

Offshore protectors: Bermuda or Jersey?

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Summary

Protectors are common features of discretionary trusts settled under Cayman Islands law, however there is very limited local jurisprudence addressing the nature and performance of their powers and duties.

On 7 September 2021 the Supreme Court of Bermuda handed down an important judgment in *Re the X Trusts* [2021] SC (Bda) 72 Civ considering the nature of protector powers of consent in the context of offshore pension trusts.

On 5 October 2021 the Royal Court of Jersey handed down an equally important judgment in *Re Piedmont and Riviera Trust* [2021] JRC 248 which also considered the nature of protector powers in the context of an application by the trustees of two trusts to approve their decision to appoint trust assets to the beneficiaries in prescribed proportions. This article explores both judgments' impact as a matter of Cayman Islands law.

Re the X Trusts: the background

The judgment forms a landmark in wider trust proceedings being heard before the Supreme Court of Bermuda. The key issue for determination concerned the role and powers of trust protectors in the context of an offshore pension trust where, as is often also the case in offshore discretionary trusts, the trustees could only exercise certain powers with the prior or simultaneous written consent of the protectors.

The parties to proceedings fell into two camps arguing for different analyses of the protectors' roles which in turn impacted upon their exercise of powers:

Under what was described as 'the Narrow View' the protectors' role would be "to satisfy themselves that the proposed exercise of a power by the Trustees of the X Trusts (or any of them) is an exercise which a reasonable body of properly informed trustees is entitled to take and, if so satisfied, to consent to the same", a similar test applied by the court in blessing

applications under the category (2) *Public Trustee v Cooper* jurisdiction.

Under what was described as 'the Wider View' the protectors' role would be "to exercise an independent discretion as to whether or not to give consent to a proposed exercise of power by the Plaintiffs (as trustees of the X Trusts) (or any of them) which requires the protectors' consent, taking into account relevant considerations and disregarding irrelevant considerations so that the protectors might withhold their consent to a proposed exercise of power by the [Trustees] even if the proposed exercise of power was an exercise of power which a reasonable body of properly informed trustees was entitled to decide upon (the latter being a relevant factor, but not the only relevant factor, for the protectors to take into account)" (similar to category (3) of the *Public Trustee v Cooper* jurisdiction)

Re the X Trusts: the decision

Ultimately Kawaley, AJ (who also sits as a judge in the Grand Court of the Cayman Islands) favoured the Narrower View and the Supreme Court of Bermuda 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. The protector's role is to be a "watchdog" to ensure due execution by the trustee of the powers vested in the trustee."

Re Piedmont & Riviera Trust: the background

The judgment similarly forms a landmark in wider trust proceedings heard by the Royal Court of Jersey as well as satellite proceedings addressing issues relating to the trusts in the courts of Vermont and New York. The Royal Court of Jersey's 2015 judgment (*Re: Jasmine Trustees Limited* [2015] JRC 196) is particularly noteworthy on the issue of trust protectors; the court found, after considerable investigation into an exercise of appointment of protectors, that the appointments "fall outside the band within which reasonable disagreement is possible and are irrational" and the appointments were declared invalid.

One of the key issues for determination in the present proceedings concerned the nature of the protectors' powers of consent. The arguments before the Royal Court were similar to those before the Supreme Court of Bermuda:

The Adult Grandchildren contended that the protectors' power of veto required an exercise of duty "to ask whether the decision of the trustees to which he is being asked to consent is one which a trustee could reasonably arrive at, whether or not it is a decision the protector himself would have made" similar to the Narrower View' (or category (2) of the *Public Trustee v Cooper* jurisdiction).

The Protector contended that its power of veto meant that it "must reach its own decision in good faith in the interests of the beneficiaries. It was not confined to assessing the rationality or

lawfulness of a proposed decision on the part of the Trustees", similar to the 'Wider View' (or category (3) of the *Public Trustee v Cooper* jurisdiction).

Re Piedmont & Riviera Trust: the decision

Ultimately Commissioner Sir Michael Birt (who also sits as a judge on the Court of Appeal of the Cayman Islands) rejected the Adult Grandchildren's submissions outright and favoured the position adopted by the Protector's advocate, that the protector's power of consent requires an exercise of discretion to reach his "own judgment in exercising those powers" which aligned with the 'Wider View' in *Re the X Trusts*.

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".

In a postscript to the judgment the Royal Court considered the impact of *Re the X Trusts* on its judgment. The Royal Court disagreed that protector powers of consent were limited to "an assessment of rationality" and stood by its decision despite Kawaley J benefitting from more detailed argument on the issue and the similarity between protector powers in both sets of proceedings preventing differentiation on the facts.

The Royal Court provided detailed reasons for its dissent to the decision in *Re the X Trusts*. Of particular note is the emphasis that the Royal Court placed on the purpose and identity of protectors in offshore trusts, which are often a means for a settlor to appoint himself or a trusted advisor to "impose some check on the exercise of the trustee's powers".

Conclusion

While both courts made fundamentally differing determinations as to the nature of protector powers of consent, they both agreed that there is a lack of judicial guidance on the nature of protector powers generally.

In usual circumstances the Grand Court of the Cayman Islands will find commonwealth authorities highly persuasive in the absence of local jurisprudence addressing a particular issue. However given the divergent approach taken by the Supreme Court of Bermuda and the Royal Court of Jersey it is very difficult to predict which authority the Grand Court will favour.

There is a current trend for cases considering protector powers, and as recently as 14 October 2021 the Grand Court considered the nature of protector powers of appointment - see *In Re ST Limited* (Cause No: FSD 50 of 2021); it will probably not be long until the Grand Court carries out its own determination as to protector powers of consent.

In the meantime, Trust practitioners must carefully consider whether new or existing trust

structures under their watch are drafted in clear terms so that trust powers, including protector powers of consent, achieve their desired intention. Ogier's multi-disciplinary Trust Advisory Group is on hand to advise on the nature and effect of powers given judicial uncertainty as to their effect.

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