Protectors-Fish or Fowl? Parts 1 and 2

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What is this creature known as a "trust protector"? Its numbers have multiplied rabbit-like and yet, strangely, there seems to be no consensus of opinion about its nature, purpose or qualities-and, until very recently, not overmuch concern about these things. Market forces rule; settlors want protectors, so they get them. But this dream-time is drawing to a close. Protector-related issues are beginning to reach the courts. There may be some hard lessons in store for protectors and trustees.

This article reviews current practice, discusses the main legal issues and suggests some conclusions.

I should start by saying what I mean by the word "protector". In this article it means a person other than the trustee who, as the holder of an office created by the terms of the trust, is authorised or required to play a part in

the administration of the trust. This is deliberately vague and all-encompassing. It makes no difference what title is used in the particular trust instrument; it might be “Adviser”, “Appointor”, “Management Committee”, or “Beneficiary Representative”-all are included.

Part I Current Practice

The functions given to protectors vary greatly from case to case, reflecting the fact that protectors are appointed for a variety of different reasons. For the benefit of those who have not seen much trust protection in practice I offer the following list of functions quite commonly given to protectors.

(a) to appoint or remove trustees

(b) to approve the trustees’ remuneration

(c) to approve self-dealing by trustees

(d) to make or approve investment or administrative decisions

(e) to make or approve amendments to the administrative terms of the trust

(f) to make or approve distribution decisions

(g) to make or approve additions to or exclusions from the class of beneficiaries

(h) to veto the settlor’s exercise of reserved powers

(i) to determine whether the settlor is suffering a disability or other misfortune such that his reserved powers should be terminated or suspended

(j) to veto the exercise of beneficiaries' rights e.g. the right to trust accounts or information

(k) to give or obtain tax advice for the trust

(1) to undertake regular reviews of the trust administration

(m) to nominate auditors

(n) to approve the trustees' accounts

(o) to release the trustees from liability for breach of trust

(p) to settle questions or disputes concerning the administration of the trust

(q) to enforce the trust by legal proceedings

(r) to change the governing law of the trust

(s) to trigger or cancel flight arrangements

(t) to terminate the trust by triggering a final vesting provision.

I hasten to say that it would be exceptional for a protector to have all or even a majority of these functions. I should also say that there are some items in the list which give rise to conceptual difficulty.

Candidates for the job

There is great variety in the types of person appointed as protector. Candidates for the job include:

(a) The settlor himself, but note that my definition of "protector" would not include a settlor who had simply reserved powers to himself as settlor.

(b) A beneficiary or a committee of beneficiaries. But note my definition would not include a beneficiary unless he derived his powers from being the holder of an office.

(c) A relative or close friend of the settlor.

(d) A professional adviser of the settlor.

(e) A professional protector, individual or corporate. For example, a number of law firms have established protector companies to look after their clients' trusts.

(f) A combination of the foregoing acting as a committee.

Reasons for having a protector

One of the reasons for this variety in the functions of protectors and in the choice of candidates for the job is that there are many different reasons why a settlor might want to have a protector. Here follows a selection:

(a) As a precaution against the trustee becoming unsuitable. A settlor may feel that the court's power to change trustees is not a sufficient reassurance-because of the cost involved in litigation and because, unless it is a case of substantial breach of trust, the court may well refuse to replace the incumbent trustee.

Sometimes the protector is given an unqualified power to change trustees, and there may even be words to the effect that the protector may do so

with or without cause. In other cases the protector's power is more circumscribed, perhaps that he may replace a trustee only if requested to do so by a majority of the adult beneficiaries. For this function it is evidently desirable that the protector should be knowledgeable about the theory and practice of trusts; but I would not say that this is usually the case.

(b) As a precaution against the chosen trust centre becoming unsuitable. A protector may be empowered to change trustees and the governing law of the trust. There are two schools of thought about flight protection. One believes in early warning and prefers a protector who is present in the offshore centre. The other prefers a remote protector who may not so swiftly detect straws in the wind but whose judgment and freedom of action will be free from influence. For those who prefer automatic flight provisions that do not rely on action by the protector or anyone else, there may nonetheless be a need for a protector to reverse the flight if it has been triggered by an event which actually does not significantly threaten the trust.

(c) As a reassurance that the trustee will pay due regard to a non-binding letter of wishes concerning the distributions from a discretionary trust. For this purpose the protector may be given power to veto distribution decisions.

(d) To involve someone knowledgeable about the settlor's family in making distribution decisions. The trustee may be required to consult with the protector, generally a friend, relative or family adviser; the protector may have a power of veto over distribution decisions.

(e) To keep the tax planning of the trust up to date. Most trustees are naturally reluctant to shoulder this responsibility. The protector is sometimes a tax expert, but more usually is expected to obtain tax advice and then give appropriate guidelines to the trustee. For some reason protectors appointed for this purpose are seldom given significant powers- but most trustees are only too happy to have the tax issue reduced to a set of practical guidelines.

(f) To provide effective liaison between the trustee and beneficiaries so that each is properly informed. Generally the settlor's main concern is to

reduce the risk of beneficiary/trustee disputes. The protector may be empowered to review the trust administration at suitable intervals. He may be required to present reports to the beneficiaries. The review process appeals to some settlors as providing a structured system for considering trust issues on a regular basis.

(g) To enable beneficiaries to participate in some fashion in the trust administration, usually with particular reference to the investment side. For this purpose the protector will probably consist of a committee of beneficiaries, and will be given appropriate powers of control, consent or consultation.

(h) To enable the trust to pursue an investment policy which the trustee regards as unduly hazardous or difficult. For this purpose the protector must be given substantial powers to control the trustee-otherwise the protector's involvement will not shift responsibility from the trustee's shoulders. One sees many variations on this theme. In some cases the objective seems to be to eliminate responsibility altogether-so that neither the trustee nor the protector should be liable for bad investments.

(i) To enable the trust to carry out some collateral purpose of the settlor, ttcollateral" in the sense that it is not just a matter of conferring financial benefit on the beneficaries. For example, he may want to keep a family business in the trust, even if it is not particularly profitable, either in the interests of beneficiaries (providing an occupation) or of those employed in the business or the community in which it operates, or simply for the sake of the business itself. In case the trustee comes under pressure to sell the business and make a more profitable investment, the settior may give a protector the power to veto any sale or other form of disposal. To provide a facade behind which the settlor may exercise control over the trust administration. This item must be mentioned in a discussion of current practice, but I have nothing polite to say about dummy protectors (see below).

(k) To enable the appearance of an offshore trust with an offshore trustee while the de facto trust administration is conducted onshore by a protector. Again this must be mentioned in a discussion of current practice, but it is a

dangerous practice, success probably depending upon concealment of the facts.

If such a diverse collection of reasons can be summarised, protectors are appointed to guard the trust from the hazards that threaten the achievement of its objective; to improve the administration, particularly in performing functions which the trustee is unwilling or unsuited to perform; to allow beneficiaries (or others) to participate in, or control, the trust administration; and to enable the trust to boldly go into regions otherwise inaccessible because of the vulnerability of trustees.

Even from this representative list it will be apparent that there is no single answer to the question of who is the best candidate to be a protector. It depends primarily on what the protector's role is to be, though there may well be secondary considerations such as tax consequences and continuity.

Given the number of wonderful things that a protector can do for a trust, one may well ask why any trust is formed without one. Finding a suitable person to do the job is a major factor, particularly if one labours under the mistaken impression that protectors are inherently uncontrolled by law and are free to do what they want with their considerable powers. Were that so, the prudent settlor should indeed beware. A factor of a quite different and more compelling sort is that the involvement of a protector inevitably complicates the trust administration and adds to the expense. Cost effectiveness is discussed further below.

Presumably every protector has a keen interest in the duties that come with the job. Surprisingly, however, it is rare that the draftsman devotes much space to this topic in the trust instrument. The result, as I hope to

demonstrate, is a great deal of uncertainty which does no one any good except those who are paid to sort out the mess.

Part II The Main Legal Issues

Introduction

It is supposed by some that the protector concept is a new invention, one with which English law has not yet grappled. According to this view we must wait impatiently for legislators or judges to lay down the rules. In the meantime the optimists suppose that this absence of law gives the draftsmen of trust instruments carte blanche to lay down their own rules. The pessimists say that uncertainty is unavoidable (except by doing without a protector); for who can say whether protection arrangements made today will be disrupted by new law tomorrow? But the premise that there is a lacuna in the law is wrong. The "protector" label may be new (though even that is open to argument), but there is nothing new in the concept of a non-trustee having powers in relation to trust property. The courts in England and in other major trust jurisdictions have been dealing with this phenomenon for centuries. There are plenty of reported cases dealing with dispositive powers held by non-trustees. Admittedly there are fewer dealing with administrative powers, but still a fair number.

Paradoxically, although the optimists and the pessimists proceed from a false premise, both are to a large degree correct in their conclusions. The trust instrument can lay down its own rules to govern the protector. There are a few limits on that freedom but in the main the law is concerned simply to give effect to the settior's intentions. On the other hand, as I have noted already, it is not the usual practice for the trust instrument to lay down comprehensive rules. So in the typical case the pessimists are

correct in saying that the protector's legal position is uncertain. The silence of the trust instrument forces the court to embark on an exercise in detective logic, to discover the settlor's intentions from the available clues in the admissible evidence. It is sometimes impossible to predict the court's decision with any assurance. At the outset there may be a real question over what the court would regard as admissible evidence. Even if that can be identified with certainty, there may well be scope for differing conclusions. However, it is unfair of the pessimists to blame this uncertainty on the law. The fault is with those who draft trust instruments and fail to provide adequate indications of the settlor's intent.

The main legal issues discussed in this article are:

What powers can be given to a protector?

What are the constraints and obligations to which a protector is subject? And how are they enforced?

What is the position of the trustee in relation to a protector?

Terminology and basic concepts

If the protector is merely authorised to perform a function, it is generally described as a power". If he is required to perform a function, it is generally described as a "duty". As a matter of theory the distinction between power and duty is clear. One is permissive and the other is mandatory. But reality is not so neatly arranged.

Duties are frequently accompanied by discretion, that is to say the protector has choices in deciding how to perform his duty; he is required to use judgment. On the other hand powers are frequently encumbered by obligations, sometimes positive obligations. For example, the protector may have an obligation to use his administrative powers to serve the interests of beneficiaries. If so, what appears to be a power may in fact be a duty, or may turn into a duty if circumstances threaten the interests of beneficiaries.

The discretion spectrum

So, the reality is that duties and powers are spread across a spectrum without clear dividing lines-you might call it the discretion spectrum. At one extreme a protector may have duties which are completely non-discretionary. The terms of the trust tell him he must act, they tell him when to act and they tell him how to act. He has no discretion. At the other extreme a protector may have powers which he is at liberty to ignore or to use at any time, in any manner and for any purpose, even to confer a benefit on himself. He has complete discretion. Between these two extremes there are on the one hand duties with varying degrees of discretion and, on the other hand, powers with varying degrees of obligation. Even in a well-drafted trust instrument the classification of a function may be difficult. In this article I use the word “power” to denote the thing which the protector is authorised to do, regardless of whether he has a duty to do it.

Dispositive or administrative powers

Another hazy but important distinction lies between “dispositive powers” and “administrative powers”. Broadly speaking, a power is dispositive if it

concerns the beneficial arrangements of the trust-who are the beneficiaries, what should they receive from the trust and when. Otherwise the power is administrative. A power concerning the investment or management of trust property is obviously administrative, but so, for example, is a power to change the trustees or the governing law. I describe the distinction as hazy because some powers straddle the line.

Example 1: The protector has the power to direct the making of loans to beneficiaries. Such a loan is both an investment of the trust fund and a benefit to the borrowing beneficiary.

Example 2: The protector's consent is required to the acquisition of new investments. The beneficial arrangements of the trust are such that some beneficiaries would like higher income while other beneficiaries would prefer capital appreciation. On the face of it the protector is in a position to use his power to favour one group of beneficiaries over the other.

In situations of this sort it may be apparent from the admissible evidence whether the settlor intended the power to be used for administrative purposes or dispositive purposes. In some cases the answer may be that he intended both.

What powers may be given?

Powers of almost any kind may be given to protectors but there are some exceptions. Plainly a protector cannot be empowered to do something prohibited by law, for example to create a perpetuity. There are probably some further exceptions in my list at paragraph 2 above, in particular:

(a) Power to release the trustees from liability for breach of trust. It is an essential part of the trust concept that the beneficiaries have enforceable rights against the trustee, not only to enforce the performance of the trust but also to obtain remedy for any breach of trust. If a protector can extinguish the beneficiaries' remedy at the stroke of a pen, do they really have any rights? On the face of it, if the trustee can secure the protector's compliance, it can do anything it wants with the trust property. If the power to release is feasible at all, which I am inclined to doubt, it can only be on the basis that the protector is a fiduciary subject to heavy restrictions and obligations-permitting him to grant a release only after careful investigation and only if it would be in the interests of the relevant beneficiaries to do so, an unlikely situation.

(b) Power to veto the exercise of beneficiaries' rights e.g. the right to trust accounts or information. Here again there might be a collision with the trust concept. The beneficiary's right to an accounting is a fundamental feature of the trust concept and, were a protector given the power to deprive the beneficiaries of that right, the validity of the power could be questioned on grounds of repugnancy. Alternatively, the power might be saved by hedging it around with implied terms.

(c) Power to settle questions or disputes concerning the administration of the trust. In general it is not possible to oust the jurisdiction of the court.

(d) Power to enforce the trust by legal proceedings. I am not convinced that a non-beneficiary non-trustee can be given the requisite standing to bring an action to enforce the trust. It seems to me the protector might be answered with the objection that he has no right or interest in the trust fund for the court to enforce, and he has no authority from beneficiaries to act on their behalf. However, it seems the protector would have the necessary standing to enforce recognition of the exercise of his own powers, certainly if held by him as a benefit or privilege, probably even if held by him on a fiduciary basis.

Constraints and obligations-expressed

A protector is constrained by the terms of his powers. To be effective in relation to the trust the protector's acts must be authorised by a valid power; any conditions for the exercise of the power must be fulfilled; the prescribed formalities for the exercise of the power must be observed; and the action must not exceed the limits of the power. If the terms of the power restrict the purposes for which it may be exercised, the protector cannot effectively exercise it for an unauthorised purpose.

Example: The trust instrument provides "the protector may, if so requested by the settlor, direct the trustee by written notice to make payment to any of the settlor's children for educational purposes in amounts not to exceed $10,000 per annum per child". This imposes a number of constraints:

(a) the condition that a request is made by the settlor,

(b) the formality of written notice to the trustee,

(c) the dollar limit,

(d) the restriction to educational purposes.

The constraints noted in the last paragraph are all of a particular kind. They do not impose any obligation on the protector, they merely tell him that, if he wishes to exercise a power, he can only do so in accordance with the terms of the power. If he purports to act outside the terms of his power, his action will be invalid and there may be other unpleasant consequences.

Imposing actual obligations

The trust instrument may also impose actual obligations.

Example 1: The protector is expressly required to respond promptly ("yes" or "no") when asked by the trustee to give a necessary consent to some proposed action.

Example 2: The protector has power to give the trustee investment directions and is expressly required to keep an eye on the trustee's investment activities and the market, and to give appropriate investment directions when needed.

However, care must be taken when drafting such obligations to ensure that they will be enforceable. One needs to focus on the question of who should have the correlative right, and on the means by which they could obtain enforcement. If the court is being relied on to enforce the right, one should not assume that the court would necessarily be willing or able to do so. If the court cannot be relied on for this purpose, the draftsman should consider an alternative enforcement mechanism, perhaps giving the settlor, the trustee or beneficiaries a right to replace the protector if he persistently fails to discharge his obligations.

Constraints and obligations-implied

The last three paragraphs have discussed in outline the constraints and obligations that may be imposed on a protector by express provision of the trust instrument. But in the typical case the trust instrument describes the protector's powers, establishes a few constraints (such as the formalities for exercising powers), and says little or nothing about other types of constraint or about obligations. You might suppose the short answer is that when no constraint is expressed there is no constraint, and when no obligation is expressed there is no obligation; but you would be wrong. The court is quite ready to imply terms. An eyebrow may be raised by

those familiar with the court's approach to the construction of contracts and its reluctance to imply a term unless absolutely necessary; but courts of equity do not construe trusts and trust-like arrangements in the same way. If a person has been given power over the property of others, the court will readily imply terms to prevent abuse of the power and to give effect to the purpose for which the power was given. Those who want their protectors to be free of constraint or obligation should include express provisions to that effect-and should take great care in the drafting.

A surprising number of people do seem to think it natural and appropriate that a protector should be given large powers free of any substantial constraint or obligation. At first blush they might regard the court's willingness to imply terms as an unwarranted interference. In answer I offer a few examples of the abuse of power which could otherwise take place:

Example 1: The protector has power to change trustees and to agree the trustee's remuneration. The protector sells the office of trustee to the highest bidder, agrees an enormous trust administration fee, and receives most of it as his payment.

Example 2: A protector whose consent is needed to any distribution to beneficiaries during the trust period notifies the trustee that the settlor's family are a bad lot and deserve nothing; and that his answer to any request for consent is therefore "no".

Example 3: A protector who has power to give the trustee investment directions threatens that, unless the trustee and the beneficiaries agree to a variation of the trust to bring in new beneficiaries whom the protector considers to be deserving, the protector will deliberately give investment directions that cause loss.

Of course each of these examples would be an outrageous abuse of power, but how many trust instruments contain express provisions preventing such abuse? It should be a source of relief (particularly for the trust draftsman and his professional indemnity insurers) that the court will look beyond the express terms of the trust instrument.

Types of implied terms

The court may imply terms of two types:

(a) implied restrictions on the purposes for which the protector may use his power,

(b) an implied obligation of the protector to serve the purpose for which the power has given.

In other words the court first seeks to discover from the admissible evidence the purpose or purposes for which the power was given and prevents its use for any other purpose (type (a) implied term). This does not oblige the protector to use the power or even consider doing so. He may ignore impassioned pleas from the beneficiaries or the trustee. But, if the protector wishes to use the power, it must be for a proper purpose - of the proper purpose if the court has concluded that the power was granted for a single purpose. If he attempts to use the power for an improper purpose it is a “fraud on the power”.

Then the court may go a step further and oblige the protector to serve the purpose for which the power was granted (type (b) implied term). If the protector has a service obligation, he must use his power, or at least

consider it from time to time; and he must pay due regard to requests that he should act. Otherwise he can hardly claim to be doing his best to serve the purpose.of his power. Moreover he must act responsibly and with due care. Indeed the service obligation naturally entails a number of other things, notably a prohibition against releasing the power or doing anything else that would impair his ability to serve the purpose of his power. Sometimes the word “fiduciary” is used to describe the service obligation and the various things it entails, but the word has been used and abused to mean so many things that it is best avoided in a discussion of this sort.

To put it another way, the court has two ways of testing the propriety of a protector’s conduct-apart from the express terms of his powers. On the one hand the court considers whether the protector has acted for a proper purpose. On the other hand, the court considers whether the protector has an obligation to serve and, if so, whether he has done his best to do so.

It must be said that the court is not always careful to say which test it is applying. This is regrettable though the circumstances are sometimes such that both tests point to the same conclusion.

Descending from these dizzy heights of generality to discuss the practical application of these principles, I suggest it is a good idea to deal separately with dispositive powers and administrative powers. Evidently they are given for completely different purposes. So, while the analytical process is the same. the results tend to be different. Discussion is difficult enough without trying to juggle both balls at the same time.

Dispositive powers-purpose restrictions

In the case of a dispositive power one can generally see without much difficulty who are the proper objects of the power-and who are not.

Example: The protector has the power to direct the trustee to make distributions amongst the children of the settlor. The protector enters into a bargain with child X under which the child is to hand over most of the distributions to the protector himself. The protector enters into a bargain with child Y which requires the child to put most of his distributions into a trust for other members of the settlor's family. The protector then directs distributions to both children. In both cases this is a fraud on the power. The court will naturally imply the restriction that the power cannot be used for the purpose of benefiting the protector himself or, indeed, anyone else other than the settlor's children. The fact that the bargain with child Y was well-intentioned is neither here nor there.

As illustrated by the last example, "fraud" in this context does not signify villainy. It means only that the power is being used for an unauthorised purpose.

An attempt to use a power to benefit a non-object is no less fraudulent because the benefit is non-pecuniary. In the English case of Cochrane v. Cochrane a man had power to appoint trust property amongst his children. To encourage his first wife to give him a divorce he made a very generous appointment in favour of the child of his first marriage. The court decided that the power had been used by the man for his own benefit (to secure a divorce) and the appointment was struck down accordingly.

In some cases it may be legitimate to use a dispositive power for the benefit of other beneficiaries of the trust who are not on the face of it objects of the power.

Example: The protector has the power to add any child or remoter issue of A as a beneficiary of a discretionary trust in which A himself is already a beneficiary. The protector decides to add A's children in order that their school fees may be paid from the trust without increasing A's taxable income. This exercise is for A's benefit, to reduce his tax bill. It is not going to make any difference to A's children. Their school fees would be paid in any event. Depending on the admissible evidence of the settlor's intent. this might be a legitimate exercise of the power.

Just because there is no intention to benefit a non-object it does not necessarily follow that a power is validly exercised. The admissible evidence may show that the power has a more restricted purpose.

Example: The protector has the power to add an; person to the class of beneficiaries of a discretionary trust, excluding only the protector himself and the trustee. The admissible evidence shows that this power was granted solely to meet the eventuality of the initial beneficiaries dying out. If the initial beneficiaries are all alive and well but the protector purports to add a lot of new beneficiaries simply because he regards them as needy and deserving, this might be attackable as a fraud on the power. But the burden would clearly be on the attacker to prove this special restriction.

In the case of discretionary trusts it is common for the settlor to sign a letter of wishes in which he explains for the benefit of the trustee and the protector the way in which he hopes they will exercise their dispositive powers. Generally such letters start with a clear statement that they are not intended to fetter the discretions of the trustee or the protector or to have any other legal effect. I am not aware of any case in which the point has been argued, but it seems to me that conceivably such a letter could, despite its preamble, set some bounds on the purposes for which the

trustee and the protector could use their dispositive powers. In other words, one might attack any attempt to use a power in a manner plainly inconsistent with the letter of wishes. I have no doubt that many will argue forcefully that this cannot be so and that the preamble to the letter of wishes must be taken at face value. I am not so sure. I am not even sure which answer I would prefer.

Dispositive powers - service obligation

Thus far I have discussed only the first type of implied term-purpose restrictions. I turn now to the question of service -obligation. For this purpose courts and commentators have suggested several different ways of classifying dispositive powers, and the result always seems to be the opposite of that intended-more confusion and argument, not less. It seems to me that a better analytical approach may be to ask the following questions:

(1) Did the, settlor grant the power in order that some purpose of his own should be achieved?

(2) If so, what did the settlor expect the protector to do for that purpose?

(3) To what extent, if any, did the settlor mean this to be a matter of obligation enforceable by the court?

(4) Is it the kind of obligation which the court is willing and able to enforce?

I must admit that there is to my knowledge no case in which the court has put this forward in so many words as the proper approach; but it seems to

me to be implicit in the reported decisions, and it does step around the classification quagmire.

Starting with question (l) - Did the settlor grant the power in order that some Purpose of his own should be achieved? - it will be appreciated that dispositive powers are sometimes given to people, perhaps even to protectors, as a benefit or privilege, not to serve any purpose of the settlor.

Example 1: The protector is empowered to call for distributions to himself up to a stated limit er annum. Obviously this is a power for the protector's' own benefit - not a very likely situation given my definition of "protector".

Example 2: The trust instrument designates successive income beneficiaries as protector and endows the office of protector with several powers, including a power to appoint up to a stated proportion of the trust fund to any person other than the trustee or the protector himself. This is not a beneficial power in the sense described above - the protector cannot make an appointment in favour of himself. But it is probably intended by the settlor to be a privilege. If there is someone upon whom the protector would like to confer a benefit, he has the power to do so. If there is no such person, the protector is at liberty to forget the power.

If a dispositive power has been given to a protector and it is not intended to be either a benefit or a privilege, it must presumably have been given to serve some purpose of the settlor. In other words question (1) is answered in the affirmative.

The answer to question (2) - What did the settlor expect the protector to do for that purpose? - obviously varies from case to case. Dispositive powers are given for a variety of different purposes. Perhaps the settlor has no particular views on who should take the trust property on the termination of his trust, provided they are in his family, and he wants to leave the decision to a responsible person who will be knowledgeable about the family circumstances when the day comes. Or perhaps the settlor has fairly definite views about his dispositive arrangements and is looking to the protector merely to fine-tune them, taking into account changing situations and circumstances. Perhaps the settlor is entirely clear in his own mind what benefits he wishes to confer, but he considers it impolitic to give the beneficiaries fixed rights-perhaps because of the tax consequences or because a fixed interest would be available to the beneficiary's creditors. Perhaps the settlor has a single specific purpose, to enable a reorganisation of the trust if the original tax planning has been undermined by changing tax laws. Or perhaps the dispositive power is simply a part of the trust's flight mechanisms to be triggered if something untoward happens in the trust domicile.

Indeed there are plenty of other possibilities and, with such variety, it is hard to generalise about the settlor's expectations of the protector's conduct. The settlor must presumably expect the protector to act, or at least to consider acting, at appropriate times. Otherwise, if the protector simply ignores his powers, the settlor's purpose is giving the power must be frustrated. There may be an expectation that the protector will be merely reactive, considering his power only when asked to do so; or the settlor may expect him to be pro-active, keeping an eye on the situation and acting whenever the need arises. There may be an expectation that the protector will conduct appropriate investigations or enquiries before making his decisions. Most probably there will also be some negative expectations, things which the protector should refrain from doing. The protector would defeat the settlor's purpose if, for example, he released his power or did anything else that would impair his ability, or that of his successors, to serve the purpose for which the power was given.

Turning to question (3) - To what extent, if any, did the settlor mean this to be a matter of obligation enforceable by the court? - it does not follow that every expectation of the protector's conduct translates into an obligation enforceable by the court. Most notably, one supposes that every settlor hopes and expects that his protector will use good judgment in exercising his discretions; but the settlor is unlikely to want the court to enforce good judgment. He has chosen to place the particular discretion in the hands of the protector, not the hands of the court. So, if the protector has acted in a way which he genuinely believes to be appropriate to serve the purpose of his power, the court will not interfere even though it disagrees with his decision - unless perhaps the decision is so extraordinary that the court finds it to be "irrational, perverse or irrelevant to any sensible expectation of the settlor". Obviously, however, this presumption that the settlor does not want the court to interfere with his protector's judgment applies only if it is an issue on which the settlor meant the protector. to have a discretion. So it is very important to identify the extent of the protector's discretion. In some cases the settlor intends the protector to a have a discretion as to how he exercises his power, but no discretion as to whether he exercises the power.

Example: The only income provision in the trust instrument requires the trustee to distribute the entire trust income amongst the children and remoter issue of the settlor at least annually in such amounts or proportions as the protector directs. The trust instrument says nothing about what should happen if the protector does not give directions. But, if the protector does fail to give directions, the settlor's dispositive arrangements will obviously be frustrated unless the court intervenes. In such a case it is highly probable that the court would intervene and conclude that the protector had no discretion whether to act. Rather, the protector had a duty to the settlor's children and remoter issue to make the necessary decisions and give the necessary directions so that income distributions could be made at least annually.

it is perfectly possible that even a well-advised settlor might decide that his protector should be entirely free of enforceable obligations despite the consequent risk that his dispositive arrangements might be frustrated or thrown into disarray. One reason might be the fear that pressure or harassment from the beneficiaries might have an undesirable influence on the protector, causing him to favour those who shouted loudest. A more common reason is the unwillingness of the favoured candidate for the office of protector to accept it on a basis of enforceable obligations decidedly awkward state of affairs if the preferred candidate happens to be the settlor's legal adviser. However, unless the admissible evidence does contain a clear indication that the protector is to be free of obligation, the natural inference must be that the protector has an obligation to do that which he was appointed to do. In saying this I should note that we are assuming that the protector was not given his power for his own benefit or as a privilege, and I should draw attention to my definition of "protector". However likely or unlikely it may be that the settlor would choose to rely entirely on the unenforceable integrity of a particular individual, it must be far less likely that he would rely to some extent on the integrity of successive holders of an office.

Turning finally to question (4) - Is it the kind of obligation which the court is willing and able to enforce? - enforceability is discussed at paragraphs 49-53. I mention it here as a reminder that the court does not enforce every kind of obligation. If the so-called obligation will not be enforced by the court, it can hardly be described as an obligation unless the trust instrument contains alternative and effective mechanisms for enforcement, e.g. by replacing the protector.

Administrative powers - purpose restrictions

There is less case law dealing with implied purpose restrictions on administrative powers than there is for dispositive powers, but it seems

that the court undertakes the same exercise of considering the purpose or purposes for which the power has been given, and preventing its use for any extraneous purpose. In practice the questions most likely to arise are:

(a) For whose benefit may the administrative power be exercised? and

(b) May a power to influence one aspect of the trust administration be used to influence a different aspect of it?

So far as benefit is concerned the range of possibilities is that the power has been given:

(a) for the benefit of the protector himself,

Example: The trust instrument designates successive income beneficiaries as protector, and gives the protector power to veto the acquisition of new investments. This may be to enable the protector to look after his own interests without regard to the interests of other beneficiaries.

(b) for the benefit of the beneficiaries of the trust or some class of them. Obviously this is the most common situation, the natural inference unless there is clear evidence to the contrary. In a House of Lords decision concerning a power to give investment directions it was said:

“Nothing short of the most direct and express words would, I think justify a construction which would enable those who exercised the’ power of direction to disregard the interests of the beneficiaries.”

(c) for the benefit of persons other than trust beneficiaries;

Example: The settlor owns a substantial block of shares in a family business. The other shares are owned by his brothers. He puts his shares into a trust for his own family but he is also concerned about the, interests of his brothers and their families. Specifically, he does not want the trust to part with its shares, even though that might be in the interests of the trust beneficiaries, unless his brothers and their families are also disposing of their shares. To achieve this the settlor appoints a protector with power to give the trustee investment directions.

(d) for other collateral. purposes of the settlor,

Example: The settlor places his business in a trust for the benefit of his family. But he is also concerned about the interests of those employed in the business and, more generally, the community in which the business operates. He feels that the shutting down of the business would cause unhappiness and hardship. Perhaps he also wishes the business to continue for its own sake, his mark on the world. Again a protector is appointed to achieve the desired result, suitably equipped with a power to prevent the disposal or liquidation of the business.

These possibilities are not mutually exclusive. The protector may have a dual role.

An administrative power may on the fact of it enable the protector to prefer one beneficiary over another, perhaps by using an investment-related power to favour income production over capital growth. In some cases this may be the settlor's intention but as a general rule one supposes that settlors do not give dispositive powers in such a roundabout way. In other words the general rule must be that protectors should not use their

administrative powers for the purpose of preferring one beneficiary over another.

The other likely question is whether a power to influence one aspect of the trust administration may be used to influence another.

Example 1: The protector has the power to remove and appoint trustees. The protector does not like the way in which the trustee is exercising its discretion to make distributions amongst beneficiaries, but the protector admits that the trustee has not committed any breach of trust or duty. Is it legitimate for the protector to use his power to put pressure on the trustee or, indeed, to find a new trustee who shares the protector's views about distribution policy? It is hard to answer that question without some more (admissible) evidence of the settlor's reasons for giving the protector this power. A letter of wishes might be relevant. If it indicated that the trustee was acting consistently with the settlor's wishes, it would be more difficult for the protector to defend his use of power. Conversely, if the trustee were acting inconsistently with the letter of wishes, the protector's decision would seem eminently defensible.

Example 2: The situation is exactly the same as in the last example but instead of a power to change trustees the protector has the power to agree the trustee's remuneration. The protector tells the trustee that no further increase in its remuneration will be agreed unless it changes its distribution policy. It seems most unlikely that the court would agree that the protector was acting for a legitimate purpose.

It should hardly need saying that there must be an implied restriction against the protector using any of his powers for the purpose of influencing the trustee to commit a breach of trust or duty.

Administrative powers-service obligation

In relation to administrative powers there are the same key questions:

(1) Did the settlor grant the power in order that some purpose of his own should be achieved?

(2) If so, what did the settlor expect the protector to do for that purposes?

(3) To what extent, if any, did the settlor mean this to be a matter of obligation enforceable by the court?

(4) Is it the kind of obligation which the court is willing and able to enforce?

Unless the administrative power was given to the protector for his own benefit or as a privilege, the answer to question (1) must be affirmative. The answers to questions (2) and (3) depend very much on the particular power and the particular circumstances. My general remarks above concerning dispositive powers are equally applicable in this context. But in this context it seems to me that the dice are loaded in favour of the protector having a service obligation to the beneficiaries. Administrative powers are by their nature concerned with the management of property which the settlor has given to the beneficiaries. So the natural inference, admittedly rebuttable, is that the purpose of an administrative power is to further or protect the interests of those beneficiaries, that the settlor expects the protector to conduct himself in whatever seems to him to be the best way of serving that purpose, and that this is intended to be a matter of enforceable obligation. However, this still does not mean that the duties of protectors are always clear in practice - rather the reverse.

Example 1: If the protector has the power to change trustees and it has been established that in this particular case the protector has a service obligation, should he keep an eye on the trust administration so as to determine whether it is being handled efficiently and economically? Or should he do nothing unless and until a beneficiary (or the trustee) asks him to act? Evidently he could be criticised either way. If pro-active, the trustee may complain about interference and expense and, if the protector is remunerated according to time spent, beneficiaries may have something to say about that too. But if he is reactive and takes no interest in the trust administration, he may be criticised by beneficiaries if it transpires that the trustee has been making a mess of things or charging too much. In favour of reactivity it may be pointed out that beneficiaries are entitled to trust accounts and information so they do not neet a protector to blow the whistle. For pro-activity it may be pointed out that not all beneficiaries are in existence let alone competent to review the trust administration.

Example 2: The protector has the power to give the trustee investment directions which the trustee must obey. The trust instrument does not say in so many words that the protector has a duty to give timely investment directions, but it does provide that the trustee may not acquire or dispose of any investment save in accordance with the protector's directions. Such a provision must strongly suggest that the protector has a duty to give timely directions. Otherwise who is to have the responsibility of looking after the trust's investments? Perhaps the protector will then argue that it is the responsibility of the trustee to keep an eye on the investment situation and to present him, the protector, with appropriate investment proposals as and when needed. Perhaps the trustee will argue the reverse and point out that it would be more efficient and less costly for the decision-maker to do his own review and research.

In short there is likely to be plenty of scope for argument about the responsibilities of the protector unless the trust instrument provides the

answers. By way of reassurance, however, it does seem unlikely that the court would penalise a protector for being too pro-active, or not pro-active enough, if he had recognised his service obligation to the beneficiaries and conducted himself in what he genuinely regarded to be the best way of furthering or protecting their interests-always assuming he had acted in accordance with the trust instrument.

Another question more likely to arise in the case of an administrative power than a dispositive power is the protector's duty of care. If the protector has a service obligation - and I do not think there can otherwise be any question of a duty of care - what standard of care and diligence is required of him? The probable answer is the same standard as that required of a trustee. It is hard to see what other standard might be proposed.

Enforcement

How does the court enforce the constraints and obligations imposed on protectors? If the question is whether the protector has validly exercised a power affecting the trust, then a trustee or beneficiary may apply to the court for a decision; and it seems that the protector himself may also do so. If the court decides that the power was not validly exercised, perhaps because the protector acted for an improper purpose, the protector's purposed action is simply a nullity.

Suppose, however, that the trustee has relied in some way on a direction, appointment, consent or other act of the protector which turns out to be invalid. The trustee may have made a distribution to a beneficiary, or perhaps it has retained a loss-making investment which would otherwise have been sold. Who pays? The answer appears to be as follows:

(a) A beneficiary who had received a distribution which ought not to have been made would have to return it. But he might not have the means to do so.

(b) The trustee would have acted without due authority (the protector's act being invalid) and so would probably be in breach of trust. The trustee would be excused by the court under its statutory jurisdiction if the court were satisfied that the trustee had acted honestly and reasonably and ought fairly to be excused. But those are significant "ifs". A trustee may well have an implied duty to satisfy itself that the protector has acted properly. Certainly a trustee would not be excused if there had been grounds for suspicion.

(c) The protector would have brought about a breach of trust and so would be accountable on the basis of "knowing inducement" if nothing else.

If the question is whether the protector should compensate the trust fund or the beneficiaries for loss resulting from the protector's breach of obligation - perhaps because the protector has failed to act when required to do so, or has acted carelessly - it seems to me that an action could be brought against the protector in exactly the same way as an action against a delinquent trustee. But this does raise the fundamental question of principle whether the obligations of protectors are enforceable. That is not quite such a silly question -as it may sound. Not all promises are enforced by the courts. There has to be a recognised basis for enforcement, such as a contract or a trust. The difficulty with the trust approach is that the protector is not a trustee. The trust property is not in his hands. This is not just a matter of semantics. One of the essential elements of a trust is that it is an obligation undertaken by a person in relation to property in which he holds an estate or interest, an obligation to do something with that estate or interest. If all that a person holds is a power over property, not an estate or interest, he cannot be a trustee. Nonetheless it has been acknowledged by the courts on several occasions that a power over property may be granted subject to trust-like (i.e. fiduciary) obligations, and it seems that an obligation of that description is enforceable as such. If a protector sought

to avoid liability on this technical ground, he would probably be faced with. alternative claims that he had made himself a constructive trustee by assisting or inducing a breach of trust - and that he was liable in tort for negligence. One way or another he would surely be fixed with liability! Those who remain uneasy about the enforceability question should ensure that the prescribed process for appointing new protectors requires the appointee to deliver a deed to the trustee on behalf of the beneficiaries undertaking to perform the duties of his office.

I do not mean to suggest that every kind of obligation imposed on a protector will be enforced by the court. I have already mentioned the possibility that a protector may be given administrative powers for the benefit of persons who are not trust beneficiaries, or for some collateral purpose of the settlor. In such situations there is likely to be certainty problem. A trust is not enforceable as such unless it meets well-known certainty requirements; and this is one of the reasons why non-charitable purpose trusts are generally unenforceable. By parallel reasoning a protector's obligation could not be enforced unless it passed the same certainty tests. There may also be a problem with the beneficiary principle - one of the other reasons why non - charitable purpose trusts are generally unenforceable-that there must be somebody in whose favour the court can decree performance.

The court has a variety of different methods available to it for enforcing the duties of trustees. It seems to me that the same methods are available as regards the duties of protectors, subject to a few important differences. As I have already noted, a protector is not strictly speaking a trustee, so it is far from clear that the court has any jurisdiction to remove or appoint protectors. On the other hand the court may have an additional method of dealing with troublesome protectors that of directing the trustee to carry on in disregard of a delinquent protector. This was done in a Canadian case, Re Rogers, where the protector had the power to give investment directions but had placed himself in a position of conflicting interests and so could not discharge his fiduciary obligation. More recently the English

court in Mettoy Pension Trustees Ltd v. Evans was prepared to direct the trustee in a situation where the fiduciary holder of a dispositive power was prevented by a conflicting duty from exercising a discretion - even though it was a discretion whether to act, not merely a discretion how to act. This strikes me as a perfectly appropriate solution - so long as it is restricted to situations such as that in Re Rogers where the protector has a service obligation and is for one reason or another unable or unwilling to perform.

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 Home