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CAUSE NO. 453 of 2004



IN THE GRAND COURT OF THE CAYMAN ISLANDS
IN THE MATTER of the Circle trust dated 8th December 2000
AND IN THE MATTER of the Trusts Law (2001 Revisions)

BETWEEN: **HSBC INTERNATIONAL TRUSTEE LIMITED**

PLAINTIFF

AND:

- | | | |
|-----|------------------------|----------------|
| (1) | WONG KIT WAN | (Madame Wong) |
| (2) | FUNG MEI LIN | (Joan) |
| (3) | FUNG MEI YEE | (Mei Yee) |
| (4) | FUNG KWOK KEUNG | (Terence) |
| (5) | FUNG HON KEUNG | (Robert) |
| (6) | FUNG KWONG FAT | (Mr. Fung Sr.) |

DEFENDANTS

Appearances:

Mr. N. Timms and Ms. Z. Robertson, for the Plaintiff
Mr. A. Fletcher, Q.C. and S. Barrie for Fung Kwok Keung (1st, 3rd, and 4th Defendants)
Mr. T. Lowe and Ms. C. Bridges for Fung Mei Lin (2nd Defendant)
Mr. G. Giglioli for Fung Hon Keung (5th Defendant)
Ms. Warnock-Smith, Q.C. and Ms. M. Crinis for Fung Kwong Fat (6th Defendant)

Before: Mr. Justice Sanderson

Hearing Date: April 16, 17, 18, 19, and 20, 2007

REASONS FOR JUDGMENT



I. INTRODUCTION

1. There are five issues before the Court for determination.

1. On October 12, 2004, one of the Beneficiaries of the Circle Trust, Terence Fung (the fourth Defendant), signed a Deed which stated in part:

“The Disclaimer hereby revocably disclaims all his interest in the Trust.”

Terence Fung has since revoked this Disclaimer of Interest and seeks to again be a Beneficiary. Is he entitled to revoke his Disclaimer of Interest?

2. If Terence Fung’s Disclaimer of his interest is not revocable, then alternatively is it void, and if void, has Terence Fung remained a Beneficiary throughout?
3. If the Deed of Disclaimer is neither revocable nor void, and therefore Terence is not a Beneficiary, is it a proper exercise of power for the Trustee to rename him as a Beneficiary pursuant to the terms of the Trust Deed?
4. Is Mr. Fung Sr. (the sixth Defendant), as Protector, entitled to participate in the upcoming hearing which will consider whether or not the operating companies indirectly owned by the Trust, should be sold or liquidated?
5. Is Mr. Fung Sr. entitled to be paid for services he provides to the operating companies as managing director, or is he precluded as Protector from receiving a salary?

II. ISSUE 1 IS TERENCE ENTITLED TO REVOKE HIS DISCLAIMER OF INTEREST

2. The Plaintiff is the Trustee of a Family Trust known as the Circle Trust. Defendants one to five were Beneficiaries under the Trust. The sixth Defendant (Mr. Fung Sr.) initially provided the assets which were placed in the original family trust and ultimately in the Circle Trust. He was appointed Protector of the Trust in 2004.
3. The first Defendant, Madam Wong, is Mr. Fung Sr.’s, wife. The second to fifth Defendants are the children of Mr. Fung Sr. and Madam Wong.
4. For the past several years there has been an ongoing and escalating dispute between

various family members. Mr. Fung Sr., Madam Wong, Mei Yee (the third Defendant) and Terence (the fourth Defendant) were unhappy with the Plaintiff's administration of the Trust. Madam Wong, Mei Yee and Terence appointed Mr. Fung Sr. as Protector in 2004, pursuant to the terms of the Trust Deed.

5. Mr. Fung Sr. attempted to work with the Trustee for approximately four months before he decided to remove HSBC as the Trustee and appoint his son Terence as the Trustee. For Terence to be appointed Trustee, it was first necessary for him to disclaim any interest in the Trust in which he had been a Beneficiary. The terms of the Trust Deed prevented a Beneficiary from acting as a Trustee.

6. On October 12, 2004, Terence signed a Deed which provided in part:

"2. DISCLAIMER

Pursuant to the powers conferred upon him by Clause 3(b) of the Settlement and all other powers in that behalf (if any) hereunto enabling him the Disclaimer hereby revocably disclaims all his interest in the Trust (but so that no revocation of this disclaimer may be made at any time when the Disclaimer is the Trustee or a Trustee) with effect from the date hereof." (emphasis added)

7. Clauses 3(a) and 3(b) of the Trust Deed stated;

"(a) The Trustee may by deed revocable or irrevocable before the Vesting Date declare that any person within the definition of Beneficiaries hereunder shall cease to be a Beneficiary and as from the date upon which such deed shall take effect such person shall cease to be a Beneficiary for all purposes of this Deed.

(b) Any Beneficiary being of full age shall have the right by deed before the Vesting Date to disclaim all or any of his interest in the trusts declared by and contained in this Deed and upon execution and delivery of such deed by the Beneficiary to the Trustee, the Beneficiary shall thenceforward cease to be a Beneficiary for all purposes of this Deed or an object of a discretionary power under this Trust to such extent as specified in the deed."

8. On October 13, 2004 Mr. Fung Sr. (as Protector) appointed Terence the Trustee of the Circle Trust. The second Defendant (Joan) and the fifth Defendant (Robert) initially took the position that the Deed of Disclaimer was ineffective because it was revocable. They took the position that he was still a Beneficiary and therefore, not entitled to be the

Trustee because the terms of the Trust Deed prohibited a Beneficiary from acting as Trustee. As a result of the objections of Robert and Joan to HSBC's removal as Trustee and the appointment of Terence in its place, the Trustee applied to the Court for directions.

9. Mr. Fung Sr. says that as a result of Joan and Robert's objection to the appointment of Terence as Trustee, he decided to appoint Barclay's Bank as a new corporate Trustee. It appears there was some difficulty in achieving this and it did not occur. In any event, on June 27, 2005, Terence executed a document described as a Deed of Revocation of Disclaimer. It provided in part:

“WHEREAS:

(D) The Vesting Date has not yet occurred, Kwok Keung Fung has given notice of his decision not to act as Trustee of the Trust and now wishes to revoke the disclaimer effected by the Deed of Disclaimer. ...

NOW THIS DEED WITNESSES as follows:

2. REVOCATION OF DISCLAIMER

Pursuant to the powers conferred upon him by Cause 3(b) of the Settlement and all other powers in that behalf (if any) hereunto enabling him Kwok Keung Fung hereby revokes the disclaimer of all his interest in the Trust effected by the Deed of Disclaimer.”

10. There were suggestions by Joan and Robert that this Deed was not effective to revoke the prior Disclaimer because Terence was still potentially the Trustee at the time he signed this first Disclaimer.
11. On February 16, 2007, HSBC, Terence, and Mr. Fung Sr. executed a Deed of Removal and Appointment of Trustee for the Circle Trust. It;
 - (i) removed and discharged Terence as Trustee, and
 - (ii) appointed HSBC to be the sole Trustee.
12. On February 20, 2007 Terence signed a second Deed of Revocation. It provided that:

“NOW THIS DEED WITNESSES AS FOLLOWS:

2. If and to the extent that by the Disclaimer Deed Terence effectively disclaimed all or any of his interest as a Beneficiary of the Trust and if such disclaimer remains operative then by this present Deed Terence now REVOKES such disclaimer pursuant to Clause 2 of the Disclaimer Deed, with the intent that such revocation should take effect immediately.

13. It is not disputed that Terence has now revoked his Deed, in which he disclaimed any interest he had in the Circle Trust. The question is whether he is allowed to revoke that Disclaimer he made on October 12, 2004.
14. Joan and Robert argue that he is not entitled to do so. They say that he is not entitled to do so under the terms of the Trust Deed or at common law. They submit that Clause 3(b) of the Trust Deed does not authorize a Disclaimer of Interest to be made revocably. They argue that word revocable is not used in Clause 3(b), which is to be contrasted with Clause 3(a) which gives the Trustee the power by deed “revocable or irrevocable”, to declare any person to cease to be a Beneficiary. They submit the draftsman expressly provided that the Trustee could declare a person shall cease to be a Beneficiary and could make that declaration revocable or irrevocable. They say the decision of the draftsman to exclude these words from Clause 3(b) indicates the intention was not to allow a disclaimer of interest to be made revocably.
15. Terence, Mr. Fung Sr., Mei Yee, and Madam Wong refer to Clause 16(e) of the Trust Deed which says:

“The Protector for the time being may at any time or times and from time to time before the Vesting Date by deed irrevocable renounce and release any power conferred on the Protector by this Deed and upon such renunciation and release such power shall be deemed to be at an end and no longer exercisable by the Protector.” (emphasis added)
16. They argue that the draftsman expressly stated that the Protector could only renounce his powers irrevocably. They say if the draftsman intended the Beneficiary was only entitled to disclaim their interest irrevocably, then Clause 3(b) would have said so in language similar to Clause 16(e).

17. Clause 3(b) can be read consistently with both Clauses 3(a) and 16(e) because Clause 3(b) provides in part,

“.....the Beneficiary shall thenceforward cease to be a Beneficiary for all purposes of this Deed or an object of a discretionary power under this Trust to such extent as specified in the deed”. (emphasis added)

The word deed at the end of the clause refers to the Deed of Disclaimer and not the Trust Deed, which is capitalized and a defined term. Therefore, the extent of the disclaimer is as specified in the Disclaimer Deed itself.

18. Terence, Mei Yee, and Madam Wong say that the words “to such extent as specified in the deed” apply to both phrases immediately preceding it, namely:

- (a) the Beneficiary shall thenceforth cease to be a Beneficiary for all purposes of this Deed; or
- (b) the Beneficiary shall cease to be ... an object of a discretionary power under this Trust.”

19. Joan and Robert submitted that the words “to such extent as specified in the deed” only apply to the words “an object of a discretionary power under this Trust”. The construction argued by Joan and Robert is, in my view, a more tortured and less obvious construction than Terrence’s when the Trust Deed is considered as a whole.

20. The Clause is not ideally worded. However, reading the document as a whole, it is apparent that the draftsman intended that;

- (i) the Trustee has the power by deed to remove a Beneficiary and that decision can be revocable or irrevocable (Clause 3(a));
- (ii) the Beneficiary has by deed a right to disclaim all or any of his interest ... to such extent as specified in the Deed of Disclaimer (Clause 3(b)); and,
- (iii) the Protector is entitled by deed to renounce his power but only irrevocably (Clause 16(e)).

21. I do not accept that Clause 3(b) should be interpreted in the manner suggested by Joan. Clause 3(b) provides that a Beneficiary has the right to disclaim any or all interest in the Trust. For example, a Beneficiary would be entitled to disclaim any interest in being considered for receipt of income from the Trust for a fixed period of time (say, two years) on the basis that he or she did not need the money for that period and would rather see it go to the other Beneficiaries. That would be disclaiming an interest in part of the Trust, i.e. income for a fixed period, but not other rights such as, for example, the right to elect a Protector.

22. Pursuant to Clause 3(b) a Beneficiary may cease to be:

- (i) a Beneficiary for the purpose of this Deed; or
- (ii) an object of a discretionary power

to the extent as specified in the Deed of Disclaimer itself. The use of the words “disclaim any or all” of his interest should be remembered when interpreting the words “to such extent as specified in the Deed”. That is, the Beneficiary is entitled to disclaim all or any interest in the Trust as he or she specifies in the Deed of Disclaimer. To the extent specified in the Deed, the Beneficiary then ceases to be a Beneficiary or an object of discretionary power.

23. This interpretation makes sense within the context of the document as a whole, is the most obvious interpretation, gives the words their plain and ordinary meaning, and is not inconsistent with either Clause 3(a) or Clause 16(e).

24. As a matter of construction, Terence was entitled to make a revocable disclaimer of his interest in the Trust and to later revoke that disclaimer pursuant to the terms of the Trust Deed. Terence’s revocation of his Disclaimer is, therefore, valid and he is entitled to be a Beneficiary effective February 17, 2007.

25. Given my conclusion on the construction of the Trust Deed, and Terence’s right to revoke

his Disclaimer pursuant to the terms of the Trust Deed, it is not necessary to consider the general common law right to revoke a Disclaimer, when there is no language permitting it. I also understood from Mr. Lowe, that if the Court concluded that Terence was entitled, as a matter of construction of the Trust Deed, to revoke his disclaimer then a consideration of the common law rights would not be necessary.

III. ISSUE 2 ALTERNATIVELY, IF TERENCE IS NOT ENTITLED TO REVOKE HIS DISCLAIMER OF INTEREST, IS HIS DISCLAIMER VOID?

26. In view of the Court's finding on the ability to revoke the Disclaimer, it is not necessary to decide the second issue.

IV. ISSUE 3 IS IT A PROPER EXERCISE OF POWER FOR THE TRUSTEE TO NAME TERENCE AS A BENEFICIARY?

27. The Trustee was prepared to reinstate Terence as a Beneficiary pursuant to Clause 5(c) of the Trust Deed, which states:

“The Trustee may in its absolute discretion at any time by deed appoint additional persons not being members of the Excluded Class to become Beneficiaries.”

28. Robert opposed the Trustee's re-appointment of Terence as a Beneficiary. Mr. Giglioli argued that the Trustee had not given due consideration to all of the facts. He said that all of the present problems have been caused by Mr. Fung Sr. and Terence, attempting together to get back the Trust assets. Mr. Giglioli raised the concern that if Terence was restored as a Beneficiary, that would shift the balance of power against Robert and Joan, and therefore should not be permitted.

29. The Trustee has been managing this Trust for several years and is intimately acquainted with all of the parties to this dispute, their allegations, counter-allegations, legal manoeuvrings and strategies. I am satisfied that the Trustee has been provided with all relevant information to enable it to make an informed and prudent decision, whether Terence should be reinstated as a Beneficiary.

30. A trustee's duty in the exercise of a discretion is to exercise it for its proper purpose with due consideration to relevant matters and excluding irrelevant matters (*Edge v. Pensions Ombudsman [2000] Ch 602*). The Court will generally sanction the decision of a trustee unless it is one that no reasonable trustee (properly instructed as to the meaning of the trust deed) could take (*Public Trustee v. Cooper [2001] 1 WLTR 901 at 925*).
31. Mr. Lowe argued on behalf of Joan that as a matter of construction of Clause 3(b) it was not possible to reappoint Terence under Clause 5(c). His submission was based on the construction of Clause 3(b) previously discussed. Namely, that Terence by his Deed of Disclaimer has removed himself as an object of the discretionary power to be appointed under Clause 5(c). That construction has previously been rejected for the reasons given.
32. If I am incorrect in the proper construction of Clause 3(b) of the Trust Deed, then, I am satisfied that the Trustee has considered all of the relevant factors and its decision to reinstate Terence as Beneficiary is one that a reasonable trustee could take. Accordingly, I conclude that if the Trustee adds Terence as a Beneficiary, it would be a proper exercise of its discretion.

V. ISSUE 4 IS MR. FUNG SR. ENTITLED TO PARTICIPATE IN THE UPCOMING COURT PROCEEDINGS?

33. Mr. Fung Sr. was appointed Protector in 2004. On March 7th, 2006 Henderson J. decided that the Beneficiaries had the power to appoint him Protector in light of the fact that no Protector had been appointed at the time the Trust Deed was executed. Henderson J. also concluded that this power was reviewable upon an allegation of irrationality, absence of good faith or impropriety of purpose. No such challenge is currently before the Court for determination.
34. The Protector's powers and duties are set out in Clauses 16 and 17 of the Trust Deed. The relevant clauses are 16 (j) and 17 which state;

“16. THE PROTECTOR

...

- (j) The Protector shall be entitled at any time and from time to time:
 - (i) upon request to be provided with a copy of this Deed, and any deed varying the terms of this Deed, and any deed relating to the appointment or removal of Trustees hereof; and
 - (ii) to require the Trustee to provide the Protector with the accounts for the Trust made up to such period as the Protector shall reasonably require.

17. PROTECTOR'S RIGHT TO REMOVE AND APPOINT TRUSTEE

The Protector shall have the power:-

- (a) to remove any Trustee at any time and from time to time; and
- (b) subject to Clause 19(d) of this Deed, to appoint a new trustee incorporated or resident in any part of the world; and
- (c) subject to Clause 19(d) of this Deed, to appoint a trustee to act as sole trustee for such part of the Trust Fund as shall be located in any place in the world to the exclusion of the Trustee in regard to such part of the Trust Fund as is located in such place in which event the trustee appointed in relation to such funds shall in all respects be subject to the provisions in this deed set forth and contained

PROVIDED THAT the removal of a sole Trustee shall not be effected otherwise than simultaneously with the appointment of a new Trustee in its place. Such power of appointment of new Trustee shall extend to the appointment of a new Trustee in the event of a Trustee ceasing for any reason whatsoever to be a Trustee hereof and shall also extend to the appointment of an additional Trustee up to any number subject to such limit (if any) as may for the time being be imposed by law.

- 35. In summary the Protector has the right to call for production of the Trust Deed and any amendments thereto, documents relating to the appointment and removal of Trustees, the accounts for the Trust and the power to remove and appoint Trustees.
- 36. Mr. Fung Sr. wants to participate in the upcoming court proceedings where the issue to be considered is whether the operating companies which are indirectly owned by the Trust, should be sold or liquidated. He is supported by Madam Wong, Terence and Mei Yee. His participation is opposed by Robert and Joan.

37. Ms. Warnock-Smith submitted on behalf of Mr. Fung Sr.:

1. The Court's decision whether to allow him to participate is discretionary;
2. His participation in the proceedings would be helpful to the Court because of his intimate knowledge of the operating companies and the fact that he is now to be their general manager;
3. Although the Protector's powers or the scope of his supervisory role is not to be in issue before the Court, he is nevertheless in a fiduciary role to the Trust and in order to discharge his function properly he needs to know what is going on;
4. The Trustee has been asked by the Settlor of the Circle Trust to take into account the wishes of Mr. Fung who was the original economic settlor;
5. His participation will not prejudice Robert and Joan; and
6. His participation is supported by 3 of the 5 Beneficiaries.

38. Joan and Robert oppose Mr. Fung's participation on the basis:

1. Primarily that it is not necessary for any legitimate exercise of the Protector's rights or powers;
2. It will unnecessarily increase the duration and expense of the subsequent hearing; and
3. Any views that Mr. Fung Sr. has or may wish to express to the Court can be done by filing affidavit evidence through the Trustee, or the other Beneficiaries if they consider it necessary.

39. No authorities were cited to me that were directly on point. There are examples of cases where Protectors did participate in Judicial Proceedings where there was no issue dealing with their powers or authority. However, in those cases the Protector's standing does not

appear to have been argued (See for example, *In the Matter of the Z Trust* [1997] *CILR*. 248). There are also cases where the Protector's powers or rights or obligations were at issue in the Court proceedings and the Protector participated in them (See for example, *In the matter of Star I and Star II Trusts*, Supreme Court of Bermuda July 13, 1994).

40. In this case, the quarrel is between the Beneficiaries as to what should happen to the operating companies. There is no issue involving the power, authority, rights, duties or conduct of the Protector. Any interest he has in this case is either;
 1. as Managing Director of the operating companies - which should not be properly considered;
 2. for the welfare of the Trust assets - in which case his view can be adequately expressed through evidence; or
 3. to take sides with one of the disputing Beneficiaries.

41. I conclude that Mr. Fung Sr. has no legal right to participate in the next hearing. I recognize, however, that the Court has the discretion to allow his appearance and hear his submissions.

42. The litigation and other legal costs associated with the various disputes are very significant. They are more than the operating companies earn annually. I do not consider it necessary or desirable to add to those legal costs by allowing the Protector to participate in the upcoming hearing considering that he has no legal interest in the proceedings.

43. He is entitled to attend personally or through counsel but is not entitled to make submissions. Any evidence of the Protector that the Trustee or other Beneficiaries wish to file can be done through them.

44. If Mr. Fung Sr. chooses to engage counsel to attend the hearings to keep himself apprised, then the legal costs associated with that attendance will not have to be paid from the Trust Fund.

45. The interest of all of the Beneficiaries and the Trustee are adequately represented. All matters of significance can be thoroughly argued by counsel present and properly considered by the Court.

VI. ISSUE 5 IS MR. FUNG SR. ENTITLED TO BE PAID FOR HIS WORK AS MANAGING DIRECTOR OF THE OPERATING COMPANIES?

46. Clause 33(a) of the Trust Deed states:

“Subject only to Clause 33(b), but notwithstanding any other provision of this Deed, no power conferred by this Deed shall be exercisable, and no provision shall operate so as to allow the Trust Fund or its income to be payable to or applicable for the benefit of any member of the Excluded Class in any circumstances whatsoever.”

47. Mr. Fung Sr. is named as a member of the Excluded Class, in the fifth Schedule. In the Court’s opinion given on March 20, 2007, I concluded that Joan should probably be removed as Managing Director of the Operating Companies and that Mr. Fung Sr. should replace her. Joan now objects to Mr. Fung Sr. being paid any salary or income for his services as Managing Director because he is a member of the Excluded Class. When Joan occupied that position she was paid approximately US\$25,000 per month. It was proposed that Mr. Fung Sr. would be paid a similar amount.

48. The Trustee, through various shareholdings, indirectly owns the company or companies that own or control the Operating Companies. The narrow question is whether the words of Clause 33 prevent an Excluded Person from being employed by one of the companies that is owned through the shareholdings by the Trustee.

49. I am told there are no reported cases directly on point. The cases that were referred to me such as *Norman Clyde Oakes v. The Commissioner of Stamp Duties of New South Wales*,

[1954] AC 57, involved construction of taxing statutes and what constituted the settled property and whether the Settlor received a benefit from the trust property. *Oaks (supra)*, was not a case involving the Trustee owning shares in a corporation. The Privy Council in *Oaks* concluded that the reservation of the right to remuneration of the Trustee, would constitute a benefit within the meaning of the taxing statute if that remuneration was paid from the trust property.

50. Clause 33(a) was almost certainly included in the Trust Deed to prevent Estate Tax in Hong Kong. The evidence of Hsu Kam Mei Fiona, of HSBC, was that the Trust was set up with the Hong Kong Estate Duty in mind. The Trust Deed should, therefore, be construed with that intention in mind (see *The Interpretation of Contracts* by Kim Lewis, Q.C., 2nd Ed., Sweet & Maxwell, 1997 at 3.04).
51. The logic of the taxing legislation and the resulting exclusion clauses contained in Trust Deeds was discussed by Lord Hoffman in *Ingram v. IRC*, [2000] 1 AC 293 HL at 305:

What, then, is the policy of section 102? It requires people to define precisely the interests which they are giving away and the interests, if any, which they are retaining. Once they have given away an interest they may not receive back any benefits from that interest. In *Lang v. Webb*, 13 C.L.R. 503, 513 Isaacs J. suggested that the policy was to avoid the "delay, expense and uncertainty" of requiring the revenue to investigate whether a gift was genuine or pretended. It laid down a rule that if the donor continued to derive any benefit from the property in which an interest had been given, it would be treated as a pretended gift unless the benefit could be shown to be referable to a specific proprietary interest which he had retained. This is probably the most plausible explanation and accepting this as the policy, I think there can be no doubt that the interest retained by Lady Ingram was a proprietary interest defined with the necessary precision.

52. It is not argued that Mr. Fung Sr. is going to receive any portion of the Trust Fund. No money is proposed to be paid from the Trust Fund, which is a defined term. Nor has he reserved any property for himself. Rather, Joan argues that Mr. Fung Sr. is being paid from the Trust Income. She says that the income should mean income that can actively or passively be controlled through the shareholding.


53. Mr. Fung Sr. does not own any shares and cannot, in any way, control the Operating Companies. The shares are owned by the Trustee. As a shareholder it can elect directors but it is up to the directors as fiduciaries to act in the best interests of the company. The directors are responsible for the running of the companies. Through management the company contracts with a variety of different employees to serve those companies. The wages that are paid to employees are not Trust assets. The money that those employees receive are not Trust income. They are corporate expenses.
54. Mr. Fung has not reserved any right to earn fees from the Operating Companies. There is no reservation of property in his favour. The decision to employ him must be made by the directors who will be elected by the shareholders. Mr. Fung Sr. cannot force or in any way compel his employment or the amount of his remuneration.
55. The income to the Trust from the Operating Companies consists of the dividends presumably paid from either the net profits or retained earnings of the Companies. The revenues to the Companies owned by the Trustee are not income to the Trust. Further, there has been no suggestion that the income to the Trust will be affected in any way by the employment of Mr. Fung Sr. Indeed, so long as he is paid a reasonable commercial salary, the income to the Trust will not be affected.
56. If potential dividends were being diverted from payment to the Trust, then it might be argued that Mr. Fung is receiving Trust Income under the language:

“No provision shall operate to allow the Trust Funds ... income to be payable to or applicable for the benefit of any member of the Excluded Class in any circumstances whatsoever.” (emphasis added)

57. My conclusion that the proposed payment to Mr. Fung Sr. does not offend the purpose of the taxing legislation is somewhat supported by the language of the Encyclopaedia of Forms and Precedents, 5th Ed., 2001 Reissue, Right Honourable Lord Millett P.C. at p. 291 where it states:

“When the settlor/trustee is allowed to retain fees under the deed it is arguable that he has reserved a benefit in the trust assets within the ruling in *Oakes v. Comr of Stamp Duties of New South Wales*. The Inland Revenue has, however, indicated that it will not take this point so long as the director’s remuneration is on reasonable commercial terms” (emphasis added.)

58. The most likely reason for the Inland Revenue’s position is that so long as the remuneration is reasonable and paid for a required service it would have no affect on the Trust assets or income. I conclude that the proposed payment is not a reservation of the Trust property nor a payment out of the income of the Trust. Such payment does not offend the purpose of the taxing legislation in general. Construing Clause 33(a) in that context leads me to conclude that Mr. Fung is entitled to be paid a reasonable remuneration for his employment as General Manager. However, the contract of employment should provide that it may be determinable on not more than 30 days notice because of the unusual circumstances present. Namely his appointment might be varied or ended within a relatively short period of time, depending on the outcome of subsequent proceedings.
59. These reasons are intentionally short. I have decided only those points necessary to deal with in the matters in issue. Their brevity is not intended to reflect on the thoroughness of counsel’s legal and evidentiary submissions, all of which were carefully considered.



DG Sanderson J
Judge of the Grand Court



Dated: May 25, 2007.