

# The Role of a Protector in a Trust

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## Summary

The powers conferred on a trustee may, under the terms of the trust, be subject to fiduciary or personal powers vested in another person, often called a 'protector'.

The role of a protector is not defined by statute<sup>1</sup> or case law, and can be as limited or as wide as a settlor wants it to be.

A protector is generally appointed to oversee the trustee's actions, and to consider whether or not those actions are in the best interests of the beneficiaries. It has been suggested that 'the essential role of a protector is to ensure that both the letter and the spirit of the trust are complied with'.<sup>2</sup>

When determining whether to appoint a protector and, if so, what powers should be conferred on that protector, it is necessary to obtain advice to ensure that the appointment will not adversely impact the tax treatment of the proposed structure or create problematic reporting or disclosure obligations. Consideration should also be given to the regulatory requirements, as acting as a protector requires a licence in some jurisdictions.

## Who may be appointed?

The settlor may select any person (including a company or foundation) to be a protector of the trust (if appointing a protector at the outset). Alternatively, the settlor may, under the terms of the trust, give someone else (or themselves) a power to select a protector at some later date.

A protector may be a professional or a layperson, including a beneficiary, settlor, committee of individuals or others. A protector should be selected with care; they should be trustworthy, with the necessary expertise to perform the role.

## Powers

A protector's powers may be dispositive (e.g. a power to appoint capital to a beneficiary) and/ or administrative (e.g. a power to agree trustee fees).

The protector's powers may be negative powers (i.e. a power to veto something the trustee proposes to do), positive powers (e.g. a power to appoint and remove trustees) or a combination of the two.

Where a protector has veto powers, there is Jersey law to the effect that the protector's role is wider than merely a review function: the protector has to reach their own decision.<sup>3</sup> At the time of writing, there were different approaches in different jurisdictions and the matter is not definitively settled. The position would

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<sup>1</sup> Although protectors are recognised by statute in the BVI: s.86 Trustee Act 1961 (as amended).

<sup>2</sup> *Steele v Paz* [1993-5] MLR 102.

<sup>3</sup> *Piedmont Trust and the Riviera Trust* [2021] JRC 248.

be subject to the terms of the trust and therefore it is recommended that the trust instrument set out clearly the extent of the trustee's role in relation to the exercise of her powers.

A settlor often chooses to give a protector powers in relation to the trust because a protector may have a detailed personal knowledge of the beneficiaries or the family business (for example, if the protector is a family member, close contact or trusted advisor). It can be reassuring for the settlor that another person is duty bound to take their wishes into account.

The protector may be granted any number of powers, with the following being common powers granted to protectors:

- power to veto distributions;
- power to add / remove trustees;
- power to add / remove beneficiaries;
- power to veto an amendment to the terms of the trust;
- power to approve trustee remuneration; and
- power to make / approve investments.

It is common to give a protector wide information rights in relation to the trust, so that the protector can properly oversee matters.

If the protector intends to charge a fee for their services, a specific charging clause will need to be included in the trust instrument.

### **Duties of a protector**

A protector must comply with the express terms of the power. They cannot act outside of their powers; if they do, the action will be void.

Powers conferred on a protector can be either fiduciary or personal. The trust instrument should expressly state whether a power is intended to be fiduciary or not. A personal power may be unlimited (in which case it is also known as a beneficial power) or limited.

If a power is fiduciary, the protector must, subject to the terms of the trust, consider periodically whether to exercise the power, and must do so honestly and in the best interests of the beneficiaries. If they do not, the protector is in breach of fiduciary duty.

If a power is non-fiduciary (i.e. personal), the protector does not have to periodically consider exercising the power. If it is an unlimited personal (or beneficial) power and they do decide to exercise the power, they may do so in any way they want, without regard for the interests of the beneficiaries. If it is a limited personal power, it will typically only be exercisable in good faith in the interests of the beneficiaries.

It would be unusual for a protector's powers to be beneficial unless the protector is also the settlor, although powers may occasionally be given to a beneficiary for their own benefit. In those circumstances, the powers would generally switch from being beneficial to fiduciary upon someone other than the settlor being appointed as protector.

The duties of the protector must be considered in relation to each power-holder and each specific power. A court will look at the nature of the power and its intended purpose.

### **Conclusion**

The specific role of a protector in relation to a particular trust very much depends upon the terms of the trust instrument. Appointing a protector can be a mutually useful arrangement, providing comfort to a settlor that the trustee will act in accordance with the best interests of the beneficiaries, whilst at the same time providing insight and assistance to the trustee in administering the trust.

### **Contacts**

A full list of contacts in our International Trusts & Private Client team who specialise in this area can be found [here](#).

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. You can find out more about us, and access our legal and regulatory notices at [mourant.com](https://www.mourant.com). © 2024 MOURANT ALL RIGHTS RESERVED