PROTECTORS AS FIDUCIARIES?

A & 6 Others v C & 13 Others

[2026] AC 846; [2026] UKPC 11

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Significance of Case



A settlor has freedom to decide on the role of a fiduciary protector when exercising their consent powers

Default role of a fiduciary protector: There is no constraint on the exercise of veto powers unless imposed expressly or impliedly in the trust deed.

What if any constraints did the trust instrument actually impose, construed in its context and with regard to any constraints imported by the general law?

The Family, the Trusts, the Protectors

Settlors

Series of family settlements since the 1950s

The Trusts

Governed by English, Bermudian and Jersey law

Trustees
(Bermudian Resident Trust Corporations)

Wide discretion over capital & income

Protectors
(Paid Professionals)

Hold veto rights over specific decisions

Beneficiaries — A Branch & B Branch

Trustees proposed splitting aggregate assets 2/3 : 1/3

The Protectors Held Two Main Powers

Capital appointments

Approve or refuse any appointment of capital to beneficiaries proposed by the trustees

Veto over Specified Securities

Approve or disapprove dealings with, or exercise by trustees of voting powers derived from specified securities owned by the trust

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From Proposal to Applications to Court

2017

Trustees propose allocating aggregate trust property 2/3 : 1/3 between A Branch and B Branch

After consultation, Protectors indicate they are unlikely to consent to the proposal – not in beneficiaries' best interests

Jun 2020

Trustees apply to the Supreme Court of Bermuda to approve their proposal in principle

B Branch and Protectors opposed application

Oct 2020

Supreme Court of Bermuda grants the orders sought

Jan 2021

Trustees seek declarations on the Protectors' true role

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Key Declaration Sought

Narrow Role

Whether role of protectors was to exercise an independent discretion as to whether or not to give consent to a proposed exercise of powers by the trustees 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 a power by the trustees 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).

Wider Role

Whether role of protectors was to satisfy themselves that the proposed exercise of a power by the trustees is an exercise which a reasonable body of properly informed trustees is entitled to undertake and, if so satisfied, to consent to the same.

Whether role of protectors was some other and if so what role?

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Starting Point: Autonomy of Settlor

A settlor has freedom to provide for a protector and to decide the protector's functions and responsibilities.

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Fundamental Question

What if any constraints did the trust instrument actually impose, construed in its context and with regard to any constraints imported by the general law?



1ST INTERPRETATION

Narrow Role

Limited to reviewing the lawfulness of the trustees' proposed exercise of their power



2ND INTERPRETATION

Wider Role

Empowered also to use an independent discretion in deciding whether or not to consent, by reference to their own view of the merits of the trustees' proposal

Positions Taken by the Parties

A Branch	B Branch	Trustees / Protectors
Narrow Role	Wider Role	Formally neutral

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Step 1: Construction appearing from natural meaning of the words



A Bare Veto Imposes No Constraints

Requiring one person's consent before another acts creates, in substance, a power of veto. Without more, that imposes no constraint on how it is used —save perhaps a duty of good faith.

Eg. A requirement in the lease for a landlord's consent to an assignment, underletting, carrying out improvements, or even keeping a pet on the demised premises works the same way: reasonableness has to be imposed by statute or by the lease. It is not inherent in a veto power or generally implied by law.



“Protector” Is Not a Term of Art

The label has not acquired a sufficiently precise settled meaning in the offshore trust industry.

The fact that “protector” includes the verb “protect” also does not help.

1. A Narrow-Role protector protects beneficiaries from unlawful trustee conduct.
2. A Wider-Role protector protects beneficiaries from decisions which, however lawful, stray unacceptably far from general expectations.

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Step 1: Construction appearing from natural meaning of the words

The trust did not by any express language impose any constraints upon the Protectors in the exercise of their powers of veto.

By appointing the Protectors as fiduciaries, the trust imported from the general law the usual fiduciary constraints affecting fiduciaries. In relation to the "pick and choose" appointments, the Protectors were not constrained by a general duty to act in the interests of the beneficiaries as a whole from considering such proposals on their merits.

The trust contemplates, without necessarily requiring, the appointment of paid professionals as Protectors who would owe a professional duty of care in the exercise of their powers of veto, as is in fact the case, but this does not impede their consideration of relevant trustee proposals upon their merits.

The precise delineation of the Protectors' powers of veto coupled with the absence of any wider constraints upon their exercise suggests that, as a matter of construction, no wider constraints were imposed.



Conclusion on natural meaning of words

The constraints identified are substantial but do not confine the Protectors to the Narrow Role.

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Step 2: Checking the construction against contextual background and business efficacy and common sense



Power to Release or Waive Consent

Protectors could give up their veto entirely, or waive it for a specific matter, before or after the Trustees decide.

If the settlor had intended the Protectors to fulfil the Narrow Role and so have a fiduciary duty to check the legality of Trustee's decisions, no reason why Protectors given the power to abdicate that role.

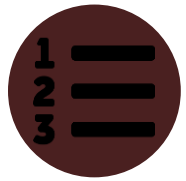


Trustees' duty to consult and consider views of Protector

If joint Protectors cannot agree unanimously, the Trustees may proceed without Protectors' consent but obliged to consult each Protector on views.

This only makes sense if disagreement is about the merits, not about legality.

If issue is about legality, the Trustees should be obliged to obtain legal advice on lawfulness of proposal before proceeding.



Consent Requirements Narrow in Scope

Consent was required only for capital appointments and dealings in the trusts' major shareholding — not all trustee decisions.

A pure legality check would more likely apply to a wider range of actions by the Trustees.

Step 2: Checking the construction against contextual background and business efficacy and common sense

Special qualifications to review legality

If the Narrow Role were intended, Trust would restrict the appointment as Protector to most obviously qualified persons.

Eg. Lawyers with specialist experience in trust matters.

Responsible persons appointed as Protectors

If only responsible persons would be appointed as Trustees, who could be relied on to act in accordance with duties and take advice when appropriate, no reason for settlor to limit Protector's role to checking on legality.

Step 2: Checking the construction against contextual background and business efficacy and common sense

Arguments Against the Wider Role

Cost & delay

Speculative — no evidence that Wider-Role protector structures cause material extra cost or delay in practice.

Risk of deadlock

Deliberately built into the structure by design — not a reason to reject Wider Role.

No exoneration or indemnity clause

Absence is a neutral factor and does not support the Narrow Role.

Step 3: Whether constraint limiting to Narrow Role is to be implied

No Room for an Implied Term

No Implied Term by Law

"Protector" is not a term of art for conferral of any particular role.

No Implied Term by Fact

Not necessary to make trusts workable in practice.

Different outcomes in judicial opinion in litigation also shows that Narrow Role cannot satisfy officious bystander test.

If the gap needed filling, it isn't even clear what term the parties would have agreed.

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What This Means in Practice

- The use of the term “protector” alone imports no fixed legal meaning and duties.
- Spell out the protector's role expressly in the trust instrument: legality check, merits review, or something else.
- In the absence of clear language, different clauses and context of trust deed could signal or undercut the role intended for settlor.
- When complex checks and balance are imposed, the Court may not construe trust deeds to avoid deadlock but could construe this as an inherent mechanism. More contentious administration of trust?
- The Court found that there is a duty of trustees and protectors to seek to find common ground where there are disagreement on merits – may require early engagement / documentation of consultation and deliberation

Review Existing Trust Deed Clauses

- Right to waive or release powers – Points towards merits-based review.
- Right of trustees to proceed without unanimous protector consent – Points towards merits-based review
- Limited range of trustee decisions requiring protector consent – Points towards merits-based review
- No restrictions on choice and no requirements on professional qualifications of protector – Points away from a legality review

Thank You

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