

Jersey Court departs from recent Bermudan precedent on protector powers

James Gleeson and William Grassick discuss the findings of the Royal Court of Jersey in its recent judgment In the Matter of the Piedmont Trust & Riviera Trust [2021] JRC 248.

Background

In a recent decision, the Royal Court had occasion to consider, among other things, the relevance of a settlor's letter of wishes and the nature of the consent powers exercised by protectors.

The case concerned a disputed application by the Representors (Jasmine Trustees Limited and Lutea Trustees Limited), as trustees of two trusts, for approval of the appointment of all the trusts' assets among the beneficiaries in specified proportions.

In the course of proceedings, the Court had to consider:

- whether an alleged conflict of interest disqualified the Representors from making their decision;
- whether they should therefore surrender their discretion to the Court;
- the role of a protector in such circumstances; and
- the significance of the letters of wishes.

This article considers the Court's comments on the weight attaching to the letters of wishes and the third issue concerning protectoral consent.

Letters of wishes

There were three letters of wishes relating to the Piedmont Trust, in 2000, 2006, and 2010, and one relating to the Riviera Trust in 2010. Both the 2006 LOW and the 2000 LOW in respect of the Piedmont Trust envisaged that the trust fund be shared as to 1/3rd each by the three children of the father.

By 2010, the father and daughter of the family had fallen out, and the latter's branch of the family was excluded in the 2010 LOWs in respect of both the Piedmont and the Riviera Trusts. It was submitted

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on behalf of the daughter and her child that the trustees had paid insufficient regard to the historic letters of wishes of 2000 and 2006 whereby she was to receive one third share of the funds.

The Court summarised that a settlor's wishes are "*a relevant consideration and trustees are therefore bound to take them into account pursuant to their duty to take relevant matters into account.*" Indeed, the settlor's wishes are "*always a material consideration in the exercise of fiduciary duties*" (quoting Lord Walker of Gestingthorpe in *Pitt v Holt* [2013] 2 AC 108 at [66]). They are not, however, binding upon trustees, who must "*make up their own mind and are free to depart from the settlor's wishes.*" A decision which slavishly follows letters of wishes can be quashed as not being that of the trustees (*Re Rabaiotti 1989 Settlement* [2000] JLR 173 at 189): not to form their own view when exercising dispositive powers would be a breach of trust leaving their decision open to challenge (Lewin on Trusts, §29-049).

The Court further noted that trustees "*may decide to place little or no weight on a settlor's wishes if they are satisfied that such wishes are based upon an unreasonable animus against a particular beneficiary*" (citing *G.B. Trustees Limited v Stock* [2021] JRC 048 at 68–69). It was therefore right for the trustees not to place weight on the 2010 LOW and the Court noted that, in fairness, the other beneficiaries who stood to gain under those wishes did not suggest that they should be followed.

Role of protector

The trustees in November 2019 put forward a scheme relating to the appointment of all the trusts' assets among the beneficiaries in specified proportions. The protector raised certain concerns. Some of those concerns were assuaged by a modification to the trustees' proposal which was re-circulated in January 2021. Following the amended proposal put forth by the trustees, the protector exercised his power of consent.

Certain of the beneficiaries argued, however, that the protector should have been bound to consent to the trustees' previous proposal of November 2019, on the ground that a protector's role was limited to one of review, where the protector was required simply to satisfy himself or herself that the proposed exercise of the power by the trustees was one which a reasonable body of properly informed trustees was entitled to undertake.

The Court, therefore, considered the nature of the protector's role in the exercise of the power of consent. Do protectors perform a narrow review of the trustees' decision-making to check that it is rational, thus being potentially obliged to consent to such a decision even if they disagree with the trustees' reasoning (the Narrower View)?

Or do they have an independent discretion as to whether or not to give consent, such that they could withhold consent even if the trustees' decision was otherwise reasonable (the Wider View)? For the same reasons set out below in relation to the Postscript, the Court decided in favour of the Wider View and determined that the protector's function was not one of review only.

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Decision

After the judgment had been handed down, but before the final version was published, the Court had its attention drawn to a recent decision in Bermuda where the Supreme Court of Bermuda had adopted the Narrower View (*Re The X Trusts* [2021] SC (Bda) 72 Civ).

In a postscript to the present judgment, the Court chose not to follow the Supreme Court of Bermuda in *X Trusts*, reasoning *inter alia* as follows:

- The Jersey court did not accept the Bermudan court's view that, just because the trustees and protector do not jointly exercise the trustees' power, a protector's role must be limited to a review of rationality.
- The Court approved Counsel's submissions made in the *X Trusts* case to the effect that the word 'consent' given its ordinary (OED) meaning indicates that protectors have a genuine choice whether or not to consent to the trustees' proposed exercise of power. The Narrower View, however, is inconsistent with the ordinary and natural meaning of the word 'consent' in that it posits not so much the existence of a discretion, as an adjudication as to whether or not relevant circumstances exist.
- The Court also noted that that it was inherently unlikely that settlors would go to the trouble of appointing a protector from the ranks of their trusted friends or advisors if the role of protector were limited to that of assessing rationality: *"If that were the case, 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."*
- If the Narrower View were adopted the protector's role would be analogous to that of the Court exercising a review function in blessing applications, which would leave the protector 'helpless' in the face of a decision which they regard as wrong but is otherwise ostensibly rational.

The Court conceded that its conclusion could lend itself to a greater risk of deadlock but found that such an outcome is in the nature of a trust where the settlor has chosen to appoint a protector. The question of whether the Court has power to break such a deadlock (as it does in the context of lack of agreement among trustees where they have to act unanimously (see *Garnham v PC* [2012] (1) JLR 204)) was left over for determination on a separate occasion. Nevertheless, the Court cautioned that the protector's discretion had to remain narrower than that of the trustee. For protectors to assume the function of trustee, for example by stating that they will consent only to a particular decision, would be to *"exceed their proper role."* The Court proceeded to encourage *"full and open discussion between trustee and protector."*

Consequences

The significance of the decision lies in the popularity of protector clauses with a power of veto in offshore trusts in recent years. Although other forms of protector power exist, a simple power of veto, without any relevant guidance in the trust instrument, is the most common form. Yet, beyond

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a recognition of the fiduciary nature of the protector's office, the offshore case law relating to a protector's power of veto has been lacking.

This decision is therefore to be welcomed in providing much needed clarity on the exact nature of the role performed by protectors in exercising their powers of consent, while also confirming the approach of the Court to the application of letters of wishes in the exercise of the dispositive powers of the trustee.

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