

The Role of Fiduciary Protectors in the Administration of Trusts

The office of protector is now a familiar feature of modern trust structures, particularly in offshore jurisdictions such as Jersey. Settlers may appoint a protector to monitor the trustees' actions and/or serve as a form of communication between the family and the offshore trustees. However, it is a relatively recent development and, unlike trustees, there is no long-established body of law defining the scope of the role. There is no statutory definition of a protector, although Article 24(3) of the Trusts (Jersey) Law 1984 recognises that a trustee's powers may be made subject to the consent of another person. As a result, the nature and extent of a protector's role has largely been left to the terms of the trust instrument and gradual judicial development.

In recent years, despite inconsistency between different jurisdictions (as will be explored below), a consistent body of case law has begun to emerge in Jersey. In particular, the decisions in In the matter of the Piedmont Trust & Riviera Trust¹, Representation of Summit Services Limited² and, most recently, A & Ors v C & Ors³ address a central issue: where a protector is required to consent to a trustee's decision, what is the nature of that role? The answer has significant implications for both the administration of a trust and the allocation of decision-making power within it.

¹ [2021] JRC 248

² [2024] JRC 222

³ [2026] UKPC 11

Before turning to those cases, it is necessary to identify the different types of protector's powers. A protector is a natural or legal person upon whom the settlor has conferred powers relating to the exercise of trustee powers. Protector powers are entirely a matter of the trust deed and may be broad or limited. They are commonly classified as either positive powers, which allow the protector to act directly, or negative powers, requiring the protector's consent before the trustee may exercise a particular power.

Equally important is the distinction between personal and fiduciary powers. A personal power may be exercised entirely in the interests of the holder, without any obligation to the beneficiaries and without the need to justify the decision. By contrast, a fiduciary power must be exercised in good faith for the benefit of the beneficiaries as a whole, free from conflict, and is capable of review if exercised improperly. In practice, protectors' powers of consent are generally treated as fiduciary, and it is in that context that the debate as to the scope of a protector's role has arisen.

Where a protector holds a fiduciary power of consent, the scope of that duty, in the absence of express provision in the trust instrument, was until recently unclear and subject to competing judicial approaches. Two views emerged. The first, often referred to as the "narrow view", was adopted by the Bermuda courts in In the matter of the X Trusts⁴. On this approach, the protector's role is essentially supervisory. The protector is required to consider whether the trustee's decision is one which a reasonable, properly informed trustee could have reached. This mirrors the approach

⁴ [2021] SC (Bda) 72 Civ

taken by the court on a blessing application, and the protector does not form an independent view on the merits but instead acts as a check on the trustee's decision-making process. The alternative is the "wide view", adopted in Jersey in Piedmont. In that case, the Royal Court rejected the narrow approach, holding that a protector is entitled to exercise their own independent judgement as to whether the trustee's proposed decision is in the best interests of the beneficiaries. The Court considered that limiting the protector to a supervisory role would risk rendering the office redundant, given that the court itself already performs that function when asked to bless a trustee's decision⁵. The protector was therefore recognised as having a more substantive role within the decision-making process, with the Court emphasising the importance of *"full and open discussion between trustee and protector, with a view to finding something upon which they can both agree"*⁶.

Piedmont was significant because it provided a clear statement of Jersey law in favour of the wide view. It established that a fiduciary power of consent is not merely procedural but may involve an independent evaluative judgement of the merits of the trustees' proposal. As the Court observed, *"the protector is not confined to a simple yes or no to a request for consent"*⁷. However, it also gives rise to a practical difficulty: if the protector can reach their own view on the merits, then the potential for conflict or deadlock with the trustee is obvious.

That difficulty is illustrated in Summit. The case concerned a trustee seeking the Court's blessing for a significant restructuring of trust assets, which the protector

⁵ Paragraph 91 of Piedmont Trust & Riviera Trust [2021] JRC 248

⁶ Paragraph 93 of Piedmont Trust & Riviera Trust [2021] JRC 248

⁷ Paragraph 93 of Piedmont Trust & Riviera Trust [2021] JRC 248

opposed on the basis that it was said to be inconsistent with the settlor's wishes and certain cultural principles said to underpin the trust. Although the issues before the Court did not require it to express a view on the narrow versus the wide view debate, it provided important guidance on the limits of the protector's role. In particular, it made clear that the existence of a consent power does not place the protector in the position of a co-trustee and that such consent is subsidiary to a decision by the trustee⁸, as was also confirmed in Piedmont where the Court observed that "*a protector's discretion lies within a narrower compass than that of a trustee*"⁹. The Court ultimately blessed the trustee's decision, notwithstanding the protector's opposition, and invited the protector to reconsider its position in light of its reasoning. In doing so, it rejected reliance on informal or contested interpretations of the settlor's wishes, as well as broader cultural arguments, as a sufficient basis for withholding consent. This shows that, even on a wide view, the protector's discretion is not unconstrained and it must be exercised by reference to the proper purposes of the power and the interests of the beneficiaries, rather than personal views or external considerations. It is worth noting that (presumably in accordance with the non-intervention principle) the Court did not order the protector to re-consider its refusal but limited itself to commenting on its decision-making process.

The uncertainty created by the divergence between Bermuda and Jersey has now been resolved by the Privy Council in A & Ors v C & Ors. The Board rejected the narrow approach and confirmed that the correct analysis is one of construction. Where a protector is given a power of consent, and the trust instrument does not

⁸ Paragraph 95 of Representation of Summit Services Limited [2024] JRC 222

⁹ Paragraph 92 of Piedmont Trust & Riviera Trust [2021] JRC 248

limit how that power is to be exercised, the protector is not confined to a supervisory role. Instead, the starting point is that the power may be exercised according to the protector's own judgement, subject to the usual requirements of good faith and proper purpose.

This confirms that the approach adopted in Piedmont is correct. A protector holding a fiduciary power of consent is not limited to assessing whether the trustee has acted rationally, but may form their own view as to the merits of the decision. As fiduciaries, protectors must not profit from their powers, must avoid conflicts of interest, and must exercise their powers for proper purposes. Importantly, this establishes that, in the absence of express limitation in the trust instrument, the wide view represents the default position. The significance of this clarification is considerable, as it establishes, at the highest level, that protectors can play a substantive role in trust decision-making. This has direct consequences for the drafting of trust instruments, which must now clearly define the scope of protectors' powers if a narrower role is intended, as well as for the administration of trusts and the resolution of disputes where consent is withheld.

In the aftermath of the Privy Council's decision, some commentary suggests that it has opened the door to unchecked exercise of power by protectors. Such commentators should note the decision in Summit. While the Privy Council confirms that a protector may exercise an independent discretion, Summit makes clear that this does not alter the distinct roles of trustee and protector. The trustee remains responsible for the administration of the trust and for making decisions in accordance

with its duties, whereas the protector's function is confined to the scope of the powers conferred by the trust instrument – typically by giving or withholding consent.

In conclusion, the recent case law reflects the evolution of the protector's role from an uncertain and loosely defined office into one with clear legal significance. Jersey law, through Piedmont, took an early and deliberate step in recognising the protector as a substantive decision-maker where fiduciary consent powers are engaged.

Summit builds on that by clarifying the limits of that role in practice and reinforcing the trustee's primary position. The Privy Council has now confirmed that the wide view is correct as a matter of principle. Protectors are not merely supervisory, but nor are they free to act without constraint. It is this balance - between independent judgement and proper exercise of fiduciary powers - that defines the modern role of the protector.

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