IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Neutral Citation Number: [2025] CIGC FSD 56

CAUSE NO: FSD 206 OF 2023 (IKJ)

IN THE MATTER OF THE O TRUST

AND IN THE MATTER OF THE TRUSTS ACT (2021 REVISION)

AND IN THE MATTER OF GCR ORDER 85

BETWEEN:

X LIMITED

(in its capacity as trustee of the O Trust)

Plaintiff

- and -

MC

Defendant

IN CHAMBERS

Before:	The Hon. Justice Kawaley
Appearances:	Mr De La Rosa of counsel with Mr Charles Moore, and Mr Majdi Beji of Harney Westwood & Riegels for the Plaintiff (the "Trustee")
	The Defendant did not appear
Heard:	21 May 2025
Date of decision:	21 May 2025
Reasons Delivered:	19 June 2025

250619 In the matter of the O Trust – FSD 206 of 2023 (IKJ) – Reasons for Decision

Discretionary Trust-approach to passing and approval of accounts-trustee being "held before the Court" pending appointment of replacement trustee-Trusts Act (2021 Revision), sections 47, 48

REASONS FOR DECISION

Background

1. By an Originating Summons dated 22 September 2023, the Trustee applied for the following primary relief:

> "*1. The Trustee be permitted, pursuant to section 10 (1) of the Trusts Act (2021 Revision)…and/or the inherent jurisdiction of the Grand Court and/or by way of the Grand Court's approval of the Trustee's exercise of its powers under clause 4.6 of the instrument settling the O Trust dated 24 November 1993, to appoint a new trustee of the O Trust in substitution of the Trustee.*"

2. On 16 December 2024, I gave directions for the hearing of the Originating Summons at a hearing which the Defendant failed to appear. In Reasons delivered on 6 January 2025, primarily for the benefit of the Defendant, I stated:

> "*10. Having regard to the Defendant's lack of legal representation and non-attendance at the hearing, it is important to explain why, in addition to directing a final hearing of the Trustee's Originating Summons, directions were ordered for filing further evidence. The Trustee will summarise in updated form their resignation and replacement case and the Defendant will have an opportunity to file her own evidence setting any factual matters she either:*
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> *(a) positively disagrees with;*
>
> *(b) agrees with; and/or*
>
> *(c) does not choose to comment on, one way or the other.*
>
> *11. It is, in effect, a further and final opportunity for the Defendant to 'tell her story' and, most importantly, to contest (should she wish to do so) the picture*

presently painted of her having no serious plans of pursuing claims against the Trustee. Should she choose not to file any evidence, it would be a breach of the procedural code under which civil litigation is conducted for opposition to the relief the Trustee seeks to be raised for the first time at the final hearing."

3. On 21 May 2025, the Originating Summons was finally heard and the Defendant failed to appear. The evidence filed by the Trustee demonstrated that the Defendant had been served and had been given the opportunity to either:

(a) attend the hearing at the Trustee's expense; or

(b) participate remotely in the hearing.

4. Having reviewed the Trustee's evidence and Skeleton Argument, and considered careful submissions by Mr De La Rosa on the evidence and applicable law, on 21 May 2025 I granted an Order which principally provided as follows:

"*1. The Account of the Plaintiff for the period 1 January 2019 to 25 March 2025 is hereby passed and approved as filed.*

2. Until the Plaintiff is discharged of its trusteeship, the Plaintiff is permitted to pay its usual fees and expenses for administering the O Trust out of the funds of the O Trust and shall be held before the Court and shall file its accounts for the period since the Account with the Court and serve its accounts on the Defendant every twelve (12) months from the date of this Order…"

5. I gave short oral reasons in relation to the factual basis for this Order. In brief, a breakdown in relations between the Trustee and the Trust's primary beneficiary is the reason why the Trustee seeks to be replaced although a replacement has not yet been found. The central focus of the application was:

(a) whether the Trustee's accounts should be approved in light of the Defendant having made unparticularised complaints about the administration of the Trust in the past; and

(b) how the Trustee should administer the Trust in the interim.

6. I found that the Defendant had "huffed and puffed" and "grumbled" but never made any coherent criticisms of the conduct of the Trustee.

7. One underlying strand of the controversy, which was mentioned in passing, deserves brief mention. That is the Trustee's refusal to distribute to the Defendant funds which should properly be applied to meet her outstanding onshore tax obligations and which the Trustee wishes to pay directly to the relevant authorities. This Court often has visibility of the fact that Caymanian trustees routinely ensure that their trusts are not used as vehicles of tax evasion. The present case was unusual in illustrating the red lines trustees may be required to draw in this regard.

8. At the end of the hearing I promised to give short reasons for the legal basis for a decision which was based on principles of law which are not 'run of the mill' under Cayman trusts law. The problematic issues arose from circumstances in which the Trustee was entitled to resign and discharge, but the options of discharging it without a replacement or terminating the Trust altogether were not realistically available ones. The two issues were:

   (a) what approach should be adopted by the Court to approving the Trustee's accounts, a task outside of the scope of the court's traditional supervisory role in relation to trusts; and

   (b) how should the Trust be administered while the Trustee who was entitled to be discharged sought a replacement in circumstances where significant decisions could not be taken in the ordinary course after consultation with the main beneficiary?

Jurisdiction

9. I accepted the Court had jurisdiction to grant the directions sought based on the following submissions advanced by Mr De La Rosa which I accepted and considered to be uncontroversial:

> "*41. Pursuant to section 48 of the Trusts Act (2021 revision):*
>
> *'Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or*

intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient; and the trustee or personal representative acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards that person's own responsibility, to have discharged that person's duty as such trustee or personal representative in the subject matter of the said application:

Provided, that this shall not indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee or personal representative shall have been found to have committed any fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction, and the costs of such application as aforesaid shall be in the discretion of the Court.

42. *The liberty so provided is not cut down in any way; and a trustee must be free in those circumstances to access the Court without being constrained by the wishes, or indeed the threats, of beneficiaries. If it were otherwise, and the contrary wishes of beneficiaries or the threat of seeking costs were sufficient to stop a trustee accessing the court pursuant to section 48, it would seriously undermine the salutary effect of that provision in allowing trustees to seek the assistance of the Court, as intended and provided by the legislature.*

43. *That statutory power is of course consistent with long-standing authority concerning the Court's willingness to assist trustees in difficult circumstances. The position was concisely summarized by Lord Oliver in Marley v Mutual Security Merchant Bank and Trust Co Ltd [1993] 3 All ER 198, 201:*

'A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court. ... it should be borne in mind that in exercising its jurisdiction to give directions on a trustee's application the court is essentially engaged solely in determining what ought to be done in the

> *best interests of the trust estate and not in determining the rights of adversarial parties.*"

Legal findings: the approach to approving the Trustee's accounts

10. The Trustee placed before the Court the sort of detailed explanation of its remuneration, which counsel aptly described as "*modest*", that this Court typically receives in the context of liquidators' remuneration applications. In this case, expenses which were (understandably) primarily legal exceeded the Trustee's fees as the Trustee has been grappling with the intractable resignation question since 2019. The legal expenses were explained by reference to legal invoices which were again similar to those seen in liquidation remuneration applications where the liquidator invites the Court to accept their judgment as the reasonableness of the legal expenses. The Trustee's deponent in the present case averred that she considered the legal expenses incurred to be reasonable.

11. My instinctive reaction would have been to adopt an approach to the approval application similar to that of the liquidation remuneration application, but there the court has an overarching positive statutory duty (in official liquidations) to approve a liquidator's fees. Mr De La Rosa instead commended a far better analogy to this Court for the present context, namely the approach adopted in relation to approving an executor's accounts.

12. The relevant statutory provision articulates the Trustee's right to be indemnified out of the Trust assets. Section 47 (1) of the Act provides firstly that a trustee is not liable for any losses or defaults "*unless the same happens through that person's own wilful default*." Subsection (2) provides:

> "*(2) A trustee may reimburse themselves or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.*"

13. The Trustee's counsel submitted that if the Defendant has invoked the Court's jurisdiction to require the Trustee to account for its expenditures under GCR Order 43, the burden would have been upon her to make out the validity of objections to expenses the Trustee had verified on oath. Not only had the Trustee not been required to account; no objections had even been raised. In these circumstances, reference was made to *Mussell-v-Patience* [2018] EWHC 430 (Ch) where HHJ Matthews (sitting as a High Court Judge) explained the difference between

assessing solicitor's costs and approving expenses incurred by an executor responsible only to account to the beneficiaries of an estate:

> "*11. …The claimants were unable to find any authority as to the level of detail concerning solicitors' invoices which an executor needed for the invoices to be included in the estate accounts. They submitted that the rules on detailed assessment are not applicable to settling an account between executor and beneficiary, because the court is not conducting a detailed assessment of the legal costs. The question is simply whether the legal costs are expenses of the executors properly incurred in the conduct of their office.*
>
> *12. Williams, Mortimer and Sunnucks, Executors, Administrators and Probate, 20th ed, say at [63-26] that*
>
> > *"the settled rule that whatever a trustee or representative has expended in the fair execution of his trust may be allowed him in passing his accounts."*
>
> *For this proposition, are cited several authorities, including Daniell's Chancery Practice, a well-known repository of chancery learning and practice. They also say, at [63-27]:*
>
> > *'The rule is that a representative is entitled to be allowed all expenses that have been properly incurred by him in the conduct of his office, except those that arise from his own default.'*
> >
> > *This is based on caselaw, as codified now by s 31(1) of the Trustee Act 2000, applied to personal representatives by s 35 of that Act.*
>
> *13. Where executors have the benefit of an express clause giving them remuneration and an indemnity for expenses incurred in the administration of the estate, they may well have a 'contractual' right within CPR r 44.5(1). But I do not think that this is the point. CPR r 44.5(1) is a rule concerned with the assessment of costs. But I agree with Mr Dickinson that the rules on detailed assessment are not applicable to settling an account between executor and beneficiary, because the court is not conducting a detailed assessment of the legal costs.*

> *14.* *…In my judgment, whatever the position on detailed assessment of costs, in relation to accounting to his or her beneficiaries for what has been done with the estate, an executor has only to show (1) that the sum concerned was indeed spent, and (2) that it was spent in the fair execution of the estate administration.*" [Emphasis added]

14. These principles are pivotally based on a statutory provision (section 31 (1) of the Trustee Act 2000 (UK)) which broadly corresponds to section 47(2) of our own Trusts Act. They were aptly relied upon by Mr De La Rosa as the principles this Court should apply when evaluating the Trustee's application for passing and approval of its accounts. The Trustee had to demonstrate that its fees and expenses:

    (a) had been incurred; and

    (b) in the due execution of the administration of the Trust

Legal findings: basis for the Trustee being "held before the Court" until a replacement can be found

15. Mr De La Rosa supported the case for directing that the Trustee be "held before the Court", in addition to the broad jurisdiction conferred by section 48 of the Trust Act, by reference to persuasive case law as well. In *Evans v Gonder* (Ontario SCJ, 12 June 2009), the trustee was also entitled to be discharged but no replacement could be found. Ramsey J held:

> "*[11] A trustee who is entitled to be discharged is not, then, bound to show to the court that there is some other person ready to accept the trust. The court itself appoints a new trustee. If no person will accept the trust, it may find itself obliged to keep the trustee before the court, and not discharge him, taking care that the trustee shall not suffer thereby.*
>
> *[12] The trustees are entitled to be discharged, but no other person is prepared to accept the trust. What is left to administered is a vacant house that is the subject of a tax lien and a certificate of pending litigation. The litigation prevents the trustees from selling the house. The tax lien prevents them from settling the litigation. The trustees are not in a position to do anything meaningful. Little is lost by letting them go. I do not feel obliged to keep them*

before the court in the circumstances. Accordingly I discharge them. The result is an estate without a trustee. The responding party is not prejudiced in his lawsuit. He can move for appointment of a litigation administrator under Rule 9.02. The rules also facilitate the amendment of the style of cause in these circumstances."

16. In *Gonder v Gonder Estate*, 2010 ONCA 127, the Court of Appeal held:

> "*[68] The removal of a sole trustee without appointment of a replacement is an extreme remedy, and will be inappropriate in most cases. It will only be available when no other option is realistically available. In our view, given the limited value of the estate, the conflict of interest that the respondents are now in as creditors of the estate, and the lack of viable replacement trustees, this is one such exceptional case.*
>
> *[69] That said, the motion judge was wrong to remove the respondents as trustees without also crafting a mechanism by which the estate could continue to be administered.*
>
> *[70] This is a case that cries out for a practical solution. It is in that spirit that the judge hearing this matter should approach the task.*" [Emphasis added]

17. These decisions clearly supported the approach proposed by the Trustee in the present case, primarily because the "extreme" remedy of removing the Trustee without replacing it was not sought. *Gonder* was approved by the English High Court, albeit it in circumstances far removed from factual matrix of the present case, in *Serious Fraud Office-v- Litigation Capita Limited* [2022] EWHC 3053 (Comm). There, Foxton J held:

> "*106. The court in Gonder referred to two English authorities said to support its decision – Gardiner v Downes (1856) 22 Bevan 395 and Barker v Peile (1865) 2 Drewry and Smale 340. Both relate to applications for costs by retiring trustees, and it is difficult to find any statement in either of the very short judgments which bears on the issue considered in Gonder. I was also referred by the Settlement Parties to In re Smirthwaite's Trusts (1870 71) LR 11 Eq 215, but that case is addressed to the rather different issue of whether the court*

could appoint a new trustee under the Trustee Act 1850 where there were no existing trustees.

107. The decision in Gonder is doubted in Underhill and Hayton: Law of Trusts and Trustees (20th), [74.14]:

> *'The court has jurisdiction in an administration action or on a claim inter partes asking for administration or execution of the trusts (but not on a claim under the Trustee Act 1925) to discharge one of two or more trustees without appointing another person to succeed him. It will not do so unless there remain at least two trustees or a trust corporation to succeed him. A Canadian case suggests that the court may remove a sole trustee (or all the trustees) so that no trustee remains in office, as long as provision is made for the ongoing orderly administration of the trust estate. This misinterprets the earlier cases relied on, which distinguish (1) removal of the trustees from office from (2) discharge of the trustee from duties in future (e.g. because of payment into court). In the second case the trustee continues and there is no need for a new appointment'.*

108. I accept that removal of the only trustees without replacing them will be a rare, perhaps exceptional, course, but I am not persuaded that it cannot be done. If, for example, there is a pressing need to remove the existing trustees because they are unable to act, or are unsuitable to remain in office, or some combination of the two, I am not persuaded that the court would be precluded from acting simply because it had not, at the stage of the removal application, been possible to identify a suitable person willing to assume the office of trustee. The court will exercise its power to remove trustees if this promotes the welfare of the beneficiaries and the competent administration of the trust (Letterstedt v Broers (1884) 9 App Case, 371, 386), and if the due and proper administration of the trust is opposed to the trustees remaining in office, with regard to the interests of all the potential beneficiaries (see [84] above)…"

18. In the present case, the guidance of the Ontario Court of Appeal in *Gonder* was most pertinent in emphasising the importance of "*crafting a mechanism by which the estate could continue to be administered".* As Mr De La Rosa and Mr Moore eloquently put it in their Skeleton Argument:

> *"62. Indeed, the solution is a bespoke one, crafted for the circumstances of this case. It appropriately charts a course between, on the one hand, the Scylla of simply removing the Trustee without a replacement, and, on the other hand, the Charybdis of what would in effect be a full administration order, whereby the Court itself would be administering the Trust, in a manner which the Court is not administratively able to do. On the basis proposed, there would be a short hearing once a year at which the accounts could be checked, and any concerns raised by [the Defendant] could be dealt with judicially.*"

19. The mechanism ultimately proposed by the Trustee here entailed:

(a) a direction that the Trustee be "held before the Court" without being discharged; and

(b) a direction that the Trustee file its accounts with the Court annually and serve the Defendant.

20. The second direction was framed in terms which excluded the need for any formal application to approve the accounts, either at an oral hearing or through a hearing on the papers. Absent any request for a hearing by the Defendant and primary beneficiary, it will in my judgment be incumbent on the assigned Judge to review the relevant accounts and determine whether any formal approval is required. That said, it is to be hoped that a replacement trustee will be found. As Mr De La Rosa submitted, this Court can remove and replace the Trustee, if necessary, without the active participation of the Defendant.

Conclusion

21. For the above reasons on 21 May 2025 I gave directions holding the Trustee before the Court and requiring the filing of annual accounts, notwithstanding the Trustee's *prima facie* entitlement to be discharged.

THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT