

# TRUST PROTECTORS

## Powers, Duties and Right to Indemnity



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**Useful guidance to trust practitioners on the powers and duties of trust protectors and their right under Manx Law to be indemnified out of trust assets in respect of claims against them arising out of their actions as protectors is contained in the decision of Deemster Corlett in the case of *Re French* [2012] MLR 637, in which Mr French, a former protector of a Manx Trust, sought an immediate indemnity out of the assets of the trust concerned in respect of his ongoing legal fees in defending criminal charges in the US. He claimed these arose out of actions he took when he was a protector of the trust.**

Neither the trust concerned nor its trustees were parties to the criminal proceedings. Mr French's right to an indemnity was dependent upon there being no wrongdoing on his part as protector.

Mr French's application for an immediate indemnity out of the trust assets, before the result of the criminal proceedings against him was known, was resisted by the trustees.

Deemster Corlett held that the trustees were entitled to "wait and see", before deciding whether or not to indemnify Mr French, once the outcome of the US criminal proceedings was known.

**"...a protector's essential role "is to ensure that both the letter and the spirit of a settlement are complied with"."**

In his detailed judgement the Deemster referred to the judgment of the Staff of Government Division (the Manx Appellate Court) in *Rawcliffe v. Steele* [1993-95] MLR 426, which found that a protector's essential role "is to ensure that both the letter and the spirit of a settlement are complied with".

He declared: "It seems to me, particularly when one considers the role of a protector as discussed in *Rawcliffe v. Steele*, that a trust protector's functions will often extend beyond the ambit of those specific powers set out in the relevant trust deed and will or may encompass a general supervisory or advisory role..." He found that:

- A protector owes a fiduciary duty to all of the beneficiaries (and not to the settlor) as to how his powers should be exercised and must exercise his powers in good faith.
- The Court can, where appropriate, imply a protector's right to an indemnity into the trust deed, which may include an indemnity for actions taken which extend beyond the ambit of the specific powers granted to the Protector, and encompass actions taken in a general supervisory or advisory role. However, the Court will not do so if the trust deed contains an express indemnity provision, even if the express indemnity is narrower than the indemnity that the Court would otherwise imply.
- However, if the effect of the express indemnity is to limit or exclude any indemnity that may otherwise be implied by the Court, then its terms must be clearly expressed, and any ambiguity should not be construed against the protector.
- The Court will not interfere with the way in which a trustee exercises any discretion that it has to indemnify a protector, provided that the trustees' decision is informed, bona fide and uninfluenced by improper motives.
- Where a right to an indemnity is dependent upon there being no wrongdoing by the protector, which would disqualify him from receiving the indemnity, the trustee is entitled to "wait and see" whether such wrongdoing has been demonstrated, before deciding whether to grant the indemnity, to ensure that it is fully informed before making its decision.

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