



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2025: No. 52

IN THE MATTER OF SECTION 47A OF THE TRUSTEE ACT 1975

AND

IN THE MATTER OF THE RC TRUST

REASONS FOR ORDER **(In Chambers)**

*Application by the Trustee of the RC Trust for Orders under s 47A of the Trustee Act 1975 to
set aside part of the exercise of a fiduciary power to add beneficiaries to the Trust*

Date of Hearing: 12 May 2025

Date of Reasons: 4 June 2025

Appearances: Ben Adamson of Conyers Dill & Pearman Limited for the Trustee

Defendants unrepresented

(Canadian Revenue Authority notified by indicated that it did not
intend to participate in foreign proceedings)

REASONS FOR ORDER of Martin, J

Introduction

1. This is an application brought by the Trustee of the RC Trust (“the Trust”) under section 47A of the Trustee Act 1975 for an Order setting aside in part the exercise of a fiduciary power by the Trustee in 2017 to add certain persons (namely Canadian tax resident members of the family) to the beneficial class of the Trust. The Court granted the Order setting aside the relevant part of the exercise of the fiduciary power and granted the declaration that the effect of the Order is that certain persons (i.e. those individuals resident in Canada for tax purposes) are to be treated as if they had never been added to the beneficial class.
2. The Court indicated it would give brief reasons for the making of the Order in these terms and these are those reasons.

Background

3. The Court made an Order sealing the Court file and anonymising the Court’s proceedings on the grounds that there is no public interest in the disclosure of private details of the internal administration of a trust and to ensure the anonymity of the parties and of any persons connected to the parties. These reasons do not set out the full history of the matter in detail, but limits the background facts to those essential to an understanding of what the Court has ordered and why, and explaining the exercise of its powers under section 47A of the Trustee Act 1975.
4. The Trust was originally established in late 2009 to make provision for a certain member of the family and his descendants. It is what is sometimes referred to as a ‘dynastic’ trust. As part of a number of the revisions to the Trust for future generations in 2017, the Trustee exercised its fiduciary powers under the Trust instrument (the “2017 Instrument”) to remove a certain beneficiary and to add others, namely all the descendants of the deceased patriarch of the family (save for some limited exceptions). The Trustee did not realise at the time that the terms of the 2017 Instrument had the effect of adding certain members of the family who were resident in Canada for tax purposes. The Trustee did not take advice from tax advisers in Canada before exercising the fiduciary power to add the relevant beneficiaries. It was later realised that the effect of the 2017 Instrument was to create a potential tax liability in respect of both the Trust and the persons who were added as beneficiaries who were at the relevant time resident in Canada for tax purposes by reason of the deemed residency rules under section 94 of the Canadian *Income Tax Act*.
5. The Trustee has explained in the evidence filed in support of the application that it did not take Canadian tax advice before exercising the fiduciary power to add the relevant beneficiaries. Had it done so, the Trustee would not have exercised the fiduciary

power in the way that it did, namely it would not have added as beneficiaries those members of the family who were tax resident in Canada.

6. Furthermore, at a later stage, under the terms of a subsequent revision to the Trust, the beneficiaries who were resident for Canadian tax purposes were removed by the terms of a Trustee resolution in 2020 (the tax considerations of which were still not then appreciated by the Trustee). The potential Canadian tax issue only came to the attention of the Trustee in late 2022. After taking specific tax advice, the Trustee confirmed the effect of the 2020 resolution by a subsequent deed in 2025 expressly directed at ensuring, amongst other things, that the relevant beneficiaries had been removed pursuant to the Trustee resolution in 2020.
7. The potential tax liability in Canada was created by the inadvertent addition of beneficiaries by the terms of the 2017 Instrument which (had the potential effect been appreciated by the Trustee) would never have been made in those terms but would have excluded those persons who were resident in Canada for tax purposes.

The application under section 47A of the Trustee Act 1975

8. The Trustee comes to the Court under the jurisdiction conferred by section 47A of the Trustee Act 1975 which empowers the Court to set aside the exercise of a fiduciary power either wholly or in part.
9. The history of the section is well known to trust lawyers but, by way of summary, the powers granted by the section were added by the Bermuda legislature to give statutory relief to Trustees who have exercised a fiduciary power under a mistaken understanding of the effect of the exercise of that power without having to demonstrate that the power had been exercised in breach of trust, such statutory provisions in effect reversing the effect of the decision of the English Supreme Court in **Pitt v Holt**¹.
10. The effect of the statutory jurisdiction under section 47A has been comprehensively explained by Kewley CJ (as he then was) in **Re F Trust**², so the Court will not cover that ground here. It will suffice to say that the requirements of the section are that the Court must be satisfied that (i) the person exercising the fiduciary power (i.e. the Trustee) did not take into account a consideration of fact or law that was relevant to the exercise of the power and (ii) that but for the failure to take that consideration into account the Trustee would not have exercised the power at all or would have done so on a different occasion or would have exercised the power in a different manner.
11. Where those conditions are met, the Court has a broad and unfettered jurisdiction to set aside the exercise of the fiduciary power wholly or in part, and may make any

¹ [2013] UKSC 26 upholding the English Court of Appeal's decision on this point (see [2011] EWCA Civ 197).

² [2015] SC Bda 77 Civ (13 November 2015)

consequential orders as the Court thinks fit. The effect of making the order under section 47A is that the exercise of the relevant power or part set aside will be treated as never having occurred.

12. The only limitation is that the jurisdiction of the Court to make such order may not be made if the effect would be to prejudice a *bona fide* purchaser for value.
13. In this case the evidence clearly shows that the Trustee did not take into account a relevant consideration (i.e. the effect of Canadian tax law) before exercising its power to add a broad class of beneficiaries to the Trust, and if it had taken such advice, the Trustee would not have exercised the power in the way that it did, but would have excluded the beneficiaries who were resident in Canada for tax purposes.
14. The Court therefore finds that the preconditions for the grant of relief are satisfied. Further, it is clear that the interests of a *bona fide* purchaser for value are not affected, so the Court has an unfettered jurisdiction to grant the relief sought.
15. The evidence shows that the Trustee acted in good faith but without taking advice as to the application of and potential consequences of Canadian tax law, which was clearly a relevant consideration in respect of the 2017 Instrument. Accordingly, the Court can and, in the circumstances of a mistaken exercise of the power, ought to grant the relief sought to set aside that part of the resolution which added the beneficiaries who were resident in Canada. The Court hereby does so.
16. The effect of the Court's Order is that the addition of those beneficiaries is to be treated as if it had never occurred and the Court, by way of consequential relief, also hereby grants a declaration in those terms.

Dated this 4th June 2025



THE HON. MR. ANDREW MARTIN

PUISNE JUDGE