

(1) Authorised Investments

2.02 The definition provides that investments may be authorised: (a) by the trust instrument if any; and (b) by law.

(a) Investments authorised by the trust instrument

2.03 As will be seen in the discussion of Part II of this Ordinance, a trust instrument or enactment creating the trust may:

- (1) authorise investments which are narrower or wider than those classes specified in the statutory list. For instance the trust instrument in *Kboo Tek Keong v Ch'ng Joo Neob* [1934] AC 529 (PC), provided that the trustees might invest trust moneys in such investments as they in their absolute discretion thought fit. Section 6(1) of the Lord Wilson Heritage Trust Ordinance (Cap.425) provides that "the Board of Trustees may invest Trust assets in such investments as it thinks fit, whether or not such investments are in Hong Kong or are authorised by section 4 of the Trustee Ordinance (Cap.29)";
- (2) authorise the trustee to invest trust funds without specifying any types of investment. See *Re Harari's Settlement Trusts* [1949] 1 All ER 430, where it was held that on the true construction of the settlement, there was no justification for implying any restriction of the words "in or upon such investments as to them may seem fit," and the trustees had power, under the plain meaning of those words, to invest in any investments which they honestly thought to be desirable, whether or not they were investments authorised by law for the investment of trust funds; or
- (3) authorise the trustee to invest the trust fund as if he were its beneficial owner. See eg cl.8 of the trust instrument in *Re Power* [1947] Ch 572, [1947] 2 All ER 282, which provided as follows: "All moneys requiring to be invested under this my will may be invested by the trustee in any manner in which he may in his absolute discretion think fit in all respects as if he were sole beneficial owner of such moneys including the purchase of freehold property in England and Wales". See Review of the Trustee Ordinance and Related Matters: Consultation Paper (Financial Services and Treasury Bureau: June 2009) para.2.16: "Trust instruments professionally drawn often provide trustees with wide powers of investment, for example, 'all the investment powers of a beneficial owner'. Express provisions such as this empower the trustees to consider the widest range of investments permissible subject to the general standard of care applicable to trustees. However, the general standard provides neither specific nor cautionary guidance". Cf s.3(1) of the Trustee Act 2000 (UK) which provides as follows: "Subject to the provisions of this Part, a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust".

(b) Investments authorised by law

2.04 Primarily this refers to investments authorised by Sch.2 of the Trustee Ordinance. It may also refer to investments which, although not in the statutory list, might be authorised by the court upon application by the trustee under s.4(1)(b).

(2) Instrument

2.05 Following the Trustee Act 1925 (UK), instrument has been defined to include an enactment (in the UK Act, "an Act of Parliament"), unless context otherwise requires.

According to s.2 of the Interpretation and General Clauses Ordinance (Cap.1), the word "enactment" has the same meaning as Ordinance. That Ordinance introduces an unwelcome complication into the Trustee Ordinance by stating that "instrument includes any publication in the *Gazette* having legal effect".

A statute which creates a trust may confer powers on trustees or otherwise deal with the administration of the trust. In such situations the statute is no different from a trust instrument. It is possibly for that reason that the word "instrument" is understood as including "enactment" within its meaning. See eg Lord Wilson Heritage Trust Ordinance (Cap.425), which overrides the investment provisions in the Trustee Ordinance. Section 6(1)(a) of that Ordinance provides that "the Board of Trustees may invest Trust assets in such investments as it thinks fit, whether or not such investments are in Hong Kong or are authorised by section 4 of the Trustee Ordinance (Cap.29)".

The word instrument occurs in many sections of the Ordinance, but in not all of these instances is the word "instrument" a reference to an instrument creating the trust. For instance see s.23(3) "instrument giving an indemnity;" s.2, definition of stock "instrument of transfer;" s.11 "instrument of mortgage;" and s.27 "instrument creating a power of attorney".

Wherever reference in a section is made to the instrument creating the trust (as in ss.3(2), 7 or 17), the word "enactment" or "law" or "general law" follows. See, for instance the reference in s.3(2) to "the powers conferred by the instrument creating the trust or an enactment" and reference in s.7 to "an investment authorised by the instrument creating the trust or the general law".

The only section that uses the words "trust instrument" is s.56(1) which refers to "any power for that purpose vested in the trustees by the trust instrument, if any, or by law".

Note that the words "law" and "general law" necessarily include "enactments".

Section 11(6) uses the word instrument without being followed by the word enactment, but this is because the word "law" precedes "instrument". Section 11(6) reads: "The powers conferred by this section shall be exercisable subject to the consent of any person whose consent to a change of investment is required by law or by the instrument, if any, creating the trust".

The word instrument creating the trust is not accompanied by the word "enactment" "law" or "general law" in ss.15, 17(3), 22(4), 28(2), 29(3), 37(1) and 44. For instance, s.15(3) provides as follows: "This section applies notwithstanding anything to the contrary in the instrument, if any, creating the trust". Two interpretations are possible: (1) since "instrument" includes "enactment", these sections override not only a trust instrument but also any statute which creates a trust; (2) These sections may fall within the opening words of s.2 "unless the context otherwise requires" and apply only to trust instruments and not to statutes creating trusts.

(3) Trust

Cohen J observed in *Re Marshall's Will Trusts* [1945] Ch 217, [1945] 1 All ER 550, that the UK Act contains no definition of "trust" and therefore that word must be given its

COMMENTARY

3.01 The Ordinance applies to trusts (whenever created) including, so far as the Ordinance applies, executorships and administratorships whenever constituted.

(1) "Trusts" includes express trusts and trusts arising by operation of law

3.02 Consistently with the interpretation of trusts in s.2, the words "any trusts (whenever created)" might be understood as a reference to express trusts and trusts arising by operation of law ("implied and constrictive trusts" as referred to in the definition of trust in s.2). Although, strictly speaking, resulting and constructive trusts are not "created" but "arise" by operation of law, it is not unusual to refer to "creation" of such trusts. The opening paragraph of Chapter VIII of Thomas Lewin, *A Practical Treatise on Trusts and Trustees* (3rd ed., 1858) refers to "the creation of trusts by operation of law". See also *Lewin on Trusts* (18th ed., 2008) the opening paragraph of Chapter 7 for same terminology.

(2) Temporal application of the Trustee Ordinance

3.03 Sub-section (1) provides that it applies to trusts (whenever created) as well as executorships and administratorships whenever constituted. This provision takes effect "except as otherwise stated in the Ordinance: sub-s.(2B).

3.04 The Ordinance does not affect the legality or validity of anything done before the commencement of the Ordinance, except as otherwise provided: sub-s.(3).

3.05 The effect of these provisions is as follows:

- (1) The original Ordinance came into effect on 27 July 1934, and operates prospectively. The provisions of the Ordinance apply not only to trusts created after 27 July 1934, but also to any trusts which were in existence on that date.
- (2) The Trustee Ordinance may provide otherwise and limit the application of any provision to trusts created after the coming into effect of the Ordinance. For instance, the Ordinance provides in ss.33 (power of maintenance and accumulation of income during a minority), 34 (power of advancement) and 35 (protective trusts) that those sections do not apply to an instrument creating the interest (s.33) or trust (ss.34 and 35) which came to effect before the commencement of the Trustee Ordinance on 27 July 1934.
- (3) The Ordinance does not affect the legality or validity of anything done before the commencement of the Ordinance, except otherwise provided. See sub-s.(3). Examples of "except otherwise provided" sections are:
 - (a) Section 9(4): "This section applies to transfers of existing securities as well as to new securities and to investments made before as well as after the commencement of this Ordinance";
 - (b) Section 10(2): "This section applies to investments made before as well as after the commencement of this Ordinance";
 - (c) Section 14(4): "This section applies to sales made before or after the commencement of this Ordinance";

- (d) Section 17(3): "This section applies to trusts created either before or after the commencement of this Ordinance, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust";
- (e) Section 2(6): "This section applies to policies effected either before or after the commencement of this Ordinance, but only to money received after such commencement";
- (f) Section 37(3): "Where a corporation being a trustee is or has been dissolved, either before or after the commencement of this Ordinance, then, for the purposes of this section and of any enactment replaced thereby, the corporation shall be deemed to be and to have been from the date of the dissolution incapable of acting in the trusts or powers reposed in or conferred on the corporation".

When the Trustee Ordinance was amended in 2013, the general principle in s.3 would have meant that all the new provisions would apply prospectively to trusts "whenever created". The Trust Law (Amendment) Ordinance 2013 Sch.4 "Transitional and Saving Provisions", s.4 explicitly states this principle: 3.06

"Part 2 of the 2013 amending Ordinance [which contains all the amendments that were made in 2013 to the Trustee Ordinance] does not affect the legality and validity of anything done or omission made before the commencement date of that part [1 December 2013], except as otherwise provided in the 2013 amending Ordinance".

Transitional arrangements further clarify the application of this principle in specific contexts: 3.07

- (1) "This section as in force immediately before the commencement date of the 2013 amending Ordinance [1 December 2013] continues to apply to a power of attorney created before the commencement date, as if this section has not been amended:" s.27(9).
- (2) "The statutory duty of care does not apply in relation to a trust created before the commencement date of this section ...": s.3A(4).
- (3) "For a trust created before the commencement date of the 2013 amending Ordinance, this section—
 - (a) has effect in respect of the trust on the expiry of 1 year after that date; and
 - (b) does not affect the liability for anything done by a trustee of the trust within that 1-year period." s.41W(6).

(3) Interplay between the Trustee Ordinance and trust instruments

Sub-section 2 clarifies that the powers that the ordinance confers on trustees are in addition to powers conferred by a trust instrument or an enactment. Sub-section (2A)(b) provides that the powers conferred by the Trustee Ordinance "have effect subject to the terms of that instrument or enactment". Sub-section 2A(a) makes it clear that the 3.08

COMMENTARY

6.01 This section is based on s.3 of the Trustee Act 1925 (UK) which was repealed in 2000

(1) Trustees' investment decisions are discretionary

6.02 It is important that the trustee takes investment decisions in his discretion and not under direction from anyone be they the beneficiaries or the settlor, unless there is a contrary indication in the trust instrument.

(2) The effect of beneficiaries' wishes on trustee's discretion

6.03 There may be instances where the trustee is under obligation to take directions or obtain consent from another person. It is trite law that consent means informed consent. Thus consent is not effective unless the person whose consent is required, usually the beneficiary, is made aware of the nature of the proposed investment: *Re Massingberd's Settlement* (1890) 63 LT 296.

(3) Competing considerations of obligation to seek consent and fair administration of the trust

6.04 When fulfilling his obligation to act on direction or with consent of another, the trustee must take into account two competing considerations: (1) They must strictly follow the trust instrument as regards consent or direction that they should obtain; but (2) such strict compliance must not lead to injustice or unfairness.

(a) The trustee's discretion is subject to any consent or direction with respect to the investment of trust fund

6.05 Where for instance the trustee is required to obtain the wife's consent to lend money to the husband, it is necessary that her consent is obtained for every act of lending to the husband, it being insufficient to secure an open ended authority to lend to her husband in the future: *Child v Child* (1855) 20 Beav 50, 52 ER 521, where the court pointed out that the marriage settlement was intended to protect the wife from her husband's power over her, at a time a married woman was not considered a *feme sole*. See *Cocker v Quayle* (1830) 1 Russ & M 535, 39 ER 206, where it was held that trustees would be in breach of trust if they acted on informal consent of the wife for advancing trust funds to her husband when the settlement required her written consent.

6.06 However, if an investment has been made without the required consent, a beneficiary cannot complain of it, who, being *sui juris* at the time, acquiesced in and adopted the investment: *Stevens v Robertson* (1868) 37 LJ Ch 499. Trustees who fail to secure consent or follow directions, where it is appropriate to do so, would be acting in breach of trust, and unless they are protected by an exemption clause or come within the protection offered by s.60 of the Trustee Ordinance, assuming it is applicable to such situations, will be liable to the adversely affected beneficiaries. In *Chapman v Browne* [1902] 1 Ch 785 the court left it open where s.3 of Judicial Trustees Act 1896 (equivalent of s.60 of the Trustee Ordinance) was applicable to such situations.

(b) The trustee must bear in mind that he is justified in non-compliance with that duty if that would cause injustice or unfairness in the administration of the trust

While the trustee is required to act according to the wishes of a beneficiary where his consent is needed for the exercise of investment powers, it does not mean that he must agree with the beneficiary at all times. The trustees must be mindful that they have to act fairly and impartially between different classes of beneficiaries. 6.07

For instance if their power to vary securities is conditional upon receiving the consent of the tenant for life, they would be right to take notice that the control is given to the tenant for life for his protection, and would be within their rights to act contrary to his wishes in the interests of the remaindermen: *Harrison v Thexton* (1858) 4 Jur NS 550. 6.08

Similarly, where every change of investment is to be with the consent of the tenant for life, and he withholds his consent though the fund is in danger, the trustee can proceed in equity and compel a change of investment against the wishes of the tenant for life: *Costello v O'Rourke* (1869) IR 3 Eq 172. 6.09

Section 7: Retention of unauthorised investment

A trustee is not liable for a breach of trust only because of the trustee's continuing to hold an investment which has ceased to be an investment authorized by the instrument creating the trust or the general law if the trustee has discharged the statutory duty of care in doing so.

(Replaced 13 of 2013 s.7)

COMMENTARY

This section is based on s.4 of the Trustee Act 1925 (UK) which was repealed in 2000. 7.01

(1) Duty to uplift unauthorised investments

Since a trustee has power to invest in authorised investments only, it should follow naturally that he should redeem an investment if it ceases to be an authorised investment. See *Re Morris* (1885) 54 LJ Ch 388, where the testator had given the power to trustees to retain certain company shares and the shares became unauthorised sometime after his death, it was held to be the trustees' duty to convert them. 7.02

(2) Exceptions to the duty

However, if in the particular circumstances of the case it would be unwise to redeem an investment at least for the time being, the trustee would be right not to redeem them. This would obviously be the case where there is no loss or prejudice caused to the trust 7.03

(1) The exercise of the power of sale**(a) When can trustees sell trust property**

13.03 Apart from situations where the trustee is empowered by the trust instrument or legislation (for instance the Probate and Administration Ordinance (Cap.10) s.62(1) provides that the personal representative holds immovable property of the intestate on trust for sale) to sell trust property, a trustee may also sell trust property where the beneficiaries have authorised him to do so. See *Re Baker and Selmon's Contract* [1907] 1 Ch 238, where Swinfen Edy J said at (243): "Seeing, therefore, that at the date of the contract the legal estate was vested in the vendor as trustee, that he had the written request of all the beneficiaries to sell, and entered into the contract in pursuance of that request, so that he had a right to compel their concurrence, I am of opinion that the vendor has shewn a good title".

(b) The powers conferred on the trustees are extensive

13.04 "These are very general words, and I should be loth to cut down their generality, so long as trustees, in availing themselves of the provisions of the Act, do not do anything that would be unreasonable in their capacity of trustees for sale:" *Re Judd and Poland and Skelcher's Contract* [1906] 1 Ch 684, 689 (Romer LJ).

(i) The trustee may concur with any other person

13.05 This is an express endorsement of the common law position at the time this provision was first enacted in England through s.13 of the Trustee Act 1893.

13.06 "First of all, on principle, what is the duty of trustees for sale? It is their duty to sell the estate to the best advantage they can, that is, in the manner most beneficial to the *cestuis que trust*. It is further their duty to take care to receive the purchase-money, and to invest it properly according to the trusts. If, therefore, the sale of the property can be effected at a higher price by joining with somebody else, so far from that being a breach of that principle, they are only carrying out their trusts and performing their duty in so obtaining that higher price. It is very astonishing to me to find that any Judge could otherwise decide:" *Re Cooper and Allen's Contract for Sale to Kitchin* (1876) 4 Ch D 802, 815 (Jessel MR).

13.07 *Cavendish v Cavendish* (1874-75) LR 10 Ch App 319 is a case where two properties, vested in different trustees and held on different trusts, were sold by one contract for one lump sum.

(ii) Trustees may enter into the agreement subject to conditions

13.08 The common law position, before legislative intervention was as follows: A trustee may sell subject to any reasonable conditions and would not be justified in clogging the property with restrictions which reduce the value of the property, it being the trustees' duty to make the most of it for the benefit of the beneficiaries.

13.09 In *Dance v Goldingham* (1872-73) LR 8 Ch App 902, James J said at 909-910: "I have always understood it to be the law, consistently with authority and principle, that, however large may be the power of trustees under their trust deed to introduce conditions limiting the title, and other special conditions which have, or are calculated to have, a depreciatory effect on the sale, they are bound to exercise them in a reasonable and proper manner—that they must not rashly or improvidently introduce a depreciatory condition for which there is no necessity".

It might be argued that although the Trustee Ordinance permits a trustee to sell trust property "subject to any conditions ... as the trustee thinks fit", the principle in *Dance v Goldingham* still operates to require that the trustee acts reasonably and prudently in agreeing to conditions. See sub-para.(iv) below "without being answerable for any loss" 13.10

In *Hobson v Bell* (1839) 2 Beav 17, 48 ER 1084, the trustees were held to be in breach of trust when they offered the trust property for sale subject to a condition which had the effect of depreciating the value of the property, inserted without reasonable ground. The beneficiaries were held entitled to prevent the sale being completed. It had been the practice before legislative provision enabled sale of trust property subject to conditions to incorporate express provision in the trust deed to authorise trustees to insert special conditions of sale: Lewin, *A Practical Treatise on the Law of Trusts* (12th ed., 1911) p.515. 13.11

This position in common law in relation to depreciatory conditions has now been altered by s.14. 13.12

(iii) Sale may be by auction or private sale

The sale may be conducted by public auction or by private contract as the one or the other mode may be most advantageous according to the circumstances of the case, and of course it is not an essential preliminary to a sale by private contract that the trustees should have previously attempted a sale by auction, or even have inserted a public advertisement that the property was for sale: Lewin, *A Practical Treatise on the Law of Trusts* (12th ed., 1911) p.514. 13.13

(iv) Trustees may exercise the powers under s.13, "without being answerable for any loss"

On the face of it, the words "without being answerable for any loss" seem to exempt the trustee from liability for whatever he does under this sub-section in relation to a sale of trust property. However, a trustee may exercise these powers only so long as he acts reasonably, honestly and prudently. As in relation to the exercise of all their powers the trustees have must discharge their fiduciary and common law duties. The new statutory duty of care not being applicable in respect of section 13, the common law duty of ordinary prudent man of business would be applicable. 13.14

(2) Division of land for sale

Sub-section (2) provides that trustees may sell any part of the land whether the division is horizontal, vertical or made any other way. 13.15

Section 14: Power to sell subject to depreciatory conditions

(1) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3) This section takes effect subject to the restrictions imposed in regard to receipts by a sole trustee, not being a trust corporation.

(4) In this section "personal representative" (遺產代理人) does not include an executor who has renounced or has not proved.

[cf 1925 c.19 s.18 UK]

COMMENTARY

20.01 This section is based on s.18 of the Trustee Act 1925 (UK).

(1) Need to ensure continuity in the administration of the trust

20.02 Sub-section (1) is intended to ensure that the death of some of the joint trustees would not affect the administration of the trust, which will fall to be performed by the survivors or survivor. This section reaffirms the pre-existing law as set out in cases such as *Re Smith* [1904] 1 Ch 139 and *Re Bacon* [1907] 1 Ch 475.

20.03 Where the sole trustee or the last surviving joint trustee is dead, his personal representative has authority to continue to perform such trustee's powers and functions, until a succeeding trustee is appointed: sub-s.(2). This is only an enabling provision and does not compel the personal representative to step into the shoes of the outgoing trustee. He may decline to accept the office of trustee: *Re Ridley* [1904] 2 Ch 774.

20.04 Sub-section (2) takes effect subject to the restrictions imposed in regard to receipts by a sole trustee, not being a trust corporation: sub-s.(3).

20.05 Where there is left one surviving trustee or his personal representative, the powers of administration is subject to restrictions placed on receipts by a sole trustee not being a trust corporation.

Section 21: Power to insure

(1) The trustee of a trust may—

- (a) insure any property that is subject to the trust against loss or damage due to any event; and
- (b) pay the premiums out of the trust funds.

(2) If a property is held on a bare trust, the power to insure the property is subject to any direction given by the sole beneficiary or (if more than one beneficiary) each of the beneficiaries that—

- (a) the property is not to be insured; or
- (b) the property is not to be insured except on the conditions specified in the direction.

(3) For the purpose of subsection (2), a property is held on a bare trust if it is held on trust for—

- (a) the sole beneficiary under the trust who is absolutely entitled to the property subject to the trust and—
 - (i) is an individual of full age and capacity; or
 - (ii) is a body corporate whose constitution does not prohibit it from exercising the power under this section; or
- (b) all the beneficiaries under the trust who (taken together) are absolutely entitled to the property subject to the trust and each of whom is either—
 - (i) an individual of full age and capacity; or
 - (ii) a body corporate whose constitution does not prohibit it from exercising the power under this section.

(4) If a direction under subsection (2) is given, the power to insure, so far as it is subject to the direction, ceases to be a delegable function for the purpose of section 41B (power to appoint agents).

(Replaced 13 of 2013 s.14)

COMMENTARY

This section is based on s.19 of the Trustee Act 1925 (UK), as amended in 2000. 21.01

The original s.21 was amended in 2013, largely following the amendment of the corresponding English provision (namely s.19 of Trustee Act 1925) by Trustee Act 2000. 21.02

(1) Trustees' power to insure trust property

This section confers power, but does not impose a duty, on trustees to insure trust property. 21.03

Trustees have the power to insure trust property using trust funds. As originally enacted sub-s.(1) authorised trustees to insure "any building or other insurable property" against "loss or damage by fire and typhoon". This subsection was amended in 2013 so that a trustee may insure "any property subject to the trust" against "loss or damage due to any event". Thus the power to insure extends to land and personal property alike. 21.04

(2) A bare trustee may insure trust property

As originally enacted, s.21(2) of the Trustee Ordinance expressly denied trustees of a bare trust the power to insure. This sub-section was amended in 2103 to confer the power to insure on trustees of a bare trust too. However, in the case of a bare trust, the trustee's power to insure is subject to directions given by the beneficiary or beneficiaries: (i) not to insure the trust property; or (ii) not to insure the trust property except on conditions specified in the direction. 21.05

A bare trust for the purpose of this section is a trust for a sole beneficiary who is absolutely entitled to the trust property or a group of beneficiaries who (taken together) are absolutely entitled to the trust property. It is also necessary that such sole beneficiary or 21.06

COMMENTARY

- 23.01 This repealed section is based on s.19 of the Trustee Act 1925 (UK), which was repealed in 2000.
- 23.02 The repealed s.23 provided that trustees may deposit any documents relating to the trust with any banker, banking company or any other company whose business includes undertaking safe custody of documents.
- 23.03 This specific provision became redundant when, by the amendment of the Trustee Ordinance in 2013, trustees were given general power to employee nominees and custodians.
- 23.04 Section 2 of Sch.4 provides that if, immediately before 1 December 2013, being the commencement date of s.16 of the Trust Law (Amendment) Ordinance 2013, a banker, banking company or any other company holds any documents deposited with it under the repealed s.23, then on and after that date, the banker, banking company or other company is to be treated as having been appointed as a custodian of the documents under s.41H.

Section 24: Reversionary interests, valuations, and audit

(1) Where trust property includes any share or interest in property not vested in the trustees, or the proceeds of sale of any such property, or any other thing in action, the trustees on the same falling into possession, or becoming payable or transferable may—

- (a) agree or ascertain the amount or value thereof or any part thereof in such manner as they may think fit;
- (b) accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value which they may think fit, any authorized investments;
- (c) allow any deductions for duties, costs, charges and expenses which they may think proper or reasonable;
- (d) execute any release in respect of the premises so as effectually to discharge all accountable parties from all liability in respect of any matters coming within the scope of such release,

without being responsible in any such case for any loss occasioned by any act or thing done by them under this section if the trustees have discharged the statutory duty of care in doing so.

(2) The trustees shall not be under any obligation and shall not be chargeable with any breach of trust by reason of any omission—

- (a) to apply for any stop or other like order upon any securities or other property out of or on which such share or interest or other thing in action as referred to in subsection (1) is derived, payable or charged; or
- (b) to take any proceedings on account of any act, default, or neglect on the part of the persons in whom such securities or other property or any of them or any part thereof are for the time being, or had at any time been, vested,

unless and until required in writing so to do by some person, or the guardian of some person, beneficially interested under the trust, and unless also due provision is made to their satisfaction for payment of the costs of any proceedings required to be taken.

(2A) Subsection (2) does not relieve the trustees of the obligation to get in and obtain payment or transfer of such share or interest or other thing in action on its falling into possession. (Added 13 of 2013 s.17)

(3) Trustees may, for the purpose of giving effect to the trust, or any of the provisions of the instrument, if any, creating the trust or of any statute, from time to time (by duly qualified agents) ascertain and fix the value of any trust property in such manner as they think proper, and any valuation made by them under this section is binding on all persons interested under the trust if the trustees have discharged the statutory duty of care in making the valuation.

(4) Trustees may, in their absolute discretion, from time to time, but not more than once in every year unless the nature of the trust or any special dealings with the trust property make a more frequent exercise of the right reasonable, cause the accounts of the trust property to be examined or audited by an independent accountant, and shall, for that purpose, produce such vouchers and give such information to the accountant as the accountant may require.

(5) The costs of the examination or audit referred to in subsection (4), including the fee of an auditor, are to be paid out of the trust funds. (Added 13 of 2013 s.17)

(Amended 13 of 2013 s.17)
[cf 1925 c.19 s.22 UK]

COMMENTARY

This section is based on s.22 of the Trustee Act 1925 (UK), as amended in 2000. 24.01

This section deals with trust property in the form of choses in action or reversionary interests, valuations and audits. 24.02

(1) Reversionary interests

Where trust property includes any share or interest in property not presently vested in them, or things in action, upon its falling into possession, or become payable or transferable, they may do any of the things classed (a)–(d) in sub-s.(1), without being held liable for any loss caused by taking such action provided that they have discharged their statutory duty of care. Prior to the amendment of this section in 2013, the trustees would be excused if they had acted in good faith. 24.03

Sub-section (2) provides that trustees are not required to take certain action in relation to reversionary interests unless a request has been made by or on behalf of a person beneficially interested under the trust and unless also provision is made for the payment of the cost of necessary proceedings. 24.04

The objects of a power of appointment have no enforceable right to receive any share of the property. Subject to directions that he has received from the donor, it is left to the discretion of the donee to decide whether to make an appointment and to whom and when.

(a) Fiduciary power of appointment

27A.03 When a power of appointment (or “a mere power”) is given to a trustee, it is referred to as a fiduciary power. While the trustee is under no obligation to exercise it, the exercise or non-exercise of the power must be consistent with his position as a fiduciary. While the objects of the power have no right to receive any part of the trust property or its proceeds, they may enforce the trustee’s fiduciary obligations in relation to the exercise of his power of appointment.

27A.04 The trustee’s fiduciary obligations in relation to a power of appointment are that he must consider periodically whether it is appropriate for him to make an appointment; consider the range of objects of the power and consider the appropriateness of making any individual appointment, especially when an object requests him to make an appointment, rather than making indiscriminate appointments. If he decides to exercise his power of appointment, he must act in a responsible manner according to its purpose and in compliance with any directions in the trust instrument regarding the exercise of the power. See *Re Gestetner Settlement* [1953] Ch 672, [1953] 1 All ER 1150, *Re Manisty’s Settlement Trusts* [1974] Ch 17, [1973] 2 All ER 1203, and *Re Hay’s Settlement Trusts* [1982] 1 WLR 202, [1981] 3 All ER 786.

(b) Fiduciary Power of appointment distinguished from discretionary trust

27A.05 A fiduciary power of appointment (or “a mere power” given to a trustee) must be distinguished from a discretionary trust or, what is sometimes confusingly referred to as “a trust power” or “a power in the nature of a trust” or “power coupled with a duty”.

27A.06 A discretionary trust imposes an obligation on the trustee to distribute the trust property among members of a class of beneficiaries, it being left to the trustee to exercise all or some of the following discretions: when to make a distribution, to whom, when and how much. The trustee of a discretionary trust generally has discretion to distribute or accumulate. The beneficiaries do not have any right to compel the trustee to give them any share of the trust property but may compel the trustee to consider from time to time whether he should make a distribution. In the case of a non-exhaustive discretionary trust, where there will always be a remainder, provision is generally made in respect of the destination of such remainder.

27A.07 Unlike the objects of a power of appointment, the beneficiaries of a discretionary trust are the equitable owners or “true owners” of the trust property and may in the case of an exhaustive discretionary trust exercise their *Sunders v Vautier* power to collapse the trust. They may, just as beneficiaries of a fixed trust, exercise other powers of beneficiaries, for instance under s.40A of the Trustee Ordinance to require the appointment or retirement of trustees.

(c) Gift in default

Where property is given on a power of appointment, there being no obligation to distribute, there is a likelihood that, by the end of period permitted for appointment, all or part of the property may remain in the hands of the donee undistributed. It is common practice to provide a gift in default to take effect in respect of such remaining property. 27A.08

(2) What share may be appointed to an object?

Since no object has a right to receive a share of the appointed property, the share left to an object may be “unsubstantial, illusory or nominal”: s.27A(1)(a). 27A.09

“Under the old law, when a power was given to appoint among a class in such parts or shares as the appointor should direct, it was held, not irrationally, that the meaning of the person creating the power was, that the appointor should appoint a substantial share to each object of the power. The power was called a non-exclusive power, and it was considered that the author of the settlement intended everybody to take a substantial share”: *Gainsford v Dunn* (1873–74) LR 17 Eq 405, 406. 27A.10

The effect of sub-s.(1) is to alter the law and give a free hand to the donee as regards appointment. 27A.11

However, the donee’s discretion to distribute or not to distribute is subject to any directions in the trust instrument. For instance the trust instrument may set out an amount of any share from which an object may not be excluded: s.27A(2)(a). 27A.12

For the development of law and legislative intervention see *Gainsford v Dunn* (1873–74) LR 17 Eq 405 and *Re Capon’s Trusts* (1879) 10 Ch D 484. 27A.13

DIVISION 2

INDEMNITIES

Section 28: Protection against liability in respect of rents and covenants

(Cross-heading repealed 13 of 2013 s.20)

- (1) Where a personal representative or trustee liable as such for—
- (a) any rent, covenant, or agreement reserved by or contained in any lease; or
 - (b) any rent, covenant or agreement payable under or contained in any grant made in consideration of a rentcharge; or
 - (c) any indemnity given in respect of any rent, covenant or agreement referred to in either of the foregoing paragraphs,
- satisfies all liabilities under the lease or grant which may have accrued, and been claimed, up to the date of the conveyance hereinafter mentioned, and, where necessary, sets apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum which the lessee

(ii) free the trustee or personal representative from the obligation to make searches similar to those which an intending purchaser would be advised to take.

(11) This section is an overriding provision

29.23 The protection that s.29 gives to personal representatives or trustees operates notwithstanding anything to the contrary in the trust instrument: sub-s.(3).

Section 30: Protection in regard to notice

A trustee or personal representative acting for the purposes of more than one trust or estate shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if he has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust or estate.

(Amended LN 446 of 1994)
[cf 1925 c.19 s.28 UK]

COMMENTARY

30.01 This section is based on s.27 of the Trustee Act 1925 (UK).

30.02 This section provides that where a trustee who acts for more than one trust or estate receives notice of any matter in relation to one trust or estate merely by reason of his acting for another trust or estate, he will not, in the absence of fraud, be affected by such notice. This section will provide relief particularly to trust companies or professional trustees who manage large numbers of trusts.

Section 31: Exoneration of trustees in respect of certain powers of attorney (Repealed 51 of 1972 s.8)

(Note that this section is reproduced from the original version of the Trustee Ordinance 1934)

A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the act or payment the person who gave the power of attorney was subject to any disability or bankrupt or dead, or had done or suffered some act or thing to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying

Provided that—

- (1) Nothing in this section shall effect the right of any person entitled to the money against the person to whom the payment of money is made;
- (2) The person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

COMMENTARY

This repealed section was based on s.27 of the Trustee Act 1925 (UK), which was repealed by Power of Attorney Act 1971. 31.01

The repealed section provided protection to trustees in respect of acts done in good faith under a defective power of attorney. 31.02

Moving the second reading of the Power of Attorney Bill in the Legislative Council on 2 August 1972 (see p.962 of the Proceedings of the Legislative Council) the Acting Attorney-General explained why the Government was proposing the repeal of s.31 of the Trustee Ordinance, which became redundant in light of the new legislation: 31.03

“[i]t will be appreciated that they can be a source of risk should [powers of attorney] be revoked without the knowledge of the donee or of third persons who have dealing with the donee. Clause 5 seeks to give protection against this risk. Thus, Sir, a donee who exercises his power without knowing that it has been revoked is freed from any liability which he would otherwise have incurred. Similarly, transactions entered into by the donee with third persons in such circumstances are given the same validity which they would have had if the power of attorney had not been revoked. There are further protections, Sir, of the same sort in the clause but I think I have said enough to indicate the general intention. In this connection however I would add that with the introduction of these safeguards it will no longer be necessary to provide such safeguards specifically for trustees for exercising delegated powers granted to them under powers of attorney. Consequently, section 31 of the Trustee Ordinance which gave that protection is being repealed”.

Section 32: Implied indemnity of trustees (Repealed 13 of 2013 s.22)

(1) A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, or of any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.

(2) A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.

[cf 1925 c.19 s.30 UK]

COMMENTARY

This repealed section was based on s.30 of the Trustee Act 1925, which was repealed in 2000. 32.01

in earlier reported decisions that bear upon the meaning and range of a power of advancement" (at 634; 627).

(2) Interplay of s.34 and provisions in the trust instrument

- 34.06 The scope of this power is determined by s.34 and any relevant provision in the trust instrument. For instance the will in question in *Re Collard's Will Trusts* [1961] Ch 293, [1961] 1 All ER 821 provided that "the statutory power of advancement of capital given to my trustees by section 32 of the Trustee Act, 1925 [the equivalent of s.34 of the Trustee Ordinance], shall apply to the trusts hereof as if incorporated herein save that no such advancement shall be made to or on behalf of any beneficiary ... for any purposes connected with business".
- 34.07 The statutory power of advancement "operates in addition to the powers conferred by the instrument creating the trust or an enactment" (s.3(2)), but would apply "if, and only in so far as, a contrary intention is not expressed in the instrument creating the trust or an enactment" (s.3(2A)).

"Since the first phrase contemplates the statutory powers being additional to the powers conferred by the instrument, the mere fact that the instrument confers express powers cannot, without more, amount to an expression of intention to exclude the statutory power. Where, then—so the argument may run—is the expression of a contrary intention to be found? Logically, it is not there unless it is stated in terms." Stamp J in *Re Evan's Settlement* [1967] 1 WLR 1294, 1297–98, [1967] 3 All ER 343, 346.

- 34.08 The grant of a power of advancement by the trust instrument does not necessarily exclude the statutory power of advancement, to the extent they can co-exist. The statutory power of advancement must yield to the power of advancement in the trust instrument to the extent they are inconsistent.
- 34.09 *Inland Revenue Commissioners v Bernstein* [1961] Ch 399, [1961] 1 All ER 320 is a case where a contrary intention in the trust instrument prevented the application of s.34, where it was held that the trust for accumulation of income during the settlor's life showed an intention in conflict with the power of advancement conferred by s.32(1) (s.34(2) of Trustee Ordinance); that s.69(2) (s.3(2) of Trustee Ordinance) did not require that the power of advancement conferred on trustees by s.32(1) (s.34(2) of Trustee Ordinance) should be expressly excluded, but that the power was inapplicable if, on a fair reading of the instrument in question, it could be said that the application of the power would be inconsistent with the purport of the instrument; that in the present case the object of the instrument was plainly to build up a capital sum which would be paid out to the beneficiary or her children, if any, on the settlor's death, and that, therefore, s.32(1) (s.34(2) of Trustee Ordinance) was inapplicable.

(3) Who may be an advancee

- 34.10 The statutory power of advancement may be exercised in favour of a person who is entitled to the capital of the trust property or any share thereof—

- (1) whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event; or
- (2) subject to a gift over on his death under any specified age or on the occurrence of any other event; and
- (3) whether in possession or in remainder or reversion.

Such advancement (payment or application) may be made notwithstanding that the interest of any such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs: sub-s.(1). This is subject to the three provisos (a), (b) and (c) set out in sub-s.(1), which are examined below.

The beneficiary may become on the happening of a contingency "attaining any specified age or on the occurrence of any other event". It was held in *Re Garrett* [1934] Ch 477 that the alternative contingency of "the occurrence of some other event" is not restricted to the occurrence of an event having no reference to a specified age, but, may also refer to a compound or double event of attaining a specified age and survivorship.

(4) Power of advancement is discretionary

"Trustees *may* at any time or times pay or apply capital money subject to a trust, for the advancement or benefit in such manner as they may, *in their absolute discretion*, think fit": sub-s.(1). Thus, trustees are under no obligation to advance any capital money and may exercise their power of advancement in their absolute discretion. What is required is that the trustees exercise their discretion properly.

As Willmer LJ explained in *Re Pauling's Settlement Trusts* [1964] Ch 303, 333, [1963] 3 All ER 1, 8 (CA):

"Being a fiduciary power, it seems to us quite clear that the power can be exercised only if it is for the benefit of the child or remoter issue to be advanced or it is thought to be 'a good thing' for the advanced person to have a share of capital before his or her due time ... a power of advancement [may] be exercised only if there is some good reason for it. That good reason must be beneficial to the person to be advanced; it cannot be exercised capriciously or with some other benefit in view. The trustees, before exercising the power, have to weigh on the one side the benefit to the proposed advancee, and on the other hand the rights of those who are or may hereafter become interested under the trusts of the settlement".

Drawing an analogy with fiduciary power of appointment, for which see *Re Hay's Settlement Trusts* [1982] 1 WLR 202, [1981] 3 All ER 786, it could be argued that trustees must consider from time to time whether it would be appropriate to exercise their discretionary power of advancement.

Where trustees exercise their discretions in good faith, the court will interfere only "where it is mischievously or ruinously exercised." *Re Brittlebank* (1881) 30 WR 99, 100 (Kay J). Courts would interfere for instance if trustees have acted for an improper purpose or

35.08 Alternatively, a protective trust may be created merely by declaring that an income will be held on protective trust for a principal beneficiary thereby attracting the application of a statutory protective trust under s.35 of the Trustee Ordinance.

(5) The main features of a statutory protective trust

(a) The nature of the principal beneficiary's beneficial interest

35.09 Section 35(1) refers to "any income, including an annuity or other periodical income payment" directed to be held on protective trust for the benefit of the principal beneficiary. This is a reference to a direction to hold a certain property or fund on trust to apply the income to the principal beneficiary, for instance the testator's residuary estate as in *Re Sartoris's Estate* [1892] 1 Ch 11; or, a share in the trust funds as in *Re Baring's Settlement Trusts* [1940] Ch 737, [1940] 3 All ER 20; or, stocks and shares as in *Re Dennis's Settlement Trusts* [1942] Ch 283.

(b) The principal beneficiary's determinable interest

35.10 Section 35(1) refers to "the period of his [ie the principal beneficiary's] life" or "any less period". Thus, the terminal point of his determinable interest is usually marked by death, but it could be an event that would give him a lesser period of benefit, for instance remarriage as in *D'Altroy's Will Trusts* [1968] 1 WLR 120, [1968] 1 All ER 181, where the testatrix directed as follows: "My trustees shall hold my residuary estate upon trust to pay the whole income thereof to Charles Henry Lowman during his lifetime upon protective trusts so long as he shall remain the widower of my late daughter Alice".

35.11 Where a trust instrument directs that a part of the trust fund should be held on a protective trust, but is silent on the determinable period, this section will be deemed to be incorporated in the instrument allowing the principal beneficiary's life time to be the determinable period: *Re Wittke* [1944] Ch 166, [1944] 1 All ER 383.

(c) Early determination of the principal beneficiary's determinable interest

35.12 (a) The principal beneficiary's determinable beneficial interest comes to a premature end when he:

"does or attempts to do or suffers any act or thing, or [when] any event happens ... whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof".

Thus, s.35(1)(a) envisages a forfeiture of the principal beneficiary's right to continue to receive the income of the trust fund, or as Morton J said in *Re Baring's Settlement Trusts* [1940] Ch 737, 742, [1940] 3 All ER 20, 23, "a situation must have arisen in which the tenant for life is not the only beneficiary". It must be remembered that in determining whether an event sufficient to determine the life interest has occurred the court must "construe the words which are actually used in this forfeiture clause and not [...] extend them or to read into the clause words which are not there": in *Re Brewer's Settlement* [1896] 2 Ch 503, 507 (Chitty J).

(b) An early determination of the principal beneficiary's exclusive beneficial interest takes place when he is "deprived of the right to receive the same or any part the [income that he would otherwise receive]": sub-s.(1)(a). What is required is that some other person becomes entitled to the income or part of the income (as illustrated by *Re Dennis's Settlement Trusts* [1942] Ch 283) which would otherwise belong to the principal beneficiary: There must be a deprivation of his interest. An attorney receiving the income on behalf of the principal beneficiary does not amount to a deprivation of the beneficiary's beneficial interest: *Morice v Swannell* (1909) 101 LT 76 (cited in *Re Baring's Settlement Trusts* [1940] Ch 737, [1940] 3 All ER 20). Nor does the fact that the trustee is entitled to deduct his expenses before the income is paid to the principal beneficiary deprive the principal beneficiary's interest and vest it in his trustee: *Re Tancred's Settlement* [1903] 1 Ch 715. A statutory charge on settled property for the recovery of a receiver's expenses does not amount to a deprivation of the principal beneficiary's interest: *Re Westby's Settlement* [1950] Ch 296, [1950] 1 All ER 479.

A forfeiture or deprivation was held to have taken place, for instance, in the following circumstances:

- (i) The principal beneficiary's bankruptcy: In *Re Sartoris's Estate* [1892] 1 Ch 11, a testator bequeathed the income of his residuary estate to his son during his life, or until he should assign or dispose of the income or some part thereof, "or become bankrupt, or do or suffer something whereby the said income if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person". In October 1890, a petition in bankruptcy was filed against the son, and in November 1890, a receiving order was made. A meeting of creditors was held in December and adjourned till January, when it was adjourned again, and nothing further was done in the matter. It was held that though the income did not vest in the official receiver, it would, by force of the receiving order have become payable to him if it had belonged absolutely to the tenant for life, and that the interest of the tenant for life had determined. In *Re Walker* [1939] Ch 974, [1939] 3 All ER 902, it was found that on the true construction of the testator's will and in the events that had happened, the annuity payable to the principal beneficiary had failed and determined by reason of his bankruptcy subsisting at the death of the testator.
- (ii) A court order directing the trustees not to pay any further money to the principal beneficiary. *Re Baring's Settlement Trusts* [1940] Ch 737, [1940] 3 All ER 20.
- (iii) Trustees asserting their right to retain the income of the fund in order to make good the breach of trust they had committed by advancing money to the principal beneficiary at his instigation. See *Re Balfour's Settlement* [1938] Ch 928, where distinguishing *Re Brewer's Settlement* [1896] 2 Ch 503, it was held that where the trustees had lent money to the principal beneficiary but had not demanded repayment there occurred no early determination.
- (iv) The execution of a new settlement deed whereby some person other than the principal beneficiary would receive part of the income originally settled on protective trust: *Re Dennis's Settlement Trust* [1942] Ch 283.

Section 40C: Provisions supplementary to sections 40A and 40B

(1) For the purposes of sections 40A and 40B, a direction is given by all the beneficiaries if—

- (a) a single direction is jointly given by all of them; or
- (b) in compliance with subsection (2), a direction is given by each of them (whether solely or jointly with one or more, but not all, of the others), and none of them by writing withdraws the direction given before it has been complied with.

(2) If more than one direction is given, each beneficiary must specify for the appointment or retirement the same person or persons.

(3) Section 37(7) (providing for the powers, authorities and discretions of new trustees) applies to a trustee appointed under section 40A or 40B as if the trustee were appointed under section 37.

(Added 13 of 2013 s.25)

COMMENTARY

40C.01 This section is supplemental of s.40A and s.40B. It clarifies that all the beneficiaries may give a joint direction or separate directions. If separate directions are given each must specify the appointment or retirement of the same person, and no such direction should have been withdrawn before it has been complied with.

40C.02 Sub-section (3) clarifies that s.37(7) which confers continuation of the same trust powers and discretions in the new trustees applies to s.40A and s.40B.

Section 40D: Application of sections 40A and 40B

(1) Sections 40A and 40B do not apply in relation to a trust if a contrary intention is expressed in the instrument creating the trust or an enactment.

(2) Sections 40A and 40B do not apply in relation to a trust created before the commencement date* of those sections in so far as provision to the effect that those sections do not apply is made by a deed executed—

- (a) if the trust was created by a person who is of full capacity, by that person; or
 - (b) if the trust was created by more than one person, by all the persons who are of full capacity.
- (3) A deed executed for the purpose of subsection (2) is irrevocable.
- (4) If a deed is executed for the purpose of subsection (2)—
- (a) the deed does not affect anything done before its execution to comply with a direction given under section 40A or 40B; but

(b) a direction given under section 40A or 40B that has not been complied with before the execution of the deed ceases to have effect.

(5) Sections 40A and 40B do not apply to the appointment and retirement of a personal representative.

(Added 13 of 2013 s.25)

* 1 December 2013

COMMENTARY

This section expressly provides that ss.40A and 40B do not apply if a contrary intention is expressed in the trust instrument. 40D.01

It is possible to amend by deed a trust instrument made before 1 December 2013, the commencement day of the Trust Law (Amendment) Ordinance 2013, to provide that ss.40A and 40B do not apply to such trust: sub-s.(2). Such a deed is irrevocable: sub-s.(3). 40D.02

Anything done in compliance with a direction under ss.40A or 40B before the execution of such a deed remains unaffected and any such direction that has not been complied with at the time of execution of the deed ceases to have effect: sub-s.(4). 40D.03

Section 41: Vesting of trust property in new or continuing trustees

(1) Where by a deed a new trustee is appointed to perform any trust, then—

- (a) if the deed contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover or receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become or are the trustees for performing the trust, the deed shall operate, without any conveyance or assignment, to vest in those persons as joint tenants and for the purposes of the trust the estate, interest or right to which the declaration relates; and
- (b) if the deed is made after the commencement of this Ordinance and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by the appointor extending to all the estates, interests and rights with respect to which a declaration could have been made.

(2) Where by a deed a retiring trustee is discharged under section 40 or 40A without a new trustee being appointed, then— (Amended 13 of 2013 s.26)

- (a) if the deed contains such a declaration as aforesaid by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, the deed shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest or right to which the declaration relates; and

- (b) a term restricting the liability of the nominee or custodian, or a delegate of the nominee or custodian, to the trustees or to any beneficiary; and
- (c) a term permitting the nominee or custodian to act in circumstances capable of giving rise to a conflict of interest.

COMMENTARY

41K.01 This section is based on s.20 of the Trustee Act 2000 (UK).

41K.02 This section provides that trustees may appoint their nominee or custodian on such terms as to remuneration and other matters that they may determine. This provision is subject to Part 4B of the Ordinance relating to remuneration and expenses, and also to the qualification that trustees may not stipulate any terms as set out in sub-s.(3), unless it is reasonably necessary for them to do so.

DIVISION 4

REVIEW OF AND LIABILITY FOR AGENTS, NOMINEES AND CUSTODIANS

Provisions in this Division are based on ss.20 to 24 of the Trustee Act 2000 (UK).

Section 41L: Application of ss.41M, 41N and 41O

(1) Sections 41M, 41N and 41O apply in a case where trustees have, under section 41B, 41G, 41H or 41I—

- (a) authorized a person to exercise functions as their agent; or
- (b) appointed a person to act as a nominee or custodian.

(2) Subject to subsection (3), sections 41M, 41N and 41O also apply in a case where trustees have, under a power conferred on them by the instrument creating the trust or an enactment—

- (a) authorized a person to exercise functions as their agent, or
- (b) appointed a person to act as a nominee or custodian.

(3) If the application of section 41M, 41N or 41O in a case is inconsistent with the terms of the instrument creating the trust or an enactment, that section does not apply to that case.

COMMENTARY

41L.01 This section is based on s.21 of the Trustee Act 2000 (UK).

41L.02 This section explains that ss.41M (review of agents), 41N (review of nominees and custodians) and 41O (liability for agents, nominees and custodians) apply when trustees have appointed an agent, nominee or custodians under ss.41B, 41G, 41H and 41I. The section goes on to state that if such an appointment has been made under a trust instrument

or an enactment, ss.41B, 41G, 41H and 41I apply provided that the application of such provisions is not inconsistent with the trust instrument or an enactment.

Section 41M: Review of agents

- (1) While an agent continues to act for a trust, the trustees of the trust must—
 - (a) keep under review the arrangements under which the agent acts and the way in which those arrangements are being put into effect;
 - (b) if circumstances make it appropriate to do so, consider whether there is a need to exercise any power of intervention that the trustees have; and
 - (c) if the trustees consider that there is a need to do so, exercise the power of intervention.
- (2) If an agent has been authorized to exercise asset management functions, the duty to review under subsection (1) includes—
 - (a) a duty to consider whether there is a need to revise or replace the policy statement made for the purposes of section 41F;
 - (b) if the trustees consider that there is a need to revise or replace the policy statement, a duty to do so; and
 - (c) a duty to assess whether the policy statement is being complied with.
- (3) The trustees must carry out the review as frequently as the circumstances of the trust may require having regard to the nature of the functions required to be exercised by the agent.
- (4) Section 41F(3) and (4) applies to the revision or replacement of a policy statement under this section as it applies to the making of a policy statement under that section.
- (5) For the purposes of subsection (1)—
 - power of intervention (干預權力) includes—
 - (a) a power to give directions to the agent; and
 - (b) a power to revoke the authorization or appointment of the agent.

COMMENTARY

This section is based on s.22 of the Trustee Act 2000 (UK).

Section 22 of the UK Act covers ground covered by both s.41M and s.41N.

Section 41M applies to review of agents, while s.41N relates to review of nominees and custodians. It requires the trustees to keep the arrangement for engaging an agent under review and to exercise power of intervention, if need be: sub-s.(1). Where an agent has been authorised to exercise management functions, the review includes keeping the policy statement up to date and ensuring compliance with it: sub-s.(2). The power of intervention includes the power to give directions to the agent and to revoke the agent's authorisation: sub-s.(5).

office due to personal incapacity, or unfit to act it is expedient to appoint a new trustee. In *Re Hodson's Settlement* (1851) 9 Hare 118, 68 ER 439, it was held that the s.32 of the Trustee Act 1850 (which is similarly worded) did not empower the court to exercise its power of appointing new trustees when the donee of the power of appointing trustees was willing to execute the power, however irregularly the donee might have previously intended to exercise it. There, the donee of the power of appointment had at first refused to exercise the power without a consideration being paid to him, but afterwards consented to execute it.

- (2) The power is given to the court to be exercised in situations when "it is found inexpedient, difficult or impracticable so to do without the assistance of the court".

(2) Court is not empowered to appoint a personal representative

42.04 Sub-section (3) provides that nothing in this section gives power to appoint an executor or administrator.

42.05 While the power of the court does not extend to appointing an executor or administrator, where the personal representative stands in the position of trustee the court may appoint an additional trustee. See *Re Ponder* [1921] 2 Ch 59, where it was held that an administrator who has paid all expenses and debts and cleared the intestate's estate stands in the same position towards the next of kin as that which an executor who has cleared the estate stands in towards the residuary legatees; he ceases to be an administrator and becomes a trustee and the court can appoint a new trustee to act jointly with him.

(3) When is it expedient to appoint new trustees?

42.06 The following are illustrations of when the courts would exercise its power to appoint new trustees:

- (1) The court may appoint trustees where there are no existing trustees: *Re Smithwaite's Trusts* (1870-71) LR 11 Eq 251, or where a constructive trust has arisen and the constructive trustees are dead (*Re Davis' Trusts* (1871) LR 12 Eq 214).
- (2) The court may appoint trustees when there is no person with the power to appoint new trustees (*Re Humphrey's Estate* (1855) 1 Jur NS 921). The court would appoint trustees where there is a doubt as to whether there is a power under the trust deed to appoint trustees: *Re Woodgate's Settlement* (1856) 5 WR 448. It was held in *Re Gibbon's Trusts* (1882) 30 WR 287, that the court should not use its statutory power of appointment because, although the trust instrument did not provide for the appointment of new trustees, the Conveyancing Act 1881 (c 41) s.31 (repealed) had given a power to appoint new trustees in every case where a trust was subsisting.
- (3) The court may exercise its power of appointment where the only person who otherwise has power to appoint a trustee is an infant, for "an infant will not be bound by any act which is either imprudent or prejudicial to his interest or which, where he is executing an authority entrusted to him, touches his interest": *Re Parsons* [1940] Ch 973, [1940] 4 All ER 65.
- (4) Where a power of sale was given by will to two trustees one of whom was an infant, the court would appoint a new trustee in the place of the infant: *Re Porter's Trusts* (1856) 20 JP 741, 25 LJ Ch 688.

- (5) Where the person having power to appoint trustees refuses to exercise the power the court may exercise its power of appointment: *Re Rendell's Trusts* (1915) 139 LT Jo 249.
- (6) Section 42(3) gives specific examples of situations where the court may exercise its power of appointment: where a trustee is sentenced to a term of imprisonment, is bankrupt or of unsound mind. See for bankruptcy as a ground *Coombes v Brookes* (1871) LR 12 Eq 61 and lunacy as a ground *Re Mason* (1874-75) LR 10 Ch App 273.
- (7) Where trustees are unable to exercise their power to make an appointment because they are unable to satisfy the requirements of s.37(1), the court may exercise its power under s.42: *Re May's Will Trusts* [1941] Ch 109, where court was willing to appoint a substitute trustee when one of the trustees was stranded in an enemy territory but it could not be said that she was "incapable" of acting as a trustee. See also *Re Bignold's Settlement Trusts* (1872) 7 Ch App 223. See generally annotations to s.37.
- (8) Where there is any reasonable question whether trustees appointed under a power have been duly appointed it may be quite right for the court in a proper case to reappoint them: *Re Vicat (A Person of Unsound Mind)* (1886) 33 Ch D 103 (CA).

(4) Considerations that the court may take into account in considering expediency

Re Tempest (1865-66) LR 1 Ch App 485 (CA), the court observed that the section does not provide clear guidelines on what considerations are relevant to determining when it would be expedient for the court to exercise its discretionary power of appointing trustees. 42.07

Lord Turner said (at 487-488) that the discretion which the court exercises in appointing new trustees is not a mere arbitrary discretion, but is to be exercised in accordance with certain principles and identified three main principles that should guide the court in exercising its power under s.42: 42.08

- (1) In selecting a person for the office, the court will have regard to the wishes of the author of the trust, expressed in, or plainly deduced from the instrument creating it.
- (2) The court will not appoint a person with a view to the interest of some of the cestui que trust, in opposition to the interest of others.
- (3) The court will have regard to the question whether the appointment will promote or impede the execution of the trust.

In *Re Higginbottom* [1892] 3 Ch 132, it was held that the court had no jurisdiction under the Trustee Acts 1850 and 1852 to appoint new trustees of a will against the wishes of an existing sole trustee desirous of exercising his statutory powers of appointing new trustees, even though the application to the court was made by a majority of the beneficiaries, and the existing trustee had himself no beneficial interest. 42.09

(4) Orders under other sub-sections

45.07 There are many Hong Kong cases illustrative of the use of this section in situations other than those covered by sub-ss.(a), (b) and (f).

45.08 A vesting order was made under sub-s.(e) in *Re Sub-section 1, Section A, Lot No 554, Demarcation District 100* (HCMP 257/2013, [2013] HKEC 311). *Re Lau Sbn Ping* (HCMP 1715/2014, [2014] HKEC 1403) and *Re Wu Kwok Keung* (HCMP 1383/2011, [2011] HKEC 1094) are cases where a vesting order was granted under s.45, presumably under sub-s.(e). In *Re Yau Wong Yan* (HCMP 3338/2013, [2014] HKEC 108) a vesting order was made under s.45, without specifying under which sub-section it was given, where the applicants were seeking a vesting order to the effect that the trustee be removed and the trust property be vested in them absolutely on the basis that they are *sui juris* and they are entitled to the property.

Section 46: Orders as to contingent rights of unborn persons

Where any interest in land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of that interest on any trust, the court may make an order releasing the land or interest therein from the contingent right, or may make an order vesting in any person the estate or interest to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

[cf 1925 c.19 s.45 UK]

COMMENTARY

46.01 This section is based on s.45 of the Trustee Act 1925 (UK).

46.02 This section enables the court to make orders as to contingent rights of unborn persons in land. *Wood v Beeston* (1854) 1 Kay & J 213, 69 ER 434 is illustrative of a situation where the court may release the rights of an unborn person. In this case the purchaser refused to complete the transaction if the property was subject to the contingent right of an unborn person.

Section 47: Vesting order in place of conveyance by infant mortgagee

Where any person entitled to or possessed of any interest in land, or entitled to a contingent right in land, by way of security for money, is an infant, the court may make an order vesting or releasing or disposing of the interest in the land or the right in like manner as in the case of a trustee under disability.

[cf 1925 c.19 s.46 UK]

COMMENTARY

This section is based on s.46 of the Trustee Act 1925 (UK). 47.01

This section explains the court's power to assist in transactions where the mortgagee is an infant. The court may make order vesting or releasing or disposing of the infant's interest in the land or contingent right in land. 47.02

Section 48: Vesting order consequential on order for sale or mortgage of land

Where any court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of any interest in the land, or entitled to a contingent right therein, and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee for the purposes of this Ordinance, and the court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate or interest as the court thinks fit in the purchaser or mortgagee or in any other person.

[cf 1925 c.19 s.47 UK]

COMMENTARY

This section is based on s.47 of the Trustee Act 1925 (UK). 48.01

This section comes into operation where the court directs the sale or mortgage of land. It declares that the persons described in the section are deemed to be trustees. The court may if it is expedient make an order vesting the land or any part of it in such person. 48.02

Li Jing v Chan Tai Kue (HCA 3803/2003, [2007] HKEC 2200) involved the issuance of an order under this section. 48.03

Section 49: Vesting order consequential on judgment for specific performance, etc.

Where a judgment is given for the specific performance of a contract concerning any interest in land, or for sale or exchange of any interest in land, or generally where any judgment is given for the conveyance of any interest in land either in cases arising out of the doctrine of election or otherwise, the court may declare—

- (1) that any of the parties to the action are trustees of any interest in the land or any part thereof within the meaning of this Ordinance; or
- (2) that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any deceased person who was

Section 79: Register of trust companies to be kept

There shall be kept in the office of the Registrar of Companies a register, to be called the "Register of Trust Companies" or "信託公司註冊紀錄冊", in which shall be entered the names of all trust companies registered under this Ordinance, together with such other particulars as the Registrar of Companies may think necessary.

(Amended 80 of 1997 s.105)

COMMENTARY

79.01 This section obliges the Registrar of Companies to maintain a Register of Trust Companies.

Section 80: Deposit to be held as security

(1) From the time of the issue to any company of a certificate under section 78, the sum of money deposited under section 77 must be held as security for the depositors and creditors of the company and for the faithful execution of all trusts which may be accepted by or imposed upon the company and for its obligations generally. (Amended 23 of 1975 s.3; 13 of 2013 s.37)

(2) If at any time, the Registrar of Companies is of opinion that a trust company should furnish additional security because of the company's increase of its gross liabilities, the Registrar may order the company to make, within a period specified in the order, a further deposit of a sum of money (as contemplated by section 77(2)(e)) of a specified amount with the Director of Accounting Services. (Replaced 13 of 2013 s.37)

(2A) The company may appeal against the order to the Chief Executive in Council, whose decision is final. (Added 13 of 2013 s.37)

(3) If a trust company has deposited a sum of money with an authorized institution or a finance company under section 77(2)(e), the trust company may, with the approval of the Director of Accounting Services and subject to the terms that the Director may specify, withdraw the sum and deposit it with another authorized institution or finance company referred to in that section. (Replaced 13 of 2013 s.37)

(4) All money accruing by way of interest in respect of sums deposited with an authorized institution or a finance company under this Part must be paid to the trust company which made the deposit. (Replaced 13 of 2013 s.37)

(Amended LN 16 of 1977)

COMMENTARY

80.01 The money that a trust company is required to deposit as provided by s.77 is held as security for its obligations generally, including for depositors and creditors of the company

as well as for the faithful execution of the trusts accepted or imposed on it. The Registrar may order a trust company to furnish further security under s.77 if there is an increase of its gross liabilities.

Section 81: Objects

(1) The objects of a trust company may be some or all of, but shall not exceed the following—

- (a) to accept and execute the offices of executor, administrator, trustee, receiver, receiver and manager, assignee, liquidator, guardian of the property of infants, committee of the estates of lunatics, or other like office of a fiduciary nature;
- (b) to act as attorney or agent for the collection, receipt and payment of money and for winding up estates and for the sale or purchase of any movable or immovable property;
- (c) to act as agent for the management and control of movable and immovable property for and on behalf of the owners thereof or for or on behalf of executors, administrators or trustees;
- (d) to act as investing and financial agent for and on behalf of executors, administrators, and trustees or any other persons whatsoever and to receive money in trust for investment and to allow interest thereon until invested; and to undertake for and on behalf of executors, administrators and trustees or any other persons whatsoever the negotiation of loans of all descriptions and the procuring and lending of money on the security of any description of property immovable or movable or without taking any security on such terms as may be arranged, and to advance and lend moneys to protect any estate, trust or property entrusted to the company as aforesaid and to charge interest upon any such advances;

Provided that nothing herein contained shall be held either to restrict or extend the powers of the company as trustee or agent under the terms of any trust or agency that may be conferred upon it;

- (e) to take securities of such nature as are deemed expedient for any moneys owing to the company;
- (f) to be the custodian on such terms as are agreed upon of any moneys, securities, jewellery, plate or other valuable property and of papers, documents, deeds, wills, debentures and other evidence of title or indebtedness;
- (g) to receive and manage any sinking, redemption, guarantee or any other special fund or deposit and to act as agent for countersigning, registering or otherwise ascertaining and certifying to the genuineness of any issue of shares, stocks, bonds, debentures or other securities for money of any government, municipal or other corporate body or of any association, whether incorporated or not, duly authorized to issue and make such issue and to hold any such securities as agent or trustee and to act generally as agent for any such government, municipal or corporate body or association;