



Protectors' Powers: The Siren Song of the "Narrower View"?

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The term "Protector" is not a term of art in trust law. The duties and the powers of any given protector are defined, subject to any applicable statute, by the trust instrument, and the resolution of any doubts will therefore always begin with a question of construction. Partly as a consequence, there is relatively little judicial guidance on the general principles applicable to all protectors. Nevertheless, two recent decisions, one from Bermuda and the other from Jersey, have sought to clarify one question that is likely to apply to many, if not all, protectors where the powers conferred on them are fiduciary. Interestingly, the two cases reached opposite conclusions.

The question in issue in both cases concerned the common situation where a power vested in the trustees can only be exercised with the consent of a protector. Was the role of the protector in such cases limited to asking whether the decision of the trustees was one which a trustee could reasonably arrive at (the "Narrower View")? Or was the protector to exercise an independent discretion in deciding whether or not to consent ("the Wider View")? The Narrower View would limit the function of the protector to something similar, if not identical, to that of the court in a blessing application: if the trustees' decision was within their powers and was rational, the protector would have no choice but to consent. On the Wider View, a protector would be entitled, exercising his own judgment, to withhold consent even if the proposed exercise of power was one which a reasonable body of properly informed trustees was entitled to decide upon.

In *In the Matter of the X Trusts* [2021] SC (Bda) 72 Civ (7 September, 2021), Kawaley J came down in favour of the Narrower View. In a lengthy and careful judgment, he

accepted that on a literal reading of the relevant provisions, the Wider View appeared persuasive. He acknowledged that the dictionary meaning of the word "consent" was "agreement or permission", which implied an element of choice. He also agreed that the Narrower View echoed the test in a *Public Trustee v Cooper* Category 2 case, in which the function of the court was to adjudicate on the question whether the decision for which approval was sought was one which a reasonable body of properly informed trustees was entitled to take: if so, the court did not have any discretion to exercise. And he accepted that, in the only case to have considered the question, *PTNZ v AS* [2020] WTLR 1423, Master Shuman had decided in favour of the Wider View, holding that "the protector's powers of consent are independent of the powers of the trustee and are to be exercised by the protector on the basis of his own discretion."

Despite these considerations Kawaley J was persuaded that the Narrower View was, in fact, correct. As he put it, "...the logic of Mr Green QC's submissions gradually grew in its cogency until, like a Siren song, it became almost irresistible." The core of those submissions was that the roles of the trustees and that of the protector were fundamentally different: the Wider View would instead result in a duplication of roles, and essentially mean that the decision was the product of a joint exercise of discretion by the protector and the trustees.

In response to the argument that the Narrower View made no commercial sense because it added nothing to what might have been done by the court, Kawaley J accepted the answer that it provided the beneficiaries with a less expensive and time-consuming option.

The second case in which this question arose was *In the Matter of the Piedmont Trust & Riviera Trust* [2021] JRC 248, which came before the Jersey Royal Court in July 2021. A draft judgment was circulated on 28 September, deciding in favour of the Wider View, but before it was formally handed down one of the parties drew the attention to the court to the *X Trusts* (dated 7 September 2021). The Jersey court nevertheless maintained its original conclusion, but added a Postscript explaining why it disagreed with Kawaley J.

The only material difference between the facts of the two cases was that the trust deeds in the *X Trusts* did not give the protector an indemnity; but Sir Michael Birt, giving the judgment of the Royal Court, did not consider that that was sufficient to distinguish

the case. However, he firmly rejected the argument that the role of the protector was the same as that of the court in a *Public Trustee v Cooper* application for blessing, because "...if the role of a protector was simply to review the trustee's decision in the same way that the Court would do, his role would be almost redundant; he would bring nothing to the table that the Court itself would not bring on a blessing application."

Sir Michael Birt also pointed out that, if the protector's role was essentially the same as that of the court, "...the key requirement for a protector would be a legal qualification rather than knowledge of the settlor's wishes and sound judgment as to what is in the best interests of particular beneficiaries." But in practice, that is rarely if ever the basis on which settlors choose the protectors of the trusts they create: the protector is chosen because he has personal knowledge and understanding of the settlor, his wishes, and the family circumstances. Often – particularly in the case of offshore trusts – the trustee is a professional trust company, and the settlor has no personal knowledge of the company or its officers.

At the same time, the protector was not another trustee: "...a protector's discretion lies within a narrower compass than that of a trustee...A protector may often find that he should consent to a discretionary decision of a trustee on the basis that it is for the benefit of one or more of the beneficiaries even though, if he had been the trustee, he might have made a different decision which he thought to be even more beneficial."

Both *The X Trusts* and *The Piedmont & Riviera Trusts* are carefully reasoned decisions by outstanding judges. But they can't both be right: it seems inevitable that this question will have to be reviewed at a higher level. I would respectfully suggest that Kawaley J ought to have remembered that the Sirens were not reliable guides, but dangerous seducers who lured those who listened to them to their destruction on the rocks.

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