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Protectors as fiduciaries: theory and practice

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Abstract

This article considers whether trust protectors owe fiduciary duties. The question cannot be answered categorically, because the law contains no accepted definitions of 'fiduciary' or 'protector', but there are relevant considerations to be taken into account in answering the question in a particular case. Ultimately, the question is one of construction: did the settlor intend that this particular protector would owe fiduciary duties, and in what way?

Introduction

This article examines the question whether trust protectors are properly considered fiduciaries: does a trust protector owe fiduciary duties? The substantive discussion in the article is divided into two parts. In the first, the question is addressed from a theoretical or conceptual perspective, inquiring after the conceptual nature of the fiduciary idea with a view to seeing how well that idea applies, or does not, to trust protectors. While it will be seen that the fiduciary idea is somewhat nebulous, it will be suggested that it is possible to give a general description of what is at stake. However, when it comes to applying that idea to trust protectors, the analysis becomes complicated because of the range of powers and positions that a protector can hold. The second part of the article, therefore, emphasizes the importance of careful construction of the trust documentation, in its particular context, when determining whether a protector holds their powers in a fiduciary capacity. In discussing that aspect of the question, the article addresses some of the more practical aspects of the rules of construction that are applied when interpreting a trust. Conclusions are then suggested.

Conceptual considerations

Fiduciary concept

An obvious place to start when trying to determine whether trust protectors are fiduciaries is with the fiduciary concept itself—what is a fiduciary? Obviously, certain categories of actors are recognized as fiduciaries: trustees, solicitors, company directors, agents, etc.[1] Protectors are not yet recognized as a category of fiduciary, for reasons which will become clear shortly. But that is not the end of the inquiry: fiduciary duties can be owed by other people on an ad hoc basis.

Unfortunately, however, the courts have preferred not to give a clear definition or test for when that is the case. To give but one example of this attitude, Sir Eric Sachs' statement in *Lloyds Bank v Bundy*, is representative:

> it is neither feasible *nor desirable* to attempt closely to define the relationship, or its characteristics, or the demarcation line showing the exact transition point where a relationship that does not entail that duty passes into one that does.[2]

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1. See, eg, McGhee QC (ed), *Snell's Equity* (32nd edn, Sweet & Maxwell 2010) 7-004.

2. *Lloyds Bank Ltd v Bundy* [1975] QB 326, 341 (emphasis added). For other similar statements, see, eg, *Hospital Products Ltd v United States Surgical Corp* [1984] 156 CLR 41, 96, 141; *Maclean v Arklow Investments Ltd* [1998] 3 NZLR 680, 691 (CA).

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The consequence has been that:

> the law has not, as yet, been able to formulate any precise or comprehensive definition of the circumstances in which a person is constituted a fiduciary in his or her relations with another.[3]

However, if one reviews the case law over the last several decades, one can identify a particular line of inquiry that has come to the fore when courts are deciding whether someone owed fiduciary duties: is it reasonable or legitimate, in all the circumstances of the particular case, for one party (the principal) to expect that that other party (the fiduciary) will act in the best interests of the principal to the exclusion of his or her own several interests? If so, fiduciary duties are owed.[4] This approach has been particularly influential in Australia, which is no surprise when one bears in mind that it stems from the writings of the Australian academic (and now Judge) Paul Finn.[5] But the same approach can be found in English cases as well. For example, in *Imperial Group v Imperial Tobacco*, Browne-Wilkinson V-C explained that an employer company's power to give or withhold consent to amendments to the company's pension scheme was not held in a fiduciary capacity because that would run counter to the expectations of all involved.[6]

A secondary line of inquiry can be found in some more recent Canadian decisions, where the Supreme Court has insisted that there can only be a fiduciary duty if the alleged fiduciary can be shown to have *undertaken* to act in the best interests of the other party.[7] However, the difference between this and the first line of inquiry is, we suggest, more apparent than real because, in addition to express undertakings (which may well be rather rare), the Canadian courts have recognized that that 'the fiduciary's undertaking may be *implied* in the particular circumstances of the parties' relationship'.[8] The importance of that is that the considerations which inform the implication of terms in this context are very similar, if not identical, to those that are relevant when deciding whether there was a reasonable or legitimate expectation that the alleged fiduciary would comply with fiduciary duties of loyalty. This does not mean that the undertaking criterion is of no use, as it does usefully focus attention on what the *fiduciary* has done to justify the expectation that he or she will comply with duties of loyalty, thereby giving some structure to the evidence that ought to be considered when determining whether the expectation of loyalty is appropriate in all the circumstances of the case. But it does mean that the inquiry in Canada is not fundamentally different from that elsewhere.

Consequently, the description that we have for a 'fiduciary' is a slightly nebulous one but that is because the courts have refused to provide anything more precise, and so any other test that we might propose would run the risk of missing relevant instances of fiduciary duties. The general thrust of the inquiry can, however, be stated thus: if we are trying to decide whether trust protectors are, or are not, fiduciaries, the initial focus of our attention should be on the question whether it is legitimate to expect that the protector would act in the interests of someone else to the exclusion of his or her own several interests.

One can see elements of that approach in some of the cases about protectors. For example, in the Cayman Islands case, *Re Z Trust*, Smellie J addressed (among other things) 'the legitimate expectations of a settlor' when trying to determine whether

3. *Breen v Williams* (1996) 186 CLR 71, 92.

4. For analysis of the cases in support of this proposition, see Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart 2010), ch 9.

5. See Finn, 'The Fiduciary Principle' in Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell 1989) ch 1 46, 54. See also Finn, *Fiduciary Obligations* (Law Book Co 1977) 400.

6. *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589, 596. See also *Re Courage Group's Pension Schemes* [1987] 1 WLR 495, 514 (ChD); *National Grid Co plc v Laws* [1997] OPLR 207, 227 (ChD).

7. See *Galambos v Perez* [2009] SCC 48 at 66, [2009] 3 SCR 247; *Alberta v Elder Advocates of Alberta Society* [2011] SCC 24.

8. *Galambos v Perez* [2009] SCC 48 at 79, [2009] 3 SCR 247 (emphasis added).

powers given to protectors were held in a fiduciary capacity.[9]

Protectors

Armed with that working description of a fiduciary, we can now consider protectors to see whether the fiduciary expectation makes sense for such people. Here, we encounter another difficulty, and it is this one which really means that it is impossible to give any categorical answers.

The difficulty arises here because, as Smith J said in the Bahamian case, *Rawson Trust Co v Perlman*: 'the term protector is not a term of art and is not known as such to our law'.[10] Further, while the term 'protector' does not have a settled legal description or definition in the Bahamas, importantly, there is no reason to think that the situation differs elsewhere.

Some of the statutes regarding trusts in the offshore jurisdictions do contain descriptions or definitions of protectors. However, even when that is the case, the definitions themselves make clear that the 'protector' label does not identify a clear or well-defined category of persons. For example, in the BVI, the relevant statute states that:

> there may be conferred on the settlor or some other person, *whether named as protector, nominator, committee or by any other name*, by the trust instrument creating the trust, any powers . . .[11]

In reality, the term 'protector' is used in such a variety of situations and ways that, absent specific context, it signifies little more than that a person who is not the (or a) trustee has been granted a power affecting the operation of the trust.

Indeed, even that simple description is somewhat misleading, in that some statutory formulations allow the protector to be a trustee as well. That is the case, for example, in Belize,[12] the Cook Islands[13] and for international trusts based on Nevis.[14] In other jurisdictions, trustees are explicitly prohibited from being protectors, as is the case (for example) with domestic trusts based in the Federation of St Kitts and Nevis.[15] Irrespective of whether the protector is technically capable of being the trustee at the same time (which, as has just been made clear, will depend on the jurisdiction in which the trust is situate), in practice, the protector is normally someone other than the trustee.

Thus, for example, the label 'protector' is commonly used in cases where the protector has a veto over a decision of the trustee (whether dispositive or administrative), as for example was the case in *Rawcliffe v Steele*, where the protector held a veto over the trustee's power of appointment.[16] However, the 'protector' description has also been used in cases where the protector himself holds the power, as opposed to a mere veto over the trustee or over the decision of someone else, as, for example, was the case in *von Knieriem v Bermuda Trust Co*.[17] The label is frequently associated with a power to appoint or remove trustees. But it goes much further. As Antony Duckworth has pointed out, a wide range of powers and functions are commonly given to protectors: in addition to the ones already mentioned, Duckworth points to functions like approving trustee remuneration, approving, or making amendments to the trust, reviewing the trust's administration, nominating auditors, settling disputes regarding the trust, terminating the trust, etc.[18]

9. *Re Z Trust* [1997] CILR 248, 278. See also 272, 277–279, 283, 287.
10. *Rawson Trust Co Ltd v Perlman* [1990] 1 Butterworths OCM 31, 50.
11. Trustee Ordinance (BVI) s 86(2) (emphasis added).
12. Trusts Act 1992 (Belize) s 16(3).
13. International Trusts Act 1984 (Cook Islands) s 20(3).
14. Nevis International Exempt Trust (Amendment) Ordinance 1995 s 9(3).
15. Trusts Act 1996 (St Kitts & Nevis) s 25(2)(a).
16. *Rawcliffe v Steele* [1993–95] Manx LR 426, 475.
17. *von Knieriem v Bermuda Trust Co Ltd* [1994] 1 Butterworths OCM 116, 123.
18. See Duckworth, 'Protectors: Fish or Fowl (Part 1)' [1996] PCB 169, 169–170.

In some jurisdictions, perhaps most notably Anguilla,[19] a protector must be capable of enforcing the trust, whether or not he has other functions concerning the trust. If that is the case, then certain other powers follow for the protector.[20] But the requirement that the protector must be able to enforce the trust is not present, at least on the face of the legislation, in other jurisdictions.[21]

Furthermore, even where the relevant statutes contain lists of powers for protectors, these powers are not necessarily applicable to all protectors within those jurisdictions. That is so because the lists are either (a) powers that can be conferred on the protector by the trust deed, as in the Bahamas,[22] in which case the settlor might choose not to include some or all of the powers in his particular trust documentation, or (b) default powers which prima facie apply to protectors but which are subject to being changed by the trust instrument, as is the case in the Cook Islands[23] and for international trusts based on Nevis.[24]

In short, the 'protector' label has been used to cover a wide range of powers, which can differ markedly one from the other, which can be combined in a wide variety of ways, and which are generally subject to being altered by the settlor in the trust instrument.

Are protectors fiduciaries?

The breadth of the range of powers to which the 'protector' label can be applied means that the question whether a protector is, or is not, a fiduciary must be approached on a case-by-case basis, rather than on a global basis by reference to some supposed (but actually non-existent) category of 'protectors'. It is, therefore, unwise in the extreme to make sweeping statements about protectors like the one made recently by Tsun Hang Tey, that:

> the core fiduciary duty of a protector, it is submitted, is to act – impartially and loyally – in the best interests of the beneficiaries or trust purposes.[25]

The question must be approached in a more confined way, by asking whether a particular power held by a particular protector is—or is not—held in a fiduciary capacity. That question must be addressed in the same way that the courts determine whether any power affecting a trust is held in a fiduciary capacity (or not): is the power held in such a way that it must be exercised (if it is exercised) in the interests of someone else, to the exclusion of the donee of the power?

But even that question is insufficiently nuanced, for the following reason. A power that is held in that way (ie so that the power holder cannot exercise it for his or her own benefit) is held in a fiduciary capacity, but a power can also be held in a limited or qualified fiduciary capacity, such as where the power holder is expected to consider whether to exercise the power on a regular basis (rather than simply ignoring it), but where the power holder is entitled to benefit from the exercise of the power (as for example, where the power is to be exercised in favour of a class of objects which includes the power holder as well as others).[26]

In such a case, the power is held in a fiduciary capacity in the sense that the power holder must consider its exercise, but it is not fully fiduciary in the sense that the power holder is not debarred from using the power for his own benefit. This point illustrates a general proposition about fiduciary doctrine,

19. See Trusts Act, Revised Statutes of Anguilla, Chapter T70, ss 1 and 15.
20. See (n 19) s 18(1).
21. See, *eg*, (n 12) s 16(2).
22. Trustee Act 1998 (Bahamas) s 81(2).
23. International Trusts Act 1984 (Cook Islands) ss 2(1) and 20(7).
24. Nevis International Exempt Trust (Amendment) Ordinance 1995 s 9(2)(a).
25. Tey, 'The Office of Protector: Its Nature and Duties' [2010] 24 TLI 110, 121.
26. There is a sound argument for saying that the duties applied in this situation ought not to be referred to as fiduciary duties (see Conaglen (n 4) ch 3), but the usage is widespread in case law and, for that reason, we follow it here.

which is that a person

> is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.[27]

Thus, as Frankfurter J once said in the United States Supreme Court,

> to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?[28]

The fiduciary label can mean different things in different contexts.

Allied to that point is the fact that the status of a protector's powers—whether they are held in a fiduciary capacity or not—ought to be able to be manipulated in the trust documentation. Thus, although certain kinds of powers (which are often granted to protectors) are generally considered to be held in a fiduciary capacity, in the sense that they must be used for the benefit of the trust beneficiaries and not for the benefit of the power holder, that position can be changed by the settlor in respect of a particular power. To give an example, the power to appoint trustees is ordinarily considered to be held in a fiduciary capacity, and so cannot be used to appoint oneself,[29] but a court could potentially conclude in a given case that such a power was granted to a donee for the donee's personal benefit, as Smellie J recognized in *Re Z Trust*.[30]

The settlor's ability to modify the status of a protector's powers is also clear from the statutory provisions concerning protectors in various offshore jurisdictions. For example, the Anguilla statute provides that 'in the exercise of his office, the protector shall not be accounted or regarded as a trustee',[31] but in the immediately subsequent subsection, it goes on to say that:

> subject to the terms of the trust, in the exercise of his office a protector shall owe a fiduciary duty to the beneficiaries of the trust or to the purpose for which the trust is created.[32]

This makes it clear that a protector will ordinarily hold his or her powers and position in a fiduciary capacity in Anguilla, but that the terms of the trust can alter that default position. The same approach is taken in Belize,[33] and for international trusts based on Nevis,[34] as well as in a number of states in the United States and in the Uniform Trust Code.[35]

In other jurisdictions, the default position is the reverse: ie, protectors seem prima facie not to be fiduciary, but again these provisions are subject to whatever the trust instrument provides. For example, the relevant legislation in the Cook Islands provides that:

> subject to the terms of the trust instrument, a protector of a trust shall not be liable or accountable as a trustee or other person having a fiduciary duty to any person in relation to any act or omission in performing the function of a protector under the trust instrument.[36]

The same approach is taken in Alaska.[37] Similarly, albeit not quite as clearly, the legislation in the

27. *Bristol & West Building Society v Mothew* [1998] Ch 1 18 (CA) *per* Millett LJ.
28. *Securities & Exchange Commission v Chenery Corp* (1943) 318 US 80, 85–86.
29. *Re Skeats' Settlement* (1889) 42 ChD 522.
30. *Re Z Trust* (n 9) 248, 285 (technically the point was obiter, as the decision in the case itself concerned a power to amend a trust, rather than a power to appoint trustees).
31. Trusts Act (n 19) Ch T70 s 15(4).
32. ibid s 15(5).
33. Trusts Act 1992 (n 12) ss 16(4) & (5).
34. Nevis International Exempt Trust (n 24) ss 9(4) & (5).
35. See Sterk, 'Trust Protectors, Agency Costs, and Fiduciary Duty' (2006) 27 Cardozo L Rev 2761, 2769–2770.
36. International Trusts Act 1984 (n 23) s 20(4). See also s 20(7), which emphasizes that any powers or functions conferred by the statute on a protector have effect subject to the terms of the trust.
37. See Sterk (n 35) 2761, 2769.

Bahamas and the BVI provides that:

> a person exercising any one or more of the powers set forth . . . shall not by virtue only of such exercise be deemed to be a trustee and, unless otherwise provided in the trust instrument, is not liable to the beneficiaries for the bona fide exercise of the power.[38]

Again, this leaves the settlor free to impose fiduciary duties if he or she so wishes.

Thus, one ends up with a spectrum of possible ways in which powers may be held by protectors, with many different combinations between the two extremes of a power held purely for personal benefit, at one end, and at the other end, 'a true fiduciary power [which] is held for the sole benefit of the beneficiaries'.[39]

We suggest that the following are possible points along that spectrum. Before mentioning those, however, we emphasize that we are not here trying to create pigeon holes into which powers must be crammed. In other words, we depart from the somewhat rigid four-fold classification that Warner J adopted in *Mettoy v Evans*,[40] in favour of a more nuanced spectrum of possibilities, although the spectrum that we are discussing spans those four categories. As Commissioner Page said in *Re Internine and Intertraders Trusts*,

> such categorization is no more than a convenient, rough shorthand for various 'baskets' of ideas: the full range and nuances of powers is as varied as the circumstances of the settlements under which they are given . . . The terms of the particular document(s) in question still have to be construed.[41]

With that firmly in mind, we suggest that the following are possible points along the spectrum, but this is by no means an exhaustive statement of all the possibilities:

a. A power given to the donee wholly for the donee's own benefit, which the donee is able to ignore or even release and which the donee can use for any purpose at all. Such a power must be exercised within its scope, but there is little more in the way of control over how it is exercised. That seems to have been the approach taken in *Rawson v Perlman*.[42]
b. A power given to the donee for the donee's own benefit, but one which the donee is only given for a limited purpose (like, eg, a mortgagee's power of sale, which is given for the purpose of securing repayment of moneys due under the mortgage[43]). Such a power must be exercised within its literal scope but also cannot be exercised for a purpose other than that for which it was given: ie, the holder cannot commit a fraud on the power.
c. A power given to the donee which is to be exercised for the benefit of a class of people, including the donee but also others, where the donee has a duty to consider from time to time whether to exercise the power, but might (after due consideration) decide not to exercise it. That was the case for one of the powers in *Re Z Trust*.[44]
d. A power given to the donee which is to be exercised for the benefit of a class of people, including the donee but also others, where the donee has a duty to exercise the power but has a choice as to how the power is to be exercised.
e. A power given to the donee which may be exercised for the benefit of a class of people, excluding

38. Trustee Act 1998 (n 22) s 81(3). See also Trustee Ordinance (BVI), s 86(3).
39. *Re Circle Trust* (2006) 9 ITELR 676 12.
40. *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1613–1614. In a similar vein, see *Rawcliffe v Steele* [1993-95] Manx LR 426, 495–498.
41. *Re Internine and Intertraders Trusts* [2005] JLR 236 56.
42. *Rawson Trust Co Ltd v Perlman* (n 10)31, 50–51.
43. *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, 312 (PC); *Meretz Investments NV v ACP Ltd* [2006] EWHC 74 (Ch) 314, [2007] Ch 197.
44. *Re Z Trust* (n 9) 248, 261.

the donee, as for example, was the case in *von Knieriem v Bermuda Trust Co*.[45]

f. A power given to the donee which must be exercised, and when it is exercised it must be exercised for the benefit of a class of people excluding the donee.

Examples (c)–(f) would typically be referred to as situations where the power is held in a fiduciary capacity, albeit a limited one in categories (c) and (d).

Some might consider example (b) to involve a fiduciary power,[46] but that is based on the mistaken view that the doctrine of fraud on a power applies only to fiduciaries. Fraud on a power occurs whenever *any* power given for a limited purpose is exercised for some other purpose: that is clear, for example, from the fact that mortgagees do not hold their powers of sale in a fiduciary capacity and yet they hold those powers subject to the constraint that they cannot be exercised for purposes other than those for which they were given.[47] This approach to the doctrine has been accepted in other decisions concerning trust protectors, which have correctly treated the fraud on a power doctrine as not dependent on the fiduciary status of the power holder.[48] As the Jersey Royal Court said in *Re Bird Trusts*,

> the doctrine of fraud on a power does not apply to general personal powers where the donee may benefit himself as well as anyone else in the world; but it does apply to limited personal powers and to fiduciary powers. In the case of a personal power, the doctrine is often the only controlling mechanism on the exercise of the power, whereas, in the case of a fiduciary power, the court of course has very wide powers to supervise and control the exercise of such powers.[49]

In short, the fiduciary classification is based, as Smellie J said in *Re Z Trust*, largely on 'evidence of accountability to others'[50] but that accountability can take a number of forms. That is a standard proposition in fiduciary cases, as Lord Upjohn recognized in *Boardman v Phipps*:

> once it is established that there is [a fiduciary] relationship, that relationship must be examined to see what duties are thereby imposed upon the agent, to see what is the scope and ambit of the duties charged upon him.[51]

If that is forgotten, the fiduciary label is 'liable to cause confusion'.[52]

In addition to the point that the fiduciary label can mean different things in different contexts, it is also important to remember that it is possible for some powers to be held in a fiduciary capacity while other powers are held by the same person in a different capacity. This was found, for example, to be the case in *Re Z Trust*,[53] where protectors held some of their powers (granted by clause 7 of the trust deed) in a limited fiduciary capacity whereas other powers (granted by clause cl 4B) were held in a personal capacity.[54] This is consistent with the fact that it is well recognized that:

> a person . . . may be in a fiduciary position quoad a part of his activities and not quoad other parts.[55]

45. *von Knieriem v Bermuda Trust Co Ltd* (n 17) 116, 124.
46. See, *eg*, *Rawson Trust Co Ltd v Perlman* (n 10) 31, 47.
47. See McGhee (n 1) 39–039. See also Conaglen (n 4) 47–50.
48. *Eg*, *Rawcliffe v Steele* (n 16) 426, 498.
49. *Re Bird Charitable Trust and Bird Purpose Trust* [2008] JRC 013 77, [2008] JLR 1, (2008) 11 ITELR 157.
50. *Re Z Trust* (n 9) 248, 262.
51. *Boardman v Phipps* [1967] 2 AC 46, 127. See also text accompanying n 28.
52. *Re Papadimitriou* [2004] WTLR 1141 57 (Manx).
53. *Re Z Trust* (n 9) 248, 266, 268.
54. This case is considered in more detail below: see text accompanying n 103.
55. *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126, 1130 (PC). See also *Breen v Williams* (1996) 186 CLR 71, 107–108; *Maruha Corp v Amaltal Corp Ltd* NZSC 40 21–22; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (ACN 113 114 832) (No.4)* [2007] FCA 963 285.

The conceptual status of trust protectors and their powers was well summed up, we respectfully suggest, by Deputy Bailiff Birt in the Jersey Royal Court in *Re Bird Trusts* as follows:

> The powers of a protector vary considerably from one trust to another. In some he may be given very limited powers; in others they may be extensive. It is a question of construction of the particular trust deed as to whether or not a particular power of a protector is fiduciary. It may well be the case that, in relation to a particular trust, some powers of a protector are fiduciary and others are personal.[56]

Practical application

The previous part of the article emphasized the various ways in which trust protectors can hold their powers. In this part of the article, therefore, we look at how the courts have practically gone about the task of determining whether those powers are held in a fiduciary capacity, and the answers that they have come up with.

There are three general points to make at the outset. First, when the courts have addressed the question, they have mostly done so in the context of a specific attack or challenge on some act or omission by a protector. So, the focus has been on the scope of the specific power and whether it has been exercised improperly. A few cases have had to consider whether the court has jurisdiction to appoint or remove a protector and those cases tell us a little more about how the courts view the position of trust protector.

Secondly, recognizing that the term 'protector' is not a term of art,[57] the courts have approached the cases on the basis that the protector is a creature of the trust created by the settlor and (subject to certain immutable principles[58]), it is open to the settlor to establish the trust on the terms that he or she wishes, regardless of how that may seem to the proposed beneficiaries or potential beneficiaries who, of course, have normally not given anything in return for their interests.

That leads to the third point, which is that the courts have treated the questions which have come before them as depending in the first place on the true construction of the settlement or trust deed. That point has already been seen in the quotation from *Re Bird Trusts* in the preceding section of the article,[59] but the same approach can be seen in the earliest offshore reported case on protectors which we have found,[60] *Rawson v Perlman*, in which the court cited with approval the following passage from the American textbook, *Scott on Trusts*:

> It is a question of interpretation of the trust instrument in the light of all the circumstances whether the power is conferred on him for his sole benefit or for the benefit of the beneficiaries of the trust.[61]

As such, it is useful to look briefly at the modern principles of construction as applied to trust documents.

The fundamental principle of construction

The starting point is that the rules of construction applicable to a trust deed are the same as the rules for a contract or any other document: as Lord Simonds said in *Lord Vestey's Executors v IRC*,

> one must solve this question of construction on a consideration of the words used in the trust deed, by which alone this right or power is constituted,

56. *Re Bird Charitable Trust and Bird Purpose Trust* (n 49) 82, [2008] JLR 1, (2008) 11 ITELR 157.
57. See text accompanying n 10.
58. For example, the rules against perpetuities and against trusts which offend against public policy.
59. See text accompanying n 56.
60. There are earlier reported cases, certainly in England and Canada, where powers were given to non-trustees, although the label 'protector' was not used: see eg *Re Rogers* [1929] 1 DLR 116 (Ontario).
61. See *Rawson* (n 10) 31, 51. The importance of careful construction is also emphasised in *von Knieriem* (n 17) 116, 121; *Rawcliffe* (n 16) 426, 499; *Re Z Trust* (n 9) 248, 256–258, 287; *Re Internine* (n 41) 54, 56; and *Re Circle Trust* (n 39) 15, 21.

> applying to these words the ordinary principles of construction.[62]

The modern approach to construction is set out in the speeches—chiefly those of Lord Hoffmann—in a quartet of House of Lords cases, starting with *Mannai Investment Co v Eagle Star*, in which Lord Hoffmann used the famous example of Mrs Malaprop's alligator to illustrate the changed emphasis of legal interpretation: no longer hung up on the literal meaning of words but concentrating on what meaning the use of the words was intended to convey.[63] This approach was developed further in *Investors Compensation Scheme v West Bromwich Building Society*, where Lord Hoffmann said that the technical rules of construction—'the old intellectual baggage'[64]—had been discarded in favour of what he described as the 'common sense principles by which any serious utterance would be interpreted in ordinary life'.[65]

The first and fundamental principle which he identified can be stated in these terms: interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties in the situation they occupied at the time of the contract.

The meaning which a document would convey to the reasonable person is not necessarily the same thing as the meaning of its words. Although the courts do not easily accept that people have made linguistic mistakes, especially in formal documents, and so are inclined to give words their natural and ordinary meaning, if consideration of the relevant background leads to the conclusion that something has gone wrong with the language, the courts will recognize that. The law does not require judges to attribute to the parties an intention which they plainly could not have had.

The reference to the intention of the parties in the preceding sentence links to the other way in which this fundamental principle is sometimes expressed:

> the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.[66]

The English courts have accepted that those principles apply equally to the construction of trusts,[67] and they have been followed in the offshore and other common law jurisdictions as applicable to contracts and trusts.[68] There are very clear statements to that effect in the High Court of Australia's recent decision in *Byrnes v Kendle*.[69]

Aspects of the principles of construction

It is worth looking at some elements of these general principles in more detail in the context of trust documentation.

First, there is the issue of the parties. In a contract, it is obvious whose intention is to be ascertained and whose background knowledge is relevant. But, in a settlement, it is less obvious which are the relevant parties. In *A-G of Belize v Belize Telecom*, Lord

62. *Lord Vestey's Executors v Inland Revenue Commissioners* [1949] 1 All ER 1108, 1131. See also *Re Gulbenkian's Settlement Trusts* [1970] AC 508, 522 per Lord Upjohn.
63. *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 774; see also 779.
64. *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912.
65. ibid.
66. *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8 8, [2002] 1 AC 251 per Lord Bingham of Cornhill.
67. See, eg, *Stevens v Bell* [2002] EWCA Civ 672 30, [2002] OPLR 207; *Breakspear v Ackland* [2008] EWHC 220 (Ch) 6, [2009] Ch 32.
68. Eg in the Eastern Caribbean, *Leeward v Hickox* [2008] HCVAP 2008/003; in Cayman, *Phoenix Meridian Equity v Lyxor Asset Management* [2009] CILR 444.
69. *Byrnes v Kendle* [2011] HCA 26.

Hoffmann restated what he had said in *Investors Compensation Scheme*:

> It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available *to the audience to whom the instrument is addressed*... It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the *intention of whatever person or body was or is deemed to have been the author of the instrument.*[70]

Thus, one must identify the author of the document. The obvious answer in the case of a trust settlement is the settlor, but there may be cases where there is a nominal settlor. If so, the background material may assist in indicating the 'deemed author' and the purpose of the transaction. For example, in *Re Internine and Intertraders Trusts*,[71] the trusts were established by declarations of trust by two trust companies which had followed letters of instruction signed by Sheikh Abdullah Alhamrani, countersigned by the respective trust company. The judge considered that the relevant parties for construction purposes were not just the trust companies, but also the Sheikh.[72]

The next point to consider is timing. The normal rule is that the document is construed as at the time it was created. However some trust instruments—for example, pension trusts—may undergo alterations and amendments after they have been entered into, pursuant to powers contained in them. In those cases, the meaning of a provision has to be ascertained in the context of the deed at the time that the provision was introduced.[73]

The document must be taken into account as a whole. As Lord Walker said in *Schmidt v Rosewood*,[74] the modern approach of the court is not to reject any part of a legal document as meaningless without first trying hard to give it a sensible meaning.

Factual matrix

Probably the most significant, and controversial, aspect of the modern approach to interpretation is the increased importance of the background to the transaction. In *Investors Compensation Scheme*, Lord Hoffmann said:

> The background was famously referred to by Lord Wilberforce as the 'matrix of fact'[75] but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next,[76] it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.[77]

That statement attracted considerable criticism on the ground that the parties would use it as an excuse to introduce vast amounts of evidence on simple issues of construction and led to Lord Hoffmann further explaining himself in *BCCI v Ali*:

> I should in passing say that when, in *Investors Compensation Scheme Ltd*..., I said that the admissible background included
>
> 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man'

70. *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10 16, [2009] 1 WLR 1988 (emphasis added).
71. *Re Internine and Intertraders Trusts* [2005] JLR 236.
72. ibid 62.
73. *Stevens v Bell* (n 67) 29, [2002] OPLR 207.
74. *Schmidt v Rosewood Trust Ltd* [2003] UKPC 23 32, [2003] 2 AC 709.
75. *Prenn v Simmonds* [1971] 1 WLR 1381, 1384.
76. This refers to the exclusion of evidence regarding prior negotiations.
77. *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913.

> I did not think it necessary to emphasize that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage:
>
> 'we do not easily accept that people have made linguistic mistakes, particularly in formal documents.'
>
> I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage.[78]

In *Chartbrook v Persimmon Homes*, the House of Lords confirmed the rule that evidence of pre-contractual negotiations or the subjective intentions of the parties is not admissible on questions of construction.[79]

In other words, evidence of what was said or done during the course of negotiating the document cannot be referred to for the purpose of drawing inferences about what the document means, but it could be used for other related purposes: for example, to establish that a fact which may be relevant background was known to the author of the document. In *Re Ofner*, for example, a letter written by a testator to his solicitor was admissible not as evidence of his intentions in executing his will but to show that he used the name, Robert, incorrectly to refer to his nephew, Richard.[80] Evidence of the parties' subsequent conduct, after the document has been entered into, is also inadmissible in determining the meaning of the document.

In the area with which we are concerned, settlements and other trust documents, the factual matrix will usually be found in letters of instructions for the establishment of the settlement, letters of wishes if contemporaneous with the creation of the settlement, and attendance notes of any lawyers or trust professionals involved in the process. The confidentiality which usually attaches to letters of wishes will, of course, be overridden if they are relevant in litigation concerning the construction of a trust document. Under the English CPR (and other procedural regimes derived from English principles), the governing criteria for disclosure are relevance and necessity. The court is looking for facts which show the circumstances in which the trust deed or other document was made. In particular, the court will have regard to evidence of background which throws light on the nature of the transaction and the purpose for which any powers were granted to the trustees and protectors.

The normal rule is that the background material must have been reasonably available to the parties or, perhaps more appropriately in the context of a trust document, the audience to whom it was addressed. However the courts will not take too narrow a view of this requirement. In *Breakspear v Ackland*,[81] Briggs J decided that he could take account of background material as to the de facto settlor's (the husband) intention in establishing a settlement, even though the material was not known to the person named as settlor (the wife). The settlement had been established as part of the divorce proceedings between the husband and wife and the overall intention of the husband was to benefit the woman with whom he was now living (Patricia). For obvious reasons, that intention had not been disclosed to the wife. The judge held that he should nevertheless have regard to the evidence about the husband's purposes: to ignore it would be a triumph of form over

78. *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8 39, [2002] 1 AC 251.
79. *Chartbrook v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101. Such evidence can be considered in a rectification claim.
80. *Re Ofner* [1909] 1 Ch 60.
81. [2008] EWHC 220 (Ch), [2009] Ch 32.

substance since the husband was, in fact, the source of the property which was the subject of the settlement.

Thus, in simple terms, the modern approach of the court when construing trust documents is to ascertain and facilitate, rather than frustrate, the intention of the settlor. Again the *Breakspear* case provides a good example. As we have said, the husband's intention was to benefit Patricia, by having her added as a beneficiary to the settlement, and he also intended that she should become a trustee. Unfortunately, because of the order in which the various deeds of appointment were executed, Patricia had already become a trustee when the deed appointing her as a beneficiary was executed. Her addition as a beneficiary therefore fell foul of the self-dealing rule. The issue was whether her appointment as a beneficiary was saved by a provision in the settlement which excluded the self-dealing rule, and in particular whether on the true construction of that provision, it was limited to transactions of an administrative nature. In deciding whether to give the provision a narrow or broad construction, Briggs J said:

> . . . the self-dealing rule . . . is a fundamental principle of trusteeship such that exceptions to it should normally be narrowly construed. That, it seems to me, is a correct starting point but may yield to clear evidence of a contrary intention, either within the settlement itself or from a perception that a broad rather than a narrow construction would better serve the purposes for which the settlement was made.[82]

He concluded, having regard to the language and also the evidence of the husband's intention to benefit Patricia, that a broad construction was appropriate.

Implying terms

The last aspect of the general rules on construction that we consider here is the implication of terms. This is relevant because, as we have seen already, the identification of an implied undertaking to act on behalf of others is one of the mechanisms by which the courts can find the existence of a fiduciary duty.[83]

In *A-G of Belize v Belize Telecom*, the Privy Council had to consider whether a term should be implied into the articles of association of Belize Telecom to the effect that a director appointed by a shareholder with a special status should vacate office if there was no longer any such shareholder. Lord Hoffmann, delivering the Board's judgment, stated that the implication of terms into a document was part of the process of construing a document, not a separate or subsequent exercise:

> The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means . . . The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls . . . In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.[84]

82. ibid 121.
83. See text accompanying nn 7–8 above.
84. *Attorney-General of Belize v Belize Telecom Ltd* (n 70) 16–18.

Lord Hoffmann went on to serve a redundancy notice on the 'officious bystander', saying that the implied term need not be either obvious to the parties, nor one that they would have actually agreed to:

> The imaginary conversation with an officious bystander in *Shirlaw v Southern Foundries (1926) Ltd*... is celebrated throughout the common law world. Like the phrase 'necessary to give business efficacy', it vividly emphasizes the need for the court to be satisfied that the proposed implication spells out what the contact would reasonably be understood to mean. But it carries the danger of barren argument over how the actual parties would have reacted to the proposed amendment. That, in the Board's opinion, is irrelevant. Likewise, it is not necessary that the need for the implied term should be obvious in the sense of being immediately apparent, even upon a superficial consideration of the terms of the contract and the relevant background. The need for an implied term not infrequently arises when the draftsman of a complicated instrument has omitted to make express provision for some event because he has not fully thought through the contingencies which might arise, even though it is obvious after a careful consideration of the express terms and the background that only one answer would be consistent with the rest of the instrument. In such circumstances, the fact that the actual parties might have said to the officious bystander 'Could you please explain that again?' does not matter.[85]

The position today

We have already made the point, on the basis of conceptual considerations, that the difference between the two approaches to identifying whether a fiduciary duty is owed may be more apparent than real.[86] Further to that point, in the context of identifying fiduciary obligations in a commercial context, there is practical evidence of a drawing together of the approaches.

In the recent case of *F & C Alternative Investments (Holdings) Ltd v Barthelemy*,[87] Sales J had to consider whether fiduciary obligations were owed in the context of a limited liability partnership which had been established under an agreement to carry on a hedge fund business. In that context, he commented:

> There are similarities between the reasoning by which terms may be implied into a contract and the way in which fiduciary obligations may be found to arise in a contractual context and it may be that with the new, unified approach to the question of the implication of contract terms set out in *A-G of Belize v Belize Telecom*... the law is moving towards some assimilation of the relevant tests... albeit that the two processes have traditionally been conceptualised as different.[88]

That leads to the following proposition: the answer to the question whether a trust protector is properly to be considered a fiduciary can only be found by ascertaining, objectively, from the trust deed or settlement if that was the intention of the settlor. Or, to put the point another way: the question that must be answered is whether, when the trust deed is read as a whole against the relevant background, it is reasonably to be understood that the protector's position was intended to be fiduciary or that any particular power was intended to be held in a fiduciary capacity.

Construction in practice

The problem with this approach to the question is that it is at a high level of generality. It is a common experience that two people can look at a text and think that the construction is obvious, but for their two interpretations to be completely

85. ibid 25.
86. See text following n 7.
87. [2011] EWHC 1731.
88. ibid 225.

different. Therefore, in this section of the article we look at how this approach has operated in practice. We will consider how the courts have interpreted provisions relating to trust protectors in practice and what factors they have considered significant in deciding whether a protector is acting in a fiduciary capacity.

The issues in the reported cases fall into three broad categories:

a. The appointment or removal of a protector.
b. The exercise by the protector of rights to appoint or remove trustees.
c. Actions by the protector in relation to dispositive powers in the trust deed, eg powers of appointment and powers of amendment. This issue can arise either where the protector holds the power directly or where the exercise of a power by the trustees is subject to the consent/veto of the protector.

Appointment or removal of protectors

In *Rawcliffe v Steele*,[89] the issue was whether a declaration of trust failed for uncertainty because no protector had been named. The trustees' powers (to determine who should be included in the class of beneficiaries, to appoint capital and income, and various other powers) could only be exercised with the consent of the protector. The protector was to be the person named in the Schedule to the trust deed, but no one was named. The Isle of Man Court, Staff of Government Division, decided that the powers of the protector were fiduciary and that it had jurisdiction to appoint a protector or to exercise the powers itself.[90] As a result, the trust was capable of subsisting as a valid trust despite the initial absence of a protector.

The factors which influenced the court in deciding that the protector's powers were held in a fiduciary, rather than a personal, capacity were as follows:

1. Recitals referring to the protector as 'protector of the trusts created by this Declaration' and 'protector of the settlement';
2. The trust envisaged that the position of protector would be held by a succession of persons, and contained a mechanism for the replacement of a protector;
3. Under the trust deed, the protector was entitled to receive information from the trustees and participate in their meetings;
4. There was a charging clause (which implied that without express provision it was thought that the protector would not have been entitled to remuneration); and
5. In relation to some of the trustees' powers, they were expressly stated to have an unfettered discretion. The Court doubted whether that could prevent the trustees' powers from being fiduciary but commented that the existence of any enhanced freedom conferred on the trustees made it more essential that the protector's powers of control should be regarded as held in a fiduciary capacity.

The court, therefore, took that view that the role of protector in the particular settlement was intended to be a fiduciary position, analogous to that of a trustee.

A similar approach was taken in *Re Freiburg Trust*[91] where there was an application to remove a protector who had been convicted of misappropriating trust funds. The protector was a named individual not connected with the settlor or the beneficiary (who was the disabled son of the

89. *Rawcliffe* (n 16) 426.
90. The court took this view on the basis that it had that power over trustees, and that fiduciaries stand in an analogous position to trustees, at least when acting in connection with a trust: see *Rawcliffe* (n 16) 426, 503.
91. [2004] JRC 056, (2004) 6 ITELR 1078.

settlor). The trustees could appoint a successor and there was a limited provision for them to remove the protector if he became insolvent or of unsound mind. The trust deed referred to the 'office of protector'. The trustees required the consent of the protector to the exercise of certain powers. Not surprisingly, the court held that the protector was intended to act in a fiduciary role to protect the interests of the beneficiary and ensure that the wishes of the settlor were respected as far as possible and appropriate. Since he was a fiduciary, the court had an inherent jurisdiction to remove him, the court explaining that:

> a protector is in the position of a fiduciary and the court must have power to police the activities of any fiduciary in relation to a trust whether he be called a protector or indeed by any other name. Such a jurisdiction is a necessary incident of the duties to protect the interests of the beneficiaries . . . and to ensure that the wishes of the settlor are respected as far as may be possible and appropriate.[92]

Indeed, the exercise of such a jurisdiction is not a recent phenomenon. In the Ontario case, *Re Rogers*,[93] Orde JA was faced with a trust where the trustees were obliged to consult with two people, one of whom was Beaton, regarding all important matters in connection with administration of the estate, and were further required to act on the advice of Beaton in respect of investment matters. Beaton was not described as a protector in such terms, but held powers which might today be described in that way. When the trust was created, Beaton had no personal interests conflicting with those of the trust, but he acquired such interests later and proceeded to act in a way which was contrary to the best interests of the trust. Beaton was effectively removed from his position as protector: Orde JA ordered that the trustees could proceed to dispose of the relevant shares:

> without consulting Beaton and free from any further right or power in him to control or direct the administration of the estate in respect thereof.[94]

More recently, in the Cayman Islands case, *Re Circle Trust*, the court listed the following factors as indicating the settlor's intention that the protector was 'to assume a fiduciary role'[95]:

1. The settlement provided that the 'office of protector' was to be vacated if the protector was found to be bankrupt or of unsound mind;
2. The protector was entitled to receive accounts from the trustees;
3. He could charge for his time;
4. He had a right of indemnification and the benefit of an exemption clause freeing him from liability in negligence; and
5. He could remove trustees and appoint new ones but could not appoint himself or any associate or entity controlled by him as trustee.[96]

In this case, the majority of beneficiaries had the power to nominate a protector. The court held that since the protector was a fiduciary, the power to nominate the protector was also a fiduciary power.

The Royal Court of Jersey took a similar view in the *Re Bird Trusts* case. It approached the question of whether the protector's role was a fiduciary one on the basis that earlier cases and text books took the view that the position was fiduciary and then looked for any indication that the powers of the protector were intended to be purely personal.[97] The first named protector was the effective settlor and intended beneficiary of the trusts. However, the Royal Court thought that fact was outweighed by provisions

92. ibid 6.
93. [1929] 1 DLR 116.
94. ibid 124.
95. *Re Circle Trust* (n 39) 23.
96. ibid 22.
97. See *Re Bird Charitable Trust and Bird Purpose Trust* (n 49) 80–81.

showing that the role was intended to be fiduciary. They identified the provisions for appointment of a successor protector, remuneration of the protector, suspension or release of his power to consent and exclusion of liability as relevant considerations in that regard.

The Royal Court returned to this topic in *Re VR Family Trust*,[98] where the trustees applied for the removal of the protector and appointor of the trust. The ground for the application was that the protector had a conflict of interest because he was pursuing claims against the trust. Until the hearing, the protector had denied that there was any conflict and refused to step down. He then resigned. The hearing was, therefore, concerned with whether the protector's behaviour justified the award of indemnity costs against him. In that context, the Court had to consider his duties.

The trust had fairly standard terms. Some of the trustees' powers (eg to appoint and apply capital, to change the class of beneficiaries, to change the proper law) were subject to the consent of the protector. The appointor had the power to appoint new trustees and protectors. The protector was not a beneficiary.

The court started from the point that the powers of the protector and appointor would normally be fiduciary. The interesting feature of the case was that the trust deed contained internally inconsistent language. In one clause, it stated:

> The trustees and the protector shall exercise the powers and discretions vested in them as they shall deem most expedient for the benefit of all or any of the persons actually or prospectively interested under this settlement

But there was also a clause that said:

> For the avoidance of doubt it is hereby declared that no power is vested in the protector in a fiduciary capacity.

The court concluded that, taken in context, the earlier clause meant that the protector's powers were not beneficial or personal but had to be exercised for the benefit of the beneficiaries. It construed the later clause as meaning only that the protector was not under an obligation to consider from time to time whether to exercise his powers. But if he did exercise them, it had to be for the benefit of one or more of the beneficiaries. As such, the protector occupied a fiduciary position, and ought not to have acted as protector once a conflict of interest had arisen.

Rights to appoint or remove trustees

The reported cases present a consistent approach in holding that powers vested in protectors to appoint or remove trustees are not purely personal powers but have to be exercised in good faith in the interests of the beneficiaries as a whole.

In *von Knieriem v Bermuda Trust Co Ltd*,[99] the court was asked to consider the substitution of a trustee by a protector under powers in two Bermuda-based settlements. Meerabux J held that the power was a fiduciary one which could not be exercised by the protector for his own benefit but only in the interests of the beneficiaries. The settlements expressly provided that the trustees' powers were fiduciary. The judge took the view that the absence of similar wording in relation to the protector did not mean that the protector was not a fiduciary. Instead, he attached weight to the following provisions:

1. The powers of appointment and removal were not powers of veto but were conferred on the protector himself;
2. The protector was prohibited from being a beneficiary and could not take any benefit under the trusts; and
3. The protector had the power to give or withhold consent in respect of the trustees' dispositive and

98. [2009] JRC 109, [2009] JLR 202, (2009) 12 ITELR 720.
99. [1994] 1 Butterworths OCM 116.

administrative powers and, therefore, to control the trustees' actions.

However, and underlining the fact that everything turns on the construction of the particular trust instrument, in *Re Papadimitriou*,[100] the Manx Court decided that the fact that the protector was herself a beneficiary did not prevent the imposition of a fiduciary duty on her in respect of her power to appoint additional trustees. In that case, the protector had the power to nominate a successor. The trustees' power to change the class of beneficiaries and the power of appointment over the trust funds were subject to the protector's consent. The Court took the view that the role of the protector was part of the structure established by the settlor to protect the trusts so that the protector's power to appoint neutral and independent trustees carried an obligation to act in good faith in the interests of all beneficiaries.

And in *Re Bird Trusts*, the Jersey Court, having decided that the protector held his powers in a fiduciary capacity, went on to rule that the power to appoint trustees and to appoint a successor were also fiduciary. The Royal Court said that the fact that power to nominate a successor was given to 'the protector for the time being' showed that it was vested in the office-holder rather than in an individual in his personal capacity.[101]

Protectors and dispositive powers

It is very common for settlements which have trust protectors to contain provisions requiring the protectors' consent to the exercise of the trustees' powers to distribute or otherwise deal with the trust funds. Are these powers to give or withhold consent personal or fiduciary?

The answer, as has been emphasized throughout this article, depends on the construction of the particular settlement at issue, but the factors which the courts take into account in coming to an answer include:

- Whether the protector is also a beneficiary; and
- What other checks or controls are contained in the settlement.

That is illustrated by the cases which have considered this topic.

Rawson v Perlman[102] concerned a family trust. The trust deed appointed four protectors who were the members of the settlor's family and who were all beneficiaries. The trustees required the unanimous consent of the protectors to the exercise of all powers. There was a family dispute and, as a result of various steps taken by some of the beneficiaries, the settlor's wife ended up as the sole protector and consented to the transfer of the trust funds to another trust under which only she would be the protector.

In considering a challenge to the validity of her actions, the Court held that the power of veto had been given to the protectors to protect their own interests as beneficiaries in order to control the trustees who otherwise would have the power to distribute all the trust funds to a single beneficiary to the exclusion of the others. The power was, therefore, not fiduciary and, so, not subject to the control of the court.

The Court reached a similar conclusion in *Re Z Trust*,[103] where the trust instrument provided for a 'management committee' which included family members who were beneficiaries and a non-family member. The management committee was given various powers to direct the trustees in the management and investment of the trust assets. The trust instrument also contained a power allowing the amendment of the trust instrument with the consent of the settlor and the management committee. The power was expressly stated only to last during the

100. [2004] WTLR 1141.
101. *Re Bird Charitable Trust and Bird Purpose Trust* (n 49) 90–91.
102. *Rawson Trust Co Ltd v Perlman* (n 10) 31.
103. [1997] CILR 248.

joint lifetime of the settlor and her daughter who was a member of the management committee. That power of amendment was exercised to give the daughter the right to receive up to 50% of the capital whereas she had only been entitled to income under the original trusts.

The court rejected the argument that the power to consent to amendment was a fiduciary power which the daughter could not use to benefit herself. Smellie J concluded that the settlor had intended the management committee to benefit all family members, and not to exclude those on the committee. She had included safeguards on the power of amendment since it was of limited duration, required her participation and a non-family member was included on the committee. It was, therefore, to be construed as a personal power, subject only to an obligation to act in good faith.

In contrast, the powers given to the committee in relation to the management of the trust assets were found to be held in a fiduciary capacity, albeit a limited fiduciary capacity. The court highlighted the following provisions of the trust instrument which led to that conclusion:

- The character of the functions given to the committee, including regarding investment, indicated that they were to act to advance the purpose of the trust as a whole;
- There was an exculpation clause;
- There was a provision that the trustees could act on directions from the committee without further inquiry and would be excused from liability in doing so; and
- The committee included non-beneficiaries and would last beyond the lifetime of the settlor.

In *Re Papadimitriou*,[104] which we have already mentioned, the protector had to consent to the trustees' making distributions to the beneficiaries, of which she was one. The court accepted that she might use that power to benefit herself or her family by refusing consent to distributions to the other beneficiary but said that possibility was inherent in the structure from the outset because of the settlor's decision to make her both protector and beneficiary.[105] Unlike the trustees, she could not be expected to be neutral.

The judge was of the view that the protector's power to appoint trustees was held in a limited fiduciary capacity, where she was obliged to act in good faith in the interests of all the beneficiaries.[106] Unfortunately, however, it is not wholly clear from the judgment whether the judge considered that the protector's power to withhold consent to distributions was also a limited fiduciary power, albeit that she might, at the same time, be benefiting herself as one of those beneficiaries. The view that it was is supported by the fact that the judge considered that if the protector was preventing the trusts from being properly executed by improperly withholding consent, the trustees could apply to the court for relief to safeguard the interests of all the beneficiaries.[107] That suggests that he considered that the protector's conduct was subject to some control, either by removal of the protector under the court's inherent jurisdiction or through the fraud on a power doctrine. Certainly the former would imply that the protector held this power in a fiduciary capacity.

A similar approach can be deduced from *Re Internine and Intertraders Trusts*,[108] where the Royal Court of Jersey had to consider the exercise of a power of amendment vested in a protector. As originally established, the trust deed appointed two protectors who had powers to revoke or amend the trusts, give directions to the trustees on investment matters, and to appoint and remove trustees. The deed expressly provided that the powers of the

104. [2004] WTLR 1141.
105. *Re Papadimitriou* (n 52) 72.
106. ibid 62–63.
107. ibid 72–73.
108. *Re Internine and Intertraders Trusts* (n 41) 236.

protectors could be exercised, notwithstanding that they were beneficiaries. It also provided that the protectors could exercise their powers individually. There was an elaborate provision for the appointment of successor protectors.

One of the protectors, Sheikh Abdullah, executed instruments making far-reaching amendments which included entrenching Sheikh Abdullah himself as the only protector. In the course of a challenge to the validity of those amendments, it was conceded that the power of amendment was a qualified fiduciary power: ie, one that had to be exercised for a proper purpose and with due consideration to the interests of the trusts as a whole. The court indicated that it considered the concession was rightly made.[109] It seems to have considered that the fiduciary nature of the role of the protectors was reinforced by the factual background to the trust: ie, that the trust assets were family assets, that all Sheikh Abdullah's siblings were entitled to share in the intended trust assets, and that Sheikh Abdullah had a power of attorney to represent his siblings in dealing with assets which became the trust assets.

Conclusions

To return to the question posed at the beginning of the article, are trust protectors fiduciaries?

Unfortunately, the most accurate answer is that trust protectors often, and perhaps usually, hold their powers in a fiduciary capacity, but that this is not always the case. There is no universal rule in this context. The reasons for that are essentially twofold: (a) the fiduciary concept itself is a rather nebulous one, which means different things in different contexts; and, most importantly, (b) the 'protector' label is applied to such a wide range of powers and functions, which are employed by settlors in a variety of different combinations, that it is impossible to say categorically that protectors always will (or will not) be fiduciary. The paramount consideration is the settlor's intention, as derived from construction of the trust documentation. Not only will that determine whether the protector is a fiduciary, but also what sort of a fiduciary role the protector has. As we have shown, the fiduciary label can cover a number of situations and fiduciary and personal powers can co-exist in the hands of a protector. Where the purpose and intention of the settlor was that the protector was also to be able to benefit under the trusts, the courts will usually respect that intention and not find fiduciary obligations which would disable the protector from acting in his own interest, although they might still hold that the protector owes limited or qualified fiduciary duties to consider the exercise of his powers on a regular basis. On the other hand, the cases show that powers which impinge upon the trustees' position as 'ultimate guardians of the trust' are likely to be treated as fiduciary, to some degree at least, so that the court can retain a supervisory jurisdiction. We suggest that it is unlikely that the court will allow that supervision to be avoided by language purporting to free the protector from any fiduciary obligations, but, again, the touchstone is always the settlor's objectively determined intention.

109. Ibid 55.