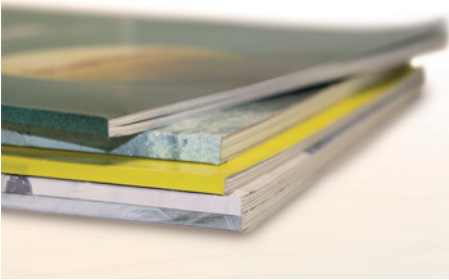


Protecting Me or Protecting You?

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Recent cases have shone a light on the role of the protector of a trust – particularly in respect of conflicts of interests. Often appointed by a settlor in order to give reassurance in ensuring that his wishes for the trust will be carried out by the trustee particularly perhaps after his death, the Protector, however, owes no duty to the settlor and is primarily there for the protection of the beneficiaries.

Fiduciary Position

There is some debate as to whether a protector is in a fiduciary position. The answer will usually depend upon the powers given to him and for what purpose. Certainly, the courts have found that in respect of dispositive powers, and powers to appoint a new trustee or a new protector, these would generally be fiduciary in nature. Not only does this mean that the fiduciary must actively consider from time to time whether or not to exercise the power, but in exercising it, he must only do so for the purpose for which it was given.

A useful summary of the position in Jersey as to the nature of a fiduciary duty was set out by the then Deputy Bailiff (now Bailiff) in **In the matter of the E, L, O and R Trusts** [2008] JRC150. He approved the comments of Millett J in **Bristol & West Building Society v. Mothew** [1996] 4 All ER 698: “A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which

give rise to a relationship of trust and confidence...The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.”

Duty of Loyalty

Certain obligations flow from that duty of loyalty. First, a fiduciary must not act for two principals with potentially conflicting interests without the informed consent of both. Secondly, he must act with good faith. If acting for more than one principal he “...*must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal.*” However, “...*an unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care.*”

If there is an actual conflict of interest a fiduciary may have no alternative but to cease to act for at least one and preferably both.

Clearly one facet of the fiduciary relationship is the protector must not place himself in a position of conflict to the beneficiaries. In the recent case of **The M Settlement** (2009) JRC 140, the court utilised what it described as its inherent power to suspend the powers of a protector who was in a position of conflict of interest. This had the effect that, under the terms of

the particular trust, references to the protector and his consent were omitted.

Suspension of Power

In a second case, **The Representation of Centre Trustees (CI) Limited** [2009] JRC 109, a protector was once again found to be in a position of conflict.

Centre Trustees acted as trustee for two trusts which each held a 50% stake in a Jersey registered company called Terret Holdings Limited (“Terret”), which was concerned in the development of mining operations in South Africa. The beneficiaries of Trust A were the two children of the settlor who, along with his wife, had subsequently been killed in a helicopter crash. Trust B had been established by a Mr Pabst, an associate of the deceased, and who was also the protector and appointer for Trust A. Certain powers of the trustee could only be exercised with prior or simultaneous consent of the protector.

Position of Conflict

The Royal Court found that certain actions taken by Mr Pabst clearly placed him in a position of conflict. Firstly, certain mining interests owned by Terret were sold. Instead of an equal split of the proceeds of sale, a greater amount of the monies went to Trust B. Secondly, Mr Pabst was involved in the making of an offer (which was not accepted) to buy Trust A’s share of Terret for US\$1. This was despite the fact that Terret owned the majority share in a South African mining company – which was later valued by the Trustee at £3.1million. Thirdly, he was involved in requests to Trust A for repayment of ‘loans’ to Terret and Trust B. These were loans which the trustee had always considered final payments for which there was no supporting documentation characterising them as ‘loans’. Fourthly, Mr Pabst exercised his powers to appoint an additional trustee in order, at least in part, to advance his own claims and finally, he, as one of the

directors of Terret, had arranged for the sale of Terret’s principal asset to a company owned by Trust B for a nominal sum.

Despite Mr Pabst’s argument that there was no conflict because the claims against Trust A concerned the administrative commercial issues of the trust in respect of which he had no functions, the court found “*all of this was to advance his interests at the expense of Trust A*” and that it “*was not inaccurate to describe him ...as a hostile party to [Trust A].*” The court found that it was “*therefore, surprising to say the least that he elected to remain in office as protector and appointer right up until the hearing...*”

Guidelines for a Protector

The court set out some guidelines for a protector. When a conflict is identified the protector should first disclose the existence of the conflict to the trustee and the principal beneficiaries. He then has choices. He can either resign or, if he honestly and reasonably believes that he can discharge his duties in the interests of the beneficiaries, he can remain in office.

If he chooses this latter option, he must be ready to justify the exercise of his powers in the context of hostile litigation and to satisfy the court that not only was the decision reasonable but that the decision was not influenced by the conflict. A finding of a breach of fiduciary duty will lead to him being liable for loss and damage caused by that breach.

Breach of Fiduciary Duty

The trustee was reminded that if the protector should actually resign and fails to do so, it is the duty of the trustee to apply to the court for his removal. Appleby (Fraser Robertson) acted for the beneficiaries in **Re Center Trustees**.

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