

Reserving powers under Guernsey Trusts Law

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For some time now it has been common for settlors to choose to reserve to either themselves or to others certain powers under the terms of a trust. This is primarily as a check and balance or means of supervising the actions of the trustees. Such a reservation of powers is expressly permitted under Guernsey trusts legislation.

The person to whom powers have been reserved are often referred to as a **protector** or **appointor** or **power holder**, although none of these terms are used or defined in Guernsey trusts legislation. The term "protector" is most common and so we will use this term throughout this briefing.

| Guernsey Trusts Law position

Pursuant to section 15 of the Trusts (Guernsey) Law, 2007 (the **Law**), a settlor can reserve to themselves or to any other person certain powers, including:

- to revoke or amend the terms of the trust
- to give directions to a trustee in connection with investments or the management of trust assets
- to restrict the exercise of any function by a trustee by requiring that it may only be exercised with the consent of the settlor or other person identified in the terms of the trust

This provision is not seen in all trust jurisdictions and was a modern inclusion in the Law.

It will be for the settlor to decide what powers are to be reserved and in what manner. This will need to be expressly set out in the terms of the trust instrument.

| How powers are reserved

In practice, powers are reserved in one or more of the following ways:

- the protector has the power themselves to take an action, for example, a positive power
- the protector's consent must be obtained for the trustee to take an action, for example, a veto power or negative power
- the protector has the power to direct the trustee to take an action

In our experience, the majority of powers reserved tend to be veto powers. However, some powers, such as the power to appoint trustees (with or without cause) or protectors, are commonly reserved to a protector.

If powers are reserved, care must be taken to ensure the correct person exercises these and the corresponding actions. For example, if the protector's consent is needed for a trustee to take an action and it is not obtained, the action taken will be in breach of trust and open to challenge. The action is ineffective, despite the trustee having the authority to conduct it, as consent was not received.

What powers should be reserved

As above, the scope of powers that can be reserved to a protector are wide. However, when considering the reservation of powers, we advise professional advice be taken to ensure the scope of the powers reserved and the persons to whom the powers are granted do not cause any unintended consequences.

Care is needed when deciding what powers should be reserved to a protector to ensure the powers provided do not:

- risk the protector being seen as a quasi trustee if their powers are extensive
- risk the trustee's powers being diluted to the extent that the intention to create a trust is open to challenge
- lead to the trust provisions being administratively unworkable
- lead to day to day difficulties with the administration of the trust from the trustee's perspective
- lead to unintended tax consequences depending on what powers are reserved and to who

For example, if extensive powers are reserved to a protector in a particular jurisdiction, there is a risk that the protector will be treated as a quasi trustee and because of their residence, the trust could be treated as resident in that jurisdiction which may have adverse tax consequences.

A protector can be very valuable in assisting with the administration of a trust, however, its

value will always depend on the choice of protector and the clarity of the protector provisions in the trust instrument.

What duties are there on the power holder

Depending on the powers that are reserved, some of the powers could be of a fiduciary nature and not just personal to the protector. This will be the case either because of the nature of the powers that are reserved or because of an express statement in the trust instrument.

If any of the powers or the collective measure of all the powers are such that the protector has fiduciary duties, then they can only exercise their powers (whether positive, negative or direction) in the best interests of the beneficiaries of the trust and not in their own personal interest. A protector must stay informed of matters which may require their involvement and should periodically consider whether or not they need to take action where they hold a positive or direction power.

Their powers cannot be exercised in bad faith or vexatiously and must be exercised in a reasonable manner in line with the intention behind the reservation of the power.

The importance of understanding the nature of the powers held and how they should be appropriately exercised were key factors in the Guernsey case of *Re K Trust*. For more information, read our briefing: [The development of the use and role of protectors in Guernsey trusts law](#)

Multiple protectors

We have seen a growth in the desire to have more than one protector (often referred to as a committee or board). There is no restriction under Guernsey law from having a protector committee or board. However, it is very important that the terms of the trust cover all necessary provisions relating to how multiple protectors act together.

These provisions include:

- voting
- communications with the trustee
- the composition of the committee or board
- changes to the composition of the committee or board

Assets and underlying companies

It is not uncommon for there to be certain reserved powers in relation to trust assets, including any underlying company held in the trust, for example:

- power to direct voting of the shares of underlying companies
- acting as investment adviser or manager (with a power of attorney)
- acting as a director of any underlying company

In such cases, from the trustee's perspective it will be important for the trustee to expressly limit its duties and liabilities in relation to the management of assets and underlying companies.

In relation to underlying companies, robust anti-Bartlett provisions should be included which can limit the trustee's duty to enquire into or supervise the conduct of a company or its directors, unless there are known circumstances that would call for an enquiry. Such clauses would need to be contained within the trust instrument to be effective.

Why reserve powers

Reserving power to someone other than a trustee is a useful structuring tool that can allow a settlor to continue to manage the investment of funds held in the trust, in a way that does not invalidate the trust structure itself. This allows for a trust to hold riskier asset classes because the range of investments which an investment advisor can be permitted to pursue is broader than those which the trustee could permissibly choose for itself, bearing in mind the trustee's duties to the beneficiaries.

Reserved powers can also be very helpful from the trustee's perspective, because they enable a trustee to reduce their fiduciary risk in managing the investments of the trust fund, provided the above points regarding assets and underlying companies are properly addressed.

Reserved powers trusts appeal to a broader range of clients than a standard discretionary trust where the trust property is often managed by a third party investment manager appointed by the trustee. A closer relationship to the management of the trust assets can give a settlor greater power to determine how their bounty is invested.

Practical considerations

In considering or discussing with a settlor whether reserved powers are appropriate, practical considerations include:

- who will be protector? – Where are they based? How old are they? What experience do they have? What knowledge do they have of the settlor and beneficiaries?
- is one protector enough or should there be multiple?

- if there will be multiple trustees how are they expected to work together?
- who can be a successor protector?
- will there be any unnecessary delays caused by the need to contact a protector?
- will they be paid?
- what standard of liability should there be on the protector?
- what tax implications or filing implications might there be in relation to a protector?

Conclusion

In summary, the appointment of a protector and inclusion of reserved power provisions in a trust instrument can allow for a greater range of persons with different skill sets, experience and knowledge to "watch over" the trustees and provide for a more balanced decision making process. The role of the protector is to monitor the actions of a trustee and check that appropriate actions are being taken thereby protecting the interests of the beneficiaries.

Given the importance of this role, choosing the appropriate protector is vital, as is careful drafting of the reserved powers provisions, including the type of powers reserved and how many powers are reserved.

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