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UPDATE

The role of the protector with the power to veto

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For the first time in the Channel Island jurisprudence, the Courts have considered the role of a protector whose consent is required by a trust instrument for a transaction and the documents and information the protector is entitled to be provided with by the trustee.

Because there is limited judicial authority as to the nature and scope of protectors' powers in the Channel Islands and beyond, the decision is important for the wider international trust community.

The role of the protector

One of the key issues in the case of *In the matter of the Piedmont Trust and the Riviera Trust* [2021] JRC 248 was the extent of the protector's role when decisions of the trustees were subject to the veto of the protector (i.e. only exercisable with the protector's consent). Was the protector's role limited to exercising a review function, in the same manner as the Court does on a blessing application, or could the protector reach its own decision?

The Royal Court of Jersey rejected the argument that the protector fulfils a review function only. The paramount duty of a protector was to act in good faith in the best interests of the beneficiaries. In pursuance of this duty, as in the case of trustees, the protector must have regard to relevant considerations, ignore irrelevant considerations and make a decision which a reasonable protector could arrive at. However, they must reach their own decision.

One of the reasons the Court exercises a limited review function on a blessing application is that a settlor does not choose the Court as a trustee; the settlor chooses their appointed trustee. It is that trustee upon whom the various discretions conferred by the trust deed have been conferred. If the Court were to exercise a wide-ranging role on such applications and decide the matter entirely for itself, the effect would be to constitute the Court as trustee. That is not the Court's role. The Court's role is a supervisory one and to ensure that decisions taken by trustees are reasonable and lawful. Accordingly, the Court does not substitute its own discretion for that of the trustee.

A protector is in a different position to the Court. The settlor has decided that a protector (often the settlor themselves or a longstanding friend or adviser whose judgement the settlor trusts) should be appointed pursuant to the trust deed and has specified those matters where the protector's consent is required. The settlor must be taken in those circumstances to have intended that the protector should exercise their own judgement in exercising those powers. It follows that, depending on the circumstances, a protector may well be entitled to veto a decision of a trustee which is, of itself, rational, in the sense that the Court would bless it.

Interestingly, the Court considered the very recent decision of the Supreme Court of Bermuda in the case of *Re The X Trusts* [2021] SC (Bva) 72 Civ – which reached the opposite conclusion – but declined to follow it. The decision was not, of course, binding on the Jersey Royal Court, but, merely persuasive.

Guidance for the protector from the Court

The Royal Court found that, in the context of a requirement for protector consent in the case of a distribution, a protector's discretion lay within a narrower compass than that of a trustee. The protector is not the trustee. It is for the trustee to make a decision and it is not the duty of the protector to take that decision itself or to force the trustee into making the decision which the protector would make if it were the trustee. That would be to exceed their proper role and to use the power given to it otherwise than for its intended purpose.

A protector may often find that it should consent to a discretionary decision of a trustee on the basis that the decision is for the benefit of one or more of the beneficiaries even though, if the protector had been the trustee, it might have made a different decision which they thought to be even more beneficial. There should be a full and open discussion between trustee and protector, with a view to finding something upon which they can both agree. A protector is not confined to a simple yes or no to a request for consent. A protector and a trustee should work together in the interests of the beneficiaries. It was therefore perfectly reasonable for a protector to explain its concerns about a particular proposal by a trustee and the trustee might often be willing to modify their proposal to take account of these concerns or the protector might be satisfied after the trustee had explained their thinking. It was open also to a protector to agree to a proposal quite different from a proposal put forward by the protector. This evidenced that the protector was not seeking to dictate to the trustee (see generally paragraphs 87 – 95 of the judgment).

Protector's entitlement to information and documents

Whilst considering whether to consent to the trustees' decision, the protector had requested a detailed explanation of the trustees' reasons for their decision, which the trustees did not initially provide. This raised the question of what information and documentation ought trustees supply to a protector.

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.

A protector owed fiduciary duties to the beneficiaries and in order to fulfil those duties, they must have access to such documents and information as were reasonably necessary for them to do so. To the extent that it is the trustees who were in possession of such information and documents, it was their duty to supply them to the protector and such duty might be enforced by the Court on the application of the protector.

What documents and information might be reasonably necessary would vary from case to case, but a good starting point was a copy of the trust instrument; any ancillary instruments modifying the beneficial interests or the terms of the trusts; deeds of appointment, removal or retirement of trustees and protectors; and any letters of wishes addressed to the protector or the trustees. The protector might also require trust accounts and documents relating to the investment of trust assets; correspondence and minutes of the meetings of outgoing protectors; correspondence and minutes of trustee meetings; and documents revealing the deliberation of former protectors and/or trustees where those discussions might impact on how the protector exercises its power.

Whilst trustees were in general not obliged to supply their reasons for a discretionary decision to a beneficiary, the positions of a beneficiary and a protector holding a fiduciary position were completely different.

Conclusion

The case provides some welcome clarification with regards to protectors' duties and the information and documents that should be provided to them. Although the Royal Court decision concerned Jersey law, we fully expect that Guernsey would follow Jersey, given the similarities between their respective trusts laws and the close connections between the trust industries in the two jurisdictions. The judgment was also given by Sir Michael Birt, former Bailiff of Jersey and a former member of the Court of Appeal of Guernsey and current member of the Cayman Court of Appeal and highly respected.

However, whilst there is conflicting authority from the Supreme Court of Bermuda, protectors and other professionals should exercise caution in this area.

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