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Protectors' powers to consent to or veto trustee decisions: Jersey's Royal Court explains the limits

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In an important case for trustees, protectors and beneficiaries¹, the Royal Court of Jersey has ruled on the scope of a protector's power to consent to or to veto a trustee's proposed exercise of power and the information a protector can require from a trustee. The Court held that the protector will usually be entitled and required to form his or her own judgment on a trustee's decision and whether to consent to it or veto it, rather than simply review whether the trustee's decision has been reached properly. The trustee should, therefore, provide the protector with all relevant information, including reasons, to enable the protector to form that view in light of all the relevant circumstances. Further, the Court expects dialogue to take place between trustees and protectors to reduce the risk of deadlock from their approaching any decision independently.

What happened?

The case arose in respect of two trusts with the same beneficiaries who were the children and grandchildren of a certain individual (referred to in the judgment as the "father", who had deceased by the time of the judgment and who was not the named settlor of either trust). The beneficiaries agreed that both trusts should be terminated and the assets distributed to them. However, there was disagreement as to the proportions each should receive, in light of various letters of wishes the settlors had written in respect of each trust and the different tax residences of the beneficiaries and consequent effect on how much of the original distribution each could receive. The trustees put forward various proposals, and as protector consent was required under each trust the question arose as to the protector's precise role in respect of those proposals.

¹ In the Matter of the Piedmont & Riviera Trusts [2021]RC248

Among the protector's powers were powers to remove and appoint trustees, as well as to consent to or veto distributions by the trustees. Although not in identical terms, this latter power was quoted from one of the trust instruments, which provided that the trustees:

"... shall stand possessed of the Trust Fund and the income thereof upon the following trusts, that is to say:

(a) Upon trust for all or any to the exclusion of the others or other of the Beneficiaries in such shares and in such manner and subject to such limitations and provisions as the Trustees (with the written consent of the Protector) in their absolute and controlled discretion at any time ... may appoint...."

The sons and the adult grandchildren, who opposed the proposed distributions and supported a previous proposal by the trustee, which the protector had vetoed, submitted that a protector's power of veto is limited, and that where a protector has such a power his or her role when exercising it is only to review the trustee's decision as being reasonable or not. They argued that in this respect, the protector had a role similar to that of the Court when it considered a trustee's application for blessing of its decision. In other words, that the protector could only ask him or herself whether the trustee's decision to which the protector's consent or veto related was one that reasonable trustees properly instructed could arrive at having taken into account all relevant and no irrelevant considerations. If so, the protector could not properly withhold consent whether he or she agreed with the decision or not.

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The Court's ruling: protector's independent judgment

The Court had “no hesitation in rejecting” that submission. It pointed out that the reason the Court's role in reviewing a trustee's decision on a blessing application is limited to assessing its reasonableness is that it is the trustee who the settlor has chosen to be the trustee, not the Court. The Court is, therefore, not concerned to make sure that the trustee has reached a decision that is correct, which may be nuanced or open to competing judgments. The discretion to weigh those nuances or form those judgments remains with the trustee, and it is irrelevant whether the Court would have come to a different decision. The Court's role is limited to supervising the trustee's decision-making, and the Court is, therefore, only concerned to ensure the trustees have reached a reasonable and lawful decision.

Of course, the protector has not been chosen to be trustee either. However, the Court pointed out that where a trust provides for a protector, the settlor has decided to appoint someone to that role (who is often personally known to and trusted by the settlor) and specified the matters for which the protector's consent is required. The Court, therefore, considered that the settlor must be taken to have intended that the protector should exercise his or her own judgment when performing that role. Otherwise, there would be no point in appointing (say) a trusted friend or adviser, rather than a trust lawyer who could consider the rationality of the trustee's decision from a technical, legal viewpoint. Equally, a protector whose role was the same as the Court's would add nothing: the Court would still be able (and often still be asked by the trustees) to bless the decision as being rational anyway. Therefore, the Court held that:

“It follows that, depending on the circumstances, a protector may well be entitled to veto a decision of a trustee which is rational, in the sense that the Court would bless it”.

Nevertheless, while the protector exercises his or her own independent judgment whether to veto the trustee's decision, the exercise of that judgment is within a narrower compass than the trustee's. The primary decision is the trustee's – often, for example (and as was the case in the matter before the Court), whether to make a distribution. It is not the protector's role to take that decision, nor to force the trustee into making the decision the protector would make if he or she were the trustee. The question for the protector remains whether the trustee's proposal is for the benefit of the beneficiaries, even if the protector might have made a different decision.

In reaching this decision, the Jersey Court disagreed with the Bermudian Supreme Court's recent decision on the same point in *In the Matter of the X Trusts* [2021] SC (Bda) 72 (Civ) (7 September 2021), as reported by Carey Olsen's Bermuda office here: [Important Bermuda judgment on the role of protectors in offshore trusts](#). In that case, the Bermudian court considered that the protector is not generally intended to exercise decision-making power jointly with the trustee, but is instead intended to have a “watchdog” role to ensure the trustee's

proper execution of the powers given to the trustee. Therefore, the Bermuda court preferred the view that the protector's role is limited to reviewing the trustee's decision by asking only whether it was a decision that a reasonable, properly informed trustee could have reached.

The Jersey Court agreed that protectors are not generally appointed to take decisions jointly with trustees. However, it considered that where appointed a protector had his or her own separate, independent decision to make, namely whether to consent or not to the trustee's decision being implemented. The Jersey Court acknowledged that its definition of the protector's role would increase the risk of deadlock where trustees and protectors take different views. However, it considered that to be the natural consequence of appointing a protector without whose consent the trustee's decision could not be implemented.

Protector entitled to information

The Jersey Court also considered what information should be available to a protector when he or she considered consenting to or vetoing a trustee's decision. Subject to the trust instrument and any order of the Court, ordinarily trustees are entitled to refuse to disclose their reasons for a decision to the beneficiaries. However, the Court considered that a protector should ordinarily be given whatever information is needed to exercise his or her fiduciary role as protector. The trustee is obliged to provide this information in discharge of its own fiduciary duties to act in the best interests of the beneficiaries – here, to ensure the protector can fully comply with his or her own duties towards the beneficiaries. This can and often will include the trustee's reasons for its decision. Whereas trustees can usually refuse to give beneficiaries reasons, that is to avoid strife and increasing the risk of hostile challenge to the trustee's reasoning. The protector, however, will be better able to decide whether or not to consent if he or she knows why the trustee proposes to act in the way it has decided.

Indeed, the Court went further and indicated that it would expect and encourage dialogue and discussions between trustees and protectors to explore the range of possible decisions with a view to finding a way forward on which they can both agree. The Court held that:

“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 is therefore perfectly reasonable for a protector to explain his concerns about a particular proposal by a trustee and the trustee may often be willing to modify his proposal to take account of these concerns or the protector may be satisfied after the trustee has explained his thinking.”

What does this mean?

We consider the Jersey Court's reasoning to be compelling as a matter of Jersey law. Although each case will depend on the precise power under consideration and interpretation of the trust instrument as a whole, trustees are almost always

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exercising fiduciary powers, as (albeit potentially to a lesser extent) are protectors. As fiduciaries, both trustee and protector are required (amongst other things) to exercise their respective powers in the interests of the beneficiaries, and to do so taking into account all relevant (and ignoring any irrelevant) considerations.

Once the trustee has formed a proposal, the protector should consider whether to consent to it. To do so, the protector will have to take into account the trustee's reasons as relevant considerations. That is true regardless of which view of the protector's role is preferred. Equally, if the protector is minded to refuse, the trustee should take into account the protector's reasons.

In theory, both trustee and protector acting with the beneficiaries' best interests in mind should be able to reach a workable solution, whether by being persuaded by the other's reasoning or by reaching a different proposal on which they can agree.

In practice, of course, that is not always possible and the risk of deadlock cannot be extinguished. If the protector is acting reasonably in withholding consent to a reasonable proposal of the trustee then the settlor must be taken to have intended that potential outcome by providing for the office of protector. However, if deadlock is reached the trustee and protector may be well advised to seek the court's direction. The Court expressly left open the possibility that it could intervene to break deadlock notwithstanding that each of the trustee and the protector is acting properly in maintaining their opposing positions.



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