the following three provisions:

1. First, a provision for the release or waiver of the protector powers. The JCPC noted: '*If the settlor had intended the Protectors to fulfil the narrow role and so have a fiduciary duty to check the legality of relevant*

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decisions of the Trustees, it is difficult to understand why he should have given them the power to abdicate that role, either generally or in relation to any particular matter. The Court of Appeal accepted Mr Green's [Counsel for the beneficiary branch supporting the narrow interpretation] submission that the Protectors are there to act as a watchdog or enforcer, but it is, to say the least, unusual to allow a watchdog or enforcer to stand down whenever it chooses to do so...'.[5]

Citing examples of cases where it might be appropriate to waive the requirement for consent, the JCPC said it was not persuaded and did not explain why, if the narrow role was intended, that the settlor would permit the protectors to abandon that role permanently.

2. Secondly, a provision that if there is more than one Protector, decisions of the joint Protectors must be unanimous, in the absence of which the Trustees are free to exercise the power without the Protectors' consent, but shall nevertheless consult with each Protector and take their views into account before making the final decision.

   The JCPC stated: '*...This makes sense if the Protectors have the wider role but it makes little sense if they have the narrow role. It would mean that although one Protector considered that the proposed exercise of a power by the Trustees was unlawful, the Trustees would nonetheless be free to proceed, having only taken into account the opposing views of the Protectors.*'[6]

3. Thirdly, the consent of the Protectors is required only for certain limited acts by the Trustees, including consent to the appointment of capital and consent to any dealing with 'Specified Securities' or any decision as regards the exercise of voting powers attached to the Specified Securities.

   In this regard, it was noted that *'[t]he matters requiring the Protectors' consent thus represents particularly important decisions by the Trustees. It is readily apparent why the Settlor might in those circumstances wish the Protectors to fulfil the wider role in the exercise of their power to give or withhold consent. What is not readily apparent is why, if the narrow role were intended, it should be restricted to those matters. If the narrow role were intended, it would more likely apply to a wider range of actions, or all actions, by the Trustees as any potential breach of trust is likely to be of concern to a settlor.*'[7]

But what if a veto leads to deadlock?

The Court of Appeal of Bermuda had concluded that the wider role was '*at best a recipe for wasteful duplication and at worst, an invitation for deadlock.*'

The risk of deadlock was, in part, why it had declined to follow *Piedmont*. In its view, the Royal Court of Jersey had been wrong to conclude that on the narrow role, protectors would serve little purpose. The judgment in *Piedmont* had placed insufficient weight on the wider role's potential to lead to deadlock.

The JCPC rejected the Bermuda Court of Appeal's concern and addressed the prospect of deadlock as follows:

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'There may be cases, and it appears that the present case is one, where common ground cannot be found. That, however, is not a reason for rejecting the wider role. Ultimately, the purpose of a protector with the wider role is to prevent a major transaction which the protector considers to be an inappropriate exercise of the trustees' powers. Necessarily, the possibility of deadlock is deliberately built into the structure but the Board repeats that it is the duty of both trustees and protectors to seek to find common ground.'

Whilst the JCPC decision provides certainty on the narrow vs wide role for protectors, as a matter of practicality the potential for deadlock remains a very real issue for trust practitioners and the parties they represent. It is easy to see that this may, in circumstances where there is a genuine deadlock, require intervention from the courts.

A genuine deadlock between trustees and protectors (adopting the wider view of the protector's role) will, by definition, only arise where both the trustees and the protector have both reached decisions that are within the envelope of what a responsible fiduciary, acting in good faith and properly instructed, could have arrived at (ie both decisions are capable of being 'blessed' by a court of competent jurisdiction).

It's difficult to see how fiduciaries in that position can (or should) be expected to abandon what is, by definition, their entirely reasonable and rational position and move towards the position of the other fiduciary, which they have presumably fully considered and rejected – simply in the spirit of compromise. Where a decision is urgent, particularly momentous or fraught with difficulty and litigation risk, it's difficult to see how a direction akin to 'go sort it out' is of very much use to either trustees or protectors in such circumstances.

What are the key takeaways from this case?

Settlor intention

Where the trust settlement does not contain express provisions constraining or dictating the exact nature of the role, it is likely that the settlor intended for and the protectors will have the wider role. This does not detract from the need for the language of each trust deed to be carefully reviewed for the natural meaning of its own words and for advice to protectors (or others with an interest) to be provided, taking into account the contextual background and the general law.

Mind (but don't fill) the gap

In the absence of express provisions as to how the protector should fulfil its role, it must be inferred that no further or narrow restraints were intended to be imposed. If this is seen as a gap, it must have been a deliberate gap and it does not need to be, nor can it usually be, filled by an implied term.

Default fiduciary role

Protectors appointed with the wider power to give consent to the trustee's exercise of certain powers with limited constraints will, by default, be fiduciaries when providing their consent or refusal, while other

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protectors may not be fiduciaries.

Look for common ground

Whilst the wider role gives protectors a veto power that could put certain trustee proposals on ice, it is incumbent on both the trustees and protectors to try to find common ground. As noted above however, as a matter of practicality, a genuine deadlock may be difficult to compromise and may require intervention from the courts.

How Collas Crill can help

Collas Crill represents beneficiaries, high-net-worth individuals, trustees, protectors and other power holders in a range of contentious and semi-contentious situations. Our lawyers have been at the forefront of the most complex, high-value private wealth litigation offshore.

Given the international nature of private wealth, with clients and their assets spread across the world, we work as a joined-up global team so that our clients can benefit from the knowledge and experience wherever they may need it.

With offices in Bermuda, the British Virgin Islands, Cayman Islands, Guernsey and Jersey, our contentious private wealth lawyers combine courtroom skill with discreet client care, advising on jurisdictional strategy, interim relief and complex equitable claims.

Our team is adept at dealing with novel points of law, creating new and innovative solutions to meet the needs of our clients.

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[1] At [82].

[2] At [82].

[3] At [74].

[4] At [81].

[5] At [104].

[6] At [105].

[7] At [107].

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