

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

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5 **CAUSE NO. FSD 59 OF 2010**
6
7

8 **IN THE MATTER of the Circle Trust dated 8th December 2000**

9
10 **AND IN THE MATTER of the Trusts Law (2001 Revision)**
11

12
13 **BETWEEN:**

14
15 **HSBC INTERNATIONAL TRUSTEE LIMITED**

16
17 **PLAINTIFF**

18
19 **AND:**

- 20
21 (1) **WONG KIT WAN**
22 (2) **FUNG MEI LIN**
23 (3) **FUNG MEI YEE**
24 (4) **FUNG KWOK KEUNG**
25 (5) **FUNG HON KEUNG**
26 (6) **FUNG KWONG FAT**
27

28 **DEFENDANTS**
29
30

31 **Appearances:** **Mr. Thomas Lowe Q.C. instructed by Ms. Cherry Bridges**
32 **of Ritch & Conolly for the 2nd Defendant and**
33 **Mr. George Giglioli of Giglioli & Company for the**
34 **5th Defendant**

35
36 **Ms. Jane Clarkson of Maples and Calder for the Trustee**

37
38 **Mr. Andrew Child instructed by Mr. Steven Barrie of**
39 **Nelson & Company for the other Defendants**
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41
42 **Before:** **Hon. Justice Henderson**
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45 **Heard:** **October 20th & 21st 2010**
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3 **JUDGMENT**
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5 1. For some years, The Plaintiff, HSBC International Trustee Limited (The
6 Trustee”), the current Trustee of the Circle Trust (“the Trust”), has found itself
7 embroiled in a bitter family dispute between the beneficiaries. On this
8 application I am asked to provide directions concerning the disposition of
9 Trust assets.

10
11 2. The Second Defendant, Fung Mei Lin, and the Fifth Defendant, Fung Hon
12 Keung, are beneficiaries of the Trust. For convenience, and intending no
13 disrespect, I will refer to them as “Joan” and “Robert” respectively. Joan’s
14 Summons asks for an order that “the Trustee do transfer forthwith” the flat in
15 which Joan is living (a Trust asset) to her “pursuant to the Trustee’s statement
16 of intention and programme of distribution set out in the Trustee’s letters to
17 the beneficiaries dated 16 June 2009 and 16 March 2010.” Robert’s Summons
18 is similar. It asks for a transfer of the apartment in which he is living (also a
19 Trust asset) to him on the same ground and requests an accounting.

20
21 **The Circle Trust**
22

23 3. The Circle Trust was established by a Deed of Settlement made December 8,
24 2000. The Settlor is identified as Mr. Cheung Wai Man but all are agreed that
25 the de facto Settlor who provided the assets of the Trust was the 6th Defendant,
26 Mr. Fung Kwong Fat (“Mr. Fung”).
27

1 4. The beneficiaries are Mr. Fung’s wife, Wong Kit Wan (the First Defendant),
2 and his four children who are the 2nd, 3rd, 4th and 5th defendants. Mr. Fung is
3 the Protector, but the Trustee by letter dated 14 September 2009 indicated that
4 “with the appointment of the whole Trust fund and the income thereof to be
5 held on trust for the five of you in equal shares absolutely, the role of Protector
6 has been extinguished”.

7
8 5. This is a discretionary trust. Among other powers, the Trustee was given the
9 power (by clause 4) at any time at its discretion to sell, call in or convert into
10 money the Trust assets. The Trustee is empowered to appoint, pay or apply
11 the whole or any part of the trust fund and the income of it for the
12 advancement, maintenance, education or benefit of any of the beneficiaries in
13 such proportions as the Trustee deems appropriate. By clause 7, the Trustee
14 was given a discretion to declare an earlier vesting date and terminate the
15 Trust:

16 “7. **TRUSTS ON VESTING**

- 17 (a) The Trustee may in its absolute discretion by deed at any time
18 declare an earlier Vesting Date which shall be any date being
19 not earlier than the date of this Deed nor later than the last day
20 of the Perpetuity Period.
- 21
22 (b) Subject to any appointment payment or application pursuant to
23 Clause 5(a) above the Trustee shall on the Vesting Date stand
24 possessed of the Trust Fund and the income thereof upon trust
25 to distribute the same to the Beneficiaries or any one or more of
26 them to the exclusion of the other of them as the Trustee shall
27 in its absolute discretion determine, such discretion to be
28 exercised in writing before the Vesting Date and in default of
29 such determination for all of the Beneficiaries then living or in
30 existence in equal shares.”
31

32 Clause 15 contains a power of appropriation:

1 “15. **APPROPRIATION OF ASSETS**

2 “The Trustee may appropriate any part of the Trust Fund in the
3 actual condition or state of investment thereof at the time of
4 appropriation in or towards satisfaction of the share of any
5 person in the Trust Fund as the Trustee may deem just and
6 reasonable without the necessity of obtaining the consent of
7 any person.”
8

9
10 The Cayman Islands is the forum for the administration of the Trust and the
11 law of the Cayman Islands is the proper law of the Trust.

12
13 **Background**

14
15 6. In 1955 Mr. Fung established a printing business in Hong Kong. The business
16 grew over the years and was listed on the Hong Kong Stock Exchange in
17 1992. Shortly after that, Mr. Fung sold his remaining share of the business
18 and established a new company named Essential (now a Trust asset) which
19 engaged in paper and stationary manufacturing in China. Mr. Fung was a
20 direcgtor of Essential from 29 April 1994 to 19 September 1996 and purported
21 to be a de facto Managing Direcotr of Essential and Big Town. In 1994 two of
22 Mr. Fung’s children, Joan and Robert, were made directors of Essential.

23
24 7. Upon Joan’s advice (see 10 Fung para. 14 ff.), Mr. Fung established trusts in
25 the early 1990s for the benefit of his family members. HSBC became the
26 Trustee in 1994.

27
28 8. By 1995 Mr. Fung and his family were contemplating a move to Canada from
29 Hong Kong. A decision was taken to transfer all existing trust assets into a

1 new trust called the Amber Trust. By 2000, again on Joan's advice (see 10
2 Fung para.19), Mr. Fung decided to terminate the Amber Trust and transfer its
3 assets into the Circle Trust.

4
5 9. The sole direct asset of the Circle Trust is 100% of the issued shares in Butter
6 Company Limited ("Butter"), a Cayman Islands Company. Butter is the sole
7 beneficial owner of four subsidiaries incorporated in the British Virgin
8 Islands: Enta Holdings Limited, Asia Link Limited, Merry Management
9 Limited, and Happy View Limited. These subsidiary companies are the
10 beneficial owners of various assets situate in Hong Kong and elsewhere. In
11 general, the assets can be placed in one of two categories: some are operating
12 businesses ("the operating companies") and others are real property.

13
14 10. Management of the trusts was given to Joan and Robert (10 Fung, para. 22).
15 There is some debate about the extent of their control of the operating
16 companies. Mr. Fung says (*ibid.*) that "Joan, and to a lesser extent, Robert,
17 controlled and manage the family companies owned directly and indirectly by
18 the Circle Trust". Joan disagrees, and the evidence on the point is not
19 consistent. The conclusion of Ferrier Hodgson in their investigative report of
20 February, 2006 (para. 1.2.8) is that there was "a struggle" between Mr. Fung
21 and his daughter for control of the operating companies "which the two of
22 them ran together between 1994 and 2003". Mr. Fung also asserts that when
23 the other Trust beneficiaries wished to obtain distributions from the Trust, the
24 practice became to ask Joan if that were possible (10 Fung, para. 22). This,
25 also, is denied by Joan.

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11. In 2004, Mr. Fung requested that HKD \$10,000,000 be taken out of one of the operating companies (Essential) and paid to the fifth Defendant, “Terrence”, to assist him in setting up his own company. Joan and Robert refused to comply with this request. Mr. Fung did not see a valid reason for the refusal. This incident appears to have sparked a family feud which continues to this day and shows no sign of abating. Defendants one, three, four and six, to whom I refer as “majority beneficiaries”, are allied in their opposition to Joan and Robert (“the minority beneficiaries”).

12. Mr. Fung says that Joan has failed to provide to the majority beneficiaries the sort of information concerning the Trust and its operating companies which they should have been entitled to receive. Moreover, the tension between the family members appears to have led to a degree of dissatisfaction on the part of both factions with the manner in which the Trust has been administered. Mr. Fung alleges that Joan and Robert have received favourable treatment from the Trustee and have misappropriated money from the operating companies. These allegations are denied. In late 2004, at the urging of Mr. Fung, HSBC appointed Ferrier Hodgson to investigate transactions entered into by Joan and Robert in relation to the Trust and the operating companies. A preliminary investigation led to a more detailed examination of the situation in February, 2006.

13. The report begins by noting that no distributions had been made from the Trust since its inception. On many occasions, funds had been withdrawn from

1 companies in the Trust by Joan and deposited into her personal account for the
2 purpose of investing in securities. In the “majority” of cases, these funds were
3 returned to the company in question. Ferrier Hodgson also saw documentation
4 which led it to suggest that Mr. Fung had received funds from companies in
5 the Trust in an unauthorized manner. Ferrier Hodgson noted a number of
6 payments to companies in the Trust for which they were unable to obtain any
7 explanation. Joan says that it was common practice to transfer funds between
8 Trust companies for business purposes. Mr. Fung has said that he was in the
9 habit of signing documents in blank in order to assist Joan in her running of
10 the business operations. On a number of occasions, both Joan and Mr. Fung
11 claimed not to know the person who was paying in the money. The
12 transactions in question extend back to 1992. The amounts of these payments
13 were substantial. Joan denies any misuse of funds removed from companies
14 in the Trust.

15
16 14. Ferrier Hodgson have asked Mr. Fung and Joan for their personal bank
17 statements but that was refused. When they put questions to Robert, he simply
18 referred them to Joan for the answers.

19
20 15. In light of the confused situation and lack of reliable accounting records,
21 Ferrier Hodgson have said they are unable to offer an opinion as to whether
22 any claim might be pursued against any member of the Fung family or any
23 third party arising from these transactions. The report’s ultimate conclusion is
24 that there is a “pressing issue” concerning the management of the companies
25 in the Trust. Ferrier Hodgson suggested five options: the appointment of a

1 receiver, the liquidation of all of the assets of the companies in the Trust,
2 replacement of the current directors with independent directors, replacement
3 of the current directors with Mr. Fung and his associates, and maintenance of
4 the status quo.

5
6 16. By 2006 the two directors who controlled the operating companies, Joan and
7 Robert, were experiencing disagreement between themselves. At this time
8 Ferrier Hodgson was appointed as a non-executive director of Essential in
9 order to mediate the resolution of the differences between Joan and Robert.
10 Eventually, in Sept 2007 Joan was removed and Robert resigned as directors
11 of Essential and of the operating companies, after which Mr. Fung and
12 Terrence assumed the management of Essential.

13
14 17. Joan and Robert have lived in flats owned by the Trust at a development
15 known as “Amber Gardens” in Hong Kong for some fifteen years. Joan’s
16 apartment has been used as collateral to obtain financing for the operating
17 companies (“the DBS Bank facilities”). The Trust has not yet charged rent for
18 the use of these Trust assets.

19
20 18. As time passed, the value of the Trust assets declined. The continuing cost of
21 litigation between the majority and minority beneficiaries took its toll. The
22 recent decline in the economy has had an adverse effect. In November, 2008
23 the Trust stopped paying monthly living allowances to the majority
24 beneficiaries. It has continued to provide rent-free accommodation to Joan

1 and Robert. In my memorandum to counsel of May 4th, 2010 providing certain
2 directions, I noted that:

3 “All parties have expressed concern over the rapidly diminishing value
4 of the remaining assets in the Trust. All parties are of the view that the
5 history of this litigation demonstrates that their differences cannot be
6 settled.”
7

8 **Attempt to Sell the Operating Companies**

9
10 19. In May, 2007 Joan applied to this Court for an order directing the Trustee to
11 sell the operating companies. Justice Sanderson heard the application. The
12 majority beneficiaries opposed it. They considered that the operating
13 companies were successful and profitable until Joan had taken over control of
14 them and that the recent poor performance could be reversed. Mr. Fung was
15 about to resume his role as general manager of those companies.

16
17 20. Sanderson, J. concluded on the evidence that there was a “substantial business
18 risk” associated with retaining the operating companies in the Trust. He said:

19 “40. It is clear to me that the present and potential risks associated
20 with keeping the Operating Companies significantly exceed
21 the potential benefit of keeping them. It is in the best economic
22 interest that they be sold. Ultimately it may prove to be in
23 the best family interest as well.

24
25 41. The Trustee should have time to properly test the market and obtain the
26 best price available. It should not be a forced sale at liquidation prices.
27 Offers and expressions of interest should be solicited.

28
29 42. Accordingly I give the following directions as requested in paragraph 1
30 of Joan’s Summons filed January 15th 2007:

31
32 1. It is in the best interest of the Beneficiaries that the Operating
33 Companies be sold.
34

- 1 2. The Operating Companies should be sold as a going concern
2 and the Trustee should endeavour to obtain the best price
3 possible.
4
5 3. The Trustee should have sufficient time to explore the market
6 and obtain offers.
7
8 4. If the parties are unable to agree whether any offer should be
9 accepted, they may apply to the Court for approval. The
10 Trustee is not, however, required to apply because pursuant to
11 the Trust Deed it has the discretionary power to sell the
12 Operating Companies at such time and on such terms as it
13 considers appropriate. It is of course open to the Trustee to
14 apply for Court approval of any proposed sale, if it wishes.”
15

16 21. The resulting order reads:

17 “IT IS HEREBY ORDERED THAT:-

- 18 1. The Trustee take reasonable steps and use their best endeavours to procure
19 a disposal of the Operating Companies referred to in paragraph 25.2 of the
20 Second Affidavit of Patrick Love sworn on 4th August 2006 (“the
21 Operating Companies”):
22 a. as a going concern;
23
24 b. with sufficient time to explore the market and to obtain offers in a
25 reasonable time; and
26 c. at the best price possible.”
27

28
29 22. By early 2008, the Trustee had concluded (upon professional advice) that the
30 operating companies could not be sold to a third party. The only potential
31 purchasers were the beneficiaries or some of them. The informality with
32 which the operating companies had been managed and their records kept
33 meant that it would have been hard (and therefore expensive) to perform due
34 diligence. The result is that any prospective purchaser would have asked for
35 representations and warranties which the Trustee would not have been able to

1 provide. The Ferrier Hodgson report (which, as I have said, contained
2 allegations of misappropriation by management) was another complicating
3 factor. As a result, the operating companies were offered for sale to the
4 beneficiaries in May 2008 by way of a private auction.

5
6 23. The operating companies were never sold. Joan was the only bidder. The
7 Trustee was never able to accept her offer because it did not include a cash
8 payment in an amount sufficient to pay off the loan from DBS Bank (or, in
9 lieu of that, confirmation from the Bank that it would release its charge over
10 the Trust properties). That loan liability was in the amount of HK
11 \$34,790,573 as at June 30th 2009. The Trustee considered that any purchaser
12 would have to pay off that facility as part of the bargain.

13
14 24. It was the failure of this private auction which suggested to the Trustee that it
15 should make an *in specie* distribution of the operating companies to the
16 majority beneficiaries. In his affidavit evidence, Mr. Love on behalf of the
17 Trustee said that it decided to “explore” such a distribution. In his affidavit of
18 February 17, 2010 Mr. Love confirmed that it was still the Trustee’s intention
19 to make an *in specie* distribution to Joan and Robert of the apartments in
20 which they were residing. In a footnote, he said:

21 “This programme of distribution will not be possible, however, if the
22 Trust’s total liabilities continue to increase and reach a level where it
23 becomes necessary for the Trustee to liquidate the operating companies
24 and/or the companies holding the apartments in order to raise funds to
25 pay the outstanding liabilities.”
26

27 He said the Trustee was continuing to liquidate pieces of real property in order
28 to pay the outstanding liabilities for professional fees.

1

2 **Creation of a Bare Trust**

3

4 25. On February 13, 2009 the Trustee wrote to the beneficiaries and Mr. Fung
5 advising that its efforts to sell the operating companies as a going concern
6 “and at the best price possible” had been unsuccessful. The letter provided an
7 up-to-date summary of the very substantial legal fees which all of the
8 beneficiaries had incurred at the ultimate expense of the Trust. The Trustee
9 said that none of the beneficiaries (or any combination of them) had offered a
10 “viable bid” for the operating companies so the Trustee proposed to obtain
11 court approval for a liquidation of those entities. Since there was every reason
12 to expect that some of the beneficiaries would oppose the Trustee’s
13 application (at further cost to the Trust), the Trustee expressed the fear that the
14 entirety of the Trust assets could eventually be consumed by the cost of
15 professional services. As a result, the Trustee said “in order to avoid this
16 outcome, the Trustee is considering vesting the trust now and distributing its
17 assets ...” (underlining added).

18

19 26. The distribution which the Trustee had in mind was to give to Joan and Robert
20 the flats in which they were living and to give to the majority beneficiaries the
21 operating companies and the real property used by those entities. The
22 remaining assets would largely need to be sold to pay professional fees but
23 any balance would be distributed equally between the five beneficiaries. The
24 Trustee appears to have considered that this distribution was feasible and

1 would result in reasonably equivalent shares by value being given to each of
2 the five beneficiaries. The letter concluded:

3 “Before finally deciding whether to proceed in this matter, the Trustee
4 would be keen to hear the views of any family members in relation to
5 the proposals outlined above.”
6

7
8 27. Only two beneficiaries replied to the earlier letter; they took issue with the
9 proposed allocation of assets. On June 16, 2009 the Trustee wrote again to the
10 five beneficiaries. It began by noting that none of the beneficiaries had
11 questioned “the underlying decision to terminate the Trust”. The letter
12 continued:

13 “The Trustee has therefore decided to press ahead with the termination
14 of the Trust and the distribution of the net trust assets in due course.
15

16 To start this process, the Trustee proposes to exercise the power of
17 appointment to appoint the trust fund between the five beneficiaries
18 equally. This therefore brings the discretionary trust, as it currently
19 stands, to an end and commences the process by which the Trustee,
20 like the Trustee of any Trust that is terminated, gathers in the trust
21 assets, pays the liabilities and then distributes the net trust fund
22 between you in accordance with the vesting allocation – in this case,
23 twenty percent to each of you.”
24
25

26 28. Attached as Schedule Two to the letter was a table headed “Possible Asset
27 Allocation to Satisfy Proposed Equal Distribution”. The body of the letter
28 described this Schedule as showing “how the net assets should be divisible, all
29 being well, between the five of you so that each of you will take the assets that
30 we understand you will most like to take on a winding up of the trust.” That
31 schedule showed a “possible” allocation to Joan and Robert of the flats in
32 which they were living and a possible distribution to the majority beneficiaries
33 of the shares of the operating companies. It also showed a cash distribution to

1 each beneficiary to be raised by a sale of the remaining assets. On this
2 scheme, the result would have been distribution in shares of equal value to
3 each of the five beneficiaries.

4
5 29. On July 9, 2009 the Trustee executed a Deed of Appointment pursuant to
6 clause 5(a) of the Settlement. The Trustee resolved to appoint and declare
7 “that the whole of the trust fund and the income thereof shall, from the date of
8 this deed, be held upon trust for the beneficiaries in equal shares absolutely.”
9 There was no appropriation of particular assets to specific beneficiaries.

10
11 30. The Deed of Appointment was brought to the attention of the beneficiaries by
12 the Trustee’s letter of August 4th, 2009. The letter explained the Deed’s effect
13 in this way:

14 “As alluded to in our letter of 26 June 2009, we write to advise that the
15 Trustee has now exercised is power to irrevocably appoint the whole of
16 the Circle Trust fund, and the income thereof, to be held upon trust for
17 the five of you in equal shares absolutely. Please see attached the
18 Resolution and Deed of Appointment, executed by the Trustee on 9
19 July 2009. In short, this means that the Trustee now holds the assets of
20 the Trust for the five of you as bare trustee and will be proceeding to
21 wind up the trust as quickly as possible. A further letter will follow
22 shortly which will detail the practical implications of this exercise,
23 including what instructions the Trustee will need from you to facilitate
24 the winding up process, and address some of the comments the Trustee
25 has received from some of you in response to its earlier letters.”
26

27 31. The Hong Kong attorneys for the majority beneficiaries responded to the
28 Trustee by letter of August 27, 2009. They stated that the majority
29 beneficiaries did not oppose the decision to terminate the Trust but considered
30 that the proposed manner of division was not fair. They complained about the
31 Trustee’s “failure to act” on the findings of Ferrier Hodgson that Joan owed to

1 entities within the Trust the sum of HK \$6,944,267 and Robert owed the sum
2 of HK \$4,138,350. A number of other objections questioned the value of HK
3 \$52,000,000 attributed by Ferrier Hodgson to the operating companies in May,
4 2008. The attorneys said that the majority beneficiaries were conducting their
5 own appraisal of the operating companies and would provide the results of that
6 assessment shortly. It has never been provided. After acknowledging that the
7 Trustee had declared itself to be a bare Trustee, the letter acknowledges the
8 willingness of the majority beneficiaries to “explore with the Trustee” the
9 transfer to them of the operating companies.

10
11 32. On September 14, 2009 the Trustee wrote to the five beneficiaries to describe
12 some of the arrangements it would take to liquidate the Trust. In relation to
13 distributions, it said:

14 “Thirdly, when all the liabilities have been established and either paid
15 off or at least provision has been made for them, the trustee will know
16 the net value of the trust fund, the assets that remain still comprised
17 within the trust fund and will therefore know the dollar value of the
18 one-fifth share of each beneficiary. If, as is hoped, the trust fund at
19 that time stills comprises the relevant assets, the trustee will then, in
20 accordance with the intended programme of distribution already
21 indicated, distribute the shares in the operating companies (or their
22 holding companies) to the three beneficiaries who would like to take
23 those shares and will distribute each apartment to the beneficiary who
24 occupies that apartment. All being well, there will be balancing
25 amounts of cash for each beneficiary to make his or her entitlement up
26 to the equal dollar value entitlement of each beneficiary. The trustee
27 therefore intends to exercise what is technically known as a power of
28 appropriation to allocate to each beneficiary the assets that each
29 beneficiary would like to receive in satisfaction of each beneficiary’s
30 one-fifth share to the dollar value of that share. A swift and co-
31 operative approach to the winding-up of the trust maximizes the
32 likelihood of each beneficiary receiving the specific assets he or she
33 wants to receive.”
34

35

1 33. The Trustee said in this letter that it would obtain an updated valuation of the
2 operating companies and that valuation would be “accepted as final for the
3 purpose of the final distribution”. The letter then addressed the subject of
4 various payments which had been made by subsidiary companies within the
5 Trust to various family members between 1994 and 2005. Some of these
6 entities had commenced proceedings in Hong Kong to recover the amounts
7 paid. All five beneficiaries (and Mr. Fung) had received money from
8 underlying Trust entities in circumstances which called into question their
9 entitlement to the funds. As for the flats, the Trustee said:

10 “2.5 Future of the Trust underlying companies

11 At this stage the Trustee has yet to formulate a comprehensive plan
12 regarding the future of the various trust underlying companies. Unless
13 they have to be liquidated, the Operating Companies will be
14 transferred in specie to some or all of you. Likewise, unless the
15 underlying flats need to be sold, the company which is holding the
16 properties which are occupied by Joan and Robert (i.e. Onlink
17 Development Limited) will be retained, at least for the time being.
18 Companies which are no longer necessary (e.g. because the landed
19 property that they used to hold have been sold to meet the expenses of
20 the trust) are likely to be wound up in due course.”
21

22 34. On September 10, 2009 the attorneys for Joan and Robert wrote to the Trustee
23 suggesting that the decision to terminate the Trust without any apportionment
24 of the assets was a mistake. The letter asserts that “it is no longer within the
25 Trustee’s power to determine who should get what.” The Trustee was urged
26 to apply to this Court to use its power to relieve the Trustee from the
27 consequences of its “mistake”.

28
29 35. By this time, the Trustee had come to the conclusion that the operating
30 companies could not be sold to any third party. The realizable assets were

1 pieces of real property, some of which were being sold to pay down liabilities
2 for professional fees. Those liabilities were continuing to be incurred at a high
3 level because of the ongoing feud between the two groups of beneficiaries.

4
5 36. By letter dated March 16, 2010 the Trustee advised the five beneficiaries of its
6 current intentions. It said:

7
8 “2. Update on Trustee’s Intended Programme of Distribution
9

10 The Trustee set out its intended programme of distribution of
11 the net Trust fund in the June Letter. This programme of
12 distribution would see Joan and Robert receive the apartments
13 they live in, and Mei Yee, Terence and Madam Fung each
14 receiving a 1/3 interest in the Operating Companies, with a
15 balancing cash payment, where applicable (‘Intended Plan of
16 Distribution’).
17

18 Whilst the Trustee’s intentions in this regard have not changed,
19 it is important to reiterate that the success of the Intended Plan
20 of Distribution is contingent on the Trustee’s ability to pay off
21 all liabilities relating to the Trust without recourse to the sale of
22 the particular assets earmarked for each of you. The effect of
23 the Trustee’s exercise of the power of appointment was to vest
24 in each of you one fifth of the net Trust Fund, not vest in each
25 of you specific assets of the Trust. This means that if the
26 payment of the liabilities cannot be accomplished through the
27 realization of the properties currently identified for this
28 purpose, the Trustee may have no choice but to realize Trust
29 assets earmarked as part of the Intended Plan of Distribution.”
30

...

31
32 “4. Treatment of Payments Made out of the Trust Fund Prior to
33 Final Distribution
34

35 A further implication of the exercise of the power of
36 appointment in favour of the five of you equally is that
37 the Trustee must now treat any payments or benefits
38 that you receive (or have received from the Trust since
39 the date of appointment) as partial pre-payments of your
40 final distribution. This means that for those of you who
41 have received, or continue to receive, payments for
42 living or medical expenses, the amounts of these
43 payments will be set-off against the value of your final
44 entitlement. Likewise, for those of you that receive the
45 benefit of living rent-free in properties that are assets of

1 the Trust, a “notional rent” will now be applied which
2 amount will be set-off against the value of your final
3 entitlement. This should be kept in mind by all of you
4 if and when you make any future requests of the Trustee
5 to pay expenses, or provide other benefits, on your
6 behalf.”
7

8 37. Mr. Fung does not now oppose the Trustee’s decision to terminate the Circle
9 Trust but does take issue with the Trustee’s appointment of the trust fund to all
10 five beneficiaries in equal shares. He says that adjustments to Joan’s and
11 Robert’s shares should be made to reflect the value of the funds and assets
12 allegedly misappropriated by them while they were in control of the operating
13 companies.
14

15 **Did Sanderson’J’s Order Impose an Affirmative Obligation to Sell?**
16

17 38. The argument presented by Joan and Robert is that the judgment of Sanderson,
18 J. in May, 2007 imposed an affirmative obligation to sell the operating
19 companies upon the Trustee. The Trustee failed in its obligation to convert the
20 investment into cash but Mr. Lowe argues that there had been a notional or
21 implied conversion as at the date of the auction in August, 2008. The
22 circumstances which led Justice Sanderson to his conclusion were summarized
23 by him in an earlier judgment of March 20, 2007 as follows:

24 “Through a series of companies and shareholdings, the Circle Trust
25 is the beneficial owner of Essential Industries Ltd. (a Hong Kong
26 Company) and Big Town Industrial Development Ltd. (also a
27 Hong Kong Company). Both Essential and Big Town operate
28 a paper manufacturing and printing business in the People’s Republic
29 of China (the P.R.C.) through affiliated companies with the same
30 name. The directions, advice or opinion sought in this case relate
31 only to the management of these Operating Companies (as
32 defined in the second affidavit of Patrick Love sworn in these
33 proceedings) and not to the other companies in the structure.

1
2 For the past few years the Operating Companies have been run
3 by Joan and Robert. The other Defendants had little or no
4 role in those companies' affairs. The two P.R.C. companies
5 now seem to be under the *de facto* control of Joan. More
6 recently, Joan and Robert have had a serious and seemingly
7 irreconcilable falling out. They cannot and will not work
8 together. Mr. Fung has also had a serious falling out with
9 both of these children and he cannot nor will not work with
10 either of them. Mr. Fung and his two children, Joan and
11 Robert, seem to be at odds on every aspect of the business.
12

13 In a very general way, it is fair to say that they have
14 made allegations of varying degrees of fraud, theft,
15 mismanagement, incompetence, conflict of interest and
16 dishonesty against each other. The business of Essential
17 has clearly suffered. Customers are aware of the ongoing
18 dispute between family members. A strike is alleged
19 to have been orchestrated by Mr. Fung, profitability is
20 down, monies have been removed from the companies
21 without any or adequate explanation in some cases, and corporate
22 accounting and tax return documents have not been
23 filed, exposing the companies to potential fines and other
24 penalties. Joan has prevented Robert from attending at the
25 factories in the P.R.C.; Robert has prevented Joan from
26 gaining access to corporate information. Corporate
27 restructuring has been undertaken but stalled and the
28 Trustee is having a difficult time understanding what is
29 happening and why.”
30

31 39. It is clear that the second judgment of Sanderson, J. imposed an affirmative
32 obligation upon the Trustee to sell the operating companies. That obligation
33 cannot be equated to the classical trust for sale which arises from the need to
34 sell assets of a wasting or future or reversionary nature, or which consist of
35 unauthorized securities, and which are part of a residuary personal estate
36 settled by will: see *Underhill and Hayton, Law of Trusts and Trustees*, 14th
37 edition, page 456. The rule in its traditional form does not apply to
38 settlements *inter vivos*.
39

1 40. The directions given by Sanderson, J. contemplated only a sale for “the best
2 price possible” after the Trustee had “sufficient time to explore the market and
3 obtain offers”. In fact, Joan was the only bidder and her bid was
4 unsatisfactory. The failure of the companies to keep appropriate books and
5 records frustrated the attempt to sell the companies as a going concern. This
6 failure is attributable to Joan and Robert (who were directors of Essential) and
7 to Mr. Fung, who seems to have retained at least some de facto control over
8 the operating companies. Nevertheless, the submission is that there has been a
9 notional conversion of the operating companies at the value (HKD
10 \$52,000,000) attributed to them in 2008.

11
12 41. In light of the lack of interest of any third party in purchasing the companies
13 as a going concern, that valuation must now be regarded as artificial and
14 unrealistic. Prior to the hearing which resulted in the judgment of Sanderson,
15 J. in May, 2007, some consideration was given to the sale of the operating
16 companies by simply liquidating their assets. That was one of the options
17 considered by Ferrier Hodgson in its report of May, 2007 on the prospects of
18 sale. However, neither the judgment of May, 2007 nor the resulting order
19 make any reference at all to a possible sale of the assets on a breakup basis.
20 No such direction was ever given to the Trustee. (In any event, there is no
21 admissible evidence before me of the current value of the operating companies
22 if they were to be liquidated in that manner.)

23
24 42. In these circumstances, the argument that the Court must recognize a notional
25 conversion of the operating companies’ value into cash as at August, 2008

1 must fail. The authorities cited in favour of the contention (*Scott on Trusts*, 6th
2 Edition, pages 506 – 507; and *Meagher, Gummow and Lehane*, 4th Edition,
3 paragraph 3 – 205 and authorities cited therein) cannot be read so as to infer a
4 conversion arising from an obligation to sell when that obligation has been
5 frustrated by events beyond the control of the Trustee. Indeed, *Meagher et al*
6 note in passing (at paragraph 3 – 210) that the maxim in which the doctrine of
7 conversion finds its origin - “equity looks on that as done which ought to be
8 done” - “is limited to circumstances where that which ought to be done can be
9 done.”

10
11 **Has There Been an Appropriation of Trust Assets?**

12
13 43. A power to appropriate was given by the Settlor to the Trustee in clause 15 of
14 the Deed of Settlement. No formal document is required for an exercise of the
15 power of appropriation: *Hutcheson v. Hammond* (1790) 3 BRO CC 128;
16 *Barclay v. Owen* (1889) 60 LT 220. A trustee’s decision to appropriate may
17 even be implied rather than express: *Re Nickels* [1898] 1 Ch 630. Joan and
18 Robert say that at the time the Trustee exercised the power of appointment in
19 July, 2009 it also decided to appropriate specific assets to individual
20 beneficiaries by giving the operating companies to the majority beneficiaries
21 and the two apartments to Joan and Robert. They say that the Trustee’s letter
22 of June 16, 2009 “showed clearly” an intention to make these appropriations
23 together with any necessary balancing payments.

24

1 44. Appropriated assets are to be valued as at the date of appropriation: *Re*
2 *Charteris* [1917] C Ch 379; *Re Collins* [1975] 1 WLR 309. Once an
3 appropriation has occurred, the beneficiary taking the appropriated assets
4 assumes the benefit of any increase and the liability of any decrease in value:
5 *Fraser v. Murdoch* (1881) 6 App. Cas. 855; *Re Richardon* [1896] 1 Ch 512. If
6 Joan and Robert are correct and there has been an appropriation of the flats to
7 them, subsequent fluctuations in value of the apartments and the operating
8 companies are of no significance. In any event, when exercising such a power
9 a trustee does not have an absolute obligation to appropriate assets of equal
10 value to each beneficiary: *Re Lepine* (1892) 1 Ch 210.

11
12 45. My reading of the evidence does not reveal anything more than a desire of the
13 Trustee to explore and consider such an appropriation. At no time did it make
14 an unequivocal decision to appropriate.

15
16 46. The plan was first mooted in the letter of February 13, 2009 in which the
17 Trustee said that it was “considering” vesting the trust and distributing the
18 assets *in specie* in the manner just described. This was a preliminary letter
19 intended to evoke reactions (and hopefully approval) from the beneficiaries.
20 The letter concluded by saying that the Trustee would like to hear the views of
21 the family members “before finally deciding whether to proceed in this
22 manner.” The Trustee never received the unanimous support for this scheme
23 of distribution for which it must have been hoping.

24

1 47. The letter of June 16, 2009 is again equivocal. It shows that the Trustee still
2 hoped to appropriate the assets in the described manner but was experiencing
3 concerns that legal and other professional expenses might render that
4 impossible as these were continuing to be paid from the Trust. The letter said:

5 “It may therefore be impossible for the Trustee to allocate the assets
6 between the five of you such that three of you are able to take the
7 shares in the operating companies and the other two are able to take
8 the apartments you currently reside in. It is therefore going to be
9 important to exercise discipline in the controlling of the legal and other
10 expenses going forward. Certainly, the rate at which these have been
11 incurred in the past is unsustainable if each of you are to get what you
12 are looking for.”
13

14 The Deed of Appointment of July 9, 2009 was not accompanied by any
15 express appropriation of assets to individual beneficiaries.

16

17 48. The beneficiaries were not at the time in any doubt about the situation. The
18 attorneys for the majority beneficiaries wrote in August, 2009 to the Trustee to
19 express their willingness to “explore with the Trustee” a transfer of the
20 operating companies to their clients. In the following month the attorneys for
21 Joan and Robert asserted that the execution of the Deed of Appointment
22 without any accompanying apportionment was a “mistake” because it robbed
23 the Trustee of the power to apportion the assets in the future. When the
24 Trustee wrote to all beneficiaries on September 14, 2009 it referred to the need
25 to pay off the Trust’s liabilities, to the need to determine the net value of the
26 trust fund, and to the Trustee’s hope that it would still be possible after those
27 things had been done to distribute the assets *in specie*.

28

1 49. The Trustee has never had title to the apartments and therefore cannot have
2 segregated those assets for the benefit of Joan and Robert in a manner
3 consistent with an appropriation. Moreover, the Trustee has been charging
4 notional rent to Joan and Robert, a fact which is wholly inconsistent with any
5 appropriation having taken place.

6

7 50. I conclude that the Trustee has never manifested an unequivocal intention to
8 appropriate any single asset to a beneficiary. It had (and still has) a desire to
9 distribute the assets in specie once the liabilities of the Trust have been
10 satisfied but has never found itself in a position where it could act upon the
11 plan it has formulated. No appropriation has occurred. The result is that the
12 summonses filed by Joan and Robert asking for a transfer of their respective
13 flats to them in recognition of the Trustee's appropriation of those assets are
14 dismissed, as is Robert's request for an accounting.

15

16 **The Future**

17

18 51. Prior to the hearing, I asked the parties to address four questions which I
19 posed.

20

21 52. In answer to the first question, the parties seem to be agreed that I have
22 jurisdiction to direct the Trustee to make a final distribution of Trust assets to
23 the beneficiaries. No argument to the contrary has been presented.

24

1 53. In response to the second question, the parties are agreed that the
2 beneficiaries' shares must be of equal value.

3

4 54. The third question asked for the value of each major asset of the Trust. This is
5 contentious.

6

7 55. One option which has at least the merit of simplicity (as it would avoid the
8 need to sell Trust assets) would be for the Trustee to transfer 20% of the
9 shares in Butter (the parent Company) to each of the 5 beneficiaries.
10 Unfortunately, that would leave Joan and Robert locked into a corporate
11 structure as minority shareholders in the midst of a longstanding and bitter
12 feud with the majority. To obtain redress they would need to petition for the
13 winding up of Butter, which would serve to perpetuate the family feud at great
14 cost to all of the beneficiaries.

15

16 56. The majority beneficiaries have never agreed to accept an *in specie*
17 distribution of the shares in the operating companies and now say that those
18 entities should be sold by the Trustee. That is the only sensible way forward.

19

20 57. The Trustee has entered in evidence a valuation by Ferrier Hodgson as at
21 March 31, 2010 which appraises the value of the operating companies at HKD
22 \$32.4 million to HKD \$42.6 million. The valuation is heavily qualified. It
23 notes that Ferrier Hodgson had "limited current financial information" and
24 lacked financial statements for the most recent financial period. It was
25 advised by management that "no up to date financial information is available".

1 No forecast information was available either. The valuation was done on a
2 “market value” basis although the earlier attempt to sell the operating
3 companies at auction suggests that there is no viable market for these
4 companies. The methodology is a multiple (3x) of earnings before interest,
5 tax, depreciation and amortization but the “key” assumption that the
6 companies were operating profitably in the immediately preceding year is
7 based primarily upon a review of cash balances obtained from bank
8 statements. A “special audit report” prepared by external auditors for a recent
9 3-month period provides some reason to suspect that the companies may not
10 be profitable at all. Ferrier Hodgson have laboured under difficult constraints,
11 as a report from Baker Tilly dated September 14, 2010 criticizing their
12 methodology makes clear. Overall, the Ferrier Hodgson report cannot be said
13 to provide a sound basis for assumptions about value when contemplating a
14 distribution *in specie* and will provide little comfort to a prospective
15 purchaser.

16
17 58. I am far from satisfied that the value of the operating companies exceeds their
18 value on a break-up basis. The best course is for the Trustee to make another
19 attempt to sell the companies as a going concern if it believes there is any
20 reasonable prospect of such a sale. If the Trustee considers that to be futile, or
21 if the attempt is unsuccessful, the assets of the operating companies should be
22 liquidated individually. Whichever type of sale occurs, it is only by
23 converting the assets to cash that their true value can be determined.

24

1 59. As for the real property, the position is simpler. The Trustee and the majority
2 beneficiaries have filed appraisals for each property which are not materially
3 different. Joan accepts the Trustee's figures and Robert has expressed no
4 opposition. The Trustee should assign the average of the values determined
5 by its own expert (Ferrier Hodgson) and by the expert for the majority
6 beneficiaries (DTZ) to each property.

7

8 60. The fourth question asks what form the distribution should take. Once the
9 operating companies have been sold (either as a going concern or on a break-
10 up basis) and all of the liabilities of the Trust have been satisfied, it will
11 become apparent whether an *in specie* distribution of the two Amber Gardens
12 apartments to Joan and Robert can be made equitably. All parties seem agreed
13 before me that, notwithstanding the creation of the bare trust, this court could
14 order such a distribution. Of course, that will be possible only if the sale of
15 the operating companies and other real estate (together with any balancing
16 payments that Joan and Robert are willing and able to make) generates
17 sufficient cash to pay to each majority beneficiary a sum equal to the value of
18 Joan's apartment. Her apartment has a value exceeding the value of Robert's
19 apartment by HKD \$1,500,000 so he must receive a balancing payment in that
20 amount.

21

22 **Disputed Funds**

23

24 61. Prior to any distribution to the beneficiaries, the Trustee will need to take a
25 number of payments and transactions into account. Since the date of the Deed

1 of Appointment, payments have been made to the majority beneficiaries for
2 such things as medical expenses. These payments must be credited against the
3 entitlement of the individual recipients. Joan and Robert have been living in
4 “their” respective apartments rent-free; a notional rent must be credited to
5 them.

6
7 62. A significant amount of the Trust’s assets are pledged as security for the
8 facility known as the DBS bank facility. Before the apartments can be
9 conveyed to Joan and Robert, those two assets need to be released from this
10 security. The Trustee has expressed an intention to sell certain properties
11 known as the “group two and three properties” with a view to paying off the
12 debt. Those properties are not essential to the operations of the operating
13 companies so their sale is appropriate at this time.

14
15 63. There are also a number of potential adjustments to the asset valuations which,
16 collectively, have been referred to at the hearing as the “disputed funds”.

17
18 64. The Trustee is currently holding USD \$580,806.48 subject to various
19 undertakings. This is the so called “UFJ deposit”. One of the operating
20 companies, Essential, obtained a credit facility from UJF Bank (Switzerland)
21 Limited in 1994 (before the Trust was settled). Mr. Fung provided his
22 personal guarantee to the bank to obtain this facility. Joan then caused
23 Essential to transfer HKD \$10,000,000 of Essential’s money to Mr. Fung as
24 “security” for the personal guarantee. Mr. Fung alleges that he is the

1 beneficial owner of these funds; Ferrier Hodgson considers that the funds
2 belong to Essential. The funds have been transferred to the Trustee on its
3 undertaking that it would not dispose of or dissipate them until the question of
4 ownership is resolved by consent or Court order. Neither claimant has
5 commenced legal proceedings regarding these funds.

6
7 65. The so called “Calyon deposit” is similar. Essential obtained another credit
8 facility in 1994, again upon the security of Mr. Fung’s personal guarantee.
9 This credit facility has also been paid in full. As with the UFJ deposit, Joan
10 caused Essential to pay the sum of USD \$653,010.80 to Mr. Fung, who now
11 claims beneficial ownership of that money. Ferrier Hodgson considers that the
12 money belongs to Essential. This sum is lodged with the Court pursuant to an
13 order of June 30, 2005. Neither party has commenced legal proceedings as
14 yet.

15
16 66. Mr. Fung is at liberty to apply if he still claims an entitlement to the UFJ and
17 Calyon deposits. If he has not done so after 30 days, the Trustee should return
18 the two sums in question to Essential.

19
20 67. Joan, Robert, and Mr. Fung have withdrawn money from Essential at various
21 times between March, 2001 and March, 2006. These amounts are recorded in
22 the Essential ledger as “drawings” by the individuals concerned and have been
23 re-allocated annually to Asia Link, a subsidiary of Butter. There is no
24 evidence to show whether these amounts have been repaid; Asia Link keeps

1 no records at all. Given the lack of available evidence, the Trustee (with the
2 benefit of legal advice) has decided not to pursue an action for the return of
3 these amounts.

4

5 68. In August, 1993 Mr. Fung withdrew HKD \$10,000,000 from Enta; since Enta
6 had insufficient funds at the time, HKD \$9,000,000 was deposited into its
7 account from an unknown source. The withdrawn funds were eventually
8 distributed to the majority beneficiaries. The Trustee has now received legal
9 advice that the limitation period for commencing an action for these funds has
10 passed.

11

12 69. Mr. Fung has said that he withdrew a further HKD \$6,000,000 around 1993
13 and gave HKD \$4,000,000 of that to Robert and HKD \$2,000,000 of that to
14 Joan. Joan has acknowledged receiving that amount. Joan has repaid the
15 HKD \$2,000,000 to the Trust. She said she thought it was a gift and did not
16 know that it emanated from Trust assets. There is no documentation available.
17 The Trustee has decided not to sue for the return of the money given to Robert
18 owing to a lack of evidence and because the claim may be time barred.

19

20 70. Joan has advised the Trustee that at some time prior to 2005 the sum of CAD
21 \$1,166,921 was deposited at Credit Lyonnais in the name of Mr. Fung. This
22 money came from one of the Trust entities. Mr. Fung denies that any such
23 deposit was made in his name. Ferrier Hodgson have not seen any

1 documentation at all concerning this transaction. The Trustee has resolved not
2 to pursue an action for the return of this amount.

3

4 71. In 1994 and 1995 Joan withdrew money from Merry Management for the
5 purchase of various shares. The shares were purchased through her own
6 personal securities trading account but the amounts withdrawn and the profit
7 made through trading was eventually returned to Merry Management. The
8 Trustee does not intend to advance any claim with respect to these
9 transactions.

10

11 72. In October, 2004 Joan invested HKD \$4,672,000 in the Metropolitan Youth
12 Choir. There is one other shareholder, a Mr. Ignatius Ho. Ferrier Hodgson
13 has made extensive efforts to seek “clarification” of this investment without
14 success. The Trustee is of the view that this asset cannot be realized. The
15 money came initially from Digital Shanghai, one of the operating companies.

16

17 73. Five of the transactions referred to above - the “drawings”, the withdrawal
18 from Enta, the payments to Robert and Joan around 1993, the deposit at Credit
19 Lyonnais, and the investment in the Metropolitan Youth Choir – may need to
20 be taken into account upon a final distribution to the beneficiaries. The
21 evidence and argument have not been sufficiently focused upon these

1 transactions to permit me to reach a conclusion about them. The Trustee is at
2 liberty to apply on this question.

3

4 74. All parties are at liberty to speak to costs.

5

6 Dated this 23rd day of May, 2011

7

8

9 Henderson, J.
10 Judge of the Grand Court