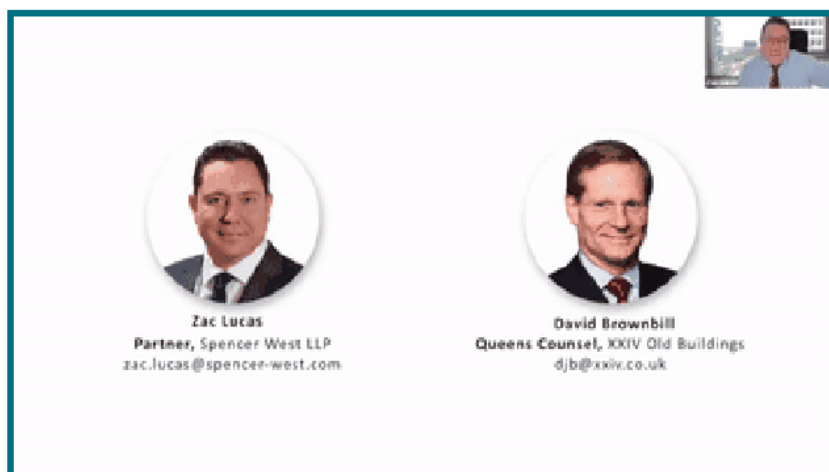


Appoint Protector with fiduciary powers. Will Protector's excess powers invalidate a trust? No, unless they are a "substituted settlor".

Most of my clients' structures are non-UK trusts categorised as SPV Custodial Institutions. The trustee is an individual. Can client appoint protector with too much fiduciary powers?

This article is mostly based on a [YouTube video regarding excessive Settlor Reserved Powers](#) which could result in the trust being struck down. Presented by attorney Zac Lucas and David Brownbill KC of Chancery Barristers [XXIV Old Buildings](#).

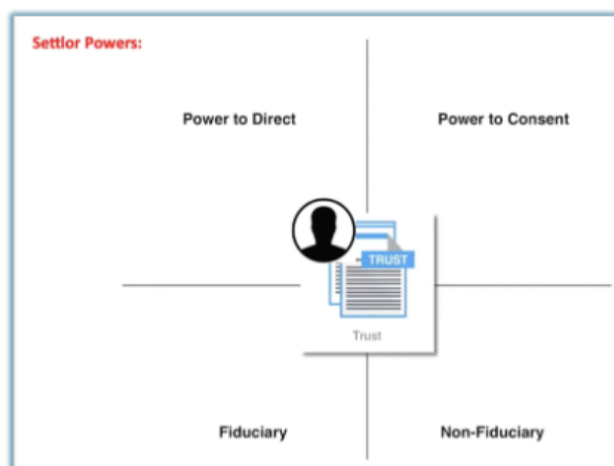
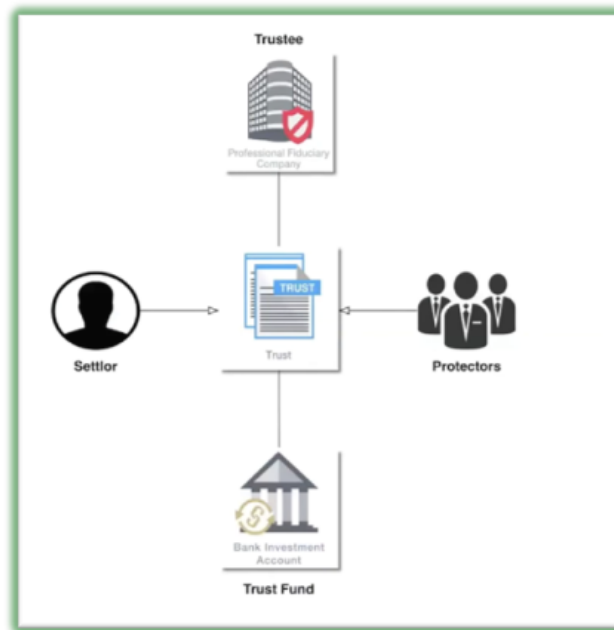


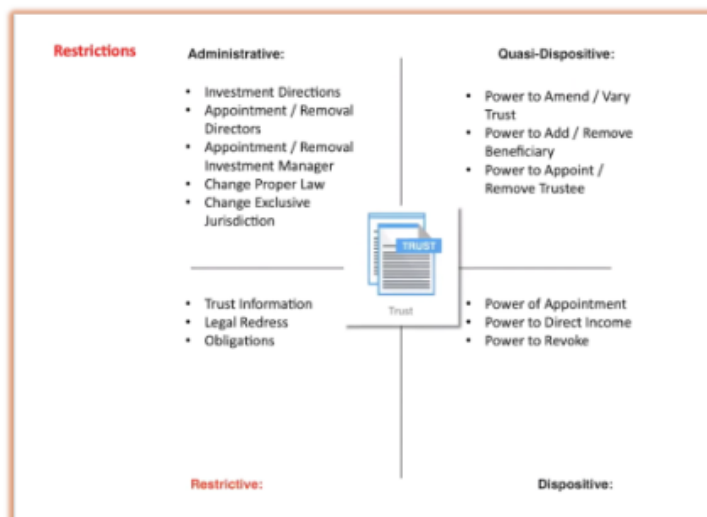
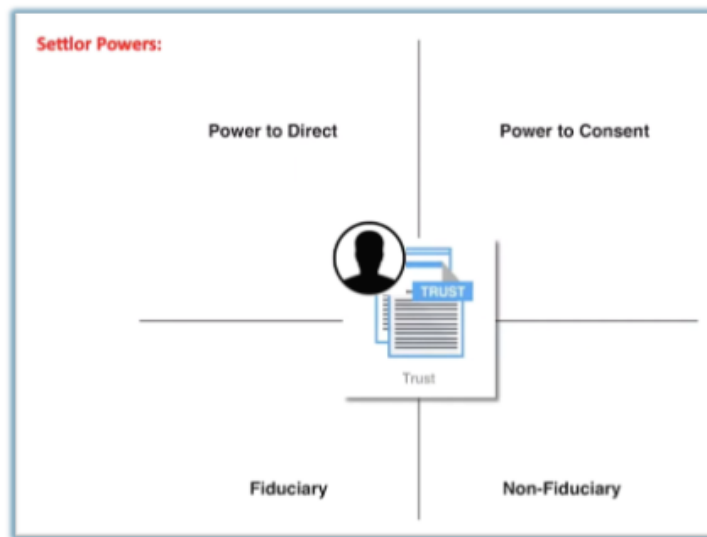
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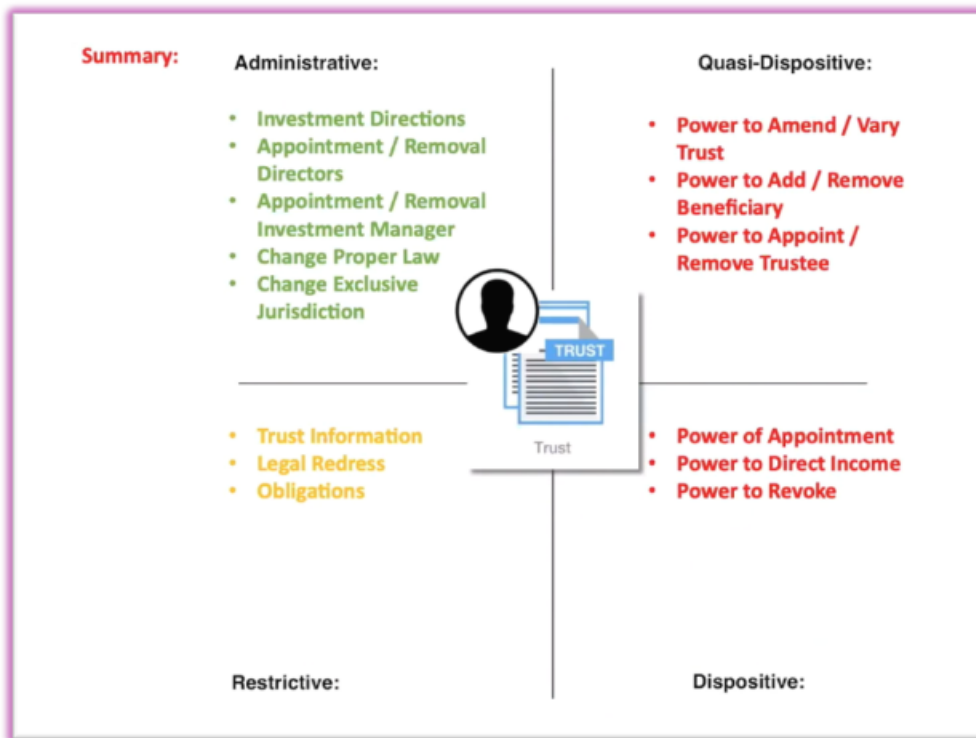
The Settlor with reserved Powers

- In the case of *Mezhprom v Pugachev* [2017], the English High Court set aside five discretionary trusts established by a Russian oligarch.
- This ground-breaking case has potentially introduced the concept of an "illusory" trust, which differs in important respects from a "sham" trust.
- The case serves as a reminder to all trust and fiduciary practitioners that the validity of a trust may be compromised if extensive powers are granted to a settlor or a Protector that is a settlor.





- Dispositive Powers intended to have an actual effect on the benefits that the beneficiaries become entitled to receive.
- A dispositive power is a power to dispose of the net income to the beneficiaries.



- The text in red is where powers retained by a Settlor are dangerous that the trust will be invalid/illusory
- The text in yellow is also at risk of the trust being struck down, but less dangerous.

The Protector

While there is no standard set of powers to be given to the protector, depending upon the wishes of the settlor and the aggressiveness of the attorney, the following is a list of powers commonly seen in whole or in part in trusts that utilize a protector

Note that not infrequently only a few such powers may be included, most commonly the power to remove and replace trustees, the power to veto distributions, and to direct or advise on investments:

- remove, add, and replace trustees
- veto or direct trust distributions
- add or delete beneficiaries
- change the situs and governing law of the trust
- veto or direct investment decisions
- consent to the exercise of a power of appointment
- determine whether an event of duress has occurred
- amend the trust as to administrative provisions
- amend the trust as to dispositive provisions
- approve trustee accounts
- terminate the trust.

1. While it is apparent that the protector cannot be given the power to further an illegal purpose, it may not always be so apparent when public policy questions arise. For instance, could the protector be given the power to prevent anyone, including a beneficiary, from seeing a copy of the trust? Or to exculpate a trustee for failure to account? Or the power to deny a beneficiary the right to an accounting?
2. Such powers offend the very premise of a trust and would likely be struck down.
3. **As observed, although it is a great temptation to include extensive protector powers to be able to deal with future problems and unforeseeable circumstances, it may become a question of whether what we are looking for is a "substituted settlor", giving the protector the collective power to completely redraft the trust at any time and from time to time.**
4. Such a result challenges the very concept of the role of the settlor, if not the trust and the trustee as well.
5. One respected author stated, for instance, "The assent of the protector has the effect of making the trustees not responsible for their actions. This turns the figure of the trustee upside down and makes him in substance an agent

Summary

- It would be highly unlikely for excessive Protector powers to result in a trust being a sham (assets not effectively transferred) or illusory (the settlor never gave up the property).
- **The problem may arise if the protector is regarded a “substituted settlor”, having the collective power to completely redraft the trust at any time.**
- It is critical to note that the Settlor, not be the Protector, that has the fiduciary nature of the Protector will be a problem.

===== END =====