



# To protect & to serve

ALASDAIR DAVIDSON AND RUPERT MORRIS DISCUSS  
THE ROLE OF PROTECTOR IN GUERNSEY TRUSTS

THE ROLE OF protector is generally a product of the offshore world, largely originating from the desire to assuage settlors' fears about retaining some element of control over assets they intend to settle. Where there is an offshore trustee, whom the settlor likely does not know, and where reserving powers might prove undesirable from a tax perspective, the appointment of a third party to oversee the exercise of some or most of a trustee's powers might provide some measure of comfort that the original intentions in setting up the trust will be fulfilled.

While the role of protector is commonplace, Guernsey law, along with that of many other offshore jurisdictions, does not provide any statutory definition of 'protector', or what such a person's roles or duties might be. That said, the role is accommodated in legislation. For example, s32 of the *Trusts (Guernsey) Law 2007* (the Trusts Law) states that a trustee may be required by the trust's terms to consult with or obtain the consent of a third party before the exercise of any function. Further, s15 provides specifically that the reservation of certain powers to such a third party will not invalidate a Guernsey trust.

Guernsey law clearly permits a protector's role to vary, depending on the terms of a trust. It can range from providing a check on a trustee's actions to exercising fiduciary powers in and of their own right. It is, perhaps, due to this potential variety that legislators have been reluctant to fetter the protector's role and rights, preferring to leave them to the wishes of the settlor.

## PROTECTOR DUTIES

Unlike trustees, protectors derive their rights and powers (and the extent of these) exclusively from the trust

instrument and any other document that contains the trust's terms. It is generally assumed from this that the role overseeing a trustee's administration will, therefore, give rise to a fiduciary relationship between the protector and the beneficiaries, with protectors owing a duty of care to them to exercise their functions in their best interest.

The position is not, however, entirely clear in Guernsey, as s15(2) of the Trusts Law effectively reverses the usual presumption, with the effect that there are fiduciary duties for reserved powers reserved to any person, settlor or otherwise. Conversely, so-called 'consent powers' will be fiduciary unless the trust terms say differently. This means that protectors' duties, and those to whom such duties might be owed, will, in Guernsey at least, need to be assessed on a case-by-case basis.

## REMOVAL OF A PROTECTOR

These points were considered by the Guernsey Royal Court in *In the matter of the K Trust*,<sup>1</sup> where they arose in the context of an application for the removal of a protector, and determination of whether her powers might be fiduciary in nature (and, therefore, potentially subject to an implied equitable right of indemnity). Following the position adopted in Jersey in *In the matter of the Bird Trust*,<sup>2</sup> the Guernsey Royal Court considered the issue by reference to the construction of the trust instrument and formed an 'overall impression' from its terms that the protector's office, in that case, had been endowed with fiduciary, rather than personal, powers.

The trust in question (the K Trust) had been settled before the Trusts Law came into effect, when no provision similar to s15 had been enacted. This meant that the position might be different for trusts settled or powers exercised by protectors after that date. In the end, the Court did not need to resolve that issue on the facts of that case, and it remains, therefore, an area of concern for protectors in Guernsey, because any implied right of indemnity they may have might be entirely dependent upon their powers being fiduciary in nature.

## A CONTRADICTION IN TERMS

It is hoped that any future amendments to the Trusts Law will address the apparently contradictory positions under s15 and s32, thereby reducing the need to pose such questions to the Court. However, irrespective of legislative changes, a protector's role should always involve consideration of whether or not an action is in the best interests of the beneficiaries.

In our view, this must, by extension, encompass ensuring the beneficiaries' welfare and cooperating in the smooth administration of a trust. A Guernsey protector will, therefore, need to be ever mindful of these two paramount considerations when exercising their functions – whether fiduciary or not – and, as ultimately held in the *K Trust*, will need to consider their actions in light of these, lest their position becomes untenable.

<sup>1</sup> Judgment 31/2015

<sup>2</sup> [2008] JRC013



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