

# Protecting a trust



Issues relevant to trust protectors have become a relatively hot topic offshore and entire books have, and no doubt will, be written on protectors. In light of an increasing number of protector disputes, Appleby's Adam Cole takes a high-level look at the nature of a protector's role and the relevant factors to consider should relations with a protector become strained.



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**I**n essence the appointment of a protector provides a means of monitoring the actions of a trustee and checking that appropriate action is taken to preserve the trust fund. In order to carry out such functions, protectors may commonly be given "positive" powers such as the power to appoint and remove trustees and "negative" powers such as the right to withhold consent to capital distributions to beneficiaries. The role of a protector can, therefore,



be a significant one in the context of the administration of a trust.

Protectors may be appointed to act in a fiduciary or non-fiduciary capacity. Where the settlor's intention in this regard is not clear, one will need to look at the nature of the particular powers given. As a rule of thumb, protectors will commonly have fiduciary obligations even if this is not expressly stated in the trust documentation. This is not always the case, however, and where, for example, the protector is also a beneficiary that expectation may be reversed. In any event we have seen a number of cases where the elements that may or may not point to a fiduciary role are in contradiction to one another and the position can very easily become one of nuance.

Protectors can play an important role in ensuring dialogue between the parties that are interested in a trust. When the office works well, it can be a successful channel for maintaining harmony in the midst of competing interests or views. This can be particularly important, albeit potentially more difficult, following the death of a settlor.

Protectors' powers mean that they can hold a large degree of influence over structures. Whilst this can undoubtedly be a positive factor, where the limitations of the role are not fully appreciated by those in office this can lead to significant problems for the administration of the trust. Such problems have been seen to materialise where, for example, a non-professional confidante of the settlor has been appointed and believes they are entitled to act in a quasi-trustee capacity.

### Resolving problems


There are obvious reasons why it would not be appropriate for a trustee or beneficiaries to be able to remove a protector simply because a dispute has arisen. Where a protector has started to act in a matter that leads to

a breakdown in trust and confidence, an extremely difficult position can, however, arise. Where such problems affect the ability of the trustee to act in the best interests of the beneficiaries there are steps that can be taken.

Parties should be mindful of the factors that the Court would consider in the context of an application to remove a protector. The threshold for removing a protector will naturally be a high one. It is a significant step to take and caution will be exercised by the Court before any order is made. Mutual hostility or distrust between the relevant parties will not suffice. A protector may quickly become unpopular as a result of decisions that do not find favour with beneficiaries or trustees and this would be no reason for a protector to step down or face forced removal.

The Courts will ultimately be guided by considerations over the welfare of the beneficiaries and the competent administration of the trust in their favour. Where a breakdown in relations

has a significantly detrimental effect on the execution of the trusts and is likely to continue to do so, that would be a sufficient basis for the Court to exercise its discretion. It is not necessary that the protector bears the bulk of the responsibility for the breakdown in relations and the consequent difficulties caused for the trust, but such a situation will serve to fortify the conclusion that it is right for the protector to be removed.

Where circumstances of this nature arise, a protector would be well advised to walk before pushed. Where this does not happen, there is clarity on the circumstances in which the Court will exercise its jurisdiction to forcibly remove a protector. Whilst issues relevant to a protector's indemnities can serve to temporarily cloud matters, in our experience the desired result can be achieved without recourse to the Court. In the majority of cases it should, therefore, be possible to limit legal costs through an early dialogue with a protector's legal advisers. 

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