

Article

The Evolution of the “Watchdog” Role of Protectors (*In the Matter of the X Trusts [2021] SC (Bda) 72 Civ (7 September 2021)*)

Authors: Anna Bruce-Smith, Director | Ben Adamson, Director | Grace Quinn, Associate | Britt Smith, Associate

Assistant Justice Dr Ian Kawaley of the Supreme Court of Bermuda has provided a seminal judgment on the role of Protectors in offshore trusts. Such a role, as he notes in his recent judgment, is ‘*a comparatively modern office ... yet to be fully worked out by the courts*’. The judgment is therefore significant not only for Bermuda. It is essential reading for those who draft trust deeds with protector provisions.

In *In the Matter of the X Trusts [2021] SC (Bda) 72 Civ (7 September 2021)*, in which Conyers acted for the Trustees who were a neutral party in the proceedings, a dispute arose as to the proper role and function of the Protectors, in particular in relation to their power of veto. The key issue to be determined was whether the role was akin to a watchdog or whether it was fully discretionary (so that they could reach their own conclusions on the issues before them). The rival contentions were described as the ‘*Narrower View*’ and ‘*Wider View*’ respectively.

The ‘*Narrower View*’ described the Protectors’ role as ‘*to satisfy themselves that the proposed exercise of a power by the Plaintiffs (as trustees of the X Trusts) (or any of them) is an exercise which a reasonable body of properly informed trustees is entitled to undertake and, if so satisfied, to consent to the same.*’

The ‘*Wider View*’ described the Protectors’ role as one ‘*to exercise an independent discretion as to whether or not to give consent to a proposed exercise of power by the Plaintiffs (as trustees of the X Trusts) (or any of them) which requires the protectors’ consent, taking into account relevant considerations and disregarding irrelevant considerations so that the protectors might withhold their consent to a proposed exercise of power by the Plaintiffs even if the proposed exercise of power was an exercise of power which a reasonable body of properly informed trustees was entitled to decide upon (the latter being a relevant factor, but not the only relevant factor, for the protectors to take into account)*’.

The trust deeds generally contained clauses typical for offshore trusts, including: ‘*The Trustees shall not exercise any power to appoint, distribute or pay any part of the Trust Fund to or for the benefit of any member of the Appointed Class or any Beneficiary without obtaining the prior written consent of the Protectorate, nor, if the Trustees’ consent is required for any appointment of capital, shall they give their consent without the prior written consent of the Protectorate.*’

Much turned on the precise wording of the other clauses and the inferences to be drawn about intention. In finding that a contextual reading of the trust deeds favoured the Narrower View, Kawaley AJ referred to three indicators in the drafting as particularly relevant:

- The substantive decision making powers were vested in the Trustees;
- The Protectors could waive consent and, where there was no unanimity between the Protectors, the requirement for consent no longer applied;
- There were no indemnity provisions in respect of the Protectors, in contrast to the position with the Trustees.

Kawaley AJ, reviewed the extrinsic evidence provided, which was extensive, but ultimately decided that there was no admissible evidence which materially supported either view.

As regards the legal context and the jurisprudence, Kawaley AJ noted that the academic texts “*which extensively address the function of protectors explicitly characterise the main role of a protector as being that of “watchdog” or a monitoring one*”. Kawaley AJ, also referred to dicta in the Bermuda Court of Appeal case of *Re Information about a Trust [2014] BDA LR 5* which characterised the role as akin to a watchdog. He was also referred to, but distinguished, the case of *PTNZ v AS [2020] WTLR 1423*, the only other reported case

on the role of protectors and one which had reached the exact opposite conclusion to the one reached by Kawaley AJ. However, as acknowledged by Kawaley AJ in his Ruling, the judge in the *PTNZ* case did not consider the extensive authorities put before the Court in the *X Trusts* case and the point did not receive the benefit of full adversarial argument.

Even though Kawaley AJ's decision ultimately turned on particular aspects of drafting, such as the lack of indemnities for the Protectors, the Ruling will likely be cited for a more general proposition: that unless the trust deed expressly points to a fully discretionary role (by referring to their powers as fully discretionary for example), it is likely that the normal inference will be that the role of a Protector is essentially one of review. This is likely welcome news for many Protectors (who may well on reflection not want the additional responsibility inherent in the Wider View of their role) as well as many Trustees (who need to have less fear of gridlock when exercising their powers which require Protector consent).

The use of Protectors is on the increase, particularly in the offshore world. The relationship between Protectors and Trustees has to date been largely uncharted. This case is a major development in understanding and advising on this important relationship.

Authors:

Anna Bruce-Smith**Director**

anna.bruce-smith@conyers.com

+1 441 298 7830

Ben Adamson**Director**

ben.adamson@conyers.com

+1 441 298 7824

Grace Quinn**Associate**

grace.quinn@conyers.com

+1 441 278 7921

Britt Smith**Associate**

britt.smith@conyers.com

+1 441 278 7985

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For further information please contact: media@conyers.com