What is a Protector?

Protectors are a common feature of discretionary trusts settled under Jersey law, however, until recently there was very limited local jurisprudence addressing the nature and performance of their powers and duties.

Interestingly, there is no statutory definition of the word 'Protector' under the laws of Jersey, with the same position sometimes been described as an 'adviser', 'appointed person', 'appointor', 'supervisor' or 'guardian'.

A protector is a person who is not a trustee but who is given powers under a trust. The role of a protector is usually considered to be to monitor, oversee or control the administration of the trust by the trustees.

There is no legal requirement to appoint a protector when creating a trust, and indeed many trusts do not have protectors.

Typically, a protector might be appointed because the settlor: (i) wants someone to monitor the activities of the trustee; (ii) the settlor wishes to involve someone in the management of the trust who has special understanding of the dynamics of the trust, relating to the beneficiaries and/or the trust assets; or (iii) indeed sometimes the settlor wishes to retain a degree of influence over the trust initially or during his or her lifetime, typically by taking the role of the first protector himself.

Who can be a protector?

Subject to the trust instrument, the protector can be any person(s) or entities, but should not also be a trustee. It is possible for the settlor to reserve this power for himself/herself, or a beneficiary can be appointed, but more often than not it tends to be a trusted friend or professional who would be more likely to act impartially in the event of a family dispute.

What powers should a protector have?

A protector's powers are primarily derived from the trust instrument itself and there is no statutory list under Jersey law that automatically provides them.

Much will depend on the settlor's views and the trust instrument can confer a wide variety of powers or functions on the protector.

The power most commonly given to a protector is the power to appoint and remove the trustees of the trust. In addition, it is common to provide that the trustees must obtain the protector's consent (usually in advance and in writing) before they exercise certain powers, for example, their powers to add or remove beneficiaries, make distributions of capital, amend the terms of the trust or make certain investment decisions (e.g. dispose of shares in a family company or a particular asset or borrow or lend).

A person's appointment as protector will normally give rise to a fiduciary relationship, meaning that he or she will owe a duty of care to the beneficiaries. Whenever the protector's involvement is required, he or she must consider what course of action is in their best interests and the courts have the right to remove

any protector who is not complying with them.

Protector's entitlement of information

The question of what information and documentation a protector is entitled to, was recently examined in the case of Piedmont Trust & the Riviera Trust [2021] JRC 248.

In this case, the Royal Court found that the position described in Ogier Trustee (Jersey) Limited v CI Law Trustees Limited [2006] JRC 158 in relation to incoming trustees was in principle equally applicable to protectors. Importantly it held that a protector who has fiduciary powers should in principle, as an incident of those powers, prima facie be entitled to seek information and access to documents which are reasonably incidental to the exercise of his functions and to be given such information and access unless and to the extent that disclosure is contrary to the interests of the beneficiaries as a whole.

Although the type of documents and information which a protector might reasonably be entitled to may vary from case to case, we would expect it to include a copy of the trust instrument, any ancillary instruments relating to the Trust and any letters of wishes. The protector might also reasonably require trust accounts and even correspondence and minutes of the meetings of outgoing protectors and correspondence and minutes of trustee meetings where those discussions might impact on how the protector exercises its power.

Appointment of Protectors

The Jersey Trust law is silent in relation to the appointment or removal of protectors and in cases where there is a protector it is common for the name of the first protector appointed to be recorded in the trust instrument or in a separate instrument of appointment. The trust instrument may also specify who is to be successor (if any) of the original protector, together the circumstances in which the successor protector will take over from the original protector.

In the case of Mazzoleni v Summerhill Trust Company, 2021/03 2DS, the power of the Trustee to appoint a protector was carefully considered. In this case, the court held that whilst the power appeared to be a mere discretionary power (the Trust Instrument stated the trustee 'may' appoint a protector), it went on to emphasise the importance of making a reasonable decision within the context of the surrounding circumstances, and the court examined the factors which the trustee should have taken into account in deciding how to exercise its power to appoint a protector.

In this case, the court concluded that in the context of the Trust the proper way to construe the power in question was to acknowledge that while the power to appoint a new protector was not an imperative power, there should nonetheless be a substantial and proper reason for not appointing a protector if that is the issue in question.

Nature of protector's powers

Two important cases have recently considered what role a protector plays where a power vested in trustees can only be exercised with the consent of the protector, these being In the matter of the X Trusts

[2021] SC (Bva) 72 Civ (Supreme Court of Bermuda) and in the matter of the Piedmont Trust & the Riviera Trust [2021] JRC 248 (Royal Court of Jersey).

Interestingly, the two cases set out opposing views, with the only material difference between the facts of the two cases being that in the matter of the Piedmont Trust & the Riviera Trust the trusts in question provide for an indemnity for the protector.

The Narrow View

In the matter of the X Trusts under what has been described as the Narrow View, the court held that the protector's role is limited to asking whether the relevant decision of the trustees is one which a trustee could reasonably arrive at, In other words, if the trustees' decision is within their powers and is rational, the protector has no choice but to consent.

In this case, the court further found that unless a contrary meaning can legitimately be discerned in the instrument conferring the relevant consent powers, the usual role of a protector is not to exercise a power jointly with the trustee in relation to the matter requiring protector consent. In other words, the protector's role is essentially one of review and being more akin to that of a "watchdog" to ensure due execution by the trustee of the powers vested in the trustee.

The Wider View

On the other hand, in the case of Piedmont Trust & the Riviera Trust the court supported the Wider View and held that the protector is entitled to exercise an independent discretion in deciding whether or not to consent, with the result that the protector is able to withhold consent to the proposed exercise of the trustees' power even if the proposed exercise of that power is one which a reasonable body of properly informed trustees could take.

In this case, the Royal Court found that "the paramount duty of a protector is to act in good faith in the best interests of the beneficiaries. In pursuance of this duty, as in the case of trustees, he must have regard to relevant considerations, ignore irrelevant considerations and make a decision which a reasonable protector could arrive at, but he must reach his own decision."

Although in this case, the Royal Court considered the judgment in the matter of the X Trusts, it rejected the Narrow View, submitting that, "if the role of a protector was simply to review the trustee's decision in the same way that the court would do, his role would be almost redundant, he would bring nothing to the table that the court itself would not bring on a blessing application."

Rather, the court found that, in practice, a protector is chosen because they have personal knowledge and understanding of the settlor, their wishes, and the family's circumstances and the settlor must be taken to have intended that the protector should exercise their own independent judgement in exercising their powers.

The only previous case that had specifically considered this issue was the case of PTNZ v AS [2020] WTLR 1423, which had also preferred the Wider View and found that the protector's powers of consent were

independent of the powers of the trustees and were to be exercised by the protector on the basis of their own discretion.

In the Jersey court's view, taking the Wider View did not allow the protector to substitute their own view for that of the trustees, but neither was the protector confirmed to a simple yes or no in response to a request for consent. In other words, the protector and the trustees should work together in the interest of the beneficiaries and it was reasonable for the protector to discuss proposals with trustees, explain any concerns they may have and even suggest modifications.

Conclusion

The Jersey case of Piedmont Trust & the Riviera Trust provides some welcome clarification, specifically in relation to protector's duties and the information and documentation that should be provided to them.

However, in light of the conflicting authority from the Supreme Court of Bermuda, the debate between the Wider View and the Narrow View will undoubtedly rumble on and it is likely that any court will look to construe the consent powers in the light of the wider protector provisions, the trust terms as a whole and the intentions of the settlor.

Therefore, in drafting a new trust, or where protector provisions are being introduced into an existing trust or existing protector provisions amended, we would recommend that these alternative views as to the status of protector consent powers are considered to ensure the drafting reflects the intentions of the relevant parties. The terms of any exoneration, indemnity or other clause in the trust instrument that relates to the protector's position would also need to be considered.

Any letter of wishes could also be tailored to set out the type of protector the settlor wishes to appoint. For example, in cases where the primary asset of the trust is the principal beneficiaries' family business, the settlor may wish to appoint a protector who has specific in-depth knowledge of the business in question and understands the family dynamics involved, which the trustee may not necessarily possess.

Alternatively, where the trust comprises of a portfolio of high-value investments, it may be the settlor's preference to appoint a long-standing professional advisor to the settlor with specialised investment knowledge who can monitor the appointment and performance of the investment advisors.

Expanding upon the letter of wishes to providing information as to the type of protector that the settlor wishes to appoint would therefore assist in conveying useful guidance to enable the trustee to understand the intentions and views of the settlor regarding the role of the
protector of the trust.

For further information or specific advice, please contact Daniel Walker.

This note is intended to provide a brief rather than a comprehensive guide to the subject under consideration. It does not purport to give legal or financial advice that may be acted or relied upon. Specific professional advice should always be taken in respect of any individual matter.