



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**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 Andrew De La Rosa of counsel with Mr Charles Moore, Mr Greg Coburn and Ms Samantha Conolly of Harney Westwood & Riegels for the Plaintiff

The Defendant did not appear

**Heard:** 16 December 2024

**Date of decision:** 16 December 2024

**Reasons Delivered:** 6 January 2025

*250106 In the matter of O Trust – FSD 206 of 2023 (IKJ) – Reasons for Decision*

*Discretionary Trust-resignation and replacement of trustee-directions for hearing*

## REASONS FOR DECISION

### Introductory

1. The Plaintiff provides professional trustee services and is the Trustee of the O Trust. The Defendant is during her lifetime the sole beneficiary of the Trust. By an Originating Summons dated 22 September 2023, the Trustee seeks assistance from the Court in relation to its own resignation and replacement.
2. By a Summons for Directions dated 12 November 2024, the Plaintiff sought directions for the advancement of the action in circumstances where the Defendant was no longer represented by Caymanian attorneys and appeared not to be actively engaging with the proceedings. The Trustee informed the Court prior to the hearing that the Defendant had declined an invitation to travel to Grand Cayman for the present hearing. A link was provided to the Defendant by the Court to permit her to attend remotely. In the event, she did not appear at all.
3. After a hearing of just over an hour, in which Mr De La Rosa explained the background to the Directions Summons in a very careful and balanced manner, I indicated that I was willing to approve the directions sought. I also indicated that I would give short reasons as soon as possible, primarily to inform the Defendant of what had transpired.
4. On 17 December 2024, I approved a formal Order as of 16 December 2024 (“Directions Order”).

### Background

5. A high-level view of how the proceedings came to be commenced is enough to adequately summarise the background to the Directions Order. The Plaintiff was appointed as Trustee in 2008, although the Trust was established in 1993 as a discretionary trust. In short, the Trustee has a broad discretion as to what distributions (if any) to make to the Defendant. Although she is a sole lifetime beneficiary, the Defendant has no fixed interest in the Trust and no legal entitlement to require or receive any monies or other distributions from the Trust assets. These provisions of the O Trust are unremarkable, but they deserve mention here because I noticed in correspondence from the

Defendant to the Trustee, which I reviewed in preparing for the hearing, language which suggested that the Defendant had perhaps forgotten how limited her legal interest in the Trust assets actually is.

6. The Plaintiff's formal evidential case is that it is entitled to resign under the Trust Deed, requested the Defendant to nominate a successor Trustee in 2019 and has been unable since then to progress the resignation and replacement process on a consensual basis. I inferred the Plaintiff wishes to resign because the Defendant has either lost confidence in it or a functional working relationship seems impossible. Unfounded allegations of misconduct have apparently been made but not legally pursued by the Defendant. This prompted me, in the course of the hearing, to quote the words of Alexander Pope, popularly used by judges and lawyers to describe a potential claim which is asserted but not actually pursued: "*willing to wound and yet afraid to strike, just hint a fault and hesitate dislike*".
7. Mr De La Rosa pointed out that because the Trust contains an unusually wide indemnity in favour of the Trustee, a claimant would not merely have to establish a breach of duty had occurred, nor even (as is often the case) wilful neglect or default. Either "*fraud*" or "*reckless disregard*" would have to be established. I agreed that the indemnity clause provides unusually broad protection to the Trustee of the O Trust, whomever it may be.
8. Against this background of a protracted resignation process, it seemed reasonable to conclude the proposed resignation should be facilitated rather than impeded by the Court. Fiduciaries who are anxious about alleged misconduct on their own part are usually keen to cling on to their stewardship, hoping to forestall independent scrutiny of their management of the relevant fund. The present case was inconsistent with any grounds for suspicion of misconduct having occurred. Ordinarily, a professional fiduciary will work best when doing so on a willing basis and should be permitted to resign when they wish to do so. If, as appeared to be the case here, effective working relations between the Plaintiff and the Defendant had broken down (for whatever reasons), the Defendant would only benefit from a fresh start with a new Trustee.

**The Directions Order**

9. I accordingly ordered as following, approving the draft Order placed before me by the Trustee's counsel:

- “1. *The Originating Summons be set down for a final hearing, on a date not before 14 April 2025 with a time estimate of 1 day (Final Hearing);*
2. *The directions leading to the Final Hearing shall be as follows:*
  - (a) The Plaintiff shall file and serve any further evidence by 31 January 2025;*
  - (b) The Defendant shall file and serve any evidence in response by 7 March 2025;*  
*and*
  - (c) The Plaintiff shall file and serve any reply evidence by 28 March 2025;*
  - (d) The parties shall file and exchange their respective skeleton arguments 10 days before the Final Hearing; and*
  - (e) The Plaintiff shall lodge the hearing bundles with the Court seven days before the Final Hearing.*
3. *In the meantime, and without prejudice to the outcome of the proceedings, the Plaintiff shall be held before the Court without being discharged of its trusteeship, and shall file its accounts with the Court by no later than 28 days before the date for the Final Hearing, on the approval of which accounts by the Court the Plaintiff shall be indemnified for the costs of its accounting from the assets of the O Trust by the Plaintiff raising and paying for its costs as an expense of the administration of the O Trust.*
4. *The Plaintiff shall be indemnified in respect of its costs of and incidental to the Directions Application which shall be raised and paid as an expense of the administration of the O Trust.*

5. *Liberty to apply.”*
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:
- (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.
12. Paragraph 3 of the Order is of general legal interest because it is not a routine form of direction frequently made. It reflects in this case a provisional judicial view, based on the absence of any opposition to date, that the Trustee should be permitted to resign and be replaced as soon as possible. The direction accordingly permits the resignation process to be commenced before the final hearing by permitting the Trustee to file its accounts before the final hearing. Again, it seems reasonable to assume the Defendant will welcome rather than reject the prospect of a new Trustee. Mr De La Rosa submitted in this regard:

“36. *The final direction the Trustee seeks is an order pursuant to paragraph 3 of its Directions Application that:*

*'In the meantime, and without prejudice to the outcome of the proceedings, the Plaintiff shall be held before the Court without being discharged of its trusteeship, and shall file its accounts with the Court by no later than 28 days before the date for the final hearing, on the approval of which accounts by the Court the Plaintiff shall be indemnified for the costs of its accounting from the assets of the O Trust by the Plaintiff raising and paying for its costs as an expense of the administration of the O Trust.'*

37. *The purpose of that direction is to ensure that (1) the Trustee can get on with the administration of the Trust, (2) it can do so without criticism from MC, but (3) the Court can ensure that there is no maladministration by passing the Trust accounts...*

39. *The juridical basis for the order (in the absence of any Cayman Islands authority directly in point) is as follows. In Evans v Gonder (Ontario SCJ, 12 June 2009), a case where a trustee desired to be discharged but could not find a replacement, Ramsey J said as follows at [11] to [12] (emphasis added).*

*"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..."*

13. In *Evans v Gonder* 2010 ONCA 127, this legal principle was upheld on appeal. It has also been approved in England in *Re Smith* [2022] EWHC 3053 (Comm) at paragraph 108 (Foxton J). In the present case, however, the principle was applied in materially diluted form. I did not discharge the Trustee before a replacement was found. Directions were merely given for the discharge process to be commenced before a replacement had been found. Moreover, in the present case reasonable grounds appeared to exist for believing a suitable replacement will be found.

**Conclusion**

14. For these reasons I granted the Directions Order on 16 December 2024, making the usual order in relation to the Plaintiff's costs.



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**THE HONOURABLE JUSTICE IAN RC KAWALEY**  
**JUDGE OF THE GRAND COURT**