

**[22.06] Definitions**

For 'mortgagee', 'property' and 'trust' and 'trustee', see s 2.

**23. Deposit of documents for safe custody**

Trustees may deposit any documents held by them relating to the trust, or to the trust property, with any banker or banking company or any other company whose business includes the undertaking of the safe custody of documents, and any sum payable in respect of such deposit shall be paid out of the income of the trust property.

[cf 1925 c 19 s 21 U.K.]

**[23.01] England**

The wording of this section is the same as that of the Trustee Act 1925 s 21.

**[23.02] Trustees may deposit**

Unless the deeds are deposited at a bank, trustees for sale may entrust the custody to one of their number; see *Cottam v Eastern Counties Rail Co* (1860) 1 John & H 243, 30 LJ Ch 217. Thus, where a trustee sold securities, forging the co-trustee's signature to the transfers, the co-trustee was not negligent in having allowed him possession of the certificates, nor, following *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650, [1952] 2 TLR 568, in failing to act as a watchdog by watching the bank pass book (though not following that case in so far as it precluded one joint account holder from succeeding upon the other's wrongdoing); see *Welch v Bank of England (Francis and Praed, third parties)* [1955] Ch 508, [1955] 1 All ER 811. In the absence of special circumstances, a trustee is not entitled to have title-deeds and non-negotiable securities removed from the custody of a co-trustee and placed at a bank, in a box accessible only to the trustees jointly; see *Re Sisson's Settlement, Jones v Trappes* [1903] 1 Ch 262, 72 LJ Ch 212.

Whilst a suit is pending, the court may direct trust deeds to be held where it is most convenient see *Stanford v Roberts* (1871) 6 Ch App 307, 19 WR 552. During the development of a building estate when deeds are often required for reference, they may be left with the solicitors to the trust, see *Field v Field* [1894] 1 Ch 425, 63 LJ Ch 233.

**[23.03] Documents**

'Document' means any publications and any matter written, expressed or described upon any substance by means of letters, characters, figures or marks, or by more than one of these means: s 3 of the Interpretation and General Clauses Ordinance (Cap 1). A letter may come within this description; see *Carlisle v East Ham Corp and Edwards* [1948] 2 KB 380, [1948] 2 All ER 550, and *Lewisham Borough Council v Roberts* [1949] 2 KB 608, [1949] 1 All ER 815. So may a tape recording of a conversation (*Grant v Southwestern and County Properties Ltd* [1975] Ch 185, [1974] 2 All ER

465, [1974] 3 WLR 221), and a cinematograph film (*Senior v Holdsworth, ex p Independent Television News Ltd* [1976] QB 23, [1975] 2 All ER 1009, [1975] 2 WLR 987 (CA)).

'There is a document wherever there is writing or printing capable of being read, no matter what the material may be upon which it is impressed or inscribed': *R v Daye* (1908) as reported in 77 LJKB 659 at 661, per Darling J; but see *Smith v Harris* (1883) 48 LT 869 at 870 (cask with brand name on it not a document). There is ground for saying that the term 'document' includes the repository of evidence or information preserved in some permanent or semi-permanent form or character such as tape recordings (see *R v Masquid Ali* [1966] 1 QB 688, [1965] 2 All ER 464, CCA; *Grant v Southwestern and County Properties Ltd* [1975] Ch 185, [1974] 2 All ER 465, [1974] 3 WLR 221), plans (see *Hayes v Brown* [1920] 1 KB 250 at 252DC), and films and film negatives (see *Senior v Holdsworth, ex p Independent Television News Ltd* [1976] QB 23, [1975] 2 All ER 1009, [1975] 2 WLR 987 (CA)).

**[23.04] Application**

The power conferred by this section applies to trusts created either before or after the commencement of this Ordinance, and is in addition to powers conferred by any trust instrument, but subject to any contrary intention expressed in that instrument; see s 3(1), (2) above.

**[23.05] Deposit of bearer securities**

Securities to bearer retained or taken as an investment by a trustee (not being a trust corporation) are, unless sold, to be deposited by him for safe custody and collection of income with a banker or banking company; see s 8(1) above.

**[23.06] Deposit of trust money**

Trust money may be paid into a bank to a deposit or other account pending investment under s 12 above.

**[23.07] Right to production**

*Prima facie*, and in the absence of any special circumstances, a *cestui que* trust, even though interested only in the proceeds of sale, is entitled to the production and inspection of all title deeds and other documents relating to the trust estate which are in the possession of the trustees; see *Re Cowin, Cowin v Gravett* (1886) 33 Ch D 179, 56 LJ Ch 78.

**[23.08] Definitions**

For 'trust' and 'trustees', see s 2.

**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 so done by them in good faith.

- (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 aforesaid 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:

Provided that nothing in this subsection shall 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 the same falling into possession.

- (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 so made in good faith shall be binding upon all persons interested under the trust.

- (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 him as he may require; and the costs of such examination or audit, including the fee of the auditor, shall be paid out of the capital or income of the trust property, or partly in one way and partly in the other as the trustees, in their absolute discretion, think fit, but, in default of any direction by the trustees to the contrary in any special case, costs attributable to capital shall be borne by capital and those attributable to income by income.

[cf 1925 c 19 s 22 U.K.]

#### [24.01] England

The wording of this section is the same as that of the Trustee Act 1925 s 22, except s 22(2)(a) applies also to omission 'to place any distinguishing notice'.

#### [24.02] Release

Where funds are transferred from the trustees of an old settlement to the trustees of a new or derivative settlement, a release is usually asked for and the request is generally complied with, but probably it could not be enforced; see *Re Cater's Trusts (No 2)* (1858) 25 Beav 366, 53 ER 676. Cf *King v Mullins* (1852) 1 Drew 308, 20 LTOS 19.

#### [24.03] In good faith

'Good faith' involves the exercise of active discretion on the part of the trustee and any loss arising from his supineness or carelessness will not be within the scope of this section; cf *Re Greenwood, Greenwood v Firth* (1911) 105 LT 509.

#### [24.04] Writing

See the note to s 15 above.

#### [24.05] Obligation to get in and obtain payment or transfer

On the trust property falling into possession, it is the duty of trustees to press for payment, and, if it is not made within a reasonable time, to enforce payment by legal proceedings; the only excuse for not taking action is a well-founded belief that such action would be fruitless, the burden of proving

the grounds of such belief being on the trustees: see *Re Broaden, Billing v Broaden* (1888) 38 Ch D 546, [1886-1890] All ER Rep 927.

#### [24.06] By duly qualified agents

For the general power of trustees to employ agents in the administration of the trust, see s 25 below.

#### [24.07] Applications

The power conferred by this section applies to trusts created either before or after the commencement of this Ordinance, and is in addition to any powers conferred by any trust instrument, but subject to any contrary intention expressed therein; see ss 3(1), (2) above.

#### [24.08] Doing other acts

Trustees have wide powers of doing other acts under s 16 above, and of entering into, giving or executing agreements, instruments of composition or arrangement or releases for those purposes.

#### [24.09] Powers of the court

The court has wide powers under s 56 below of authorising dealings with trust property where no other power to effect a particular transaction exists and the court considers it expedient that the transaction should be carried out.

Under s 60 below the court has power to relieve trustees, who have acted honestly and reasonably and ought fairly to be excused, from personal liability for any breach of trust.

#### [24.10] Audited accounts

A statement of accounts of the trust funds administered by the Secretary for Home Affairs Incorporation, or the Director of Social Welfare Incorporation, or the Permanent Secretary for Education and Manpower Incorporation, which has been audited by an independent accountant under subsection (4) of this section need not be submitted to the Director of Audit; see the Secretary for Home Affairs Incorporation Ordinance (Cap 1044) s 10(4), the Director of Social Welfare Incorporation Ordinance (Cap 1096) s 8(4), or the Permanent Secretary for Education and Manpower Incorporation Ordinance (Cap 1098) s 8(4) respectively.

#### [24.11] Definitions

For 'authorised investments', 'possessions', 'property', 'securities', 'trusts' and 'trustees', see s 2.

### 25. Power to employ agents

- (1) Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's

or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.

- (2) Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting insurances of, or managing or cultivating, or otherwise administering any property, movable or immovable, subject to the trust or forming part of the testator's or intestate's estate, in any place outside Hong Kong, or executing or exercising any discretion or trust or power vested in them in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions as they may think fit, including a power to appoint substitutes, and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby.

(Amended 9 of 1993 s 7)

- (3) Without prejudice to such general power of appointing agents as aforesaid-
- (a) a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed having in the body thereof or endorsed thereon a receipt for such money or valuable consideration or property, the deed being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration;
- (b) a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the production of any such deed by the solicitor shall have the same statutory validity and effect as if the person appointing the solicitor had not been a trustee;
- (c) a trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the banker or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee, and a trustee shall

**[55.04] Directly or indirectly**

The former is obvious; the latter no doubt would include sales to spouses or close relatives or to companies controlled by the personal representative or possibly a company in which he has an interest. It can be noticed that the rule as expressed in the section does not require proof of any bad faith or collusion or undervalue, but is expressed in absolute terms.

**[55.05] Voidable**

See [54.13] above.

**[55.06] Any other person interested in the property**

See [54.14] above.

**[55.07] Definitions**

For 'personal representative' and 'property', see s 2 above.

**56. Duty of personal representative as to inventory**

The personal representative of a deceased person shall, when lawfully required so to do, exhibit, by affidavit filed in the court, a true and perfect inventory and account of the movable and immovable property of the deceased, and the court shall have power as heretofore to require personal representatives to bring in inventories.

[cf 1925 c 23 s 25 U.K.]

**[56.01] England**

Paragraph (b) of s 25 of the Administration of Estates Act 1925 has some correspondence.

**[56.02] General Note**

Personal representatives should prepare and continually update an inventory (a detailed list of goods) or inventories of the assets of the estate for the purposes of the administration. The personal representatives have a duty to ascertain, collect and safeguard the assets of the estate immediately on appointment and each asset should be valued with the assistance of experts if necessary. Such an inventory will be required for the purposes of preparing the new Affidavit/Affirmation and attached Schedule of the Assets and Liabilities of the deceased; see section 24A above. This section provides for the formal filing of such an inventory, in court if so required. Although not expressly so limited, this will usually only be required where there is contentious proceedings concerning the estate, possibly alleging a *devastavit* by the personal representative; as to which see Parry and Clark, *The Law of Succession* (12th Ed) Chapter 25.

**[56.03] Commencement**

As to meaning, see [1.03] above.

**[56.04] When lawfully required to do so**

This phrase is not really necessary as the court has inherent jurisdiction over the administration of estates by personal representatives and can always require the personal representative to account to it.

**[56.05] Exhibit by affidavit filed in the court**

This emphasizes the formal nature of such a proceeding.

**[56.06] A true and perfect inventory and account**

This should comprehensively list the assets in the estate with valuations and contain full details of those assets which have been disposed of by sale, assent or appropriation, or which are subject to mortgage or charge. Once personal representatives have ascertained the net residuary estate, ie have paid all expenses, duty, tax, debts and liabilities properly payable and have paid or transferred all the specific and general legacies under the will if any, then they will draw up the residuary accounts, showing exactly how much and what property is available for distribution to the residuary beneficiaries. The section empowers the court to demand such an account and also no doubt intermediate accounts showing the progress of the administration to date; see *Re Estate of Lee Da Kor* [2010] 1 HKLRD 413, under Order 85 Rule 2(3) of the Rules of the High Court. The equivalent English provision (s 25(b) of the Administration of Estates Act 1925) refers to 'a full inventory of the estate and when so required render an account of the administration of the estate'.

**[56.07] Movable and immovable property**

This will comprehend all the assets of the estate; see the commentary in [12.07] and [54.05] above. It can be noted that there is no reference to the location of the property and so the generality of the phrase will include property wherever situated.

**[56.08] Heretofore ... to bring in inventories**

It is not clear what this adds to the previous part of the section and the word 'heretofore' is archaic.

**[56.09] Definitions**

For 'court', 'personal representative' and 'property', see s 2 above. For 'immovable property' and 'movable property', see the Interpretation and General Clauses Ordinance (Cap 1) s 3.

**57. Protection of persons acting on probate or administration**

(1) Every person making or permitting to be made any payment or disposition in good faith under a representation shall be

indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the representation.

[cf 1925 c 23 s 27(1) U.K.]

- (2) Where a representation is revoked, all payments and dispositions made in good faith to a personal representative under the representation before the revocation thereof are a valid discharge to the person making the same; and the personal representative who acted under the revoked representation may retain and reimburse himself in respect of any payments or dispositions made by him which the person to whom representation is afterwards granted might have properly made.

[cf 1925 c 23 s 27(2) U.K.]

- (3) All transfers and conveyances of any interest in property made to a purchaser either before or after the commencement of this Ordinance by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation, either before or after the commencement of this Ordinance, of the probate or administration.

[cf 1925 c 23 s 37(1) U.K.]

- (4) This section takes effect without prejudice to any order of the court made before the commencement of this Ordinance and applies whether the testator or intestate died before or after such commencement.

[cf 1925 c 23 s 37(2) U.K.]

#### [57.01] England

Subsections (1) and (2) correspond with the English Administration of Estates Act 1925 ss 27(1) and (2); and subsections (3) and (4) with ss 37(1) and (2) of the same Act.

#### [57.02] General Note

This is a complex section dealing with at least four analogous but diverse matters. As noted above the corresponding English provisions are to be found in two quite separate sections, the first headed 'Protection of persons acting on probate or administration'; the second headed 'Validity of conveyance not affected by revocation of representation' and it is advisable to bear this dichotomy in mind. The first subsection protects persons acting on the grant of probate or administration, notwithstanding any defect therein or any circumstances affecting the validity of the grant. The next two subsections deal with the position following revocation of the grant. Subsection (2) contains two matters: firstly, it preserves the validity of any payments or

dispositions made (in good faith) to the personal representatives, notwithstanding any revocation of the grant and, secondly, protects the personal representatives in respect of payments or dispositions made by them acting on the revoked grant. The third subsection preserves the title of purchasers taking title from the personal representatives, notwithstanding a subsequent revocation of the grant. The fourth subsection states the general application of the section.

It can be stated that although payments to creditors or other purchasers (in good faith) are generally protected under the provisions in this section as a whole, payments wrongly made to beneficiaries are not; see s 67 below on the right of a person to trace or follow the assets into the hands of persons who wrongly receive them as volunteers, which of course includes beneficiaries under a deceased estate.

#### [57.03] Commencement

As to meaning, see [1.03] above.

#### [57.04] Subsection (1)

The ambit of this provision is not entirely clear owing to the ambiguity of the language used. The subsection is copied from the English legislation which is usually taken to cover payments by a personal representative to a third party, for example, in payment of debts or in distributing the estate to the beneficiaries. Such payments will be protected notwithstanding any defects or circumstances affecting the validity of the grant but this must be without prejudice to the right of persons to follow or trace property wrongly paid to volunteers; see s 67 below. This construction derives from the reference to the payment or disposition being made 'under a representation', which must mean in this context, under or under a grant of representation. However the opening reference to 'every person' extends the protection of the section beyond personal representatives, perhaps to persons holding assets, such as a bank, although strictly such payments would be made in reliance on rather than under a grant. The provision is not restricted to cases where the grant is revoked in view of the general reference to 'any defect or circumstance' and because payments by a personal representative where the grant is subsequently revoked is expressly covered by the second part of subsection (2) and by subsection (3). The heading (which is copied from s 27 in the English legislation) also seems inappropriate to cover payments wrongly made by personal representatives, although it adequately covers the provision in subsection (2).

#### [57.05] Every person

See [57.04] above.

#### [57.06] Making or permitting to be made

This phrase tends to confirm that the subsection is concerned with payments or dispositions by personal representatives since they are the only person with such power; certainly in terms of 'making'. It is possible that a beneficiary could 'permit' a disposal, where, for example, the consent of a beneficiary is required under the will before a particular asset is sold, or where a beneficiary consents to an appropriation under s 68 below.

**[57.07] Any payment or disposition**

Payment could be made to the revenue, to a creditor, or to a beneficiary. 'Disposition' has a wide general meaning to include all forms of transfer or disposal and common examples in this context would include assents to beneficiaries and assignments to purchasers. The subsection does not seem to cover executory contractual obligations or liabilities entered into by the personal representative.

**[57.08] In good faith**

This means honestly, without collusion or bad motive; see *Re Vickery, Vickery v Stephens* [1931] 1 Ch 572, [1931] All ER Rep 562. See the phrase 'bona fide' in s 22 and [22.04], above; and 'good faith' in s 61(2) below. The requirement of acting in good faith is crucial to the enjoyment of the protection afforded by the section; the rationale of the provision is that the personal representative acts under the grant made to him honestly, believing that it is valid and correct. If that subsequently proves to be not so, because for example a later valid will is found in respect of which a new grant should be made, then they are protected in respect of the things they did whilst acting under their grant, provided they did not know, for example, that there was a later will. If there were no such protection people would be reluctant to assume the office of personal representative since they would be apprehensive lest it should subsequently emerge that they were not entitled to the grant and fearful that they would then be held liable for all their acts done as personal representative. Conversely if they collude with a beneficiary to suppress a will so that they can benefit that beneficiary under a supposed intestacy, they will not be protected under this subsection; see *In the Estate of Bloch*, cited in Parry and Clark, *The Law of Succession* (12th Ed) Chapter 19.

**[57.09] Under a representation**

This cannot mean a representation at large and must mean a grant of representation; see also 'the representation' later in the subsection.

**[57.10] Indemnified and protected**

An indemnity is an obligation to pay or reimburse another for loss. A personal representative is probably generally entitled to an indemnity from the estate for expenses reasonably and properly incurred in the administration, for example, for reasonable funeral expenses; see *Sharp v Lush* (1879) 10 Ch D 468. This subsection creates a right to a specific indemnity in the circumstances specified. It also states that the person will be protected, in the sense of not being liable for breach of duty or *devastavit* if acting in good faith.

**[57.11] Any defect or circumstance whatsoever**

Merely formal defects will not necessarily invalidate the grant and would in any event fall within this provision. This subsection, unlike the next, does not refer expressly to the grant being 'revoked' but it is thought that this would be one of the circumstances envisaged by the provision; as to revocation of grants, see s 33 and commentary thereto above.

**[57.12] Validity of the representation**

The subsection will operate where the grant of representation is not valid or, it is thought (see above) has been revoked.

**[57.13] Subsection (2): Representation is revoked**

See s 33 above and commentary thereon.

**[57.14] Payments and dispositions**

See [57.07] above.

**[57.15] Made in good faith**

See [57.08] above.

**[57.16] To a personal representative**

This makes clear that the section is concerned with payments made by third parties to personal representatives, possibly in settlement of a claim by the personal representatives against them.

**[57.17] Under the representation**

This must mean under, in the sense of under, the grant of representation which could be either of probate or of administration, since the section is general.

**[57.18] Before the revocation thereof**

This limits the operation of the subsection to cases where the grant has been revoked; see s 33 above and commentary thereto; in contrast to the previous subsection which is not so limited.

**[57.19] Are a valid discharge**

This protects the person making the payment or disposition provided it was made in good faith; see above. It is a necessary provision in practice since otherwise third parties would be reluctant to deal with personal representatives, even with a grant, if there was a danger that any payments they made would not be recognised.

**[57.20] Personal representative who acted under the revoked representation**

The personal representative must act in his representative, not his personal, capacity. Note that there is no specific requirement of 'good faith' in this connection, although that was no doubt intended and perhaps the reference earlier could be made to apply. This provision applies where the grant is 'revoked' (see s 33 above) which will mean that a fresh grant will have to be made pursuant perhaps, to a newly discovered will or to a different person entitled on administration. In such circumstances it is possible that a payment was wrongly made, either to a creditor, where the new will might contain different express provisions for the payment of debts, or to a beneficiary. If such payment is challenged under the terms of a newly discovered will for example, then the personal representatives can invoke the protection of the subsection.

**[57.21] Retain and reimburse himself**

This phrase can be contrasted with that in the previous subsection