OVERVIEW OF TRUST LAW IN MALAYSIA AND THE ROLE OF PROTECTORS

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ABSTRACT

The concept of "protectors" remains relatively unfamiliar within Malaysian trust law, but it has become an increasingly important feature in modern trust structures, especially in offshore trusts where settlors rely solely on trustees for the administration of the trust. Despite its growing popularity, the nature, scope and limits of a protector's powers remain vague and largely dictated by the drafting of the trust instruments. To address this uncertainty, this article adopts a doctrinal legal research methodology, examining case law, foreign legislation, and academic commentary to analyse the nature and extent of a protector's powers. A comparative study is also employed, focusing on jurisdictions with established statutory recognition of protectors, such as Belize, Saint Kitts and Nevis and selected offshore jurisdictions, due to their structural and functional relevance to Malaysia's trust landscape. The article also critically evaluates the advantages and disadvantages of appointing protectors before incorporating a normative analysis to propose methods aimed at mitigating the shortcomings discussed. Ultimately, these methods seek to address the identified limitations by harnessing the very features of the protector's role and transforming them into strengths, thereby promoting a more balanced framework that preserves the flexibility desired by settlors while ensuring the effective administration of trusts. The findings of this article emphasise the importance of precise drafting of trust instruments, clearer delineation of protector powers, and the potential need for legislative guidance to enhance certainty, accountability, and the overall robustness of trust governance in Malaysia.

Keywords: Trust, protectors, settlors, beneficiaries, trustees

ABSTRAK

Konsep "pelindung" masih belum begitu dikenali dalam undang-undang amanah di Malaysia. Namun, peranan ini semakin penting dalam struktur amanah moden, khususnya amanah luar pesisir apabila pemberi

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amanah bergantung sepenuhnya kepada pemegang amanah untuk mentadbir amanah. Walaupun penggunaannya semakin meluas, sifat, skop dan had kuasa pelindung masih belum jelas dan sebahagian besarnya bergantung pada peruntukan surat ikatan amanah. Isu ini diteliti melalui kaedah penyelidikan undang-undang doktrinal dengan menganalisis keputusan mahkamah, perundangan asing dan penulisan akademik mengenai sifat serta keluasan kuasa pelindung. Kajian perbandingan turut dibuat terhadap bidang kuasa yang telah mengiktiraf pelindung melalui perundangan, termasuk Belize, Saint Kitts dan Nevis serta beberapa bidang kuasa luar pesisir yang mempunyai persamaan dari segi struktur dan fungsi dengan landskap amanah di Malaysia. Kelebihan dan kelemahan pelantikan pelindung turut dinilai secara kritis sebelum suatu analisis normatif dikemukakan untuk menunjukkan bagaimana ciri peranan tersebut boleh dimanfaatkan bagi mengurangkan kelemahan yang dikenal pasti. Pendekatan ini bertujuan membentuk kerangka yang lebih seimbang dengan mengekalkan fleksibiliti yang dikehendaki oleh pemberi amanah tanpa menjejaskan pentadbiran amanah yang berkesan. Dapatan kajian menekankan kepentingan surat ikatan amanah yang dirangka dengan tepat, penetapan kuasa pelindung yang lebih jelas dan kemungkinan perlunya panduan perundangan bagi meningkatkan kepastian, akauntabiliti serta keteguhan tadbir urus amanah di Malaysia.

Kata kunci: amanah, pelindung, pemberi amanah, benefisiari, pemegang Amanah

INTRODUCTION

The term "Protector," as its ordinary meaning suggests, refers to a person who provides safeguards to another person. In the context of trust law, a protector, also otherwise known as a guardian or an advisor, serves to protect the interests of the beneficiaries and to ensure the trust is administered in line with the settlor's intentions.

Although protectors may appear to share certain purpose with trustees, their roles are fundamentally distinct. In this regard, a protector has been described as "an unrelated, disinterested overseer of a trust who possesses broader authority than a trustee."[1] This distinction exists because protectors may be vested with significant powers, including the authority to consent to or veto actions proposed by the trustees. However, unlike trustees, protectors merely have powers vested in them and hold no title in the trust assets. The core responsibility for administering the trust remains firmly with the trustees. As such, protectors are generally not expected to bear the same high level of duty as trustees, as their role is primarily supervisory.

Within this framework, the protection of the trust is robustly safeguarded through a structured allocation of responsibilities among various parties. While the beneficiaries hold the beneficial interests of the trust assets, trustees are entrusted with the administration and management of the trust, and the protectors operate as an additional supervisory mechanism, exercising oversight over the trustees' exercise of powers. In the event of disputes, the court remains the ultimate forum of adjudication.

In light of the increasing complexity of modern trust structures, the role of protectors has emerged as a significant, yet insufficiently defined, feature within trust law. While widely recognised in offshore jurisdictions, the Malaysian legal framework remains largely silent on the nature and limits of this role. Therefore, this article examines the legal position of protectors.

This discussion proceeds in four parts. First, it analyses the nature and extent of the powers conferred upon protectors from a doctrinal perspective. Secondly, it reviews how selected foreign

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1 Bryan A. Garner, *Black's Law Dictionary* (Thomas Reuters, 2019), s.v. "protector", 1479.

jurisdictions approach the use of protectors, highlighting key comparative insights. Thirdly, it evaluates the advantages and disadvantages arising from the appointment of protectors. Finally, in recognising its potential value, this article concludes by proposing several recommendations aimed at addressing the shortcomings and enabling protectors to fulfil their duties more effectively.

A PROTECTOR

Who?

In Malaysia, unlike trustees, whose roles and obligations are circumscribed by the Trustees Act 1949, the powers, duties, and liabilities of protectors are determined by the settlor's discretion when drafting the terms of the trust instrument. For example, two individuals may each be appointed as protectors under two separate trust instruments, but the nature and extent of their duties and powers may differ significantly, depending on the construction of each trust. This position is comparable to that in the United Kingdom, where the concept of a "protector" remains highly flexible, and the statutory definition continues to be lacking, leaving its scope to be determined and refined through common law.[2]

Despite the seemingly broad discretionary powers granted to protectors, certain limitations remain in place. For instance, a protector cannot determine questions of law and such matters continue to fall within the jurisdiction of the courts.[3] Furthermore, a protector is not authorised to restrict a beneficiary's right to inspect trust documents or to absolve trustees from liability for a breach of trust, both of these powers rest firmly within the courts.[4]

The Nature of Power

In view of the important role played by a protector, it is pertinent to understand the nature of the protector's power to further utilise its

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2 Patrick Harney and Marie McCallum, "The Role of Protectors: A UK Perspective," *Trusts & Trustees* 28, no. 9 (2022): 862, 863.

3 Philip H Pettit, *Equity and the Law of Trusts* (United Kingdom: Oxford University Press, 2012), 491.

4 Ibid, 491.

functions. Kessler et al. (2023) suggested that in the absence of any abnormality in the trust, a protector holds fiduciary and not personal powers.[5]

From a doctrinal perspective, the courts have generally inclined towards treating certain protector's powers as fiduciary in nature. In *Jurgen van Knierem v Bermuda Trust Company Limited and Grosvenor Trust Company Limited*,[6] the Supreme Court of Bermuda found that the protector's power to appoint and remove trustees are fiduciary in nature.[7]

Similarly, the court of Isle of Man in *Steele v Paz*[8] also recognised the fiduciary status of a protector and exercised its inherent power to appoint a protector so that the trust would not fail for want of certainty.[9] This approach was further affirmed by the Guernsey court in *Re The K Trust*[10] ("K Trust"), which held that the fact that the protector is armed with wide veto powers should be regarded as having fiduciary duties, or else the trust would be "unworkable" as the protector would not be accountable for his actions. According to the court:[11]

> … As can be seen from the extensive list of clauses where the Protector was given an effective veto, if this were only a personal power, and not fiduciary, there would be no accountability and the trust would be unworkable. Construing the Settlement as a whole, this does not appear to have been the intention of the Settlor.

However, this position is not without challenge. From an academic perspective, Hubbard critiques the view in *K Trust*, adopting a stricter approach that emphasises adherence to legislative frameworks rather than evolving common law interpretations, on the

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5 Kessler KC James et al., *Drafting Trusts and Will Trusts: A Modern Approach* (Sweet & Maxwell, 2023), 149.

6 [1994] 1 BOCM 116.

7 *Jurgen van Knierem v Bermuda Trust Company Limited and Grosvenor Trust Company Limited [Supreme Court of Bermuda* [1994]1 BOCM 116.

8 [1993 – 1995] MLR 102.

9 *Steele v Paz* [1993 – 1995] MLR 102.

10 [2016] WTLR 1225.

11 Re the K Trust [2016] WTLR 1225

basis that Guernsey law explicitly recognises that a protector may owe non-fiduciary duties, the nature of which depends upon the construction of the trust.[12]

Notwithstanding this, the classification of powers as personal should not render their exercise entirely beyond control and a protector should still be held accountable due to the doctrine of fraud. This is illustrated by the Jersey Royal Court in *Re Bird Charitable Trust and Bird Purpose Trust*[13], where the doctrine of fraud is found not to be confined to fiduciary powers only, it may serve as a controlling mechanism on the exercise of personal powers.[14]

This limitation is particularly important in situations where protectors may derive benefits from the trust. In these circumstances, the courts generally uphold the settlor's wishes, acknowledging that protectors owe only limited or qualified fiduciary duties.[15] However, the protectors must still act "reasonably" in the interests of the beneficiaries.[16]

In light of this dynamic framework, there is no uniform approach in determining the nature of the powers of protectors. The presence of the protector itself should not be regarded as entailing any fiduciary powers, rather, it is dependent upon the type of powers conferred upon the protector. Accordingly, the fiduciary character of such powers is not all-or-nothing and it is necessary to examine the scope of these powers, as the practical significance of a protector ultimately depends not only on their nature, but also on the extent to which they may be exercised.

The Extent of Power

The focus now shifts to how far such powers may extend, whether limited to supervisory or review functions or extending to independent

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12 Mark Hubbard, "Should I Stay or Should I Go? Re K Trust and the Retirement of a Guernsey Protector," *Trusts & Trustees* 24, no. 7 (2018): 714, 716.

13 [2008] JRC 013 77, [2008] JLR 1, (2008) 11 ITELR 157.

14 *Re Bird Charitable Trust and Bird Purpose Trust* [2008] JRC 013 77, [2008] JLR 1, (2008) 11 ITELR 157.

15 Katy Barnett, "Protectors and Guardians: Observations from Australia," *Trusts & Trustees* 30, no. 7 (2024): 407, 410.

16 Ibid, 410.

decision-making authority. Renouf and Flavin categorised protector's powers into two types: the narrower view, in which the protector merely acts as a check on the trustees' authority, and the broader view, which grants the protector discretion to make decisions independently.[17]

The approaches taken by the judiciary differ. The conservative approach is taken in *Re the X Trusts*[18] ("X Trusts") where the Supreme Court of Bermuda held that based on the terms of the trusts, protectors are limited to review function only and should not be empowered to veto rational decisions (this does not apply to irrational decisions).[19] The Supreme Court went even further to suggest the general application of the conservative approach applies to all situations unless expressly stated otherwise in the trust. Nonetheless, the court stressed that protectors should act as a "watchdog" in monitoring the trustees and the powers of protectors should not be exercised in tandem with the trustees:

> [113] The Narrower View reflects the true construction of the consent powers conferred on the Protectors of the X Trusts primarily because it is clear from the terms of the relevant instruments that their dominant purpose is to ensure the due exercise of the powers vested in the Trustees. The preponderant view of the text writers whose learning on this topic was placed before this Court supports the following critical conclusion. Unless a contrary meaning can legitimately be discerned in the instrument conferring the relevant consent powers, the usual role of a protector is not to exercise a power jointly with the trustee in relation to the matter requiring protector consent. The protector's role is to be a 'watchdog' to ensure due execution by the trustee of the powers vested in the trustee.

The converse approach was taken by the Royal Court of Jersey in the matter of the *Piedmont Trust and Riviera Trusts*[20] ("Piedmont") where the protectors are allowed to have veto powers over trustees'

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17 Mark Renouf and Marcus Flavin, "Piedmont and X-Trusts:'What Are Protectors For?,'" *Trusts & Trustees* 28, no. 2 (2022): 76, 77.

18 [2021] SC (Bda) 72 Civ.

19 *Re the X Trusts* [2021] SC (BDA) 72 Civ.

20 [2021] JRC 248.

decisions and the protectors' consent may be required prior to the exercise of the trustees' powers.[21] However, the court cautioned that such powers must be exercised with care. Protectors should not withhold consent to a trustee's decision simply because they might have reached a different conclusion. The court emphasised that protectors' powers are not limited to a mere review function, and they must always act in the best interests of the beneficiaries.

The case of *Piedmont* was decided after *X Trusts*, yet it reached a conclusion that departed from the earlier decision. In fact, the Royal Court of Jersey pointed out that:

> If the role of the protector was simply to review the trustee's decisions 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 in a blessing application.

Despite the differing approaches, Tey observes that the distinction between the wider and narrower views is largely semantic, cautioning that adopting either should not be treated as definitive.[22] He further illustrates that even where a trust instrument does not impose fiduciary duties on the protectors, the court retains the inherent power to intervene, when necessary, e.g. to compel disclosure of trust documents, as Lord Walker noted in *Schmidt v Rosewood Trust Limited*.[23] In light of these uncertainties, further insight may be gained by examining how the role of protectors has been recognised and structured across different jurisdictions.

STATUS OF PROTECTORS IN COMPARATIVE JURISDICTIONS

The concept of "protector" remains vague and largely dependent on the construction of the trust instrument. To further understand the nature and scope of this role, it is necessary to examine the legal frameworks

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21 In the matter of *the Piedmont Trust and Riviera Trusts* [2021] JRC 248.

22 Tsun Hang Tey, "The Office of Protector: Its Nature and Duties," *Trust Law International* 24, no. 2 (2010): 110; *Schmidt v Rosewood Trust Limited* [2003] 2 AC 709 (PC).

23 *Schmidt v Rosewood Trust Limited* [2003] 2 AC 709 (PC).

of several jurisdictions, including Bermuda, Saint Kitts and Nevis, Belize, Barbados, the Cook Islands, the Republic of Singapore ("Singapore"), and the Federal Territory of Labuan ("Labuan") that have formally recognised the office of a protector within their primary legislation.

The Legal Definition of a Protector

I. Malaysia

In Malaysia, trust law is principally governed by two statutes, namely the Trustee Act 1949 and the Trustees (Incorporation) Act 1952. However, neither statute nor case law provides a legal definition of a protector. Notwithstanding the foregoing, in Labuan, Malaysia, the Labuan Trusts Act 1996 refers to the term "protector," defining the role solely by reference to its appointment, i.e. "a person who is appointed in accordance with section 35."[24]

II. Other Jurisdictions

In many jurisdictions, a protector is generally regarded as a figure exercising control or exerting influence over the trustees in the administration of the trust, as follows:

(a) **Singapore Trustees Act 1967**: "a person who…has any control over how a trustee of the trust administers the trust;"[25]
(b) **Saint Kitts and Nevis' International Exempt Trust Ordinance:** a person who "is capable of directing a trustee in matters relating to the trust…and the holder of a power of appointment or dismissal of trustees;"[26] and
(c) **Cook Islands International Trusts Act 1984, No. 14, 1984, as amended by International Trusts Amendment Acts 1985, 1989, 1991, 1995–96, and 1999**: a person who "has the power to appoint or remove a trustee or directly or indirectly

[24] Malaysia, Parliament, Labuan Trusts Act 1996, s 35.
[25] Singapore, Parliament, Trustees Act 1967, s 83.
[26] Nevis, Parliament, Nevis International Exempt Trust Ordinance, s 2.

> controls…the trustees' exercise of…their powers, functions or discretions."[27]

Belize adopts a broader approach, defining a protector as "the person appointed by the settlor to intercede between the trustees, settlor and beneficiaries."[28] This suggests that, under Belizean law, a protector need not necessarily possess powers of control over the trustees but may instead serve as an intermediary between the various parties to the trust.

In the abovementioned jurisdictions, the office of protector must be established either by the terms of the trust or through the relevant legislation. There is no restriction limiting who may act as a protector. In Labuan, Saint Kitts and Nevis, Cook Islands and Belize, a protector may also assume the role of a settlor, trustee, or beneficiary.[29]

By contrast, Barbados expressly prohibits a protector from serving as a trustee.[30] This is both sensible and necessary, as allowing multiple roles in the same trust instrument may blur the line of their respective obligations and undermine the very purpose of the protector, namely, to safeguard against the potential failings of trustees.

Powers of a Protector

I. Malaysia

Pursuant to the Labuan Trusts Act 1996, the terms of a trust may confer a protector with various powers, including the power to appoint or remove trustees, determine the proper law of the trust, change its place of administration, and withhold consent for certain trustee actions.[31] The Labuan Trusts Act 1996 also draws a clear distinction between the

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27 Cook Islands, Parliament, International Trusts Act 1984, No. 14, 1984, as amended by International Trusts Amendment Acts 1985, 1989, 1991, 1995–96, and 1999, s 2.

28 Belize, National Assembly, Trusts Act (Chapter 202) Revised Edition 2011, s 64.

29 Labuan Trusts Act 1996, s 35; Nevis International Exempt Trust Ordinance, s 9; International Trusts Act 1984, No. 14, 1984, as amended by International Trusts Amendment Acts 1985, 1989, 1991, 1995–96, and 1999, s 16; Trusts Act (Chapter 202) Revised Edition 2011, s 20.

30 Barbados, Parliament, Trusts (Miscellaneous Provisions) Act 2018, s 10.

31 Parliament, Labuan Trusts Act 1996, s 35.

liability of a protector and that of a trustee, ensuring that a protector is not held liable as a trustee when carrying out their duties.[32]

As noted above, this position does not extend to the rest of Malaysia, namely the Trustee Act 1949 and the Trustees (Incorporation) Act 1952, and therefore no statutory power or obligations are conferred upon a protector. The rationale for this differing treatment between Labuan and the rest of Malaysia is reflected in the Hansard, i.e. the Malaysian Parliamentary debates on the Labuan Trusts Bill 1996.[33]

The distinction arises from the intention for Labuan to develop as an international offshore financial centre, with the Labuan Trusts Act 1996 aimed at attracting non-resident asset owners to establish trusts in Labuan for the protection and management of their assets for the benefit of beneficiaries. Given the geographical distance between the non-resident settlors and their trust assets in Labuan, the recognition of a "protector" under the Labuan Trusts Act 1996 facilitates the appointment of a protector to ensure that the settlor's intentions are preserved and effectively carried out.

II. Other Jurisdictions

To appreciate the position of protectors in Malaysia in relation to their statutory powers, it is helpful to compare their powers with those in other jurisdictions. The most common powers conferred (also reflected in the Labuan Trusts Act 1996) is the power to appoint or remove trustees, as seen in Belize, Saint Kitts and Nevis and Barbados. Notably, both Belize and Saint Kitts and Nevis went further in authorising protectors to apply to the court for orders relating to the execution, administration or enforcement of a trust.[34] In Belize, protectors are also empowered to enforce the fiduciary duties owed by the trustees and to seek for court orders to vary or revoke the terms of a trust, or to vary the powers of the trustees on behalf of minors or unborn persons.[35]

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32 Labuan Trusts Act 1996, s 35.

33 Malaysia, Hansard, House of Representatives (24 July 1996).

34 Trusts Act (Chapter 202) Revised Edition 2011, s 58; Nevis International Exempt Trust Ordinance, s 21.

35 Trusts Act (Chapter 202) Revised Edition 2011, s 27 and 58.

While Belize and Saint Kitts and Nevis have expanded the role of protectors to include certain court-related powers, the framework in Barbados aligns more closely with that of Labuan. In Barbados, a protector enjoys the power to inspect confidential trust instruments.[36] The Barbados Trusts (Miscellaneous Provisions) Act 2018 further enumerates a range of powers that may be conferred by the terms of a trust, including the power to appoint or remove trustees, to change the proper law of the trust, to receive advance notice of specified actions of the trustees, and to obtain information relating to the trust's accounts.[37] Despite these extensive powers, a protector is not to be regarded as a trustee by virtue of holding such powers.[38]

Powers that are not set out in the primary legislation may still be conferred upon the protectors, provided that it is clearly stated in the trust instrument. Examples of such power include the power to monitor and approve trustee's fees, withhold consent in specified circumstances and make or delete the class of beneficiaries.[39] The extent of a protector's power remains highly contingent upon the drafting of the trust instrument.

Consistent with this flexibility in the powers conferred on protectors, the courts have also confirmed the protectors have legal standing to apply to the court for the purposes of proper administration of trusts. For instance, the High Court in the United Kingdom in *Davidson and another v Seelig and others*[40] acknowledged the supervisory function of a protector over trust administration includes the right to apply to the court to properly exercise their powers.[41] Likewise, the Royal Court of Jersey in the case of *Re Hare Trust*[42] also recognised that protectors have the right to appear before the court for the same purpose.[43]

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36 Trusts (Miscellaneous Provisions) Act 2018, s 12.

37 Trusts (Miscellaneous Provisions) Act 2018, s 25.

38 Trusts (Miscellaneous Provisions) Act 2018, s 25.

39 David Hayton, Paul Matthews, and Charles Mitchell, *Underhill and Hayton: Law of Trust and Trustees* (Lexis Nexis, 2016), 52.

40 [2016] EWHC 549 (Ch).

41 *Davidson and another v Seelig and others* [2016] EWHC 549 (Ch).

42 [2001] 4 ITELR 288.

43 *Re Hare Trust* (2001).

Obligations of a Protector

I. Malaysia

Across various jurisdictions, including Labuan, a recurring statutory obligation imposed on protectors is the duty to record any dissent in writing when the protector disagrees with the majority's decision.[44] This requirement is crucial as the written evidence encourages protectors to exercise caution in making every decision, rather than blindly following the majority. It also identifies those responsible for the decision while safeguarding those who have discharged their duties diligently.

II. Other Jurisdictions

The duty to record dissent is similarly recognised in other jurisdictions. For instance, the Cook Islands goes a step further by clearly distinguishing individual accountability, exempting protectors from liability if they properly record their dissent from the decision.[45]

In Belize, protectors are vested with additional responsibilities. They are required to furnish information to the Registrar of International Trusts when it is necessary to ensure compliance with the Belize Trusts Act[46], or for any other fit and proper cause as determined by the authorities.[47]

Obligations of Other Parties

I. Malaysia

The Labuan Trusts Act 1996 does not impose any corresponding obligations on other parties in relation to the appointment of a protector.

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44 Labuan Trusts Act 1996, s 35; Nevis International Exempt Trust Ordinance, s 9; Trusts Act (Chapter 202) Revised Edition 2011, s 16; Trusts (Miscellaneous Provisions) Act 2018, s 25; International Trusts Act 1984, No. 14, 1984, as amended by International Trusts Amendment Acts 1985, 1989, 1991, 1995–96, and 1999, s 20.

45 International Trusts Act 1984, No. 14, 1984, as amended by International Trusts Amendment Acts 1985, 1989, 1991, 1995–96, and 1999, s 20.

46 (Chapter 202, Revised Edition 2011).

47 Trusts Act (Chapter 202) Revised Edition 2011, s 65C.

II. Other Jurisdictions

Conversely, the recognition of the protector's status has given rise to corresponding obligations on other parties. The trustees in Singapore, Bermuda and Belize are required to obtain and keep information pertaining to the identity and particulars of the protectors, such as residential address and other relevant information.[48] This enhances transparency and accountability in the administration of the trust.

When are Protectors Needed?

I. Malaysia

Protectors in Malaysia are more commonly required in offshore trusts, as settlors are typically not within the vicinity to directly supervise the trustees, as discussed in the Hansard above. In Labuan, in the event that the trust provides for the appointment of a protector but one could not be found, Labuan courts may dispense with such a requirement upon the application by the trustees.[49]

II. Other Jurisdictions

Jurisdictions such as Saint Kitts and Nevis, Belize, and Barbados mandate the appointment of a protector as a requirement for the creation of a valid international non-charitable trust.[50] In the absence of a protector, or if the protector is unwilling or incapable of acting, the relevant Minister has the power to appoint an appropriate individual to ensure that the trust will not fail for want of certainty.[51]

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48 Trustees Act 1967, s 84Q; Bermuda, Parliament, Trustee Act 1975, s 13AA and s 13B; Trusts Act (Chapter 202) Revised Edition 2011, s 65A.

49 Labuan Trusts Act 1996, s 35.

50 Nevis International Exempt Trust Ordinance, s 8; Trusts Act (Chapter 202) Revised Edition 2011, s 15; Trusts (Miscellaneous Provisions) Act 2018, s 9.

51 Nevis International Exempt Trust Ordinance, s 8; Trusts Act (Chapter 202) Revised Edition 2011, s 15.

THE DUAL EDGE OF A PROTECTOR

The Advantages of Appointing a Protector

Given that both, Malaysia and various foreign jurisdictions, recognise the role of a protector, it follows that there are inherent advantages to such recognition which warrants further examination.

I. The Watchdog

A protector is desired for many reasons. At its core, a protector is tasked with safeguarding the interests of the beneficiaries, which indirectly ensures that the purpose of the trust intended by the settlor will be fulfilled. A protector serves as a "watchdog", guarding not only against incompetent trustees but also from various hazards. Their presence provides a certain degree of flexibility in addressing unforeseen circumstances, especially where it requires the trustees to act out of the scope of its powers and duties or where they lack jurisdiction in making decisions that is fully aligned with the settlor's intention.[52]

Further, the presence of a protector introduces an intermediate layer of accountability within the governance framework of the trust, as the protector may require trustees to justify their decisions at an early stage, thereby encouraging greater caution in the exercise of the trustees' powers and reducing the necessity for immediate recourse to litigation. In the absence of a protector, parties may be compelled to resort to time-consuming and costly court procedures to resolve disputes, which could be avoided entirely if a protector is appointed.

For instance, in the Malaysia High Court case of *Mak Chee Chong v Rockwills Trustee Bhd,*[53] the administration of the estate was brought to a standstill due to a dispute over the trustee's fees and trustee's refusal to step down.[54] As a result, the grant of probate was not applied for, resulting in prolonged delays and uncertainty in the administration of the estate. The case demonstrated that even where the beneficiaries are dissatisfied with the conduct of a trustee, the threshold for removing a trustee remains considerably high, such that

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52 Alexander A Bove Jr, "Trust Protectors in the United States. A Step Behind the Rest of the World," *Trusts & Trustees* 22, no. 7 (2016): 737.

53 [2015] MLJU 1853.

54 *Mak Chee Chong v Rockwills Trustee Bhd* [2015].

beneficiaries are compelled to overcome significant procedural and substantive hurdles by undertaking lengthy and expensive litigation and establish a "sufficient cause" before the court will intervene to remove the trustee.

Had a protector been appointed in such circumstances, the protector could have required the trustee to justify the fee structure and if empowered with veto or replacement powers, facilitate the removal or replacement of the trustee without recourse to court proceedings. This serves a dual function: first, by encouraging trustees to exercise greater prudence and accountability in their decision-making, and second, by providing an intermediate mechanism for resolving disputes between trustees and beneficiaries before escalation into litigation.

Moreover, protectors are often individuals who have a close relationship with the settlor, such as friends or relatives, and are therefore more likely to understand and act in accordance with the settlor's wishes (hereinafter known as the "friendly protectors." Consequently, in cases of disputes, the trustees and beneficiaries will be more inclined to consider the views of the friendly protectors as they are perceived as someone entrusted by the settlors. By virtue of their position as a "friend" rather than a "foe," friendly protectors can help to facilitate settlement and resolve disputes.[55]

In addition, where protectors are subject to a proactive duty, as suggested by Duckworth (2013), they play an active supervisory role in safeguarding the interests of the beneficiaries.[56] This places the trustees under constant and high-intensity of oversight, as the protectors are empowered to take the initiative to intervene, when necessary, rather than remaining passive and acting only upon request. The supplementary role of a protector reinforces the trustees' fiduciary duties, promoting a more careful and deliberate approach in giving effect to the settlor's intention.

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55 Peter Hodson, "The Trust Protector: Friend or Foe?," *Trusts & Trustees* 12, no. 6 (2006): 8, 10.

56 Antony Duckworth, "Protectors: Law and Practice," *Trusts & Trustees* 19, no. 1 (2013): 98, 104.

II. A Safeguard for Cautious Settlors

Another key reason for appointing a protector is to provide reassurance to untrusting settlors. It is generally known that once a trust is set up, the legal ownership of the trust assets is vested with the trustees, and the settlor will lose direct control of the trust. In today's society, modern trusts often serve not merely to distribute wealth, but to focus on "creating an ideal structure to hold the family wealth."[57] This prompts the settlor to adopt a cautious approach, from drafting comprehensive trust terms prior to the creation of the trust to overseeing its administration afterwards.

To achieve this, settlors may appoint a protector to retain a certain degree of oversight without compromising the integrity of the trust, for retaining excessive control over the trust may undermine the three certainties of trust law. For a settlor who has parted with his trust assets to a far-reaching jurisdiction, the inability to directly oversee the trustees' exercise of power may cause difficulties for the settlor to relinquish control, especially where the trustees are inexperienced or have no personal connection with the settlor. This is especially so in other jurisdictions (such as Saint Kitts and Nevis, Belize, and Barbados), where protectors are commonly appointed in the context of international trusts. The appointment of a protector provides a practical solution in allowing the settlor to retain a degree of monitoring power over the trust assets.

Protectors also function as a problem-solving mechanism by acting as a reasonable intermediary between insecure settlors and challenging trustees, particularly when the protectors are located in the same jurisdiction as the trustees and can intervene more readily than the distant settlor.[58] In this way, protectors assure untrusting settlors that the trust will be administered in accordance with their intentions, by exercising powers that the settlors would have wished to exercise but are unable to.

However, these advantages must be carefully balanced against the fundamental principles of trust law. Regardless of whether the trust

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57 Terence Tan Zhong Wei, "The Irreducible Core Content of Modern Trust Law," *Trusts & Trustees* 15, no. 6 (2009): 481.

58 Dayra Berbey de Rojas, "Panama: The Role of the Protector in the Private Interest Foundation," *Trusts & Trustees* 14, no. 5 (2008): 350.

is established as an offshore trust or otherwise, a valid trust requires the settlor to genuinely give up control over the trust assets, such that trustees retain effective authority over their administration. In this regard, the introduction of a protector vested with extensive powers has the potential to disrupt the fundamental principles underpinning trust law. While a settlor may wish to retain a degree of oversight over the administration of the trust assets, such caution must not evolve into continued exercise of influence or control over the trust property. Therefore, it is necessary to strike a careful balance between accommodating modern wealth-management expectations and preserving the traditional trust law principle that trustees, and not settlors, must retain effective control over the trust assets.

III. Oversight without Burden

Furthermore, some individuals may be willing and eager to assist the settlor in fulfilling their final wishes, especially when they are friends or family members. Yet, they may be hesitant to take on the role of a trustee, given the onerous fiduciary duties involved, ranging from managing day-to-day administration, liaising with relevant authorities, keeping accurate records of all trust transactions, ensuring legal and regulatory compliance, to overseeing miscellaneous tasks such as upkeeping the trust assets.

Acting as a protector allows them to supervise and oversee the trust without being burdened by administrative responsibilities. The settlors generally expect the protectors to play a different role from the trustees, and the protectors are only expected to step in when potential abuse may arise.[59] As a result, these individuals may continue their daily routines while still contributing meaningfully to safeguarding the trust. This arrangement attracts individuals to accept the office of a protector while offering an extra layer of protection for the trust assets.

In view of the foregoing, when properly empowered, protectors can play a significant role in strengthening a trust structure. The benefits of having a protector are particularly evident in the context of offshore trusts, where settlors are often powerless in monitoring the trustees.

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[59] Tey, 122.

The Disadvantages of Appointing a Protector

Notwithstanding these advantages, the same features that make the protector's role attractive, namely flexibility also give rise to significant risks. The following section examines how it may undermine certainty, distort governance, and weaken accountability within the trust structure.

I. True Intention of the Settlor

Given that a protector may be vested with extensive powers, there may be a risk that such powers could be exercised improperly, resulting in an abuse of power. While the ultimate purpose of a protector is to oversee the trustees, various powers conferred upon them through the trust instrument that are intended to assist them in fulfilling this role, rarely specify the underlying rationale for their conferment. This hinders the parties to the trust from discerning the true intention behind the conferment of such powers on the protectors. Moreover, the intention of the settlors is inherently subjective and may encompass an infinite range of possibilities, giving rise to differing interpretations.

To exacerbate the matter, the view of a protector is often respected because it carries a personal element that represents the settlor's wishes. However, as noted by Hubbard, once the settlor is deceased or incapacitated, the settlor can no longer communicate his intention to the protector, thereby eliminating the personal element in the protector's role.[60] When coupled with beneficiaries holding divergent views, the ceasing of this personal element may aggravate tensions and give rise to conflicts among the parties to the trust, notwithstanding that the protector may have acted in good faith. For example, in *K Trust*, the court held that "the Protector's term of office had to come to an end" because the protector's views no longer aligned with the beneficiaries, resulting in a breakdown of the relationship and administrative problems in managing the trust.[61] In the absence of a clear express purpose, it will be challenging to determine whether the protectors are genuinely exercising their powers to effectuate the settlor's wishes or merely masking them for their own benefit.

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60 Hubbard, 718.

61 *Re The K Trust,* Guernsey Judgment 31/2015, [2016] WTLR 1225.

II. Illusory Trusts and Sham Trusts

Depending on the construction of the trust, a protector may effectively operate as the settlors' "alter ego," allowing the ultimate control of the trust to remain at the hands of the settlors.[62] This was exemplified in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev,*[63] where the settlor was both the protector and also one of the beneficiaries.[64] Under the terms of the trust, the settlor could act in the capacity of a protector to veto the trustees' decisions and appoint a successor to remove any trustees who failed to act in accordance with his wishes. Birss J held that the preservation of vast power over the trust failed to effectively part the ownership of the trust assets from the settlor. Consequently, the assets were found to be held on bare trust.

Such an arrangement risks the creation of an "illusory trust" and Lee defines this as:[65]

> …a misnomer that describes not a valid trust but a failed attempt to create one…More recently, however, the term 'illusory trust' has been revived as a shorthand for a trust that has failed because the settlor had reserved so much power under the trust that they could effectively exercise the powers of ownership over the trust property.

Any excessive intervention by a protector (particularly one vested with wide-ranging powers) may, in substance, be regarded as reflecting the exercise of control by the settlor, thereby constraining the trustee's independent discretion to the extent where it is effectively circumscribed in practice. As the protector's influence deepens, the boundary between the protector (or settlor) and trustee becomes increasingly blurred, giving rise to a structure in which decision-making authority is no longer clearly delineated. This blurring not only risks distorting the proper administration of the trust but may also support the contention that the trust is merely illusory in nature, as

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62 Hodson, 10.

63 [2017] EWHC 2426 (Ch), 20 ITELR 905.

64 *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), 20 ITELR 905.

65 Pey Woan Lee, "Remedying the Abuse of Organisational Forms: Trusts and Companies Considered," *Journal of Equity* 13 (2019): 211, 219.

ultimate control over the trust property effectively remains with the settlor.

Aside from the risk of an "illusory trust," the court may also scrutinise the protector's performance where it suspects that the protector has been appointed for the settlor to retain control over the trust. In such situations, the court may find such a trust a sham, on the basis that the appointment of the protector is intended to create a misleading appearance that an independent party has been appointed.[66] Hayton et al. provide a clear and insightful description of a "sham trust," as follows:[67]

> …taking into account of the alleged subjective intentions of the settlor…and his trustee..,and of any conduct subsequent to the creation of the trust that indicates that at the outset the trust was a sham because the rights and obligations apparently created within the four corners of the trust instrument were intended to create a misleading smoke-screen.

This danger is heightened where the powers conferred upon the protectors allow the settlors to indirectly place the trustees in straitjackets. A fine but important distinction exists between a trustee holding the trust at the settlor's direction and a trustee acting only when the settlor (or protector) so directs. Where the trust structure is left overly open-ended, it may therefore invite the allegation that the trust is a sham. It is pertinent to note that trustees remain accountable to the beneficiaries as fiduciaries, notwithstanding that they may have merely complied with the protectors' directions and in those circumstances, a finding of sham becomes more likely.

III. Liability of Protectors

As alluded to above, although the power to appoint or remove trustees is generally regarded as fiduciary, this cannot be assumed for all other powers. This distinction is significant because it enables trustees and beneficiaries to assess the extent of liability that may be incurred by the protectors. As highlighted by Lambourne , this is because the rule of "fraud on a power," which occurs where a power granted for a limited purpose is exercised beyond that purpose, applies only to those who are

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66 Tey, 129.

67 Hayton et al., 97.

subject to fiduciary duties.[68] On the contrary, where an individual holds to a purely personal power, the courts are generally unwilling to impose conditions as to how those individuals ought to behave, as long as the exercise of the power is within the scope conferred.[69]

In this regard, Labuan appears to have adopted the latter approach. Under the previous framework of the Labuan Trusts Act 1996, an express provision clarified that a protector shall not be deemed as a trustee when carrying out duties under the trust instrument to consent to the acts or omissions of trustees. However, in 2010, the Malaysian Government subsequently expanded this protection by providing that, so long as protectors exercise their powers without ill intent, they would not be treated as trustees or be held liable to beneficiaries or trustees, unless the trust instrument provides otherwise.[70]

While the Labuan framework reflects a clear legislative choice, the characterisation of such powers continues to be the subject of academic debate. For instance, Puni argued that the settlor's intention alone cannot conclusively determine the nature of the duty, especially powers such as the appointment and removal of trustees, ought to be fiduciary in nature.[71] In this context, reliance on immunity conferred under the trust instrument is insufficient, as such protection is tenuous and does not bind beneficiaries. Therefore, Puni further suggested that the courts may, in those circumstances, treat the duties breached by the protectors as fiduciary in nature for reasons of public policy, including to ensure the effective administration of the trust and to provide a fair remedy to beneficiaries who have suffered losses.[72] This position, however, is not universally accepted.

Hayton et al. take the view that the fact that a trustee may be removed "at the whim" of the settlor or protector pursuant to a personal power should not, itself, be viewed negatively. If such a power is

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68 Phil Lambourne, "Appointors, Guardians and Protectors: Are They Fiduciaries? — Harris v Rothery," *Retirement & Estate Planning Bulletin (Newsletter)* 16, no. 6 (2013): 123–25.

69 Ibid.

70 Annotated Statutes of Malaysia, Labuan Trusts Act 1996 (Act 554), s 35.

71 Rebecca Puni, "Exploring the Many Identities of the Protector," *Trusts & Trustees* 19, no. 9 (2013): 908–915.

72 Ibid, 915.

instead characterised as fiduciary in nature, its exercise would be susceptible to challenge in court, potentially giving rise to protracted litigation, delays, and uncertainty. This may undermine the efficient administration of the trust and ultimately operate to the detriment of the beneficiaries' interests.[73]

IV. Administrative Inefficiency

The appointment of a protector may give rise to significant administrative inefficiencies within the trust structure. These inefficiencies may manifest in various ways, including delays in decision-making, increased costs, and operational complexity.

First, inefficiencies may arise from conflicts between the protector and other parties to the trust. Where the scope of a protector's powers is unclear, disagreements may lead to deadlock, potentially requiring court intervention. This may be both timely and costly, and Renouf and Flavin blamed such consequences on the appointment of a protector.[74] The time and cost required escalate further where there is a dispute over whether a protector has effectively discharged his duties or whether an inactive protector who is disinterested in engaging with the role ought to be removed.

However, even where removal is justified, practical difficulties remain. The court in *Re Papadimitriou*[75] confirmed that a protector will only be removed in exceptional circumstances, such as when it is necessary to prevent the trust from failing.[76] The threshold for what constitutes "exceptional circumstances" is expected to be high and ambiguous, thereby discouraging the parties from seeking court intervention.

Secondly, inefficiencies may stem from uncertainty surrounding the scope and expectations of the protector's role. A protector armed with extensive powers, but coupled with a poorly drafted trust instrument, may inadvertently become burdened with unwanted duties. For instance, an overzealous protector may be under the impression that he must seek professional advice for every decision or routinely

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73 Hayton et al., 99.
74 Renouf and Flavin, 79.
75 [2004] WTLR 1141.
76 *Re Papadimitriou* [2004] WTLR 1141.

verify every accounting report, even where such actions were not intended by the settlor. The lack of clarity may lead to unnecessary costs, additional delays, and even deter individuals from holding the office of a protector.

Thirdly, structural inefficiencies may arise from the manner in which the protector's role is set up. The appointment of multiple protectors also complicates the process of reaching a unanimous consent, as illustrated in the Bahamian case of *Rawson Trust Co Ltd v Susan Perlman*.[77] Even in otherwise straightforward trusts, the need to reconcile differing views may necessitate court intervention, thereby increasing delay and expense. In addition, the requirement for trustees to obtain protector consent before acting inevitably increases administrative costs and time. As these costs are borne out of the trust assets, they ultimately reduce the value available to beneficiaries.

Taken together, the preceding discussion demonstrates that the flexibility of a protector's powers can be a double-edged sword. While it offers protection to the trust, it also creates confusion, misuse and disputes. Ironically, the very role designed to ensure the proper administration of the trust may itself become an obstacle in achieving that primary purpose.

ASSESSING THE NEED FOR A PROTECTOR

Having considered the advantages and disadvantages of appointing a protector, the next issue is whether such an appointment is necessary in practice. This must be evaluated in light of the particular circumstances of each trust, taking into account factors such as the adequacy of the trust's governance structure, the existence of proper checks and balances, and the clarity with which the protector's powers and fiduciary duties are defined. In certain contexts, such as offshore trusts, the appointment of a protector may serve a more significant role. It is within this broader framework that the necessity and utility of a protector can be meaningfully examined.

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77 No 194 of 1989 (unreported).

Offshore Trusts

Appointing a protector may be necessary in the context of offshore trusts, where the settlors lack control or oversight over the administration of the trust. However, it could be argued that if the settlor appoints competent and trustworthy trustees from the outset, the need for a protector would be redundant. Having multiple layers of protection may be unnecessary when a single diligent layer guarded by the trustees is sufficient. Moreover, the appointment is at the expense of costs deriving from the trust fund, potentially negating the ultimate purpose of preserving trust assets for the beneficiaries.

Nonetheless, the mere presence of a protector is often sufficient to encourage the trustees to undertake their duties more diligently, given that the protector is generally perceived as a monitoring device. This can also reassure untrusting settlors to part with his trust assets, helping to ensure that the trust would not fail for want of certainty. Besides, the significance of a friendly protector is undeniable, as they provide a personal touch and insight into the settlor's intention that professional trustees alone may not possess. This facilitates the fulfilment of the settlor's wishes and addresses circumstances that may be unforeseen by the professional trustees.

The Malaysian government clearly understands the role and purpose of a protector, as it chose to incorporate the concept of a protector into the legislation governing Labuan trusts, i.e. an offshore regime designed to attract international trust structures, and not extending the same concept to the general trust legislation applicable in other parts of Malaysia. This appreciation is further reflected in the Hansard of the second reading of the Labuan Offshore Trusts (Amendment) Act 2010, as translated below:[78]

> "…This is to provide room for those who wish to establish a trust in that jurisdiction, as they may sometimes feel uncertain or uneasy about the trustee. Initially, the trustee may act properly, this is not to say otherwise, but there is nonetheless a possibility that the trustee's powers could be misused.
>
> Therefore, a protector has an additional layer of authority. It has nothing to do with a safety net; rather, it relates to trusts

[78] Malaysia, Hansard, House of Representatives (16 December 2009).

> that are established, private trusts, individual trusts, such as when someone sets up a trust for their children. The protector plays a role here, and it is not connected to anything else. I see it as being more protective in that sense, ensuring the trust is safeguarded and not misused."

In light of the foregoing, the Malaysian government may consider clarifying the nature and scope of powers that may be conferred upon a protector, so as to ensure that the role continues to serve its intended purpose as envisaged at the time of its incorporation into the legislation in 2010. Such clarification would help reinforce the intended function of the protector as an additional safeguard within the trust structure while also providing greater certainty for foreign settlors establishing trusts in Labuan, thereby indirectly enhancing the attractiveness of Labuan.

Proper Structure and Governance Framework

The issue of uncertainty concerning the extent of a protector's power causes difficulties for the beneficiaries to determine whether the protector has properly discharged their duties. This issue can be mitigated through careful drafting of the trust instrument by specifying the scope of the protector's powers, the authorised purposes, and the conditions under which the protector may act. For instance, the terms of the trust may mandate the requirement to seek professional advice only when making certain decisions, such as those relating to tax planning or investment management.

To further address this uncertainty and reduce conflicts, the terms of the trust should provide mechanisms that allow the beneficiaries to request action from the protector such as requiring the protector to review certain trustees' decisions. This equips the beneficiaries with a self-protecting mechanism, reducing the need for court intervention. Additionally, to facilitate effective decision-making, the protector should be granted the right to access relevant information necessary for carrying out their duties. It follows that precise and comprehensive drafting of the trust instrument is essential in enabling the beneficiaries to assess whether the protector has properly discharged the duties and responsibilities entrusted to him.

Aside from ensuring unambiguous drafting, the effective operation of the protector role also depends on the settlor's careful

consideration at the stage of appointment**.** The settlor should clearly consider the objectives behind appointing a protector, specifying the qualities desired e.g., responsibility and diligence, as well as considerations such as the protector's relationship with the beneficiaries and their understanding of the trust.[79]

Even where the terms of the trusts are clearly set out and the appropriate protectors are appointed, care must be taken not to blur the role of a protector with that of a co-trustee. If extensive powers are granted to a protector, there is a risk that the courts might treat them as a co-trustee, resulting in an increase in the likelihood of a domestic court exerting jurisdiction over the trust assets, thereby undermining the purpose of relocating the trust assets offshore.[80] Therefore, establishing a proper structure and governance framework for the protectors can mitigate this concern, providing a safe environment in which they can exercise their functions to their full potential.

Fiduciary Duties

Given that protectors may exercise powers capable of affecting, or even overriding, the decisions of trustees, the question of whether such powers should be subject to fiduciary duties becomes a matter of critical importance. The significance of fiduciary duties as a cardinal principle of trust law has been consistently upheld by the courts. In *Re Estate of Lee Wee Nam, Deed; Lee Hiok Ping & Ors v Lee Hiok Tng & Anorre Estate of Lee Wee Kheng, Decd; Lee Hiok Ping & Ors V Lee Hiok Kwee & Anor,*[81] the Malaysian court held that a trustee, even if also a beneficiary, could not benefit from the trust while serious claims against him remained unresolved, thereby reaffirming the strict and uncompromising enforcement of fiduciary duties.[82] This position is further reinforced by the Malaysian Federal Court in *Takako Sakao v Ng Pek Yuen,*[83] where the court recognised that fiduciary duties may arise even between business partners, demonstrating that such

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79 Harney, 866.

80 Tey, 125.

81 [1982] 1 MLJ 109.

82 *Re Estate of Lee Wee Nam, Deed; Lee Hiok Ping & Ors v Lee Hiok Tng & Anor. Re Estate of Lee Wee Kheng, Decd; Lee Hiok Ping & Ors v Lee Hiok Kwee & Anor* [1982] 1 MLJ 109.

83 [2009] 6 MLJ 751.

obligations extend beyond formal trusteeships to protect relationships founded on trust and confidence.[84]

It follows that protectors, who are power-holders tantamount to trustees, should be subject to certain irreducible core fiduciary duties. The utmost fiduciary obligation of a protector is to act in the best interests of the beneficiaries, ensuring that all significant decisions made by the protectors take into account the interests of the beneficiaries. In addition, protectors should also be bound by other core fiduciary obligations, including the duty to act in good faith, the duty not to profit from the trust, and the duty not to receive secret profits. The imposition of these duties serves as an important safeguard, ensuring that protectors exercise their powers impartially and independently.

Accordingly, the exercise of such powers and duties should likewise be subject to scrutiny. Just as trustees are expected to act responsibly in order to discharge their fiduciary obligations, protectors should not be shielded from accountability for their improper conduct. Where such powers are exercised arbitrarily, protectors ought to be capable of removal in the same manner as trustees. The availability of such a mechanism promotes careful decision-making, thereby reducing the risk of excessive intervention and minimising the likelihood of sham or illusory trusts.

In this context, the importance of appointing professionally qualified protectors should not be overlooked. Compared to friendly protectors, professional protectors are generally better equipped with the expertise required to discharge their functions effectively. They are more likely to remain within the legal limits of their role and to resist settlors' undue influence, thus preserving trustee independence and strengthening the overall governance of the trust. Notwithstanding the foregoing, such appointments should not be regarded as mandatory in all circumstances, since friendly protectors may likewise offer certain practical advantages as discussed above.

Nevertheless, an important question arises as to the appropriate level of accountability that should be imposed on protectors, whether professional or friendly. It is generally not disputed that paid professionals are expected to owe fiduciary duties to the beneficiaries,

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84 *Takako Sakao v Ng Pek Yuen* [2009] 6 MLJ 751.

but such an expectation does not arise in cases involving friendly protectors. Notably, the British Virgin Islands and Bahamas exempt all protectors from liability, provided that they have acted *bona fide*. This approach comes at a cost, as it potentially removes a safeguard intended to protect the beneficiaries' interests. Regardless of whether protectors are professional or "friendly," they should not be granted automatic immunity unless the settlors expressly acknowledge in the trust instrument that they are aware of the risk that the beneficiaries may have no recourse for damages in the event of a breach. A balanced approach would be to hold the protectors accountable only in cases of gross negligence or wilful misconduct, ensuring measures to enforce accountability while maintaining the flexibility of the role.[85]

CONCLUSION

The law in Malaysia on "protectors" is still evolving, and currently, the nature and extent of their powers largely depend on the construction of the trust instrument. A comparative analysis with other jurisdictions reveals that most of them do not expressly confer either fiduciary or personal power upon the protectors. Instead, in the case of disputes, the nature and extent of their powers is to be determined by the courts, as evidenced by case law. In the absence of statutory framework, this suggests that, by default, the role of a protector itself should not entail fiduciary duties, save for certain powers such as the power of appointment or removal of trustees. While this high degree of flexibility allows trust structure to be administered in accordance with the settlor's wishes, it is also more susceptible to abuse, either by the protectors themselves or by the settlors. However, the fact that the presence of a protector plays a critical role in safeguarding defenceless beneficiaries against incompetent trustees and reassuring insecure settlors should not be overlooked. To address the current gaps in governance, the trust instruments should be well-constructed and carefully drafted to clearly state the purpose of appointing a protector and narrow the scope of powers conferred by specifying the conditions for their exercise. Protectors generally should not enjoy automatic immunity from liability unless the settlors have expressly acknowledged the risks associated with negligent or incompetent

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85 Bove Jr, 739.

protectors. In light of these considerations, Malaysia may benefit from observing how foreign jurisdictions regulate protectors and consider whether the time has come to formally govern protectors through legislation.