PROTECTORS

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Lately, instructions to advise on offshore trusts have been coming in, not from the trustees or beneficiaries, but from the protectors. This may be partly because with the popular form of a "blind" trust (charities the only named beneficiaries, with power for the trustees to add those really intended to benefit) there are no individual beneficiaries for the time being and enforcement is left to the protectors. Last year came the second court decision that I know of about protectors, as the word is used in an offshore trust connection, and of recent years various offshore jurisdictions have legislated expressly for protectors. So this seems an appropriate moment to try to summarise some of the law about them.

In the word "protectors" I include all those other than the trustees who are given powers in connection with a trust, either positive powers or negative discretions conferred by requiring their consent to different acts of the trustees or the settlor. They may be called protectors or advisers or a management committee, or a number of other names.

The first thing to note is that there is no single category of protectors: different trust instruments give protectors different powers and duties, the terms of the particular instrument have to be considered as a whole, and the law applying to one power or duty may be quite different from the law applying to another. The consent of protectors is commonly required for the exercise of trustees' powers to add beneficiaries of a discretionary trust, or their powers of appointment, or of distributing capital, or even income, under a discretionary trust, so conferring a veto on the protectors. Protectors (often called investment advisers in such contexts) may be given a similar veto over changes of investment, or may be given the investment power themselves. Their consent may be required to any exercise of a settlor's power of revocation or variation of the trust, or to a move to a different jurisdiction under a flight clause, or to the appointment of new trustees; or again they may be given the power themselves to vary or revoke the trust, or to trigger the flight arrangements, or to remove and appoint trustees. Many other examples can be found in the trust instruments of offshore trusts. Section 86(2) of the Trustee Ordinance of the British Virgin Islands contains a list of specific powers that may be conferred on protectors.

Is a protector a trustee? So far as English law goes, only a person who holds trust property is a trustee. So, unless protectors hold the trust property themselves, which they

very rarely do, if ever, they are not trustees as the word is used in England or in offshore jurisdictions whose law is based on that of England. (The only exceptions in England are Settled Land Act trustees, called trustees by the Settled Land Act 1925 though the land is vested in the tenant for life, and "managing trustees", wrongly so called, of unit and other trusts whose funds are held by custodian trustees.) Legislation in Belize and the British Virgin Islands provides expressly that, in exercising their powers as such, protectors are not to be considered trustees, and in Jersey and the Turks and Caicos Islands there are sections which, without using the word "protector", bring about the same result for anyone whose consent is required for the exercise of a trustee's power or discretion. (Positive powers, as opposed to vetoes, are not mentioned.) Care must nonetheless be taken. Though protectors are not trustees for the purposes of the local law, they may be accounted trustees for the purposes of United States revenue laws, and perhaps other laws.

Is a protector a fiduciary? Statute apart, this question has to be answered power by power and duty by duty, on a consideration of the language of the particular trust instrument. Because so many different kinds of power and duty can be conferred, it is not possible to label someone a protector and then say that he is therefore in a fiduciary position, let alone what the legal consequences of that position are. They in turn depend on the particular power or duty in question, and the wording of the trust instrument.

Take, at one end of the scale, a protector who is a capital beneficiary and whose consent the trust instrument requires for any distribution of capital by the trustees under a discretionary trust. Even if he is called a protector, the veto may very well be conferred on him for his own protection alone, and, if so, his discretion to give or withhold consent is not a fiduciary one at all. It can be exercised in a purely self-regarding way to preserve the protector's own beneficial interest in capital.

At the other end of the scale is a power to appoint trustees, which is fiduciary. Obviously, as Kay J said as long ago as 1889, where the trusteeship is remunerated, the appointor could not sell it to the highest bidder and pocket the price. That can only be because the power is a fiduciary one. As Kay J said, the appointor must select honest and good trustees, and is bound to select to the best of his ability the best people he can find for the purpose. A power to remove trustees is less usual and more draconian, so is considered to be a fiduciary power as a rule, subject to contrary wording in the trust instrument. In the Star Trusts case last year, Meerabux J in the Supreme Court of Bermuda held, on the true interpretation of the power and the whole frame of the settlements in question, that a power for the protector to remove the trustee and appoint a new one was fiduciary to the extent that if the protector exercised the power he could not do so for his own benefit. He found as a fact, however, that the protector had not exercised the power corruptly in such a way.

Powers to revoke or vary the trust may perhaps be considered together. It has been held in the USA that a power reserved to the settlor to vary the trust was not fiduciary and so

could be exercised to revoke the trust entirely and take the whole trust fund back. A settlor's power of revocation in an ordinary private trust is obviously not fiduciary, because the settlor must be intended to be able to exercise it so as to take the trust fund beneficially. Powers of variation and similar powers reserved to the employer in pension fund trust deeds have been held to be fiduciary, but on a ground that distinguishes them from settlors' powers in ordinary private trusts, that the employees give value for their pension rights. It has also been held that the employer must not act in a way calculated or likely to destroy or seriously damage the relation of confidence and trust between employer and employee, but that cannot apply to an ordinary private trust. And even in a pension trust the power of amendment may not be fiduciary.

A power to choose trust investments was held by the House of Lords, on a consideration of the settlement as a whole, to be fiduciary. Lord Morton said that those entrusted with the power (not beneficiaries themselves) had to exercise it "bona fide in what they consider to be the interest of the beneficiaries".

If the power is fiduciary it must be exercised bona fide for the purpose for which it was conferred, in the interest of the beneficiaries and not for the individual benefit of the protector. That, however, can all be modified by the express or implied terms of the trust instrument. Notwithstanding the question raised, and strong language used, by Vinelott J in two pension fund cases, it is thought clear that if a protector is also a beneficiary the powers can be exercised in the protector's personal favour as much as for any other beneficiary, just as the donee of a special power of appointment can appoint to himself if among the appointable class, though if the power is fully fiduciary it may have to be exercised fairly as between the protector and other beneficiaries. The general rule is that a fiduciary is not allowed to derive a benefit from the fiduciary office, but that rule may be altered by the express terms of the trust, or by implication, as with the special power of appointment, or a settlor's power of revocation. An income beneficiary with a power to direct investments has even been held entitled to require the trustees to buy them (at a proper price) from himself, and to realise existing investments in order to do so.

Likewise, though the power ss fiduciary, the trust instrument can excuse the protector from the liabilities that would otherwise attach to its misuse. Section 85(3) of the Trustee Ordinance of the British Virgin Islands excuses from liability a protector exercising bona fide any power to determine the proper law of the trust, or to change its forum of administration, remove or appoint trustees or withhold consent from any acts of the trustees. An express provision in the trust instrument could do the same, and perhaps should normally do so, though settlors may not wish to go so far as ss.36 and 37 of the Fines and Recoveries Act 1833, from which the name of protector derives, Shadwell V-C said that those sections set the protector at liberty to act from mere caprice, ill-will or any bad motive, and even to take a bribe for giving consent.