



TO PROTECT AND SERVE: UNDERSTANDING THE MERCURIAL ROLE OF A PROTECTOR

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The paradox of the protector is that the role is rather difficult to define and yet this frustration can enable a greater degree of flexibility for Jersey trusts. In 2008 the Royal Court ruled to include fiduciary powers in the role of a protector and in June 2009 ruled that a protector needs to carefully watch any conflict of interest arising from his fiduciary position, but this still leaves an interesting area of trust law that, when suitably utilised, can reap benefits for clients.

A mercurial definition

Articles 24(3) and 24(4) of the Trusts (Jersey) Law 1984 leave it to the trust draftsman to delineate the role of a protector. There is no statutory list of protector rights and powers and it is a matter to be decided by the settlor and the trustees when agreeing the terms of the trust for administration. To confuse matters further, while it is often the case that a single person is appointed as a protector, it is also possible for a committee of protectors to act together either by majority or unanimously when exercising their powers.

A position of trust

When establishing a trust, it can be a difficult concept to accept that the settlor may, for example, no longer own the shares in the business they have built up over the years. In this case, they may need assurance that their intentions when creating the trust will be honoured by the trustees. They might appoint themselves, a close trusted friend or even a professional advisor to maintain a watchful eye over the trustees because they wish to retain some degree of control of what are potentially unknown, and often distant, trustees as the legal title to their assets is being handed over. This third party, known as the protector, is bound by the details as outlined by the trust documents.

The powers and rights of a protector

A protector has negative and/or positive powers under the terms of the trust. Article 24(3) of the Trusts (Jersey) Law 1984 only deals with negative powers (i.e. situations where consent is required), and not positive powers (i.e. situations where specific powers are granted). This leaves a gap in terms of statutory guidance as to whether a protector can have positive powers. I would suggest that the trust document reflects the terms agreed between the parties and is flexible enough to allow for positive powers. There is little room for doubt that positive powers are allowed to be held by protectors, but the question arises as to whether those powers are fiduciary or not (see below).

Negative powers

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Negative powers are described as such simply because they prevent the trustees exercising their powers without the consent of the protector. These powers will normally have been drafted to be subject to the protector's consent. Consent is usually required either before or at the time of the trustees exercising their powers and/or discretions. Areas that require the protector's consent include:

- appointment of income and/or capital
- addition or exclusion of beneficiaries
- shortening the trust period and/or terminating the trust
- changing the proper law and/or forum of administration
- amending the terms of the trust

It is unwise for all (or a substantial number of the trustees' powers) to be subject to protector consent, particularly if the settlor is acting as protector, as it places a question over the independence of the trustees, their discretion and the integrity of the trust structure.

Positive powers

Positive powers are powers given to a protector under the terms of the trust which would normally reside with the trustees. The powers are called "positive" because they are unilateral actions taken by the protector and they are usually restricted to the appointment of a successor protector and/or the removal of and appointment of new and additional trustees.

Positive powers can affect the trust property directly (through the power to appoint capital). As the trust property is not vested in a protector (they are not a trustee), it is an implied consequence that once a positive power has been exercised, the trustees will follow the exercise of the protector's power in accordance with the terms of the trust.

In such circumstances, both a protector and trustees should consider protecting their positions. Standard trust documentation should contain exoneration provisions for both a protector and trustees. Additional indemnities can also be obtained.

Duties of protector: a fiduciary position?

There is no doubt that a protector with negative powers occupies a fiduciary position (*Sociedad Financiera Sofimeca v Kleinwort Benson (Jersey) Trustees Ltd* [1993]). Therefore a relationship of complete confidence between the protector and the beneficiaries must exist although legally speaking the protector will owe a duty of care towards the beneficiaries.

When a protector is exercising their negative powers and providing consent, they must consider whether the proposed exercise of the trustees' powers is in the best interests of the beneficiaries. This will present the protector with a difficult task if the proposal is in favour of one beneficiary when many beneficiaries (including unborn or unascertained beneficiaries) are discretionary objects of the trust. It also then stands to reason that a protector with positive powers also occupies a fiduciary position to beneficiaries. It would seem nonsensical to say that a protector with positive powers does not hold a fiduciary position where trustees holding the same power would be in a fiduciary position. Also positive powers, as opposed to negative powers, can impact more on the administration of a trust.

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A protector's duty before exercising his positive powers would be similar to that of a trustee and include, for example:

- a duty to consider from time to time whether to exercise the power;
- a duty to make a proper survey of the objects of the power;
- a duty to consider the appropriateness of any exercise of the power;
- not exercise his power for an improper purpose.

Relevant Case Law

The Royal Court of Jersey held that a protector is a fiduciary and because of this the Court must police his activities to protect the interests of beneficiaries to ensure the wishes of the settlor are respected as far as possible (*Mourant v Magnus* [2004]).

Therefore the Royal Court claims jurisdiction over protectors, but also suggests that all protectors are in a fiduciary position. In this case it was essential for the Royal Court to define the protector as a fiduciary to exercise its inherent power to remove, what was alleged to be, an unsuitable person from being protector. It was not specifically submitted to the Court whether all protectors were fiduciaries and therefore this case cannot be an absolute authority as to whether or not a protector having positive powers also holds a fiduciary position.

In the matter of the Bird Charitable Trust and The Bird Purpose Trust [2008] the Royal Court confirmed its judicial supervisory jurisdiction over protectors and also considered whether a protector's positive power to appoint successor protectors is a fiduciary power. Whilst ultimately the Court noted that such a question was one of construction of the particular trust document, the Court considered that it must consider the overall role of the protector and, if his role is fiduciary, it is more likely that the power is also fiduciary.

In this instance, the Court noted (i) that there were a number of provisions of the trust document which supported the protector being a fiduciary and (ii) if the protector did not exercise the power, then it fell to the trustees in whose hands it would be a fiduciary power. Therefore the Court

surmised it would be illogical for the power of appointment of new protector to be personal when made by a protector, yet fiduciary when made by trustees. Therefore the Royal Court found a protector having a positive power to be fiduciary, but such position was dependant upon construction of the trust's terms.

Furthermore a protector also needs to carefully watch any conflict of interest arising from his fiduciary position. In the matter of the representation of Centre Trustees (C.I.) Limited [2009] the Royal Court confirmed that when a conflict first comes to light, a protector should disclose the same to the trustee and to the beneficiaries. How the conflict is managed will then depend upon the protector's powers, the nature of the conflict and how pervasive its effect.

A protector may be able to remain in office if that is in the interests of the beneficiaries and if the protector honestly and reasonably believes that he can discharge his duties in the interests of the beneficiaries. If so he must, like trustees in a position of conflict, run the risk of having to justify the exercise of his powers in hostile litigation and satisfying a Court that any decision taken was not influenced by the conflict. However, if he cannot do this, his duty is to resign and if he fails to do so it is the duty of the trustee to apply to Court for

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his removal.

Access to trust information and remuneration

From a practical point of view, the settlor should ensure that the terms of the trust allow for the protector to have access, as required, to trust information in order to allow them to exercise their fiduciary positions fully and effectively. This is often overlooked in trust drafting as standard trust documentation restricts access to trust information (outside of the trustees) either in accordance with the Trusts (Jersey) Law 1984 and/or the judgment of *re Rabiotti 1989 Settlement* [2000]. Yet if a protector has restricted access to trust information, how can they successfully fulfil their duties? Access to information and confidentiality must be balanced and a confidentiality agreement is the answer.

The Trusts (Jersey) Law 1984 is silent on whether protectors can be remunerated for their services and reimbursed for their proper expenses. Historically persons occupying a fiduciary position have not been paid for their services and statutory intervention has been required in order to allow for remuneration of trustees. However, it is now common practice for trust documentation to make similar provisions to those of trustees in respect of remuneration and expenses.

Summary

The particular role of a protector is dependant upon trust documentation. It is essential that trustees and the protector are fully acquainted with the terms of the trust and any powers that are expressed in the name of the protector. Otherwise the trustees operate the risk of exercising powers without consent or which belong to the protector.

In most instances, a protector will be a fiduciary with negative powers of consent who owes the beneficiaries a duty of care. Being a protector is an important role and it must be carried out by a trustworthy person. It is important to realise that a protector might need to make decisions, which require commercial awareness and/or expertise so it is prudent for settlors to either appoint a professional advisor to the role of protector or appoint a committee of protectors so that decisions can be reached together.

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