

Trustee Ordinance

(Cap. 29)

Contents

Section		Page
Part 1		
Preliminary		
1.	Short title	1-2
2.	Interpretation	1-2
3.	Application	1-8
Part 1A		
Statutory Duty of Care		
3A.	Statutory duty of care	1A-2
Part 2		
Investments		
4.	Authorized investments	2-2
5.	Retention of redeemable stocks until redemption	2-2
6.	Discretion of trustees	2-2
7.	Retention of unauthorized investment	2-4
8.	<i>(Repealed)</i>	2-4
9.	Loans and investments by trustees not chargeable as breaches of trust	2-4

Section		Page
10.	Liability for loss by reason of improper investment	2-6
11.	Powers supplementary to powers of investment	2-8
12.	Power to deposit at bank and to pay calls	2-12
Part 3		
General Powers of Trustees and Personal Representatives		
Division 1—General Powers		
13.	Power of trustees for sale to sell by auction, etc.	3-2
14.	Power to sell subject to depreciatory conditions	3-2
15.	Power of trustees to give receipts	3-4
16.	Power to do other acts	3-6
17.	Powers of trustees of renewable leaseholds to renew and raise money for the purpose	3-8
18.	Power to raise money by sale, mortgage, etc.	3-10
19.	Protection to purchasers and mortgagees dealing with trustees	3-10
20.	Devolution of powers or trusts	3-10
21.	Power to insure	3-12
22.	Application of insurance money where policy kept up under any trust, power or obligation	3-14

Section		Page
23.	<i>(Repealed)</i>	3-16
24.	Reversionary interests, valuations, and audit	3-16
25.	<i>(Repealed)</i>	3-20
26.	Power to concur with others	3-22
27.	Individual trustee's delegation by power of attorney	3-22
27A.	Validation of appointments where objects are excluded or take illusory shares	3-26
Division 2—Indemnities		
28.	Protection against liability in respect of rents and covenants	3-28
29.	Protection by means of advertisement	3-32
30.	Protection in regard to notice	3-34
31-32.	<i>(Repealed)</i>	3-34
Division 3—Maintenance, Advancement and Protective Trusts		
33.	Power to apply income for maintenance and to accumulate surplus income during a minority	3-36
34.	Power of advancement	3-40
35.	Protective trusts	3-42
Part 4		
Appointment and Discharge of Trustees		
36.	Limitation of the number of trustees	4-2

Section		Page
37.	Power of appointing new or additional trustees	4-2
38.	Supplemental provisions as to appointment of trustees	4-8
39.	Evidence as to a vacancy in a trust	4-10
40.	Retirement of trustee without a new appointment	4-12
40A.	Appointment and retirement of trustees on beneficiaries' directions	4-12
40B.	Appointment of substitute for incapacitated trustee	4-18
40C.	Provisions supplementary to sections 40A and 40B	4-20
40D.	Application of sections 40A and 40B	4-20
41.	Vesting of trust property in new or continuing trustees	4-22

Part 4A

Appointment of Agents, Nominees and Custodians

Division 1—Application

41A.	Application of Part 4A	4A-2
------	------------------------	------

Division 2—Agents

41B.	Power to appoint agents	4A-2
41C.	Persons who may act as agents	4A-4
41D.	Linked functions, etc.	4A-6

Section		Page
41E.	Terms of agency	4A-6
41F.	Special restrictions relating to asset management	4A-8
Division 3—Nominees and Custodians		
41G.	Power to appoint nominees	4A-10
41H.	Power to appoint custodians	4A-10
41I.	Investment in bearer securities	4A-12
41J.	Persons who may be appointed as nominees or custodians	4A-12
41K.	Terms of appointment of nominees and custodians	4A-16
Division 4—Review of and Liability for Agents, Nominees and Custodians		
41L.	Application of sections 41M, 41N and 41O	4A-18
41M.	Review of agents	4A-18
41N.	Review of nominees and custodians	4A-20
41O.	Liability for agents, nominees and custodians	4A-22
41P.	Effect of trustees exceeding their powers	4A-24
Part 4B Remuneration and Expenses		
41Q.	Application of Part 4B	4B-2
41R.	Interpretation of Part 4B	4B-2

Section		Page
41S.	Remuneration of trustees under instrument creating trust	4B-4
41T.	Remuneration of trustees other than under instrument creating trust	4B-6
41U.	Trustee's expenses	4B-8
41V.	Remuneration and expenses of agents, nominees and custodians	4B-10
Part 4C		
Exemption from Liability		
41W.	Trustee is not exempted from liability for breach of trust	4C-2
Part 4D		
Reserve Power and Transfer of Movable Property		
41X.	Reserve power of settlor	4D-2
41Y.	Transfer of movable property not affected by foreign law of inheritance	4D-2
Part 5		
Powers of the Court		
Division 1—Appointment of New Trustees		
42.	Power of court to appoint new trustees	5-2
43.	Power to authorize remuneration	5-4
44.	Powers of new trustee appointed by court	5-4
Division 2—Vesting Orders		
45.	Vesting orders of land	5-4

Section		Page
46.	Orders as to contingent rights of unborn persons	5-8
47.	Vesting order in place of conveyance by infant mortgagee	5-8
48.	Vesting order consequential on order for sale or mortgage of land	5-10
49.	Vesting order consequential on judgment for specific performance, etc.	5-10
50.	Effect of vesting order	5-12
51.	Power to appoint person to convey	5-12
52.	Vesting orders as to stock and thing in action	5-14
53.	Vesting orders of charity property	5-18
54.	Vesting orders in relation to infant's beneficial interest	5-18
55.	Orders made upon certain allegations to be conclusive evidence	5-18
Division 3—Jurisdiction to Make Other Order		
56.	Power of court to authorize dealing with trust property	5-20
57.	Persons entitled to apply for orders	5-22
57A.	Charitable trusts	5-24
58.	Power to give judgment in absence of a trustee	5-24

Section		Page
59.	Power to charge costs on trust estate	5-26
60.	Power to relieve trustee from personal liability	5-26
61.	Power to make beneficiary indemnity for breach of trust	5-26
Division 4—Payment into Court		
62.	Payment into court by trustees	5-28
Part 6 The Judicial Trustee		
63.	Power of court on application to appoint judicial trustee	6-2
64.	Rules	6-4
65.	Definitions	6-6
Part 7 The Official Trustee		
66.	Appointment of Official Trustee	7-2
67.	Payment of trust moneys into bank to credit of Official Trustee	7-2
68.	Transfer of trust securities into name of Official Trustee	7-4
69.	Conveyance of land in trust to Official Trustee	7-4
70.	Certificate to be given by Official Trustee	7-6
71.	Order for payment, etc. by majority of trustees without concurrence of others	7-6

Section		Page
72.	Administration of trust estate	7-8
73.	Charges upon trust estate administered by Official Trustee	7-8
74.	General rights and powers of Official Trustee	7-10
75.	Limitation of liability of Official Trustee	7-12
76.	Rules for administration of trust funds	7-12
Part 8		
Trust Companies		
77.	Application by company to be registered as a trust company	8-2
78.	Issue of certificate	8-8
79.	Register of trust companies to be kept	8-8
80.	Deposit to be held as security	8-10
81.	Objects	8-12
82.	Trust company may act as executor	8-18
83.	Trust company to apply for probate or administration	8-18
84.	Procedure as to petitions, etc.	8-22
85.	Appointment of a company to be a trustee	8-24
86.	Joint tenancy	8-24
87.	Trust company may act as agent	8-24
88.	Security not required	8-26

Section		Page
89.	Trust funds to be kept separate	8-26
90.	Investment of trust funds	8-26
91.	Investment of trust company's own funds	8-28
92.	Loans to trust company officers, etc. prohibited	8-30
93.	Borrowing	8-30
94.	<i>(Repealed)</i>	8-32
95.	Investigation by inspector	8-32
96.	Special provision as to winding up a trust company	8-34
97.	Personal liability of officers of a trust company	8-36
98.	Offences	8-36
99.	Not to be guardian or committee	8-38
100.	Restriction on holding shares in a trust company	8-38
101.	Voluntary winding-up or disposal may be restrained	8-38
102.	Liability and powers of trust company	8-40
103.	Registration of a trust company as shareholder, etc. not notice of trust	8-40
104.	Unclaimed money to be paid into court	8-40
105.	Fees payable by trust companies	8-42

Section		Page
106.	Registration of certain banking corporations as trust companies	8-42
107.	Limitation of powers of inspectors under section 95	8-44
108.	Striking off trust company registered under section 106	8-44

Part 9
General Provisions

109.	Indemnity	9-2
110.	Transitional and savings for the purpose of 2013 amending Ordinance	9-2
Schedule 1	Fees to be paid by Trust Companies to the Registrar of Companies	S1-2
Schedule 2	Authorized Investments	S2-2
Schedule 3	Application of Statutory Duty of Care	S3-2
Schedule 4	Transitional and Saving Provisions	S4-2

To amend the law relating to trustees.

[27 July 1934]

(*Format changes—E.R. 2 of 2014*)

Part 1

Preliminary

1. Short title

This Ordinance may be cited as the Trustee Ordinance.

2. Interpretation

In this Ordinance, unless the context otherwise requires—

2013 amending Ordinance (《2013年修訂條例》) means the Trust Law (Amendment) Ordinance 2013 (13 of 2013); (*Added 13 of 2013 s. 3*)

authorized investments (特准投資項目) means investments authorized by the instrument, if any, creating the trust for the investment of money subject to the trust, or by law;

body corporate (法人團體) means a body corporate incorporated or established in Hong Kong or elsewhere; (*Added 13 of 2013 s. 3*)

contingent right (待確定權利) as applied to land includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent; (*Amended L.N. 446 of 1994*)

convey and **conveyance** (轉易) as applied to any person include the execution by that person of every necessary or suitable assurance (including an assent) for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seized or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law for the validity of the conveyance;

income (收益) includes rents and profits;

instrument (文書) includes enactment;

land (土地) includes land of any tenure, and mines and minerals, whether or not severed from the surface, buildings or parts of buildings, whether the division is horizontal, vertical or made in any other way, and other corporeal hereditaments; also a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land, or an undivided share in land; and in this definition **mines and minerals** (礦藏及礦物) includes any strata or seam of minerals or substances in or under any land, and powers of working and getting the same, and an undivided share thereof;

lunatic (精神病人) means any person who has been found by due course of law to be of unsound mind and incapable of managing his affairs;

mortgage (按揭) and **mortgagee** (承按人) include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee;

pay and **payment** (繳存) as applied in relation to stocks and securities and in connexion with the expression “into court” include the deposit or transfer of the same in or into court;

person of unsound mind (精神不健全的人) means any person, not a minor, who not having been found to be a lunatic is incapable from infirmity of mind of managing his own affairs;

personal representative (遺產代理人) means the executor, original or by representation, or administrator for the time being of a deceased person;

possession (管有) includes receipt of rents and profits or the right to receive the same, if any; and ***possessed*** (據有) applies to receipt of income of and to any vested estate less than a life interest in possession or in expectancy in any land;

property (財產) includes movable and immovable property, and any estate, share and interest in any property, movable or immovable, and any debt, and any thing in action, and any other right or interest, whether in possession or not;

rights (權利) includes estates and interests;

sale (售賣) includes an exchange;

securities (證券) includes stocks, funds and shares, and so far as relates to payments into court has the same meaning as in the enactments relating to funds in court and ***securities payable to bearer*** (須付款予持有人的證券) includes securities transferable by delivery or by delivery and endorsement;

statutory duty of care (法定謹慎責任), in relation to a trustee, means the duty of care required to be exercised by the trustee under section 3A as read with Schedule 3; (*Added 13 of 2013 s. 3*)

stock (股票) includes fully paid up shares, and, so far as relates to vesting orders made by the court under this Ordinance, includes any fund, annuity, or security transferable in books kept by any corporation, company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein;

transfer (轉讓、轉歸), in relation to stock or securities, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee;

trust (信託) does not include the duties incident to an estate conveyed by way of mortgage, but with this exception the expression **trust** (信託) and **trustee** (受託人) extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and **trustee** (受託人) where the context admits includes a personal representative, and **new trustee** (新受託人) includes an additional trustee;

trust corporation (信託法團) means a corporation appointed by the court in any particular case to be a trustee (if authorized by its constitution to act as trustee) or any trust company registered under Part 8; (*Amended 25 of 1998 s. 2*)

trust for sale (售產信託), in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without power at discretion to postpone the sale; and **trustees for sale** (售產受託人) means the persons (including a personal representative) holding land on trust for sale; (*Amended 13 of 2013 s. 3*)

trust funds (信託基金) means any income or capital funds of a trust. (*Added 13 of 2013 s. 3*)

(*Amended E.R. 2 of 2014*)

[*cf. 1925 c. 19 s. 68 U.K.*]

3. Application

- (1) This Ordinance applies to trusts (whenever created) including, so far as this Ordinance applies, executorships and

administrators whenever constituted. *(Replaced 13 of 2013 s. 4)*

- (2) Subject to subsection (2A), the powers conferred by this Ordinance on trustees are in addition to the powers conferred by the instrument creating the trust or an enactment. *(Replaced 13 of 2013 s. 4)*
- (2A) The powers conferred by this Ordinance on trustees—
- (a) apply if, and so far only as, a contrary intention is not expressed in the instrument creating the trust or an enactment; and
 - (b) have effect subject to the terms of that instrument or enactment. *(Added 13 of 2013 s. 4)*
- (2B) Subsections (1) and (2) have effect except as otherwise stated in this Ordinance. *(Added 13 of 2013 s. 4)*
- (3) This Ordinance does not affect the legality or validity of anything done before the commencement of this Ordinance, except as otherwise expressly provided.

[cf. 1925 c. 19 s. 69 U.K.]

Part 1A

Statutory Duty of Care

(Part 1A added 13 of 2013 s. 5)

3A. Statutory duty of care

- (1) If the statutory duty of care applies to a trustee as provided in Schedule 3, the trustee must exercise the care and skill that is reasonable in the circumstances, having regard to—
 - (a) any special knowledge or experience that the trustee has or holds out as having; and
 - (b) if the trustee is acting in that capacity in the course of a business or profession, any special knowledge or experience that is reasonably expected of a person acting in the course of that kind of business or profession.
- (2) If the statutory duty of care applies to a trustee when exercising a power or doing an act, that duty has effect in place of any common law rules and equitable principles regarding the duty and standard of care owed by the trustee to the beneficiaries of the trust when exercising the power or doing the act.
- (3) The statutory duty of care does not apply to a trustee if, or in so far as, it appears from the instrument creating the trust or an enactment that the duty is not meant to apply.
- (4) The statutory duty of care does not apply in relation to a trust created before the commencement date[#] of this section in so far as provision to the effect that subsection (1) does 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;

- (b) if the trust was created by more than one person, by all the persons who are of full capacity; or
- (c) if none of the persons creating the trust is of full capacity, by—
 - (i) the sole beneficiary under the trust who is absolutely entitled to the property subject to the trust and—
 - (A) is an individual of full age and capacity; or
 - (B) is a body corporate whose constitution does not prohibit it from exercising the power under this section; or
 - (ii) 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—
 - (A) an individual of full age and capacity; or
 - (B) a body corporate whose constitution does not prohibit it from exercising the power under this section.

(Amended E.R. 2 of 2014)

Editorial Note:

Commencement date: 1 December 2013.

Part 2

Investments

4. Authorized investments

- (1) A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not—
 - (a) in any investment specified in Schedule 2 subject to the compliance with any condition specified in relation to the investment in that Schedule; (*Amended 13 of 2013 s. 6*)
 - (b) in any other investment (including deposits in a bank outside Hong Kong) which may be authorized by the court on summary application for that purpose made in chambers. (*Amended 9 of 1993 s. 7*)
- (2) Any application to the court made under subsection (1)(b) shall be made by the trustee ex parte and shall be supported by affidavit.
- (3) The Financial Secretary may from time to time by order published in the Gazette amend Schedule 2. (*Amended 9 of 1993 s. 2*)

(Replaced 48 of 1968 s. 2. Amended E.R. 2 of 2014)

5. Retention of redeemable stocks until redemption

A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Ordinance, or any Ordinance replaced by this Ordinance.

[cf. 1925 c. 19 s. 2 U.K.]

6. Discretion of trustees

Every power conferred by sections 4 and 5 shall be exercised according to the discretion of the trustee, but subject to any consent or direction with respect to the investment of the trust funds, required by the instrument, if any, creating the trust or by any Ordinance.

[cf. 1925 c. 19 s. 3 U.K.]

7. Retention of unauthorized 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)

8. *(Repealed 13 of 2013 s. 8)*

9. Loans and investments by trustees not chargeable as breaches of trust

(1) A trustee lending money on the security of any property on which he can properly lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the court—

(a) that immediately prior to the making of the loan the trustee obtained a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere; and *(Amended 48 of 1968 s. 3)*

- (b) that the amount of the loan does not exceed one half of the value of the property as stated in the report; and
(Amended 48 of 1968 s. 3)
 - (c) that the loan was made under the advice of the surveyor or valuer expressed in the report.
- (2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.
- (3) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase, or in lending money upon the security, of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title accepted be such as a person acting with prudence and caution would have accepted.
- (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.

[cf. 1925 c. 19 s. 8 U.K.]

10. Liability for loss by reason of improper investment

- (1) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorized investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.
- (2) This section applies to investments made before as well as after the commencement of this Ordinance.

[*cf. 1925 c. 19 s. 9 U.K.*]

11. Powers supplementary to powers of investment

- (1) Trustees lending money on the security of any property on which they can lawfully lend may contract that such money shall not be called in during any period not exceeding 7 years from the time when the loan was made, provided interest be paid within a specified time not exceeding 30 days after every half-yearly or other day on which it becomes due, and provided there be no breach of any covenant by the mortgagor contained in the instrument of mortgage or charge for the maintenance and protection of the property.
- (2) On a sale by trustees of land for a term having at least 60 years to run, the trustees may, where the proceeds are liable to be invested, contract that the payment of any part, not exceeding two-thirds, of the purchase money shall be secured by mortgage of the land sold, with or without the security of any other property, but such mortgage, if any buildings are comprised therein, shall contain a covenant by the mortgagor to keep such buildings insured against loss or damage by fire to the full value thereof.
- (3) The trustees shall not be bound to obtain any report as to the value of the land or other property to be comprised in such mortgage, or any advice as to the making of the loan, and if the trustees have discharged the statutory duty of care, the trustees are not liable for any loss which may be incurred by reason only of the security being insufficient at the date of the mortgage. (*Amended 13 of 2013 s. 9*)
- (4) Where any securities of a company are subject to a trust, the trustees may concur in any scheme or arrangement—
 - (a) for the reconstruction of the company;

- (b) for the sale of all or any part of the property and undertaking of the company to another company;
- (c) for the amalgamation of the company with another company;
- (d) for the release, modification, or variation of any rights, privileges or liabilities attached to the securities or any of them,

in like manner as if they were entitled to such securities beneficially, with power to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of or in exchange for all or any of the first-mentioned securities. (*Amended 13 of 2013 s. 9*)

- (4A) The trustees are not responsible for any loss occasioned by an act or thing done under subsection (4) if they have discharged the statutory duty of care in doing so. (*Added 13 of 2013 s. 9*)
- (4B) The trustees may retain any securities accepted under subsection (4) for a period for which they could have properly retained the original securities. (*Added 13 of 2013 s. 9*)
- (5) If a conditional or preferential right to subscribe for securities in a company is offered to trustees for any holding in the company, the trustees may, for all or any of the securities—
 - (a) exercise the right and apply the trust funds in payment of the consideration;
 - (b) renounce the right;
 - (c) assign for the best consideration that can be reasonably obtained the benefit of the right, or the title to the right, to any person, including a beneficiary under the trust. (*Replaced 13 of 2013 s. 9*)

- (5A) The trustees are not responsible for any loss occasioned by an act or thing done under subsection (5) if they have discharged the statutory duty of care in doing so. *(Added 13 of 2013 s. 9)*
- (6) 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.
- (7) Where the loan referred to in subsection (1), or the sale referred to in subsection (2), is made under the order of the court, the powers conferred by those subsections respectively shall apply only if and as far as the court may by order direct.

[cf. 1925 c. 19 s. 10 U.K.]

12. Power to deposit at bank and to pay calls

- (1) Trustees may, pending the negotiation and preparation of any mortgage or charge, or during any other time while an investment is being sought for, pay any trust money into a bank to a deposit or other account, and all interest, if any, payable in respect thereof shall be applied as income.
- (2) Trustees may apply the trust funds of the trust in payment of a call on any shares subject to the trust. *(Replaced 13 of 2013 s. 10)*

[cf. 1925 c. 19 s. 11 U.K.]

Part 3

General Powers of Trustees and Personal Representatives

(Cross-heading repealed 13 of 2013 s. 11)

Division 1—General Powers

(Added 13 of 2013 s. 12)

13. Power of trustees for sale to sell by auction, etc.

- (1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to resell, without being answerable for any loss.
- (2) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof, whether the division is horizontal, vertical, or made in any other way.

[cf. 1925 c. 19 s. 12 U.K.]

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) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon any of the grounds aforesaid.
- (4) This section applies to sales made before or after the commencement of this Ordinance.

[cf. 1925 c. 19 s. 13 U.K.]

15. Power of trustees to give receipts

- (1) The receipt in writing of a trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge to the person paying, transferring, or delivering the same and shall effectually exonerate him from seeing to the application or being answerable for any loss or misapplication thereof.
- (2) A receipt in writing for the proceeds of sale or other capital money arising under a trust for sale of land shall be a sufficient discharge if it is signed by the person or persons lawfully executing the conveyance in pursuance of that sale and the person making payment shall not be liable for any loss or misapplication of those proceeds or that money.
(Replaced 62 of 1984 s. 63)
- (3) This section applies notwithstanding anything to the contrary in the instrument, if any, creating the trust.

[cf. 1925 c. 19 s. 14 U.K.]

16. Power to do other acts

A personal representative, or 2 or more trustees acting together, or, subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation, a sole acting trustee where by the instrument, if any, creating the trust, or by statute, a sole trustee is authorized to execute the trusts and powers reposed in him, may, if and as he or they think fit—

- (a) accept any property, before the time at which it is made transferable or payable; or
- (b) sever and apportion any blended trust funds or property; or
- (c) pay or allow any debt or claim on any evidence that he or they think sufficient; or
- (d) accept any composition or any security, for any debt, or for any property, claimed; or
- (e) allow any time for payment of any debt; or
- (f) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust,

and for any of those purposes may enter into, give, execute and do such agreements, instruments or composition or arrangement, releases, and other things as to the personal representative, trustees or sole acting trustee seem expedient, without being responsible for any loss occasioned by an act or thing done under this section if the personal representative, trustees or sole acting trustee has or have discharged the statutory duty of care in doing so. (*Amended 13 of 2013 s. 13*)

[cf. 1925 c. 19 s. 15 U.K.]

17. Powers of trustees of renewable leaseholds to renew and raise money for the purpose

- (1) A trustee of any leaseholds for lives or years which are renewable from time to time either under any covenant or contract, or by custom or usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite:

Provided that, where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this section shall not apply unless the consent in writing of that person is obtained to the renewal on the part of the trustee.

- (2) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewal lease, and if he has not in his hands sufficient money for the purpose he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose, or otherwise as to the application thereof.

- (3) This section applies to trusts created either before or after the commencement of this Ordinance, but nothing in this section shall authorize 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.

[cf. 1893 c. 53 s. 19 U.K.]

18. Power to raise money by sale, mortgage, etc.

- (1) Where trustees are authorized by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession.
- (2) This section applies notwithstanding anything to the contrary contained in the instrument, if any, creating the trust, but does not apply to trustees of property held for charitable purposes.

[cf. 1925 c. 19 s. 16 U.K.]

19. Protection to purchasers and mortgagees dealing with trustees

No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.

[cf. 1925 c. 19 s. 17 U.K.]

20. Devolution of powers or trusts

- (1) Where a power or trust is given to or imposed on 2 or more trustees jointly, the same may be exercised or performed by

the survivors or survivor of them for the time being.

- (2) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or, where there were 2 or more trustees of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or other the trustees or trustee for the time being of the trust.
- (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 U.K.*]

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)

22. Application of insurance money where policy kept up under any trust, power or obligation

- (1) Money receivable by trustees or any beneficiary under a policy of insurance against the loss or damage of any property subject to a trust, shall, where the policy has been kept up under any trust in that behalf or under any power statutory or otherwise, or in performance of any covenant or of any obligation statutory or otherwise, or by a tenant for life impeachable for waste, be capital money for the purpose of the trust as the case may be. *(Amended 13 of 2013 s. 15)*
- (2) If any such money is receivable by any person, other than the trustees of the trust, that person shall use his best endeavours

to recover and receive the money, and shall pay the net residue thereof after discharging any costs of recovering and receiving it, to the trustees of the trust, or, if there are no trustees capable of giving a discharge therefor, into court.

- (3) Any such money—
 - (a) if it was receivable in respect of property held upon trust for sale, shall be held upon the trusts and subject to the powers and provisions applicable to money arising by a sale under such trust;
 - (b) in any other case, shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.
- (4) Such money, or any part thereof, may also be applied by the trustees, or, if in court, under the direction of the court, in rebuilding, reinstating, replacing, or repairing the property lost or damaged, but any such application by the trustees shall be subject to the consent of any person whose consent is required by the instrument, if any, creating the trust to the investment of money subject to the trust.
- (5) Nothing contained in this section shall prejudice or affect the right of any person to require any such money or any part thereof to be applied in rebuilding, reinstating, or repairing the property lost or damaged, or the right of any mortgagee, lessor, or lessee, whether under any statute or otherwise.
- (6) This section applies to policies effected either before or after the commencement of this Ordinance, but only to money received after such commencement.

[cf. 1925 c. 19 s. 20 U.K.]

23. *(Repealed 13 of 2013 s. 16)*

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 U.K.]

25. *(Repealed 13 of 2013 s. 18)*

26. Power to concur with others

Where an undivided share in the proceeds of sale of land directed to be sold, or in any other property, is subject to a trust, or forms part of the estate of a testator or intestate, the trustees or personal representatives may (without prejudice to the trust for sale affecting the entirety of the land and the powers of the trustees for sale in reference thereto) execute or exercise any trust or power vested in them in relation to such share in conjunction with the persons entitled to or having power in that half over the other share or shares, and notwithstanding that any one or more of the trustees or personal representatives may be entitled to or interested in any such other share, either in his or their own right or in a fiduciary capacity.

[cf. 1925 c. 19 s. 24 U.K.]

27. Individual trustee's delegation by power of attorney

(Replaced 13 of 2013 s. 19)

- (1) Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons. *(Amended 13 of 2013 s. 19)*
- (1A) A delegation under this section—
 - (a) commences as provided by the instrument creating the power of attorney or, if the instrument makes no provision as to commencement of the delegation, on the date of the execution of the instrument by the donor of the power; and
 - (b) continues for a period of 12 months or, if a shorter period is provided by the instrument creating the power of attorney, the shorter period. *(Added 13 of 2013 s. 19)*

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- (2) The persons who may be donees of a power of attorney under this section include a trust corporation. (*Amended 13 of 2013 s. 19*)
- (2A) If a trust has more than one trustee, the exercise of the power of delegation must not result in the trust having only 1 donee under a power of attorney or 1 trustee administering the trust, unless the donee or trustee is a trust corporation. (*Added 13 of 2013 s. 19*)
- (3) An instrument creating a power of attorney under this section shall be attested by at least one witness.
- (4) Before or within 7 days after giving a power of attorney under this section the donor shall give written notice thereof (specifying the date on which the power comes into operation and its duration, the donee of the power, the reason why the power is given and, where only some trusts, powers and discretions are delegated, the trusts, powers and discretions delegated) to— (*Amended 13 of 2013 s. 19*)
- (a) each person (other than himself) if any, who under any instrument creating the trust has power (whether alone or jointly) to appoint a new trustee; and
- (b) each of the other trustees, if any,
- but failure to comply with this subsection shall not, in favour of a person dealing with the donee of the power, invalidate any act done or instrument executed by the donee.
- (5) The donor of a power of attorney given under this section shall be liable for acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.
- (6) For the purpose of executing or exercising the trusts or powers delegated to him, the donee may exercise any of the powers conferred on the donor as trustee by statute or by the instrument creating the trust, including power, for the purpose of the transfer of any inscribed stock, himself to delegate to

an attorney power to transfer but not including the power of delegation conferred by this section.

- (7) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any such power of attorney or otherwise, that in dealing with any stock the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person in whose books the stock is inscribed or registered with any notice of the trust.
- (8) This section applies—
- (a) to a personal representative as it applies to a trustee except that subsection (4) shall apply as if it required notice there mentioned to be given to each of the other personal representatives, if any, except any executor who has renounced probate;
 - (b) whenever the trusts, powers or discretions in question arose.
- (9) This section as in force immediately before the commencement date[#] of the 2013 amending Ordinance continues to apply to a power of attorney created before the commencement date[#], as if this section had not been amended. (*Added 13 of 2013 s. 19*)

(Replaced 51 of 1972 s. 8)

[cf. 1971 c. 27 s. 9 U.K.; 1925 c.19 s. 25 U.K.]

Editorial Note:

[#] Commencement date: 1 December 2013.

27A. Validation of appointments where objects are excluded or take illusory shares

- (1) An appointment made in exercise of a power to appoint property among 2 or more objects—

- (a) shall not be invalid on the ground that—
 - (i) an unsubstantial, illusory or nominal share only is appointed to or left unappointed to devolve upon any 1 or more of those objects; or
 - (ii) any object of the power is thereby altogether excluded;
 - (b) shall be valid notwithstanding that any 1 or more of those objects is not thereby, or in default of appointment, to take any share in the property.
- (2) Subsection (1) shall not operate to affect any provision—
- (a) in the instrument which creates the power referred to in that subsection; and
 - (b) which declares the amount of any share from which any object referred to in that subsection is not to be excluded.

(Added 79 of 1997 s. 2)

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

Division 2—Indemnities

(Added 13 of 2013 s. 21)

28. Protection against liability in respect of rents and covenants

- (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 or grantee agreed to lay out on the property demised or granted, although the period for laying out the same may not have arrived, then and in any such case the personal representative or trustee may convey the property demised or granted to a purchaser, legatee, devisee or other person entitled to call for a conveyance thereof and thereafter—

- (i) he may distribute the residuary estate of the deceased testator or intestate, or, as the case may be, the trust estate (other than the fund, if any, set apart as aforesaid) to or amongst the persons entitled thereto, without appropriating any part, or any further part, as the case may be, of the estate of the deceased or of the trust estate to meet any future liability under the said lease or grant;
 - (ii) notwithstanding such distribution, he shall not be personally liable in respect of any subsequent claim under the said lease or grant.
- (2) This section operates without prejudice to the right of the lessor or grantor, or the persons deriving title under the lessor or grantor, to follow the assets of the deceased or the trust property into the hands of the persons amongst whom the same may have been respectively distributed, and applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust.

- (3) In this section *lease* (租約) includes an underlease and an agreement for a lease or underlease and any instrument giving any such indemnity as aforesaid or varying the liabilities under the lease; *grant* (批地) applies to a grant whether the rent is created by limitation, grant, reservation, or otherwise, and includes an agreement for a grant and any instrument giving any such indemnity as aforesaid or varying the liabilities under the grant; *lessee* (承租人) and *grantee* (獲批地人), include persons respectively deriving title under them.

[*cf.* 1925 c. 19 s. 26 U.K.]

29. Protection by means of advertisement

- (1) With a view to the conveyance to or distribution among the persons entitled to any movable or immovable property, trustees or personal representatives may give notice by advertisement in the Gazette, and such other like notices, including notices elsewhere than in Hong Kong, as would, in any special case, have been directed by a court of competent jurisdiction in an action for administration, of their intention to make such conveyance or distribution as aforesaid, and requiring any person interested to send to the trustees or personal representatives within the time, not being less than 2 months, fixed in the notice or, where more than one notice is given, in the last of the notices, particulars of his claim in respect of the property or any part thereof to which the notice relates. (*Amended 9 of 1993 s. 7*)
- (2) At the expiration of the time fixed by the notice the trustees or personal representatives may convey or distribute the property or any part thereof to which the notice relates, to or among the persons entitled thereto, having regard only to the claims, whether formal or not, of which the trustees or personal representatives then had notice and shall not, as respects the property so conveyed or distributed, be

liable to any person of whose claim the trustees or personal representatives have not had notice at the time of conveyance or distribution; but nothing in this section shall—

- (a) prejudice the right of any person to follow the property, or any property representing the same, into the hands of any person, other than a purchaser, who may have received it; or
 - (b) free the trustees or personal representatives from any obligation to make searches similar to those which an intending purchaser would be advised to make or obtain.
- (3) This section applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust.

[cf. 1925 c. 19 s. 27 U.K.]

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 L.N. 446 of 1994)

[cf. 1925 c. 19 s. 28 U.K.]

31. *(Repealed 51 of 1972 s. 8)*

32. *(Repealed 13 of 2013 s. 22)*

(Cross-heading repealed 13 of 2013 s. 23)

Division 3—Maintenance, Advancement and Protective Trusts

(Added 13 of 2013 s. 24)

33. Power to apply income for maintenance and to accumulate surplus income during a minority

- (1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property—
- (a) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is—
- (i) any other fund applicable to the same purpose; or
- (ii) any person bound by law to provide for his maintenance or education; and
- (b) if such person on attaining full age has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) to him, until he either attains a vested interest therein or dies, or until failure of his interest: *(Amended 32 of 1990 s. 8)*

Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then,

so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

- (2) During the infancy of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorized investments, and shall hold those accumulations as follows—
 - (a) if any such person—
 - (i) attains full age, or marries before attaining full age, and his interest in such income during his infancy or until his marriage is a vested interest; or
 - (ii) on attaining full age or on marriage before attaining full age becomes entitled to the property from which such income arose absolutely,

the trustees shall hold the accumulations in trust for such person absolutely, and so that the receipt of such person after marriage, and though still an infant, shall be a good discharge; and (*Amended 32 of 1990 s. 8*)
 - (b) in any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes,

but the trustees may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.
- (3) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of

the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be \$5 per cent per annum.

- (4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely.
- (5) This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Ordinance.

[cf. 1925 c. 19 s. 31 U.K.]

34. Power of advancement

- (1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of 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:

Provided that—

- (a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and
 - (b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and
 - (c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application.
- (2) This section applies only where the trust property consists of money or securities or of property held upon trust for sale calling in and conversion, and such money or securities, or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land.
 - (3) This section does not apply to trusts constituted or created before the commencement of this Ordinance.

[cf. 1925 c. 19 s. 32 U.K.]

35. Protective trusts

- (1) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called the *principal beneficiary*) for the period of his life or for any less period, then, during the period (in this section called *the trust period*) the said income shall, without prejudice to any prior interest, be held on the following trusts, namely—

-
- (a) upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, 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, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;
- (b) if the trust aforesaid fails or determines during the subsistence of the trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say)— (*Amended L.N. 7 of 1979*)
- (i) the principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any; or
 - (ii) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund, if any, or arrears of the annuity, as the case may be,
- as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.
- (2) This section does not apply to trusts coming into operation before the commencement of this Ordinance, and has effect

Trustee Ordinance

Part 3—Division 3

3-46

Section 35

Cap. 29

subject to any variation of the implied trusts aforesaid contained in the instrument creating the trust.

- (3) Nothing in this section operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside.

[cf. 1925 c. 19 s. 33 U.K.]

Part 4

Appointment and Discharge of Trustees

36. Limitation of the number of trustees

- (1) Where, at the commencement of this Ordinance there are more than 4 trustees of a settlement of land or more than 4 trustees holding land on trust for sale, no new trustees shall (except where as a result of the appointment the number is reduced to 4 or less) be capable of being appointed until the number is reduced to less than 4, and thereafter the number shall not be increased beyond 4.
- (2) In the case of settlements and dispositions on trust for sale of land made or coming into operation after the commencement of this Ordinance—
 - (a) the number of trustees thereof shall not in any case exceed 4, and where more than 4 persons are named as such trustees, the 4 first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy;
 - (b) the number of the trustees shall not be increased beyond 4.
- (3) The restrictions hereby imposed on the number of trustees do not apply in the case of land vested in trustees for charitable, ecclesiastical, or public purposes or where the net proceeds of the sale of the property are held for like purposes.

[cf. 1925 c. 19 s. 34 U.K.]

37. Power of appointing new or additional trustees

- (1) Where a trustee, either original or substituted, and whether

appointed by a court or otherwise, is dead, or remains out of Hong Kong for more than 12 months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is a person under the age of 21 years, then, subject to the restrictions imposed by this Ordinance on the number of trustees—

- (a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
- (b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee,

may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased, remaining out of Hong Kong, desiring to be discharged, refusing, or being unfit or being incapable, or being a person under the age of 21 years, as aforesaid. (*Amended 32 of 1990 s. 9; 9 of 1993 s. 7*)

- (2) Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if he were dead, or, in the case of a corporation, as if the corporation desired to be discharged from the trust, and the provisions of this section shall apply accordingly, but subject to the restrictions imposed by this Ordinance on the number of trustees.
- (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.

- (4) The power of appointment given by subsection (1) or any similar previous enactment to the personal representatives of a last surviving or continuing trustee shall be and shall be deemed always to have been exercisable by the executors for the time being (whether original or by representation) of such surviving or continuing trustee who have proved the will of their testator or by the administrators for the time being of such trustee without the concurrence of any executor who has renounced or has not proved.
- (5) But a sole or last surviving executor intending to renounce, or all the executors where they all intend to renounce, shall have and shall be deemed always to have had power, at any time before renouncing probate, to exercise the power of appointment given by this section, or by any similar previous enactment, if willing to act for that purpose and without thereby accepting the office of executor.
- (6) Where a sole trustee, other than a trust corporation, is or has been originally appointed to act in a trust, or where, in the case of any trust, there are not more than 3 trustees (none of them being a trust corporation) either original or substituted and whether appointed by the court or otherwise, then and in any such case—
 - (a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
 - (b) if there is no such person, or no such person able and willing to act, then the trustee or trustees for the time being,

may, by writing, appoint another person or other persons to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee, unless the instrument, if any, creating the trust, or any statutory enactment provides to the contrary, nor shall the number of trustees be increased beyond 4 by virtue of any such appointment.

- (7) Every new trustee appointed under this section, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.
- (8) The provisions of this section relating to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.
- (9) Where a lunatic or person of unsound mind, being a trustee, is also entitled in possession to some beneficial interest in the trust property, no appointment of a new trustee in his place shall be made by the continuing trustees or trustee, under this section, unless leave has been given by the court to make the appointment.

[cf. 1925 c. 19 s. 36 U.K.]

38. Supplemental provisions as to appointment of trustees

- (1) On the appointment of a trustee for the whole or any part of trust property—
 - (a) the number of trustees may, subject to the restrictions imposed by this Ordinance on the number of trustees, be increased; and

- (b) a separate set of trustees, not exceeding 4 may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees, or, if only one trustee was originally appointed, then, save as hereinafter provided, one separate trustee may be appointed; and
 - (c) it shall not be obligatory, save as hereinafter provided, to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than 2 trustees were originally appointed, but, except where only one trustee was originally appointed, and a sole trustee when appointed will be able to give valid receipts for all capital money, a trustee shall not be discharged from his trust unless there will be either a trust corporation or at least 2 individuals to act as trustees to perform the trust; and
 - (d) any assurance or thing requisite for vesting the trust property, or any part thereof, in a sole trustee, or jointly in the persons who are the trustees, shall be executed or done.
- (2) Nothing in this Ordinance shall authorize the appointment of a sole trustee, not being a trust corporation, where the trustee, when appointed, would be under the age of 21 years or, would not be able to give valid receipts for all capital money arising under the trust. (*Amended 32 of 1990 s. 10*)

[cf. 1925 c. 19 s. 37 U.K.]

39. Evidence as to a vacancy in a trust

- (1) A statement, contained in any instrument coming into operation after the commencement of this Ordinance by which a new trustee is appointed for any purpose connected with land, to the effect that a trustee has remained out of Hong Kong for more than 12 months or refuses or is unfit to act, or is incapable of acting, or that he is not entitled to a beneficial interest in the trust property in possession, shall, in favour of a purchaser of a legal estate, be conclusive evidence of the matter stated. (*Amended 9 of 1993 s. 7*)
- (2) In favour of such purchaser any appointment of a new trustee depending on that statement, and any vesting declaration, express or implied, consequent on the appointment, shall be valid.

[cf. 1925 c. 19 s. 38 U.K.]

40. Retirement of trustee without a new appointment

- (1) Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least 2 individuals to act as trustees to perform the trust, then, if such trustee as aforesaid by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Ordinance, without any new trustee being appointed in his place.
- (2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

[cf. 1925 c. 19 s. 39 U.K.]

40A. Appointment and retirement of trustees on beneficiaries'

directions

- (1) This section applies in relation to a trust if—
 - (a) no person is nominated for the purpose of appointing new trustees by the instrument creating the trust or an enactment; and
 - (b) either—
 - (i) the sole beneficiary under the trust is absolutely entitled to the property subject to the trust and—
 - (A) is an individual of full age and capacity; or
 - (B) is a body corporate whose constitution does not prohibit it from exercising the power under this section; or
 - (ii) all the beneficiaries under the trust (taken together) are absolutely entitled to the property subject to the trust and each of whom is either—
 - (A) an individual of full age and capacity; or
 - (B) a body corporate whose constitution does not prohibit it from exercising the power under this section.
- (2) The sole beneficiary or all the beneficiaries may give either or both of the following directions—
 - (a) a written direction to a trustee directing the trustee to retire from the trust;
 - (b) a written direction to a sole trustee or all the trustees for the time being or, if there is none, to the personal representative of the last person who was a trustee, directing the sole trustee, trustees or the personal representative to appoint by writing a person specified in the direction as a trustee.

- (3) A trustee to whom a direction under subsection (2)(a) has been given must make a deed declaring the trustee's retirement if—
- (a) reasonable arrangements have been made for the protection of any rights of the trustee in connection with the trust;
 - (b) after the trustee has retired, there will be either a trust corporation or at least 2 persons to act as trustees of the trust; and
 - (c) either—
 - (i) another person is to be appointed as a new trustee on the trustee's retirement (whether in compliance with a direction given under subsection (2)(b) or otherwise); or
 - (ii) the continuing trustees by deed consent to the retirement.
- (4) When the deed declaring the trustee's retirement is made—
- (a) the retirement takes effect and the trustee is discharged from the trust; and
 - (b) the trustee and the continuing trustees (together with any new trustee) must (subject to any arrangement for the protection of the rights of the retiring trustee) do anything necessary to vest the property subject to the trust in—
 - (i) the continuing trustees; or
 - (ii) the continuing trustees and new trustees.
- (5) This section has effect subject to the restrictions imposed by section 36 on the number of trustees.

(Added 13 of 2013 s. 25)

40B. Appointment of substitute for incapacitated trustee

- (1) This section applies in relation to a trust if—
 - (a) a trustee, because of mental incapacity as defined by section 2(1) of the Mental Health Ordinance (Cap. 136), is incapable of exercising the trustee's functions (*the incapacitated trustee*);
 - (b) no person is entitled, willing and able to appoint, under section 37(1), a new trustee in place of the incapacitated trustee; and
 - (c) either—
 - (i) the sole beneficiary under the trust is absolutely entitled to the property subject to the trust and—
 - (A) is an individual of full age and capacity; or
 - (B) is a body corporate whose constitution does not prohibit it from exercising the power under this section; or
 - (ii) all the beneficiaries under the trust (taken together) are absolutely entitled to the property subject to the trust and each of whom is either—
 - (A) an individual of full age and capacity; or
 - (B) a body corporate whose constitution does not prohibit it from exercising the power under this section.
- (2) Either the sole beneficiary or all the beneficiaries may give a written direction to the specified attorney or committee to appoint a person specified in the direction to be a new trustee in place of the incapacitated trustee.
- (3) In subsection (2)—

- (a) the specified attorney is an attorney acting for the incapacitated trustee under an enduring power of attorney; and
- (b) the specified committee is a committee of the estate or other person acting for the incapacitated trustee appointed or authorized by the court under Part II of the Mental Health Ordinance (Cap. 136).

(Added 13 of 2013 s. 25)

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)

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.

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- (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)

Editorial Note:

* Commencement date: 1 December 2013.

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) 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 such person as aforesaid extending to all the estates, interests and rights with respect to which a declaration could have been made.
- (3) An express vesting declaration, whether made before or after the commencement of this Ordinance, shall, notwithstanding that the estate, interest or right to be vested is not expressly

referred to, and provided that the other statutory requirements were or are complied with, operate and be deemed always to have operated (but without prejudice to any express provision to the contrary contained in the deed of appointment or discharge) to vest in the persons respectively referred to in subsections (1) and (2), as the case may require, such estates, interests and rights as are capable of being and ought to be vested in those persons.

- (4) This section does not extend—
- (a) to land conveyed by way of mortgage for securing money subject to the trust, except land conveyed on trust for securing debentures or debenture stock;
 - (b) to land held under a lease which contains any covenant, condition or agreement against assignment or disposing of the land without licence or consent, unless, prior to the execution of the deed containing expressly or impliedly the vesting declaration, the requisite licence or consent has been obtained, or unless, by virtue of any statute or rule of law, the vesting declaration, express or implied, would not operate as a breach of covenant or give rise to a forfeiture;
 - (c) to any share, stock, annuity or property which is only transferable in books kept by a company or other body, or in manner directed by or under any enactment.

In this subsection *lease* (租約) includes an underlease and an agreement for a lease or underlease.

- (5) For purposes of registration of the deed, the person or persons making the declaration, expressly or impliedly, shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Ordinance.

Trustee Ordinance

Part 4

4-28

Section 41

Cap. 29

- (6) This section applies to deeds of appointment or discharge executed on or after 1 July 1901.

[cf. 1925 c. 19 s. 40 U.K.]

Part 4A

Appointment of Agents, Nominees and Custodians

(Part 4A added 13 of 2013 s. 27)

Division 1—Application

41A. Application of Part 4A

- (1) Except as otherwise provided in section 41I(6)—
 - (a) this Part applies in relation to a trust having a sole trustee in the same way as it applies to a trust that has more than one trustee; and
 - (b) references to trustees in this Part (except in sections 41C(1) and 41J(6)) include the sole trustee of a trust.
- (2) The powers conferred by this Part are only exercisable by trustees jointly if there is more than one trustee.

(Amended E.R. 2 of 2014)

Division 2—Agents

41B. Power to appoint agents

- (1) Subject to the provisions of this Division, the trustees of a trust may authorize a person to exercise one or more of their delegable functions as their agent.
- (2) For a trust that is not a charitable trust, the trustees' delegable functions are any functions of the trustees other than—
 - (a) a function relating to whether, or in what way, any assets of the trust are to be distributed;

- (b) a power to decide whether any fees or other payment due to be made out of the trust funds is to be made out of income or capital of the trust;
 - (c) a power to appoint a person to be a trustee of the trust; or
 - (d) a power conferred by the instrument creating the trust or an enactment that permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.
- (3) For a charitable trust, the trustees' delegable functions are—
- (a) a function relating to carrying out a decision that the trustees have taken;
 - (b) a function relating to the investment of assets subject to the trust (including, in the case of land held as an investment, managing the land and creating or disposing of an interest in the land); and
 - (c) a function relating to the raising of funds for the trust (otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose).
- (4) For the purposes of subsection (3)(c), a trade, whether carried on in Hong Kong or elsewhere, is an integral part of carrying out a trust's charitable purpose if the profits of the trade are applied solely for the purposes of the trust and either—
- (a) the trade is carried on in the course of the actual carrying out of a primary purpose of the trust; or
 - (b) the work in connection with the trade is mainly carried out by the beneficiaries of the trust.

41C. Persons who may act as agents

- (1) Subject to subsection (2), a person whom the trustees may

under section 41B authorize to exercise functions as the trustees' agent includes one or more of the trustees.

- (2) The trustees may not authorize 2 or more persons to exercise the same function unless the persons are to exercise the function jointly.
- (3) The trustees may under section 41B authorize a person to exercise a function as their agent even though the person is also appointed to act as the trustees' nominee or custodian (whether under section 41G, 41H or 41I or any other power).

41D. Linked functions, etc.

- (1) Subject to subsection (2), a person who is authorized under section 41B to exercise a function as the trustees' agent is (whatever the terms of agency) subject to any specific duties or restrictions attached to the function.
- (2) A person who is authorized under section 41B to exercise a power which is subject to a requirement to obtain advice is not subject to the requirement if the person is the kind of person from whom it would have been proper for the trustees, in compliance with the requirement, to obtain advice.

41E. Terms of agency

- (1) Subject to subsection (2), section 41F(2) and Part 4B (remuneration and expenses), the trustees may under section 41B authorize a person to exercise functions as their agent on the terms as to remuneration and other matters that the trustees may determine.
- (2) The trustees may not under section 41B authorize a person to exercise functions as their agent on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.
- (3) The terms are—

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

(Amended E.R. 2 of 2014)

41F. Special restrictions relating to asset management

- (1) The trustees may not under section 41B authorize a person to exercise any of their asset management functions as their agent except by an agreement made, or evidenced, in writing.
- (2) In addition, the trustees may not under section 41B authorize a person to exercise any of their asset management functions as their agent unless—
 - (a) the trustees have provided that person with a statement that gives guidance as to how the functions are to be exercised (*policy statement*); and
 - (b) the agreement under which the agent is to act includes a term to the effect that the agent will secure compliance with—
 - (i) the policy statement; or
 - (ii) if the policy statement is revised or replaced under section 41M (review of agents), the revised or replaced policy statement.
- (3) The trustees must formulate any guidance given in the policy statement with a view to ensuring that the functions will be exercised in the best interest of the trust.
- (4) A policy statement must be made, or evidenced, in writing.

- (5) The asset management functions of trustees are their functions relating to—
- (a) the investment of assets subject to the trust;
 - (b) the acquisition of property which is to be subject to the trust; and
 - (c) the management of property which is subject to the trust and the disposal of, or creation or disposal of an interest in, the property.

Division 3—Nominees and Custodians

41G. Power to appoint nominees

- (1) Subject to the provisions of this Division, the trustees of a trust may—
- (a) appoint a person to act as the trustees' nominee in relation to any of the assets of the trust as they determine; and
 - (b) take the steps that are necessary to ensure that those assets are vested in a person so appointed.
- (2) An appointment under subsection (1)(a) must be made, or evidenced, in writing.
- (3) This section does not apply to any trust having a custodian trustee.

41H. Power to appoint custodians

- (1) Subject to the provisions of this Division, the trustees of a trust may appoint a person to act as a custodian in relation to any of the assets of the trust as they determine.
- (2) For the purposes of this Ordinance, a person is a custodian in relation to any assets if the person undertakes the safe custody

of the assets or of any documents or records concerning the assets.

- (3) An appointment under subsection (1) must be made, or evidenced, in writing.
- (4) This section does not apply to any trust having a custodian trustee.

41I. Investment in bearer securities

- (1) Trustees may, unless expressly prohibited by the instrument creating the trust or an enactment, retain or invest in securities payable to bearer which, if not so payable, would have been authorized investments.
- (2) A direction that investments must be retained or made in the name of a trustee is not an express prohibition referred to in subsection (1).
- (3) If trustees retain or invest in securities payable to bearer, the trustees must appoint a person to act as a custodian of the securities.
- (4) Subsection (3) does not apply if the instrument creating the trust or an enactment contains a provision that (however expressed) permits the trustees to retain or invest in securities payable to bearer without appointing a person as a custodian.
- (5) An appointment under subsection (3) must be made, or evidenced, in writing.
- (6) Subsections (3), (4) and (5) do not impose a duty on a sole trustee if that trustee is a trust corporation.
- (7) Subsections (3), (4) and (5) do not apply to any trust having a custodian trustee.

41J. Persons who may be appointed as nominees or custodians

- (1) A person may not be appointed under section 41G as a

nominee unless one of the conditions mentioned in subsection (2) is satisfied.

- (2) The conditions are—
 - (a) the person carries on a business that consists of, or includes, acting as a nominee;
 - (b) the person is a body corporate that is controlled by the trustees.
- (3) A person may not be appointed under section 41H or 41I as a custodian to undertake the safe custody of the assets or of any documents of title concerning the assets unless one of the conditions mentioned in subsection (4) is satisfied.
- (4) The conditions are—
 - (a) the person carries on a business that consists of, or includes, acting as a custodian;
 - (b) the person is a body corporate that is controlled by the trustees.
- (5) For the purpose of subsections (2)(b) and (4)(b), a body corporate is controlled by the trustees if the trustees have the power to ensure that the affairs of the body corporate are conducted in accordance with the wishes of the trustees—
 - (a) by means of holding shares or possessing voting power in, or in relation to, that body corporate or any other body corporate; or
 - (b) because of any powers conferred by the articles of association or other document regulating that body corporate or any other body corporate.
- (6) Subject to subsections (1) and (3), the persons whom the trustees may under section 41G, 41H or 41I (as the case requires) appoint as a nominee or custodian—

- (a) include one of the trustees, if that one is a trust corporation; or
 - (b) include 2 or more of the trustees, if they are to act as joint nominees or joint custodians.
- (7) The trustees may under section 41G appoint a person to act as their nominee even though the person is also—
 - (a) authorized to exercise functions as the trustees' agent (whether under section 41B or any other power); or
 - (b) appointed to act as the trustees' custodian (whether under section 41H or 41I or any other power).
- (8) The trustees may under section 41H or 41I appoint a person to act as their custodian even though the person is also—
 - (a) authorized to exercise functions as the trustees' agent (whether under section 41B or any other power); or
 - (b) appointed to act as the trustees' nominee (whether under section 41G or any other power).

41K. Terms of appointment of nominees and custodians

- (1) Subject to subsection (2) and Part 4B (remuneration and expenses), the trustees may under section 41G, 41H or 41I appoint a person to act as a nominee or custodian on the terms as to remuneration and other matters that the trustees may determine.
- (2) The trustees may not under section 41G, 41H or 41I appoint a person to act as a nominee or custodian on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.
- (3) The terms are—
 - (a) a term permitting the nominee or custodian to sub-delegate the trustees' powers or functions to a delegate of the nominee or custodian;

- (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.

(Amended E.R. 2 of 2014)

Division 4—Review of and Liability for Agents, Nominees and Custodians

41L. Application of sections 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.

41M. Review of agents

- (1) While an agent continues to act for a trust, the trustees of the trust must—

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- (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.

41N. Review of nominees and custodians

- (1) While a nominee or custodian continues to act for a trust, the trustees of the trust must—
 - (a) keep under review the arrangements under which the nominee or custodian 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) 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 nominee or custodian.
- (3) For the purposes of subsection (1)—

power of intervention (干預權力) includes—

 - (a) a power to give directions to the nominee or custodian; and
 - (b) a power to revoke the appointment of the nominee or custodian.

41O. Liability for agents, nominees and custodians

- (1) A trustee of a trust is not liable for any act or omission of an agent, nominee or custodian acting for the trust (each is a ***representative***) if the trustee has discharged the statutory duty of care applicable to the trustee under Division 2 of Schedule 3 when—
 - (a) entering into the arrangements under which a person acts as the representative; and
 - (b) carrying out the duties to review under section 41M or 41N.

- (2) If a trustee has agreed to a term under which a representative is permitted to sub-delegate the trustee's powers or functions to a delegate of the representative, the trustee is not liable for any act or omission of the delegate if the trustee has discharged the statutory duty of care applicable to the trustee under Division 2 of Schedule 3 when—
- (a) agreeing to that term; and
 - (b) carrying out the duties to review under section 41M or 41N as far as the duties relate to the use of the delegate.

(Amended E.R. 2 of 2014)

41P. Effect of trustees exceeding their powers

A failure by the trustees to act within the limits of the powers conferred by this Part does not invalidate—

- (a) the authorization of a person to exercise a function of the trustees as an agent; or
 - (b) the appointment of a person to act as a nominee or custodian.
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Part 4B

Remuneration and Expenses

(Part 4B added 13 of 2013 s. 27)

41Q. Application of Part 4B

This Part applies in respect of—

- (a) services provided to, or on behalf of, a trust (whenever created) on or after the commencement date[#] of this Part; or
- (b) expenses incurred on behalf of a trust (whenever created) on or after the commencement date[#] of this Part.

(Amended E.R. 2 of 2014)

Editorial Note:

[#] Commencement date: 1 December 2013.

41R. Interpretation of Part 4B

- (1) For the purposes of this Part, a trustee acts in a professional capacity if—
 - (a) the trustee acts in the course of a profession or business that consists of, or includes, the provision of services in connection with—
 - (i) the management or administration of trusts generally or a particular kind of trust; or
 - (ii) any particular aspect of the management or administration of trusts generally or a particular kind of trust; and

- (b) the services that the trustee provides to, or on behalf of, the trusts fall within the description of paragraph (a).
- (2) For the purposes of this Part, a person acts as a lay trustee if the person—
 - (a) is not a trust corporation; and
 - (b) does not act in a professional capacity.

(Amended E.R. 2 of 2014)

41S. Remuneration of trustees under instrument creating trust

- (1) Subject to subsection (2)—
 - (a) subsections (3) and (4) apply to a trustee who—
 - (i) is a trust corporation; or
 - (ii) is not a trust corporation, but is acting in a professional capacity as a trustee of a non-charitable trust; and
 - (b) subsections (3) and (4) apply to a trustee—
 - (i) if the trustee is not a trust corporation, but is acting in a professional capacity as a trustee, other than the sole trustee, of a charitable trust; but
 - (ii) only to the extent to which a majority of the other trustees of the charitable trust have agreed that those subsections apply to the trustee, subject to any inconsistent provision in the instrument creating the trust or an enactment.
- (2) Subsections (3) and (4) apply to a trustee—
 - (a) only if there is a provision in the instrument creating the trust or an enactment entitling the trustee to receive payment out of trust funds for services provided by the trustee to, or on behalf of, the trust; and

- (b) except to the extent to which any inconsistent provision is made in the instrument creating the trust or an enactment.
- (3) A trustee is to be treated as being entitled under the instrument creating the trust to receive payment for services provided even if the services are capable of being provided by a lay trustee.
- (4) Any payment to which a trustee is entitled for services provided is to be treated as remuneration for services (but not as a disposition of property) for the purposes of section 10 of the Wills Ordinance (Cap. 30) (avoidance of gifts to attesting witnesses and their spouses).

41T. Remuneration of trustees other than under instrument creating trust

- (1) Subject to subsection (2)—
 - (a) subsections (3) and (4) apply to a trustee who is a trust corporation; and
 - (b) subsections (3) and (4) apply to a trustee who is not a trust corporation, but is acting in a professional capacity as a trustee, other than the sole trustee, of a trust if each of the other trustees of the trust has agreed in writing that the trustee may be remunerated for services provided by the trustee to, or on behalf of, the trust.
- (2) Subsections (3) and (4) apply to a trustee of a charitable or non-charitable trust only if the trustee's entitlement to remuneration—
 - (a) is not provided by the instrument creating the trust or an enactment; and
 - (b) is not expressly prohibited by a term in the instrument or enactment.

- (3) A trustee is entitled to receive reasonable remuneration out of trust funds for services provided by the trustee to, or on behalf of, the trust.
- (4) A trustee is to be treated as being entitled under this section to receive remuneration for services provided even if the services are capable of being provided by a lay trustee.
- (5) This section applies to a trustee authorized to act in another capacity as it applies to any other trustee.
- (6) For the purpose of subsection (5), a trustee authorized to act in another capacity is a trustee who has been authorized, under a power conferred by Part 4A (appointment of agents, nominees and custodians), the instrument creating the trust or an enactment—
 - (a) to exercise functions as a trustee's agent; or
 - (b) to act as a nominee or custodian.
- (7) For the purposes of this section—

reasonable remuneration (合理酬金)—

 - (a) means, in relation to the provision of services by a trustee of a trust, the remuneration that is reasonable in the circumstances for the provision of those services by the trustee to, or on behalf of, the trust; and
 - (b) includes, in relation to the provision of services by a trustee who is an authorized institution under the Banking Ordinance (Cap. 155) and provides those services in the course of, or incidental to, the exercise of its function as a trustee, the institution's reasonable charges for the provision of those services.

(Amended E.R. 2 of 2014)

41U. Trustee's expenses

- (1) A trustee of a trust who has properly incurred expenses when

acting on behalf of the trust—

- (a) is entitled to be reimbursed from the trust funds for those expenses; or
 - (b) may pay for those expenses out of the trust funds.
- (2) This section applies to a trustee authorized to act in another capacity as it applies to any other trustee.
- (3) For the purpose of subsection (2), a trustee authorized to act in another capacity is a trustee who has been authorized, under a power conferred by Part 4A (appointment of agents, nominees and custodians), the instrument creating the trust or an enactment—
- (a) to exercise functions as a trustee's agent; or
 - (b) to act as a nominee or custodian.

(Amended E.R. 2 of 2014)

41V. Remuneration and expenses of agents, nominees and custodians

- (1) This section applies, if, under a power conferred by Part 4A (appointment of agents, nominees and custodians), the instrument creating the trust or an enactment, a person other than a trustee has been—
- (a) authorized to exercise functions as a trustee's agent; or
 - (b) appointed to act as a nominee or custodian.
- (2) The trustees of the trust may remunerate the agent, nominee or custodian (each is a *representative*) out of trust funds for services if—
- (a) the representative is engaged on terms entitling the representative to be remunerated for those services; and
 - (b) the amount does not exceed the remuneration that is reasonable in the circumstances for the provision of

Trustee Ordinance

Part 4B

4B-12

Section 41V

Cap. 29

those services by the representative to, or on behalf of, the trust.

- (3) The trustees may reimburse the representative out of trust funds for any expenses properly incurred in exercising the representative's functions.

(Amended E.R. 2 of 2014)

Part 4C

Exemption from Liability

(Part 4C added 13 of 2013 s. 27)

41W. Trustee is not exempted from liability for breach of trust

- (1) Subject to subsection (2), this section applies to a trustee who—
 - (a) acts in a professional capacity; and
 - (b) receives remuneration for the trustee's services provided to, or on behalf of, the trust.
- (2) This section does not apply to an approved trustee of a registered scheme under the Mandatory Provident Fund Schemes Ordinance (Cap. 485).
- (3) The terms of a trust must not—
 - (a) relieve, release or exonerate a trustee from liability for a breach of trust arising from the trustee's own fraud, wilful misconduct or gross negligence; or
 - (b) grant the trustee any indemnity against the trust property for the liability.
- (4) A term of a trust is invalid to the extent to which it purports to—
 - (a) relieve, release or exonerate a trustee from liability for a breach of trust arising from the trustee's own fraud, wilful misconduct or gross negligence; or
 - (b) grant the trustee any indemnity against the trust property for the liability.
- (5) This section has effect in respect of a trust created on or after the commencement date* of the 2013 amending Ordinance.

Trustee Ordinance

Part 4C

4C-4

Section 41W

Cap. 29

- (6) 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.
- (7) In this section, a reference to a trustee who acts in a professional capacity is to be construed in accordance with section 41R(1).

Editorial Note:

* Commencement date: 1 December 2013.

Part 4D

Reserve Power and Transfer of Movable Property

(Part 4D added 13 of 2013 s. 27)

41X. Reserve power of settlor

- (1) A trust is not invalid only because of the person creating the trust (*the settlor*) reserving to the settlor any or all powers of investment or asset management functions under the trust.
- (2) If a power or function referred to in subsection (1) has been reserved by the settlor, a trustee who acts in accordance with the exercise of the power or function is not in breach of the trust.
- (3) If a trust was declared invalid by the court before the commencement date* of the 2013 amending Ordinance, subsection (1) does not operate to revive the invalid trust on or after that date.
- (4) Subject to subsection (3), if the validity of a trust (whenever created) is being questioned, the court may take into account subsection (1) in determining the validity.

Editorial Note:

* Commencement date: 1 December 2013.

41Y. Transfer of movable property not affected by foreign law of inheritance

- (1) This section applies in relation to a trust (whenever created) only if—
 - (a) the trust is expressed to be governed by Hong Kong law; and

- (b) at all times when the trust is in force, each trustee of the trust is—
 - (i) an individual who ordinarily resides in Hong Kong;
 - (ii) a body corporate incorporated or established in Hong Kong; or
 - (iii) a body corporate incorporated or established outside Hong Kong and the central management and control of which is in Hong Kong.
 - (2) A person who during his or her lifetime transfers any movable property to be held on trust (whenever created) is regarded as having the capacity to transfer the property if the person has capacity to do so under any of the following laws—
 - (a) the law applicable in Hong Kong;
 - (b) the law of the person's domicile or nationality; or
 - (c) the proper law of the transfer.
 - (3) A law relating to inheritance or succession of a foreign jurisdiction does not affect the validity of the transfer of any movable property to be held on trust if the person transferring the movable property had the capacity to do so under subsection (2).
 - (4) The reference to law in paragraph (a), (b) or (c) of subsection (2) does not include any choice of law rules that form part of the law in any of those paragraphs.
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Part 5

Powers of the Court

(Cross-heading repealed 13 of 2013 s. 28)

Division 1—Appointment of New Trustees

(Added 13 of 2013 s. 29)

42. Power of court to appoint new trustees

- (1) The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in substitution for a trustee who is sentenced to a term of imprisonment or is a lunatic or a person of unsound mind or is a bankrupt or is a corporation which is in liquidation or has been dissolved.
- (2) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.
- (3) Nothing in this section gives power to appoint an executor or administrator.

[cf. 1925 c.19 s. 41 U.K.]

43. Power to authorize remuneration

Where the court appoints a corporation to be a trustee either solely or jointly with another person, the court may authorize the corporation to charge such remuneration for its services as trustee as the court may think fit.

(Amended 25 of 1998 s. 2)

[cf. 1925 c. 19 s. 42 U.K.]

44. Powers of new trustee appointed by court

Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

[cf. 1925 c. 19 s. 43 U.K.]

(Cross-heading repealed 13 of 2013 s. 30)

Division 2—Vesting Orders

(Added 13 of 2013 s. 31)

45. Vesting orders of land

In any of the following cases, namely—

- (a) where the court appoints or has appointed a trustee, or where a trustee has been appointed out of court under any statutory or express power;
- (b) where a trustee entitled to or possessed of any land or interest therein, whether by way of mortgage or otherwise, or entitled to a contingent right therein, either solely or jointly with any other person—

- (i) is under disability; or
- (ii) is out of the jurisdiction of the court; or
- (iii) cannot be found, or, being a corporation, has been dissolved;
- (c) where it is uncertain who was the survivor of 2 or more trustees jointly entitled to or possessed of any interest in land;
- (d) where it is uncertain whether the last trustee known to have been entitled to or possessed of any interest in land is living or dead;
- (e) where there is no personal representative of a deceased trustee who was entitled to or possessed of any interest in land, or where it is uncertain who is the personal representative of a deceased trustee who was entitled to or possessed of any interest in land;
- (f) where a trustee jointly or solely entitled to or possessed of any interest in land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or interest or a release of the right, to convey the land or interest or to release the right, and has wilfully refused or neglected to convey the land or interest or release the right for 28 days after the date of the requirement;
- (g) where land or any interest therein is vested in a trustee whether by way of mortgage or otherwise, and it appears to the court to be expedient,

the court may make an order (in this Ordinance called a *vesting order*) vesting the land or interest therein in any such person in any such manner and for any such estate or interest as the court may direct, or releasing or disposing of the contingent right to such person as the court may direct:

Provided that—

- (i) where the order is consequential on the appointment of a trustee the land or interest therein shall be vested for such estate as the court may direct in the persons who on the appointment are the trustees; and
- (ii) where the order relates to a trustee entitled or formerly entitled jointly with another person, and such trustee is under disability or out of the jurisdiction of the court or cannot be found, or being a corporation has been dissolved, the land, interest or right shall be vested in such other person who remains entitled, either alone or with any other person the court may appoint.

[cf. 1925 c. 19 s. 44 U.K.]

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 U.K.]

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 U.K.]

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 U.K.]

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—

- (a) 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
- (b) 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 during his lifetime a party to the contract or transaction concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Ordinance,

and thereupon the court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

[cf. 1925 c. 19 s. 48 U.K.]

50. Effect of vesting order

A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a trustee, have the same effect—

- (a) as if the persons who before the appointment were the trustees, if any, had duly executed all proper conveyances of the land for such estate or interest as the court directs; or
- (b) if there is no such person, or no such person of full capacity, as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate or interest as the court directs,

and shall in every other case have the same effect as if the trustee, or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

[cf. 1925 c. 19 s. 49 U.K.]

51. Power to appoint person to convey

In all cases where a vesting order can be made under any of the foregoing provisions, the court may, if it is more convenient, appoint a person to convey the land or any interest therein or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

[cf. 1925 c. 19 s. 50 U.K.]

52. Vesting orders as to stock and thing in action

- (1) In any of the following cases, namely—
 - (a) where the court appoints or has appointed a trustee, or where a trustee has been appointed out of court under any statutory or express power;
 - (b) where a trustee entitled, whether by way of mortgage or otherwise, alone or jointly with another person to stock or to a thing in action—
 - (i) is under disability; or
 - (ii) is out of the jurisdiction of the court; or
 - (iii) cannot be found, or, being a corporation, has been dissolved; or
 - (iv) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a thing in action, according to the direction of the person absolutely entitled thereto for 28 days next after a request in writing has been made to him by the person so entitled; or
 - (v) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a thing in action for 28 days next after an order of the court for that purpose has been served on him;
 - (c) where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a thing in action is alive or dead;
 - (d) where stock is standing in the name of a deceased person whose personal representative is under disability;

- (e) where stock or a thing in action is vested in a trustee whether by way of mortgage or otherwise and it appears to the court to be expedient,

the court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover the thing in action, in any such person as the court may appoint:

Provided that—

- (i) where the order is consequential on the appointment of a trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and
- (ii) where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the court may appoint.
- (2) In all cases where a vesting order can be made under this section, the court may, if it is more convenient, appoint some proper person to make or join in making the transfer:
- Provided that the person appointed to make or join in making a transfer of stock shall be some proper officer of the bank, or the company or society whose stock is to be transferred.
- (3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the court under this Ordinance may transfer the stock to himself or any other person, according to the order, and all companies, banks and societies shall obey every order under this section according to its tenor.
- (4) After notice in writing of an order under this section it shall not be lawful for any company, bank or society to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

- (5) The court may make declarations and give directions concerning the manner in which the right to transfer any stock or thing in action vested under the provisions of this Ordinance is to be exercised.
- (6) The provisions of this Ordinance as to vesting orders shall apply to shares in ships registered under the enactments relating to merchant shipping as if they were stock.

[cf. 1925 c. 19 s. 51 U.K.]

53. Vesting orders of charity property

The powers conferred by this Ordinance as to vesting orders may be exercised for vesting any interest in land, stock or thing in action in any trustee of a charity or society over which the court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the court under its general or statutory jurisdiction.

[cf. 1925 c. 19 s. 52 U.K.]

54. Vesting orders in relation to infant's beneficial interest

Where an infant is beneficially entitled to any property, the court may, with a view to the application of the capital or income thereof for the maintenance, education or benefit of the infant, make an order—

- (a) appointing a person to convey such property; or
- (b) in the case of stock, or a thing in action, vesting in any person the right to transfer or call for a transfer of such stock, or to receive the dividends or income thereof, or to sue for and recover such thing in action, upon such terms as the court may think fit.

[cf. 1925 c. 19 s. 53 U.K.]

55. Orders made upon certain allegations to be conclusive evidence

Where a vesting order is made as to any land under this Ordinance founded on an allegation of any of the following matters namely—

- (a) the personal incapacity of a trustee or mortgagee; or
- (b) that a trustee or mortgagee or the personal representative of or other person deriving title under a trustee or mortgagee is out of the jurisdiction of the court or cannot be found, or being a corporation has been dissolved; or
- (c) that it is uncertain which of 2 or more trustees, or which of 2 or more persons interested in a mortgage, was the survivor; or
- (d) that it is uncertain whether the last trustee or the personal representative of or other person deriving title under a trustee or mortgagee, or the last surviving person interested in a mortgage is living or dead; or
- (e) that any trustee or mortgagee has died intestate without leaving a person beneficially interested under the intestacy or has died and it is not known who is his personal representative or the person interested,

the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order; but this section does not prevent the court from directing a reconveyance or surrender or the payment of costs occasioned by any such order if improperly obtained.

[cf. 1925 c. 19 s. 55 U.K.]

(Cross-heading repealed 13 of 2013 s. 32)

Division 3—Jurisdiction to Make Other Order

(Added 13 of 2013 s. 33)

56. Power of court to authorize dealing with trust property

- (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.
- (2) The court may, from time to time, rescind or vary any order under this section, or may make any new or further order.
- (3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

[cf. 1925 c. 19 s. 57 U.K.]

57. Persons entitled to apply for orders

- (1) An order under this Ordinance for the appointment of a new trustee or concerning any interest in land, stock, or thing in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or thing in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.
- (2) An order under this Ordinance concerning any interest in land, stock, or thing in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not,

or of any person interested in the money secured by the mortgage.

[cf. 1925 c. 19 s. 58 U.K.]

57A. Charitable trusts

Without prejudice to the generality of sections 56 and 57, the court may provide such relief, make such order, or give such direction, as it thinks just relating to a charitable trust upon an application made to it—

- (a) by—
 - (i) 2 or more persons who have the consent in writing of the Secretary for Justice to make the application;
 - (ii) the Secretary for Justice; or
 - (iii) all or any one or more of the trustees or persons administering the trust, or persons claiming to administer the trust, or persons otherwise interested in the trust; and (*Amended L.N. 362 of 1997*)
- (b) either—
 - (i) complaining of a breach of the trust or supposed breach of the trust; or
 - (ii) for the purposes of the better administration of the trust.

(Added 79 of 1997 s. 3)

58. Power to give judgment in absence of a trustee

Where in any action the court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action, to serve him with a process of the court, and that he cannot be found, the court may hear and determine the action and give judgment therein against that person in his character of a trustee as if he had been duly served, or had entered

an appearance in the action, and had also appeared by his solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character.

[cf. 1925 c. 19 s. 59 U.K.]

59. Power to charge costs on trust estate

The court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be raised and paid out of the property in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the court may seem just.

[cf. 1925 c. 19 s. 60 U.K.]

60. Power to relieve trustee from personal liability

If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Ordinance, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.

[cf. 1925 c. 19 s. 61 U.K.]

61. Power to make beneficiary indemnity for breach of trust

- (1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court may, if it thinks fit, make such order as to the court seems just, for impounding all or any part of the interest of

the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming through him. (*Amended 27 of 1971 s. 15*)

- (2) This section applies to breaches of trust committed as well before as after the commencement of this Ordinance.

[cf. 1925 c. 19 s. 62 U.K.]

(Cross-heading repealed 13 of 2013 s. 34)

Division 4—Payment into Court

(Added 13 of 2013 s. 35)

62. Payment into court by trustees

- (1) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into court, and the same shall, subject to the rules of court, be dealt with according to the orders of the court.
- (2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into court.
- (3) Where money or securities is or are vested in any persons as trustees, and the majority are desirous of paying the same into court, but the concurrence of the other or others cannot be obtained, the court may order the payment into court to be made by the majority without the concurrence of the other or others.
- (4) Where any such money or securities is or are deposited with any banker, broker, or other depository, the court may order payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into court.

Trustee Ordinance

Part 5—Division 4

5-30

Section 62

Cap. 29

- (5) Every transfer, payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered.

[cf. 1925 c. 19 s. 63 U.K.]

Part 6

The Judicial Trustee

63. Power of court on application to appoint judicial trustee

- (1) Where application is made to the court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, or by the Secretary for Justice in the case of a charitable trust, the court may, in its discretion, appoint a person (in this Part called a *judicial trustee*) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees. (*Amended 68 of 1995 s. 14; L.N. 362 of 1997*)
- (2) The administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Part.
- (3) Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee, and, in the absence of such nomination, or if the court is not satisfied of the fitness of a person so nominated, an official of the court may be appointed, and in any case a judicial trustee shall be subject to the control and supervision of the court as an officer thereof.
- (4) The court may, either on request or without request, give to a judicial trustee any general or special directions in regard to the trust or the administration thereof.
- (5) There may be paid to the judicial trustee out of the trust property such remuneration, not exceeding any prescribed limits, as the court may assign in each case, subject to any

rules under this Part respecting the application of such remuneration where the judicial trustee is an official of the court, and the remuneration so assigned to any judicial trustee shall, save as the court may for special reasons otherwise order, cover all his work and personal outlay.

- (6) Once in every year the accounts of every trust of which a judicial trustee has been appointed shall be audited, and a report thereon made to the court by such persons as may be prescribed, and, in any case where the court shall so direct, an inquiry into the administration by a judicial trustee of any trust, or into any dealing or transaction of a judicial trustee, shall be made in such manner as may be prescribed.

[cf. 1896 c. 35 s. 1 U.K.]

64. Rules

The Chief Justice may with the approval of the Legislative Council make rules for carrying into effect this Part of this Ordinance and especially to prescribe or provide for—

- (a) requiring judicial trustees, who are not officials of the court, to give security for the due application of any trust property under their control;
- (b) the safety of the trust property, and the custody thereof;
- (c) the remuneration of judicial trustees and the fees to be taken under this Part so as to cover the expenses of the administration of this Part, and the payment of such remuneration and fees out of the trust property, and, where the judicial trustee is an official of the court, the application of the remuneration and fees payable to him;
- (d) dispensing with formal proof of facts in proper cases;
- (e) facilitating the discharge by the court of administrative duties under this Part without judicial proceedings and

- otherwise regulating procedure under this Part and making it simple and inexpensive;
- (f) the suspension or removal of any judicial trustee, and the succession of another person to the office of any judicial trustee who may cease to hold office, and the vesting in such person of any trust property;
 - (g) the classes of trusts in which officials of the court are not to be judicial trustees, or are to be so temporarily or conditionally;
 - (h) the procedure to be followed where the judicial trustee is executor or administrator;
 - (i) preventing the employment by judicial trustees of other persons at the expense of the trust, except in cases of strict necessity;
 - (j) filing and auditing of the accounts of any trust of which a judicial trustee has been appointed.

[*cf.* 1896 c. 35 s. 4 U.K.]

65. Definitions

In this Part—

official of the court (法院官員) means

- (a) the Official Solicitor; or
- (b) the holder of such paid office in or connected with the court as may be prescribed; (*Replaced 98 of 1991 s. 9*)

prescribed (訂明) means prescribed by rules made under this Part.

[*cf.* 1896 c. 35 s. 5 U.K.]

Part 7

The Official Trustee

66. Appointment of Official Trustee

- (1) For the purpose of carrying into effect the provisions of this Part, it shall be lawful for the Chief Executive to appoint a fit and proper person to be Official Trustee: *(Amended 18 of 1999 s. 3)*

Provided that, until such appointment is made, the Official Solicitor shall ex officio exercise all the powers, privileges and discretions, and discharge the duties required to be performed by the Official Trustee under this Ordinance.

- (2) The said office shall have perpetual succession, and all lands or any interest therein, and all moneys, stocks, and securities and land which may be vested in the Official Trustee under this Part shall be deemed to be vested in the Official Trustee for the time being, without any further transfer or conveyance.

(Amended 98 of 1991 s. 9)

67. Payment of trust moneys into bank to credit of Official Trustee

- (1) Trustees, or the majority of trustees, having in their hands or under their control any moneys belonging to any trust, shall be at liberty, on filing in the Registry of the court an affidavit shortly describing the instrument creating the trust, according to the best of their knowledge and belief, to pay the same, with the consent of the Official Trustee and in accordance with such directions as they may receive for the purpose from him, into the court; and the said trust moneys shall be paid through the Treasury into a bank authorized by the Chief Executive on deposit bearing interest, or otherwise, to the

account of the Official Trustee (by his official designation) in the matter of the particular trust (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the court. (*Amended 18 of 1999 s. 3*)

- (2) Any trust moneys paid into a bank pursuant to subsection (1) which—
- (a) remain unclaimed for a period of 5 years from the last making of any order of the Court in relation thereto; or
 - (b) if no such order shall have been made, remain unclaimed for a period of 5 years from the date of payment into the bank,

shall be transferred by the Official Trustee to the general revenue of Hong Kong. (*Added 71 of 1971 s. 3. Amended 9 of 1993 s. 7*)

[cf. 1847 c. 96 s. 1 U.K.; 1893 c. 53 s. 42 U.K.]

68. Transfer of trust securities into name of Official Trustee

Trustees, or the majority of trustees, having any securities standing in their names in the books of any public company or corporation established in Hong Kong, or in the names of any deceased persons of whom they are personal representatives, upon any trust, shall be at liberty, on filing such affidavit as aforesaid, to transfer such securities, with such consent and in accordance with such directions as aforesaid, into the name of the Official Trustee (by his official designation) or to deposit the same in his name in such bank as aforesaid in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the court.

(Amended 9 of 1993 s. 7)

[cf. 1847 c. 96 s. 1 U.K.]

69. Conveyance of land in trust to Official Trustee

Trustees, or the majority of trustees, in whom any land within Hong Kong is or becomes vested upon any trust, shall be at liberty, on filing such affidavit as aforesaid, to convey such land, with such consent and in accordance with such directions as aforesaid, to the Official Trustee, in trust to attend the orders of the court.

(Amended 9 of 1993 s. 7)

[cf. 1847 c. 96 s. 1 U.K.]

70. Certificate to be given by Official Trustee

In every such case as aforesaid, the certificate of the Official Trustee for the moneys so paid, or of the transfer or deposit of such securities, or of the conveyance of such land shall be a sufficient discharge to such trustees for the moneys so paid, or the stocks or securities so transferred or deposited, or the land so conveyed as aforesaid.

[cf. 1847 c. 96 s. 1 U.K.]

71. Order for payment, etc. by majority of trustees without concurrence of others

- (1) Where any moneys or securities, or any land, are or is vested in any persons as trustees, and the majority of them are desirous of paying, transferring, depositing, or conveying the same as aforesaid, but the concurrence of the other or others cannot be obtained, the court may order the payment, transfer, deposit, or conveyance to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into court.
- (2) Every payment, transfer, deposit, delivery, and conveyance made in pursuance of any such order shall be valid and take

effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys, securities, or land so paid, transferred, deposited, delivered, or conveyed.

[cf. 1893 c. 53 s. 42 U.K.]

72. Administration of trust estate

- (1) Such orders as may seem fit shall be made by the court in respect of the trust estate and for the investment and payment of any such moneys or of any dividends or interest on any such securities, and for the transfer and delivery out of any such securities, and for the administration of any such trust generally, upon a petition to be presented in a summary way to the court by such party or parties as to the court may appear to be competent and necessary in that behalf, and service of such petition shall be made on such person or persons as the court may see fit and direct.
- (2) Every order made upon any such petition shall have the same authority and effect, and shall be enforced in the same manner, as if the same had been made in an action regularly instituted in the court.
- (3) If in any case it appears that the trust estate cannot be safely administered without the institution of one or more action or actions, the court may direct any such action or actions to be instituted.

[cf. 1847 c. 96 s. 2 U.K.]

73. Charges upon trust estate administered by Official Trustee

- (1) There shall be imposed and levied, for the use of the Government, upon every trust estate administered under this Part a charge equivalent to the following percentage of the net value of the trust estate—10 per cent where the value of the trust estate does not exceed \$100,000, or, where the value

exceeds \$100,000, 10 per cent on the first \$100,000 and 5 per cent on the excess.

- (2) The said charge shall constitute a primary lien upon the trust estate, and shall be levied, in the case of trust moneys deposited in a bank, by an order of the court, authorizing the payment thereof to the Official Trustee for the use of the Government, and in the case of securities or land, by sale, mortgage, or otherwise as the court may direct, and in case of any such sale or mortgage, the court may, by the same or any further order, empower the Official Trustee to execute all instruments necessary for carrying out this provision, and instruments so executed shall be as valid and effectual to all intents and purposes as if the same had been executed by all persons who, but for this provision, would have been necessary parties thereto.
- (3) There shall also be imposed and levied, for the use of the Government, upon every such estate a charge equivalent to 5 per cent of the annual revenue of the trust estate. The Official Trustee shall deduct such charge in making up the annual accounts of the estate.

(Amended 27 of 1985 s. 2; 18 of 1999 s. 3)

74. General rights and powers of Official Trustee

- (1) In the administration of any trust estate, the Official Trustee shall have and may exercise all the rights and powers conferred upon trustees by this Ordinance, so far as they are applicable to such trust estate.
- (2) The Official Trustee may, subject to any rules that may be made under section 76, employ for the purposes of any trust such solicitors, bankers, accountants, brokers or other persons, as he may consider necessary, and, in determining the persons to be employed in relation to any trust, he shall have regard to the interests of the trust, but subject to this he shall,

whenever practicable, take into consideration the wishes of the creator of the trust and of the other trustees (if any) and of the beneficiaries, either expressed or implied by the practice of the creator of the trust, or in the previous management of the trust. [*cf. 1906 c. 55 s. 11(2) U.K.*]

75. Limitation of liability of Official Trustee

The Official Trustee shall incur no personal liability by reason of any securities being transferred into his name as aforesaid, or by reason of any land being conveyed to him as aforesaid, or by reason of any loss accruing to any trust estate in his hands, otherwise than by his own wilful neglect or default:

Provided that nothing in this Part shall be deemed to affect any rights or remedies against the trust estate or any cestui que trust or any person other than the Official Trustee and the trustees so discharged as aforesaid.

76. Rules for administration of trust funds

The Chief Executive in Council may make rules providing for the administration of trust funds.

(Replaced 9 of 1950 Schedule. Amended 18 of 1999 s. 3)

Part 8

Trust Companies

77. Application by company to be registered as a trust company

- (1) Any company incorporated in Hong Kong (not being a private company within the meaning of section 11 of the Companies Ordinance (Cap. 622)) may apply in writing to the Registrar of Companies to be registered as a trust company under this Part. (*Amended 28 of 2012 ss. 912 & 920*)
- (2) A company which makes an application under subsection (1) shall be eligible to be registered under this Part if, but only if—
 - (a) the objects of the company as set out in its articles of association are restricted to some or all of the objects set out in section 81; (*Amended 28 of 2012 ss. 912 & 920*)
 - (b) the issued share capital of the company is not less than \$3,000,000;
 - (c) in the case of a company having an issued share capital of \$3,000,000 that capital is bona fide fully paid up for a cash consideration and, in the case of a company having an issued share capital exceeding \$3,000,000 at least \$3,000,000 of that capital is bona fide paid up for a cash consideration;
 - (d) the board of directors has been duly appointed in accordance with the articles of association of the company;
 - (e) the company has either—
 - (i) deposited in the name of the Director of Accounting Services with an authorized institution

- within the meaning of section 2 of the Banking Ordinance (Cap. 155) a sum not less than \$1,500,000 and lodged a receipt issued by the authorized institution for that amount with the Director of Accounting Services; (*Replaced 13 of 2013 s. 36*)
- (ii) deposited in the name of the Director of Accounting Services with a finance company that is a subsidiary of a bank within the meaning of section 2 of the Banking Ordinance (Cap. 155) a sum not less than \$1,500,000 and lodged a receipt issued by the finance company for that amount with the Director of Accounting Services; or (*Amended 27 of 1986 s. 137; 49 of 1995 s. 53*)
- (iii) deposited with the Director of Accounting Services a guarantee, in terms acceptable to the Director of Accounting Services, from a bank within the meaning of section 2 of the Banking Ordinance (Cap. 155); and (*Added 9 of 1993 s. 3. Amended 49 of 1995 s. 53*)
- (f) the company is able to meet its obligations, apart from its liability to its shareholders, without taking into account the sum deposited under paragraph (e). (*Amended L.N. 16 of 1977; 13 of 2013 s. 36*)
- (3) For the purposes of subsection (2)—
- (a) ***finance company*** (財務公司) means a company whose principal business involves the receiving on deposit of money, whether repayable to depositors with or without interest or other consideration, and the lending of that money, or a substantial part of that money, to borrowers on terms that the money is repayable to the company or its nominee with interest or at a premium or with consideration in money or money's worth, but does not

- include a bank within the meaning of section 2 of the Banking Ordinance (Cap. 155); (*Amended 49 of 1995 s. 53*)
- (b) section 15 of the Companies Ordinance (Cap. 622) applies as if a reference in that section to “a body corporate” were read as a reference to a finance company and as if the reference in that section to “another body corporate” or “other body corporate” were read as a reference to a bank within the meaning of section 2 of the Banking Ordinance (Cap. 155). (*Amended 27 of 1986 s. 137; 49 of 1995 s. 53; 28 of 2012 ss. 912 & 920*)
- (4) A trust company registered under this Ordinance before the date of commencement⁺ of the Trustee (Amendment) Ordinance 1975 (23 of 1975) which has not previously complied with the requirements as to eligibility for registration as a trust company as set out in subsection (2) of this section shall, within 9 months after that date, comply with those requirements to the satisfaction of the Registrar of Companies. (*Amended 90 of 1975 s. 2*)
- (4A) Subject to subsection (4B), a trust company registered under this Ordinance, whether before, on or after the date of commencement of the Trustee (Amendment) Ordinance 1993 (9 of 1993), shall after its registration and for so long as it carries on any business or executes any office included in the objects set out in section 81(1) comply with the requirements set out in subsection (2). (*Added 9 of 1993 s. 3*)
- (4B) A trust company registered before the date of commencement of the Trustee (Amendment) Ordinance 1993 (9 of 1993) which at that date does not comply with one or more of the requirements set out in subsection (2) shall, within 9 months after that date, comply with those requirements to the

satisfaction of the Registrar of Companies. (*Added 9 of 1993 s. 3*)

(5) (*Repealed 28 of 2012 ss. 912 & 920*)

(*Replaced 23 of 1975 s. 2. Amended 9 of 1993 s. 3*)

Editorial Note:

+ Commencement date: 1 July 1975.

78. Issue of certificate

- (1) On the receipt of an application under section 77, the Registrar of Companies shall make such inquiry as he deems necessary, and, if satisfied that all the requirements of section 77 have been complied with, shall register the company applying for registration as a trust company in the register prescribed by section 79 and shall issue to it a certificate that the company is registered as a trust company, and thereupon the company shall be invested with all the powers, privileges and immunities and shall be subject to all the liabilities imposed by this Part.
- (2) Notice of the issue of such certificate shall be published by the Registrar of Companies in the Gazette for 4 consecutive weeks next following the issue.
- (3) If the Registrar of Companies is not satisfied that all the requirements of section 77 have been complied with, he shall refuse to register the company as a trust company:

Provided that the company may appeal from such refusal to the Chief Executive in Council, whose decision shall be final.
(*Amended 18 of 1999 s. 3*)

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)

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 L.N. 16 of 1977)

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;
- (h) to acquire and hold immovable property for the actual use and occupation of the company or any of its officers and servants and to erect, construct, enlarge, alter and maintain any buildings necessary or convenient for the said purposes and to sell or otherwise dispose of any such immovable property if not required for the said purposes;

- (i) to hold land which having been mortgaged to the company is acquired by it for the protection of its investments; and from time to time sell, mortgage, lease or otherwise dispose thereof;
- (j) to deposit the moneys of the company not immediately required with any bank or banks at interest until such moneys can be more permanently invested and to invest the moneys of the company in accordance with the provisions of section 91;
- (k) to borrow moneys and secure the repayment thereof with interest in accordance with the provisions of section 93;
- (l) to receive and collect such remuneration for its services as is agreed upon or as fixed or allowed from time to time by law and all usual and customary charges, costs and expenses;
- (m) to support and subscribe to any charitable or public object and any institution, society or club which may be for the benefit of the company or its employees or may be connected with any town or place where the company carries on business; to give pensions, gratuities or charitable aid to any person or persons who may serve or have served the company or to the wives, children or other relatives of such persons; to make payments towards insurance and to form and contribute to provident and benefit funds for the benefit of any persons employed by the company:

Provided that no such subscription, gift, payment or contribution shall be given or made, except out of profits of the company available for distribution as dividend;

- (n) to acquire and undertake the whole or any part of the business of any person or company of a like nature to any business which a trust company is authorized to

- carry on and in consideration for such acquisition to undertake all or any of the liabilities of such person or company and to issue shares to such person or company;
- (o) to do all such other things as are incidental or conducive to the attainment of the beforementioned objects or any of them; (*Amended 13 of 2013 s. 38*)
 - (p) to carry out all or any of the objects aforesaid either within or outside Hong Kong and by or through trustees, agents or otherwise and either alone or in conjunction with others. (*Added 48 of 1968 s. 4. Amended 9 of 1993 s. 7*)
- (2) Nothing in this section shall be construed to authorize any trust company to engage in the business of banking or of insurance or the business of a deposit, provident or benefit society.
- (3) No trust company shall carry on any business or execute any office other than the businesses or offices included in the objects set out in subsection (1).
- (4) For the avoidance of doubt it is hereby declared that nothing in subsection (1) shall be construed so as to restrict, or at any time to have restricted, a trust company to carrying out its objects within Hong Kong only. (*Added 48 of 1968 s. 4. Amended 9 of 1993 s. 7*)

(Amended 24 of 1950 Schedule)

82. Trust company may act as executor

If at any time a trust company shall be appointed executor of the will of any testator, it shall be lawful for the company to apply to the court for probate of the will and if probate be granted, to exercise and discharge all the powers and duties of an executor.

83. Trust company to apply for probate or administration

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- (1) If and whenever any person shall be entitled to apply for probate of the will of any testator without leave being reserved to any other person to apply for probate, it shall be lawful for such person, whether absent from Hong Kong or not, and notwithstanding the provisions of any other enactment, instead of himself applying for such probate, to authorize a trust company to apply to the court for a grant of administration with the will annexed of the estate of such testator, and such grant may be made to the trust company upon its own application, when so authorized, but the provisions of this section shall not apply to any case in which a will provides that a company shall not act as executor or in the trusts thereof. (*Amended 9 of 1993 s. 7*)
 - (2) If and whenever any person shall be entitled to apply for letters of administration with the will of any testator annexed of the estate of such testator, it shall be lawful for such person, whether absent from Hong Kong or not, and notwithstanding the provisions of any other enactment, to authorize a trust company, either alone, or jointly with any other person, to apply to the court for a grant of letters of administration with the will annexed of the estate of such testator, and such grant may be made to the company upon its own application when so authorized, but the provisions of this section shall not apply to a case in which a will provides that a company shall not act as executor, or in the trusts thereof. (*Amended 9 of 1993 s. 7*)
 - (3) It shall be lawful for any person or persons entitled to apply for administration of the estate of any intestate, whether such person or persons be absent from Hong Kong or not, and notwithstanding the provisions of any other enactment, to authorize a trust company to apply to the court for such letters of administration, either alone or jointly with any other person, and administration of the estate of any such intestate may be granted to the company either alone or jointly as

aforesaid, upon its own application, when so authorized.
(Amended 9 of 1993 s. 7)

- (4) For the purposes of any application to the court for letters of administration to the estate of any deceased person, the court shall consider a trust company, when authorized as aforesaid, to be in law entitled, equally with any other person or class of persons to apply for and obtain a grant, but a trust company, being so entitled, shall not on that account alone, be preferred to the widower, widow, or next-of-kin of any intestate.
- (5) No grant of probate or of letters of administration shall be granted to a syndic or nominee on behalf of a trust company.
- (6) Where any person entitled to apply for probate or letters of administration has authorized a trust company to apply for a grant in favour of the company under subsection (1) or (2) and the court has subsequently made such a grant, all property, functions, powers, authorities, discretions and rights vested in or conferred on that person by the will or by law shall, on the making of the grant and without conveyance or assignment or the execution of any other instrument, become vested in and exercisable by the company as fully and effectually as if it had been named as executor under the will.
(Added 23 of 1975 s. 4)

84. Procedure as to petitions, etc.

- (1) In all cases in which a trust company is empowered under this Part to apply for probate or letters of administration, and petition, declaration, account or affidavit or other necessary document may be made or sworn by any officer of the company duly authorized by the company in that behalf.
- (2) Any officer of the company appointed by a trust company for that purpose may, on behalf of the company, sign any petition, account or statement, take any oath, swear any affidavit, make any declaration, verify any act, give personal attendance at

any court or place, and do any act or thing whatsoever, which may require to be signed, taken, sworn, made, verified, given, or done on behalf of the company:

Provided that nothing in this Part contained shall confer upon any person, not otherwise entitled thereto, any right to appear or be heard before or in any court on behalf of the company or to do any act whatsoever on behalf of the company which could otherwise be lawfully done only by a barrister or by a solicitor.

85. Appointment of a company to be a trustee

In all cases in which the court or any person or persons has or have power to appoint a trustee, whether as an original or new or additional trustee, to perform any legal trust or duty a trust company may be appointed in the same manner as if the company were a private individual:

Provided that—

- (a) no trust company shall be appointed in any case in which the instrument creating the trust, or the power authorizing the appointment, forbids the appointment of a company;
- (b) nothing in this section shall be deemed to derogate from the provisions of sections 38 and 40. (*Added 24 of 1950 Schedule*)

86. Joint tenancy

A trust company, acting in a fiduciary capacity, shall be capable of acquiring and holding any property in joint tenancy in the same manner as if it were a private individual.

87. Trust company may act as agent

It shall be lawful for a trust company to act under any deed or

instrument by which the company is appointed agent or attorney for any person, and all the powers conferred upon the company by any such deed or instrument may be exercised by such officer of the company as the company may appoint for that purpose:

Provided that nothing in this section shall be deemed to authorize any person to confer upon a trust company any power which may not lawfully be delegated by him.

88. Security not required

- (1) Notwithstanding the provisions of any other enactment, no trust company to which a grant of letters of administration has been made shall be required to furnish security for the due administration of the estate.
- (2) Notwithstanding the provisions of any other enactment, no trust company appointed by the court to perform the duties of receiver, guardian, committee or any other office or trust shall be required to furnish security for the due performance of such duties.

89. Trust funds to be kept separate

All moneys, property and securities received or held by any trust company in a fiduciary capacity shall always be kept distinct from those of the company and in separate accounts, and so marked in the books of the company for each particular trust as always to be distinguished from any other in the registers and other books of account to be kept by the company, so that at no time shall trust moneys form part of or be mixed with the general assets of the company; and all investments made by the company as trustee shall be so designated that the trusts to which such investments belong can be readily identified at any time.

90. Investment of trust funds

- (1) A trust company may invest trust moneys in its hands in or

upon any securities in which private trustees may by law invest trust moneys and may from time to time vary any such investment for others of the same nature:

Provided that the company shall not in any case invest the moneys of any trust in or upon securities prohibited by the instrument creating the trust, and whenever any special directions are given in any order, judgment, decree or will or in any other instrument creating the trust, as to the particular class or kind of securities or property in or upon which any investment shall be made, the company shall follow such directions. The company may also, in its discretion, retain and continue any investment and securities coming into its possession in any fiduciary capacity.

- (2) No trust company shall directly or indirectly invest any trust moneys otherwise than in accordance with the provisions of subsection (1).

91. Investment of trust company's own funds

- (1) A trust company may invest moneys forming part of its own capital or reserve or accumulated profits—
 - (a) in or upon any securities in or upon which private trustees may by law invest trust moneys; and
 - (b) in or upon such other securities as the Financial Secretary may from time to time approve. (*Amended 9 of 1993 s. 4*)
- (2) A trust company may acquire and hold immovable property for the actual use and occupation of itself or of any of its officers or servants and may sell and dispose of the same.
- (3) A trust company may, for the protection of its investments, acquire land which has been mortgaged to it, but shall sell any land so acquired within 3 years after the acquisition

thereof, unless such time is extended by the Financial Secretary. (*Amended 9 of 1993 s. 4*)

- (4) No trust company shall directly or indirectly invest any of its moneys otherwise than in accordance with subsections (1), (2) and (3):

Provided that nothing in this section shall be deemed to prevent the acceptance by a trust company of any securities whatsoever to secure the payment of a debt previously contracted in good faith; but any security so acquired by the company which it would otherwise be prohibited from taking or holding shall, within 2 years from the time of its acquisition, or within such further time as may be allowed by the Registrar of Companies, be sold or disposed of.

92. Loans to trust company officers, etc. prohibited

No loan shall be made by any trust company to any director or other officer or servant thereof or to any company or firm in the management of which any such director or other officer or servant is actively engaged. If any loan is made in contravention of this section, all directors and officers of the company who made the loan or assented thereto shall be jointly and severally liable to the company for the amount thereof with interest.

93. Borrowing

- (1) For the purpose of attaining the objects of the company as set out in section 81 (or such of them as the company may have adopted), and for no other purpose, a trust company may from time to time borrow money provided that the aggregate of the sums of money borrowed shall at no time exceed the amount of the company's capital for the time being paid up.
- (2) Moneys borrowed by a trust company shall not be secured, by debenture or otherwise, on its capital or general undertaking, but may be secured on any of the company's property

(not being property held by it on any trust), other than the securities deposited by it with the Director of Accounting Services under the provisions of this Part. (*Amended 9 of 1950 Schedule; L.N. 16 of 1977*)

94. (*Repealed 84 of 1970 s. 2*)

95. Investigation by inspector

- (1) The Financial Secretary may at any time appoint an inspector to investigate the affairs and management of any trust company if it appears to the Financial Secretary that there are circumstances suggesting—
- (a) that the trust company has committed a breach of trust;
 - (b) that the business of the trust company has been or is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose;
 - (c) that persons concerned with its formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members;
 - (d) that its members have not been given all the information with respect to its affairs that they might reasonably expect;
 - (e) that it is insolvent; or
 - (f) that it has failed to comply with any of the requirements of this Part. (*Replaced 9 of 1993 s. 5*)
- (1A) The Financial Secretary may give directions as to the manner in which and the extent to which an investigation under subsection (1) shall be conducted. (*Added 9 of 1993 s. 5*)

- (2) It shall be the duty of all officers and servants of the company to produce for examination by the inspector all books, accounts, vouchers and other documents in their custody or control in relation to matters under investigation, and to answer truly all inquiries addressed to them by the inspector respecting any matter affecting the affairs of the company.
- (3) The inspector shall make a report of his investigation to the Financial Secretary.
- (4) All expenses of and incidental to any such investigation shall be paid by the company, if the Financial Secretary so directs.

(Amended 9 of 1993 s. 5)

96. Special provision as to winding up a trust company

- (1) The court may order the winding up of a trust company in accordance with the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), and the provisions of that Ordinance shall apply accordingly subject however to the modification that the company may also be ordered to be wound up on application made by the Secretary for Justice if— *(Amended L.N. 362 of 1997; 28 of 2012 ss. 912 & 920)*
 - (a) the company has made default in complying with a requirement of this Part and such default has continued for a period of 2 months after notice of default has been served upon the company; or
 - (b) from the consideration of the report of an inspector appointed under section 95 it appears that the company has committed a breach of trust.
- (2) Upon the winding up of a trust company every person who has been a director of the company at any time within the period of 2 years immediately preceding the commencement of the winding up shall be liable for the balance unpaid on

every share which he may have transferred during such 2 years.

97. Personal liability of officers of a trust company

Where a trust company holds the office of executor, administrator or trustee, every person employed by the company to discharge any of the duties of such office shall, in respect of the duties entrusted to him, be personally responsible to the court and be subject to the process of the court, as though he had been personally appointed to such office.

98. Offences

- (1) Any director, officer or servant of a trust company who wilfully and with intent to defraud neglects to make any entry in the books of the company which it is his duty to make shall be guilty of an offence triable upon indictment.
- (2) Any director, officer or servant of a trust company, who wilfully and with intent to defraud makes or abets the making of any false entry in the books of the company, or subscribes or exhibits any false document with intent to deceive any person appointed under this Part to investigate the affairs and management of the company shall be guilty of an offence triable upon indictment.
- (3) Any director, officer or servant of a trust company who refuses to produce for examination to any person appointed under this Part to investigate the affairs and management of the company all books and documents relevant to such investigation which are in his custody or control shall be guilty of an offence triable upon indictment.
- (4) A trust company which contravenes section 77(4), (4A) or (4B), 81(3), 91(4), 92 or 93 commits an offence and is liable on conviction to a fine at level 4 and if the offence is continued after conviction the trust company commits a

further offence and is liable on conviction to a fine of \$1,000 for every day or part of a day on which the offence is so continued. *(Added 9 of 1993 s. 6)*

(Amended 23 of 1975 s. 5; 50 of 1991 s. 4; E.R. 2 of 2014)

99. Not to be guardian or committee

No trust company shall be appointed to be guardian of the person of an infant or committee of the person of a lunatic.

100. Restriction on holding shares in a trust company

- (1) No member of a trust company shall at any time hold shares in the capital of the company to an amount exceeding one-fifth of the issued capital of the company for the time being.
- (2) Subsection (1) does not apply to a trust company that is the subsidiary of a bank within the meaning of section 2 of the Banking Ordinance (Cap. 155). *(Added 23 of 1975 s. 6. Amended 49 of 1995 s. 53)*
- (3) For the purposes of subsection (2) of this section, section 15 of the Companies Ordinance (Cap. 622) applies as if a reference in that section to “a body corporate” were read as a reference to a trust company and as if the reference in that section to “another body corporate” or “other body corporate” were read as a reference to a bank within the meaning of section 2 of the Banking Ordinance (Cap. 155). *(Added 23 of 1975 s. 6. Amended 49 of 1995 s. 53; 28 of 2012 ss. 912 & 920)*

(Amended 27 of 1986 s. 149)

101. Voluntary winding-up or disposal may be restrained

So long as any estate in respect of which a trust company is trustee shall remain in whole or in part unadministered, it shall not be lawful to proceed to wind up the company voluntarily, unless with

the sanction of the court, and it shall be lawful for any person interested in such estate, or who may have any claim in respect thereof, to apply to the court in a summary way by motion to restrain any director or any shareholder from disposing of any shares which such director or shareholder may hold in the company or to restrain the winding up voluntarily of the company; and the court shall have power to make such order as it deems just.

102. Liability and powers of trust company

Subject to the provisions of this Part, the liability of every trust company to the person or persons interested in any estate held by the company as executor, administrator, trustee, receiver, liquidator, assignee, guardian or committee or in any other official or business capacity shall be the same as if the estate had been held by a private person in the like capacity; and the powers of the company shall be the same as those of a private person in the like capacity.

103. Registration of a trust company as shareholder, etc. not notice of trust

Neither the application by a trust company for registration as a member or shareholder in the books of any company or corporation nor the entry of the name of a trust company in the books of any company or corporation shall constitute notice of trust, and no company or corporation shall be entitled to object to enter the name of a trust company on its books by reason only that the company may be or is a trustee, and, in dealings with property, the fact that the person or one of the persons dealt with is a trust company shall not of itself constitute notice of a trust.

104. Unclaimed money to be paid into court

All money and securities which shall remain in the hands of a trust company, as trustee, unclaimed by the person entitled to the same for a period of 6 years after the time when the same shall have

become payable to such person (except where payment has been restrained by order of a court of competent jurisdiction), together with such interest, if any, as shall have been received by the company in respect thereof, less any commission or other charges properly chargeable by the company, shall be paid by the company into court under and in accordance with section 62:

Provided that it shall not be necessary for the company to comply with the provisions of this section more often than once in any year nor shall it be necessary for the company to obtain the concurrence or consent of any person to such payment into court.

105. Fees payable by trust companies

- (1) There shall be paid by every trust company to the Registrar of Companies, in respect of the matters mentioned in Schedule 1, the several fees specified therein. *(Amended 48 of 1968 s. 5)*
- (2) All such fees shall be paid by the Registrar of Companies into the Treasury.
- (3) It shall be lawful for the Chief Executive from time to time, by notification in the Gazette, to add to or alter Schedule 1. *(Amended 48 of 1968 s. 5; 72 of 1973 s. 2; 18 of 1999 s. 3)*

(Amended E.R. 2 of 2014)

106. Registration of certain banking corporations as trust companies

- (1) Notwithstanding the foregoing, any company lawfully carrying on banking business in Hong Kong and having a capital (in stock or shares) for the time being issued of not less than \$4,000,000 (of which not less than \$1,600,000 shall have been paid up in cash) may with the consent of the Chief Executive be registered as a trust company:

Provided that the Chief Executive shall not give such consent unless he is satisfied that the extent and nature of the

company's business in Hong Kong is sufficient to justify such special registration. *(Amended 9 of 1993 s. 7)*

- (2) Consent of the Chief Executive under subsection (1) shall be notified to the Registrar of Companies who shall register the company in the register prescribed by section 79, issue to it a certificate that the company is registered as a trust company, and publish notice thereof in the Gazette for 4 consecutive weeks next following such issue.
- (3) The provisions of sections 77, 78, 80, 81, 91, 92, 93, 96 and 100 shall not apply to such company or to such registration, but subject to such exceptions and to the provisions of the succeeding section the said company shall be invested with all the powers, privileges and immunities and shall be subject to all the liabilities imposed by this Part.

(Replaced 24 of 1950 Schedule. Amended 72 of 1973 s. 2; 18 of 1999 s. 3)

107. Limitation of powers of inspectors under section 95

The powers of investigation conferred upon inspectors under section 95 shall in the case of a corporation registered as a trust company under section 106 be limited to the trust business of the corporation.

(Added 17 of 1939 s. 2)

108. Striking off trust company registered under section 106

On application made by the Secretary of Justice the court may order that any corporation registered under the provisions of section 106 as a trust company shall be struck off the register of trust companies if it ceases to be qualified for registration under that section or if from the consideration of the report of an inspector appointed under section 95 it appears that the corporation has committed a breach of trust, and the court may appoint a

Trustee Ordinance

Part 8

8-46

Section 108

Cap. 29

new trustee, or new trustees, for any trust property held by the corporation.

(Added 17 of 1939 s. 2. Amended L.N. 362 of 1997)

Part 9

General Provisions

109. Indemnity

This Ordinance, and every order purporting to be made under this Ordinance, shall be a complete indemnity to any bank and to all persons for any acts done pursuant thereto, and it shall not be necessary for any bank or person to inquire concerning the propriety of the order, or whether the court by which the order was made had jurisdiction to make it.

[cf. 1925 c. 19 s. 66 U.K.]

110. Transitional and savings for the purpose of 2013 amending Ordinance

The transitional and saving provisions as set out in Schedule 4 have effect.

(Added 13 of 2013 s. 39. Amended E.R. 2 of 2014)

Schedule 1

[s. 105]

Fees to be paid by Trust Companies to the Registrar of Companies

- | | |
|---|----------|
| 1. On application for registration under section 77..... | \$11,250 |
| 2. For certification of registration under section 78 (<i>Replaced L.N. 14 of 1996</i>) | \$840 |

(Amended 48 of 1968 s. 6; L.N. 195 of 1970; 27 of 1985 s. 3; L.N. 92 of 1991; L.N. 416 of 1994; L.N. 14 of 1996)

Schedule 2

[s. 4 & Sch. 3]

(Amended 13 of 2013 s. 40; E.R. 2 of 2014)

Authorized Investments

1. Subject to paragraph 7A, any shares or debentures which are issued or allotted by a company and which satisfy the following conditions at the date the investment is made— *(Amended 13 of 2013 s. 40)*
 - (a) in the case of shares—
 - (i) the shares are listed on a recognized stock market or specified stock exchange as these terms are defined in section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571); *(Replaced 5 of 2002 s. 407)*
 - (ii) the market capitalization of the company issuing the shares is not less than \$5 billion (\$5,000,000,000) or its equivalent in foreign currency; and *(Amended 13 of 2013 s. 40)*
 - (iii) the company has paid, in any 3 years out of the 5 years immediately preceding the calendar year in which the investment is made, a dividend, either wholly in cash or in kind or partly in cash and partly in kind on all the shares issued by the company, excluding any shares issued after the dividend was declared and any shares which by their terms of issue did not rank for the dividend in that year; *(Amended 13 of 2013 s. 40)*
 - (b) in the case of debentures, the security meets the credit rating as specified in the Table.

For the purposes of subparagraph (a)(iii) a company formed—

- (i) to take over the business of another company or other companies; or
- (ii) to acquire the securities of, or control of, another company or other companies,

or for either of those purposes and for other purposes shall be deemed to have paid a dividend as mentioned in that subparagraph in any year in which such a dividend has been paid by the other company or all the other companies, as the case may be.

2. Subject to paragraph 7A, any debt security which is issued by, or the payment of principal and interest on which is guaranteed by— (*Amended 13 of 2013 s. 40*)
 - (a) in Hong Kong, the Government of Hong Kong, the Exchange Fund established by the Exchange Fund Ordinance (Cap. 66) or a company 100% of the shares in which are owned beneficially by the Government of Hong Kong; or
 - (b) outside Hong Kong, the government, the central bank or an equivalent agency of a country which qualifies for the credit rating specified in the Table; or
 - (c) any multilateral agency specified in Part 4 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571) which qualifies for the credit rating specified in the Table. (*Amended 5 of 2002 s. 407*)

3. Any unit trust or mutual fund authorized as a collective investment scheme under section 104 of the Securities and Futures Ordinance

Trustee Ordinance

Schedule 2

S2-6

Section 4

Cap. 29

(Cap. 571). (*Replaced 5 of 2002 s. 407*)

4. Subject to paragraph 7A, any deposit (as defined in section 2 of the Banking Ordinance (Cap. 155)) with an authorized institution. (*Amended 13 of 2013 s. 40*)

5. Subject to paragraph 7A, certificates of deposit, bills of exchange, promissory notes or short-term (i.e. less than 1 year) debt securities issued or guaranteed by an authorized institution or by an exempted body. (*Amended 13 of 2013 s. 40*)

6. Subject to paragraph 7A, first legal mortgages of any property, including an undivided share in property, which is situated in Hong Kong and held under a Government lease of which the unexpired term at the time of investment is not less than 50 years, excluding any term for which the lease can be renewed. (*Amended 29 of 1998 s. 105;13 of 2013 s. 40*)

7. Subject to paragraph 7A, any derivatives which are traded on a recognized stock market, specified stock exchange, recognized futures market or specified futures exchange as these terms are defined in section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571); except that an investment under this paragraph— (*Amended 13 of 2013 s. 40*)

-
- (a) shall be made for hedging purposes only, that is to say, the derivatives acquired shall be of a type and specification suitable for reducing the impact on the trust fund of a diminution in the value of specific assets already held by the trust fund or which are to be acquired at the same time as the derivatives; and
- (b) shall not be made except in accordance with the written advice of a corporation licensed to carry on, or an authorized financial institution registered for carrying on, a business in advising on securities, advising on futures contracts, advising on corporate finance or asset management under Part V of the Securities and Futures Ordinance (Cap. 571) expressly obtained as to—
- (i) the nature and extent of the risk of diminution in the value of the assets in question, the type and specification of the derivatives suitable to reduce the impact of such diminution in value, and generally the strategy to be adopted in acquiring, holding and disposing of the derivatives;
 - (ii) the potential loss that could result from acquiring and holding the derivatives and the risk of such occurring; and
 - (iii) the nature and extent of the various risks of diminution in the value of the trust fund and the suitability of using derivatives to protect against those risks.

(Amended 5 of 2002 s. 407)

- 7A. Paragraphs 1, 2, 4, 5, 6 and 7 do not include any structured product as defined by section 1A of Part 1 of Schedule 1 to the Securities

and Futures Ordinance (Cap. 571). (*Added 13 of 2013 s. 40*)

8. In this Schedule—

authorized institution (認可機構) has the meaning assigned to it in section 2 of the Banking Ordinance (Cap. 155);

bill of exchange (匯票) and **promissory note** (承付票) have the same meanings as in the Bills of Exchange Ordinance (Cap. 19);

certificate of deposit (存款證) means a document relating to money, in any currency, which has been deposited with the issuer or some other person, being a document—

- (a) which recognizes an obligation to pay a stated amount to bearer or to order, with or without interest; and
- (b) by the delivery of which, with or without endorsement, the right to receive that stated amount, with or without interest, is transferable;

company (公司) means a body corporate—

- (a) incorporated under the Companies Ordinance (Cap. 622); (*Amended 28 of 2012 ss. 912 & 920*)
- (ab) incorporated under a former Companies Ordinance as defined by section 2(1) of the Companies Ordinance (Cap. 622); (*Added 28 of 2012 ss. 912 & 920*)
- (b) incorporated under any other enactment; or
- (c) incorporated or established outside Hong Kong;

debentures (債權證) includes debenture stock, bonds and any other securities of a company whether or not constituting a charge on the assets of the company;

debt security (債務證券) means—

- (a) debenture or loan stock;

Trustee Ordinance

Schedule 2

S2-12

Section 8

Cap. 29

- (b) debentures, bonds, notes and other securities or instruments acknowledging, evidencing or creating indebtedness, whether secured or unsecured;
- (c) options, warrants or similar rights to subscribe to or purchase any of the foregoing; and
- (d) convertible loan stock;

derivative (衍生工具) means any right in or to a financial contract or financial instrument the value of which is determined by reference to the value of or any fluctuation in the value of a share, index, rate of exchange or rate of interest either individually or in the aggregate;

exempted body (豁免團體) means a body specified in Part 3 of Schedule 4 to the Securities and Futures Ordinance (Cap. 571) but does not include a body referred to in item 11 of that Part; (*Replaced 5 of 2002 s. 407*)

shares (股份) means shares in the capital of a company and includes the stock or any part of the stock of a company;

(*Amended 5 of 2002 s. 407*)

Table

Credit Ratings

- (a) For long-term debt (one year or over)—

Given by

Moody's Investors Service Inc.

A3

Standard & Poor's Corporation

A-

Trustee Ordinance

Schedule 2

S2-14

Cap. 29

or an equivalent rating given by any recognized credit rating agency approved by the Secretary for Financial Services and the Treasury.
(Amended L.N. 106 of 2002)

(b) For short-term debt (less than one year)—

Given by

Moody's Investors Service Inc.

Prime-1

Standard & Poor's Corporation

A-1

or an equivalent rating given by any recognized credit rating agency approved by the Secretary for Financial Services and the Treasury.
(Amended L.N. 106 of 2002)

(Schedule 2 replaced L.N. 177 of 1995)

Schedule 3

[ss. 2, 3A & 41O]

Application of Statutory Duty of Care

Division 1—Investment

1. The statutory duty of care applies to a trustee when—
 - (a) exercising the power of investment under section 4(1) or any other power of investment, however conferred;
 - (b) exercising the power under section 5, 11(1), (2), (3), (4) or (5), 12 or 41I; or
 - (c) continuing to hold an investment that has ceased to be an investment authorized by the instrument creating the trust or the general law as mentioned in section 7.

2. For the purpose of section 1(a) of this Schedule, when investing any trust funds in any investment specified in Schedule 2, the trustee must discharge the statutory duty of care in addition to complying with that Schedule.

(Amended E.R. 2 of 2014)

Division 2—Agents, Nominees and Custodians

3. The statutory duty of care applies to a trustee when—

- (a) entering into arrangements under which a person is authorized, under section 41B or any other power (however conferred), to exercise functions as an agent;
 - (b) entering into arrangements under which a person is appointed, under section 41G or any other power (however conferred), to act as a nominee;
 - (c) entering into arrangements under which a person is appointed, under section 41H or any other power (however conferred), to act as a custodian; or
 - (d) carrying out a trustee's duty under section 41M (review of agents) or 41N (review of nominees and custodians).
4. For the purpose of section 3 of this Schedule, entering into arrangements under which a person is authorized to exercise functions as an agent or is appointed to act as a nominee or custodian includes—
- (a) selecting the person who is to act;
 - (b) determining the terms on which the person is to act; and
 - (c) if the person is being authorized to exercise asset management functions, the preparation of a policy statement under section 41F.

Division 3—Power to Do Other Things

5. The statutory duty of care applies to a trustee when—
- (a) exercising powers relating to trust properties conferred by section 16; or
 - (b) exercising any corresponding power, however conferred.

Division 4—Insurance

6. The statutory duty of care applies to a trustee when—
- (a) exercising the power under section 21 to insure property;
or
 - (b) exercising any corresponding power, however conferred.

Division 5—Reversionary Interests, Valuations and Audit

7. The statutory duty of care applies to a trustee when—
- (a) exercising the power under section 24(1) or (3); or
 - (b) exercising any corresponding power, however conferred.
- (Schedule 3 added 13 of 2013 s. 41)*
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Schedule 4

[s. 110]

Transitional and Saving Provisions

1. Savings for repeal of section 8 (investment in bearer securities)

If, immediately before the commencement date[#] of section 8 of the 2013 amending Ordinance, a banker or banking company holds any securities payable to bearer deposited with it under the repealed section 8, then on and after that date, the banker or banking company is to be treated as having been appointed as a custodian of the securities under section 41I.

2. Savings for repeal of section 23 (deposit of documents for safe custody)

If, immediately before the commencement date[#] of section 16 of the 2013 amending Ordinance, a banker, banking company or any other company holds any documents deposited with it under the repealed section 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 section 41H.

3. Savings for repeal of section 25 (power to employ agents)

- (1) Subsection (2) applies if, before the commencement date[#] of section 18 of the 2013 amending Ordinance, a person has been employed or appointed to act as an agent under the repealed section 25(1) or (3).
- (2) For any period for which the employment or appointment has left to run on or after the commencement date[#], the person is to be treated as having been authorized to exercise functions as an agent under section 41B (and, if appropriate, as also

having been appointed under section 41G or 41H to act as a nominee or custodian).

- (3) Subsection (4) applies if, before the commencement date[#] of section 18 of the 2013 amending Ordinance, a person has been appointed to act as an agent or attorney under the repealed section 25(2) (power to employ agents or attorney in respect of property outside Hong Kong).
- (4) For any period for which the appointment has left to run on or after the commencement date[#], the person is to be treated as having been authorized to exercise functions as an agent under section 41B (and, if appropriate, as also having been appointed under section 41G or 41H to act as a nominee or custodian).

4. Transitional and savings provisions concerning Part 2 of 2013 amending Ordinance

Without affecting section 3 of this Ordinance, Part 2 of the 2013 amending Ordinance does not affect the legality and validity of anything done or omission made before the commencement date[#] of that Part, except as otherwise expressly provided in the 2013 amending Ordinance.

(Schedule 4 added 13 of 2013 s. 41)

Editorial Note:

[#] Commencement date: 1 December 2013.