THE PROTECTORS' POWER OF CONSENT

AN EVOLVING CONCEPT

Authored by: David E. Grant – Outer Temple Chambers

Introduction

Three recent cases in three different jurisdictions [1] have considered a hitherto unexplored question in the law of trusts, namely the scope of a protector's power of consent. The different conclusions of, on the one hand, the English High Court and the Royal Court of Jersey and, on the other, the Supreme Court of Bermuda create uncertainty as to what approach a protector should adopt when invited to provide the necessary consent and increase the prospect and need for further consideration of the point, preferably at appellate level. [2]

Issue for Resolution

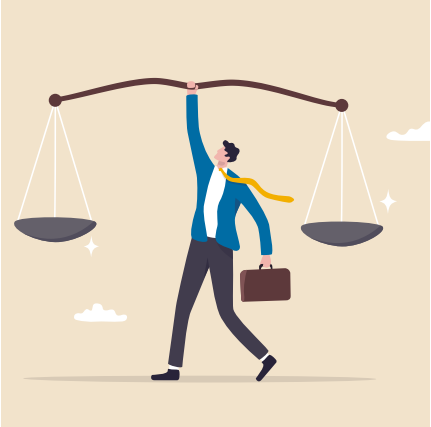
The common issue for resolution was the nature of the decision that a protector has to make when exercising their consent power. [3] The question can be posited in different ways but it boils down to this: does a protector whose consent is required for a trustee to exercise a power have an independent decision-making discretion amounting to a power of veto ("the wider view") or does the protector merely have a discretion to determine that the Trustees' decision was rational and valid amounting to a rationality review ("the narrower view") analogous to the role of a court in a Public Trustee v Cooper [4] category 2 application. [5]

Context

All three cases were or related to blessing applications. PTNZ concerned the restructuring of four family trusts and redistribution of funds. The hearing before the Master was the first of two hearings to determine the validity of the appointment of the protector and what role they were to play at the substantive blessing application. Conversely, in X Trusts, AJ Kawaley had already approved the plaintiff trustees' proposals for the long term administration of the trusts subject to determination of the scope of the protectors issues. Piedmont concerned an application to appoint all the assets of the trusts amongst the beneficiaries in specified proportions upon which the trusts would be terminated.

In PTNZ the argument was between the neutral trustees, who assumed responsibility for arguing for the narrower view [6], and the protector who argued for the wider view. In X Trusts the A Branch of the family argued for the narrower view, i.e. seeking to uphold the trustee's decision while the B Branch argued for the wider view. In Piedmont the protector objected to an initial proposal but consented to a subsequent, revised one. The protector argued for the wider role [7] while the adult grandchildren, who favoured the trustees' original proposal, argued for the narrower role. [8]

1 The cases are:
PTNZ v AS & Ors [2020] EWHC (3114 (Ch) November 2020, a decision of Master Shuman (as she was) ("PTNZ")
In the matter of the X Trusts [2021] SC (Bda) 72 Civ, a decision of Assistant Justice Kawaley ("X Trusts")
In the matter of the Piedmont Trust and Riviera Trust, Jasmine Trustees & Anor v M & Ors [2021] JRC24, a decision of the Royal Court (Samedi) (Sir Michael Birt, Commissioner and Jurats Ramsden and Olsen) ("Piedmont").
2 At the time of writing it is not clear if either 2021 decision is being appealed.
3 PTNZ at [74].
4 Public Trustee v Cooper [2001] WTLR 901.
5 The question was identified in PTNZ at [92] as whether the protector held effectively a joint power with the trustee or whether he had a power of review.
6 See [86] where it is recorded that counsel for the trustee was expressly not adopting the position he was advancing. It was an influential part of the successful argument in X Trusts that there had not been full adversarial argument in PTNZ. See [105].
7 See [87].
8 See [33].



Applicable Wording

In PTNZ Master Shuman provided [9] a precis of the expanded powers of the protector under the deed of variation: "The trustees shall not exercise specified powers and discretions without the written consent of the protector"[10]. Of relevance were the power to appoint the trust fund and apply capital and the power to add or remove any persons from the category of beneficiaries. In X Trusts ¬¬the Judge set out a sample clause [11] restricting the Trustees' power to appoint capital "The Trustees shall not exercise any power to appoint, distribute or pay any part of the Trust Fund…without obtaining the prior written consent." In Piedmont any appointment of capital or income was to be "with the written consent of the Protector". [12]

The question of whether the wider view or the narrower view was to prevail was defined in X Trusts as the Interpretation Issue. [13] In PTNZ the relevant question was posed more broadly, namely "whether [the protector's] consent is required in relation to the decisions of the trustee that are the subject of the blessing application."[14] In Piedmont, the court initially appeared to consider the issue not as one of construction of the relevant provisions before it but as a general question of the role of a protector.[15] Interestingly, in the postscript prepared after the draft judgment had been circulated in response to which the court was furnished with a copy of the decision in X Trusts, the Royal Court referred to "the correct interpretation of a protector consent clause" [16]

Despite the nature of the issues before the courts, i.e. the construction of the respective trust deeds [17], this is not an issue where the precise wording is as involved or as decisive as with other trust powers. As is apparent from the above summary, the three cases concerned materially identical language requiring written consent on the part of the protector as a condition precedent to the exercise by the trustee of the power in question.

Rationale for Protectors

The phrase "protector" is not a term of art [18] and there are many unresolved issues as to the classification and scope of a protector's power. At a high level, though, a settlor appoints a protector to exercise due control over the trustee absent judicial intervention. [19] A trustee's powers can be unilateral or joint and, without limitation, may cover the appointment or removal of trustees, the appointment of beneficiaries and restoration of hostile beneficiaries as well as consenting to distributions or the sale of trust property.

Irrespective of the question of whether the narrower or wider view prevails, there are certain pre-existing controls as to a protector's consideration and exercise of power. It was common ground in PTNZ that the protector's powers were to be exercised in good faith and for the purpose for which they are conferred (the fraud on a power rule). [20] It was common ground in X Trusts [21] and Piedmont [22] that powers were fiduciary. This is to be distinguished from PTNZ where it was contended on behalf of the trustee that the powers of consent are fiduciary while the protector argued that the power was a limited or restricted one. [23]

Previous authority and outcome

The courts in PTNZ and Piedmont commented on the lack of authority on the point generally and particularly the lack of authority in support of the narrower view. [24] After the Royal Court circulated its draft judgment, it was provided with X Trusts in response to which it added a postscript to the judgment. [25] The Royal Court was not shown PTNZ upon which it considered no great weight could be placed, despite agreeing with the outcome. [26] X Trusts had the most detailed argument and the most sustained examination of authorities and academic writings even if the decision is – as a matter of construction - one which many practitioners will consider to be wrong, no matter the benefits of the narrower view.

In essence, the task of construction is to ascertain the objective meaning of the words used and the objective intention of the parties (in the case of a unilateral document, the settlor).[27] On a literal reading, the wider view prevails.[28] The literal reading represents the start of the iterative constructive process and, increasingly, the conclusion of that process. [29] This begs the question of on what basis the Bermudan court departed from the literal reading (and its own first impression). In essence, having regard to the academic commentary and

9 At [76(b)].

10 One assumes that the text is very close, if not identical, to the actual wording.

11 At [11]. There were several trusts.

12 See [70] According to the judgment, there was similar wording in relation to other powers of disposition to beneficiaries while the wording in the Riviera Trust was similar but not identical.

13 See the Summons set out at [3].

14 See the summary of issues at [4(2)(b)].

15 See [87] – [95], particularly at [90].

16 At [116(ii)]

17 As just indicated, Master Shuman and AJ Kawaley explicitly recognised this. The position of the Royal Court was different.

18 In PTNZ Master Shuman accepted at [96] that there was no magic in the word protector.

19 According to Hayton, The International Trust 3rd ed, "The term is usually used to describe a person, who is not one of the trustees of a trust, but upon whom the trust deed confers a 'watchdog' role in respect of the administration of the trust by the trustees." See X Trusts at [85].

20 See [79].

21 See [9]

22 See [79]. The Court expressly explained that it had not considered the position if the protector were not a fiduciary.

23 See [80]. The Royal Court also held at [89] that the paramount duty of a protector was to act in good faith in the best interests of the beneficiaries.

24 See [93] of PTNZ and [89] of Piedmont.

25 At [112]-[120].

26 See [116(ii)]

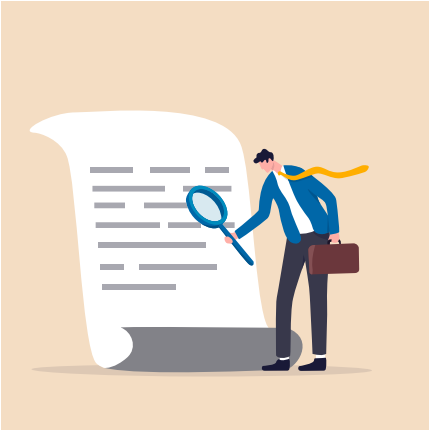
27 See the joint statement of legal principles in PTNZ at [42].

28 See X Trusts at [65] and [114].

29 See the authorities cited at PTNZ at [36] to [43] and AJ Kawaley's acceptance in X Trusts at [24] that primacy should ordinarily be given to a textual analysis of trust instruments.

downplaying the decision in PTNZ[30], AJ Kawaley was persuaded by the practical consequences of the wider view and the fact that a review function was consistent with the supporting watchdog role of a protector.[31] He was of the opinion that the narrower view was still a very substantial power[32] a decision with which the Royal Court disagreed, categorising the role - if the narrower view were correct - as a "fundamentally limited one".[33] The Royal Court rightly observed that one of the reasons why the court exercises a limited review function on a blessing application is that the settlor does not choose the court as a trustee.[34] Such considerations do not apply to a protector.

Continuing with the question of the protector's role, and developing the analogy accepted by AJ Kawaley between private trusts and pension schemes,[35] pension deeds contain a balance of powers between trustee and employer. Almost invariably,[36] the most important powers are bilateral, whether in the hands of the employer with the trustee's consent or vice versa. Although it is possible to draft a pension deed in such a way that the consent required can only be withheld in limited circumstances (comparable to wording often found in leases), it has never been argued that the trustee or employer, as the case may be, has a limited review power. Rather, the power is one of veto so that the power is effectively a joint one.



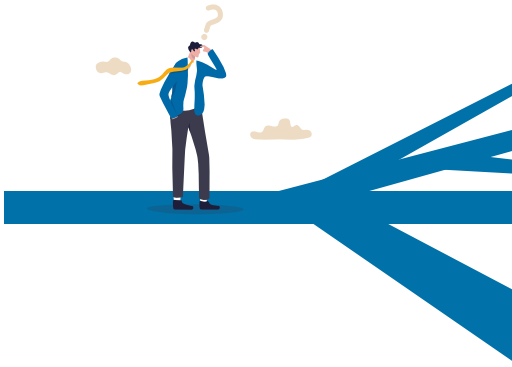
Practical consequences

It is undoubtedly true that the wider view increases the prospect of a deadlock[37] for the simple reason that trustee and protector can hold equally rational, but opposed views, as to how the trust should be distributed. The Royal Court held this to be the natural consequence of the settlor's decision to introduce the office of protector into the trust deed.[38] A true deadlock may still arise if the narrower view is correct (most obviously if the protector considers that the trustee has taken into account an irrelevant consideration or failed to consider a relevant one) and, in any event, can be resolved by an application to court.

In this context, it is pertinent to consider the earlier observation of the Royal Court that a protector's discretion lies within a narrower compass than that of a trustee.[39] This seems to suggest a third way between a full power of veto and a power of review although such a test may be difficult to apply in practice. Furthermore, as each of PTNZ, X Trusts and Piedmont confirms, the role of a protector hardly abrogates the need for a blessing application when significant sums of money are at stake. Although one should not make light of the consequences of applying to court, Vos LJ noted in Cotton v Earl of Cardigan[40] that the procedure is intended to be "quick and accessible."

Going forwards – consequence of applying wrong test

Given the different outcomes in these cases, protectors in all jurisdictions have a dilemma when their consent is sought as to which test to apply. The first issue is whether the fact that the protectors might ask themselves the wrong question automatically vitiates their exercise of the power of consent. If so, the next issue is what impact that has upon the trustee's decision.[41] Practically, there are four possible scenarios, only two of which are problematic. If (i) a protector gives their consent applying the wider test, it is implicit that they would give their consent under the narrower test. In such a case, a court is most unlikely to entertain any challenge. Equally, if (ii) a protector objects to a proposal which they consider to be irrational, applying the narrower test, it follows that they would not give their consent on the wider view. The complication arises if a protector would consent on the narrower view but not on the wider view. In this case the application of the test is critical to the granting of consent. Here the protector's decision is subject to challenge if they (iii) grant consent wrongly applying the narrower test or (iv) withhold consent thinking the wider test governs. This is sufficient reason for the protector to seek specialist advice and potentially judicial determination. While there will always be difficult cases, the hope is that much of the current doubt can be addressed. When parties to a trust are faced with monumental decisions, it is surely desirable that applications to court are limited to whether the court will give its blessing, not to the ancillary question of what the protectors' role is.



30 On the basis that it was the decision of a Master who had not had the benefit of full adversarial submissions. See [105].

31 At [99].

32 [97].

33 At [116(iv)].

34 See Piedmont at [90].

35 At [24].

36 The principal exceptions concern industry wide schemes which may have hundreds of employers and it is more likely to find unilateral powers vested in the trustee.

37 See X Trusts at [99] and Piedmont at [118].

38 [118].

39 [92].

40 [2014] EWCA Civ 1312 at [78].

41 Note that the exercise of a power vested in joint donees who must act together will be vitiated if only one of them has an improper purpose and intention. See Lewin on Trusts 20th ed at 30.080.