IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 111

Originating Summons No 725 of 2016

Between

Carolyn Fong Wai Lyn

… *Plaintiff*

And

(1) Linda Kao Chai-Chau
(2) Airtrust (Singapore) Pte Limited
(3) HSBC Trustee (Singapore) Limited

… *Defendants*

JUDGMENT

[Trusts] — [Express trusts]
[Trusts] — [Beneficiaries] — [Remedies]
[Powers] — [Exercise]

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Fong Wai Lyn Carolyn
v
Kao Chai-Chau Linda and others

[2017] SGHC 111

High Court — Originating Summons No 725 of 2016
Steven Chong JA
25 January; 2, 23 February 2017

23 May 2017 Judgment reserved.

Steven Chong JA:

Introduction

1 Airtrust (Singapore) Pte Ltd ("Airtrust"), the second defendant, was started in 1972 by the late Peter Fong. By the time he passed away in April 2008, Airtrust had developed into a successful company. Unfortunately since then, its principal activity has been litigation, though on this occasion its involvement is only as a nominal defendant. Airtrust, Peter Fong's estate, related parties and the directors of Airtrust have been embroiled in numerous legal proceedings, most of which have some bearing on the tussle for control of Airtrust. Tragically as a consequence of the interminable disputes, Airtrust's business dealings have practically reached a standstill although it remains asset-rich. Receivers and managers, who were appointed by consent in January 2012 to manage and carry on the business of Airtrust, have since

been discharged. This is hardly surprising given that Airtrust is now dormant with no significant business to be managed.

2 The numerous disputes between the various factions have to-date already generated at least seven reported decisions: *Hong Alvin v Chia Quee Khee* [2011] SGHC 249; *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another* [2011] 3 SLR 980; *Lee Pei-Ru Alice and another v Airtrust (Singapore) Pte Ltd* [2013] SGHC 259; *Airtrust (Singapore) Pte Ltd v Kao Chai-Chau Linda and another suit* [2014] 2 SLR 673; *Airtrust (Singapore) Pte Ltd v Kao Chai-Chau Linda* [2014] 2 SLR 693; *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn and others* [2016] 1 SLR 21; and *HSBC Trustee (Singapore) Limited v Carolyn Fong Wai Lyn and others* [2016] SGHC 31. From the list of pending suits, this catalogue of reported decisions is likely to accumulate.

3 The present action was commenced by Carolyn Fong Wai Lyn ("Ms Fong"), one of Peter Fong's daughters and a beneficiary of the estate of Peter Fong ("the estate"). The subject matter of the action relates to 600,000 ordinary shares in Airtrust (approximately 6% of total shareholding in Airtrust)[1] held on trust by the first defendant, Linda Kao Chai-Chau ("Ms Kao"), formerly the managing director of Airtrust, under a trust deed dated 20 January 2000 ("the 2000 Trust Deed").[2] In essence, Ms Fong seeks a declaration that those shares are held on trust by Ms Kao for the estate. Ms Kao in the course of the dispute offered different and conflicting case theories as to the fate of those shares, though ultimately her final landing point – which only emerged at the hearing itself – was that those shares are held on trust by her as absolute gifts by Peter Fong to the other existing shareholders in proportion to their shareholding as at the date of Peter Fong's demise. It is

1 Affidavit of Carolyn Fong Wai Lyn dated 18 July 2016 ("CF 1st Affidavit"), para 17.

2 CF 1st Affidavit, exhibit "CF-1", Tab 2.

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common ground that the substantive merits of the declaration sought are to be determined as a matter of construction of the 2000 Trust Deed.

4 The application was met by a threshold objection by Ms Kao that the application, in the absence of "special circumstances", should have been brought by the executors of the estate, HSBC Trustee (Singapore) Limited ("HSBC"), instead. HSBC has however been added as the third defendant and it supports Ms Fong's application. This judgment will examine the underlying rationale of the rule requiring such actions to be brought by the executors and whether the reasons which compelled Ms Fong to make this application in place of the executors qualify as "special circumstances".

Issues

5 In this application ("OS 725"), Ms Fong prays for a declaration that:

(a) the 600,000 ordinary shares of Airtrust registered in Ms Kao's name are held on trust for the estate; and

(b) Ms Kao is obliged to comply with any direction from the executors of the estate as regards, *inter alia*, the exercise of the voting rights attached to the trust shares and the disposal of the trust shares.

6 There are hence three issues before the court:

(a) Does Ms Fong in her capacity as beneficiary of Peter Fong's estate have *locus standi* to seek a declaration on behalf of the estate?

(b) Who beneficially owns the trust shares?

(c) If the trust shares are held on trust for the estate, is Ms Kao obliged to comply with the executors' directions as regards the

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exercise of the voting rights attached to the trust shares and the disposal of the trust shares?

Locus standi

The law

7 Ordinarily, the proper party to obtain a remedy on behalf of and for the benefit of the estate is the executor. Since a beneficiary has no vested equitable interest in an unadministered estate but only a right to have it administered properly, he or she would, in commencing any action on behalf of the estate, be seeking to assert the *estate's* right of property (see *Wong Moy (administratrix of the estate of Theng Chee Khim, deceased) v Soo Ah Choy* [1996] 3 SLR(R) 27 ("*Wong Moy*") at [11]). All parties agreed that the purpose of confining the right of action to the executor or trustee is to avoid multiplicity of suits and to control unilateral actions by beneficiaries. This in turn protects the estate from being subjected to the costs of divergent actions (see *Sharpe v San Paulo Railway Co* (1873) LR 8 Ch App 597 at 609–610). The rule also avoids vexing third parties with multiple suits (see *Alexander v Perpetual Trustees WA Limited* [2004] HCA 7 ("*Alexander v Perpetual Trustees WA Ltd*") at [55]).

8 It is widely accepted that in special circumstances, the court will permit an action to be brought by a beneficiary on behalf of the estate (*Wong Moy* at [12]). The obvious situation in which it would be appropriate for the beneficiary to have conduct of proceedings is where the executor's position has been compromised in some way. Thus in *Joseph Hayim Hayim and another v Citibank NA and another* [1987] AC 730, Lord Templeman summed up the authorities as follows (at 747C and 748F):

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> The authorities … only demonstrate that when a trustee commits *a breach of trust or is involved in a conflict of interest and duty or in other exceptional circumstances* a beneficiary may be allowed to sue a third party in the place of the trustee. But a beneficiary allowed to take proceedings cannot be in a better position than a trustee carrying out his duties in a proper manner.
>
> …
>
> These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace *a failure, excusable or inexcusable, by the trustees in the performance of the duty owned* [*sic*] *by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate*. …
>
> [emphasis added]

9 "Special circumstances" are however not confined to an executor's default. It is not a closed category and is a fact-specific inquiry. A review of the authorities will demonstrate that the courts have adopted a flexible approach to "special circumstances", taking cognisance of factors such as the executor's unwillingness or inability to sue, the merits of the case, and the potential loss to the beneficiaries. In *Wong Moy*, the deceased died intestate. The appellant, his lawful widow, sought to institute an action *qua* beneficiary against the respondent, the deceased's partner from a void marriage, to claim the proceeds of properties allegedly belonging to the estate. She could not bring an action *qua* administratrix because the grant of administration could not be extracted without clearance from the Commissioner of Estate Duty. This clearance could not be obtained without an estate duty affidavit specifying the properties belonging to the estate which were being held by the respondent, from whom such information was not forthcoming. After a comprehensive review of the authorities, the court explained that "special circumstances" are wider than an executor's default and should be evaluated in the light of all the circumstances of the case:

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> 24 … In our opinion, special circumstances are not confined solely to cases where the personal representative has defaulted in acting to recover the property. Such a rule would be too inflexible and may lead to injustice. For instance, there may be cases where unless the beneficiaries are allowed to initiate proceedings to protect the assets of the estate such assets would be at risk of being disposed of or dissipated by a third party. In such circumstances, it should be open to a beneficiary to apply to court for relief to protect the property, where either the representative refused or failed to act or where there was at the time no proper personal representative appointed to represent the estate …
>
> …
>
> 28 In our opinion, all the circumstances of the case should be considered, including the nature of the assets, the position of the personal representative and the reason for the default of the personal representative. It may be pertinent to see whether the circumstances made it "impossible, or at least seriously inconvenient for the representatives to take proceedings" [citing *Osborne Hilliard v Luke Eiffe* (1874) 7 LRHL 39 at 44(n)].

10 On the facts, the court found that special circumstances existed to enable the appellant to bring the action *qua* beneficiary. She had done all she could to try to preserve and protect the assets of the estate and was prevented by circumstances not within her control from extracting the grant of administration (at [35]). In other words, as putative administratrix, she was not in default but was obstructed from invoking the capacity of administratrix in commencing suit.

11 In *Re Atkinson, deceased* [1971] VR 612, the Supreme Court of Victoria held that in the absence of an indemnity from the beneficiaries, the trustee company was excused from bringing proceedings against the testator's widow to claim an interest in a farmhouse which had vested in her solely as the surviving joint tenant but which was alleged to be a partnership asset. Though not strictly a default, the decision by the trustee company not to commence the proceedings was treated as tantamount to a failure to get in the

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estate (at 617). In such a situation, the beneficiaries – in particular the testator's son – had sufficient equity to obtain a remedy on behalf of the estate, because the beneficiaries' interests "must be adversely affected" in the absence of any action and "surely cannot be defeated by the personal representative's *inactivity*" [emphasis added] (at 617).

12 Counsel for Ms Fong, Ms Kee Lay Lian ("Ms Kee"), highlighted the decision of Powell J of the Supreme Court of New South Wales in *Ramage v Waclaw* (1988) 12 NSWLR 84 ("*Ramage v Waclaw*"). The plaintiff was the deceased's sister and the universal legatee under her will. A major asset of the deceased's estate was her interest as tenant in common with the plaintiff in a dwelling-house occupied by both of them. When the deceased was aged eighty-seven, residing in a nursing house and not in good health, she transferred her interest in the dwelling-house to her children without the plaintiff's knowledge and at her daughter's inducement. Having regard to the conflicting medical reports on the deceased's mental capacity at the time of the transfer, the Public Trustee (the executor of the deceased's estate) declined to commence proceedings to set aside the transfer. Hence, the plaintiff commenced proceedings in her own name to set aside the transfer.

13 Powell J held that the plaintiff had *locus standi* to bring proceedings on behalf of the estate to challenge the validity of the transfer. The special circumstances justifying her claim to relief included the fact that the interest in the dwelling-house was the deceased's major asset; the merits of the case as the evidence suggested a *prima facie* case of undue influence; the Public Trustee's *bona fide* refusal to commence proceedings; and the fact that an asset which could markedly increase the size of the deceased's estate could be lost unless the plaintiff were allowed to proceed. In arriving at this conclusion, Powell J recognised that circumstances regarded as "exceptional" or "special"

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were not limited to cases of the trustee's insolvency or collusion between the trustee and debtor, but also included cases where the executor refused to sue (whether collusively or *bona fide*) or where there exist assets which might be recovered and which, but for such suit, would probably be lost to the estate (at 91F–93C).

14 Finally, I was referred to the Supreme Court of South Australia's decision in *Porker v Richards* [2016] SASC 98 ("*Porker v Richards*"). The parties were children of the deceased and equal beneficiaries of her estate. The first and second defendants were executors of the estate under the deceased's will. For a substantial period after the deceased's death, the first defendant resided at a property belonging to the estate pursuant to a rent agreement with the estate. After the property was sold, the plaintiff on behalf of the estate sued the first defendant for arrears of rent. Blue J opined that "[a]lthough it is said that it is necessary that there be exceptional or special circumstances, the better view is that it is sufficient that the executor or trustee is *unable or unwilling* to bring the action and the action is *meritorious*" [emphasis added] (at [88]). He stated the rule as such: "A beneficiary may sue on behalf of an estate if the executor or trustee is unable or unwilling to bring the action and the executor or trustee is joined as a co-defendant to ensure finality."

15 Blue J found it to be an appropriate case for the plaintiff to bring a derivative action as a beneficiary. First, the first defendant was an executor and was obviously unwilling to sue herself. Significantly, the second defendant, as co-executor, did not institute proceedings but supported the plaintiff's action. Finally, the action was a meritorious one (at [89]).

16 The flipside, as the High Court of Australia puts it in *Alexander v Perpetual Trustees WA Ltd* (at [55]), is that "[a]s long as the trustee is ready

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and willing to take the proper proceedings against the third person, the beneficiaries cannot maintain a suit against him". In that case, it was held that the beneficiaries of certain superannuation funds were not entitled to recover compensation from a third party because the trustees were ready and willing to take – and did in fact take – proper steps against the third party to restore the funds. The rationale of avoiding multiplicity of suits was clearly engaged. Another example of this restriction is *Foo Jee Boo and another v Foo Jhee Tuang and another (Foo Jee Seng, intervener)* [2015] SGHC 176, where George Wei J disallowed the plaintiff from suing in his personal capacity as beneficiary when it was open to him to sue in his capacity as executor; unlike in *Wong Moy*, he had full authority as executor and was in fact willing and able to sue (at [71]).

Analysis

17 Turning to the facts of the present case, in order to determine if special circumstances exist, it is vital to consider the reasons why the action was commenced by Ms Fong in July 2016 and why the executor, HSBC, did not or could not bring the action instead.

18 A fact that deserves emphasis at the outset is that HSBC supports Ms Fong's application and takes the same position that the trust shares are held on trust by Ms Kao for the estate. HSBC adopted this position in no uncertain terms at the hearing on 25 January 2017 ("the substantive hearing"). In a later affidavit dated 8 February 2017 (filed on my direction), HSBC elaborated on its view that Ms Fong's application is in the estate's best interests because it protects its interests in the trust shares; is being pursued by Ms Fong who is more familiar with the background facts; and saves costs for the estate, including investigation and litigation costs.[3]

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19 The fact that the executor agrees with the application does not automatically dispense with the need for the plaintiff to establish *locus standi*. There remains a need to show special circumstances justifying the beneficiary's action in its place so that executors are not encouraged to abdicate their responsibilities. However, once the executor's agreement has been obtained, the predominant mischief behind the *locus standi* requirement – namely to control unilateral actions by beneficiaries – would no longer be in play. Hence I am prepared to take a more generous approach in my examination of the special circumstances in this case.

Events prompting this application

20 It is common ground that the immediate objective of the application was to obtain an injunction restricting Ms Kao's exercise of the voting powers attached to the trust shares at the then-upcoming annual general meeting ("AGM") of Airtrust and that an originating process was necessary to do so. The material background facts are as follows. On 5 July 2016, the receivers and managers of Airtrust ("the R&Ms") announced that an AGM would be held on 20 July 2016 ("the 20 July AGM").[4] Ms Fong was clearly concerned that the issue of renewal of directors would be raised at the 20 July AGM as she was advised by her solicitors that the existing directors' appointments had lapsed and that a proposal to appoint new directors could be tabled at the 20 July AGM under "any other business".[5] The R&Ms were due to be discharged on 31 July 2016 and Ms Fong's application to extend the R&Ms' appointment was dismissed on 12 July 2016. Hence, the management of Airtrust would revert back to its directors. Under those circumstances, Ms Fong was worried

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3 Affidavit of Jamie Yu dated 6 February 2017 ("HSBC Affidavit"), para 3(c).

4 CF 1st Affidavit, para 16.

5 Affidavit of Carolyn Fong dated 8 February 2017 ("CF 5th Affidavit"), paras 8–9.

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that Ms Kao may exercise the voting powers attached to the trust shares at the 20 July AGM to influence the composition of the Airtrust board and thereby frustrate Airtrust's pending suits against her (Ms Kao) for, *inter alia*, breaches of fiduciary duties. This was particularly so since there was no indication at that time how the Fong Foundation Ltd ("Fong Foundation"), the majority shareholder holding 51% of the shares in Airtrust, would vote on such a proposal.[6]

21 Despite these concerns, Ms Fong did not rush to court but on 13 July 2016 instructed her solicitors to write to HSBC's solicitors to seek confirmation that HSBC would instruct Ms Kao on the exercise of the voting powers attached to the trust shares at the AGM and would take steps to require Ms Kao to transfer legal title back to the estate.[7] HSBC through its solicitors replied on 15 July 2016 stating that given the short notice, HSBC was only in a position to write to Ms Kao to express that the trust shares were held on trust for the estate and to instruct her not to exercise the voting rights attached to the trust shares. HSBC duly wrote to Ms Kao on 15 July 2016.[8] Ms Fong's solicitors replied that while it sufficed for immediate purposes to write to Ms Kao, in the longer term HSBC should direct Ms Kao to transfer legal title to the trust shares back to the estate. They further stated that injunctive relief should be sought immediately if Ms Kao refused to confirm by start of business on 18 July 2016 that she would comply with HSBC's instruction.[9]

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6 CF 1st Affidavit, para 20.

7 CF 1st Affidavit, para 31 and exhibit "CF-1", Tab 23; CF 5th Affidavit, para 11.

8 CF 1st Affidavit, exhibit "CF-1", Tab 24; Affidavit of Linda Kao Chai-Chau dated 1 August 2016 ("LK 1st Affidavit"), Tab 3.

9 CF 5th Affidavit, exhibit "CF-4", Tab 3.

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22 By mid-day on 18 July 2016, Ms Kao had not given the requested confirmation that she would heed HSBC's instructions. Thus Ms Fong proceeded to file the present OS 725 to seek the declarations set out at [5] above.

23 At the same time, Ms Fong filed an interlocutory application seeking an interim injunction restraining Ms Kao from exercising the voting rights of the trust shares at all general meetings of Airtrust pending the determination of OS 725 ("the Injunction Application").

24 The same day, Ms Kao's solicitors replied to HSBC, asserting that HSBC has no standing to instruct Ms Kao how to vote in relation to the trust shares and enclosing a copy of a purported supplemental trust deed dated 13 February 2004 ("the 2004 Supplemental Deed"). On its face, the 2004 Supplemental Deed terminates the 2000 Trust Deed and vests all title, interest and rights in the trust shares in Ms Kao absolutely for a nominal consideration. It appeared that Ms Kao was asserting authority to deal with the trust shares as she pleased by virtue of her beneficial ownership. Ms Kao's stance was highly problematic for several reasons and would understandably have increased Ms Fong's anxiety to obtain an interim injunction.[10] First, the authenticity of the 2004 Supplemental Deed had been challenged in prior proceedings, leading Ms Kao to disown the 2004 Supplemental Deed at those junctures (see [40] below). Her sudden reliance on it was therefore troubling and even appeared disingenuous. Second, the position taken in this letter dated 18 July 2016 contradicted her earlier stance that the trust shares were held on trust for Airtrust's employees (see [43] below).

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10 CF 5th Affidavit, para 20.

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25 At the urgent hearing of the Injunction Application before Kan Ting Chiu SJ on 19 July 2016, Ms Kao's counsel, Mr Mahesh Rai ("Mr Rai"), relied on the 2004 Supplemental Deed to argue that neither Ms Fong nor the estate has standing to direct Ms Kao's exercise of voting powers because she owned the trust shares. His alternative case was that under the 2000 Trust Deed, the trust shares were held for the shareholders in proportion to their existing shareholding at the time of Peter Fong's demise. Mr Rai did not raise the *locus standi* objection now being pursued, *ie*, that it was for *HSBC as executor*, and not Ms Fong, to apply for a declaration determining the estate's interest in the trust shares. Instead, he raised a different *locus standi* argument: if the trust shares were held on trust for the shareholders (according to his alternative case), Ms Fong as a beneficiary under the trust (*qua* shareholder) could not direct *Ms Kao as trustee* how to act.

26 After hearing the parties, Kan SJ granted an interim injunction restraining Ms Kao from exercising the voting rights of the trust shares in any resolution to appoint directors in place of retiring directors at the 20 July AGM or any adjournment thereof. The interim injunction was granted even though the R&Ms confirmed at the hearing that they did not intend to remove and reconstitute the board of directors at the upcoming AGM.

27 At the 20 July AGM, Ms Fong herself raised the issue of reconstituting the board of Airtrust before the R&Ms were discharged, but this was adjourned to the next AGM. Eventually, on 23 January 2017, two new directors, Charles Chew and Fong Wei Heng, were elected. The immediate precipitant of this application has thereby fallen away. Nonetheless, the merits of the beneficial ownership of the trust shares remain live and ultimately have to be determined.

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Special circumstances on the facts

28 There was initially no explanation why HSBC could not have made the application. I found this to be an unsatisfactory situation given that the merits of the application were fully argued at the substantive hearing on 25 January 2017 and, if the action were to be dismissed solely on account of *locus standi*, substantially the same arguments would be rehearsed at a fresh application brought by the executor. Accordingly, on 2 February 2017, I granted leave to Ms Fong and HSBC to file an affidavit each to explain why the application was commenced by Ms Fong instead of HSBC. On 23 February 2017, the parties appeared before me again for further submissions on *locus standi*.

29 Taken together, HSBC and Ms Fong gave a number of reasons why HSBC was unable or unwilling to bring this application. First, Ms Fong was of the view that the application had to be brought urgently within a short span of time in view of the upcoming AGM. Yet HSBC was only in a position to write to Ms Kao and could not take further steps given the short notice. Consistent with this, HSBC attested that it did not have the opportunity to fully consider the matter and conduct investigations before the application was taken out by Ms Fong.[11] Considering Ms Fong's concern about the renewal of directors at the 20 July AGM before the discharge of the R&Ms and Ms Kao's sudden claim of beneficial ownership over the trust shares, I agree with Ms Fong that there was urgency at the time when the application was filed in July 2016.

30 Mr Rai argued that with the passing of the 20 July AGM and the eventual election of new directors, there was no longer any urgency necessitating Ms Fong's action in place of HSBC. That may well be so by the time the application came before me for hearing. But in my view, it is not

[11] HSBC Affidavit, para 18.

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necessary for the urgent circumstances to continue throughout the life of the proceedings. The question of urgency should instead be assessed as of the time when the application was taken out. As an example, the court recognised in *Wong Moy* that an instance of special circumstances is where "unless the beneficiaries are allowed to initiate proceedings to protect the assets of the estate such assets would be at risk of being disposed of or dissipated by a third party" (at [24]). It is only sensible that threats to the estate's assets or interests be assessed at the time when the proceedings are commenced. In *Porker v Richards*, the beneficiary originally initiated the action to obtain an order compelling the sale of property belonging to the estate in which the first defendant continued to reside. During the course of proceedings, the property was sold but the beneficiary nonetheless had standing to proceed with the other claim for rent arrears (see [70]). Here, without commencing an originating process for declaratory relief, Ms Fong could not have obtained the interlocutory injunction on an urgent basis prior to the 20 July AGM.

31 The second reason was that HSBC was not familiar with the facts giving rise to the application because it was a professional trustee without first-hand knowledge of the material background concerning the trust shares and with limited sources of documentary information.[12] In contrast, Ms Fong was fully apprised of the essential facts surrounding the trust, including the discovery of the two trust deeds, the authenticity of the 2004 Supplemental Deed and Ms Kao's inconsistent stance towards the trust shares over the years.[13]

32 In my view, more significant weight should be given to this factor. HSBC was clearly unwilling in July 2016 to take further steps to secure the estate's interest in the trust shares beyond writing to Ms Kao. It was also not

12 HSBC Affidavit, paras 8–12.

13 CF 5th Affidavit, para 17.

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equipped to investigate Ms Kao's surprising claim to the beneficial ownership over the trust shares just one working day before the AGM.[14] As established by the authorities discussed above, it does not matter that HSBC was not in default and did not act in bad faith. It was apparent from the conduct of the proceedings that HSBC took a back seat and allowed Ms Fong to have full conduct of the matter since she was more familiar with the facts. HSBC did not tender submissions but supported Ms Fong's application. In response, Mr Rai submitted that by admitting its unfamiliarity, HSBC effectively gave its consent without conducting its own due diligence into the merits of the matter.[15] However, it appears to me that HSBC wrote to Ms Kao after being legally advised and supported Ms Fong's application at the hearing after having sight of the parties' affidavits and submissions. Thus, while HSBC was not sufficiently acquainted with the facts to have brought the action in July 2016, its consent was informed by all the facts and arguments placed before the court by the time the application was heard in January 2017.

33 Third, Ms Fong submitted that there was no assurance that HSBC would remain as executors given that it had been granted liberty by the court to apply to discharge itself as and when it managed to find a suitable replacement.[16] The concern, apparently, was that HSBC may not be able to see this application to its conclusion. To my mind, this fact is of limited significance because there was no indication of an imminent discharge or a winding down of HSBC's duties. HSBC nevertheless wrote to Ms Kao when approached by Ms Fong.

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14 HSBC Affidavit, para 18.

15 First defendant's further submissions dated 20 February 2017, para 16.

16 CF 5th Affidavit, paras 22–23.

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34 The fourth reason was that HSBC lacked the financial resources to bring the proceedings.[17] The estate lacks liquid funds and HSBC has not been paid its fees since around April 2014. Further legal costs are likely to be incurred by the estate in pending suits. While I accept that HSBC was unwilling to commence proceedings because of the estate's financial constraints, I agree with Mr Rai's submission that this is not a significant factor in itself because the costs of the application could have been addressed by a funding arrangement with the beneficiaries of the estate.

35 Having reviewed all the circumstances, I find that there were special circumstances justifying Ms Fong in making the application as beneficiary instead of the executor:

(a) Consent: First, the executor's consent is an important consideration. As I stated at the beginning, this means that the rationale underlying the rule requiring special circumstances is not engaged. Since Ms Fong has been able to show that the circumstances required her urgent action, allowing her to proceed in this case is not tantamount to encouraging executors to abdicate their duties to the estate.

(b) Merits: As noted in *Ramage v Waclaw* and *Porker v Richards* (see [13]–[14] above), the merits of an action are relevant to establishing special circumstances. In my view, Ms Fong's case has merits and should be allowed to proceed.

(c) Prejudice to the estate: Finally, it would be prejudicial to the estate to deny Ms Fong *locus standi* to bring this application. All

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17 CF 5th Affidavit, para 24; HSBC Affidavit, para 21.

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parties agreed that the same substantive arguments would be raised if HSBC were to start a fresh application. If that were to occur, further costs would be incurred by all parties, including the estate. The prudent course is thus to permit Ms Fong's application to proceed.

36 Since Ms Fong has *locus standi* to seek relief on behalf of the estate, I move on to address the substantive issues in this application.

Ownership of the trust shares

The 2000 Trust Deed

37 Originally held by Peter Fong, the trust shares were transferred to Ms Kao on 13 January 2000. A notation was made on the share transfer form indicating that the transfer was "merely a transfer from the beneficiary to the trustee".[18] I set out the text of the 2000 Trust Deed in full here:[19]

> **THIS DEED** is made the 20 day of January Two Thousand (2000) between Ms Kao Chai Chau, Linda … (hereinafter called "the **Trustee**") of the one part and Peter Fong … (hereinafter called "the **Beneficiary**") of the other part.
>
> WHEREAS:
>
> 1. The company known as Airtrust (Singapore) Pte Ltd, a company incorporated in Singapore (hereinafter called "the Company"), has an authorised capital of S$50,000,000.00 and a paid-up capital of S$10,000,000.00 comprising 10,000,000 shares of S$1.00 each.
>
> 2. The trustee is the registered proprietor of the said 1,100,000 shares in the Company.
>
> 3. Of the said 1,100,000 shares, 600,000 shares thereof belong to the beneficiary, as the trustee hereby acknowledges and admits.

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18 CF 1st Affidavit, para 23.

19 CF 1st Affidavit, exhibit "CF-1", Tab 2.

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4. The beneficiary is the founder of the Company and confirm [*sic*] he owns another 7,400,000 shares of the Company registered in his name, the aforesaid 600,000 shares is a reserve, apart from the shares he owns and/or stated in his will, designed to offer to staff/employees of the Company and/or any party or assign or to be assigned during his life time as gesture of appreciation at a nominal consideration of S$0.80 per share or as per book value whichever is lower, otherwise, to the existing shareholders proportionately to the number of shares held as registered in the Register of Members on the day of his demise.

5. The parties hereto acknowledge of such schemes and/or agreement abovementioned and desire to enter into this Deed to evidence that fact.

NOW THIS DEED WITNESSETH as follows : -

1. The trustee hereby declares that it/she holds 600,000 shares equivalent to 6% of the said paid-up capital of the Company on trust for the beneficiary and shall deal with the shares and the dividends and interest payable in respect of the same in such manner on the instructions of the beneficiary and in such manner as the beneficiary shall from time to time direct.

2. The trustee will at the request of the beneficiary attend all meetings of shareholders or otherwise which it shall be entitled to attend by virtue of being the registered holder of the said shares or any of them will vote at every such meeting in such manner as the beneficiary shall have previously directed in writing and in default of and subject to any such direction at the discretion of the trustee and further will if so required by the beneficiary execute all proxies or other documents which shall be necessary or proper to enable the beneficiary or its representatives or assigns or its nominees to vote at such meeting in the place of the trustee.

3. The trustee will at the request and cost of the beneficiary transfer, deal and/or sell the said shares to such person or persons at such time or times and in such manner or otherwise deal with the same as the beneficiary shall direct or appoint and will make such applications to the competent authorities and execute and do all such documents acts and things as may be necessary to procure the appropriate registration of the said shares to give effect to any transfer or dealing or if so required to enable the interest of the beneficiary to be protected.

4. The beneficiary will at all times hereafter indemnify and keep indemnified the trustee its successors in title against all

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> liabilities which the trustee or they may incur by reason of such shares being so registered in the name of the trustee as aforesaid and all costs and expenses incurred by the trustee in the execution of the trusts of this deed.
>
> IN WITNESS WHEREOF the parties have hereunto set their hands the day and year first above written.

Beneficial ownership of the trust shares

38 There are altogether five competing theories as regards the beneficial ownership of the trust shares, four of which Ms Kao is responsible for. In summary, according to each of these theories, the trust shares are respectively:

(a) Beneficially owned by Ms Kao;

(b) Held on trust for deserving employees to purchase at $0.80 per share or book value whichever is lower;

(c) Held on trust for the other existing shareholders to purchase at $0.80 per share or book value whichever is lower in proportion to their shareholding as at the date of Peter Fong's demise;

(d) An absolute gift to the other existing shareholders in proportion to their shareholding as at the date of Peter Fong's demise; or

(e) Beneficially owned by the estate since Peter Fong had not offered or assigned the trust shares to any party during his lifetime.

Abandoned theories

39 The first three theories were advanced at various points by Ms Kao but were abandoned by the time of the substantive hearing. A brief treatment of them is necessary to set the context for the theories that remain live.

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(1) Beneficially owned by Ms Kao

40 Ms Kao has never asserted *by way of affidavit* that she owns the trust shares beneficially. This theory is premised on the purported 2004 Supplemental Deed which appears to vest "title, interest and rights" in the trust shares in Ms Kao absolutely. The 2004 Supplemental Deed was accompanied by a purported share transfer form dated 13 February 2004, signed by Ms Kao, seeking to transfer the trust shares from herself as trustee to herself as beneficiary. Until July 2016, Ms Kao's position was that the 2004 Supplemental Deed was of no legal effect and the trust shares were held on trust for deserving employees of Airtrust (*ie*, the second theory).

41 The 2004 Supplemental Deed was first placed before the court in 2010 when Ms Fong challenged its authenticity in separate proceedings to which I shall refer as "OS 505/2010". Ms Fong adduced evidence that the terms of the 2004 Supplemental Deed were printed on blank sheets of paper pre-signed by Peter Fong, and in an earlier unsuccessful attempt at producing this false document, the terms were printed with his signature upside-down. There was evidence that this was done on Ms Kao's instruction. In 2010, when this evidence came to light, Ms Kao denied being party to any forgery and claimed she had never seen the 2004 Supplemental Deed.[20]

42 In a surprising turn of events, as related above, Ms Kao relied on the 2004 Supplemental Deed in correspondence on 18 July 2016 and at the hearing of the Injunction Application. Despite this, she shockingly still maintained in a subsequent affidavit dated 1 August 2016 that she had "never seen" the 2004 Supplemental Deed prior to the proceedings in OS 505/2010 and was "unaware of its origins" but left it "up to the Court to interpret [its]

[20] Affidavit of Linda Kao dated 10 June 2010 filed in OS 505/2010, para 48.

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validity and effect" – an obviously duplicitous position.[21] When this matter came before me, Mr Rai initially stated that *for the purposes of this application*, Ms Kao was not claiming ownership over the trust shares. I informed Mr Rai that it was not open to Ms Kao to hedge her position and stood down the hearing for him to take her instructions. In my view, whether Ms Kao has any ownership interest over the trust shares is a matter entirely capable of a definitive position. Mr Rai then confirmed that Ms Kao is not asserting any ownership over the trust shares.

(2) Trust for deserving employees of Airtrust

43 The theory that Ms Kao had advanced for years prior to this application was that the trust shares were held on trust for deserving employees of Airtrust to purchase at $0.80 per share or at book value, whichever is lower. The theory is premised on paragraph 4 of the recital to the 2000 Trust Deed which expresses Peter Fong's intention to offer the trust shares to employees of Airtrust during his lifetime at a nominal consideration as a gesture of appreciation. Ms Kao first adopted this theory in her affidavit dated 10 June 2010 in relation to OS 505/2010, in response to Ms Fong's allegations that Ms Kao had forged the 2004 Supplemental Deed. The same stance was taken in subsequent affidavits filed by Ms Kao in various suits between 2010 and 2016.[22] As recently as 1 August 2016, she stated on affidavit that "[a]s far as [she is] concerned, Mr Peter Fong's instructions to [her] were to hold the Trust Shares on trust for the employees of Airtrust".[23]

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21 LK 1st Affidavit, paras 21–22.

22 Plaintiff's submissions dated 20 January 2017, para 18; CF 1st Affidavit, para 6 and pp 56, 118 and 406.

23 LK 1st Affidavit, para 22.

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Yet this theory was ultimately not pursued at the substantive hearing, when Mr Rai advanced the "absolute gift" theory instead.

(3) Trust for shareholders

44 The third theory was that Ms Kao held the trust shares on trust for the existing shareholders of Airtrust to purchase at $0.80 per share or book value, whichever is lower, in proportion to their shareholding as at the date of Peter Fong's demise. Ms Kao's counsel articulated this theory in their written submissions tendered for the substantive hearing.[24] This submission relied principally on paragraph 4 of the recital to the 2000 Trust Deed, which I set out here again for convenience:

> 4. The beneficiary is the founder of the Company and confirm [*sic*] he owns another 7,400,000 shares of the Company registered in his name*, the aforesaid 600,000 shares is a reserve, apart from the shares he owns and/or stated in his will, designed to offer* to staff/employees of the Company and/or any party or assign or to be assigned during his life time as gesture of appreciation at a nominal consideration of S$0.80 per share or as per book value whichever is lower, otherwise, *to the existing shareholders proportionately to the number of shares held as registered in the Register of Members on the day of his demise.*
>
> [emphasis added]

45 To be conceptually precise, the proposition as I understand it is that paragraph 4 of the recital created a series of individual gifts to be distributed if two condition precedents were satisfied: first, that the putative beneficiary answers to the description of a "shareholder" at the date of Peter Fong's demise; second, that they opted to purchase the trust shares at $0.80 per share or at book value whichever is lower (see a similar option to purchase in *Re Barlow's Will Trusts* [1979] 1 WLR 278 at 282B–282C). Ms Kao's counsel

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[24] First defendant's submissions dated 20 January 2017 ("LK Submissions 1"), para 46.

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submitted that until the existing shareholders opt to purchase the trust shares, each shareholder "does not have an absolutely vested interest and is only a **potential** beneficiary" of the trust shares because the "beneficial interest of the [trust shares] did not automatically pass on to the said shareholders" [emphasis in original].[25] On this basis, it was argued that Ms Fong lacked standing to seek a declaration as putative beneficiary of the trust shares.

46 At the substantive hearing, however, this theory was not developed and it was a modified "absolute gift" theory that was advanced instead. It is therefore unnecessary for me to deal with the merits of this or any of the above theories.

47 It seems to me that Ms Kao has no reservation to tailor her arguments to meet Ms Fong's submissions as she perceives them to be. However, when it no longer serves her interest to advance any particular argument or it emerges that an argument is plainly untenable, she has no qualms whatsoever to abandon them. She has amply demonstrated her propensity to craft and subsequently abandon the three conflicting arguments as outlined above.

Competing theories

48 During the substantive hearing, only two competing theories remained alive for the court's decision. The parties agree that the competing theories are to be resolved as a matter of construction of the 2000 Trust Deed. No material facts are in dispute insofar as the proper construction of the 2000 Trust Deed is concerned.

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25 LK Submissions 1, paras 46 and 48.

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(1) Absolute gift to shareholders

49 Ms Kao's position is now that the 2000 Trust Deed created an "absolute gift" to the other existing shareholders in proportion to their shareholding as at the date of Peter Fong's demise. This argument was only raised by Mr Rai during the *oral* submissions at the substantive hearing on 25 January 2017. According to Mr Rai, this argument was also advanced before Kan SJ during the hearing of the Injunction Application. However, a perusal of the notes of the hearing reveals that the argument canvassed on that occasion was yet again a different one:

> Paragraph 4 of recital. Peter Fong did not give them away in his life time. *By ademption*, the [6]% of shares went to the other shareholders, not the estate.
>
> [emphasis added]

While the concept of "ademption" was not pursued before me, Ms Kee was correct to highlight that ademption is inapplicable. Ademption only occurs when a specific gift in a will fails because the subject-matter is disposed of or destroyed before the will takes effect, ceases to conform to the description of the gift, or has changed in its nature (see *Low Gim Har v Low Gim Siah* [1992] 1 SLR(R) 970 at [58]). Here, the trust shares still exist in their original form. No gift of the trust shares has *failed*; more accurately, no gift came into existence in the first place as no party was nominated by Peter Fong to receive the shares unconditionally during his lifetime.

50 Not only has the submission of an "absolute gift" come as a surprise, it is in fact contrary to the "trust for shareholders" theory advanced in Mr Rai's *written* submissions (*ie*, the third theory). The crucial difference between the two is that under the "absolute gift" theory, the shareholders already have a vested beneficial interest in the trust shares without having to exercise an

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option to purchase them. Mr Rai did not specify exactly how and when this beneficial interest has purportedly come to vest in the shareholders, whether it be by way of an absolute gift in default of any nomination of other beneficiaries during Peter Fong's lifetime or by way of a testamentary gift taking effect upon Peter Fong's death.

51 Once again, the "absolute gift" argument is premised upon paragraph 4 of the recital to the 2000 Trust Deed (set out at [44] above). It is important to recognise that a recital in a deed can only assist in the construction of the substantive terms of the deed; it cannot override or control the operation of the substantive terms where such terms are clear and unambiguous: *Management Corporation Strata Title Plan No 1933 v Liang Huat Aluminium Ltd* [2001] 2 SLR(R) 91 ("*Liang Huat Aluminium*") at [7]. In *Walsh v Trevanion* (1850) 15 QB 733 at 751, the following rule of construction was laid down:

> [W]hen the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed. On the other hand, when those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words.

The interplay between the recital and the operative parts of a deed was explained as follows by Lord Esher MR in *Ex parte Dawes; In re Moon* (1886) 17 QBD 275 at 286:

> Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.

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These propositions were cited with approval by the Court of Appeal in *Liang Huat Aluminium* (at [7]).

52 The question arises whether a recital can create legal rights and obligations where there is nothing inconsistent between the recital and the operative parts. In *Tiger Airways Pte Ltd v Swissport Singapore Pte Ltd* [2009] 4 SLR(R) 992, Judith Prakash J (as she then was) noted that while "recitals *do not impose legal obligations on the parties*, they can often be of assistance to the courts in the construction of contractual terms" [emphasis added] (at [34]). There, the recital was used merely to confirm that the court's interpretation was consistent with the business purpose of creating a long-term relationship as recited.

53 Though as a general rule covenants are not found in the recitals, it appears that in an appropriate case, the court may interpret a recital as carrying with it an obligation or covenant to carry into effect that which is recited (see Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 6th ed, 2015) ("*The Interpretation of Contracts*") at para 10.15). In *A S Nordlandsbanken and another v Nederkoorn Robin Hoddle* [2000] 3 SLR(R) 918, G P Selvam J observed at [27] that "[w]here the recital states a specific point of agreement, there being nothing inconsistent in the operative [part], the parties are bound by the agreement evidenced by and contained in the recital". Where the body of the bond agreement did not contain a specific stipulation as to duration, the bond was held to be limited to the time period stated in the recital.

54 That having been said, I find instructive the following guidance from the learned author of *The Interpretation of Contracts* (at para 10.15):

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> But the court will in any case be cautious in spelling a covenant out of a recital, because that is not the part of the deed in which covenants are usually expressed. The court must be satisfied that *the language does not merely show that the parties contemplated that the thing might be done, but it must amount to a binding agreement upon them that the thing shall be done*.
>
> [emphasis added]

55 Returning to this application, it was argued on Ms Kao's behalf that the operative part of the deed is ambiguous because it is silent on the treatment of the trust shares following Peter Fong's demise; hence, paragraph 4 of the recital is said to be the governing clause.

56 The relevant clauses of the operative part of the 2000 Trust Deed are reproduced here for ease of reference:

> **THIS DEED** is made the 20 day of January Two Thousand (2000) between Ms Kao Chai Chau, Linda … (hereinafter called "the **Trustee**") of the one part and Peter Fong … (hereinafter called "the **Beneficiary**") of the other part.
>
> WHEREAS: -
>
> [Recitals]
>
> NOW THIS DEED WITNESSETH as follows : -
>
> 1. *The trustee hereby declares that it/she holds 600,000 shares equivalent to 6% of the said paid-up capital of the Company on trust for the beneficiary* and *shall deal with the shares* and the dividends and interest payable in respect of the same in such manner *on the instructions of the beneficiary and in such manner as the beneficiary shall from time to time direct*.
>
> …
>
> 3. The trustee will at the request and cost of the beneficiary *transfer, deal and/or sell the said shares to such person or persons at such time or times and in such manner or otherwise deal with the same as the beneficiary shall direct or appoint* and will make such applications to the competent authorities and execute and do all such documents acts and things as may be necessary to procure the appropriate registration of the said shares to give effect to any transfer or dealing or if so

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> required to enable the interest of the beneficiary to be protected.
>
> [emphasis added in italics]

57 In my view, the "absolute gift" theory is simply untenable. First, there is no ambiguity in the operative part of the 2000 Trust Deed so no recourse need be had to the recital. Clause 1 unequivocally states that the shares are held on trust for the "beneficiary", who has been specifically and expressly identified as Peter Fong. Clauses 1 and 3 are each clear that transfers, dealings and sales of the trust shares are to occur only at Peter Fong's direction; in the absence of such direction, Peter Fong continues to retain the beneficial interest. In context, the fact that the operative part is silent as regards the treatment of the trust shares in the event of Peter Fong's demise does not give rise to ambiguity because his beneficial interest in the trust shares will devolve according to the law of succession upon his death. In other words, there is no ambiguity because the default law will come into operation.

58 Second, there is nothing in the language of paragraph 4 of the recital which supports the argument that a gift has been made to the shareholders absolutely. Paragraph 4 is a statement of purpose or intention, and does not amount to a binding conferral of rights. Significantly, it does not specify *when* such rights would be conferred on the shareholders. Instead, the language is precatory and prospective in nature ("designed to offer … assign or to be assigned …"). This accords with the tenor of the operative part under which subsequent transfers of the trust shares by Ms Kao require *positive* direction from Peter Fong. Mr Rai relies on the word "to" preceding "the existing shareholders" to indicate that a gift has been made. No authority was cited to show that this could suffice. In my view, no clear intention to make a gift can be discerned from this word alone, especially when neither of the possible operative verbs ("designed to offer" or "assign or to be assigned")

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unequivocally indicates an unconditional gift. The lack of certainty in paragraph 4 is borne out by Ms Kao's own conduct, namely her adoption of multiple and conflicting positions with regards to the ownership of the trust shares, all premised on the same paragraph of the recital.

59 Lastly, other than this belated submission by Ms Kao, none of the shareholders has ever asserted that they are entitled to the trust shares under an absolute gift in the 2000 Trust Deed. Neither has Ms Kao ever offered the shares to the shareholders or informed them that they are putative beneficiaries of this gift. This goes to show just how fallacious and disingenuous the argument is. It is but one of Ms Kao's many contrived afterthoughts in her ill-conceived bid to retain control over the trust shares.

(2) Beneficially owned by the estate

60 Having eliminated the other theories, I come finally to the estate's claim to the beneficial ownership over the trust shares.

61 The starting point is that under the 2000 Trust Deed, the beneficiary was specifically identified as Peter Fong. Since Peter Fong did not direct the transfer or sale of the trust shares to anyone else during his lifetime, by default the beneficial interest must necessarily reside in his estate.

62 Mr Rai claimed that the trust shares are not provided for under Peter Fong's will ("the Will"). This is premised on the fact that Cl 3.1 of the Will contemplates that the Will is to govern only Peter Fong's 65.59% shareholding in Airtrust. To set the context, Cl 3.1 of the Will makes a gift of 51% of the shares in Airtrust to Fong Foundation. This submission relies on a clarificatory paragraph in Cl 3.1, which reads:

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> The reference to "fifty-one per cent (51%) of my Shares … in [Airtrust]" above means 51% of the 100% shares in the [Airtrust] and not 51% *of my 65.59% shares held by me in [Airtrust]* …
>
> [emphasis added]

63 By definition, Peter Fong's 65.59% shareholding in Airtrust excludes the trust shares which would add another 6% to that figure. Since the title of the executors is derived from the Will, Mr Rai argued that HSBC has no title to, and no right to deal with, the trust shares. Instead, the trust shares are to be dealt with separately under the Intestate Succession Act (Cap 146, 2013 Rev Ed) and separate letters of administration have yet to be obtained.

64 To my mind, this submission does not strictly affect the conclusion that the beneficial interest in the trust shares lies in the estate. It only addresses the issue of *who* is entitled to deal with this beneficial interest on behalf of the estate, *ie*, whether it is HSBC or another administrator to be separately appointed. Nevertheless, in response, Ms Kee raised two arguments which in my view adequately dispose of the objection. First, the trust shares are covered by Cl 11.2 of the Will which states:

> In respect of the *rest of my shares or interests* in [Airtrust] and the Airtrust Group of Companies not comprised in My Shares as hereinbefore defined, I give them to my … 3 daughters and … my son … in equal shares.
>
> [emphasis added]

The said "My Shares" was defined in Cl 3 as the 51% of total shareholding in Airtrust gifted to Fong Foundation. Thus, any shares owned by Peter Fong apart from this 51% would come under Cl 11.2 of the Will.

65 Second, even if the trust shares were not covered under the Will, HSBC has the power to deal with the trust shares according to the rules of

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distribution in the Intestate Succession Act, by virtue of s 24 of the Civil Law Act (Cap 43, 1999 Rev Ed). Section 24 of the Civil Law Act deems the executor appointed under a will to be a trustee in respect of any residue not expressly disposed of under the will, holding for the benefit of the person(s) who would be entitled to the estate according to the rules of intestacy. Section 10 of the Intestate Succession Act provides for the same position. HSBC is therefore entitled to the trust shares as the estate's representative in any event.

66 Accordingly, Ms Fong is entitled to the declaration that Ms Kao holds the trust shares on trust for the estate of Peter Fong.

Trustee's voting powers and disposal of trust shares

67 Finally, I come to the second declaration, *viz*, that Ms Kao is obliged to comply with any direction from HSBC as to, *inter alia*, the exercise of the voting rights attached to the trust shares and the disposal of these shares. Mr Rai submitted that the court should not direct how Ms Kao exercises her discretion to exercise the voting rights of the trust shares in the absence of evidence that she has done so improperly. He relied on *Foo Jee Seng and others v Foo Jhee Tuang and another* [2012] 4 SLR 339 ("*Foo Jee Seng*") for this principle. In that case, the will devised a trust for sale of the family home, under which the trustees were directed to sell the property and had a power to postpone the sale in their absolute discretion. The surviving trustee refused to sell the property, taking the view that the property was an ancestral home and was still capable of reaping income. The beneficiaries commenced proceedings to compel the trustee to sell the property and to distribute the proceeds of sale in accordance with the will. The Court of Appeal made the following observations in connection with the boundaries of court supervision over a trustee's exercise of his discretion (at [51]–[52] and [54]):

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> 51 … As a general proposition, even in relation to a will like the present, the discretion exercised by the trustees should, as a rule, be respected.
>
> 52 However, there appears to be a corresponding rule that where discretion is vested in a trustee, that duty has to be exercised properly. The court cannot intervene unless the discretion is either improperly exercised, or not exercised at all – see *Tempest v Lord Camoys* (1882) 21 Ch D 571 where Jessel MR stated (at 578):
>
> > … It is settled law that when a [settlor] has given a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly. …
>
> …
>
> 54 Admittedly, beneficiaries cannot dictate the way a trustee should exercise his discretion. In *Re Brockbank* [1948] Ch 206, the court declined to compel a trustee to appoint a new professional trustee to act in his place as demanded by the beneficiaries of that trust. The discretion was that of the trustee and there was no obligation to consult the beneficiaries before exercising that discretion. There was also no obligation to follow the beneficiaries' wishes, even if they were expressed and made known to the trustee. However, this was not to say that the beneficiaries' wishes, their objective *needs and interests*, could be completely disregarded by the trustee in making his decision.
>
> [emphasis in italics in original; emphasis in underline added]

68 Clearly, the Court of Appeal took pains to emphasise that the court would intervene in respect of the trustee's power of sale *not to give effect to beneficiaries' wishes* but only where the trustee has acted improperly. In that case, the court compelled a sale because it was found that the trustee had improperly exercised his discretion to postpone the sale and thereby deprived the beneficiaries of their just entitlement under the will (at [78] and [80]).

69 The rationale appears to be that a trustee who has been conferred a power or discretion is "bound and entitled to use his own judgment" as long as he is guided by the trust instrument and the rules of equity (see *Snell's Equity*

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(John McGhee QC gen ed) (Sweet & Maxwell, 33rd ed, 2015) at para 29-029). Thus in *In re Brockbank, Ward v Bates* [1948] 1 Ch 206 ("*Brockbank*"), the beneficiaries were not entitled to control the trustees' exercise of their fiduciary power to appoint new trustees, which had been vested in them by the trust instrument or by statute. Vaisey J noted (at 209) that the beneficiaries had two courses open to them. They must either keep the trust on foot (in which case the trust must continue to be executed by the trustees in their discretion and not at the whim or fancy of the beneficiaries) or extinguish the trust by directing the trustee to transfer the beneficial interests to them or persons nominated by them.

70 Mr Rai further sought to distinguish the contrary case of *Butt v Kelson* [1952] 1 Ch 197 ("*Butt v Kelson*") which held that if necessary, beneficiaries could compel trustees to use their voting powers attached to trust shares in the manner as the beneficiaries directed. According to Romer LJ, this position was a corollary of the wider principle that beneficiaries were entitled to be treated as though they were the registered shareholders in respect of trust shares, with the advantages and disadvantages which that position involved. On the facts, in order to avoid an order compelling the trustees to use their voting powers as directed by the beneficiaries, the court ordered the trustees *qua* directors to give inspection of company documents specified by the beneficiaries with good reasons.

71 Mr Rai submitted that this case should not be followed because it has been criticised by subsequent decisions and confined to its facts, namely the situation in which the trustees are also the sole directors (see David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (LexisNexis, 19th ed, 2016) ("*Underhill and Hayton*") at paras 66.29–66.30). Reliance was placed on *Re George Whichelow Ld Bradshaw v*

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Orpen [1954] 1 WLR 5 ("*Re Whichelow*") where Upjohn J noted (at 8) that *Butt v Kelson* was difficult to reconcile with the *Brockbank* line of authorities and declined to apply it because not all the potential beneficiaries of the trust shares were before the court. Mr Rai also cited *Burns v Steel* [2006] 1 NZLR 559 ("*Burns v Steel*") where the court agreed that *Butt v Kelson* should be restricted to trustee-shareholders who are also directors (at 571). This was a case where, under a will, the testator gifted his shares in a company to the plaintiff. The company's constitution contained rights of pre-emption which applied to any transfer of the shares from the trustees to the plaintiff. The plaintiff sought to direct the trustees on, first, how and when the pre-emption process was to be undertaken and second, how they were to exercise their voting rights as shareholders pending completion of the pre-emption process. The court held that the trustees were not obliged to act in accordance with the plaintiff's directions on both counts for two reasons. First, due to the rights of pre-emption, the plaintiff was not absolutely entitled to the shares *in specie* and could not exercise rights of administration over the company to which she may never become entitled. Second, as a matter of construction of the will, the trustees were not bare trustees but had active duties and discretion, and must retain the discretion to decide how and when to activate the pre-emption process in order to fulfil their duty to distribute the estate under the will.

72 In response, Ms Kee did not dispute the principles laid down in *Foo Jee Seng* or defend *Butt v Kelson* as good law. Instead, she submitted that the authorities cited involved cases where the trustees were vested with discretion. In contrast, the 2000 Trust Deed conferred no discretion on Ms Kao as trustee as regards the voting powers attached to the trust shares. In this respect, the 2000 Trust Deed was more akin to a bare trust. In relation to bare trusts, I note Romer J's observations in *Kirby v Wilkins* [1929] 2 Ch 444 that "[w]here a

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shareholder holds shares as a bare trustee for a third person, he is no doubt obliged to exercise his voting power in the way that the cestui que trust desires, but unless and until the cestui que trust has indicated his wish as to the way in which the voting power should be exercised, there is no reason why the nominee should not exercise the voting power vested in him as a trustee … in the best interests of his cestui que trust" (at 454). In *Hotung & Anor v Ho Yuen Ki* [2002] 4 HKC 233, the Hong Kong Court of Appeal likewise accepted that a bare trustee can be directed by the beneficiary as regards his manner of voting. The main issue in that case was whether the court should go further to compel the trustee to execute powers of attorney to appoint the beneficiaries as the trustee's attorney in respect of the shares; the court declined to do so, stating that if the beneficiaries wished to perform the role of trustee, then the proper course would be to terminate the trust.

73 In my judgment, the crucial fact in the present case is that the trustee's discretion to vote in relation to the trust shares is expressly circumscribed by the 2000 Trust Deed. The cases relied upon by Mr Rai presuppose that the trustee has a discretion with which the beneficiaries are attempting to interfere. The anterior question is naturally the *scope or extent* of the trustee's power and discretion under the trust instrument. The fundamental duty of trustees is after all that they "must not act beyond the limits of the powers conferred upon them by law or the terms of the trust instrument": *Underhill and Hayton* at para 43.2. In this regard, Cl 2 of the 2000 Trust Deed states:

> 2. The trustee will at the request of the beneficiary attend all meetings of shareholders or otherwise which it shall be entitled to attend by virtue of being the registered holder of the said shares or any of them *will vote at every such meeting in such manner as the beneficiary shall have previously directed in writing and in default of and subject to any such direction at the discretion of the trustee* and further will if so required by the beneficiary execute all proxies or other documents which shall be necessary or proper to enable the beneficiary or its

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> representatives or assigns or its nominees to vote at such meeting in the place of the trustee.
>
> [emphasis added]

74 Clause 2 makes clear that Ms Kao as trustee is obliged to vote according to the directions, if any, of the beneficiary. Her discretion to vote only exists insofar as *no such direction* has been given. Given my finding above that the estate holds the absolute beneficial interest in the trust shares, the court's objections in *Re Whichelow* and *Burns v Steel* (that the plaintiff did not represent or was not entitled to the whole beneficial interest) have no application here. By virtue of the express terms of the 2000 Trust Deed, the estate is entitled to a declaration that Ms Kao is obliged to comply with any direction from HSBC as to the exercise of the voting rights attached to the trust shares.

75 In any event, even if Ms Kao were vested with a discretion to vote, I find sufficient evidence that she intended to improperly exercise this discretion. When asked by HSBC over correspondence to confirm that she would comply with HSBC's instructions on the manner of voting, Ms Kao's solicitors relied on the 2004 Supplemental Deed to assert ownership of the trust shares (see [24] above). This conduct completely betrays the fact that she never intended to exercise the voting rights of the trust shares in the best interests of the estate in accordance with the 2000 Trust Deed, the very instrument under which she was appointed as the trustee.

76 Lastly, Mr Rai's arguments above have no bearing on the prayer seeking a declaration that Ms Kao is to comply with HSBC's instructions as regards the disposal of the trust shares. In fact, Mr Rai accepted in his written submissions that beneficiaries who are *sui juris* and together entitled to the whole beneficial interest are entitled to direct the trustees to transfer the trust

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property to them or such persons as they direct (see *Saunders v Vautier* (1841) 4 Beav 115).[26] Since the estate is absolutely entitled to the whole beneficial interest in the trust shares, this declaration is also in order.

Conclusion

77 In conclusion, I declare as follows:

(a) The trust shares registered in Ms Kao's name are held on trust for the estate of Peter Fong;

(b) Ms Kao is obliged to comply with the directions of HSBC (as executor of the estate of Peter Fong) as to the exercise of the voting rights attached to the trust shares and the disposal of the trust shares.

78 Ms Kao is to pay Ms Fong's costs of this application, fixed at $15,000 inclusive of disbursements. Ms Kao's claim for an indemnity of her costs against the value of the trust shares under O 59 r 6(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) is denied as she had acted unreasonably in resisting this application. No order as to costs as regards Airtrust and HSBC.

Steven Chong
Judge of Appeal

Kee Lay Lian and Lim Wen Juin
(Rajah & Tann Singapore LLP) for the plaintiff;
Mahesh Rai s/o Vedprakash Rai and Huang Junjie

[26] LK Submissions 1, paras 67(a) and 74(a).

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(Drew & Napier LLC) for the first defendant;
Chan Yi Zhang (Tan Kok Quan Partnership)
for the second defendant;
Vincent Lim (Shook Lin & Bok LLP)
for the third defendant.

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