

A BILL

ENTITLED

AN ACT to Make provision for the Establishment and Administration of trusts; and for connected matters.

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BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica, and by the authority of the same, as follows:—

PART I—*Preliminary*

1. This Act may be cited as the Trusts Act, 2018.

Short title.

2.—(1) In this Act, unless the context otherwise requires—

Interpretation.

“beneficiary” means a person, a charitable organization, or another trust, entitled to benefit under a trust or in whose favour a power to distribute trust property may be exercised;

“breach of trust” means a breach of any duty imposed on a trustee by this Act or by the terms of a trust, or otherwise imposed upon him as a trustee by any rule of law or equity;

“charitable organization” means—

- (a) a charitable trust; or
- (b) any institution, whether incorporated or not, which—
 - (i) is established for a charitable purpose exclusively;
 - (ii) is intended to and does operate for the public benefit; and
 - (iii) has no part of its net income or assets enuring to the personal benefit of any governing board member or settlor of the organization, or of any other private individual,

but shall not include an excluded body;

“charitable purpose” has the meaning assigned to it in section 3 of the *Charities Act*;

“charitable trust” means a trust that—

- (a) is established for a charitable purpose exclusively;
- (b) is established under a deed of trust that requires the trustees of the trust to apply all of the property (both real and personal) of the trust in furtherance of that purpose except, for moneys expended in the management of the trust; and
- (c) has no part of its net income or assets enuring to the personal benefit of any governing board member or settlor of the organization, or of any other private individual;

“child” means, subject to the terms of the trust—

- (a) a person who is under the age of eighteen years;
or
- (b) a person who is under the age of twenty-one years where that person is the subject of a court order requiring the payment of sums for maintenance or education in keeping with the *Law Reform (Age of Majority) Act*;

“corporate trustee” means a trustee which is a body corporate;

“Court” means the Supreme Court;

“debtor” in relation to—

- (a) an individual, includes an individual who has been adjudicated bankrupt under the *Insolvency Act*;
- (b) a body corporate, includes a body corporate in respect of which a receiver (interim or otherwise) has been appointed or which (except for the sole purpose of solvent amalgamation, reconstruction or winding up) has passed a special resolution requiring it to be wound up voluntarily or a body corporate that is otherwise insolvent;

“disposition” includes any means by which property or any legal or equitable interest in property is created, transferred, dealt with, extinguished or charged, and related expressions shall be construed accordingly;

“enforcer” means a person appointed to ensure the execution of the non-charitable purposes of a trust in accordance with section 16;

“excluded body” means—

- (a) a political party or body that promotes a political party or a candidate of a political party;
- (b) a trade union;

- (c) a representative body of employers;
- (d) a chamber of commerce or other body that promotes the interests of commercial entities; or
- (e) a body that promotes purposes that are—
 - (i) unlawful;
 - (ii) prejudicial to public order or public safety;
 - (iii) in support of terrorism or terrorist activities, whether those activities occur in Jamaica or outside of Jamaica; or
 - (iv) for the benefit of an organization, being a member of which is unlawful;

“foreign heirship right” means any right, claim or interest arising under the law of a foreign jurisdiction in, against or in the property of any person arising, accruing or existing in consequence of, or in anticipation of, that person’s death other than a right, claim or interest created by will or expressed in any other voluntary disposition by that person or resulting from an express limitation in the disposition of the property to that person;

“foreign trust” means a trust, the proper law of which, is not the law of Jamaica;

“formalities”, in relation to disposition of property—

- (a) means any documentary and other action required generally by the law of the jurisdiction in question for the disposition of property, without regard to—
 - (i) the fact that the particular disposition is made in trust;
 - (ii) the terms of the trust;

(iii) the circumstances of the parties to the disposition; or

(iv) any other particular circumstances; but

(b) includes any special formality required by reason that the party effecting the disposition is a child, a person under legal disability or a body corporate;

“functions” includes powers and duties;

“governing board member”, in relation to a charitable organization, means—

(a) a trustee, director or other person who is a member of the governing body (by whatever name called) which is responsible for the management of the charitable organization, whether or not he is an employee of the charitable organization; and

(b) the secretary of the charitable organization;

“guardian” in relation to a child, includes any person who, in the opinion of the Court, having cognizance of any case in relation to the child or in which the child is concerned, has for the time being the charge of or control over the child;

“instrument in writing” means any executed document including, a will or codicil;

“insurance” includes assurance;

“Jamaica trust” means a trust the proper law of which is the law of Jamaica;

“letter of wishes” shall be construed in accordance with section 37(3);

“personal relationship” includes—

(a) every form of relationship by blood, adoption, marriage or cohabitation regardless of whether the law of any jurisdiction recognizes the validity, legitimacy or existence of the relationship;

(b) a former personal relationship which has terminated in law or in fact,

and a personal relationship also exists between two persons if a personal relationship exists between each of them and a third person;

“personal representative” means the executor or administrator of the estate of a deceased person;

“profit” includes gain or advantage;

“proper law” has the meaning assigned to it in section 8;

“property” includes—

- (a) real and personal property of any description, wherever situate, and any share, right or interest therein, any tangible or intangible property and any debt or chose in action;
- (b) rights and interests whether vested, contingent, defeasible or future;

“protector” means a person appointed a protector under the terms of a trust and capable of enforcing the trust, whether or not he has any other function conferred upon him in relation to the trust;

“purpose” means any purpose whatsoever, whether or not involving the conferral of any benefit on any person, and includes the holding or ownership of property and the exercise of functions;

“settlor” means a person who directly or indirectly provides trust property or makes a testamentary disposition on or to a trust;

“terms of a trust” means the written or oral terms of a trust and any other terms applicable under its proper law;

“third party” means a person other than a settlor, trustee, enforcer, protector, trust official or beneficiary;

“trust” includes—

- (a) the trust property; and
- (b) the functions, interests and relationships under a trust; “trustee” means a person to whom section 4 (1) applies and includes a corporate trustee, a receiver or the Government Trustee when acting as trustee pursuant to the *Insolvency Act* and the Administrator-General when acting as trustee pursuant to the *Administrator-General Act*;

“trust official” means a person having a function or holding an office in respect of the trust other than a settlor, trustee, enforcer, protector or beneficiary;

“trust property” means property held on trust;

“unit trust” means a trust established for the purpose, or having the effect, of providing for persons having funds available for investment, facilities for the participation by them as beneficiaries under the trust in any profits or income arising from the acquisition, holding, management or disposal of property.

3.—(1) Subject to section 96, and except where provision is made to the contrary, this Act applies to trusts created before or after the commencement of this Act. Application of Act.

(2) This Act applies to both a Jamaica trust and a foreign trust except where stated otherwise.

PART II—*Nature of Trusts*

4.—(1) Subject to the provisions of this Act, a trust exists if a person (a “trustee”) holds or has vested in him, or is deemed to hold or have vested in him, property which does not form or which have ceased to form part of his own estate— Existence of trust.

- (a) for the benefit of another person (a beneficiary), whether or not yet ascertained or in existence; or

- (b) for any purpose, other than a purpose for the benefit only of the trustee,

and shall include the characteristics specified in subsection (2).

(2) A trust shall include the following characteristics—

- (a) the property of the trust constitute a separate fund and are not a part of the estate of the trustee;
- (b) title to the property of the trust is held in the name of the trustee or in the name of another person on behalf of the trustee;
- (c) the trustee has the power and the duty to manage, employ or dispose of the property of the trust in accordance with the terms of the trust and the special duties imposed upon him by law; and
- (d) the trustee is accountable for the management and administration of the property of the trust.

Validity of trust.

5.—(1) Subject to the provisions of this Act, a trust is valid and enforceable in Jamaica in accordance with its terms.

(2) A trust is invalid and unenforceable in Jamaica to the extent that—

- (a) it purports to do anything contrary to the laws of Jamaica;
- (b) it confers or imposes any right or function the exercise or discharge of which would be contrary to the laws of Jamaica;
- (c) it has no beneficiary identifiable or ascertainable in accordance with section 13(1), unless it—
 - (i) is for a charitable purpose; or
 - (ii) is for a non-charitable purpose in relation to which it is valid and enforceable by virtue of section 16(1); or
- (d) the Court declares that—
 - (i) it was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty;

- (ii) the property of the trust, or part of it, are derived from the proceeds of a criminal offence for which the settlor has been convicted in Jamaica or in any other jurisdiction, so however, if the Court determines that a portion of the property of the trust are the proceeds of a criminal offence, the Court may declare the trust invalid only with respect to that property and the Court may declare what property is to be held subject to the trust;
- (iii) it is immoral or contrary to public policy;
- (iv) its terms are so uncertain that its performance is rendered impossible; or
- (v) the settlor was, at the time of its creation, incapable of creating such a trust.

(3) Where only some of the terms of a trust are invalid—

- (a) if the terms cannot be separated, the trust is invalid;
- (b) if the terms can be separated, the Court may declare that the trust is valid as to the terms which are valid.

(4) Where a trust is partially invalid, the Court may declare what property is and what property is not to be held subject to the trust.

(5) Property in relation to which a trust is invalid shall, subject to any order of the Court, be held by the trustees on trust for the settlor absolutely or, if he is dead, for his personal representative.

(6) An application to the Court under this section may be made by any person mentioned in section 64(2).

6.—(1) Subject to the terms of a trust, all questions arising in relation to a Jamaica trust or any disposition of property to or upon such a trust, including, without limitation, questions as to—

Application of law to questions of validity.

- (a) the capacity of the settlor;

- (b) the validity, interpretation or effect of the trust or disposition or any variation or termination thereof;
- (c) the administration of the trust, whether it is conducted in Jamaica or elsewhere, including, without limitation, questions as to the functions, appointment and removal of trustees, protectors and enforcers;
- (d) the existence and extent of any functions in respect of the trust, including, without limitation, powers of variation, revocation and appointment and the validity of the exercise of any such function;
- (e) the distribution of the trust property,

shall be determined according to the laws of Jamaica without reference to the laws of any other jurisdiction.

(2) For the purposes of subsection (1), the laws of Jamaica do not include the Jamaican rules of private international law, except those set out in this section and sections 8 and 9.

(3) Subsection (1)—

- (a) shall not validate any disposition of property which is neither owned by the settlor nor the subject of a power of disposition vested in the settlor;
- (b) shall not affect the recognition of the law of any other jurisdiction in determining whether the settlor is the owner of any property or the holder of any such power;
- (c) shall not, in determining the capacity of a body corporate, affect the recognition of the law of its place of incorporation;
- (d) shall not affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property;
- (e) subject to subsection (4), does not validate any—
 - (i) trust or disposition of real property situate in another jurisdiction which is invalid under the law of that jurisdiction; and

- (ii) testamentary disposition which is invalid under the law of the testator's domicile at the time of his death.

(4) No Jamaica trust and no disposition of property to or upon such a trust, is void, voidable, liable to be set aside, invalid or subject to any implied condition, nor is the capacity of any trust official or third party to be subjected to any obligation or liability or deprived of any right, claim or interest, by reason that—

- (a) the laws of any other jurisdiction prohibit or do not recognize the concept of a trust; or
- (b) the trust or disposition—
 - (i) avoids or defeats or potentially avoids or defeats rights, claims, interests, obligations or liabilities conferred or imposed by the law of any other jurisdiction on any person—
 - (A) by reason of a personal relationship to a settlor or beneficiary; or
 - (B) by way of foreign heirship rights; or
 - (ii) contravenes or potentially contravenes any rule of law, judgment, order or action of any other jurisdiction intended to recognize, protect, enforce or give effect to any such rights, claims, interests, obligations or liabilities.

(5) Notwithstanding any law for the time being in force in relation to the recognition or enforcement of judgments, no judgment or order of a court of a jurisdiction outside Jamaica shall be recognized or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that—

- (a) it is inconsistent with this Act; or
- (b) the Court so orders for the purpose of protecting the interests of the beneficiaries or in the interest of the proper administration of the trust.

(6) This section applies—

- (a) whenever the trust or disposition arose or was made;
- (b) notwithstanding any other provision of this Act.

Reservation
or grant of
certain
powers does
not invalidate
trust.

7.—(1) A trust is not invalidated by the reservation or grant by the settlor (whether to the settlor or any other person) of all or any of the following powers or interests—

- (a) a power to revoke, vary or amend the terms of the trust or any trusts or functions arising thereunder, in whole or in part;
- (b) a power to advance, appoint, pay or apply the income or capital of the trust property or to give directions for the making of any such advancement, appointment, payment or application;
- (c) a power to act as, or give direction as to the appointment or removal of, a director or other officer of any body corporate wholly or partly owned as trust property;
- (d) a power to give directions to the trustees in connection with the purchase, retention, sale, management, lending or charging of the trust property or the exercise of any function arising in respect of such property;
- (e) a power to appoint or remove any trust official;
- (f) a power to appoint or remove any investment manager or investment adviser or any other professional person acting in relation to the affairs of the trust or holding any trust property;
- (g) a power to change the proper law of the trust or the forum for the administration of the trust;
- (h) a power to restrict the exercise of any function of a trustee by requiring that it may only be exercised with the consent of the settlor or any other person identified in the terms of the trust; and

(i) a beneficial interest in the trust property.

(2) The reservation, grant or exercise of a power or interest referred to in subsection (1) does not—

- (a) constitute the holder of the power or interest of a trustee;
- (b) subject to the terms of the trust, impose any fiduciary duty on the holder; or
- (c) of itself render any trustee liable in respect of any loss to the trust property.

(3) A trustee who acts in compliance with the valid exercise of any power referred to in subsection (1) does not by reason only of such compliance, act in breach of trust.

8. Subject to sections 9 and 68, the proper law of a trust is—

Proper law
of trust.

- (a) the law chosen by the settlor to be the proper law, the choice being expressed or implied in the terms of the trust; or
- (b) if no law is so chosen, the law with which the trust has its closest connection at the time of its creation, and in determining the law with which a trust has its closest connection, regard shall be had in particular to—
 - (i) the place of administration of the trust designated by the settlor;
 - (ii) the situs of the property of a trust;
 - (iii) the place of residence or business of the trustee; and
 - (iv) the objects of the trust and the places where they are to be fulfilled.

9.—(1) Where the terms of a trust provide for the proper law of the trust to be changed from the law of another jurisdiction to the law of Jamaica, and *vice versa*, the change is valid and effective only if the new proper law recognizes the validity of the trust and the respective interests of the beneficiaries.

Change of
proper law.

(2) The terms of a trust may provide—

- (a) for the severable aspects of the trust, particularly the administration of the trust, to be governed by a different law from the proper law of the trust; and
- (b) for the law governing a severable aspect of the trust to be changed from the law of Jamaica to the law of another jurisdiction and *vice versa*.

(3) Subsection (2) is without prejudice to the powers of the Court under Part V.

(4) When the proper law of a trust or the law governing the severable aspects of a trust is changed from the law of Jamaica to the law of another jurisdiction, no provision of the law of Jamaica operates to render the trust void, invalid or unlawful or to render void, invalid or unlawful any function conferred on the trustee under the law of that other jurisdiction.

(5) Where the proper law of a trust or the law governing the severable aspects of a trust is changed from the law of another jurisdiction, to the law of Jamaica, no provision of that other jurisdiction operates to render the trust void, invalid or unlawful or to render void, invalid or unlawful any functions conferred on the trustee under the law of Jamaica.

Creation and Duration of Trust and Beneficiaries of Trust

Creation of trust.

10.—(1) Subject to subsections (2), (3), (4) and (5), a trust may be created—

- (a) by an oral declaration;
- (b) by an instrument in writing;
- (c) by conduct; or
- (d) in any other manner whatsoever.

(2) A unit trust may be created only by an instrument in writing.

(3) A trust of real property situate in Jamaica may be created only by an instrument in writing.

- (4) Nothing in subsection (3)—
- (a) applies in relation to a trust of real property created before the commencement of this Act; or
 - (b) affects the creation or operation of a resulting, an implied or constructive trust.
- (5) No technical expressions are needed for the creation of a trust.

11.—(1) Unless the terms provide otherwise, a trust (whether established before or after the commencement of this Act) may continue in existence for an unlimited period. Duration of trust.

(2) No rule against perpetuities or excessive accumulations shall apply to a trust or to any advancement, appointment, payment or application of property from a trust.

(3) Except where the terms of a trust provide to the contrary, any advancement, appointment, payment or application of property from that trust to another trust shall be valid even if that other trust may continue after the date by which the first trust shall terminate.

12.—(1) Any property may be held on trust. Property that may be held on trust.

(2) A trustee may accept property to be held on trust from any person. Property that may be held on trust.

13.—(1) A beneficiary shall be— Beneficiaries of a trust.

- (a) identified by name; or
- (b) ascertainable by reference to—
 - (i) a class; or
 - (ii) a relationship to another person, whether or not living at the time of the creation of the trust or at the time by reference to which, under the terms of the trust, members of a class are to be determined.

(2) The terms of a trust may provide for the addition or removal of a person as beneficiary or for the exclusion from benefit of a beneficiary either revocably or irrevocably.

(3) The terms of a trust may impose an obligation on a beneficiary as a condition of a benefit.

(4) A settlor or trustee of a trust may also be a beneficiary thereof.

Disclaimer of
beneficial
interest.

14.—(1) Subject to the terms of the trust, a beneficiary may disclaim his interest or any part of it, whether or not he has received any benefit from it.

(2) A disclaimer shall be in writing and, subject to the terms of the trust may—

- (a) be temporary; and
- (b) if the disclaimer so provides, be revoked in the manner and circumstances specified thereby.

(3) A disclaimer is not effective until received by a trustee.

Nature of
beneficial
interest.

15. The interest of a beneficiary is personal property and, subject to the terms of the trust, may be dealt with or charged accordingly.

Purpose of Trust, Enforcer and Protector of Trust

Trusts for
non-
charitable
purposes;
appointment
of enforcer,
etc.

16.—(1) Subject to section 95(2), a trust is valid and enforceable where it is created by an instrument in writing for, or including a non-charitable purpose, and the terms of the trust provide for—

- (a) the appointment of an enforcer in relation to the non-charitable purposes of the trust; or
- (b) the appointment of a new enforcer in relation to the non-charitable purposes of the trust at any time when there is no enforcer.

(2) The terms of a trust for non-charitable purposes may provide for the addition, variation or removal of a non-charitable purpose of the trust or for the exclusion of a non-charitable purpose from the objects of the trust.

(3) It is the fiduciary duty of an enforcer to enforce the trust in relation to its non-charitable purposes.

(4) The appointment of a person as enforcer of a trust has no effect if the person is also a trustee of the trust.

(5) An enforcer may resign his office by delivering a written notice of resignation to the trustees.

(6) Subject to subsection (7), a resignation takes effect —

- (a) on delivery of the notice; or
- (b) on such later date or on the happening of such later event as may be specified therein.

(7) A resignation given to facilitate a breach of trust or a breach of the fiduciary duty of the enforcer has no effect.

(8) An enforcer ceases to be the enforcer of a trust immediately on—

- (a) his removal from office by the Court;
- (b) his resignation becoming effective;
- (c) the coming into effect of a provision in the terms of the trust under or by which he is removed from office or otherwise ceases to hold office; or
- (d) his appointment as a trustee of the trust.

(9) A trustee of a trust which includes non-charitable purposes which are valid and enforceable by virtue of subsection (1) shall, at any time when there is no enforcer in relation to those purposes, take such steps as may be necessary to secure the appointment of an enforcer.

(10) Where the trustee of a trust referred to in subsection (1) has reason to believe that the enforcer in relation to those purposes—

- (a) is unwilling or is refusing to act;
- (b) is bankrupt or otherwise unfit to act;
- (c) is incapable of acting; or
- (d) is a corporate enforcer that has become insolvent,

the trustee shall apply to the Court for the removal of the enforcer and the appointment of a replacement.

(11) For the avoidance of doubt, the settlor or a body corporate can be appointed as an enforcer.

Duty of enforcer not to profit from his office.

17.—(1) An enforcer shall not—

- (a) derive, directly or indirectly, any profit from his appointment;
- (b) cause or permit any other person to so derive any such profit; or
- (c) on his own account, enter into any transaction with the trustees or relating to the trust property which may result in any such profit, except—
 - (i) with the approval of the Court;
 - (ii) as permitted by the provisions of this Act; or
 - (iii) as expressly provided by the terms of the trust.

(2) An enforcer is entitled to be paid (if provided for by the terms of the trust), and shall be reimbursed, by the trustees from the trust property for all expenses and liabilities properly incurred in connection with the trust.

Protector of trusts.

18.—(1) An instrument creating a trust may contain provisions by virtue of which the exercise by the trustees of any of their powers and discretions shall be subject to the prior consent of the settlor or some other person, whether named as protector, nominator, committee or any other name.

(2) If so provided in the instrument creating the trust, the trustees shall not be liable for any loss caused by their actions if the prior consent was given.

(3) There may be conferred on the settlor or some other person, whether named as protector, nominator, committee or by any other name, by the instrument creating the trust, any powers (and without limiting the foregoing power), to do any one or more of the following—

- (a) determine the law of which jurisdiction shall be the proper law of the trust;
- (b) change the forum of administration of the trust;
- (c) remove the trustees;

- (d) appoint new or additional trustees;
- (e) exclude any beneficiary as beneficiary of the trust;
- (f) include any person as a beneficiary of the trust in substitution for or in addition to any existing beneficiary of the trust; and
- (g) withhold consent from specified actions of the trustees either conditionally or unconditionally.

(4) A person exercising any of the powers specified in subsections (3)(a) to (c) and (f) shall not by virtue only of the exercise of the power be deemed to be a trustee and, unless otherwise provided in the instrument creating the trust, is not liable to the beneficiaries for the *bona fide* exercise of the power.

Trustees

19.—(1) Subject to subsection (2), the number of trustees of a trust shall not be less than two, unless— Number of trustees.

- (a) only one trustee was originally appointed;
- (b) a corporate trustee resident in Jamaica is acting;
- (c) the Administrator General is acting; or
- (d) the terms of the trust provide otherwise.

(2) A trust shall not fail on the ground that there is no trustee or less than the number required in subsection (1).

20. Subject to the terms of the trust, where the number of trustees falls below the number required by section 19(1)— Position of continuing trustees on reduction in number of trustees.

- (a) the necessary number of additional trustees shall be appointed; and
- (b) until the required number is reached, the existing trustee shall act only to preserve the trust property.

21.—(1) Where—

- (a) the terms of a trust contain no provision for the appointment of a new or additional trustee; Appointment of new or additional trustee.

- (b) a provision for the appointment of a new or additional trustee has lapsed or failed;
- (c) the person with power to appoint a new or additional trustee is not capable of exercising that power; or
- (d) the Court deems it expedient,

a new or additional trustee may be appointed by—

- (i) the existing trustees;
- (ii) the last remaining trustee;
- (iii) the personal representative or receiver of the last remaining trustee; or
- (iv) the Court.

(2) Subject to the terms of a trust, a trustee appointed under this section has the same functions and may act in all respects, as if he had been originally appointed a trustee.

(3) A trustee with power to appoint a new or additional trustee who fails to exercise the power may be removed from office by the Court.

(4) On the appointment of a new or additional trustee, anything necessary to vest the trust property in him jointly with his co-trustees (if any) shall be done.

Powers of
new trustee
appointed by
court.

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

Nature of
trustee's
interest.

23.—(1) Subject to subsection (2)—

- (a) the interest of a trustee in the trust property is limited to that which is necessary for the proper performance of the trust; and
- (b) the trust property does not form part of the trustee's estate.

(2) Where a trustee of a trust is also a beneficiary thereof, subsection (1) does not apply to his interest as a beneficiary.

24.—(1) A person appointed as trustee need not accept the appointment, but he shall be deemed to have done so if he knowingly intermeddles with the trust or its affairs. No renunciation after acceptance.

(2) A person appointed as trustee may, before acceptance (actual or deemed)—

- (a) disclaim the appointment by notice in writing to the settlor or other trustees; or
- (b) if the settlor is dead or cannot be found, and there are no other trustees, apply to the Court for relief from the appointment, whereupon the Court may make such order as it thinks fit, but if the person appointed does not act under subsection (2)(a) or (b) within a reasonable period of time of becoming aware of the appointment, he shall be deemed to have accepted it.

25.—(1) Unless the terms of the trust provide otherwise, a trustee other than a sole trustee may resign his office by delivering a written notice of resignation to his co-trustees. Resignation or removal of trustees.

(2) Subject to subsection (3) and to the terms of the trust, a resignation under subsection (1) takes effect—

- (a) on delivery of the notice; or
- (b) on such later date or on the happening of such later event as may be specified therein.

(3) A resignation under subsection (1) has no effect if it—

- (a) is given to facilitate a breach of trust; or
- (b) would result in there being no trustee or less than the number required by section 19.

(4) A trustee ceases to be a trustee immediately on—

- (a) his removal from office by the Court;
- (b) subject to subsection (3), his resignation taking effect; or
- (c) the coming into effect of, or the exercise of a power under a provision in the terms of the trust under or by which he is removed from or otherwise ceases to hold his office.

(5) A person who ceases to be a trustee under this section shall do everything necessary to vest the trust property in the new or continuing trustee.

Trustee's Statutory Duty of Care

Trustee's
statutory
duty of care.

26.—(1) In exercising any power, carrying out any duty or doing any act, a trustee shall exercise such care and skill as is reasonable in the circumstances, having regard in particular—

- (a) to any special knowledge or experience that he has or holds himself out as having; and
- (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that may reasonably be expected of a person acting in the course of that kind of business or profession.

(2) This section shall apply in relation to trusts whether created before, on or after the date of commencement of this Act.

General
fiduciary
duties.

27.—(1) A trustee shall, in the exercise of his functions, observe the utmost good faith and act in a prudent and responsible manner.

(2) A trustee shall execute and administer the trust and shall exercise his functions under it—

- (a) in accordance with the provisions of this Act; and
- (b) subject to those provisions—
 - (i) in accordance with the terms of the trust; and
 - (ii) only in the interests of the beneficiaries or the advancement of the charitable or non-charitable purpose, as the case may be.

Duty to
preserve trust
property.

28.—(1) A trustee shall, subject to the terms of the trust and to the provisions of this Act—

- (a) ensure that the trust property is held by or vested in him or is otherwise under his control; and
- (b) preserve and enhance, so far as is reasonable, the value of the trust property.

(2) A trustee shall not dispose of trust property, or any part of it in such a manner as to frustrate or adversely affect the purpose of the trust and the interests of the beneficiaries.

29. A trustee shall not—

- (a) derive, directly or indirectly, any profit from his trusteeship;
- (b) cause or permit any other person to so derive any profit from his trusteeship; or
- (c) on his own account enter into any transaction—
 - (i) with his co-trustees;
 - (ii) relating to the trust property, which may result in any such profit, except—
 - (A) with the approval of the Court;
 - (B) as permitted by the provisions of this Act; or
 - (C) as expressly provided by the terms of the trust.

Duty of trustee not to profit from trusteeship.

30. A trustee shall keep accurate accounts and records of his trusteeship.

Duty to keep accounts.

31.—(1) A trustee shall, at all reasonable times, at the written request of—

Duty to give information.

- (a) an enforcer; or
- (b) subject to the terms of the trust—
 - (i) a beneficiary (including a charitable organization named in the trust);
 - (ii) the settlor;
 - (iii) the protector; or
 - (iv) a trust official, provide full and accurate information as to the state and amount of the trust property.

(2) Where the terms of the trust prohibit or restrict the provision of any information described in subsection (1), a trustee, an enforcer, a

protector, a beneficiary, a trust official or a settlor may apply to the Court for an order authorizing or requiring the provision of the information.

(3) The person applying to the Court for an order under subsection (2) shall show that the provision of the information is necessary or expedient for—

- (a) the proper disposal of any matter before the court;
- (b) the protection of the interests of any beneficiary; or
- (c) the proper administration or enforcement of the trust.

Duty to keep trust property separate.

32. A trustee shall keep trust property separate from the trustee's own property and separately identifiable from any other property of which he is a trustee.

Duty of co-trustees to act together.

33.—(1) All the trustees of a trust shall, subject to the terms of the trust, join in the execution of the trust.

(2) Subject to subsection (3), no function conferred on trustees shall be exercised unless all the trustees agree on its exercise.

(3) The terms of a trust may empower the trustees to act by a majority.

(4) A trustee who dissents from a decision of the majority may require his dissent to be recorded in writing.

(5) Notwithstanding the provisions of subsections (1) to (4), but subject to subsection (6), in the case of a trust in respect of which the Administrator-General has been appointed to act as trustee—

- (a) the Administrator-General shall act alone in the execution of the trust;
- (b) the functions conferred on the trustees shall be exercised by the Administrator-General without the agreement of any other trustee; and
- (c) the functions of any trustee other than the Administrator-General shall cease,

during the period of the appointment of the Administrator-General.

(6) Any provision of subsection (5) (a) to (c) may be excluded in any particular case by—

- (a) the Administrator-General in writing;
- (b) the Court, at the time of appointment of the Administrator-General; or
- (c) the Court, at any other time.

34.—(1) Where a trust has—

Impartiality
of trustees.

- (a) more than one beneficiary or a charitable or non-charitable purpose; or
- (b) a beneficiary and a charitable or non-charitable purpose, the trustees, subject to the terms of the trust and to subsection (2), shall be impartial and shall not execute the trust for the advantage of one at the expense of another.

(2) Subsection (1) does not prejudice the exercise of a discretion conferred on a trustee by the terms of the trust.

Powers of Trustee

35.—(1) A trustee may, at the expense of the trust property, consult professional persons in relation to the affairs of the trust.

Consultation
by trustees.

(2) The terms of the trust may require a trustee to consult or obtain the consent of another person before exercising any function.

(3) A person shall not, by virtue of being so consulted or giving or refusing consent—

- (a) be deemed to be a trustee; or
- (b) unless the terms of the trust so provide, be under any fiduciary duty to the beneficiaries or the settlor.

36.—(1) A trustee shall not delegate his functions unless permitted to do so—

Delegation by
trustees.

- (a) by this Act or by the terms of the trust; or
- (b) in the case of the Government Trustee, by the provisions of the *Insolvency Act*.

(2) Except where the terms of the trust specifically provide to the contrary, a trustee may—

- (a) delegate the management of trust property to, and appoint, investment managers whom the trustee reasonably considers to be competent and qualified to manage the investment of the trust property;
- (b) appoint professional persons to act in relation to the affairs of the trust or to hold any trust property; and
- (c) authorize any such manager or person to retain any commission or other payment usually payable for services of the description rendered.

(3) A trustee who, without any breach of section 26(1) and without prejudice to section 45, makes or permits the continuation of a delegation or appointment under subsection (2), is not liable for any loss to the trust arising from the delegation or appointment.

Non-disclosure of deliberations or letters of wishes.

37.—(1) A trustee is not, subject to the terms of the trust and to any order of the Court, obliged to disclose—

- (a) documents which reveal—
 - (i) his deliberations as to how he should exercise his functions as trustee;
 - (ii) the reasons for any decision made in the exercise of those functions;
 - (iii) any material upon which such a decision was or might have been based;
- (b) any letter of wishes.

(2) The person applying to the Court for an order under this section for the disclosure of any document shall show that the disclosure is necessary or expedient for the—

- (a) proper disposal of any matter before the court;
- (b) protection of the interests of any beneficiary; or
- (c) proper administration or enforcement of the trust.

(3) In this section “letter of wishes” means a letter or other document indicating how the settlor or beneficiary wants the trustees to exercise any of their functions.

38.—(1) Subject to the terms of the trust and subject to the duties of the trustee under this Act, a trustee shall, in relation to the trust property, have all the same powers as a natural person acting as the beneficial owner of such property. Powers of trustees re trust property.

(2) The terms of a trust may require a trustee to obtain the consent of some other person before exercising a power or a discretion.

(3) A person who consents as provided in paragraph (2) shall not by virtue of so doing be deemed to be a trustee.

39.—(1) A trustee may sue and be sued in his capacity as trustee. Power to sue and compromise.

(2) A trustee may, without the sanction of the Court, compromise or settle any action or claim brought by or against the trustee or in any way relating to the trust or the trust property.

40.—(1) Subject to subsection (11), unless the terms of the trust otherwise provide, a trustee may, by a power of attorney, delegate for a period not exceeding three years, the performance of any trust or function vested in him as trustee, alone or jointly. Powers of attorney.

(2) A power of attorney under this section is renewable.

(3) A trustee who delegates a trust or function by a power of attorney under this section is referred to in this section as the “donor” and the person to whom the trust or function is delegated is referred to as the “donee”.

(4) The persons who may be donees include corporate trustees but may not (unless that person is a corporate trustee) be the only other co-trustee of the donor.

(5) Without prejudice to any other applicable law, a power of attorney under this section shall be in writing and shall—

- (a) if the donor is an individual, be signed by him, or by his direction and in his presence, in the presence of a witness, who shall also sign; or

- (b) if the donor is a corporate trustee, be executed by the donor in accordance with its articles of incorporation or its other constituent documents.

(6) Without prejudice to any other applicable law, within seven days of giving a power of attorney under this section, the donor shall give written notice thereof to—

- (a) every other person who, under the terms of the trust, has power (alone or jointly) to appoint a new trustee; and
- (b) every co-trustee.

(7) The notice under subsection (6) shall state the—

- (a) date of commencement and duration of the power of attorney;
- (b) name and address of the donee;
- (c) reason for giving the power of attorney; and
- (d) trust or function delegated.

(8) Failure to comply with subsection (6) or (7) does not of itself, in favour of a person dealing with the donee, invalidate anything done by the donee.

(9) The donor is bound by and liable for all acts and defaults of the donee, done or purportedly done under the power of attorney as if they were his own acts and defaults.

(10) For the purpose of performing the trust or function delegated, the donee may exercise any function conferred on the donor as trustee by law or by the terms of the trust, with the exception of the power to give powers of attorney under this section.

(11) The period referred to in subsection (1) does not apply to a power of attorney given as part of any arrangement—

- (a) for the subordination of debts; or
- (b) to confer security over the trust property.

(12) In subsection (11), “security” includes any mortgage, charge, hypothecation, lien or security interest as defined in section 2 of the *Security Interests in Personal Property Act*.

41. Subject to the terms of the trust, a trustee may, without the consent of any beneficiary, appropriate trust property in or towards satisfaction of the interest of a beneficiary in such manner and in accordance with such valuation as he thinks fit.

Power to appropriate.

42.—(1) A trustee may—

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

Power to insure.

(2) In the case of property held on a bare trust, the power to insure is subject to any direction given by the beneficiary or each of the beneficiaries—

- (a) that any property specified in the direction is not to be insured; or
- (b) that any property specified in the direction is not to be insured except on such conditions as may be so specified.

(3) If a direction under subsection (2) is given, the power to insure, so far as it is subject to the direction, ceases to be a delegable function for the purposes of section 36.

(4) For the purposes of this section—

- (a) property is held on a bare trust if it is held on trust for—
 - (i) a beneficiary who is of full age and capacity and absolutely entitled to the property subject to the trust; or
 - (ii) beneficiaries each of whom is of full age and capacity and who (taken together) are absolutely entitled to the property subject to the trust; and
- (b) “trust funds” means any income or capital funds of the trust.

(5) This section shall apply in relation to trusts whether created before, on or after the enactment of this Act.

43. A corporate trustee may—

- (a) act in connection with a trust by a resolution of its board of directors or other governing body; or

Corporate trustee may act by resolution.

- (b) by such resolution, appoint an officer or employee or a committee of officers or employees or both, to act on its behalf in connection with the trust.

Remuneration and Liability of Trustee

Remuneration
and expenses
of trustee,
etc.

44.—(1) Subject to the terms of the trust, a trustee shall be entitled to charge and be paid all usual professional fees for services rendered in the execution, administration and maintenance of the trust and to be reimbursed for the trustee's proper expenses incurred in carrying out his duties.

(2) A trustee or former trustee claiming to be entitled to any fees and expenses under subsection (1), may apply to the Court for an order which provides that the trustee or former trustee with a first and paramount charge over the trust property in an amount equal to all outstanding fees and expenses.

Liability for
breach of
trust.

45.—(1) Subject to the provisions of this Act and to the terms of a trust, a trustee who commits or concurs in a breach of trust is liable for—

- (a) any loss or depreciation in value of the trust property resulting from the breach; and
- (b) any profit which would have accrued to the trust had there been no breach.

(2) A trustee may not set off a profit accruing from one breach of trust against a loss or depreciation in value resulting from another.

(3) Subject to subsection (6), a trustee is not liable for a breach of trust committed by another person prior to his appointment.

(4) A trustee is not liable for a breach of trust committed by a co-trustee unless—

- (a) he becomes or ought to have become aware of the breach or of the intention of his co-trustee to commit the breach; and
- (b) he actively conceals the breach or intention, or fails within a reasonable time to take proper steps to protect or restore the trust property or to prevent the breach.

(5) Where trustees are liable for a breach of trust, they are liable jointly and severally.

(6) A trustee who becomes aware of a breach of trust to which subsection (3) applies shall take all reasonable steps to have the breach remedied.

(7) The terms of a trust may not—

- (a) relieve a trustee of liability for a breach of trust arising from his own fraud, willful misconduct or gross negligence; or
- (b) grant the trustee any indemnity against the trust property in respect of any such liability.

(8) For the avoidance of doubt and without prejudice to any other provision of this Act—

- (a) subsection (7) applies to a trust created before or after the commencement of this Act; and
- (b) a term of a trust is invalid to the extent that it purports to—
 - (i) relieve a trustee of liability for a breach of trust arising from his own fraud, willful misconduct or gross negligence; or
 - (ii) grant him any indemnity against the trust property in respect of any such liability.

46.—(1) A beneficiary may—

- (a) relieve a trustee of liability to him for any breach of trust;
- (b) indemnify a trustee against liability for any breach of trust.

Beneficiary may relieve or indemnify trustee.

(2) Subsection (1) shall not apply if the beneficiary—

- (a) is a minor or person under a legal disability;
- (b) does not have full knowledge of all the material facts; or
- (c) is improperly induced by the trustee to act under subsection (1).

47.—(1) A trustee is not, in the absence of fraud, affected by notice of any instrument, matter, fact or other thing in relation to a trust if he

Trustees of more than one trust.

obtained notice of it by reason of his acting or having acted for the purposes of another trust.

(2) A trustee of a trust shall disclose to his co-trustees any interest which he has as trustee of another trust if any transaction in relation to the first mentioned trust is to be entered into with the trustees of the other trust.

Dealings by
trustees with
third parties.

48.—(1) Subject to subsection (3), where, in a transaction or matter affecting a trust, a trustee informs a third party that he is acting as trustee or the third party is otherwise aware of the fact, the trustee does not incur any personal liability and a claim by the third party in respect of the transaction or matter extends only to the trust property.

(2) If the trustee fails to inform the third party that he is acting as trustee and the third party is otherwise unaware of the fact—

- (a) he incurs personal liability to the third party in respect of the transaction or matter; and
- (b) he has a right of indemnity against the trust property in respect of his personal liability, unless he acted in breach of trust.

(3) Nothing in this section prejudices a trustee's liability for breach of trust or any claim for breach of warranty of authority.

(4) This section applies to a transaction notwithstanding the *lex causae* of the transaction, unless the terms of the transaction expressly provide to the contrary.

Position of
outgoing
trustees.

49.—(1) When a trustee resigns or is removed—

- (a) he shall, subject to paragraph (b), duly surrender all trust property held by or vested in him or otherwise under his control; and
- (b) he may require that he be provided with reasonable security for liabilities (existing, future, contingent or otherwise) before surrendering the trust property.

(2) Where the security to be given for the purposes of subsection (1)(b) is to be given by way of indemnity against the trust property, the indemnity shall not, except with leave of the Court or with

the consent of all beneficiaries, be greater than that to which the trustee would have been entitled had he remained a trustee.

(3) A trustee who complies with subsection (1)(a) is relieved of liability to any beneficiary, trustee or other person interested under the trust for any act or omission in relation to the trust property or to his functions as a trustee.

(4) Notwithstanding subsection (3), a trustee is not by reason only of such compliance relieved of any liability—

- (a) arising from a breach of trust to which he (or in the case of a corporate trustee, any of its officers or employees) subjected the trust property or the proceeds thereof in his possession; or
- (b) in respect of an action to recover from him (or, in the case of a corporate trustee, any of its officers or employees) trust property or the proceeds thereof in his possession.

(5) An indemnity given in writing by a trustee or beneficiary and expressed to be in favour of a trustee who has previously resigned or been removed from office (a “previous trustee”) is, subject to its terms, enforceable by the previous trustee against the indemnifying party notwithstanding that the previous trustee is not a party to or signatory of, the indemnity.

50.—(1) For the purpose of securing a trustee’s right to pay from the trust property and to be reimbursed from the trust property for all the expenses and liabilities properly incurred in connection with the trust, a trustee is entitled to a non-possessory lien over the trust property in respect of all such expenses and liabilities (existing, future, contingent or otherwise). Trustee’s
lien.

(2) The lien—

- (a) continues after the trustee ceases to be a trustee and has duly surrendered all trust property in accordance with section 49; and
- (b) is without prejudice to any indemnity or other security to which the trustee is entitled.

(3) The lien attaches to any trust property, except to the extent that—

- (a) the lien is expressly waived or released; or
- (b) the property—
 - (i) is no longer identifiable;
 - (ii) is in the hands of a *bona fide* purchaser for value or a person (other than the trustee) who derived the title through such a purchaser; or
 - (iii) comprises real property.

(4) Subject to subsection (3), in this section “trust property” includes property that has ceased to be held on trust by reason of distribution from the trust (including a distribution on termination of the trust) or otherwise and property into which trust property has been converted.

(5) The lien granted under subsection (1) is the right of the trustee, where he is not exonerated or reimbursed from the trust property, to follow, recover and appropriate the trust property for the purpose of realization, payment and reimbursement.

Bankruptcy
of trustee.

51. Where a trustee becomes bankrupt, or upon his property becoming liable to arrest, seizure or similar legal process, his creditors have no recourse against the trust property except to the extent that the trustee himself has a claim against it or a beneficial interest in it.

Payment into Court by Trustees

Payment into
Court by
trustees.

52.—(1) Trustees, or the majority of trustees, having in their hands or under their control, moneys or securities belonging to a trust, may pay the same into Court, and the same shall, subject to the rules of Court, be dealt with according to the rules of Court.

(2) The receipt or certificate of the officer of the Court authorized to receive the moneys or securities, as the case may be, shall be a sufficient discharge to trustees for the moneys or securities so paid into Court.

(3) Where any moneys or securities are vested in trustees, and the majority of the trustees are desirous of paying the same into Court but the concurrence of the other or others cannot be obtained, the Court may order the payment into Court to be made by the majority without the concurrence of the other or the others.

(4) Where any moneys or securities are deposited with any banker or other depository, the Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into Court, and every transfer, payment and delivery made in pursuance of any such order shall be valid and take effect as if the same has been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid or delivered.

PART III—*Protective Trusts, Class Interests and Certain Powers*

53. The terms of a trust may make the interest of a beneficiary— Protective trusts.

- (a) liable to termination;
- (b) subject to a restriction on alienation or dealing; or
- (c) subject to diminution or termination in the event of the beneficiary becoming bankrupt or any of his property becoming liable to arrest, seizure or similar process of law.

54. Where a trust or an interest under a trust is in favour of a class of persons then, subject to the terms of the trust the following rules shall apply— Class interests.

- (a) the class closes when it is no longer possible for any other person to become a member of the class;
- (b) a woman over the age of sixty years shall be deemed to be no longer capable of bearing a child; and
- (c) where the interest of the class relates to income, and no member of the class exists, the income shall be accumulated and, subject to section 11(2), retained until a member of the class exists or the class closes.

Trust may be
revoked or
varied.

55.—(1) A trust and any power or exercise of a power under a trust may be expressed to be capable of—

- (a) revocation, in whole or in part; or
- (b) variation.

(2) The terms of the trust may be varied in any manner provided by those terms.

(3) No revocation or variation prejudices anything lawfully done by a trustee in relation to the trust before he receives notice of the revocation or variation.

(4) Subject to the terms of the trust, if the trust is revoked in whole or in part, the trustees shall hold the trust property or that part of the trust property which is the subject of the revocation, as the case may be, in trust for the settlor absolutely or, if he is dead, for his personal representative and the trust property shall be distributed within a reasonable time.

Trust may
confer power
to appoint or
assign trust
property.

56. The terms of a trust may confer on the settlor, trustees or any other person, power to appoint or assign all or any of the trust property or any interest in it, to, or for the benefit of, any person (whether or not a beneficiary of the trust immediately prior to the appointment or assignment).

Charitable and Non-charitable Trusts

Charitable
and non-
charitable
trusts.

57.—(1) This section shall apply in any case where trust property is held for a charitable or non-charitable purpose and—

- (a) the purpose has been, as far as may be, fulfilled;
- (b) the purpose cannot be carried out, or not according to the directions given and to the spirit of the gift;
- (c) the purpose provides use for part only of the property;
- (d) the property, and other property applicable for a similar purpose, can be more effectively used in conjunction, and to that end can suitably be applied to a common purpose, regard being had to the spirit of the gift;

- (e) the purpose was laid down by reference to—
 - (i) an area which was then, but has since ceased to be, a unit for some other purpose; or
 - (ii) a class of persons or to an area which has for any reason since ceased to be—
 - (A) suitable; or
 - (B) practicable in administering the gift, regard being had to the spirit of the gift;
 - (f) the purpose has been adequately provided for by other means;
 - (g) in the case of a charitable purpose, the purpose has ceased to be charitable (by being useless or harmful to the community or otherwise); or
 - (h) the purpose has ceased in any other way to provide a suitable and effective method of using the property, regard being had to the spirit of the gift.
- (2) On the application of—
- (a) the trustees; or
 - (b) in the case of a non-charitable purpose, the enforcer, the property, or the remainder of the property of a trust, as the case may be, shall be held for such charitable or non-charitable purpose as the Court may declare to be consistent with the original intention of the settlor.

Accumulation of Income

58.—(1) The terms of a trust, whether established before or after the commencement of this Act, may direct or authorize the accumulation for any period of all or part of the income of the trust.

Accumulation
of income.

(2) For the avoidance of doubt, no rule limiting the period of accumulation or any analogous rule applies to a trust or to any advancement, appointment, payment or application of property from a trust.

(3) Subject to subsection (4), income which is not distributed shall be accumulated.

(4) Subject to the terms of the trust and to any prior interest or charge affecting the trust property, the trustees may—

- (a) where a beneficiary is a child (whether or not his interest is vested), apply the income attributable to his interest, or any part of that income, to or for his maintenance, education or other benefit;
- (b) advance or apply for the benefit of a beneficiary, part of the trust property prior to the happening of the event on which he is to become absolutely entitled thereto.

(5) Subject to the terms of the trust—

- (a) any trust property advanced or applied under this section shall be brought into account in determining the beneficiary's share in the trust property; and
- (b) no part of the trust property so advanced or applied shall exceed the beneficiary's vested, presumptive or contingent share in the trust property.

(6) The receipt of a guardian of a beneficiary who is a minor or a person under legal disability is a sufficient discharge to the trustees for a payment made to the beneficiary for his benefit.

PART IV—*Failure, Lapse and Termination of Trusts*

Failure or
lapse of
interest.

59. Subject to the terms of the trust and to any order of the Court, where—

- (a) an interest lapses;
- (b) a trust terminates;
- (c) there is no beneficiary and no person who can become a beneficiary, or no purpose in accordance with the terms of the trust; or
- (d) property is vested in a person otherwise than for his sole benefit, but the trusts on which he is to hold the property are

not declared or communicated to him, the interest or property concerned shall be held by the trustees on trust for the settlor absolutely or, if he is dead, for distribution by his personal representative.

60.—(1) On the termination of a trust, the trust property shall, subject to subsection (2), be distributed by the trustees within a reasonable time in accordance with the terms of the trust to the persons entitled thereto. Termination of trusts.

(2) Notwithstanding subsection (1), the trustees may require that they be provided with reasonable security for liabilities (existing, future, contingent or otherwise, including outstanding or anticipated trustee fees and disbursement) before so distributing the trust property.

(3) Without prejudice to the powers of the Court under subsection (5), and notwithstanding the terms of the trust, where all the beneficiaries are in existence and have been ascertained, and none is a child or a person under legal disability, they may require the trustees to terminate the trust and distribute the trust property among them.

(4) Subsection (3) shall not apply to a beneficiary of an interest under a protective trust.

(5) The Court may, on the application of any person mentioned in section 68(2)—

- (a) direct the trustees to distribute, or not to distribute, the trust property; or
- (b) make such other order in respect of the termination of the trust and the distribution of the trust property as it thinks fit.

PART V—*Jurisdiction, Rules and Powers of Court, Dispute Resolution, Etcetera*

61. The Court has jurisdiction in respect of—

- (a) a Jamaica trust; and
- (b) a foreign trust—
 - (i) a trustee of which is resident in Jamaica;

Jurisdiction of Court.

- (ii) any property of which is situate or administered in Jamaica; or
- (iii) the terms of which provide that the Court is to have jurisdiction.

Rules of Court.

62.—(1) The Rules Committee of the Supreme Court established under section 3 of the *Judicature (Rules of Court) Act* may by order make rules dealing with all procedural and incidental matters arising under this Act and generally for carrying this Act into effect.

(2) Rules made under subsection (1) may, without limitation, regulate and prescribe—

- (a) the procedure, including the method of pleading and the practice to be followed in proceedings;
- (b) the means by which matters may be proved; and
- (c) the manner and the way in which evidence may be adduced.

Application for direction.

63. A trustee may apply to the Court for directions as to how he should or might act in any of the affairs of the trust, and the Court may make such order as it thinks fit.

General powers of Court.

64.—(1) On the application of any person mentioned in subsection (2), the Court may—

- (a) make an order in respect of—
 - (i) the execution, administration or enforcement of a trust;
 - (ii) a trustee, including an order as to the exercise by a trustee of his functions;
 - (iii) the removal of a trustee—
 - (A) if he refuses or is unfit to act;
 - (B) if he is incapable of acting or is bankrupt;
 - (C) if his property becomes liable to arrest, seizure or similar process of law;

- (D) if the trustee is a corporate trustee that has become insolvent;
 - (E) for any other reason that the Court deems fit;
- (iv) the appointment, remuneration or conduct of a trustee;
 - (v) the keeping and submission of accounts and the making of payments, whether into court or otherwise;
 - (vi) a beneficiary or any person connected with a trust;
 - (vii) any trust property, including an order as to the vesting, preservation, application, distribution, surrender or recovery thereof;
 - (viii) an enforcer, in relation to any non-charitable purpose of a trust, including—
 - (A) an order as to the exercise by an enforcer of his functions;
 - (B) the removal of an enforcer for refusal or unfitness to act, bankruptcy, or if his property becomes liable to arrest, seizure or similar legal process; and
 - (C) the appointment, remuneration or conduct of an enforcer;
- (b) make a declaration as to the validity or enforceability of a trust;
 - (c) rescind or vary an order or declaration under this Act or make a new or further order or declaration.
- (2) An application under subsection (1) may be made by—
- (a) a trustee;
 - (b) a settlor;

- (c) a beneficiary;
- (d) a person described in section 35(2);
- (e) in relation to a non-charitable purpose, the enforcer;
- (f) a protector;
- (g) with leave of the Court, any other person.

(3) Where a trustee is appointed or removed under this section—

- (a) the Court may impose such requirements and conditions as it thinks fit, including requirements and conditions as to the vesting of trust property;
- (b) subject to the Court's order, a trustee appointed by the Court has the same functions and may act in all respects, as if he had been originally appointed a trustee.

Powers of
Court re
default.

65. If a person does not comply with an order of the Court under this Act requiring him to do anything, the Court may, on such terms and conditions as it thinks fit, order that the thing be done by another person, nominated for the purpose by the Court, at the expense of the person in default (or otherwise as the Court directs), and a thing so done has effect in all respects as if done by the person in default.

Payment of
costs.

66. The Court may order the costs and expenses of, and incidental to an application to the Court under this Act, to be paid from the trust property or in such manner and by such persons as the Court thinks fit.

Power of
Court to
approve
arrangement
to vary or
revoke trust,
etc. generally.

67.—(1) The Court, on the application of the trustees, may approve any arrangement which—

- (a) varies or revokes the purposes or the terms of the trust; or
- (b) enlarges or modifies the powers of management or administration of the trustees if it is satisfied that the arrangement—
 - (i) is suitable or expedient; and
 - (ii) is consistent with the original intention of the settlor and the spirit of the gift.

(2) The Court may dispense with the consideration set out in subsection (1) if it is satisfied that the original intention of the settlor cannot be ascertained.

(3) The Court shall not approve an arrangement under this section unless the Court is satisfied that any person with a material interest in the trust had an opportunity of being heard.

68.—(1) The Court, on the application of any person mentioned in subsection (2), on behalf of—

Variation on behalf of children, etc.

- (a) a child or a person under legal disability having, directly or indirectly, an interest, vested or contingent, under a trust;
- (b) an unborn person;
- (c) any person, ascertained or not, who may become entitled, directly or indirectly, to an interest under a trust, as being (at a future date or on the happening of a future event) a person of any specified description or a member of a specified class;
- (d) any person, in respect of an interest that may accrue to him by virtue of the exercise of a discretionary power on the failure or determination of an existing interest; or
- (e) with leave of the Court, any other person, may, subject to subsection (3), approve any arrangement which varies or revokes the terms of a trust or enlarges or modifies the powers of management or administration of any trustee, whether or not there is another person with a beneficial interest who is capable of assenting to the arrangement.

(2) An application under subsection (1) may be made by—

- (a) a trustee;
- (b) a settlor;
- (c) a beneficiary;
- (d) a person described in section 35(2);
- (e) in relation to a non-charitable purpose, the enforcer;
- (f) the protector;

(g) with leave of the Court, any other person.

(3) The Court shall not approve an arrangement on behalf of a person mentioned in subsection (1)(a), (b) or (c) unless the arrangement appears to be for the benefit of the person.

Power of Court to approve particular transactions.

69. Where, in the management or administration of a trust, a transaction is, in the opinion of the Court, expedient but cannot be effected because the necessary power is not vested in the trustees by the terms of the trust or by law, the Court may, on the application of any person mentioned in section 68(2)—

- (a) confer on the trustees, generally or in any particular circumstances, the necessary power, on such terms and conditions as the Court thinks fit;
- (b) direct the manner in which, and the property from which, any moneys authorized to be expended, and the costs of any transaction, are to be paid or borne.

Appointment of resident trustees.

70.—(1) Where there is no trustee resident in Jamaica, a beneficiary may apply to the Court for the appointment of a person, resident in Jamaica and nominated in the application, as an additional trustee.

(2) The Court may appoint that person as an additional trustee—

- (a) if the Court is satisfied that notice of the application has been served on the existing trustees;
- (b) having heard any representations of the existing trustees, the settlor or his personal representatives, the other beneficiaries and any other person described in section 35(2); and
- (c) having ascertained that the person nominated is willing to act.

Power of Court to relieve trustee from personal liability.

71. The Court may relieve a trustee wholly or partly of liability for a breach of trust or indemnify a trustee against liability for a breach of trust whether committed before or after the commencement of this Act, where it appears to the Court that the trustee—

- (a) has acted honestly and reasonably; and

- (b) ought fairly to be excused—
- (i) for the breach of trust;
 - (ii) for omitting to obtain the directions of the Court, in the matter in which the breach arose.

72. Where a trustee commits a breach of trust at the instigation or request or with the concurrence of a beneficiary, the Court (whether or not the beneficiary is a child or a person under a legal disability) may impound all or part of his interest by way of indemnity to the trustee or a person claiming through him.

Power to make beneficiaries indemnify.

73.—(1) Any order, judgment or finding of law or fact of the Court in an action against a trustee founded on breach of trust is binding on all beneficiaries of the trust, whether or not yet ascertained or in existence, and whether or not children or persons under legal disability.

Judgment against trustee to be binding on beneficiaries.

(2) Subsection (1) applies in respect of a beneficiary only if—

- (a) he was represented in the proceedings (whether personally, or by his guardian, or as the member of a class or otherwise); or
- (b) not so represented, he had notice of the proceedings and a reasonable opportunity of being heard.

(3) In subsection (2)(b) “notice” means fourteen days notice or such other period as the Court may direct.

(4) This section is without prejudice to the powers of the Court in respect of representative parties as outlined in the Civil Procedure Rules.

74. Where, in any action, the Court is satisfied that diligent search has been made for any person, who in the role of trustee is made a defendant in any action, to serve him with a process of the Court, and that he cannot be found, the Court may hear and determine the action and give judgement therein against that person in his role as a trustee as if he had been duly served, or had entered an appearance in the action, and had also appeared by his attorney-at-law at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other role.

Power to give judgment in absence of trustee.

Power to
sanction sale
of land or
minerals
separately.

75.—(1) Where a trustee or other person is for the time being authorized to dispose of land by way of sale, exchange, partition or enfranchisement, the Court may sanction his so disposing of the land with an exception or reservation of any minerals, or so disposing of the minerals, with or without the said rights or power, separately from the residue of the land.

(2) Any such trustee or other person, with the said sanction previously obtained, may, unless forbidden by the instrument creating the trust or direction, from time to time, without any further application to the Court, so dispose of any such land or minerals.

(3) Nothing in this section shall derogate from the power which a trustee may have under the *Settled Land Act* or otherwise.

Settlement of
action against
trustees by
alternative
dispute
resolution.

76.—(1) Where—

- (a) the terms of a trust direct or authorize, or the Court so orders, that any claim against a trustee, founded on breach of trust, may be referred to alternative dispute resolution;
- (b) a claim arises and, in accordance with the terms of the binding on trust or the order of the Court, is referred to alternative dispute resolution; and
- (c) the alternative dispute resolution results in a settlement of the claim which is recorded in a document signed by or on behalf of all parties,

the settlement is binding on all beneficiaries of the trust, whether or not yet ascertained or in existence, and whether or not children or persons under legal disability.

(2) Subsection (1) applies in respect of a beneficiary only if—

- (a) he was represented in the alternative dispute resolution proceedings (whether personally or by his guardian or as a member of a class, or otherwise); or
- (b) not represented, in the alternative dispute resolution proceedings, he had notice of the proceedings and a reasonable opportunity to be heard,

and, in the case of a beneficiary who is not yet ascertained or in existence, or who is a child or person under legal disability, the person conducting the alternative dispute resolution proceedings certifies that he was independently represented by a person appointed for the purpose by a court.

(3) In subsection (2)(b) “notice” means fourteen days notice or such other period as the person conducting the alternative dispute resolution proceedings may direct.

(4) A person who represents a beneficiary in the alternative dispute resolution proceedings for the purposes of subsection (2)(a) is under a duty of care to the beneficiary.

(5) For the avoidance of doubt, the alternative dispute resolution proceedings need not be conducted in Jamaica or in accordance with the law of Jamaica.

(6) In this section—

“alternative dispute resolution” includes conciliation, mediation, early neutral evaluation, adjudication, expert determination and arbitration; and

“proceedings” includes oral and written proceedings.

PART VI—*Disposition to or by a Trust*

77.—(1) This Part applies to—

Application.

- (a) an action or proceeding relating to a disposition to or by a trust, or to, or by an entity owned or controlled by a trust, whether the property has, or had its situs within or outside Jamaica, at the time of the disposition or of the commencement of such proceedings; and
- (b) any proceedings by a creditor alleging fraud or cause of action founded in fraud against a settlor, a trust or an entity owned by a trust, or against any person who shall settle property upon, dispose of property to, or establish a trust on behalf of a settlor, to the exclusion of any other remedy, principle or any rule of law whether provided for by an enactment or founded in equity or common law.

(2) In this Part the term “creditor” includes any person who alleges a cause of action on behalf of, or in the name of a creditor.

Avoidance of
fraud.

78.—(1) Where it is proven by a creditor in proceedings that are final and not subject to further appeal that—

- (a) a trust was settled or established; or
- (b) a disposition was made to or by a trust, and the property after the disposition constituted trust property; and
- (c) the trust was settled, created, migrated, continued, established or property was disposed by or on behalf of the settlor’s nominee with the intent being to defraud the creditor of the settlor; or
- (d) the disposition did, at the time the settlement, creation, migration, continuation, establishment, or disposition took place, render the settlor insolvent,

the settlement, creation, migration, continuation, establishment, or disposition shall not be void or voidable, but the trust shall be liable to satisfy the creditor’s claim out of the property of the trust and the amount of the liability shall only be to the extent of the interest that the settlor had in the property disposed to the trust prior to its settlement, creation, migration, continuation, establishment, or disposition, and to any accumulation to that property subsequent thereto.

(2) Unless it is proven, in accordance with the provisions of subsection (1), that a trust was settled or created, or a disposition was made to or by a trust, with the intent being to defraud the creditor and with the result of the settlement, establishment or disposition being the insolvency of the settlor, the Court shall not find that the trust is liable to satisfy the creditor’s claim out of trust property or that any disposition to the trust is void or voidable.

(3) In determining whether the creation of a trust, or a disposition to, or by a trust has rendered the settlor insolvent, regard shall be had to the fair market value of the settlor’s property, not being property of, or relating to the trust, at the time immediately after the settlement, establishment or disposition and in the event that the fair

market value of the property exceeded the value of the creditor's claim at the time, then the trust so settled or established, or the disposition made, shall, for the purposes of this Act, be deemed not to have been settled or established or the property disposed of with intent to defraud the creditor.

(4) Where a trust is liable to satisfy a creditor's claim in the manner provided for in subsection (1), but is unable to do so by reason of the fact that the property has been disposed of other than to a *bona fide* purchaser for value, then the disposition shall be void.

(5) For the purposes of this section, the onus of proof of the settlor's intent to defraud the creditor lies on the creditor, and the required standard of proof is to demonstrate the settlor's intent beyond a reasonable doubt.

79.—(1) A trust settled, created, migrated, continued or established or a disposition to or by the trust shall not be fraudulent as against, or void or voidable by, a creditor of a settlor if— Limitations.

- (a) the settlement, creation, migration, continuation or establishment of the trust or the disposition takes place after the expiration of two years from the date that such creditor's cause of action accrued;
- (b) the creditor fails to commence an action before the expiration of one year from the date such settlement, creation, migration, continuation, establishment or disposition took place; or
- (c) the settlement, creation, migration, continuation, establishment or disposition took place before the creditor's cause of action against the settlor accrued.

(2) A settlor shall not have imputed to him an intent to defraud a creditor solely by reason that the settlor—

- (a) settled, created, migrated, continued or established a trust, or disposed of property to the trust within two years from the date that the creditor's cause of action accrued;

- (b) retained, possessed or acquired any of the powers or benefits referred to in section 7;
 - (c) is a beneficiary or a trustee of the trust.
- (3) For the purpose of this section—
- (a) the date the cause of action accrued shall be the date of the act or omission being relied upon to establish, either partly or wholly, the cause of action and, if there is more than one act or omission, the first which occurred shall be the date the cause of action shall have accrued; and
 - (b) in the case of an action upon judgement, the date the cause of action accrued shall be the date of the act or omission upon which the judgement was based and, where there is more than one act or omission or the same is, or was, continuing, the date of the first act or the date the omission first occurred shall be the date the cause of action accrued.

Certain rights where a disposition to a trust is set aside.

80. Where a disposition to a trust is set aside by a court and if the court is satisfied that the beneficiary of the disposed property has not acted in bad faith—

- (a) the beneficiary shall have first and paramount charge over the disposed property in an amount equal to the entire costs properly incurred by the beneficiary in the defence of the action or proceedings to set aside, and not merely such costs as might otherwise be allowed by the Court;
- (b) the disposition shall be set aside subject to the payment by the creditor of the proper fees, costs, pre-existing rights, claims and interest of the beneficiary and of any predecessor beneficiary who has not acted in bad faith; and
- (c) the disposition shall only be set aside subject to the right of such beneficiary to retain any distribution made consequent upon the prior exercise of a trust, power or discretion vested in the trustee of such trust, or any other person and otherwise properly exercised.

81. A disposition shall be set aside pursuant to this Part only to the extent necessary to satisfy the obligation to a creditor at whose instance the disposition has been set aside together with such costs as the court may allow.

Extent of avoidance of relevant dispositions.

PART VII—*Foreign Trusts*

82.—(1) Subject to subsection (2), a foreign trust is governed by, and shall be interpreted in accordance with its proper law.

Enforceability of foreign trusts.

(2) A foreign trust is unenforceable in Jamaica to the extent that—

- (a) it purports to do anything contrary to the law of Jamaica;
- (b) it confers or imposes any right or function, the exercise or discharge of which would be contrary to the law of Jamaica; or
- (c) the Court declares that it is immoral or contrary to public policy.

83. Notwithstanding section 82, a foreign trust may only be enforceable in Jamaica, if it is created by an instrument in writing.

Foreign trust not enforceable unless created by an instrument in writing.

PART VIII—*Miscellaneous*

84. Without prejudice to the personal liability of a trustee, trust property which has been charged or dealt with in breach of trust, or the property into which it has been converted, may be followed and recovered unless—

Following and recovering trust property.

- (a) it is no longer identifiable; or
- (b) it is in the hands of—
 - (i) a *bona fide* purchaser for value without notice of the breach of trust; or
 - (ii) a person (other than the trustee) who derived the title through such a purchaser.

Protection
for persons
dealing with
trustees.

85.—(1) A *bona fide* purchaser for value without notice of a breach of trust—

- (a) may deal with a trustee in relation to trust property as if the trustee were the beneficial owner thereof; and
- (b) is not affected by the trust on which the property is held.

(2) A person paying or advancing money to a trustee is not concerned to see that—

- (a) the money is wanted;
- (b) no more than is wanted is raised; or
- (c) the transaction or the application of the money is proper.

Limitation
and prescrip-
tion.

86.—(1) No period of limitation or prescription applies to an action brought against a trustee—

- (a) in respect of any fraud to which the trustee was a party or was privy; or
- (b) to recover from the trustee, trust property or the proceeds thereof—
 - (i) held by or vested in him, or otherwise in his possession or under his control; or
 - (ii) previously received by him and converted to his use.

(2) Subject to subsection (1), the period within which an action founded on breach of trust may be brought against a trustee is—

- (a) three years from the date on which the claimant first has knowledge of the breach; or
- (b) where the claimant was, at the time of the breach of trust, a minor or a person under legal incapacity—
 - (i) three years from the date on which his guardian first has knowledge of the breach; or
 - (ii) three years from the date on which the claimant ceased to be a child or a person under legal disability,

whichever first occurs.

87.—(1) A person who derives a profit from a breach of trust, or who obtains property in breach of trust, shall be deemed to be a trustee of the profit or property unless he derives or obtains it in good faith without notice of the breach of trust. Constructive trusts.

(2) A person who becomes a trustee by virtue of subsection (1) shall deliver up the profit or property to the person properly entitled to it.

(3) This section does not exclude any other circumstances in which a constructive trust may arise.

88. All the powers and provisions contained in this Act with reference to the appointment of new trustees, are to apply to and include trustees for the purposes of the *Settled Land Act*, whether appointed by the Court or by the settlement, or under the provisions contained in the settlement. Application to trustee under *Settled Land Act* of provisions as to appointment of trustees.

89.—(1) Subject to the provisions of this Act, property vested in any person on any trust or by way of mortgage shall in the case of that person being sentenced to death or imprisonment by a court of competent jurisdiction remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict. Trust estates not affected by a trustee becoming a convict.

(2) This section shall not affect the title to the property so far as it relates to any beneficial interest therein of any such trustee or mortgagee.

90. Every order made under this Act shall be a complete indemnity to all persons, for any acts done pursuant thereto; and it shall not be necessary for any person to enquire concerning the propriety of the order, or whether the court by which it was made had jurisdiction to make the same. Indemnity.

PART IX—*General*

91.—(1) The Minister may make regulations generally for the better carrying out of the provisions of this Act. Regulations.

(2) Regulations made under subsection (1) shall be subject to affirmative resolution.

Review of Act.

92. The provisions of this Act shall be reviewed by a joint select committee of both Houses of Parliament not later than five years after the date of commencement of this Act.

Repeal of *Trustee Act*.
Amendment of *Trustees, Attorneys and Executors (Accounts and General) Act*.

93. The *Trustee Act* is repealed.

94. The *Trustees, Attorneys and Executors (Accounts and General) Act* is amended in section 2 in the definition of “trustees”, by deleting the words “Trustee Act” and substituting therefor the words “Trusts Act”.

PART X—*Savings and Transitional*

Savings.

95.—(1) Nothing in this Act—

- (a) affects the functions under any provision of any law of a guardian or an attorney;
- (b) subject to section 6, validates an otherwise invalid disposition of property to a trust;
- (c) affects the validity of anything done in relation to a trust before the date of commencement of this Act;
- (d) affects the validity of a trust arising from a document or disposition executed or taking effect before the date of commencement of this Act;
- (e) derogates from any right of a minor to repudiate a transaction on attaining full age;
- (f) disappplies or derogates from any rule of law or custom relating to the formalities required for the disposition of real property in Jamaica.

(2) Notwithstanding section 16, there is no requirement for an enforcer to be appointed in relation to a trust created before the date of commencement of this Act.

(3) Nothing in this Act derogates from the powers of the Court which exist independently of this Act—

- (a) to set aside, vary or reduce any transfer or other disposition of property, testamentary or otherwise;
- (b) in respect of trusts, trustees or other trust property;
- (c) to make an order relating to matrimonial proceeding;
- (d) to make an order relating to the avoidance of fraud on creditors.

(4) Nothing in this Act affects a personal representative acting as such.

96.—(1) Anything done before the date of commencement of this Act or in the process of being done on that date under the *Trustee Act*, which could be done under this Act shall have effect as if done or, as the case may be, may be continued under this Act. Transitional.

(2) Any reference, however, expressed, in—

- (a) any enactment, statutory instrument or rule of court; or
- (b) any trust instrument, will, settlement, or other instrument of whatever nature, to the *Trustee Act*, or any provision of that Act shall, unless the contrary intention appears, be construed after the date of commencement of this Act, as a reference to this Act, or as the case may be, to the corresponding provision of this Act.

MEMORANDUM OF OBJECTS AND REASONS

This Bill seeks to provide for the establishment and operation of trust services in Jamaica in relation to both Jamaica and foreign trusts. The Bill repeals the *Trustee Act* and seeks to create a modern statutory instrument which addresses the most pertinent principles of trust law. The Bill—

- (a) addresses the creation, validity, duration and enforceability of trusts;
- (b) identifies the property which may be held on trust;
- (c) establishes the procedure for the appointment and removal of trustees;
- (d) identifies the general fiduciary duties of trustees, including—
 - (i) impartiality;
 - (ii) keeping of accounts;
 - (iii) giving of information;
 - (iv) separation of trust property; and
 - (v) preservation of trust property;
- (e) provides for the settlement of actions against trustees by alternative dispute resolution; and
- (f) provides for the power to relieve trustees from personal liability and indemnification of trustees by beneficiaries.

ANDREW HOLNESS
Prime Minister.

ABILL

ENTITLED

ANACT to Make provision for the Establishment
and Administration of trusts; and for
connected matters.

As introduced by the Honourable Prime Minister.

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