

This appeal was heard in private. **THE COURT ORDERED THAT** nobody shall publish or reveal the name or address of any of the persons (including any companies) who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of those persons or any member of their family in connection with these proceedings.



Hilary Term  
[2026] UKPC 11  
Privy Council Appeal No 0094 of 2024

## **JUDGMENT**

**A and 6 others (Appellants) v C and 13 others  
(Respondents)**

**From the Court of Appeal of Bermuda**

before

**Lord Reed  
Lord Briggs  
Lord Stephens  
Lady Rose  
Lord Richards**

**JUDGMENT GIVEN ON  
19 March 2026**

**Heard on 26 and 27 November 2025**

*Appellant – A and 6 others*

Jonathan Crow KC

Simon Taube KC

Thomas Fletcher

(Instructed by Boodle Hatfield LLP (London))

*Respondent – C and 2 others*

Elsbeth Talbot Rice KC

Edward Cumming KC

(Instructed by Charles Russell Speechlys LLP (London))

*Respondent – F*

Brian Green KC

Anna Littler

Michael Ashdown

(Instructed by Macfarlanes LLP)

*Respondent – G and another*

Henry Legge KC

Sam Chandler

(Instructed by Farrer & Co LLP)

## **LORD BRIGGS AND LORD RICHARDS:**

1. The parties to this appeal from the Court of Appeal of Bermuda ask the Board to resolve a longstanding issue of offshore trust law about the default role of fiduciary protectors when exercising a power to consent, or to refuse to consent, to a proposed exercise by trustees of their powers under a trust instrument. In short, the question they raise is whether the protectors are limited solely to reviewing the lawfulness of the trustees' proposed exercise of their power, or whether the protectors are 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. Following the example set by academic and other commentators, the former has in these proceedings been labelled "the Narrow Role" and the latter "the Wider Role".

2. This issue is described as being about a default role because (i) it is acknowledged that, in principle, a settlor is entitled to specify either role (or any other role) for protectors appointed in a settlement and (ii) it is typical of most offshore settlements, and of all those the subject matter of these proceedings, that the words of the settlement deed do not spell out in express terms what role the protectors are to perform when exercising their consent powers. The question is what, in the absence of any express provision, is the default role of fiduciary protectors when exercising powers to consent or refuse to consent to a proposed exercise by the trustees of their own powers. It is common ground that the protectors of the settlements in issue in these proceedings are all fiduciaries, while accepted that some protectors may not be.

3. It is also common ground that the issue as between the Narrow Role and the Wider Role turns on the true construction of the settlements in question. This common ground derives from the parties' acknowledgment that the settlor is, in principle, free to choose what role to give to protectors, so that the choice must depend upon the settlor's intention, as an objective matter to be derived from the words used in the settlement deed. Those words are to be interpreted in accordance with well-settled principles applicable generally to written contracts and other private documents, including trust deeds, to which, although largely uncontentious, the Board will shortly return, together with any terms to be implied either in law or in fact.

4. The hearing of this appeal, like the hearings in the courts below, was conducted in private. It is very rare for the Board to do so, but it was persuaded that a public hearing would present an unacceptable risk that aspects of the private affairs of children beneficiaries, and confidential, market sensitive consequences of this litigation for a company in which the settlements in issue have a substantial collective shareholding, would thereby come into the public domain. Nonetheless, and because the question in issue is one of general public importance for offshore trusts and settlements generally, extending well beyond the settlements in question, this judgment is being given in public. Readers will therefore understand that it has of necessity been expressed in a way which,

although less than usually transparent about the underlying facts, continues to respect the privacy and market sensitivity of those matters.

## **Protectors – the essential general context**

5. The office of protector, as provided in the trust deeds in the present appeal and in the deeds establishing or governing many settlements in Bermuda and other offshore jurisdictions is rarely seen in UK-based trusts. That is not to say that UK-based trusts have never provided for persons who are not trustees to have fiduciary powers to direct or control actions by the trustees: see, for example, *Vestey's Executors v Inland Revenue Comrs* [1949] 1 All ER 1108. But the office of protector with fiduciary powers of the sort seen in the present appeal has become a common feature of offshore trusts, almost always with settlors and beneficiaries resident elsewhere.

6. There is consensus among practitioners and others who have written on the subject that provision for the appointment of protectors in offshore trusts has been common since the mid to late 1980s. Their powers will vary from trust to trust, but frequently include, as in the present case, a requirement for their consent to any appointment of capital. The requirement for their consent to dealings with certain securities held by the trusts, which is an important feature of the trusts in this appeal, is less widespread but by no means uncommon.

7. It is impossible to define the powers that a trust instrument may confer on a protector but other frequently found examples include powers to direct or veto the appointment and removal of trustees, additions to or exclusions from the class of beneficiaries, the provision of information to beneficiaries and changes to the governing law of the trust. As will be seen, in the case of the trusts in the present appeal, the protectors' powers extend beyond their powers as regards capital distributions and dealings with securities. There is a useful discussion of the range of powers that may be conferred on protectors and common reasons for their appointment in Duckworth, "Protectors – Fish or Fowl?" [1996] PCB 169, 169–173.

8. As most commentators agree, it is not difficult to understand why settlors, particularly of family settlements, find provisions for protectors to be attractive. If a settlor establishes a trust in his or her home country, the settlor can ensure the appointment of trustees with knowledge and understanding of the settlor's family and of the settlor's wishes and approach to family matters. Such trustees might include the settlor, family members or trusted friends or advisers. This is not, however, usually possible in the case of offshore trusts. The settlor and his or her family will usually have no personal connection with the country in which the trust is established. Local trustees, usually local trust companies, will be appointed as the trustees but they will rarely have any close knowledge or understanding of the settlor's family. As counsel for the respondent

submitted at first instance in the present case, the parties were agreed that “protectors may be geographically and personally closer to the settlors and the beneficiaries than are potentially more or less remote, distant, offshore trustees”: see the judgment of Kawaley AJ, [2021] SC (Bda) 72 Civ; (2021) 24 ITEL R 586, para 58. Gloster JA (with whose judgment Clarke P and Maurice Kay JA agreed) acknowledged that protectors “are likely to be closer personally to a settlor or the principal beneficiaries” than the trustees: [2023] CA (Bda) 4 Civ; (2023) 27 ITEL R 1, para 98.

9. The factual context in which the instruments governing the trusts in the present appeal were made or amended so as to include the provisions for protectors conform to the common pattern. As Gloster JA said at para 10 of her judgment:

“In 1989 and 1990, the English resident trustees of many of the X Trusts were replaced with Bermudian resident corporate trustees. The new trustees were both relatively unknown to, and physically distant from, the English-resident beneficiaries. It was in this context that in or about early 1991 the X Family and its advisors considered the introduction of Protector Provisions.”

She said at para 58(iii): “As can be inferred from the subsequent inclusion of such provisions, and, in particular, the consent requirement, some measure of protection was considered desirable by members of the X Family, their advisors, and the trustees”. As regards the requirement for the protectors to consent to dealings with defined securities, she said at para 58(vi): “Even in the absence of any evidence, common sense would suggest that this block of shares had, and would continue to have, greater value and influence over OpCo if the trustees of the various X Trusts voted to act in a unified or tactical manner.”

10. The term “protector” is not a term of art, but a useful title which the drafters of offshore settlements have adopted to describe a person who is invested with some or all of a wide range of powers, typically including powers of veto over capital (and sometimes income) distributions and (as in this case) over certain investment-related decisions. Unlike a trustee, for example, it is not an office to which the law has thus far attached particular responsibilities, duties, liabilities and rights.

11. In his judgment in *In the Matter of the Piedmont Trust & Riviera Trust* [2021] JRC 248 (“*Piedmont*”), to which we later refer in some detail, Sir Michael Birt at para 88 observed that there was “scant judicial authority on the nature of a protector’s duties, particularly in the context of a requirement for a protector’s consent”. He continued:

“This is probably because widespread use of protectors in trusts is a comparatively recent development and also because the role of a protector varies so much, depending on the nature and extent of the powers conferred by the trust deed, with the consequence that it is difficult to develop general principles which are applicable to all protectors or to all decisions of a protector.”

12. A settlor has freedom to provide for a protector and to decide the protector’s functions and responsibilities. It is therefore ultimately a question of construing the trust deed, in accordance with well-established principles, to determine the settlor’s intentions in this regard.

13. There is nothing unusual about the wording of the relevant provisions in the trust instruments in the present appeal. Based on the expert evidence given at trial, it is common ground that “the consent wordings used in the relevant settlements are (and were in 1994/95) of general application, standard in concept, and commonly used, and contained nothing that was out of the ordinary or exceptional in form” (per Gloster JA at para 87).

### **The background facts**

14. Beginning in the 1950s a series of discretionary trusts were established by Mr X and his relatives which are now held for the principal benefit of A and B and their families. The trusts each have at least one of two Bermuda resident trust corporations as their trustees (“the X Trusts” and “the Trustees”). Some are governed by English law, some by the law of Bermuda and one by Jersey law. There are also a small number of further trusts, established in Jersey for Mr X’s family, but nothing turns on them.

15. All except one of the X Trusts now have broadly identical provisions for the appointment of one or more protectors, described collectively as “the Protector” or “the Protectorate”. We will call them “the Protectors”. In outline (but described in more detail below) the Protectors are given two main powers. The first is the power to approve or refuse to approve any appointment of capital to beneficiaries proposed by the Trustees under their very wide discretionary powers. The second is the power to approve or disapprove any dealing with, or exercise by the Trustees of voting powers derived from, “Specified Securities”, the most important of which are shares in a company (“OpCo”), of which the X Trusts, viewed in the aggregate, own a large holding. Without the written approval of the Protectors, the Trustees are prohibited from making such appointments or engaging in such dealings.

16. Subject to those requirements for approval by the Protectors, the Trustees are given very wide discretionary powers of appointment, of capital and income, and they enjoy the ordinary powers inherent in being the legal owners of the Specified Securities. They rather than the Protectors have the responsibility for the day-to-day management and administration of each of the X Trusts. Although each trust is separate, since the Trustees, Protectors and beneficiaries of all the X Trusts are largely the same, the responsibilities of the Trustees and Protectors may in practice (as they appreciate) be said to encompass the separate property of all the X Trusts viewed in the aggregate, for the benefit of all their beneficiaries.

17. Of the earlier X Trusts, some did not originally have provisions for protectors at all. A further number did, but in terms which have now been replaced. Common form provisions for the appointment of protectors (“the Protector Provisions”) were introduced into all (except one) of the then existing X Trusts in the early to mid-1990s as part of a scheme called “Operation Protector”, in connection with moving the administration of the X Trusts offshore, from England to (mainly) Bermuda. For the then existing X Trusts this was achieved by the exercise of discretionary powers by the Trustees. Thereafter the same common form Protector Provisions were inserted into a further number of the X Trusts from their inception, by their respective settlors. The result is that all bar one of the X Trusts now in existence have Protector Provisions in substantially the same common form (as set out in detail below). Also pursuant to Operation Protector, all the X Trusts with Protector Provisions have one of two companies as protectors, both incorporated in Jersey.

### **The Emergence of the Present Issue**

18. In 2017 the Trustees of the X Trusts produced proposals for the future of the Trusts which were further developed thereafter. The essential feature of the final proposals was the allocation of the aggregate property of all the X Trusts, amounting in value to some billions of pounds sterling, upon A and A’s family (“the A branch”) and B and B’s family (“the B branch”) using the proportions 2/3 : 1/3 as a starting point (“the Scheme”). Aspects of the Trustees’ proposals required the Protectors’ consent. After consultation the Protectors formed the view that the Scheme did not, as proposed, serve the best interests of the beneficiaries, so that their approval would be unlikely to be forthcoming. The Protectors approached the question whether they should approve the Scheme on the assumption that theirs was the Wider Role.

19. On 22 June 2020, the Trustees issued a summons in the Supreme Court of Bermuda seeking, in accordance with *Public Trustee v Cooper* [2001] WTLR 901, the approval of the court to their preliminary proposals as in principle a proper exercise of their powers and to their continued development. The B Branch opposed this application. The Protectors also opposed the application on the basis that they were minded to refuse their

consent to the Trustees' proposals and that therefore the time and cost of further work on the proposals could not be justified.

20. In summary, the Protectors expressed three reservations. First, it was unclear whether the proposed division was intended to be revocable. Second, the value of the Trusts' OpCo shares might be reduced if it proved impossible to negotiate shareholder agreements to co-ordinate voting of the shares and to provide pre-emption rights before the sale of shares to third parties. Third, the proposed division of the trust property was unfair as between the beneficiaries. The Protectors stated that they were entitled to withhold their consent on the basis of their independent assessment of the proposals' merits.

21. On 23 October 2020, the Supreme Court made the orders sought by the Trustees. The Trustees made clear their intention to return to the Supreme Court in due course to seek final approval for their proposals in detail.

22. On 20 January 2021, the Trustees issued a summons in the Supreme Court seeking declarations as to the basis on which the Protectors were entitled to withhold their consent. In particular, the Trustees sought a declaration as to whether, on the proper interpretation of the relevant trust instruments, the role of the Protectors of the X Trusts in exercising their powers to consent to the exercise of powers vested in the Trustees was:

“(a) to exercise an independent discretion as to whether or not to give consent to a proposed exercise of power by the plaintiffs (as trustees of the X Trusts) (or any of them) which requires the protectors' consent, taking into account relevant considerations and disregarding irrelevant considerations so that the protectors might withhold their consent to a proposed exercise of a power by the plaintiffs even if the proposed exercise of power was an exercise of power which a reasonable body of properly informed trustees was entitled to decide upon (the latter being a relevant factor, but not the only relevant factor, for the protectors to take into account);

(b) to satisfy themselves that the proposed exercise of a power by the plaintiffs (as trustees of the X Trusts) (or any of them) is an exercise which a reasonable body of properly informed trustees is entitled to undertake and, if so satisfied, to consent to the same; or

(c) some other and if so what role.”

23. The A Branch argued in favour of the Narrow Role, as expressed in para (b), and the B Branch in favour of the Wider Role, as expressed in para (a). The Trustees and the Protectors were both formally neutral.

24. By an order made on 22 November 2021, Kawaley AJ, sitting as an Assistant Justice of the Supreme Court, held that the role of the Protectors was the Narrow Role and made a declaration in the terms of para (b).

25. In his judgment, Kawaley AJ accepted that “at first blush” the language of the Protector Provisions appeared to support the Wider Role, but he preferred the Narrow Role in light of the provisions of the trust instruments read as a whole, commentaries on the role of protectors, and the practical consequences of the Wider Role.

26. Kawaley AJ noted that the substantive power to deal with trust property was vested solely in the Trustees. The Protectors’ powers were ancillary. It could therefore be inferred that their role was limited. He considered the ancillary nature of the Protectors’ role was emphasised by the requirement that any decision to withhold consent be unanimous. He also noted that the trust instruments did not indemnify the Protectors against liability and that professionals would usually refuse to carry out substantive decision-making without indemnity protection. It was therefore “clear from the terms of the relevant instruments that [the Protectors’] dominant purpose is to ensure the due exercise of the powers vested in the Trustees” (para 113). He reviewed the commentaries and concluded that on balance they slightly favoured the Narrow Role.

27. Turning to the practical consequences of the competing views, Kawaley AJ held that the Wider Role created a risk of deadlock if the Trustees and Protectors disagreed and that there was no clear mechanism for resolving such an impasse. By contrast, on the Narrow Role, any deadlock could readily be resolved by asking a court to determine the legality of the Trustees’ proposal in accordance with *Public Trustee v Cooper*. He considered that protectors nonetheless fulfilled a valuable role under the Narrow Role because they might be able to resolve disputes about the legality of trustee proposals without recourse to a court and provided a “communications bridge” between beneficiaries and offshore trustees.

28. In a judgment given on 23 February 2023, the Court of Appeal dismissed an appeal by the B Branch and affirmed the declaration that Protectors had the Narrow Role.

29. Giving the lead judgment, Gloster JA held that the Wider Role was inconsistent with the Trustees’ “paramount substantive role of administering the trusts” (para 89). She considered that a protector’s normal role was that of a watchdog supervising the trustees; a protector with an independent discretion would in effect be the ultimate decision-maker,

not a mere watchdog. A protector's role could be widened by clear language but there was no such language in the instruments for the X Trusts.

30. Gloster JA considered that the trust instruments as a whole suggested that the Protectors' responsibilities were "less extensive and less important than the Wider Role might suggest" (para 101). She drew attention to the requirement that the Protectors be unanimous to veto a decision, the Protectors' power to waive the need to obtain their consent and the absence in most of the trust instruments of provisions indemnifying the Protectors against liability. Turning to the practical consequences of the competing roles, Gloster JA concluded that the Wider Role was at best a recipe for wasteful duplication and at worst an invitation for deadlock.

31. She declined to follow the judgment of the Royal Court of Jersey (Sir Michael Birt sitting with two jurats) in *Piedmont*, which had been given after Kawaley AJ's decision. She held that it was wrongly decided, and in particular the Royal Court had been wrong to conclude that on the Narrow Role the Protectors would serve little purpose, and had placed insufficient weight on the Wider Role's potential to lead to deadlock. She did not find any assistance in the commentaries which, although interesting, simply reflected the opposing views.

32. Clarke P gave a short concurring judgment. He held that, as a matter of ordinary language, the term protector "more naturally" described the Narrow Role (para 162). The Protectors' role was ancillary to that of the Trustees. The appointment and distribution of trust property were decisions for the Trustees. Moreover, the Narrow Role established a "simple, clear, efficient and complementary" division of responsibilities whilst the Wider Role was "calculated to produce in some cases duplication, delay, cost and conflict which would not arise if the Narrow Role was adopted" (para 165).

### **The Detailed Terms of the X Trusts**

33. The substantial similarity of the written terms of the X Trusts enabled the parties to present their arguments on construction of the Protector Provisions by reference to a single original deed of settlement, as later amended and re-settled, and to invite the Board to proceed upon the basis that the true construction of that one should be determinative of them all. The Board gratefully accepts that sensible invitation. The chosen settlement is that made on 30 March 1951 by Mr X's sister ("the 1951 Settlement"). It conferred upon the trustees wide discretionary powers of appointment of both income and capital in favour of six named beneficiaries (including Mr X and his children) and their spouses, children and remoter issue, together with wide powers of investment.

34. By Clause 10 of the 1951 Settlement the Settlor retained power completely to revoke and re-appoint the trust fund upon different trusts for the beneficiaries (as defined)

(“the Clause 10 Power”). By Clause 11 the Settlor was empowered to delegate the exercise of the Clause 10 Power to the trustees or to any beneficiary who might survive her, subject to certain conditions as to time and a prohibition upon such a beneficiary using that power to benefit him or herself.

35. By a further Deed dated 28 July 1956 (“the 1956 Deed”) the Settlor exercised the Clause 11 power to delegate the exercise of the Clause 10 Power to the trustees of the 1951 Settlement. By a Deed of Revocation and Appointment dated 13 May 1994 (“the 1994 Deed”) the then trustees exercised the Clause 10 Power by a partial revocation of the then subsisting trusts of the 1951 Settlement (which had in the meantime frequently been varied) and the establishment of new revocable discretionary trusts in favour of some of the original beneficiaries of the 1951 Settlement, including B’s grandchildren.

36. By Clause 8 of the 1994 Deed, and in further exercise of the Clause 10 Power, the trustees declared to be irrevocably in force the provisions of the Schedule to the Deed (“the Schedule”), which contain the Protector Provisions, as described above. Since those lie at the heart of the process of construction upon which the Board is invited to embark, they are set out or summarised (in italics) below, in full. We do so in the slightly redacted form used to maintain privacy and confidentiality.

#### “1. Definitions

In this Schedule:

(A) the ‘Protectorate’ means the body of Protectors which may comprise one or more companies or individuals, each of whom shall be known as a ‘Protector’. The first Protector shall be Protector 1. Successor Protectors shall be appointed in accordance with Paragraph 11.

(B) ‘Specified Securities’ means shares in [*OpCo*] and such other securities as may from time to time directly or indirectly comprise part or the whole of the Trust Fund (whether such shares or securities are held by the Trustees or by a company a majority or all the voting shares of which are held by the Trustees) as the Protectorate may designate in accordance with Paragraph 7.

#### 2. Restriction on power to appoint capital

The Trustees shall not exercise any power to appoint, distribute or pay any part of the Trust Fund to or for the benefit of any member of the Appointed Class or any Beneficiary without obtaining the prior written consent of the Protectorate, nor, if the Trustees' consent is required for any appointment of capital, shall they give their consent without the prior written consent of the Protectorate.

### 3. Restriction in relation to Specified Securities

Notwithstanding anything to the contrary contained herein or in the Settlement, the Trustees shall not, without in each case obtaining the prior written consent of the Protectorate:

(A) sell, charge, exchange, transfer or otherwise deal with any Specified Securities or any interest therein, whether legal or equitable;

(B) give any consents that may be required of them in relation to any sale, charge, exchange, transfer or other dealing with any Specified Securities or any interest therein, whether legal or equitable; nor

(C) exercise, or take or omit to take any action in relation to the exercise of, voting rights attaching to any Specified Securities.

### 4. Investment Adviser....

### 5. Use of Nominees....

### 6. Removal and Appointment of Trustees

*(A) This sub-paragraph gives the Protectorate power, in the event of an emergency, to remove and replace trustees.*

(B) For the purposes of sub-clause (A), 'the event of an emergency' shall mean the existence of circumstances which are determined by the Protectorate, acting in its sole and absolute discretion, to be such as will or are likely to put at risk

the security of the assets comprising the Trust Fund (whether held directly by the Trustees or indirectly) or impair or impede the proper administration of the Settlement.

(C) ...

## 7. Designation of Specified Securities

The Protectorate may at any time or times by notice in writing to the Trustees designate as Specified Securities any securities from time to time directly or indirectly comprising the whole or any part of the Trust Fund (whether held by the Trustees or by a company a majority or all the shares of which are held by the Trustees) and may also, at any time or times, revoke any such designation by giving written notice thereof to the Trustees.

## 8. Release or Waiver of Protectorate's Powers

The Protectorate may, at any time or times by deed revocable (during the Trust Period) or irrevocable release, extinguish or restrict any or all of the powers conferred upon it by the terms of this Deed. The Protectorate may also waive, either specifically in relation to any particular matter or generally in relation to one or more matters, the requirement for the Trustees to obtain its prior written consent. Any such waiver must be given in writing but may be given either before or after the Trustees' decision in relation to any particular matter.

## 9. Protectorate's Consents....

## 10. Protector's Remuneration....

## 11. Appointment of Protector....

*This paragraph gives each Protector power to appoint a successor or additional Protector, with a default power to appoint Protectors conferred upon the Trustees. A Protector may resign by written notice to the Trustees.*

## 12. Effect of Vacancy in Protector's Office

If there shall at any time be no Protectorate this Deed shall during such time as there shall be no Protectorate (but not further or otherwise) be read and construed as if all references to the requirement for the Protectorate's consent or agreement and to the exercise by the Protectorate of any power were omitted from this Deed.

## 13. Joint Protectors

If the Protectorate comprises more than one Protector, any decision by the Protectorate must be taken unanimously. If any power vested in the Trustees requires the prior written consent of the Protectorate and if the members of the Protectorate cannot agree as to whether it should give or withhold its consent to a proposed exercise of such power in relation to a particular matter, the Trustees shall then be free to exercise their power (in relation to the matter in question but not further or otherwise) without having obtained the prior written consent of the Protectorate. In such a case the Trustees shall nevertheless consult with each Protector and shall take into account the views expressed before making a final decision.”

### **The parties' submissions**

37. Mr Jonathan Crow KC, on behalf of the B Branch as appellants, submitted that the Court of Appeal was wrong, as a matter of the construction, to hold that the Protectors were intended to fulfil the Narrow Role. He based his submission that they fulfilled the Wider Role on the application of well-established principles of construction to the express terms of the 1994 Deed, including in particular the unqualified and unrestricted terms in which the requirement for the Protectors' consent is stated and other provisions in the 1994 Deed which supported the view that the Protectors had the Wider Role, and having regard to the circumstances in which these offshore trusts were established. Mr Crow further submitted that there was no basis for implying a term that the Protectors were to fulfil the Narrow Role.

38. Mr Brian Green KC, appearing for the A Branch, supported the reasoning of the Court of Appeal. He submitted that the Protectors were intended to perform the Narrow Role, as a matter of the construction of the provisions under which the substantive powers in the administration of the trusts remained with the Trustees, while the provisions requiring the Protectors' consent were ancillary to those powers, and that this reflected

the distinct fiduciary offices of the Trustees and the Protectors. It was not the function of the Protectors to duplicate performance of the Trustees' duties, but to ensure that, in those circumstances in which their consent was required, the trust was being run properly. He relied also on other provisions of the 1951 Settlement and on the practical consequences of each Role. Alternatively, Mr Green submitted that the different fiduciary offices of the Trustees and the Protectors provided the basis for an implication of law that the Protectors were to fulfil the Narrow Role.

39. The Trustees and the Protectors took a neutral position. They were separately represented by counsel who made oral and written submissions directed to features, including in particular practical consequences, of the Narrow and Wider Roles.

### **Authorities and academic writing**

40. As Gloster JA observed in her judgment at para 87:

“...whilst the law relating to the trustee’s role as regards the exercise of a substantive power vested in it is well developed, having been declared and affirmed by courts over many years, the law relating to the fiduciary protector’s role where a consent power is conferred on it in relation to a trustee’s substantive power is relatively undeveloped.”

41. The Court of Appeal nonetheless found some support for its conclusion that the Narrow Role represented the correct analysis of a protector’s powers under the common wording adopted in the trust instruments in the present case.

42. In none of the cases on which the Court of Appeal placed some reliance was the contest between the Wider and the Narrow Roles in issue. No argument was addressed to it nor was any view on it expressed in the judgments.

43. *Rawcliffe v Steele* [1993-1995] MLR (SGD) 426 was a decision of the Staff of Government Division (the Court of Appeal) of the Isle of Man. The trust deed in question provided for the appointment of a protector whose consent was required as regards a number of crucial trustee powers, and without a protector to exercise those powers the trust could not function. The court held that it had power to appoint a protector just as it had power to appoint trustees. Acting Deemster Hegarty said at p 511 that: “the obvious intention of the settlor on the face of the declaration of trust is that his protector should give proper consideration to the trustees’ proposals and decide whether to exercise his power of consent, having due regard to the extent of the trustees’ enquiry, the basis of their selection and the overall purposes of the trust.” The context of that statement was an

issue as to whether the protector’s power was personal or fiduciary, not the scope of the power. In any event the Board is unable to derive from this passage support for the Narrow Role. Indeed, earlier in his judgment at pp 477–478 the Acting Deemster had said that the relevant provisions of the trust deed providing for the selection of those beneficiaries who were to become the immediate objects of the powers of appointment “appear to suggest that the initiative lies with the trustee, who may put up proposals to the protector, *who is then entitled to consent or refuse his consent* in relation to each individual comprised within the proposal” (emphasis added). Nor can the Board derive any support for the Narrow Role from Acting Deemster Smith’s statement at p 529 that “The protector must bona fide consider the exercise of his powers from the point of view of the beneficiaries under the trust”, which was also directed to whether the protector’s powers were personal or fiduciary but which, if anything, might be thought to be more consistent with the Wider Role.

44. *In the Matter of the A and B Trusts* [2012] JRC 169A was a first instance decision of the Royal Court of Jersey on an application by beneficiaries to remove the protector of two trusts. A redacted version of the judgment of Howard Page QC, Commissioner, was published “in view of the scarcity of reported judgments concerning the role of trust protectors” (preamble). The court found that relations between the protector and the applicant beneficiaries had irretrievably broken down and that the overwhelming majority of the other adult beneficiaries wanted him to go. The court found that the root problem lay in the protector’s “misconceived view of himself as the living guardian and enforcer of the settlor’s wishes” (para 3). Although he gave evidence that he understood that he had a duty to act in what he considered to be the best interests of the beneficiaries, he also stated that he considered it “my duty to ensure that the wishes of [the settlors] are adhered to in principle in the management and distribution of the trust fund of the Trusts and to ensure that the Trustees exercise their discretion broadly in accordance with these wishes, but with an overriding concern to exercise their discretion wisely having regard to changing circumstances which might arise over the period of the Trusts” (para 3).

45. At para 4 of his judgment, the Commissioner said:

“It can be no part of the function of a protector with limited powers of the kind conferred on S by the trust instruments to ensure that a settlor’s wishes are carried out any more than it is open to a settlor himself to insist on them being carried out. A trustee’s duty as regards a letter of wishes is no more than to have due regard to such matters without any obligation to follow them. And a protector’s duty can, correspondingly, be no higher than to do his best to see that trustees have due regard to the settlor’s wishes (in whatever form they may have been imparted): from the moment of his acceptance of the office of protector his paramount duty is to the beneficiaries of the trust.”

46. The Court of Appeal in the present case found support for the Narrow Role in the words “a protector’s duty can, correspondingly, be no higher than to do his best to see that trustees have due regard to the settlor’s wishes”, as showing that, if a protector does that, he “will therefore have discharged his proper function of ensuring lawful and rational trustee decision-making” (para 114). The Board is unable to derive this conclusion from the Commissioner’s judgment. The quoted words were confined to the extent of the protector’s duty as regards the settlor’s wishes; they were not an exhaustive statement of the protector’s role. As the Commissioner said in the last sentence of the passage set out above, the protector’s “paramount duty is to the beneficiaries of the trust”.

47. The third case on which the Court of Appeal placed reliance was the decision of the Court of Appeal of Bermuda in *Re an Application for Information about a Trust* [2013] CA (BdA) 8 Civ; [2014] Bda LR 5 (“*Re an Application for Information*”). This was an application by a beneficiary for disclosure of trust accounts and related documents issued against the trustee. Under the terms of the trust deed, such disclosure required the prior consent of the protector, who was also the principal beneficiary. The protector refused his consent, and the protector was joined to the application.

48. Evans JA (with whose judgment Zacca P and Ward JA agreed) said at para 11:

“We understand that the role of protector, also called a ‘watchdog’ or the ‘enforcer’ of a trust is now recognised and accepted as a feature of trusts where the settlor does not wish to exercise personal oversight over the administration of the trust, or where not being a local resident he cannot conveniently do so. An independent third party, either a personal friend or a professional adviser, residing in the locality, can often perform the role and be responsive to his wishes, without acting formally on his behalf.”

49. Evans JA commented at para 12 that there were “few reported judgments on this comparatively new addition to trusts machinery”. He noted at para 15 that numerous clauses in the trust deed in question gave the protector “wide powers in the administration of the trust and to control and direct the trustees”. Importantly, the trust deed also provided that the protector “shall not owe any fiduciary duty towards and shall not be accountable to any person or persons from time to time interested hereunder or to the trustees for any act [or] omission or commission...to the intent that the protector (in the absence of fraud or dishonesty) shall be free from any liability whatsoever...” (para 17).

50. After a thorough examination of the law as it applies to the right of a beneficiary to the disclosure of information, Evans JA concluded that it was fundamental that a beneficiary is entitled to information to enable the beneficiary to enforce the trust. He

referred to textbooks which took the view that the court's general jurisdiction to secure the good operation of trusts enabled it to intervene in a refusal of consent by a protector, even if under the term of the trust instrument the protector owes no fiduciary duties. He held that the protector in the case before the court had to exercise his power to give or refuse consent to the disclosure of information to a beneficiary "in the interests of the trust and of its beneficiaries", notwithstanding that the protector owed no fiduciary duties (para 45).

51. In a postscript to the judgment at paras 67–69 (as reported in [2014] Bda LR 5), Evans JA made clear that, although the protector's consent to a disclosure of information was required, the trustees remained under an obligation to make their own decision "in the interests of the Trust and in accordance with the intentions of the settlor as set out in the trust deed". He went on to say:

"In our judgment, the protector is bound by the same constraints as are the trustees. The clause encompasses the release of information to beneficiaries as well as to strangers to the trust. There is no indication that the settlor intended that they should be deprived of information to which they are entitled as of right under the general law. Just as the trustees were expected to exercise their discretion accordingly, so also in our judgment is the protector in deciding whether to refuse consent to a proposed release. The protector cannot lawfully refuse consent in a case where the settlor is taken to have approved the release, any more than the protector can vary the terms of the trust."

52. The Board reiterates that no issue arose in *Re an Application for Information* about whether the protector had the Narrow or the Wider Role, but the passage just quoted and the judgment as a whole is, in the view of the Board, more obviously consistent with the Wider, rather than the Narrow, Role.

53. Of greater significance than the cases just discussed was the decision of Sir Michael Birt (formerly the Bailiff of Jersey), sitting as a Commissioner, in *Piedmont*. It directly addressed the issue whether a protector had the Narrow or the Wider Role, after argument on the issue. As Gloster JA correctly said in her judgment at para 129, Sir Michael is "a judge who is extremely experienced in dealing with trust matters" and, one might add, in dealing with offshore trusts.

54. The application in *Piedmont* was made by the trustees of two family trusts for the court's approval of their decision to appoint all the assets of the trusts among the beneficiaries in specified proportions. There was disagreement among the beneficiaries

as to the appropriate proportions. The principal beneficiaries of both trusts were a father, his children and remoter issue. The settlors of each trust were relatives of the family.

55. The trust deeds in both cases provided for the appointment of a protector with a range of powers including the appointment and removal of trustees and requirements for their consent to appointments of income and capital to beneficiaries. One deed provided in terms that the protector should act in a fiduciary capacity. The other deed was silent on the point but in earlier proceedings the Jersey Court had held that the protector of that trust was also required to act in a fiduciary capacity. The original protector of both trusts was the father but he resigned and subsequently the court appointed a corporate fiduciary as protector of both trusts.

56. Following lengthy consultations with beneficiaries starting in late 2018, the trustees formulated proposals for appointments of capital in November 2019. In the course of further discussions, it became clear that the protector was not willing to consent to these proposals. The trustees considered the matter afresh and put forward new proposals in early 2021 to which the protector consented.

57. At paras 87–95, Sir Michael addressed the role of the protector, whose actions were challenged by some beneficiaries. He did so expressly on the basis that it was required to act in a fiduciary capacity (para 79). It was argued on behalf of some beneficiaries that the protector had the Narrow Role, while the protector argued that it had the Wider Role, which was summarised as being to “reach its own decision in good faith in the interests of the beneficiaries” and “was not confined to assessing the rationality of a proposed decision on the part of the Trustees” (para 87).

58. Sir Michael set out the court’s view of the role of the protector appointed under the trust deeds in question, which were not materially different from the relevant provisions in the present case, as follows:

“91. ...The settlor has decided that a protector (often himself or a longstanding friend or adviser whose judgment he trusts) should be appointed pursuant to the trust deed and has specified those matters where the protector’s consent is required. The settlor must be taken in those circumstances to have intended that the protector should exercise his own judgment in exercising those powers; otherwise why bother to go to the trouble of appointing a trusted friend or adviser (or himself) as protector rather than someone with a legal qualification to judge issues of rationality. Furthermore, if the role of a protector was simply to review the trustee’s decision in the same way that the court would do, his role would be almost

redundant; he would bring nothing to the table that the court itself would not bring on a blessing application. It follows that, depending on the circumstances, a protector may well be entitled to veto a decision of a trustee which is rational, in the sense that the court would bless it.

92. However, in the context of a power to consent, as in this case, a protector's discretion lies within a narrower compass than that of a trustee. He is not the trustee. It is for the trustee to make a decision in the first place as to distributions or in relation to the exercise of any other discretionary power conferred on the trustee. It is emphatically not the duty of the protector to take that decision himself or to force the trustee into making the decision which the protector would make if he were the trustee by stating that he will only consent to a particular decision. That would be to exceed his proper role and to use the power given to him otherwise than for its intended purpose. Such conduct would also almost certainly not be in the interests of the beneficiaries and would be likely to lead to deadlock requiring the intervention of the court. A protector may often find that he should consent to a discretionary decision of a trustee on the basis that it is for the benefit of one or more of the beneficiaries even though, if he had been the trustee, he might have made a different decision which he thought to be even more beneficial.

93. In this connection, it is to be expected and indeed encouraged for there to be full and open discussion between trustee and protector, with a view to finding something upon which they can both agree. We see nothing wrong with the sort of discussions which took place between the protector and the trustees in this case. A protector is not confined to a simple yes or no to a request for consent. A protector and a trustee should work together in the interests of the beneficiaries. It is therefore perfectly reasonable for a protector to explain his concerns about a particular proposal by a trustee and the trustee may often be willing to modify his proposal to take account of these concerns or the protector may be satisfied after the trustee has explained his thinking."

59. After Sir Michael had circulated the judgment in draft, counsel in *Piedmont* informed the court that Kawaley AJ had given his judgment in the present case some three weeks earlier. In a postscript to his judgment, Sir Michael considered Kawaley AJ's

judgment and concluded that it did not cause the court to change its decision or the reasons for its decision.

60. While the court's reasons remained those stated in the body of the judgment, Sir Michael commented on the matters relied on by Kawaley AJ for his conclusion. Three points may be noted.

61. First, Sir Michael accepted that the role of a protector is not to exercise a power "jointly" with the trustee. On the contrary, "the discretionary power to make a distribution lies with the trustee. The protector's only function is to decide whether or not to consent to that decision by the trustee. It is a separate decision on the part of the protector, not a joint exercise of a power with the trustee" (para 116(i)). The court did not see that this pointed towards the Narrow Role rather than the Wider Role.

62. Secondly, if the Narrow Role were correct, it would have the result that, provided the trustee's decision was rational and there had been no failure to have regard to relevant considerations and to disregard irrelevant considerations, "the protector is helpless, regardless of how wrong he thinks the trustee's decision to be in terms of the interests of the beneficiaries" (para 116(iv)). He continued at para 117:

"The last point has particular force in the context of offshore trusts where the use of a protector is most common. As mentioned in *Re X Trust* [ie Kawaley AJ's judgment in the present proceedings], it is frequently the case that a settlor is recommended to a particular trustee company by his advisers but has no personal knowledge of the trustee company or its officers. Not unnaturally therefore, he will often wish to impose some check on the exercise of the trustee's powers and to do this by appointing himself or a trusted friend or adviser as protector. To take a common example, he may well have views about how much money should be given to comparatively young children or grandchildren and does not wish to give them too much too early. A decision by trustees to appoint a comparatively large sum (perhaps at the request of a beneficiary) is unlikely to be categorised as irrational but this is just the sort of situation where a settlor would no doubt intend that a protector should be able to see that the trust is administered in accordance with his (the settlor's) wishes by refusing consent. One can think of many other examples. It seems inherently unlikely that settlors would go to the trouble of appointing themselves or trusted friends or advisers as protectors if they intended the role of protector to be limited to that of assessing rationality. If that were the case, the key

requirement for a protector would be a legal qualification rather than knowledge of the settlor's wishes and sound judgment as to what is in the best interests of particular beneficiaries.”

63. Thirdly, Sir Michael acknowledged at para 118 that the Wider Role carried a greater risk of deadlock between the trustee and the protector but:

“...there is the potential for deadlock where the trustee and the protector both reach rational but opposing decisions. In our judgment, this is a natural consequence of the settlor's decision to introduce the office of protector into the trust deed. A settlor must be taken to have intended (by imposing a requirement for consent) that a trustee should not be able to make certain decisions unless the protector consents. If consent is refused, the trustee's decision cannot be put into effect. In most cases this is likely to lead to further discussion between trustee and protector in the hope of finding a sensible outcome. In the event of complete deadlock where such deadlock is causing real damage to the interests of the beneficiaries, we leave open the possibility of recourse to the court. The court has power to break a deadlock where this is caused by lack of agreement among trustees where they have to act unanimously (see *Garnham v PC* [2012] (1) JLR 204, approved by the Supreme Court in *Children's Investment Fund Foundation (UK) v Attorney General* [[2020] UKSC 33; [2022] AC 155] at para 219. It may be arguable that the court has a similar jurisdiction in the event of damaging deadlock between a trustee and a protector. However, we say no more about that. We have not heard any argument on the point and it does not arise in this case.”

64. The Board was referred to several textbooks and to articles written mainly by practitioners. Of the textbooks, neither *Lewin on Trusts*, 20<sup>th</sup> ed (2020) nor *Underhill and Hayton: Law Relating to Trusts and Trustees* 20<sup>th</sup> ed (2022) nor *The International Trust* 3<sup>rd</sup> ed (2011) discusses the issue of the Narrow as against the Wider Role, but *Snell's Equity* 35<sup>th</sup> ed (2025) at para 10-018 prefers the Wider Role. Of the articles which discuss the issue, all except one support the Wider Role: Christie: “Resisting the Siren song of the narrower view of protectors” [2022] 1 PCB 7 (Advocate Christie appeared in *Piedmont* for the protector arguing for the Wider Role); Cooper KC: “Protectors' Powers” (2021) (Wilberforce Chambers eBriefing); Egan: “Protectors as ‘mere toothless tigers’?” (2022) 28 Trust & Trustees 715; Hayton: “When can a refusal to consent to the exercise of a power be challenged?” (2022) 28 Trusts and Trustees 914; Hubbard: “Getting to ‘No’: The scope of protectors' powers to consent” (2022) 28 Trusts & Trustees 193. The only article to express the contrary view is Renouf & Flavin: “Piedmont and X-Trusts:

‘what are protectors for?’” (2022) 28 *Trusts & Trustees* 76 (Advocate Renouf appeared in *Piedmont* for the beneficiaries arguing for the Narrow Role).

## Relevant legal principles

### (i) *Construction of trust deeds*

65. The most recent relevant authoritative statement about the construction of trust deeds is to be found in the judgment of Lord Hodge in *Buckinghamshire v Barnardo’s* [2018] UKSC 55; [2019] ICR 495, at paras 13 to 16. He was concerned with a particular type of trust instrument, namely a pension scheme, but most of his observations are applicable to trust instruments generally. In summary, he said that the general principles for the construction of contracts and other written instruments worked out by the UK Supreme Court in the trilogy of cases, *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 were applicable to pension schemes, but with a heightened regard for textual analysis over background factual matrix because of five characteristics, namely:

- (i) the instrument is a formal legal document prepared by skilled and specialist legal draftsmen,
- (ii) the instrument is not the product of commercial negotiation by parties with conflicting interests acting under pressure, who may leave loose ends to be sorted out in future,
- (iii) the instrument is designed to operate in the long term, defining people’s rights long after the particular economic and other circumstances existing at the time of the instrument may have changed,
- (iv) the instrument confers important rights (and we would say responsibilities) on persons who were not parties to it, and
- (v) members of a pension scheme (here, beneficiaries under the trust created by the instrument) may not be readily able to ascertain the circumstances which existed when the instrument was made.

66. Lord Hodge found this approach to have been applied in recent cases about the construction of pension schemes, and approved this observation by Lord Briggs in

*Safeway Ltd v Newton* [2017] EWCA Civ 1482; [2018] Pens LR 2, at para 22, giving the judgment of the Court of Appeal:

“the deed exists primarily for the benefit of non-parties, that is the employees upon whom pension rights are conferred whether as members or potential members of the Scheme, and upon members of their families (for example in the event of their death). It is therefore a context which is inherently antipathetic to the recognition, by way of departure from plain language, of some common understanding between the principal employer and the trustee, or common dictionary which they may have employed, or even some widespread practice within the pension industry which might illuminate, or give some strained meaning to, the words used.”

67. Nonetheless Lord Hodge stated at para 16 that:

“The emphasis on textual analysis as an interpretative tool does not derogate from the need both to avoid undue technicality and to have regard to the practical consequences of any construction. Such an analysis does not involve literalism but includes a purposive construction when that is appropriate.”

After referring to dicta of Millett J in *In re Courage Group’s Pension Schemes* [1987] 1 WLR 495, 505, warning against special rules for the construction of pension schemes, he continued:

“Instead, the focus on textual analysis operates as a constraint on the contribution which background factual circumstances, which existed at the time when the scheme was entered into but which would not readily be accessible to its members as time passed, can make to the construction of the scheme.”

68. The general principles applicable to the construction of written instruments need no repetition. They were recognised by the Court of Appeal and were not in dispute between counsel before the Board. They may be taken from their summary by Lord Hamblen in *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2; [2023] 1 WLR 575, at para 29:

“(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge

which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.

(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.

(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated.”

69. If the scope of the language used in a provision is to be restricted by a process of construction, the restriction must be based on a consideration of the express terms of the instrument set in their relevant context.

70. This principle is best enunciated by Lord Hodge in the following passage in *Arnold v Britton* at para 77. Referring to and endorsing the unitary process of construction laid down by Lord Clarke in *Rainy Sky SA v Kookmin Bank* at para 21, he continued:

“This unitary exercise involves an iterative process by which each of the rival meanings is checked against the provisions of the contract and its commercial consequences are investigated (*Re Sigma Finance Corpn* ([2009] UKSC 2) [2010] 1 All ER 571, para 12 per Lord Mance). *But there must be a basis in the words used and the factual matrix for identifying a rival meaning.* The role of the construct, the reasonable person, is to ascertain objectively, and with the benefit of the relevant background knowledge, the meaning of the words which the parties used. The construct is not there to re-write the parties’ agreement.” (Emphasis added).

71. In *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Rental Ltd*, at para 61, Lord Briggs (dissenting, but not on this point) said by reference to the above passage in *Arnold v Britton*:

“...it is well-settled that the uncommerciality of the prima facie meaning of contractual words only yields to a more commercial

alternative if there is some basis in the language of the contract as a peg upon which that alternative can properly be hung.”

To much the same effect is this dictum of Lord Hope in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc* [2013] UKSC 28; [2013] 1 WLR 1408, para 64, that the role of commercial common sense:

“is to find out what the parties meant when they entered into the arrangement, not to replace it with something which is not to be found in the language of the documents at all.”

72. Perhaps the best expression of the principle in a textbook is this from Ryan Catterwell, *A Unified Approach to Contract Interpretation* (2020) at para 4-41:

“The court can only infer the intent permitted by the words, taken in context. An alleged interpretation must be grounded by the choice of words in the contract; it must have a clear textual foothold.”

## **(ii) Implied terms**

73. The principles applicable to the implication of terms into an instrument are similarly uncontentious, having been settled (thus far once and for all) in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742. Leaving aside terms implied by law, the implied term must be necessary either to make the contract (or scheme laid down by a trust deed) work in practice, or its omission must satisfy the officious bystander test: it was too obvious to need to be mentioned. And the content of the term must be sufficiently clear.

74. The search for an implied term usually follows a perception that there is some “gap” in the written instrument, that is, the absence of any express provision to deal with a problem which has arisen in the practical application of its terms. But the first question which arises is whether the apparent gap is deliberate. This is perhaps most memorably expressed in this dictum of Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988 at para 17:

“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.”

75. Although that paragraph is part of a larger passage which has been relegated from authoritative dictum to “characteristically inspired discussion” by Lord Neuberger of Abbotsbury in *Marks and Spencer*, the Board does not consider that there was any intention to cast doubt on this pithy and plainly correct observation. Most apparent gaps are deliberate, even (perhaps especially) in the most carefully prepared instruments.

76. That this dictum survived the demotion of the rest of Lord Hoffmann’s unitary analysis of construction and implied terms is apparent from the reliance placed upon it by the majority and one of the minority judgments in *Barton v Morris* [2023] UKSC 3; [2023] AC 684 (at paras 18-19 by Lady Rose and at para 135 by Lord Leggatt).

77. The principle is of considerable antiquity. In *Aspdin v Austin* (1844) 5 QB 671, 684 Lord Denman CJ said:

“Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implication: the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.”

78. In *Churchward v R* (1866) LR 1 QB 173, 195-196 Cockburn CJ said:

“.... where a contract is silent, the court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent.”

79. In *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, at 137 Lord Wright observed:

“It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing.”

80. Academic and textbook writings are to the same effect: see *Lewisson, The Interpretation of Contracts* 8<sup>th</sup> ed (2023) paras 6.45 to 6.53, *McMeel on the Construction of Contracts* 4<sup>th</sup> ed (2025) at paras 11.55-11.56, Farnsworth, “Meaning in the Law of Contract” (1967) 76 Yale LJ 939, 954 and *Calnan, Principles of Contractual Interpretation* 2<sup>nd</sup> ed (2017) at paras 8.16-18 and 8.36-7.

81. The above dicta are generally deployed as a warning against the over-ready implication of terms. If the silence or “gap” in the text of the instrument is deliberate, then it will militate against the implication of a term to fill it. This is because it has been determined that the express words contain the whole of the terms which have been agreed. There is no reason to confine this principle to cases of arms-length negotiated contracts where the parties have been unable to agree about a particular matter and therefore deliberately left a gap in their contract, hoping that the uncovered eventuality may never occur. An apparent gap may equally deliberately be left in a trust deed where the settlor decided, after due consideration and advice, to leave a trustee or other fiduciary free to act without constraint, trusting more in the good sense of the fiduciaries rather than shackling them with a set of rules.

### **The proper construction of the trust deeds in this case**

82. Once the right question has been formulated, the answer to most questions of construction turns out to be quite short. This case is no exception. The issue was presented to the Board as a binary choice between two different default roles for protectors appointed under the provisions of a trust instrument which did not spell out their role in express words. Reflecting discussion in commentaries, the issue has been presented as if the Board has to assume that the settlor must have had in mind one or the other of those two roles, the task for the Board being just to decide which.

83. The Board does not consider this to be the correct approach. Where (as here) the settlor has made provision for one or more persons (calling them protectors) to exercise precisely defined powers, including powers to approve or disapprove steps being proposed by the trustees in the appointment and administration of the trust property, but remained silent about how those powers should be exercised, the question is not which of two roles was specified (Narrow or Wider) but rather: 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?

84. This is the correct question because, speaking generally, the imposition of a requirement that a person (“A”) obtains the consent of another person (“B”) before doing something places B under no constraint at all in the exercise against A’s proposal of what is in substance a power of veto, save perhaps an obligation of good faith. Probably the most familiar example known to the law is the frequently found requirement in leases that

the lessee obtain the landlord's consent before assigning the lease, underletting, carrying out improvements, or even keeping a pet on the demised premises. A requirement not to withhold consent unreasonably may be imposed by statute, or contained in the lease, but it is not inherent in the power of veto or generally implied by law: see: *Guardian Assurance Co Ltd v Gants Hill Holdings Ltd* [1983] 2 EGLR 36 at 37; *Price v Bouch* (1986) 53 P & CR 257, and *Cryer v Scott Bros (Sunbury) Ltd* (1986) 55 P & CR 183.

85. Two preliminary matters can be disposed of at the outset. The first is that there is nothing in the use of the words "protectors" or "protectorate" as labels for the appointees that sheds any useful light on the answer. As already explained, the word protector has not acquired a sufficiently precise settled meaning in the offshore trust industry which it can be assumed that the settlor wished to import into the 1951 Settlement. Other words than protector have been used for persons with similar powers, and "protector" has not acquired a usage which necessarily imports any particular constraints upon the discharge of the powers typically conferred. Nor do all persons described as protectors in trust instruments have precisely the same powers.

86. Nor does the fact that "protector" includes the verb "protect". A power of veto over the trustees' decision making can fairly be described as protective, whether the person so appointed and described is given the Narrow or the Wider Role. A Narrow Role protector may be said to be there to protect the beneficiaries' rights and expectations from being harmed by unlawful conduct by their trustees. A Wider Role protector may be said to be there, for example, to protect the beneficiaries and the settlor from the exercise of discretionary powers by the trustees which, however lawful, stray unacceptably far from the family's general expectations.

87. The second is that the rather unusual fact that the Protector Provisions in most of the settlements in issue (including the 1951 Settlement) were introduced by the trustees of the settlements rather than the settlors cannot in the Board's view be material to their construction. This is because (i) the trustees were doing so in the exercise of powers of appointment conferred on them by their settlors which involved delegation to the relevant trustees by the settlors in accordance with the terms of the powers in question to state or restate or fill gaps in the trusts on the settlor's behalf (see *Muir v Muir* [1943] AC 468 at 483 per Lord Romer), and (ii) because it is not suggested that the Protector Provisions which are in common form across all the X Trusts are to be differently interpreted, according to whether they were laid down by the settlor or the trustees of each settlement, or whether they were originally included in a particular settlement or subsequently added, as in the case of the 1951 Settlement. It is a clear aspect of the relevant background that "Operation Protector" was an undertaking designed to introduce a common scheme of Protectors across the whole of the X Trusts, to be construed and operated in the same way whoever introduced the Protector Provisions into each settlement, or whether they were originally there, or later introduced by amendment. We will refer to those (whether original settlor or existing trustees) who caused the protector provisions to be included as "settlors". Even if those persons were the trustees of a particular settlement, they were

thereby exercising powers of appointment or re-settlement, characteristic of the powers of a settlor.

88. One feature of the Protector Provisions in all the X Trusts is that, as is common ground, they were designed to, and did, confer powers (including the powers of veto) on persons who were to exercise them as fiduciaries. Therefore, they were to be exercised subject to all the constraints undertaken by fiduciaries under the general law. These are not constraints or duties imposed by equity, but rather they are taken by equity to be voluntarily undertaken by those who assume, accept or arrogate to themselves a fiduciary role: see *Hopcraft v Close Bros Ltd* [2025] UKSC 33; [2025] 3 WLR 423 at paras 82-110.

89. The main relevant constraints are comprised in the well-known no-profit and no-conflict duties and the duty to exercise their powers for proper purposes: see as to the first two *Rukhadze v Recovery Partners GP Ltd* [2025] UKSC 10; [2025] 2 WLR 529 and as to the third *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71; [2015] Bus LR 1395 and *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47; [2023] WTLR 149. Those constraints are formidable. In relation to the Protectors the first two require, in effect, that they exercise their powers selflessly, with single-minded loyalty to and regard for the interests of the beneficiary class, rather than to serve their own interests, or those of anyone else, such as the settlor. The proper purpose duty ensures for example that protectors do not use (or abuse) their powers of veto to cajole the trustees into accepting their views about other aspects of the administration of the trust about which the trustees have not sought, or may not even be obliged to seek, the protectors' consent.

90. Mr Brian Green KC for the respondents tried to harness the fiduciary status of the Protectors as a route to identification of the Narrow Role in two ways. First he submitted that since the Protectors' fiduciary duties were owed to the beneficiaries and therefore to be exercised for the protection and preservation of their rights, and since the beneficiaries' rights as against the Trustees were no greater than to have the Trustees carry out their duties in a lawful manner, then it followed that the Protectors' function could be no wider than the Narrow Role. The Wider Role would confer on the beneficiaries something either more than or different from their rights under trust law, or confer protection for example for the implementation at all costs of the settlor's wishes, who was someone to whom the protectors owed no fiduciary or other duties at all.

91. The Board does not accept that submission. The rights and expectations of discretionary beneficiaries under a family settlement of this general kind are those which come their way as the result of the design and operation of the settlement as a whole. Where the settlor has set up a structure under which its purposes are to be achieved by trustees and protectors (however named) working together, it is blinkered to regard the beneficiaries' rights under the settlement as just those which consist of or flow from the lawful performance of their role by the trustees alone. The respondents do not dispute that

a settlement may legitimately provide for Wider Role protectors if the settlor chooses to do so. If this first submission were correct it is not clear to the Board how such a chosen structure could be lawful.

92. Mr Green's second submission was that the Wider Role could not be performed by protectors owing duties to the beneficiary class as a whole, because that duty would disable them from considering, on its merits, a proposal by trustees to distribute or appoint part of the trust property to some rather than other members of a discretionary class. The trustees' power to pick and choose in that way requires them to give all potential recipients in a discretionary class due consideration but does not constrain them from appointing to one or more but not other beneficiaries merely because so to do would not serve the interests of the class as a whole. They have, as Mr Green put it, authority to discriminate. Thus far the Board would agree: see e.g. *Lewin on Trusts* 20<sup>th</sup> ed, at paras 29-062 to 29-064. But protectors, he submitted, enjoyed no such authority to discriminate, or to pick and choose, sufficient to enable them to consider such a trustee proposal on its merits. All they could do was to satisfy themselves that the trustees had acted lawfully by giving proper consideration to the potential claims of all members of the beneficial class.

93. Again, this submission either assumes what it seeks to prove, or proves too much. The respondents accept that a settlor may endow protectors with the Wider Role for the exercise of a power of veto even within a discretionary trust. But this could not be performed if their supposedly invariable duty to have regard only to the beneficiaries' interests as a whole prevented them from assessing the merits of a pick and choose proposal. The answer is that the law would simply recognise that the protectors had such authority (ie to consider the merits of a pick and choose proposal) to enable them to carry out that role. The nature of a fiduciary duty in any particular situation is moulded by, and to, the function which the fiduciary has undertaken to perform, not the other way round.

94. Looked at in the round, the fiduciary status of the Protectors does impose significant constraints upon the way in which they have to exercise their powers to approve or disapprove proposals for appointments and for dealings with Specified Securities put to them by the Trustees, but those constraints all operate within, and in harmony with, the Wider Role. They come nowhere near confining the Protectors to the Narrow Role, within any of the X Trusts.

95. A further constraint upon the Protectors is that, as recognised by para 10 of the Protector Provisions, they are expected to be, and indeed are, paid professional persons. This is likely (subject to any immunities) to require them to act with reasonable care and skill, under a professional duty of care. But again, this constraint does not come near to confining them to the Narrow Role, as is obvious from the fact that the Trustees themselves are paid professional entities with very wide discretionary powers.

96. Some attempts were made to extract an indication that the Narrow Role had been chosen for the Protectors from other parts of the Protector Provisions than paragraphs 2 and 3 which create their powers of veto. Reference was made to the use of the word “discretion” in the 1951 Settlement, both in the original deed, the 1956 Deed, the 1994 Deed and in the embedded Protector Provisions themselves. The submission was that where it was intended to create a discretion this was stated expressly. Therefore, the absence of any reference to discretion in paragraphs 2 and 3 of the Protector Provisions meant that no discretion was intended to be conferred. The Narrow Role was not discretionary at all. It merely required the protectors to veto any proposed exercise of the relevant trustee powers which appeared to be unlawful.

97. It is certainly true that there are many instances where reference is made to “discretion”, or “absolute discretion” when describing powers conferred upon the Trustees: see e.g. clauses 2, 4, 5, 6 and 7 of the 1951 Deed and clause 4A of the 1984 Deed. Furthermore, the Protectors are themselves given a power, expressed as being exercisable in their absolute discretion, in paragraph 6(B) of the Protector Provisions, namely their power to decide what is or is not an event of an emergency, as the gateway for their power to remove and appoint trustees.

98. But a wider reading of the trust instruments, and in particular the Protector Provisions themselves, shows that the word “discretion” is by no means invariably used in the description of what are obviously discretionary powers. For example, the power in clause 5 of the 1984 Deed for the Trustees to exclude individuals or classes of individuals from the Appointed Class of beneficiaries (as defined) is plainly discretionary but is not so described. In the Schedule to the 1984 Deed, containing the Protector Provisions, the power given to the Protectors to remove and appoint Trustees is plainly discretionary, as is the Protectors’ power to designate Specified Securities and their power to release or waive the exercise of any of their powers, including their powers of veto. But in none of those instances is the power expressly described as discretionary.

99. If explanation were needed for the absence of the word “discretion” in paragraphs 2 and 3 of the Protector Provisions (which in substance create the powers of veto) it is that those two paragraphs are expressed in terms which prohibit the Trustees from certain acts, without the Protectors’ consent, rather than in express terms creating the Protectors’ powers to give or refuse that consent.

100. The answer so far to the question of construction posed at para 83 above may be summarised thus:

- (i) The 1951 Settlement did not by any express language impose any constraints upon the Protectors in the exercise of their powers of veto over Trustees’ proposals for appointment or dealings with the Specified Securities.

(ii) By appointing Protectors as fiduciaries, the 1951 Settlement imported from the general law the usual fiduciary constraints affecting fiduciaries, encompassed by the no-profit, no-conflict and proper purpose duties. In relation to proposed “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.

(iii) The 1951 Settlement 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.

(iv) 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.

(v) The constraints thus identified, though substantial, do not confine the Protectors to the Narrow Role.

101. The iterative process of construction now requires the Board to check the construction appearing from the natural meaning of the words of the Protector Provisions (including the absence of words) against the wider consideration of the contextual background and against considerations of business efficacy and common sense, but always mindful of the limits of that process in the context of an instrument like a trust deed, described in paras 65 ff above.

102. In the Board’s view, there are no terms of the trust deeds, including the Protector Provisions, which support the Narrow Role. By contrast, there are terms which provide significant support for the Wider Role. The Board draws attention in particular to three provisions.

103. First, paragraph 8 of the Schedule provides for the release or waiver of the Protectors’ powers. It empowers them at any time to release, extinguish or restrict, revocably or irrevocably, all or any of their powers. They may also “waive, either specifically in relation to any particular matter or generally in relation to one or more matters, the requirement for the trustee to obtain its prior written consent”. Such waiver may be given before or after the Trustee’s decision in relation to any particular matter.

104. If the settlor had intended the Protectors to fulfil the Narrow Role and so have a fiduciary duty to check the legality of relevant decisions of the Trustees, it is difficult to understand why he should have given them the power to abdicate that role, either

generally or in relation to any particular matter. The Court of Appeal accepted Mr Green's submission that the Protectors are there to act as a watchdog or enforcer, but it is, to say the least, unusual to allow a watchdog or enforcer to stand down whenever *it* chooses to do so. Mr Green gave examples of cases where it might, he submitted, be appropriate for the Protectors to waive the requirement for consent, such as urgency or the repetition of an act to which the Protectors had previously agreed. These do not appear to the Board to be persuasive examples but in any event they do not explain why, if the Protectors were intended to have the Narrow Role, the settlor would have allowed them to abandon their function permanently.

105. Secondly, paragraph 13 of the Schedule provides that if there is more than one Protector, decisions of the joint Protectors must be unanimous. It further provides that if the Protectors cannot agree whether to give or withhold consent where required, the Trustees are free to exercise the power without the Protectors' consent but shall nevertheless consult with each Protector and "shall take into account the views expressed before making a final decision". This makes sense if the Protectors have the Wider Role but it makes little sense if they have the Narrow Role. It would mean that although one Protector considered that the proposed exercise of a power by the Trustees was unlawful, the Trustees would nonetheless be free to proceed, having only taken into account the opposing views of the Protectors. If the Protectors' role was to consider whether the Trustees' decision was lawful, the least one would expect in such circumstances is that the Trustees be required to obtain legal advice that the proposal did not involve a breach of trust before proceeding with it.

106. Third, the consent of the Protectors is required only for a limited range of acts by the Trustees. Paragraph 2 of the Schedule requires consent to the appointment of capital and paragraph 3 requires consent to any dealing with "Specified Securities" or any decision as regards the exercise of voting powers attached to the Specified Securities. "Specified Securities" are defined in para 1(B) as shares in OpCo and such other securities as the Protectors may designate. A requirement for a protector's consent to appointments of capital is a common feature of the powers conferred on protectors, and the requirement for consent as regards dealings in, and the voting of, Specified Securities is easily explained by the need for a coordinated approach where the X Trusts hold in aggregate a very substantial shareholding in OpCo.

107. The matters requiring the Protectors' consent thus represent particularly important decisions by the Trustees. It is readily apparent why the settlor might in those circumstances wish the Protectors to fulfil the Wider Role in the exercise of their power to give or withhold consent. What is not readily apparent is why, if the Narrow Role were intended, it should be restricted to those matters. If the Narrow Role were intended, it would more likely apply to a wider range of actions, or all actions, by the Trustees as any potential breach of trust is likely to be of concern to a settlor.

108. Additionally, there are other factors which support the Wider Role.

109. First, if the Narrow Role were intended, it might be expected that appointment as Protector would by the terms of the settlement be restricted to those most obviously qualified to assess the legality of the Trustees' proposed action, such as lawyers with specialist experience in trust matters.

110. Second, if, as no doubt was intended by the settlor, only responsible persons would be appointed as Trustees, who could be relied on to act in accordance with their duties and to take advice when appropriate, it is not clear why a settlor would wish to provide for a Protector whose role would be limited to checking that the trustee was acting lawfully.

111. As against that, the A Branch relies on certain factors as pointing to the Narrow Role as the correct analysis.

112. First, they refer to the additional cost and delay which would be involved with the Wider Role. This submission is not based on any evidence of the way in which structures providing for protectors to fulfil the Wider Role work in practice. If, as would be expected, a trustee keeps a protector informed of the development of proposals for which the protector's consent will be needed and seeks the protector's views as the proposals develop, there is unlikely to be significant delay. There will of course be a cost to the trust, whichever role applies. Whether the Wider Role will involve significant extra cost is a matter of speculation but, insofar as it does, it will be small in the context of the trusts in this case.

113. Second, the A Branch refers to the prospect of deadlock if the Protectors do not consent to the Trustees' proposal. In many, probably most, cases it should be possible for trustees and protectors acting in accordance with their respective fiduciary duties to find common ground. There may be cases, and it appears that the present case is one, where common ground cannot be found. That, however, is not a reason for rejecting the Wider Role. Ultimately, the purpose of a protector with the Wider Role is to prevent a major transaction which the protector considers to be an inappropriate exercise of the trustees' powers. Necessarily, the possibility of deadlock is deliberately built into the structure but the Board repeats that it is the duty of both trustees and protectors *to seek* to find common ground.

114. For completeness, mention should be made of the absence in most, but not all, of the X Trust deeds of any exoneration of, or indemnity for, the Protectors. While Kawaley AJ placed some reliance on this point, the Court of Appeal attached very little, if any, weight, to it, Gloster JA saying that [at] best, it is perhaps slightly supportive" of the Narrow Role (para 107). Before the Board, Mr Green made clear that he placed no

reliance on it, and no other party sought to do so. The Board agrees that the point is of no assistance.

115. In the view of the Board, the balance of these factors, drawn from the terms of the settlement and more generally, overwhelmingly favours the Wider Role for the Protectors of these trusts.

### **Implied term?**

116. We have thus far concluded that the iterative contextual process of construction of the Protector Provisions discloses no constraints upon the role of the Protectors in exercising their veto powers under paragraphs 2 and 3 narrower than the Wider Role, and certainly no constraints which would limit them to the non-discretionary Narrow Role. It remains to consider whether a constraint limiting the Protectors to the Narrow Role is to be identified by way of an implied term.

117. The Court of Appeal considered that, as a matter of construction, the Protectors of the X Trusts were limited to the Narrow Role, but they indicated that they would have reached the same conclusion by way of an implied term “of the second type”, i.e. a term implied by law, as a necessary incident of the relationship concerned. We have already explained why, in the Board’s opinion, the fiduciary and professional relationship between the Protectors, Trustees and beneficiaries of the X Trusts does not do so as a matter of construction. The same reasons sufficiently explain why that relationship does not give rise to a Narrow Role constraint upon the Protectors by way of a term implied by law, in the absence of any express provision to that effect. The conferring in a settlement of a power of veto over trustee decisions upon persons described as protectors says nothing, in and of itself, about the protectors’ role because, in contrast to the word trustee, the word “protector” has yet to acquire the status of a term of art recognised by the law as the badge for the conferral of any particular role.

118. Any attempt to insert a Narrow Role constraint upon the Protectors by a term to be implied in fact would be doomed to failure. Although it might (by comparison with the Wider Role) be less likely to lead to deadlock, it is not necessary to make the X Trusts workable in practice, nor (as is apparent from the different outcomes in judicial opinion in this litigation) could it be said that the proposed Narrow Role term would satisfy the officious bystander test. Nor could it be said, if it was thought (wrongly in the Board’s view) that the absence of an expression of the Protectors’ role cried out for the implication of a term to fill that gap, what term would have been agreed.

## **Conclusion**

119. Those responsible as settlors for implementing Operation Protector introduced into the X Trusts common form, carefully and professionally drafted Protector Provisions which conferred upon the Protectors, as fiduciaries, a power of veto over certain types of decision making by the Trustees. They chose not to set out expressly how (in terms of role) the Protectors were to decide whether to approve or disapprove proposals submitted to them by the Trustees for approval. The settlors must be taken to have known or been advised as to the constraints upon decision-making undertaken by the acceptance by the Protectors of fiduciary responsibilities in carrying out their allotted tasks. It must be inferred, as a matter of construction, that no further or narrower restraints were intended to be imposed. If the absence of a more precisely specified role for the Protectors may be seen by some as a gap in the Protector Provisions, it must be taken to have been a deliberate gap. It is not a gap which needs to be, or can be, filled by any implied term. And the Narrow Role cannot as a matter of construction be identified as having been imposed by any language used in the Protector Provisions, or in the X Trusts containing those provisions, viewed as a whole. There is simply no peg on which to hang the Narrow Role.

120. For those reasons the Board will humbly advise His Majesty that this appeal be allowed.