

*These notes refer to the Trustee Act (Northern Ireland)
2001 (c.14) which received Royal Assent on 20 July 2001*

Trustee Act (Northern Ireland) 2001

EXPLANATORY NOTES

COMMENTARY ON CLAUSES

Part IV: Agents, Nominees and Custodians

Sections 11 to 27 form Part IV of the Act. Firstly, *sections 11* to 15 set out powers of collective delegation – that is powers to appoint agents to act on their behalf - that trustees have in default of wide express powers being conferred by the trust instrument. These new provisions are not concerned with the possibility of delegation by an individual trustee, which continues to be governed by section 26 of the Trustee Act (Northern Ireland) 1958. Secondly, *sections 16* to 20 confer on trustees powers to appoint nominees and custodians in cases where the trust instrument contains no express power to do so. In this context, a nominee is a person nominated to hold trust property in his own name on behalf of the trustees. A custodian is a person who undertakes the safe custody of trust assets or documents. The mechanism of appointing nominees or custodians is valuable because it facilitates dealings with the trust assets. Thirdly, *sections 21* to 23 provide for the review by trustees of the activities of their agents, nominees and custodians and the liability of trustees for their actions. Lastly in this Part of the Act, *sections 24* to 27 deal with supplementary matters.

These powers of delegation and appointment of nominees and custodians are subject to the statutory duty of care (see *section 2* and paragraph 3 of Schedule 1). They will operate as a default provision applicable to all trusts apart from the special cases of pension trusts, authorised unit trusts, and common investment schemes for charities as set out in *sections 39* to 41.

Under the present law trustees cannot, as a collective body, delegate their dispositive duties to distribute the trust property or their fiduciary discretions (that is powers implying a personal discretion such as the selection of trust investments or the decision whether or not to sell trust property) without express authority in the trust instrument. In view of the increasingly specialised nature of the tasks that have to be undertaken by trustees, some of these restrictions are seen as a serious impediment to the administration of trusts. It is no longer desirable to prohibit delegation of powers of investment and management. In general terms the policy of the Act is that the proper distinction to be drawn for the purpose of ascertaining whether a particular function ought to be delegable or not is between administrative powers (which should be delegable) and

distributive powers (which should not be delegable). That approach is reflected in [section 11](#).

In relation to charitable trusts different provision is required. The purpose here is to allow charitable trustees to delegate functions relating to the generation of funds but not the carrying out of the charitable purpose of the trust.

Section 11: Power to employ agents

[Section 11](#) governs the functions that may be delegated by trustees. Subject to the provisions of Part IV, trustees may authorise an agent to carry out any or all of their “delegable functions”. As was mentioned above, the scope of delegable functions differs for charitable and non-charitable trusts. [Section 11\(2\)](#) provides that a trustee of a non-charitable trust may delegate any function other than those listed. The exceptions or non-delegable functions comprise - (a) a function relating to the distribution of trust assets; (b) a power to allocate trust payments to income or capital; (c) a power to appoint a trustee; and (d) a power to delegate a trust function or to appoint a nominee or custodian.

[Section 11\(3\)](#) sets out the scope of delegable functions for charitable trustees, which is in different terms. The functions which charitable trustees may delegate are (a) functions involving carrying out a decision taken by the trustees – so these are non-discretionary matters; (b) investment matters; (c) raising funds for the charity except in so far as the income is derived from the profits of a trade which is an integral part of carrying out the trust’s charitable purpose; and (d) any other function prescribed by an order made by the Department for Social Development.

[Section 11\(4\)](#) defines the concept of “a trade which is an integral part of carrying out the trust’s charitable purpose”. This covers the situation where the trade is exercised in the course of the actual carrying out of a primary purpose of the trust, or the work in connection with the trade is mainly carried out by beneficiaries of the trust. An example of non-delegable fund raising activities within the scope of this definition would be the charging of fees by a school operating as a charitable trust.

Section 12: Persons who may act as agents

[Section 12](#) defines the persons who may act as agents under this new statutory power. There are few limitations. One or more of the trustees may be authorised to act as agent, but not a beneficiary even if he or she is also a trustee. If more than one person is appointed then they must act jointly. A person who is appointed to act as nominee or custodian may be authorised to act as agent too.

Section 13: Linked functions etc.

[Section 13](#) relates to specific duties or restrictions attached to a function delegated to an agent. That agent is to be subject to the same requirements. For example, if investment functions are delegated to an agent, then that agent will be obliged to have regard to the standard investment criteria laid down in [section 4](#).

He may also be required to obtain and consider proper advice in accordance with [section 5](#) – although the usual expectation might be that the chosen agent in that situation would himself be a person reasonably qualified to advise.

Section 14: Terms of agency

[Section 14](#) regulates the terms on which an agent may be appointed. The general rule is that trustees will be free to decide the terms of the appointment of the agent. This is subject to specific constraints set out in [section 14\(3\)](#): trustees may not delegate on terms which permit their agent to appoint a substitute or sub-delegate; they may not agree to terms which restrict the liability of the agent or a substitute; and they may not consent to an agent acting where a conflict of interest may arise. However, these restrictions on the scope of their power to appoint agents will not apply if it is reasonably necessary to delegate on such terms ([section 14\(2\)](#)). In practice today it is often advisable to appoint an investment fund manager so relaxation of the traditional rule against delegation is appropriate. In addition, the section recognises the fact that in practice standard form terms of business usually include limits on liability and the freedom to act despite a conflict of interest and trustees would be severely hampered if they were forbidden to accept such terms.

There are additional restrictions in relation to the delegation of asset management functions under [section 15](#) and remuneration under [sections 29](#) to [32](#). These are discussed below.

Section 15: Asset management: special restrictions

[Section 15](#) imposes special restrictions on the exercise of asset management functions by an agent. This refers to the investment of trust assets and the acquisition, disposal and management of trust property. Where delegation of these particular functions is concerned, there has to be an agreement made or evidenced in writing. In addition, a policy statement must be prepared by the trustees beforehand, again in writing, to give guidance on how the functions should be exercised in the best interests of the trust. The agreement under which the agent is to act must include a term to the effect that he will ensure compliance with the policy statement.

Section 16: Power to appoint nominees

[Section 16](#) confers on trustees a power to appoint a person to act as nominee and then vest the relevant trust assets in that person. This appointment must be made in or evidenced in writing.

Section 17: Power to appoint custodians

[Section 17](#) confers a power to appoint a person to act as custodian undertaking the safe custody of assets of the trusts or documents or records concerning the assets. That definition of a custodian is found in [section 17\(2\)](#). Again, this appointment must be made in or evidenced in writing.

Section 18: Investment in bearer securities

Section 18 governs investment in bearer securities, at present permitted to a limited extent and governed by section 7 of the Trustee Act (Northern Ireland) 1958, a provision repealed by this Act. The new provision allows trustees to invest in securities payable to bearer but they must appoint a person to act as custodian, unless their trust instrument or statute allows otherwise. The appointment of the custodian must be made or evidenced in writing.

Section 19: Persons who may be appointed as nominees or custodians

Section 19 regulates the persons who may be appointed as nominees or custodians. The objective is to protect beneficiaries. *Section 19(2)* provides that the person to be appointed must be someone carrying on a business of that nature, or a body corporate controlled by the trustees, or a body corporate recognised under Article 26A of the Solicitors (Northern Ireland) Order 1976. In the case of a charitable trust, the trustees must comply with guidance from the Department for Social Development as to the selection of nominees and custodians (*section 19(4)*). The trustees may appoint one of their number if that one is a trust corporation, or two or more of their number to act jointly as nominees or custodians. They may appoint the same person as nominee, custodian and agent.

Section 20: Terms of appointment of nominees and custodians

Section 20 governs the terms of appointment of nominees and custodians. This provision has similar effect in relation to the appointment of nominees and custodians as *section 14* has in relation to the appointment of agents.

Section 21: Application of sections 22 and 23

Sections 21 to *23* are concerned with the review of and liability for agents, nominees and custodians. These provisions on review and liability apply where trustees have appointed an agent, nominee or custodian under the new statutory powers. They also apply where trustees have appointed an agent, nominee or custodian under a power conferred by their trust instrument or a statutory provision, but in those cases they may be overridden by inconsistent terms in the instrument or statute.

Section 22: Review of agents, nominees and custodians etc.

Section 22 imposes a duty of review on trustees. The three elements of the basic duty are set out in *section 22(1)*: (a) to keep the arrangements under review; (b) where appropriate, to consider whether there is a need to intervene; and (c) to intervene if necessary. Amongst other possibilities, intervention might take the form of giving directions to the agent, nominee or custodian, or revoking his or her authorisation or appointment. Intervention would be appropriate, for example, if the agent, nominee or custodian is not carrying out his or her functions effectively, or where there is an indication that the person involved

is no longer suitable to act in this way. In the case of an agent exercising asset management functions, there is a particular duty to consider the need to revise or replace the policy statement and assess compliance with it. It may be added that the duty to review does not oblige trustees to examine the situation at specific intervals or in any prescribed way. Rather, there is an ongoing obligation to do what is reasonable in the circumstances. To reinforce this, trustees are subject to the duty of care in carrying this out.

Section 23: Liability for agents, nominees and custodians etc.

Section 23 governs the liability of a trustee for the acts or defaults of the agent, nominee or custodian, or any permitted substitute. This replaces the present unsatisfactory state of affairs under the Trustee Act (Northern Ireland) 1958 where different rules apply depending on the nature of the delegation. The basic approach of the new provision is that the trustee will not be liable unless he has failed to comply with the duty of care when entering into the initial arrangements or when reviewing arrangements. This includes the selection of the person involved, the determination of terms of appointment and the preparation of any policy statement. Similarly, in the case of liability for the acts of a substitute the test is failure to live up to the duty of care in agreeing to the term allowing the appointment of a substitute in the first place or carrying out the duty to keep the situation under review.

Section 24: Effect of trustees exceeding their powers

Sections 24 to *27* are concerned with supplementary matters. *Section 24* provides that a failure by trustees to act within the limits of their powers to authorise delegation or appoint nominees or custodians does not invalidate the authorisation or appointment involved. The consequence is that third parties dealing with the agent, nominee or custodian are facilitated and they do not have to make any inquiries into whether the trustees had complied with the statutory requirements.

Section 25: Sole trustees

Section 25 provides that these new powers in relation to agents, nominees and custodians are to apply to cases where there is a sole trustee. By *section 25(2)* the duty in *section 18* (appointment of a custodian for investment in bearer securities) does not apply to a sole trustee who is a trust corporation.

Section 26: Restriction or exclusion of this Part etc.

Section 26 makes it clear that these powers are additional to powers conferred on trustees from other sources but they can be restricted or excluded by the trust instrument or legislation. In this regard the new powers relating to agents, nominees and custodians are default powers, as are the new powers of investment and acquisition of land.

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Section 27: Existing trusts

Section 27 states that this Part is to apply to existing trusts as well as those to be created in the future. This means that these new powers become available to most trustees and beneficiaries.