

Important Bermuda judgment on the role of protectors in offshore trusts

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While protectors are now widely encountered in offshore trusts, until now the legal relationship between protectors and trustees has not been the subject of substantive legal enquiry. *In the Matter of the X Trusts [2021] SC (Bda) 72 Civ (7 September 2021)* Assistant Justice Dr Ian R.C. Kawaley of the Supreme Court of Bermuda has handed down significant guidance to assist in the understanding of this important relationship in offshore trusts.

The judgment focussed on the core issue of whether the protector provisions in the X Trusts conferred an independent decision-making discretion (Wider View), or merely a discretion to ensure that the trustees' substantive decision is a valid and rational one (Narrower View). The issue arose in the context of asset allocation proposals as part of a planned restructuring of the X Trusts for which protector consent would ultimately need to be sought.

Dependent on the court's decision on whether the Wider View or the Narrower View applied, the trustees sought declarations as to whether:

1. it was within the power of the then trustees of the X Trusts to confer on the protectors the powers which they purportedly conferred, in whole or in part; and
2. the instruments by which the protectors were appointed are valid and effective or not; and/or
3. the instruments by which the protectors were appointed should be avoided, in whole or in part (together with any necessary consequential relief).

The Court heard submissions on behalf of two branches of beneficiaries of the X Trusts, the "A Branch" contended for the Narrower View while the "B Branch" contended for the Wider View. The Trustees and Protectors adopted a neutral position.

Kawaley AJ preferred the Narrower View, and held that on the proper interpretation of the relevant trust instruments, the role of the protectors is to satisfy themselves that the proposed exercise of a power by the Trustees is an exercise which a reasonable body of properly informed trustees is entitled to undertake and, if so satisfied, to consent to the same.

In making this finding Kawaley AJ said that, unless a contrary meaning can legitimately be discerned in the instrument conferring the relevant consent powers, the usual role of a protector is not to exercise a power jointly with the trustee in relation to the matter requiring protector consent. The protector's role is to be a "watchdog" to ensure due execution by the trustee of the powers vested in the trustee. In arriving at this view the Judge relied on the dicta of Lord Hodge in *Barnardo's-v-Buckinghamshire* [2018] UKSC 55, [2019] ICR 495 at [13] to [17] and Sir Christopher Clarke in *Grand View Private Trust Company-v-Wong et al* [2020] CA (Bda) 6 Civ at paragraphs 178-179.

Kawaley AJ went on to hold that it was within the power of the then-trustees of the X Trusts to confer on the protectors the powers which they purportedly conferred and the instruments by which the protectors were appointed were valid and effective.

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As a point of general application the judgment is authority for the proposition that, unless the trust deed expressly points to a fully discretionary role, it is likely that the normal inference will be that the role of a protector is essentially one of review only and not one conferring independent decision-making discretion. As Acting Justice Kawaley noted:

“Unless a contrary meaning can legitimately be discerned in the instrument conferring the relevant consent powers, the usual role of a protector is not to exercise a power jointly with the trustee in relation to the matter requiring protector consent. The protector’s role is to be a “watchdog” to ensure due execution by the trustee of the powers vested in the trustee.”



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