



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Neutral Citation Number: [2025] CIGC (FSD) 85

FSD 249 OF 2024 (IKJ)

IN THE MATTER OF THE S TRUST

AND IN THE MATTER OF SECTION 64A OF THE TRUSTS ACT (2021 REVISION)

AND IN THE MATTER OF ORDER 85 OF THE GRAND COURT RULES (2023 REVISION)

ORDER 85, RULE 2(2) (a)

IN CHAMBERS

AA

Plaintiff

-and-

(1) CITITRUST (CAYMAN) LIMITED

(2) BB

(3) CC

(4) DD

(5) EE

(6) FF

(7) GG

Defendants

Before: The Hon. Justice Ian Kawaley

Appearances: Mr Robert Lindley, of Conyers, for the Plaintiff
Hector Robinson KC and Jessica Vickers, of Mourant, for the First Defendant

Heard: On the papers

Date of Decision: 14 July 2025

Draft Reasons circulated: 15 July 2025

Reasons delivered: 26 August 2025

Application to set aside establishment of discretionary trust on the grounds of mistaken exercise of a discretionary power – governing principles – relevant considerations – Trusts Act (2021 Revision), section 64A

REASONS

Background

1. The Plaintiff is the Settlor and a beneficiary of the S Trust, established under Cayman Islands law in 2012. By an Originating Summons dated 9 August 2024, the Plaintiff applied for relief under section 64A of the Trusts Act (2021 Revision) (the “Act”) setting aside the establishment of the Trust and ancillary transactions associated therewith. This was as significant relief as could possibly be sought under this comparatively new statutory provision.
2. An Interim Confidentiality Order was made on 24 September 2024, anonymising the proceedings and sealing the file as is customary in applications relating to the administration of a trust. On 29 May 2025, a Directions Order was made by consent which provided most significantly as follows:
 - “1. *Bernadette Carey of Carey Olsen Cayman Limited shall be appointed as a representative to represent the interests of the unborn beneficiaries of the S Trust and be added as the eighth defendant to these proceedings in her capacity as an appointed representative (the **Representative**).*
 2. *The Attorney-General having been put on notice of the Originating Summons shall not be joined to these proceedings to represent the interest of charitable beneficiaries of the S Trust, unless the Attorney-General expressly requests to*

be so joined in which case the Plaintiff will apply to Court for further directions.

3. *The Confidentiality Order is hereby amended such that the parties are expressly permitted to disclose information and documents relating to the Originating Summons to the Attorney-General, Her Majesty's Revenue and Customs and any other relevant governmental authority where such disclosure is provided in connection with the administration of the S Trust or the management of such party's personal affairs.*
4. *The Representative for the unborn beneficiaries shall file and serve a position statement by 3pm on 6 June 2025.*
5. *The Originating Summons shall not be listed for a hearing on the basis that the Court may, if it sees fit, make a determination on the papers without a hearing."*

3. On 1 July 2025 the Plaintiff's attorneys, Conyers, wrote the Court advising that all documents had been filed and requesting that the matter be dealt with on the papers. On 14 July 2025, I granted an Order substantially in terms of the draft Order included in the Hearing Bundle which provided, *inter alia*:

- (1) the S Trust "*is set aside ab initio and all assets held on the terms of the Trust are declared to be held on bare trust by the First Defendant for the Plaintiff absolutely with effect from the date that such asset(s) were transferred to, or acquired by, the First Defendant as trustee to be held on the terms of the Trust*";
- (2) certain specific asset transactions were set aside on the basis that the assets formerly treated as belonging to the Trust are absolutely beneficially owned by the Plaintiff.

4. These are the reasons for that decision.

Governing legal principles

5. Section 64A of the Act provides as follows:

"Jurisdiction of Court to set aside mistaken exercise of fiduciary power

- 64A. (1) *If the Court, in relation to the exercise of a fiduciary power, is satisfied by a person specified in subsection (5) that the conditions set out in subsection (2) have been met, the Court may —*
- (a) *set aside the exercise of the power, either in whole or in part, and either unconditionally or on such terms and subject to such conditions as the Court may think fit; and*
 - (b) *make such order, consequent upon the setting aside of the exercise of the power, as it thinks fit.*
- (2) *The conditions referred to in subsection (1) are that —*
- (a) *in the exercise of the power, the person who holds the power did not take into account one or more considerations (whether of fact, law or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more considerations that were irrelevant to the exercise of the power; and*
 - (b) *but for that person's failure to take into account one or more such relevant considerations or that person having taken into account one or more such irrelevant considerations, the person who holds the power —*
 - (i) *would not have exercised the power;*
 - (ii) *would have exercised the power, but on a different occasion to that on which it was exercised; or*
 - (iii) *would have exercised the power, but in a different manner to that in which it was exercised.*
- (3) *If and to the extent that the exercise of the power is set aside under this section, to that extent the exercise of the power shall be treated as never having occurred.*
- (4) *The conditions specified in subsection (2) may be satisfied without it being alleged or proved that in the exercise of the power, the person who holds the power, or any advisor to such person, acted in breach of trust or in breach of duty.*
- (5) *An application to the Court under this section may be made by —*
- (a) *the person who holds the power;*
 - (b) *where the power is conferred in respect of a trust or trust property, by any trustee of that trust, or by any person beneficially interested under that trust, or (in the case of a purpose trust) the enforcer;*

- (c) *where the power is conferred in respect of a charitable trust or otherwise for a charitable purpose, the Attorney General; or*
 - (d) *with the leave of the Court, any other person.*
- (6) *No order may be made under subsection (1) which would prejudice a bona fide purchaser for value of any trust property without notice of the matters which allow the Court to set aside the exercise of a power over or in relation thereto.*
- (7) *In this section —*

‘fiduciary power’ means any power that, when exercised, must be exercised for the benefit of or taking into account the interests of at least one person other than the person holding the power...’

6. This statutory power was conferred on the Court to give a more flexible basis for setting aside the flawed or mistaken exercise of a fiduciary power than might be available under judge-made law. In *Re Settlements*, FSD 228/2023 (IKJ) Judgment dated 28 September 2023 (unreported), which was placed before the Court, I summarised the jurisdiction conferred by section 64A as follows:

“24. *In summary:*

- (a) *the statutory regime makes it possible for the Court to grant relief on a basis which cuts through the conceptual thickets which many consider were erected around the traditionally flexible Hastings-Bass principle by the Supreme Court decision in Pitt-Holt. [2013] UKSC 26. Under section 64A, there is no need to establish a breach of fiduciary duty;*
- (b) *it seems to me that the Court is still required to find facts which would (section 64A apart) have amounted to the improper exercise of a fiduciary power (in the sense that either relevant matters were ignored or irrelevant matters were taken into account). This is to my mind likely in many (if not most) cases to be indistinguishable (legal labelling apart) from having to establish a breach of the fiduciary duty of due deliberation in conceptual terms;*
- (c) *in practical terms, however, the statutory jurisdiction will be a more liberally available one. Because the purpose of the enactment was*

clearly to sidestep a perceived narrowing of a previously more flexible jurisdiction, section 64A can confidently be construed as intending to facilitate a flexible approach to setting aside the flawed exercise of fiduciary powers. The courts will generally be obliged, subject to appropriate limitations informed by the facts of each case, to give effect to this important legislative purpose;

(d) according to the (strictly obiter) findings of the UK Supreme Court in Pitt-v-Holt, if the impugned transaction is set aside, it is merely voidable. Under section 64A, the flawed exercise of the fiduciary power is explicitly void. In this respect, the statutory regime more explicitly introduces a material difference to the non-statutory legal position.”

7. It was clear that the Plaintiff as a beneficiary had standing to apply for relief in any event under section 64A (5) (b) and Mr Lindley submitted:

“16. It is commonly the case that applications for relief concerning a mistaken exercise of fiduciary power are made by a trustee. However, the scope of section 64A also allows for a beneficiary, holder of the power, enforcer, Attorney General, or (with leave of the Court) any other person, to bring an application. The Settlor, as a beneficiary clearly has standing to bring the application. Arguably, the settlor could also be construed as the holder of a fiduciary power, however this concept has not been explored in detail in these submissions.” [Emphasis added]

8. It appears there are no cases where the concept of a settlor being the holder of a fiduciary power has been fully explored or explained. Nonetheless, if the impugned transaction is the establishment of a trust, it seemed at first blush more straightforward to me to view the settlor as the fiduciary exercising the power in a mistaken way than the trustee. Admittedly that would entail viewing the very notion of a fiduciary in a way which equity lawyers might consider heretical. But section 64A (7) creates the following bespoke definition for the purposes of this bespoke statutory provision:

“In this section —

‘fiduciary power’ means any power that, when exercised, must be exercised for the benefit of or taking into account the interests of at least one person other than the person holding the power.’

9. Even that definition, carefully considered, only applies in the traditional sense to powers which “*must be exercised*” for the benefit of at least one other person. Settlers transferring assets to a trust ordinarily do so voluntarily in both a legal and non-legal sense. Moreover the Jersey cases, which were aptly relied upon to illustrate how the statutory mistake principles applied in relation to a similar UK tax context, had considered mistaken settlements upon trust in the following distinctive legislative context:

“47E Power to set aside a transfer or disposition of property to a trust due to mistake

- (1) *In this paragraph, ‘person exercising a power’ means a person who exercises a power to transfer or make other disposition of property to a trust on behalf of a settlor.*
- (2) *The court may on the application of any person specified in Article 47I(1), and in the circumstances set out in paragraph (3), declare that a transfer or other disposition of property to a trust.”*

10. It was in this legislative context that the settlor’s mistake as to the tax consequences of establishing a trust was the basis for setting aside the transfers in *In the Matter of the B Trust* [2019] JRC 035. In the Caymanian legislative context, there is no express power to set aside transfers made by a settlor to a trust. On a proper analysis therefore, Mr Lindley’s decision to pin the Plaintiff’s colours to the ‘Trustee acting as fiduciary’ mast was a far clearer legal gateway to choose.

11. While it is straightforward to contend that a trustee in administering a trust is a fiduciary in the requisite statutory sense, it was still necessary for me to be satisfied that the Trustee in establishing the Trust and receiving the Trust assets was acting in the same capacity. Mr Lindley addressed this issue in the following way:

“18. In the present circumstances, the relevant exercises of fiduciary power relate to the Trustee’s determination to establish the Trust and accept the assets to be held on trust...”

20. *We submit that these actions constitute an ‘exercise of fiduciary power’ for the purpose of section 64A because such actions clearly involve the assumption of duties that must be performed for the benefit of others. By their very nature, these are fiduciary powers as they are powers exercised for the benefit of the beneficiaries of the Trust. The declaration of trust being the foundational exercise of fiduciary power which sets the stage for all subsequent fiduciary obligations and responsibilities of the trustee.”*
12. This was a compelling submission. The only potential basis for rejecting it was adopting an improbably narrow construction of section 64A, which limited its operation to all transactions carried out by fiduciaries after the founding assets were received by the Trust, disapplying its application to the foundational processes altogether. There is nothing in the language of section 64A to support the implication of such an improbable legislative intent.
13. Finally, in *Re a Settlement*, I referred to an additional requirement for granting discretionary relief under section 64A:

*“I would tentatively suggest an additional implied requirement of section 64A, a matter which will obviously benefit from further analysis if the need arises in future cases. Section 64A confers a judicial discretion and sets out certain mandatory express requirements for the exercise of this jurisdiction. In *Re Hastings-Bass* [1975] Ch 25 at 41G, Buckley LJ described the discretionary power exercised by a trustee which could potentially be set aside as being ‘a discretion as to some matter under which he acts in good faith’. Was this simply distinguishing the jurisdiction from that which would be engaged to set aside a transaction on the grounds of fraud? Or was ‘good faith’ an additional discretionary requirement for granting equitable relief? I provisionally prefer the latter view. Bearing in mind that *Hastings-Bass* relief has more often than not been sought to avoid unintended adverse tax consequences flowing from the exercise of a fiduciary power, it seems logical that an implicit requirement for obtaining equitable relief is that the applicant acted in good faith or comes to the Court with ‘clean hands’. In my judgment the starting assumption ought to be that, by necessary implication, section 64A relief can only be obtained when the applicant has acted in good faith in relation to the impugned transaction and has not deliberately pursued a course of conduct designed to gain some undisclosed and impermissible onshore tax advantage, nor indeed designed to procure any other improper benefit.” [Emphasis added]*

14. The Plaintiff's counsel proceeded on the basis that this additional requirement for granting relief had to be met.

Application of principles to the facts of the present case

15. The Plaintiff had to establish that (1) he had standing to seek relief, (2) that he was seeking to set aside the exercise of a fiduciary power and (3) that the party who had exercised the fiduciary power would not have exercised it had they not failed to "*take into account one or more considerations (whether of fact, law or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more considerations that were irrelevant to the exercise of the power*". The first two conditions were clearly met and required no meaningful evidential analysis.
16. At the heart of the application was the basis upon which it was contended the exercise of the Trustee's decision to establish the Trust and receive the Trust assets should be set aside. This can be stated shortly. The Plaintiff who was not originally domiciled in the United Kingdom ("UK") acquired shares as sweat equity while working overseas for a company which ultimately became listed. He took advice from reputable advisers about settling his shares on trust before he became domiciled in the UK for tax purposes and becoming exposed to inheritance tax ("IHT"). The Trust, to be administered by a reputable professional trustee, was established in some haste in 2012 with a view to 'beating' what was believed to be a looming domicile deadline. In 2021 during a review of the Plaintiff's affairs, it was discovered that an earlier period of UK residence had been overlooked (the "Earlier Period of UK Residence"). The resulting true position was that he was potentially liable to IHT when the Trust was settled. The main effect of this was that he became liable to pay IHT immediately rather than upon his death.
17. This was a very clear and straightforward basis for contending that (1) considerations consisting of a "*combination of fact of law*" that lay at the heart of the decision to establish the Trust had been overlooked and that (2) but for this, the Trust would not have been established. The Trustee filed evidence to the explicit effect that had the true position taking into account the implications of the Earlier Period of UK Residence been known, it would not have agreed to establish the Trust and receive the Trust assets. While delay can sometimes be problematic, here it was explicable in satisfactory terms. In addition, unwinding the Trust was fairly said to be straightforward because:

- (a) the only distributions from the Trust were two charitable donations and three beneficiary loans, two of which had been repaid;
 - (b) the effect of setting aside the impugned transfers to the Trust would be that the assets were treated as belonging to the Plaintiff as Settlor;
 - (c) all the adult beneficiaries consented to the application;
 - (d) the Representative of the unborn children considered that their interests were aligned with those of the adult children of the Settlor; and
 - (e) the Plaintiff as Settlor confirmed that he would going forward benefit charity in broadly the same way as was likely to occur under the Trust (and no application was made to set aside the charitable donation in any event).
18. As regards the discretion to grant relief, it was clear that the Settlor had acted in good faith in both establishing the Trust and in pursuing the present application on notice to the relevant UK tax authorities. That similar mistakes about tax domicile have been made and remedied by corresponding judicial relief was demonstrated by reference to Jersey cases including In the matter of the *L Trust* [2017] JRC 191 and *R, S, T and U Trusts* [2021] JRC 166.
19. A satisfactory case for granting the relief sought was made out.

Conclusion

20. For the above reasons, on 14 July 2025 I granted the Order sought under section 64A of the Act setting aside the establishment of the S Trust.



THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT