

# TRUSTEE ACT 1956

1956/61 (NZ) – 1 January 1957

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**To consolidate and amend the law relating to trusts and trustees**

**1 Short title**

This is the Trustee Act 1956.

PART 1  
PRELIMINARY

**2 Interpretation and application**

(1) In this Act –

“authorised investments” means investments authorised for the investment of money subject to the trust by the instrument, if any, creating the trust or by this Act or any other Act;

“Bank” means a bank registered under the Niue Bank Act 1994;

“benefit”, in relation to any person, includes insurance on the life of that person;

“contingent right” as applied to land includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitations of the interest or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent;

“conveyance”, as applied to any person, includes the execution by that person of every necessary or suitable assurance for conveying, transferring, assigning, appointment, surrendering, or otherwise 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” includes rents and profits other than profits which under any rule of law are in the nature of capital;

“instrument” includes an Act;

## Trustee Act

- “land” 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 any other corporeal hereditament; and also includes a rent and other incorporeal hereditaments, and an easement, right, privilege, share, interest, or benefit in, over, or derived from land; and in this definition “mines and minerals” includes any strata or seams of minerals or substances in or under any land, and powers of working and getting the same; and in this definition “hereditaments” means real property which under an intestacy might at common law have devolved on an heir;
- “lease” includes a bailment;
- “mortgagee” includes every person having an estate or interest regarded at law or in equity as merely a security for money; and also includes every person deriving title to the mortgage under the original mortgage;
- “payment”, in relation to stocks and securities, includes the deposit or transfer of the same;
- “personal representative” means the executor, original or by representation, or an administrator for the time being of a deceased person;
- “possession” includes receipt of income or the right to receive the same, if any; and “possessed” applies to receipt of income of and to any vested estate less than a life interest, at law or in equity, in possession or in expectancy in any land;
- “property” includes real and personal property, and any estate, share, and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not;
- “Registrar” means the Registrar of the Court, and includes a Deputy Registrar where there is no Registrar, or in any case where the Deputy may lawfully act for and on behalf of the Registrar;
- “rent” includes a rent service or a rentcharge, or other rent, toll, duty, royalty, or annual or periodical payment in money or money’s worth reserved or issuing out of or charged upon land, but does not include mortgage interest;
- “right” includes an estate or interest;
- “sale” includes an exchange;
- “securities” includes stock, funds, and shares;
- “securities payable to bearer” includes securities transferable by delivery or by delivery and endorsement;
- “stock” includes Government securities, and shares; and, so far as relates to vesting orders made by the Court under this Act, includes any fund, money, annuity, or security transferable in books kept by any corporation or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest in it;
- “transfer”, 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” does not include the duties incidental to an estate conveyed by way of mortgage, but with this exception it extends to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental to the office of an administrator within the meaning of the Family Law Code;
- “trust for sale”, 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;

“trustee for sale” means the person (including a personal representative) holding land on trust for sale.

(2) For the purposes of this Act a person shall be deemed to be under a disability while he is not of full age or full mental capacity.

(3) This Act, except where otherwise expressly provided, applies to trusts constituted or created either before or after the commencement of this Act.

(4) The powers conferred by or under this Act on a trustee who is not a corporation are in addition to the powers given by any other Act and by the instrument, if any, creating the trust; but the powers conferred on the trustee by this Act, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument.

(5) The powers conferred by or under this Act on a trustee that is a corporation are in addition to the powers given by the instrument, if any, creating the trust and to the powers given by or under the Act or any instrument by or under which the corporation is constituted and any other Act; but the powers conferred on the trustee by this Act, unless otherwise stated –

(a) Apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument;

(b) (i) Apply if and so far only as a contrary intention is not expressed in the Act or any instrument by or under which the corporation is constituted and any other Act and have effect subject to the terms of every such Act and instrument;

(ii) Nothing in this paragraph shall affect any Act which applies to all trustees, whether corporations or not.

### **3 Act to bind Crown**

This Act shall bind the Crown.

## **PART 2**

### **INVESTMENTS**

### **4 Power to invest**

(1) A trustee may invest any trust funds, whether at the time in a state of investment or not, in any property.

(2) Subject to subsections (3) and (4), a trustee exercising any power of investment shall exercise the care, diligence, and skill that a prudent person of business would exercise in managing the affairs of others.

(3) Subject to subsection (4), where a trustee’s profession, employment, or business is or includes acting as a trustee or investing money on behalf of others, the trustee, in exercising any power of investment, shall exercise the care, diligence, and skill that a prudent person engaged in that profession, employment, or business would exercise in managing the affairs of others.

(4) The duty imposed on a trustee by subsection (2) or (3) shall apply to a trustee if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust or any Act, and shall have effect subject to the terms of that instrument or Act.

**5-13** [Repealed]

PART 3

GENERAL POWERS AND INDEMNITIES OF TRUSTEES

*General Powers*

**14 Powers to sell, exchange, partition, postpone, lease, purchase**

(1) Subject to this section, every trustee may exercise the following powers in respect of any property for the time being vested in him –

- (a) Sell the property;
- (b) Dispose of the property by way of exchange for other property in Niue of a like nature and a like or better tenure, or, where the property vested in him consists of an undivided share, concur in the partition of the property in which the share is held, and give or take any property by way of equality of exchange or partition;
- (c) Postpone the sale, calling in, and conversion of the property, whether or not it is of a wasting, speculative or reversionary nature:  
Provided that nothing in this paragraph shall permit a trustee to postpone the sale, calling in, or conversion of any property of a wasting or speculative nature for longer than is reasonably necessary to permit its prudent realisation;
- (d) Let or sublet the property at a reasonable rent for any term not exceeding one year, or from year to year, or for a weekly, monthly, or other like tenancy, or at will;
- (e) Grant a lease or sublease of the property for any term not exceeding 21 years to take effect in possession within one year next after the date of the grant of the lease or sublease at a reasonable rent, with or without a fine, premium or foregift:  
Provided that where a fine, premium or foregift is taken, the amount of it shall be deemed to be part of and an accretion to the rental, and shall, as between the persons beneficially entitled to the rental, be considered as accruing from day to day and be apportioned over the term of the lease or sublease;
- (f) At any time during the currency of a lease of the property, reduce the rent or otherwise vary or modify the terms of it;
- (g) In the case of property subject to a lease, grant to a sublessee (with the consent of the lessee) a lease direct from the trustee of the whole or any part of the land comprised in the original lease for the residue of the original term.

(2) Any trustee may purchase land in Niue in any of the following cases –

- (a) If the land being purchased adjoins other land which the trustee has power to retain and which is held by the trustee on the same trusts as the money expended in respect of the purchase of the land, and the amount so expended does not exceed \$2000;
- (b) If the land being purchased has a dwelling house on it and is required exclusively or principally as a home for the person entitled to the income of the money being expended in respect of the purchase.

(2A) Any trustee may erect a dwelling house on land that is subject to the same trusts as the money being expended in respect of the erection, or may purchase land in Niue and erect a dwelling house on it, if the dwelling house and land are required exclusively or principally as a home for the person entitled to the income of the money being expended in respect of the erection or the purchase and erection, as the case may be.

(2B) In any case where a trustee is authorised by or under this Act or any other enactment, or by the instrument creating the trust, to provide or acquire a home for any person, he shall have power, in addition to any authority so conferred –

- (a) To acquire a flat or apartment or the right to occupy a flat or apartment by any means which he may consider appropriate (whether by acquiring shares in a limited liability company or an undivided share or interest in the land on which the premises are erected or in any other way); and
- (b) To enter into any lease, licence, agreement, or other arrangement under which he or his nominee or the beneficiary who is to occupy the flat or apartment has the right to occupy it (including an arrangement whereby any shares in a limited liability company and the benefit of any such lease, licence, or agreement may be held by that beneficiary or by some other nominee or the trustee upon trust for him).

(3) Any trustee may accept or concur or join with any other person in accepting a lease or sublease of any property on such terms and subject to such covenants and conditions as he thinks fit; and may surrender or concur or join with any other person in surrendering any lease or sublease; and, if lessor or sublessor, may accept or concur or join in with any other person in the acceptance of the surrender of any lease or sublease.

(4) Any trustee may, on such conditions as he thinks proper, rescind or cancel or modify or vary any contract or agreement for the sale and purchase of any land, or agree to do so, or compromise with or make allowances to any person with whom such contract or agreement has been made, or who is the assignee of it in respect of any unpaid purchase money secured on mortgage or otherwise.

(5) In exercising any power of leasing or subleasing conferred by this section or by the instrument (if any) creating the trust, a trustee may –

- (a) Grant to the lessee or sublessee a right of renewal for one or more terms at a rent to be fixed or made ascertainable in a manner specified in the original lease or the original sublease, but so that the aggregate duration of the original and of the renewed terms shall not exceed the maximum single term that could be granted in exercise of the power;
- (b) Subject to this section, grant a lease with an optional or compulsory purchasing clause:

Provided that this power shall not apply to the exercise of any power of sale conferred by any mortgage unless the mortgage confers authority to do so;

- (c) Grant to the lessee or sublessee a right to claim compensation for improvements made or to be made by him in, upon, or about the property which is leased or subleased.

(6) (a) No trustee shall, without the consent of the Court, exercise any power conferred on him by this section of granting a lease with an optional or compulsory purchasing clause, or of selling or exchanging any freehold and, in any case where the value of land (as determined under section 28) exceeds \$15,000.

- (b) A trustee may, without the consent of the Court, sell any such land for more than \$15,000 in exercise of the powers conferred on him by this section, if (under section 28) he has in good faith fixed the value of the land immediately before the sale at \$15,000 or less.

(6A) Where a person dies intestate as to any personal chattels within the meaning of the Family Law Code and leaves a husband or wife, the trustee of his estate shall not, without the consent of the Court or of the husband or wife, sell those chattels, unless a sale is required for purposes of administration owing to want of other assets.

(6B) Where upon inquiry the Court is satisfied that a partition of the real estate of a deceased person would be advantageous to the parties interested in it, the Court may order a partition or may appoint one or more arbitrators to effect a partition, and to exercise in regard to it, under its directions and control, such powers as it thinks



fit; and if the report and final award of the arbitrator are approved by the Court, the trustee shall, by conveyance or transfer, give effect to the same accordingly.

(7) (a) Where there is a power (statutory or otherwise) to postpone the sale of any land or authorised investment that a trustee has a duty to sell by reason only of a trust or direction for sale, then (subject to any express direction to the contrary in the instrument, if any, creating the trust), the trustee shall not be liable in any way merely for postponing the sale, in the exercise of his discretion, for an indefinite and unlimited period, whether or not that period exceeds the period during which the trust or direction for sale remains valid; nor shall a purchaser of the land or authorised investment be concerned in any case with any directions respecting the postponement of a sale;

(b) This subsection shall not apply to any property of a wasting or speculative nature.

## 15 Miscellaneous powers

(1) Every trustee may exercise the following powers in respect of any property for the time being vested in him –

- (a) Expend money subject to the same trusts for the repair, maintenance, upkeep, or renovation of the property, whether or not the work is necessary for the purpose of the salvage of the property; and (subject to the rules of law applicable in such cases and to any direction of the court to the contrary) apportion the cost of the work between capital and income or otherwise among the persons entitled thereto in such manner as he considers equitable, with power, in any case where the whole or part of the cost of the work is charged to capital, to recoup capital from subsequent income if such a course would be equitable having regard to all the circumstances of the case;
- (b) Expend money subject to the same trusts in the improvement or development of the property or in improving his title to the property or his tenure thereof, whether by the acquisition of an interest in reversion or otherwise:  
Provided that, in exercise of the power conferred by this paragraph, not more than \$10,000 may be so expended by a trustee without the consent of the Court for any one purpose.
- (c) Where the property is land and the land may be sold or let or leased or otherwise disposed of under any power or trust vested in the trustee, subdivide the land into sections and for that purpose construct and dedicate all such roads, streets, access ways, service lanes, and footpaths and make all such reserves, and do all such other things, and pay all such money, as he thinks necessary or as are required by any law or bylaw relating to subdivisions;
- (d) Contribute out of money subject to the same trusts such sum as he thinks reasonable towards the construction and maintenance of such roads, streets, access ways, service lanes, and footpaths, and such sewerage, water, electricity, drainage and other works as are in the opinion of the trustee likely to be beneficial to the property, notwithstanding that they are intended to be constructed wholly or in part on land not subject to the same trusts;
- (e) Grant easements and *profits à prendre* and enter into party wall agreements and agreements which relate to fencing and execute all necessary documents to give effect to it;
- (f) Pay rates, taxes, assessments, insurance premiums, and other outgoings in respect of the property out of money subject to the same trusts;
- (g) As mortgage or mortgagee, agree to the renewal, extension, or variation of the mortgage for such period and on such terms and conditions as he thinks fit:

Provided that the powers conferred by this paragraph may be exercised by a trustee as mortgagor for the purpose of raising additional money on the security of a mortgage of any property in any case where the trustee would have power under section 21 to raise money by a mortgage of the property, but not otherwise:

Provided also that nothing in this paragraph shall authorise any trustee to advance any money on the security of any mortgage that would not be an authorised investment in respect of the amount advanced;

- (h) Make such inquiries, by way of advertisement or otherwise, as he deems necessary for the purposes of ascertaining the next-of-kin or beneficiaries entitled to the property, and charge the cost of the inquiries and advertisements against the property;
- (i) Where the property includes a life policy and there is no money or insufficient money available for the payment of premiums on the policy, surrender the policy for money, or accept instead of the policy a fully paid up policy, or vary the terms of the policy in such manner as the trustee thinks fit;
- (j) Appropriate any part of the property in or towards satisfaction of any legacy payable or any share (whether settled, contingent or absolute) to which any person is entitled, and for that purpose value the whole or any part of the property under section 28 of this Act:

Provided that before any such appropriation is effectual notice thereof shall be given to all persons of full age and full mental capacity who are interested in the appropriation, and any such person may within one calendar month after receipt of the notice apply to the Court to vary the same, and the appropriation shall be conclusive save as otherwise directed by the Court:

Provided also that where the person interested is out of the jurisdiction the said period of one month may be extended by the court for such period as the Court thinks fit, on the application of the trustee or of any person interested;

- (k) Where provision is made in any instrument creating a trust for payment of annuity or other periodical payment, and notwithstanding that the annuity or payment may by the instrument be charged upon the trust property or upon any part of it, set aside and appropriate out of property available for payment of the annuity and invest a sum sufficient in the opinion of the trustee at the time of the appropriation to provide out of the income of it the amount required to pay the annuity or periodical payment, and, after the appropriation shall have been made, the residue of the trust property and the income of it shall no longer be liable for the annuity, and may be distributed forthwith under the trusts declared of and concerning the same;
- (l) Do or omit all acts and things and execute all instruments necessary to carry into effect the powers and authorities given by this Act or by or under the instrument creating the trust.

(2) (a) Where in the administration of any property employed in the production of income or from which income is derived a trustee considers that in the interests of the persons entitled or who may become entitled to the capital of the property it is equitable to set up a depreciation or replacement fund in respect of the property or in respect of any asset comprised in it, then, notwithstanding any rule of law to the contrary, it shall be lawful for but not obligatory upon him to do so, and to credit to the fund and accumulate by way of compound interest such part of the income so produced or derived as he considers equitable and also the resulting income from it.

- (b) In any such case the fund shall follow the destination of the capital of the property and shall be subject to all the trusts, powers, and provisions applicable



to it; with further power to the trustee to apply as he thinks fit the fund and accumulations of income in or towards the replacement, repair or otherwise of property or assets of a like nature or which otherwise may advantageously be employed in conjunction with the property in producing or deriving the income as aforesaid.

**16 Power of trustee for sale to sell**

(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 encumbrances or not, and either together or in lots, by public auction or by public tender or by private contract, subject to any such conditions respecting title or evidence of title or other matters 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 of it, whether the division is horizontal, vertical, or made in any other way, and also includes a trust or power to sell or dispose of any buildings, fixtures, timbers, or other things affixed to the soil apart and separately from the land itself.

(3) In exercise of any power of sale in respect of several properties held under one lease, the trustee may sell the properties separately on the terms that one of the purchasers shall take an assignment of the lease and grant subleases to the other purchasers, and that if any part of the property is not sold the trustee shall retain the lease and grant subleases of the portions sold.

(4) Where a trustee may sell any property at a fixed or specified time under any trust or power vested in him, the trustee may, with the consent of the persons (if any) entitled to sell the possession of it pending the sale of the property, sell the property at any time before the date originally appointed.

**17 Power to sell property on terms**

(1) A sale of property by a trustee in exercise of any power vested in him in that behalf by the instrument creating the trust or by or under this Act or any other enactment may be on terms of deferred payment or otherwise.

(2) The terms of deferred payment shall be such as a person acting with prudence would, if the property were his own, have accepted in the circumstances in order to sell the property to the best advantage, and, subject to it, may provide for the payment of the purchase money or any part thereof under an agreement for sale or for the conveyance of the property sold and the securing of the unpaid purchase money by mortgage of the property sold.

(3) Whether the sale is made under the order of the Court or otherwise, the Court may make such order as it thinks fit as to the terms of deferred payment.

(4) A trustee selling property on terms authorised by this section or by an order of the Court shall not be affected by section 4 or section 10 in respect of so much of the purchase money as is payable under an agreement for sale or is secured by a mortgage, and shall not be liable for any loss that may be incurred by reason only of the security being insufficient at the date of the agreement or mortgage.

(5) For the purposes of any consent or direction required by the instrument, if any, creating the trust or by statute, a trustee selling property on terms of deferred payment shall not be deemed to be lending money or investing trust funds.

**18 Sale 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 or transfer, 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.

**19 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 that person from seeing the application or being answerable for any loss or misapplication of it.

(2) This section applies notwithstanding anything to the contrary in the instrument, if any, creating the trust.

**20 Power to compound liabilities**

A trustee may, if and as he thinks fit –

- (a) Accept any property, real or personal, 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 thinks sufficient; or
- (d) Accept any composition or any security, real or personal, for any property, for any debt or for any property, real or personal, claimed; or
- (e) Allow any time for payment of any debt; or
- (f) Surrender any leasehold property subject to onerous covenants of such a nature that it would not be to the advantage of the person beneficially interested to retain the property; or
- (g) Compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the trust or to the trust property –

and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him seem expedient, without being responsible for any loss occasioned by any act or thing so done by him in good faith.

**21 Power to raise money by sale or mortgage**

(1) Where a trustee is authorised by the instrument, if any, creating the trust or by this Act or any other Act or by law to pay or apply capital money subject to the trust for any purpose or in any manner, he 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) Without restricting the generality of subsection (1), the power conferred on the trustee by this section to raise any money that is required as aforesaid by the sale, conversion, calling in, or mortgage of all or any part of the trust property for the

time being in possession shall extend and be deemed always to have extended so as to confer on the trustee power so to raise money required for the purpose of meeting any debt or other liability of the trustee, whether secured or unsecured and whether owing or incurred at or before the commencement of the trust or subsequently.

## **22 Protection of purchasers**

Where an instrument is made or executed in professed exercise of the power to sell, exchange, lease, or mortgage conferred by the instrument (if any) creating the trust or by this Act or any other Act, the title of the purchaser, transferee, lessee, or mortgagee shall not be impeachable except on the ground of fraud, or be affected on the ground that no case has arisen to authorise the sale, exchange, lease, or mortgage, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an authorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power, and no purchaser, transferee, lessee, or mortgagee shall be concerned to see to the application of the money paid by him, or be responsible for the misapplication of it.

## **23 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) (a) Until the appointment of a new trustee, the personal 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 for the time being of the trust;

(b) In this subsection “trustee” does not include a personal representative as such.

(3) This section does not authorise the exercise or performance of any power or trust by an executor who has renounced or has not proved.

## **24 Power to insure**

(1) A trustee may insure against loss or damage, whether by fire or earthquake or otherwise, any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding the full insurable value of the building or property, or (with the consent of the person entitled to the income of the Court) the full replacement value of the building or property; and may also insure against any risk or liability against which it would be prudent for a person to insure if he were acting for himself; and may pay the premiums for the insurance out of the income of the building or property concerned or out of the income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled wholly or partly to that income.

(2) The trustee may recover the costs of any premiums paid in respect of any such insurance from the life tenant or other person entitled to or in receipt of the rents and profits of the building or property concerned.

(3) Nothing in this section shall impose any obligation on a trustee to insure.

## **25 Application of insurance money where policy kept up under any trust, power or obligation**

(1) Money receivable by a trustee or any beneficiary under a policy of insurance against the loss of or damage to any property subject to a trust, whether by fire or otherwise, 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 for the purposes of the trust, except so far as it would be regarded as income under any rule of law.

(2) If any such money is receivable by any person other than the trustee of the trust, that person shall use his best endeavours to recover and receive the money, and shall pay the net residue of it, after discharging any costs of recovering and receiving it, to the trustee of the trust, or, if there is no trustee capable of giving a discharge for it, to the Crown under section 77.

(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 the trust;

(b) In any other case, shall be held upon trust corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.

(4) Any such money, or any part thereof, may also be applied by the trustee, or, if held by the Crown, under the direction of the Court, in rebuilding, reinstating, replacing, or repairing the property lost or damaged, but any such application by the trustee 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 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 rights 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 Act, but only to money received after the commencement.

## **26 Deposit of documents for safe custody**

A trustee may deposit any documents held by him relating to the trust, or to the trust property, with any bank or corporation whose business includes the undertaking of the safe custody of documents, and any sum payable in respect of any such deposit shall be paid out of the income of the trust property, and so far as there is no available income out of the capital of the trust property.

## **27 Reversionary interests**

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

(a) Agree or ascertain the amount or value of it or any part of it in such manner as he may think fit;

(b) Accept in or towards satisfaction of it, at the market or current value, or upon any valuation or estimate of value which he may think fit, any authorised investments;

(c) Allow any deductions for duties, costs, charges, and expenses which he 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 the release –

without being responsible in any such case for any loss occasioned by any act or thing so done by him in good faith.

## Trustee Act

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

(a) To give any notice in respect of or apply for any charging or other like order upon any securities or other property out of or in 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 the securities or other property or any of them or any part of it 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 his satisfaction for payment of the costs of any proceedings required to be taken.

(3) Nothing in subsection (2) shall relieve the trustee of the obligation to get in and obtain payment or transfer of the share or interest or other thing in action on the same falling into possession.

### **28 Valuations**

(1) A trustee 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 this Act or any other Act, ascertain and fix the value of any trust property, or of any property which he is authorised to purchase or otherwise acquire, in such manner as he thinks proper; and where the trustee is not personally qualified to ascertain the value of any property he shall consult a duly qualified person (whether employed by him or not) as to that value; but the trustee shall not be bound to accept any valuation made by any person whom the trustee may consult.

(2) Any valuation made by the trustee in good faith under this section shall be binding on all persons beneficially interested under the trust.

### **29 Power to employ agents**

(1) A trustee may, instead of acting personally, employ and pay an agent, whether a solicitor, accountant, bank, trustee corporation, 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 trust property, including the receipt and payment of money, and the keeping and audit of trust accounts, 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) A trustee may appoint any person to act as his agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing or cultivating, or otherwise administering any property, real or personal, movable or immovable, subject to the trust in any place outside Niue or executing or exercising any discretion or trust or power vested in him in relation to any such property, with such ancillary powers and with and subject to such provisions and restrictions as he may think fit, including a power to appoint substitutes, and shall not, by reason only of his having made any such appointment, be responsible for any loss arising thereby;

(2A) Without restricting the other powers conferred by this section, a trustee may –

(a) Employ a trustee corporation to be his agent for the purpose of investing any trust funds in his possession, whether at the commencement of the employment in a state of investment or not, whether they came into his possession before or after the commencement of this section, and whether they comprise the whole or any part of the trust estate to which they belong; and



- (b) Pay or transfer any such trust funds to the trustee corporation so employed.
  - (3) Without prejudice to such general power of appointing agents –
- (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 or instrument having in the body of it or endorsed on it a receipt for the money or valuable consideration or property, the deed or instrument 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 or instrument by the solicitor shall have the same validity and effect as if the person appointing the solicitor had not been a trustee;
- (c) A trustee may appoint a bank 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 bank 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 not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

(3) Nothing in subsection (2) shall exempt a trustee from any liability which he would have incurred if this Act and any enactment replaced by this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the bank or solicitor for a period longer than is reasonably necessary to enable the bank or solicitor, as the case may be, to pay or transfer the same to the trustee.

### **30 Power to concur with others**

Where an undivided share in any property is subject to a trust, the trustee may (without prejudice to any trust or power in relation to the entirety of the property) execute or exercise any trust or power vested in him in relation to that share in conjunction with the persons entitled to or having power in that behalf over the other share or shares, and notwithstanding that the trustee or any one or more of several trustees may be entitled to or interested in any such other share, either in his or their own right or in a fiduciary capacity.

### **31 Power to delegate trusts**

- (1) A trustee who –
    - (a) Is for the time being out of Niue or is about to depart from it; or
    - (b) Expects that he may be absent from Niue during the administration of the trust; or
    - (c) Is or may be about to become temporarily incapable, by reason of physical infirmity, of performing all his duties as trustee; or
    - (d) Expects that he may be from time to time temporarily incapable, by reason of physical infirmity, of performing all his duties as a trustee –
- may, notwithstanding any rule of law or equity to the contrary, by power of attorney executed as a deed, delegate to any person the execution or exercise, during any period for which the trustee may be absent from Niue or incapable of performing all his duties as a trustee, of all or any trusts, powers, authorities, and discretions vested in him as such trustee, whether alone or jointly with any other person or persons:  
Provided that a person being the only other co-trustee and not being a trustee corporation shall not be appointed to be an attorney under this subsection.

(2) Where any such delegation has been duly made to and accepted by any person and is for the time being in operation, that person shall have, within the scope of the delegation, the same trusts, powers, authorities, discretions, liabilities, and responsibilities as he would have if he were then the trustee.

(3) In any proceedings brought by any person beneficially interested under the trust against the donor of a power of attorney given under this section in respect of any act or default of the donee of the power it shall be a defence for the donor to prove that the donee was appointed by him in good faith and without negligence.

(4) All jurisdiction and powers of any Court shall apply to the donee of the power of attorney in the same manner, so far as respects the execution of the trust or the administration of the estate to which the power of attorney relates, as if the donee were acting in relation to the trust or estate in the same capacity as the donor of the power.

(5) The power of attorney shall not come into operation unless and until the donor is out of Niue or is incapable of performing all his duties as a trustee, and unless the deed otherwise provides shall be deemed to be revoked by his return or by his recovery of that capacity, as the case may be.

(6) In favour of any person dealing with the donee of a power of attorney given under this section, any act done or instrument executed by the donee shall, notwithstanding that the power has never come into operation or has been revoked, whether by the Act of the donor of the power or by operation of law, be as valid and effectual as if the power had come into operation and remained unrevoked at the time when the act was done or the instrument executed, unless that person had at that time actual notice that the power had never come into operation or of the revocation of the power.

(7) A statutory declaration by the donee of a power of attorney relating to any trust or estate that the power has come into operation, or that in any transaction the donee is acting in the execution of the trust or the administration of the estate, shall in favour of a person dealing with the donee of the power be conclusive evidence of that fact.

(8) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any power of attorney or otherwise, that in any transaction the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person dealing in good faith with the donee with any notice of the trust.

(9) For the purpose of executing or exercising the trusts, powers, authorities, and discretions delegated to him the donee may exercise any of the powers, authorities and discretions conferred on the donor as trustee by statute or by the instrument creating the trust, except the power of delegation conferred by this section.

## **32 Power to carry on business**

(1) Subject to any other Act, if at the time of his death any person (whether alone or in partnership) is engaged in carrying on a business, trade, or occupation, it shall be lawful for his trustee to continue to carry on the same in the same manner for any one or more of the following periods –

- (a) Two years from the death of that person;
- (b) Such period as may be necessary or desirable for the winding up of the business;
- (c) Such further period or periods as the Court may approve.

(2) In exercise of the powers conferred by this section or by the instrument creating the trust, a trustee may employ any part of the deceased's estate which is

subject to the same trusts; and may increase or diminish the part of the estate so employed; and may purchase stock, machinery, implements, and chattels for the purposes of the business; and may employ such managers, agents, servants, clerks, workmen, and others as he thinks fit; and may at any time enter into a partnership agreement to take the place of any partnership agreement subsisting immediately before the death of the deceased or at any time after it.

(3) Application to the Court for leave to carry on a business may be made by the trustee or any person beneficially interested in the estate at any time, whether or not any previous authority to carry on the business has expired; and the Court may make such an order, or may order that the business be not carried on, or be carried on subject to conditions, or may make such other order as in the circumstances seems proper.

(4) Nothing in this section shall prejudice any other authority to do the acts thereby authorised to be done.

(5) Where a trustee is in any manner interested or concerned in a trade or business, he may make such subscription as it would be prudent for him to make if he were acting for himself out of the income of the assets affected to any fund created for objects or purposes in support of trades or businesses of a like nature and subscribed to by other persons engaged in the like trade or business.

### **33 Power to convert business into a company**

A trustee may at any time, at the expense of the trust property, convert or join in converting any business into a company limited by shares in such manner as he may think fit; and may, at the like expense, promote and assist in promoting a company for taking over the business; and may sell or transfer the business and the capital and assets and goodwill of it, or any part of it, to the company, or to any company having for its objects the purchase of such a business, in consideration in either case, wholly or in part of ordinary or preference shares wholly or partially paid up of any such company, or wholly or in part of debentures, debenture stock, or bonds of any such company, and as to the balance (if any) in cash payable immediately, or by any instalments with or without security.

### **33A Trustee may sue himself in a different capacity**

(1) Notwithstanding any rule of law or practice to the contrary, a trustee of any property in that capacity may sue, and be sued by, himself in any other capacity whatsoever, including his personal capacity.

(2) In every such case the trustee shall obtain the directions of the Court in which the proceedings are taken as to the manner in which the opposing interests are to be represented.

### *Indemnities*

### **34 Protection against liability in respect of rents and covenants**

(1) Where a 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 paragraph (a) or (b) –

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 trustee may convey the property demised or granted to a purchaser, legatee, devisee, or other person entitled to call for a conveyance of it, and after it –

- (i) He may distribute the trust estate (other than the fund, if any, set apart as aforesaid) to or amongst the persons entitled to it, without appropriating any part, or any further part, as the case may be, of the trust estate to meet any future liability under the said lease or grant;
- (ii) Notwithstanding the distribution, he shall not personally be liable in respect of any subsequent claim under the said lease or grant.

(2) For the purposes of this section a trustee shall be deemed to be liable as such for any liabilities arising from privity of estate which he may incur under the obligations contained in a lease or grant if he is entitled to reimburse himself out of the trust property for all expenses he may incur in respect of the liabilities.

(3) 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 trust property or any part of it or any property representing the same into the hands of the persons amongst whom the same may have been respectively distributed, and applies notwithstanding anything to the contrary in the instrument, if any, creating the trust.

(4) In this section “lease” includes a sublease and an agreement for a lease or sublease and any instrument giving any such indemnity as aforesaid or varying the liabilities under the lease; “grant” 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; and “lessee” and “grantee” include persons respectively deriving title under them.

### **34A Lien on policy money for premiums**

Where a trustee pays any premiums in respect of any policy of insurance he shall have a lien on the policy money for the amount of the premiums so paid, together with interest on it at the rate of 6 percent.

### **35 Protection against creditors**

(1) (a) Where a trustee has given notice by advertisement published at least once in a newspaper circulating in each locality in which in the opinion of the trustee claims are likely to arise requiring persons having claims to which this section applies to send to the trustee, within the time fixed in the notice, particulars of their claims and warning them of the consequences of their failure to do so, then, at the expiration of that time or at any time after it the trustee may administer or distribute the property or any part of it to which the notice relates to or among the persons entitled to it having regard only to the claims, whether formal or not, of which the trustee then has notice; and he shall not, as respects the property so administered or distributed, be liable to any person of whose claim he has not had notice at the time of the administration or distribution.

(b) Nothing in this section shall prejudice any remedy which the person may have under section 193 of the Family Law Code or any other right or remedy available to him against any person other than the trustee, including any right which he may have to follow the property and any money or property into which it is converted.

(2) (a) The time to be fixed as aforesaid by any such notice shall not be less than one month from the date on which the notice is given.

(b) Where the notice is given in a newspaper circulating mainly outside Niue the time to be fixed as aforesaid shall be not less than 2 months.

(3) In any case where the personal representative of a deceased person gives any such notice, the localities specified in subsection (1) shall include each locality in which the deceased resided or carried on business at any time during the year immediately preceding his death.

(4) Where the trustee is in doubt as to what advertisements should be published under this section he may apply to the Court for directions.

(5) Any advertisement published under this section may relate to more than one estate or trust property.

(6) This section shall apply notwithstanding anything to the contrary in the instrument, if any, creating the trust.

(7) Except as provided in subsection (8) this section shall apply to the claims, whether present or future, certain or contingent, against a trustee personally by reason of his being under any liability in respect of which he is entitled to reimburse himself out of the estate or property that he is administering.

(8) This section shall not apply to –

(a) Any claim arising out of any contract to make a will containing certain provisions or not to revoke an existing will or a specified provision therein or not to make a will; or

(b) Any claim by a person to be a beneficiary under the will or to be entitled on the intestacy of the deceased person or to be beneficially interested under the trust.

### **36 Protection in regard to notice**

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

### **37 Exoneration of trustees in respect of certain powers of attorney**

(1) A trustee acting or paying money in good faith in reliance on any power of attorney and on a statutory declaration or other sufficient evidence that the power of attorney has not been revoked shall not be liable for any such act or payment by reason of the fact that at the time of the act or payment the person who gave the power of attorney was subject to any disability, or bankrupt, or dead, or had done or suffered some act or thing to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

(2) (a) Nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made.

(b) The person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

### **38 Implied indemnity of trustees**

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



(2) (a) A trustee may reimburse himself or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers; but, except as provided in this Act or any other Act or as agreed by the persons beneficially interested under the trust, no trustee shall be allowed the costs of any professional services performed by him in the execution of the trusts or powers unless the contrary is expressly declared by the instrument creating the trust.

(b) The Court may on the application of the trustee allow such costs as in the circumstances seem just.

**39 Protection of trustee who pays trust money to bankrupt**

(1) (a) If a trustee in good faith, without negligence, and without actual knowledge of the bankruptcy of any person, pays or transfers to or to the order of that person any trust money or trust property which he would have been entitled to receive (whether as a beneficiary or otherwise) if he had not been adjudged bankrupt, the trustee shall not be liable to the assignee in bankruptcy of the estate of the bankrupt for any money so paid or any property so transferred.

(b) Nothing in this section shall prejudice the right of the assignee in bankruptcy to follow the money or property or any part of it into the hands of the persons who have received the same.

(2) For the purposes of this section a trustee shall not be deemed to have actual knowledge of the bankruptcy of any person by reason merely of the fact that notice of the adjudication has been published in any newspaper or in the *Gazette*.

**39A Protection of trustee in handing over chattels to life tenant**

(1) Where any chattels are, under the provisions of any will, bequeathed to any person including an infant for life or for any limited interest, the trustee may cause an inventory to be made of the chattels, which inventory shall be signed by that person and retained by the trustee, and a copy of the inventory shall be delivered to that person.

(2) The trustee may thereupon deliver the chattels to that person on such terms and conditions as the trustee thinks fit, and shall not after it be bound to see to the repair or insurance of the chattels, and shall not be subject to any liability whatsoever by reason of the loss or destruction of the chattels or the neglect of that person to effect any such repairs or insurance.

(3) A copy of any such inventory, signed by that person and by the trustee shall be deemed to be an instrument within the meaning of the Chattels Transfer Act 1924, and may be registered accordingly.

**39B Protection of trustee in handing over chattels to infant**

(1) A trustee may in his discretion deliver to an infant, or to the guardian or any of the guardians of an infant, any chattels absolutely vested in the infant, and the receipt of the infant or guardian shall be a complete discharge to the trustee for any chattels so delivered.

(2) The powers conferred by this section are in addition to the powers conferred by section 41 and, for the purposes of section 41(2)(b) the value of the chattels delivered under this section shall not be taken into account in any way.

*Maintenance, Advancement and Protective Trusts*

**40 Power to apply income for maintenance**

(1) Where any property is held by a trustee in trust for any person for any interest whatsoever, whether vested or contingent, then, any prior interests or charges affecting that property –

- (a) During the infancy of any such person, if his interest so long continues, the trustee may, at his sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance or education (including past maintenance or education) or his advancement 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, education, advancement, or benefit; and
- (b) If the person on attaining the age of 20 years has not a vested interest in that income, the trustee shall thenceforth pay the income of that property and of any accretion to it under subsection (2) to him until he either attains a vested interest in it or dies, or until failure of his interest:

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 trustee 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 the trustee has 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 trustee shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income of it in authorised investments, and shall hold those accumulations as follows:

- (a) If any such person –
  - (i) Attains the age of 20 years, or marries under that age, and his interest in the income during his infancy or until his marriage is a vested interest; or
  - (ii) On attaining the age of 20 years or on marriage under that age becomes entitled to the property from which the income arose in fee simple absolute or determinable, or absolutely –

the trustee shall hold the accumulations in trust for that person absolutely, but without prejudice to any provision with respect to it contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt of that person after marriage, and though still an infant, shall be a good discharge; and
- (b) In any other case the trustee shall, notwithstanding that that person had a vested interest in the income, hold the accumulations as an accretion to the capital of the property from which the accumulations arose and as one fund with that capital for all purposes –

but the trustee may, at any time during the infancy of that person if his interest so long continues, apply those accumulations, or any part of it, 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 the place of a parent 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 that for the time being prescribed by or under section 186 of the Family Law Code.

(4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by a trustee in trust to pay the income of it 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.

**41 Power to apply capital for maintenance**

(1) A trustee may at any time or times pay or apply any capital money or other capital asset subject to a trust, for the maintenance or education (including past maintenance or education), or the advancement or benefit, in such manner as he may in his absolute discretion think fit, of any person entitled to the capital of the trust property or of any share of it, 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 any such payment or application may be made notwithstanding that the interest of that 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.

(2) (a) The money or asset so paid or applied for the maintenance, education, advancement, or benefit of any person shall not exceed altogether half of the presumptive or vested share or interest of that person in the trust property where the value of that share or interest exceeds \$2,000 and in any other case shall not exceed altogether \$1,000 in amount or value; and

(b) Where that person or any other person is or becomes absolutely and indefeasibly entitled to the share of the trust property in which that person had presumptive or vested interest when the money or asset was so paid or applied, that money or asset shall be brought into account as part of that share in the trust property; 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 or asset paid or applied unless that person is in existence and of full age and consents in writing to the payment or application, or unless the Court, on the application of the trustee so orders.

**41A Conditional advances for maintenance**

(1) (a) Where a power to pay or apply any property for the maintenance, education, advancement, or benefit of any person, or for any one or more of those purposes, is vested in a trustee, the trustee when exercising the power shall have, and be deemed always to have had, authority to impose on the person any condition, whether as to repayment, payment of interest, giving security, or otherwise.

(b) At any time after imposing any such condition, the trustee may, either wholly or in part, waive the condition or release any obligation undertaken or any security given by reason of the condition.

(2) In determining the amount or value of the property which a trustee who has imposed such a condition may pay or apply in exercise of the power, any money repaid to the trustee or recovered by him shall be deemed not to have been so paid or applied by the trustee.

(3) Nothing in this section shall impose upon a trustee any obligation to impose any such condition; and a trustee, when imposing any condition as to giving

security as aforesaid, shall not be affected by any restrictions upon the investment of trust funds, whether imposed by this Act or by any rule of law or by the trust instrument (if any).

(4) A trustee shall not be liable for any loss which may be incurred in respect of any money that is paid or applied as aforesaid, whether the loss arises through failure to take security, or through the security being insufficient, or through failure to take action for its protection, or through the release or abandonment of the security without payment, or from any other cause.

#### **42 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 that 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 of it, 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 of it 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 –
  - (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 of it or to the annuity fund, if any, or arrears of the annuity, as the case may be;

as the trustee in his absolute discretion, without being liable to account for the exercise of such discretion, thinks fit.

(2) This section shall not apply to trusts coming into operation before the commencement of this Act, and has effect subject to any variation of the implied trusts aforesaid contained in the instrument creating the trust.

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

### **PART 4**

#### **APPOINTMENT AND DISCHARGE OF TRUSTEES**

#### **43 Power of appointing new trustees**

(1) Where a trustee (whether original or substituted, and whether appointed by the Court or otherwise) –

- (a) Is dead; or
- (b) Remains out of Niue for the space of 12 months during which no delegation of any trusts, powers, or discretions vested in him as such trustee remains in operation under section 31; or

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- (c) Desires to be discharged from all or any of the trusts or powers reposed in or conferred on him; or
- (d) Refuses to act; or
- (e) Is unfit to act; or
- (f) Is incapable of so acting; or
- (g) Being a corporation, has ceased to carry on business, is in liquidation, or is dissolved, then –

the person nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees for the time being, or the personal representatives of the last surviving or continuing trustee, may by deed appoint a person or persons (whether or not being the person or persons exercising the power) to be a trustee or trustees in the place of the first-mentioned trustee.

(2) On the appointment of a trustee or trustees for the whole or any part of trust property –

- (a) The number of trustees may be increased; and
- (b) A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part, and whether or not new trustees are or are to be appointed for other parts of the trust property; and any existing trustee may be appointed or remain one of the separate set of trustees; or if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and
- (c) It shall not be obligatory 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 two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section unless there will be either a trustee corporation or at least two 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, jointly in the persons who are the trustees shall be executed or done.

(3) 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 had been dissolved, and this section shall apply accordingly.

(4) (a) 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 that surviving or continuing trustee who have proved the will of their testator or by the administrators for the time being of that trustee without the concurrence of any executor who has renounced or has not proved.

- (b) 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.

(5) Where a sole trustee is or has been originally appointed to act in a trust, or where, in the case of any trust, there are not more than three trustees 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 a person or persons (whether or not being the person or persons exercising the power) 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:

Provided that an additional trustee or additional trustees shall not be appointed under this subsection without the consent of –

- (a) The trustee or trustees for the time being; or
- (b) The Court.

(6) 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.

(7) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee whether sole or otherwise in a will, and who dies 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.

(8) The provisions of this section relative to a person nominated for the purpose of appointing new trustees apply whether the appointment is made in a case specified in this section or in a case specified in the instrument, if any, creating the trust, but where a new trustee is appointed under this section in a case specified in that instrument, the appointment shall be subject to the terms applicable to an appointment in that case under the provisions of that instrument.

(9) In this section “trustee” does not include a personal representative as such.

#### **44 Evidence as to a vacancy in a trust**

(1) A statement contained in any instrument coming into operation after the commencement of this Act by which a new trustee is appointed for any purpose connected with land as to how a vacancy in the office of trustee occurred shall, in favour of a purchaser of the land, be conclusive evidence of the matter stated.

(2) In favour of any 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.

#### **45 Retirement of trustee**

(1) Where there are two or more trustees –

- (a) If one of them by deed declares that he is desirous of being discharged from the trust; and
- (b) 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 of the trust property in the co-trustees alone –

then, subject to subsection (3), the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall by deed be discharged from it under this Act 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 and done.

(3) Except where only one trustee was originally appointed, a trustee shall not be discharged under subsection (1) unless there will be either a trustee corporation or at least two individuals to act as trustees to perform the trust.

**46 Discharge of trustee**

(1) Where any trustee is desirous of being discharged from his trust he shall be entitled to retire from it on passing his accounts before the Registrar, and giving notice of his retirement to his co-trustees (if any), and to such other person (if any) as is empowered to appoint new trustees.

(2) If such co-trustees, or such other person, as aforesaid empowered to appoint new trustees, or any of them, refuse or neglect to appoint a new trustee or to consent to such appointment in place of the trustee so retiring, or if the retiring trustee is the sole trustee having power to appoint a new trustee, but the exercise of that power is impracticable or difficult without the assistance of the Court, it shall be lawful for the retiring trustee to apply to the Court for the appointment of a new trustee in his place.

(3) The Court may, upon any such application, make an order appointing some proper person as trustee in place of the trustee so desirous of being discharged from his trust, and direct any accounts and inquiries to be made, and make an order discharging the trustee from the trust and from all liability in respect of it, and may make such order as to costs or otherwise as it thinks fit, and may exercise any of the powers contained in Part 5 and the person who upon the making of the order becomes trustee shall have the same rights and powers as he would have had if appointed by judgment in an action duly instituted.

**47 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 that is 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 or interest or right to which the declaration relates; and
- (b) If the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary in it contained, operate as if it had contained such a declaration by the appointed 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 the statutory power without a new trustee being appointed, then –

- (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 or interest or right to which the declaration relates; and
- (b) If the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary in it contained, operate as if it had contained such a declaration by such persons 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 Act shall, notwithstanding that the estate or 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 (including a sublease and an agreement for a lease or sublease) which contains any covenant, condition, or agreement against assignment or disposing of the land without licence or consent, unless (before 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 transferable only in books kept by a company or other body, or in the manner directed by or under any Act.

(5) For purposes of registration of the deed in any registry, 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 Act.

#### **48 Corporations acting as trustees**

(1) (a) Any trustee corporation may be appointed and may lawfully act as the sole trustee in respect of any trust, notwithstanding that the instrument creating the trust may provide for or direct the appointment of two or more trustees.

(b) Nothing in this subsection shall prevent any other corporation from acting as a trustee under any authority vested in it in that behalf, whether by its memorandum of association or otherwise.

(c) No corporation shall administer the estate of any deceased person unless expressly authorised to do so by any Act.

(2) This section shall not permit the appointment of a corporation as trustee if the instrument creating the trust forbids the appointment of the corporation.

(3) This section shall extend to all trusts and instruments, and to all appointments of trustees, whether created or made before or after the commencement of this Act.

#### **49 Advisory trustees**

(1) In the administration of any trust property any trustee may act, to the extent hereinafter provided, with an advisory trustee, which term includes, in its application to the estate of a mentally defective person, an advisory committee or advisory administrator of the estate.

(2) An advisory trustee may be appointed in respect of all or any part of the trust property –

- (a) By the testator, settlor, or other creator of the trust, in the instrument creating the trust; or

- (b) By order of the Court made on the application of any beneficiary or trustee or of any person on whose application the Court would have power to appoint a new trustee; or
- (c) By the responsible trustee or any person having power to appoint a new trustee; or
- (d) In respect of the estate of a mentally defective person, by order of the Court made on the application of the committee or person authorised to administer the estate.

(3) Where a trustee acts with an advisory trustee the trust property shall be vested in the first-mentioned trustee (in this section referred to as the responsible trustee), who shall have the sole management and administration of the estate and its trusts as fully and effectually as if he were the sole trustee:

Provided that –

- (a) The responsible trustee may consult the advisory trustee on any matter relating to the trusts or the estate;
- (b) The advisory trustee may advise the responsible trustee on any matter relating to the trusts or the estate, but shall not be a trustee in respect of the trust;
- (c) Where any advice or direction is tendered or given by the advisory trustee, the responsible trustee may follow the same and act on it and shall not be liable for anything done or omitted by him by reason of his following that advice or direction;
- (d) In any case where the responsible trustee is of opinion that such advice or direction conflicts with the trusts or any rule of law, or exposes him to any liability, or is otherwise objectionable, he may apply to the Court for directions in the matter, and the decision and order in it shall be final and shall bind the responsible trustee and the advisory trustee, and the court may make such order as to costs as appears proper:

Provided that nothing in this paragraph shall make it necessary for the responsible trustee to apply to the Court for any such directions.

- (e) Where advisory trustees are not unanimous, and tender to the responsible trustee conflicting advice or directions, the responsible trustee may similarly apply to the Court for directions;

(4) No person dealing with the responsible trustee in relation to any trust property shall be concerned to inquire as to the concurrence or otherwise of the advisory trustee, or be affected by notice of the fact that the advisory trustee has not concurred.

(5) Subject to the provisions of the instrument (if any) creating the trust and to any order made by the Court, in any case where remuneration is payable to the trustee of any trust property, remuneration or commission may be paid to both the responsible trustee and the advisory trustee, and subject as aforesaid the amount of it shall be determined by the responsible trustee if he is entitled to fix his own remuneration, or by the Court.

## **50 Custodian trustees**

(1) Subject to this section and to the instrument (if any) creating the trust, any corporation may be appointed to be custodian trustee of any trust in any case where it could be appointed to be trustee, in the same manner as it could be so appointed.

(2) Subject to the provisions of the instrument (if any) creating the trust, where a custodian trustee is appointed of any trust –

- (a) The trust property shall be vested in the custodian trustee as if the custodian trustee were sole trustee, and for that purpose vesting orders may, where necessary, be made under this Act;

- (b) The management of the trust property and the exercise of all powers and discretions exercisable by the trustee under the trust shall remain vested in the managing trustees as fully and effectually as if there were no custodian trustee;
- (c) The sole function of the custodian trustee shall be to get in and hold the trust property, and invest its funds, and dispose of the assets, as the managing trustees in writing direct, for which purpose the custodian trustee shall execute all such documents and perform all such acts as the managing trustees in writing direct;
- (d) For the purposes of paragraph (c) a direction given by the majority of the managing trustees where there are more than one, shall be deemed to be given by all the managing trustees;
- (e) The custodian trustee shall not be liable for acting on any such direction: Provided that if the custodian trustee is of opinion that any such direction conflicts with the trusts or the law, or exposes the custodian trustee to any liability, or is otherwise objectionable, the custodian trustee may apply to the Court for directions under section 66; and any order giving any such directions shall bind both the custodian trustee and the managing trustees; and the Court may make such order as to costs as it thinks proper;
- (f) The custodian trustee shall not be liable for any act or default on the part of any of the managing trustees;
- (g) All actions and proceedings touching or concerning the trust property shall be brought or defended in the name of the custodian trustee at the written direction of the managing trustees, and the custodian trustee shall not be liable for the costs of it apart from the trust property;
- (h) No person dealing with the custodian trustee shall be concerned to inquire as to the concurrence or otherwise of the managing trustees, or be affected by notice of the fact that the managing trustees have not concurred;
- (i) The power of appointing new trustees, when exercisable by the trustee, shall be exercisable by the managing trustees alone, but the custodian trustee shall have the same power as any other trustee of applying to the Court for the appointment of a new trustee.

(3) On the application of the custodian trustee, or of any of the managing trustees, or of any beneficiary, and on satisfactory proof that it is the general wish of the beneficiaries, or that on other grounds it is expedient to terminate the custodian trusteeship, the Court may make an order for that purpose, and may also make such vesting orders and give such directions as in the circumstances seem to the Court to be necessary or expedient.

(4) Subject to the provisions of the instrument (if any) creating the trust and to any order made by the Court, in any case where remuneration or commission is payable to the trustee of any trust property, remuneration may be paid to both the custodian trustee and the managing trustees, and subject as aforesaid the amount of it shall be determined by the managing trustees if they are entitled to fix their own remuneration or by the Court.

## PART 5

### POWERS OF THE COURT

#### *Appointment of New Trustees*

#### **51 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



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in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

(2) In particular and without prejudice to the generality of subsection (1), the Court may make an order appointing a new trustee in substitution for a trustee who

- (a) Has been held by the Court to have misconducted himself in the administration of the trust; or
- (b) Is convicted, whether summarily or on indictment, of a crime involving dishonesty; or
- (c) Is a mentally defective person; or
- (d) Is a bankrupt; or
- (e) Is a corporation which has ceased to carry on business, or is in liquidation, or has been dissolved.

(3) 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.

(4) Nothing in this section shall give power to appoint an executor or administrator.

(5) Every trustee appointed by the Court 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.

### *Vesting Orders*

#### **52 Vesting orders of land**

(1) Subject to subsections (2) and (3) in any of the following cases, namely

- (a) Where the Court appoints or has appointed a trustee of any land or interest in it, or where a trustee of any land or interest in it 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 in it, whether by way of mortgage or otherwise, or entitled to a contingent right in it, 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
  - (iv) Being a corporation, has ceased to carry on business or is in liquidation or has been dissolved;
- (c) Where it is uncertain who was the survivor of two 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 alive 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 deceased person was entitled to or possessed of any interest in land and his personal representative is under disability;

- (g) Where a trustee jointly or solely entitled to or possessed of any interest in land, or entitled to a contingent right in it, 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;
- (h) Where land or any interest in it 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 Act called a vesting order) vesting the land or interest in it 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.
  - (2) Where any such order is consequential on the appointment of a trustee, the land or interest in it shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees.
  - (3) Where any such order relates to a trustee entitled or formerly entitled jointly with another person, and that trustee is under disability or out of the jurisdiction of the Court or cannot be found, or (being a corporation) has ceased to carry on business or is in liquidation or has been dissolved, the land, interest, or right shall be vested in the other person who remains entitled, either alone or with any other person that the Court may appoint.

### **53 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 of it, become entitled to or possessed of that interest on any trust, the Court may make an order releasing the land or interest in it 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.

### **54 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.

### **55 Vesting order consequential on order for sale or mortgage of land**

Where the 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 in it, 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 Act, and the Court may if it thinks expedient make an order vesting the land or any part of it for such estate or interest as the Court thinks fit in the purchaser or mortgagee or in any other person.

### **56 Vesting order consequential on judgment for specific performance**

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 of it within the meaning of this Act; 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 Act –

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.

### **57 Effect of vesting order**

A vesting order under sections 52 to 56 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 interests as the Court directs; or
- (b) If there is no such person or no such person of full age and full mental capacity, as if such person had existed and been of full age and full mental 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 age and full mental capacity and had executed a conveyance or release to the effect intended by the order.

### **58 Power to appoint person to convey**

In all cases where a vesting order can be made under section 52 to 56, the Court may, if it is more convenient, appoint a person to convey the land or any interest in it 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.

### **59 Vesting orders as to stock and things in action**

(1) Subject to subsections (2), (3) and (4) 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
  - (iv) Being a corporation, has ceased to carry on business or is in liquidation or has been dissolved; or
  - (v) Neglects or refuses to transfer stock or receive the dividends or income of it, or to sue for or recover a thing in action, under the direction of the person absolutely entitled to it for 28 days next after a request in writing has been made to him by the person so entitled; or
  - (vi) Neglects or refuses to transfer stock or receive the dividends or income of it 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 who was the survivor of two or more trustees entitled to stock or to a thing in action;

(d) 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;

(e) Where there is no personal representative of a deceased person entitled to stock or to a thing in action or where it is uncertain who is the personal representative of a deceased person who is entitled to stock or to a thing in action;

(f) Where stock is standing in the name of a deceased person whose personal representative is under disability;

(g) 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 of it, or to sue for or recover the thing in action in any person as the Court may appoint.

(2) Where any such order is consequential on the appointment of a trustee, the right shall be vested in the persons who, on the appointment, are the trustees.

(3) Where the person whose right is dealt with by any such 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.

(4) No such order shall be made vesting shares that are not fully paid up in any person unless he applies for the order or consents to the making of the order.

(5) 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; and without restricting the powers of the Court under this subsection it is hereby declared that the person appointed to make or join in making a transfer of stock may be some proper officer of the bank or company or society or association in whose books the stock is to be transferred.

(6) 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 Act may transfer the stock to himself or any other person under the order, and all banks, societies, associations, companies, and persons shall obey every order under this section under its tenor.

(7) After notice in writing of an order made under this section it shall not be lawful for any bank, society, association, company, or person to transfer any stock to which the order relates or to pay any dividends on it except under the order.

(8) 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 this Act is to be exercised.

## **60 Vesting orders in respect of shares in ships and industrial property**

The provisions of this Act as to vesting orders shall apply to shares in ships registered in Niue and to any intellectual property rights, as if they were stock.

## **61 Vesting orders of charity property**

The powers conferred by this Act as to vesting orders may be exercised for vesting any interest in any 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.

**62 Orders made upon certain allegations to be conclusive evidence**

Where a vesting order is made as to any land under this Act or under any other Act 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 ceased to carry on business or is in liquidation or has been dissolved; or
- (c) That it is uncertain which of two or more trustees, or which of two 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 shall not prevent the Court from directing a reconveyance or surrender or the payment of costs occasioned by any such order if improperly obtained.

**63** [Repealed]

*Jurisdiction to Make Other Orders*

**64 Power of Court to authorise dealings with trust property and variations of trust**

(1) Subject to any contrary intention expressed in the instrument (if any) creating the trust, where in the opinion of the Court any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, retention, expenditure, or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the same without the assistance of the Court, or the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the Court may by order confer upon the trustee, 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 authorised to be expended, and the costs of any transaction, are to be paid or borne, and as to the incidence of it between capital and income.

(2) Notwithstanding anything to the contrary in the instrument (if any) creating the trust, the Court, in proceedings in which all trustees and persons who are or may be interested are parties or are represented or consent to the order, may make such an order and may give such directions as it thinks fit to the trustee in respect of the exercise of any power conferred by the order.

(3) (a) The Court may rescind or vary any order made under this section, or may make any new or further order;

(b) No such rescission or variation of any order shall affect any act or thing done in reliance on the order before the person doing the act or thing became aware of the application to the Court to rescind or vary the order.

(4) 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.



**64A Powers of Court to authorise variations**

(1) Without limiting any other powers of the Court, it is hereby declared that where any property is held on trusts arising under any will, settlement, or other disposition, or on the intestacy or partial intestacy of any person, or under any order of the Court, the Court may by order approve on behalf of –

- (a) Any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting; or
- (b) Any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the Court; or
- (c) Any unborn or unknown person; or
- (d) Any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined – any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting to it) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:

Provided that, except by virtue of paragraph (d), the Court shall not approve an arrangement on behalf of any person if the arrangement is to his detriment; and in determining whether any such arrangement is to the detriment of any person the Court may have regard to all benefits which may accrue to him directly or indirectly in consequence of the arrangement, including the welfare and honour of the family to which he belongs:

Provided also that this subsection shall not apply to any trust affecting property settled by any Act other than the Family Law Code.

(2) Any rearrangement approved by the Court under subsection (1) shall be binding on all persons on whose behalf it is so approved, and thereafter the trusts as so rearranged shall take effect accordingly.

(3) In this section –  
“discretionary interest” means an interest arising under the trust specified in section 42 (1)(b) or any like trust;  
“principal beneficiary” has the same meaning as in section 42(1);  
“protective trusts” means the trusts specified in section 42 (1) (a) or (b) or any like trusts.

**65** [Repealed]

**66 Right of trustee to apply to Court for directions**

(1) Any trustee may apply to the Court for directions concerning any property subject to a trust, or respecting the management or administration of any such property, or respecting the exercise of any power or discretion vested in the trustee.

(2) Every such application shall be served upon, and the hearing may be attended by, all persons interested in the application or such of them as the Court thinks expedient.

**67 Persons entitled to apply to Court**

(1) An order under this Act for the appointment of a new trustee or concerning any property subject to a trust may be made on the application of any person beneficially interested in the property, whether under disability or not, or on the application of any person duly appointed trustee of it or intended to be so appointed.

(2) An order under this Act concerning any interest in any property subject to a mortgage may be made on the application of any person beneficially interested in the property, whether under disability or not, or of any person interested in the money secured by the mortgage.

**68 Applications to Court to review acts and decisions of trustee**

(1) Any person who is beneficially interested in any trust property, and who is aggrieved by any act or omission or decision of a trustee in the exercise of any power conferred by this Act, or who has reasonable grounds to anticipate any such act or omission or decision of a trustee by which he will be aggrieved, may apply to the Court to review the act or omission or decision or to give directions in respect of the anticipated act or omission or decision; and the Court may require the trustee to appear before it, and to substantiate and uphold the grounds of the act or omission or decision that is being reviewed, and may make such order in the premises as the circumstances of the case may require:

Provided that no such order shall –

- (a) Disturb any distribution of the trust property made without breach of trust before the trustee became aware of the making of the application to the Court;
- (b) Affect any right acquired by any person in good faith and for valuable consideration.

(2) Where any such application is made, the Court may –

- (a) If any question of fact is involved, direct how the question shall be determined;
- (b) If the Court is being asked to make an order that may prejudicially affect the rights of any person who is not a party to the proceedings, direct that any such person shall be made a party to the proceedings.

**69 Protection of trustee while acting under direction of Court**

(1) Any trustee acting under any direction of the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in the subject-matter of the direction, notwithstanding that the order giving the direction is subsequently invalidated, overruled, set aside, or otherwise rendered of no effect.

(2) This section shall not extend to indemnify any trustee in respect of any act done under any such direction if he has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the Court making the order giving the direction.

**70 Powers of Court to give judgment in absence of a trustee**

Where in any proceedings 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 proceedings and give judgment 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 counsel and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the proceedings in any other character.

**71 Power of Court to charge costs**

The Court may order the costs and expenses of and incidental to any application for any order under this Act, or of and incidental to any such order, or any conveyance or assignment in pursuance of it, 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.

**72 Commission**

(1) The Court may, out of the property subject to any trust, allow to any person who is or has been a trustee thereof or to that person's personal representative such commission or percentage for that person's services as is just and reasonable.

(1A) In considering under subsection (1) what commission or percentage is just and reasonable the Court shall have regard to the following circumstances, namely

- (a) The total amount that has already been paid to any trustee of the trust, whether under the trust instrument or to any earlier order of the Court or to any agreement or otherwise;
- (b) The amount and difficulty of the services rendered by the trustee;
- (c) The liabilities to which the trustee is or has been exposed, and the responsibilities imposed on him;
- (d) The skill and success of the trustee in administering the trust;
- (e) The value of the trust property;
- (f) The time and services reasonably required of the trustee;
- (g) Whether any commission or percentage that might otherwise have been allowed should be refused or reduced by reason of delays in the administration of the trust that were occasioned, or that could reasonably have been prevented, by the trustee; and
- (h) All other circumstances that the Court considers relevant.

(2) The Court may make any such allowance at any time, before or during the administration of the trust, or on the termination of the trust, and may, subject to such terms and conditions as the Court thinks fit, make any such allowance in respect of services to be rendered by the trustee during any specified period subsequent to the date of the order.

(3) Where the Court allows a commission or percentage under this section in any case in which 2 or more persons are or have been the trustees, whether acting at the same time or at different times, the amount so allowed shall be apportioned among the trustees as they mutually agree; and if there is no such agreement the Court may, apportion the total amount allowed among the trustees in such manner as it thinks fit, and, in particular, may divide the amount in unequal shares or may make the allowance to one or more of the trustees to the exclusion of the other or others.

**73 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 Act, 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 the breach, then the Court may relieve him either wholly or partly from personal liability for the same.

**74 Power to make beneficiary indemnify for breach of trust**

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, and notwithstanding that the beneficiary may be a married woman restrained from anticipation, 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.

**75 Barring of claims**

(1) Where a trustee desires to reject a claim that has been made, or that he has reason to believe may be made –

- (a) To or against the estate or property that he is administering; or
- (b) Against the trustee personally by reason of his being under any liability in respect of which he is entitled to reimburse himself out of the estate or property that he is administering –

the trustee may serve upon the claimant or the person who may become a claimant as aforesaid a notice calling upon him, within a period of 3 months from the date of service of the notice, to take legal proceedings to enforce the claim and also to prosecute the proceedings with all due diligence.

(2) At the expiration of that period the trustee may apply to the Court for an order under subsection (3), and shall serve a copy of the application on the person concerned.

(3) If on the hearing of that application that person does not satisfy the Court that he has commenced the proceedings and is prosecuting them with all due diligence, the Court may make an order –

- (a) Extending the period, or barring the claim, or enabling the trust property to be dealt with without regard to the claim; and
- (b) Imposing such conditions and giving such directions, including a direction as to the payment of the costs of or incidental to the application, as to the Court seems just.

(3A) Where a trustee has served any such notices in respect of claims on two or more persons and the period specified in each of the said notices has expired, he may, if he thinks fit, apply for an order in respect of the claims of those persons in a single application, and the Court may on that application make an order accordingly.

(4) [Repealed]

(5) [Repealed]

(6) On an application by a trustee under this section, the persons beneficially entitled to the estate or property need not be made parties to the proceedings, and no order made by the Court on the application shall prejudice their right to contest the claim of the trustee to be entitled to indemnify himself out of the estate or property that he is administering if they have not been parties to the proceedings in which the order was made.

**76 Distribution of shares of missing beneficiaries**

(1) Where any property is held by a trustee and the property or any part of it cannot be distributed because the trustee does not know whether any person who is or may be entitled to it is or at any material date was in existence, or whether all of any of the persons who are members of any class who are or may be entitled to it are or at any material date were in existence, or because the trustee does not know whether any such person is alive or dead or where he is, the trustee may publish such advertisements (whether in Niue or elsewhere) as are appropriate in the circumstances calling upon every such person and every person claiming through any such person to send in his

claim within a time to be specified in the advertisements, not being less than 2 months in any case from the date on which the advertisement is published. Where the trustee is in doubt as to what advertisements should be published under this subsection, he may apply to the Court for directions in that regard.

(2) (a) Where the trustee has received (whether as a result of the advertisements or not) any claim to be a person to whom any such advertisement relates, or any notice that any person may claim to be such a person but the trustee is not satisfied that the claim is or would be valid, the trustee may serve upon the claimant or the person of whom the trustee has notice as aforesaid, a notice calling upon him, within a period of 3 months from the date of service of the notice, to take legal proceedings to enforce the claim, if he wishes to pursue it, and to prosecute the proceedings with all due diligence; and advising him that, if he fails to do so, his claim may be disregarded and application may be made to the Court without further notice for an order authorising the distribution of the property.

(b) Nothing in this subsection shall make it necessary for the trustee to serve such a notice on any such person; and the Court may make an order under this section, whether or not such a notice has been served on any such person, if it is satisfied that the information supplied to the trustee by that person or otherwise in the possession of the trustee indicates either that the person is not one of the persons specified in the advertisements or that he is not likely to be one of those persons.

(3) Upon proof by affidavit of the circumstances, and of the inquiries that have been made, and of the results of the inquiries and advertisements, and of the claims of which the trustee has received notice, and of the notices that the trustee has given to claimants under subsection (2), and of the action (if any) which the claimants have taken to enforce their claims, the Court may order that the trustee may distribute the property or part of it, subject to such conditions as the Court may impose –

(a) As if every person and every member of any class of persons specified in the order (being all or any of the persons specified in the advertisements) is not in existence or never existed or has died before a date or event specified in the order; and

(b) Where as a consequence of the order it is not possible or practicable to determine whether or not any condition or requirement affecting a beneficial interest in the property or any part of it has been complied with or fulfilled, as if that condition or requirement had or had not been complied with or fulfilled (as the Court may determine).

(4) In making any order under subsection (3), the Court may –

(a) Disregard (without express reference to it in the order) the claims of any persons who do not appear to the Court to be, or to be likely to be, any of the persons specified in the advertisements;

(b) Disregard (without express reference to it in the order) the claim of any person to whom the trustee has given notice under subsection (2) and who has failed to take legal proceedings to enforce the claim or to prosecute any such proceedings with all due diligence;

(c) Exclude from the operation of the order any person to whom the trustee has not given notice under subsection (2) and who in the opinion of the Court may be one of the persons specified in the advertisements, or any person whom the Court considers should for any reason be excluded from the operation of the order;



(d) Provide that the order shall not be acted on for such period or except on such conditions as may be specified in the order or that the effect of the order shall during a period so specified be advertised in such manner and form as may be specified in the order, or that the order be served upon such person or persons as are specified in it; and in the event of the Court exercising the jurisdiction conferred by this paragraph it may in the order direct that the same shall be of no effect in respect of any person specified in it in the event of that person instituting proceedings in Niue to enforce his claim and serving the proceedings upon the trustee within such period as is specified in the order.

(5) Any such order may be made notwithstanding that there has not been strict compliance with any directions as to advertisements previously given by the Court, or that an error has been made in any advertisement (whether or not any directions have previously been given by the Court) if the Court considers that the error would not be likely to have prejudiced or misled the persons to whom the advertisement relates.

(6) (a) Where the Court makes an order under this section that the trustee may distribute any property or part of it as if every person and every member of any class of persons specified in the order (not being a person expressly excluded from the operation of the order) is not in existence or never existed or has died before a date or event specified in the order, and the trustee distributes under the order, the trustee shall be exonerated from any further liability to any such person or to any member of any such class.

(b) Nothing in this subsection shall prejudice any remedy which any person may have against any person other than the trustee, including any right which he may have to follow the property and any money or property into which it is converted.

(7) The Court may make one or more orders under this section in respect of the same property.

(8) Any order made under this section may direct how the costs of the order and of advertising under or for the purposes of the order shall be borne.

(9) It shall not be necessary to serve notice of an application for an order under this section upon any person, unless the Court otherwise orders.

(10) Nothing in this section shall prejudice the right of the trustee to distribute under any other law or statutory provision or prejudice the protection thereby afforded when he makes distribution under any such law or provision.

#### **76A Service of notices under sections 75 and 76**

(1) Any notice, application, or order that is to be served under section 75 or section 76 or under any order made under section 76, may be served –

(a) Either by delivering it to the person for whom it is intended or by sending it by post in a registered letter addressed to that person at his usual or last known place of abode or business; or

(b) In such other manner as may be directed by an order of the Court.

(2) Where a notice is sent by post as aforesaid it shall be deemed to be served at the time at which the letter would have been delivered in the ordinary course of post.

#### *Payment to Crown*

#### **77 Payment by trustees to Crown**

(1) (a) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may, on filing in the Court nearest

to which they or the majority of them reside an affidavit describing the instrument creating the trust and giving particulars of the persons beneficially entitled under the trust to the best of their knowledge and belief, and on serving a copy of the affidavit on the Financial Secretary, pay the money or transfer the securities (if they can legally be so transferred) to the Crown in the matter of the particular trust, which shall be described in the affidavit by the names of the parties as accurately as may be for the purpose of distinguishing it.

(b) All money and securities so paid or transferred shall be administered in the Treasury.

(c) All such money and all money derived from securities which have been transferred to or vested in the Crown under this section shall be credited by the Financial Secretary to a deposit account established under the Public Revenues Act to be dealt with as hereafter provided in this Act.

(2) The receipt of the Financial Secretary shall be a sufficient discharge to the trustees for the money or securities paid or transferred to the Crown under this section.

(3) Where money or securities are vested in any persons as trustees, and the majority are desirous of paying or transferring the same to the Crown as aforesaid, but the concurrence of the other or others cannot be obtained, the Court may order the payment or transfer to the Crown to be made by the majority without the concurrence of the other or others.

(4) Where any such money or securities 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 or transfer to the Crown.

(5) Every transfer, payment, and deliver made under 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.

(6) The Financial Secretary may at any time sell any securities held by the Crown under this section.

(7) [Repealed]

(8) Where any trustee has obtained or is seeking a discharge in respect of any money or securities under this section or has obtained such a discharge under the corresponding provisions of any former section, the Financial Secretary may at any time require that trustee to give such information in his possession or control as he may require in relation to the persons beneficially entitled to the money or securities, including information as to the steps taken to trace those persons; and if any person refuses or wilfully neglects to give any such information that is in his possession or control when so required, or wilfully gives any false information in answer to any such requisition, he commits an offence and shall be liable on conviction to a fine not exceeding 2 penalty units.

## **78 Disposal of funds paid to Crown**

(1) At the end of each financial year the Financial Secretary shall publish in the *Gazette* a statement of all money and securities then held by the Crown under section 77, being –

(a) Money which has not previously been credited to the Niue Government Account under subsection (4);

(b) Securities which were transferred to the Crown within the immediately preceding 6 years.

(2) Every statement so published in the *Gazette* shall contain sufficient particulars to show the matters in which the money and securities are held by the Crown and the amount held in respect of each matter.

(3) (a) All money and securities for the time being held by the Crown under section 77 (whether or not they are held in the Niue Government Account shall be so held to attend the order of the Court.

(b) Any such money or securities may be paid or transferred by the Financial Secretary to the person entitled to it upon his establishing a claim to it or may be paid or transferred to the person from whom they were received to be held by him as trustee if that person so requests.

(c) All costs and expenses reasonably incurred by the Crown or the Financial Secretary in connection with any such money or securities may be deducted out of the money or securities or out of any other money and securities which are for the time being held by the Crown and are subject to the same trusts.

(4) The Financial Secretary shall transfer to the Niue Government Account all money held under section 77, being money which was –

(a) Paid to the Crown more than 6 years previously; or

(b) Derived from securities which were transferred to the Crown, or transferred or deposited in the name of any Registrar, more than 6 years previously.

(5) Any money previously transferred to the Niue Government Account under subsection (4) which is paid or required to be paid under subsection (3) may be paid out of the Niue Government Account without further appropriation than this subsection.

(6) (a) Under no circumstances shall the liability of the Crown or the Financial Secretary in respect of any securities which are transferred to or vested in the Crown under section 77 exceed the value of those securities and of any other securities and money which are held by the Crown and subject to the same trusts at the time when demand is made for satisfaction of the liability.

(b) If the said securities and money are insufficient to meet any such liability, the claimant shall, in respect of any unpaid balance of the liability, have the same rights and remedies against the person beneficially entitled to the securities in respect of which the liability arose as he would if those securities were transferred to that person.

(7) Neither the Crown nor the Financial Secretary shall have the duties or liabilities of a trustee in respect of any money or securities for the time being held by the Crown under section 77 (whether in the Niue Government Account or not); and no interest shall be payable by the Crown or the Financial Secretary in respect of any money so held.

(8) Where any money or securities paid or transferred to any claimant under this section are afterwards claimed by any other person, the Crown and the Financial Secretary shall not be responsible for the payment or transfer of it but that person shall have recourse against the claimant to whom the money was paid or the securities were transferred.

## **79 Orders in respect of funds paid to Crown**

(1) (a) Upon application made *ex parte* by such person or persons as are competent or necessary in that behalf, the Court may make such order as it thinks fit in respect of any money or securities for the time being held by the Crown under section 77 (whether in the Niue Government Account or not), and for the payment, transfer, and administration of it.

(b) The Court may direct service of the application on such persons as it thinks fit.

(2) Every such order shall have the same authority and effect and shall be subject to rehearing and appeal in the same manner as if it had been made in any action regularly instituted in the Court; and if it appears that any such money or securities cannot be safely distributed without the institution of one or more actions, the Court may direct any such action to be instituted.

## PART 6

### GENERAL PROVISIONS

#### **80 Indemnity to banks and others**

This Act, and every order purporting to be made under this Act, shall be a complete indemnity to all banks, companies, societies, associations, and persons for any acts done pursuant to it, and it shall not be necessary for any bank, company, society, association, or person to inquire concerning the propriety of the order, or whether the Court had jurisdiction to make it.

#### **81 Operation on bank account of trustees**

(1) Where there are more trustees than one, and the trustees, by writing under their hands communicated to a bank at which their account is kept, arrange that the account may be operated upon by cheques or drafts signed by one or more of them, or by one of them and a delegate or delegates named in the writing of another or others of them, the bank shall be entitled to honour and pay the cheques or drafts as if they had been signed by all the trustees, until the bank receives notice in writing of the revocation, by death or otherwise, of the arrangement.

(2) Nothing in this section or in any rule of law shall prevent trustees from opening a bank account named as an imprest account and from authorising any one or more of their number or any other person or persons to operate upon the imprest account.

**82** [Repealed]

#### **83 Special rules as to apportionment**

(1) For the purposes of this section –

- (a) The term “fixed-income asset” means an asset coming within any of the following classes –
  - (i) The securities mentioned in section 4 (1) (a), (c), (d), (e), (f), (g) and (i);
  - (ii) Debentures, bonds, and stock (other than shares) in which the trustee is authorised to invest trust money;
  - (iii) Any other asset bearing interest or carrying the right to a dividend if the interest or dividend is payable at a fixed rate and if the interest or dividend has been paid regularly in respect of the asset for at least 5 years before the material date and if the trustee has no reason to believe that the interest or dividend in respect of the period to which the apportionment relates will not be paid reasonably promptly after the same falls due;
- (b) The term “shares” means share or stock of any company, whether incorporated in or outside Niue except any such shares or stock which constitutes a fixed-income asset under paragraph (a) (iii);
- (c) An appropriation of shares (whether under the power conferred by section 15 (1) (j) or otherwise) shall be deemed to be a transfer of those shares to which subsection (4) applies.

(2) Where any payment received by a trustee in respect of a sale of any fixed-income asset is or includes payment for the right to receive income accrued from

that asset at the time of sale, though the income may not then be due, the amount of the accrued income shall, for the purposes of the trust, be deemed to have been received as income in respect of the period during which it so accrued.

(3) Where any payment made by a trustee in respect of a purchase of any fixed-income asset is or includes payment for the right to receive any income accrued from that asset at the time of the purchase, though the income may not then be due, the amount of the accrued income when received shall, for the purposes of the trust, be deemed to have been received as purchase money repaid.

(4) Where a trustee transfers any shares (not being a fixed-income asset) to the person entitled to it under the trust, then, unless the trustee in his absolute discretion having regard to all the circumstances of the case thinks that it is equitable, practicable, and convenient to make an apportionment, there shall be no apportionment of any dividends which have accrued at the date of transfer but have not then been declared, and no person who would have been beneficially interested in any such dividends if they had been declared and paid to the trustee shall have any claim in respect of it against the trustee or against the transferee of the shares.

(5) Where a trustee sells any shares that are not a fixed-income asset, no part of the proceeds of the sale shall, for the purposes of the trust, be deemed to have been paid for the right to receive dividends which have accrued in respect of the shares at the time of the sale, but have not then been declared, and there shall accordingly be no apportionment of the proceeds as between capital and income.

(6) Where a trustee purchases any shares that are not a fixed-income asset, no part of the purchase price shall, for the purposes of the trust, be deemed to be paid for the right to receive any dividends which have accrued in respect of the shares at the time of the purchase but have not then been declared, and there shall accordingly be no apportionment of the purchase price as between capital and income, nor shall any part of the dividends received by the trustee be deemed to have been received as purchase money repaid.

(7) Except as herein expressly provided, nothing in this section shall affect the rights and obligations of the trustee or of any other person in respect of apportionment of income on the sale or purchase of any asset or the transfer of it to any person beneficially entitled to it.

(8) Anything done by a trustee before the commencement of this section which would have been authorised by this section if then in force shall be deemed to have been authorised by this section.

(9) The provisions of this section shall apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument.

### **83A Examination of accounts of trust estates administered by trustee corporations**

In the case of any trust estate administered by a trustee corporation, a solicitor or accountant authorised in writing by a beneficiary shall be entitled as of right to examine at any reasonable time the accounts of that estate, and for the purpose shall have access to the trustee corporation's books and vouchers (but not the file) relating to that estate, and to the securities and documents of title held by the trustee corporation on account of that estate.

### **83B Audit of other trust estates**

Subject to the provisions of any regulations made under this Act, and unless the Court otherwise orders, the condition and accounts of any trust estate (being an estate which is not being administered by a trustee corporation) shall, on an application being made and notice of it being given in the prescribed manner by or on behalf of any trustee or beneficiary in that



estate, be investigated and audited by such solicitor or such member of the New Zealand Society of Accountants as may be agreed on between the applicant trustee and his co-trustees.

**84 Costs and testamentary expenses to be payable out of capital of settled residuary estate of deceased**

(1) (a) Where, under the provisions of the will of a person dying after the commencement of this Act (in this section referred to as the deceased) any real or personal property included either by specific or general description in a residuary gift is settled by way of succession, no part of the income of that property shall be applicable in or towards the payment of the funeral, testamentary, and administration expenses, death duties, debts, legacies, and liabilities, or of the interest (if any) on it up to the date of the death of the deceased.

(b) This subsection shall not apply to any commission which is payable to the trustee in respect of any such income or to any testamentary or administration expenses which, apart from this subsection, would be payable wholly out of income.

(2) The income of the settled property shall be applicable in priority to any other assets in payment of the interest (if any) accruing due on the funeral, testamentary, and administration expenses, death duties, debts, legacies, and liabilities after the date of the death of the deceased and up to the payment of it, and the balance of that income shall be payable to the person for the time being entitled to the income of the property.

(3) Where, after the death of the deceased, income of assets comprised in the settled property which are ultimately applied in or towards payment of the funeral, testamentary, and administration expenses, death duties, debts, legacies and liabilities, arises pending that application, that income shall, for the purposes of this section, be deemed income of the residual estate of the deceased.

(4) This section shall only affect the rights of beneficiaries under the will as between themselves, and shall not affect the rights of creditors of the deceased or limit any other powers of the trustee.

(5) The provisions of this section shall apply if and so far only as a contrary intention is not expressed in the will, and shall have effect subject to the terms of the will and of any Act as to charges on property of the deceased.

(6) Nothing in this section shall apply to any annuity which is payable out of the estate of the deceased.

**85 Application of income of settled property pending conversion**

(1) Subject to this section, where under the will of any person any real or personal property included (either by specific or general description) in a residuary gift is settled by way of succession, then, notwithstanding that the property may be of a wasting, speculative, or reversionary nature –

(a) Pending any sale, calling in, or conversion of the settled property, the whole of the net income of property actually producing income shall be applied as income and no part of it shall be appropriated to capital; and

(b) On any such sale, calling in, or conversion, or on the falling in of any reversionary property, no part of the proceeds of the sale, calling in, conversion, or falling in, shall be applied as past income.

(2) This section shall apply only in respect of the wills of persons who die after the date of the commencement of this Act.

(3) This section shall apply if and so far only as a contrary intention is not expressed in the will of the deceased, and shall have effect subject to the terms of that will.

**86 Fees and commission deemed a testamentary expense**

The fees, commission, remuneration and other charges payable to a trustee in respect of the administration of the estate of a deceased person shall be deemed to be testamentary expenses.

**87 Costs of inquiring regarding beneficiaries**

The costs, expenses and charges of the trustee of any property in respect of any inquiries made by him to ascertain the existence and identity of any person or persons entitled to any legacy, money, or distributive share in the property or otherwise incurred in relation to it shall be borne by and paid out of the legacy, money, or distributive share of the person or persons in respect of whom the inquiries were made.

**88 Life tenant to have powers of a trustee in certain cases**

(1) In any case where there is no trustee of any land, but the land is for the time being lawfully vested in any person entitled to the possession of it or to the receipt of the rents and profits from it for an estate for life, or for a term of years determinable with his life, or for any greater estate, that person may exercise all the powers conferred on a trustee by this Act, and the Court may confer on that person all the powers which it could confer on a trustee under this Act; and anything done by any such person in exercise of any such power shall have the same force and effect as if it had been done by a trustee.

(2) Nothing in this section shall authorise any such person to sell any such land, or to raise any capital money by a mortgage of it or other dealing with it, unless the money paid on the sale or the capital money so raised is paid to a trustee who is duly appointed and entitled to receive it.

**89 [Spent]**

**90 Regulations**

Cabinet may make such regulations as it thinks fit for the purposes of this Act.