



Important Bermuda decision concerning the removal of a Trust Protector

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In the matters of *FA Trust and FB Trust* [2021] SC (Bda) 59 Civ (6 January 2021), the Chief Justice of Bermuda has handed down an important decision dealing with the legal test the Bermuda court will apply when considering the exercise of its inherent jurisdiction to remove a protector of a Bermuda trust.

The case concerns two materially identical Bermuda trusts created by Declarations of Trust dated January 2000 (**Trusts**). The Trusts share a common trustee (**Trustee**) and the same individual protector (**Protector**).

The First Defendant, a US lawyer, was named protector of the Trusts at the date of the Declarations of Trust. The Second Defendant is the Protector's wife and was designated by the Protector as his Successor Protector. Both Defendants are in practice together as attorneys. The Trustee was appointed by the Protector in 2018.

As a part of the on-boarding process by the Trustee, the Protector completed a Personal Declaration Form and submitted it to the Trustee. The Protector declared amongst other things that he was not the subject of any investigation proceeding or other inquiry by a self-regulatory organisation of which he was a member and/or, the subject of a judicial or other inquiry. The Protector also agreed to promptly notify the Trustee of any circumstances which caused the information in the declaration form to become untrue.

The Trustee became aware, in January 2019, that the Protector had been "Publicly Censured" (a term of art) by the Attorney

Grievance Committee for the First Judicial Department of New York State because he had counselled a client to engage in conduct he knew or ought to have known was illegal or fraudulent and suggested that lawyers in the United States could act with impunity (**Censure**). The Protector had been the subject of a journalistic "sting" by an anti-corruption advocacy group. During the sting an undercover journalist met with the Protector, in his capacity as a lawyer and not as protector of the Trusts, claiming to be a representative of an unnamed West African Minister. The Protector was told that the Minister was interested in moving funds, said to be in the tens of millions of dollars and of dubious provenance, into the United States financial system in order to enable the unnamed minister to purchase luxury property, an airplane and a yacht. The Protector was recorded advising the minister's representative on techniques that could be used to move the funds in a manner that would hide their true origin. These techniques included "scrubbing" the money as well as using intermediary accounts and making use of corporate vehicles to hold the assets. This "sting" was reported nationally in the United States in 2016.

Despite admitting to violations of the New York Rules of Professional Conduct in late summer to early autumn of 2018 as a part of the Censure proceedings, the Protector did not tell the Trustee about the ongoing proceedings, or provide an updated declaration to the Trustee as he had agreed he would do as a part of the Personal Declaration. The Protector did not tell the Trustee about the Censure at all until after he was confronted about it by the Trustee in February 2019. As a result

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of the Censure and his failure to notify the Trustee about it, the Trustee notified the Protector of its intention to request his resignation. The Protector refused to resign and countered that he intended remove the Trustee as trustee of the Trusts “with all deliberate speed” pursuant to his power to do so under the trust deeds. The Trustee sought, and was granted, an interim injunction restraining the Protector’s power to remove it as Trustee pending the outcome of its application to remove the Protector.

The Protector made an interlocutory application for an order that the Trustee be required to indemnify the Protector on a contemporaneous basis in respect of the legal costs incurred by the Protector in the proceedings seeking his removal pursuant to an indemnity provision in the trust deeds. The Court refused to make an order providing for the indemnity until after the completion of the Trustee’s application for removal, finding that a trust deed providing for an indemnity in favour of a protector in respect of litigation costs must be construed as providing for an indemnity for litigation costs which are properly and reasonably incurred both in relation to entitlement under the clause and in relation to the quantum of such costs. Relying on the Manx case of *IFG International Trust Company v French* [2012] Manx LR 637 the Court found that the sort of indemnity relied upon by the Protector is only applicable in cases where there is no credible allegation of factual circumstances or misconduct on the part of Protector which may disqualify the Protector from making a claim under this provision.

Having secured an injunction restraining the Protector’s power to remove it as Trustee, the Trustee applied for the Protector’s removal pursuant to the court’s inherent jurisdiction to do so. The application was supported by the beneficiaries of the Trusts although they did not participate as named parties in the application.

The Chief Justice, finding in favour of the Trustee, made an order for the removal of the Protector. He concluded that it is the welfare of the beneficiaries and the competent administration of the trust that founded the jurisdiction for the removal of a trustee and so, by analogy, a protector. The Chief Justice cited with approval the test for the removal of a Trustee as set down in *Letterstedt v Broers and Another* (1884) 9 App Cas 371 and applied by the Royal Court of Guernsey in *In the matter of the K Trust*, [2016] WTLR 1225 and held that (emphasis added);

“The overriding consideration is the welfare of the beneficiaries and the competent administration of the trust. It is unnecessary for the Court to make a finding of wrongdoing on the part of the protector as a ground for removal. It is sufficient that there is evidence that the continuance of the office holder would be detrimental to the execution of the trust.”

The Chief Justice found that the actions of the Protector in the instant case, including the fact that he was censured, that he failed to promptly notify the Trustee of the Censure despite agreeing to do so and that he threatened to remove the Trustee when confronted about the Censure without appearing to properly take into account his fiduciary obligations to the beneficiaries, seriously damaged his relationship with the Trustee. The Chief Justice found that that the Trustee justifiably took the position that it could no longer have any professional relationship with the Protector and went on to conclude that the continuation of such a state of affairs – when the beneficiaries also sought a clean break from the Protector – were sufficient grounds for the Protector’s removal. The Second Defendant was also removed in light of the fact that she was the Protector’s appointee and her strong business and personal relationship with the Protector.

Carey Olsen Bermuda Limited acted for the successful Plaintiff.



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