



2001 CHAPTER 14

PART IV

AGENTS NOMINEES AND CUSTODIANS

*Agents*

**Power to employ agents**

**11.—(1)** Subject to the provisions of this Part, the trustees of a trust may authorise any person to exercise any or all of their delegable functions as their agent.

(2) In the case of a trust other than a charitable trust, the trustees' delegable functions consist of any function other than—

- (a) any function relating to whether or in what way any assets of the trust should be distributed,
- (b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital,
- (c) any power to appoint a person to be a trustee of the trust, or
- (d) any power conferred by any other statutory provision or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.

(3) In the case of a charitable trust, the trustees' delegable functions are—

- (a) any function consisting of carrying out a decision that the trustees have taken;

- (b) any function relating to the investment of assets subject to the trust (including, in the case of land held as an investment, managing the land and creating or disposing of an interest in the land);
  - (c) any function relating to the raising of funds for the trust otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose;
  - (d) any other function prescribed by an order made by the Department for Social Development subject to negative resolution.
- (4) For the purposes of subsection (3)(c) a trade is an integral part of carrying out a trust's charitable purpose if, whether carried on in the United Kingdom or elsewhere, the profits are applied solely to the purposes of the trust and either—
- (a) the trade is exercised in the course of the actual carrying out of a primary purpose of the trust, or
  - (b) the work in connection with the trade is mainly carried out by beneficiaries of the trust.

#### **Persons who may act as agents**

**12.**—(1) Subject to subsection (2), the persons whom the trustees may under section 11 authorise to exercise functions as their agent include one or more of their number.

(2) The trustees may not authorise two (or more) persons to exercise the same function unless they are to exercise the function jointly.

(3) The trustees may not under section 11 authorise a beneficiary to exercise any function as their agent (even if the beneficiary is also a trustee).

(4) The trustees may under section 11 authorise a person to exercise functions as their agent even though he is also appointed to act as their nominee or custodian (whether under section 16, 17 or 18 or any other power).

#### **Linked functions, etc.**

**13.**—(1) Subject to subsection (2), a person who is authorised under section 11 to exercise a function is (whatever the terms of the agency) subject to any specific duties or restrictions attached to the function.

For example, a person who is authorised under section 11 to exercise the general power of investment is subject to the duties under section 4 in relation to that power.

(2) A person who is authorised under section 11 to exercise a power which is subject to a requirement to obtain advice is not subject to the requirement if he is the kind of person from whom it would have been proper for the trustees, in compliance with the requirement, to obtain advice.

**Terms of agency**

**14.—**(1) Subject to subsection (2) and sections 15(2) and 29 to 32, the trustees may authorise a person to exercise functions as their agent on such terms as to remuneration and other matters as they may determine.

(2) The trustees may not authorise a person to exercise functions as their agent on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.

(3) The terms are—

- (a) a term permitting the agent to appoint a substitute;
- (b) a term restricting the liability of the agent or his substitute to the trustees or any beneficiary;
- (c) a term permitting the agent to act in circumstances capable of giving rise to a conflict of interest.

**Asset management: special restrictions**

**15.—**(1) The trustees may not authorise a person to exercise any of their asset management functions as their agent except by an agreement which is in or evidenced in writing.

(2) The trustees may not authorise a person to exercise any of their asset management functions as their agent unless—

- (a) they have prepared a statement that gives guidance as to how the functions should be exercised (“a policy statement”), and
- (b) the agreement under which the agent is to act includes a term to the effect that he will secure compliance with—
  - (i) the policy statement, or
  - (ii) if the policy statement is revised or replaced under section 22, the revised or replacement policy statement.

(3) The trustees must formulate any guidance given in the policy statement with a view to ensuring that the functions will be exercised in the best interests of the trust.

(4) The policy statement must be in or evidenced in writing.

(5) The asset management functions of trustees are their functions relating to—

- (a) the investment of assets subject to the trust,
- (b) the acquisition of property which is to be subject to the trust, and
- (c) managing property which is subject to the trust and disposing of, or creating or disposing of an interest in, such property.

### *Nominees and custodians*

#### **Power to appoint nominees**

- 16.—**(1) Subject to the provisions of this Part, the trustees of a trust may—
- (a) appoint a person to act as their nominee in relation to such of the assets of the trust as they determine (other than settled land), and
  - (b) take such steps as are necessary to secure that those assets are vested in a person so appointed.
- (2) An appointment under this section must be in or evidenced in writing.

#### **Power to appoint custodians**

- 17.—**(1) Subject to the provisions of this Part, the trustees of a trust may appoint a person to act as a custodian in relation to such of the assets of the trust as they may determine.
- (2) For the purposes of this Act a person is a custodian in relation to assets if he undertakes the safe custody of the assets or of any documents or records concerning the assets.
- (3) An appointment under this section must be in or evidenced in writing.

#### **Investment in bearer securities**

- 18.—**(1) If trustees retain or invest in securities payable to bearer, they must appoint a person to act as a custodian of the securities.
- (2) Subsection (1) does not apply if the trust instrument or any statutory provision contains provision which (however expressed) permits the trustees to retain or invest in securities payable to bearer without appointing a person to act as a custodian.
- (3) An appointment under this section must be in or evidenced in writing.

#### **Persons who may be appointed as nominees or custodians**

- 19.—**(1) A person may not be appointed under section 16, 17 or 18 as a nominee or custodian unless one of the relevant conditions is satisfied.
- (2) The relevant conditions are that—
- (a) the person carries on a business which consists of or includes acting as a nominee or custodian;
  - (b) the person is a body corporate which is controlled by the trustees;
  - (c) the person is a body corporate recognised under Article 26A of the [Solicitors \(Northern Ireland\) Order 1976 \(NI 12\)](#).

(3) The question whether a body corporate is controlled by trustees is to be determined in accordance with section 840 of the Income and Corporation Taxes Act 1988 (c. 1).

(4) The trustees of a charitable trust must act in accordance with any guidance given by the Department for Social Development concerning the selection of a person for appointment as a nominee or custodian under section 16, 17 or 18.

(5) Subject to subsections (1) and (4), the persons whom the trustees may under section 16, 17 or 18 appoint as a nominee or custodian include—

- (a) one of their number, if that one is a trust corporation, or
- (b) two (or more) of their number, if they are to act as joint nominees or joint custodians.

(6) The trustees may under section 16 appoint a person to act as their nominee even though he is also—

- (a) appointed to act as their custodian (whether under section 17 or 18 or any other power), or
- (b) authorised to exercise functions as their agent (whether under section 11 or any other power).

(7) Likewise, the trustees may under section 17 or 18 appoint a person to act as their custodian even though he is also—

- (a) appointed to act as their nominee (whether under section 16 or any other power), or
- (b) authorised to exercise functions as their agent (whether under section 11 or any other power).

### **Terms of appointment of nominees and custodians**

**20.**—(1) Subject to subsection (2) and sections 29 to 32, the trustees may under section 16, 17 or 18 appoint a person to act as a nominee or custodian on such terms as to remuneration and other matters as they may determine.

(2) The trustees may not under section 16, 17 or 18 appoint a person to act as a nominee or custodian on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.

(3) The terms are—

- (a) a term permitting the nominee or custodian to appoint a substitute;
- (b) a term restricting the liability of the nominee or custodian or his substitute to the trustees or to any beneficiary;
- (c) a term permitting the nominee or custodian to act in circumstances capable of giving rise to a conflict of interest.

*Review of and liability for agents, nominees and custodians, etc.*

**Application of sections 22 and 23**

**21.**—(1) Sections 22 and 23 apply in a case where trustees have, under section 11, 16, 17 or 18—

- (a) authorised a person to exercise functions as their agent, or
- (b) appointed a person to act as a nominee or custodian.

(2) Subject to subsection (3), sections 22 and 23 also apply in a case where trustees have, under any power conferred on them by the trust instrument or by any statutory provision—

- (a) authorised a person to exercise functions as their agent, or
- (b) appointed a person to act as a nominee or custodian.

(3) If the application of section 22 or 23 is inconsistent with the terms of the trust instrument or the statutory provision, the section in question does not apply.

**Review of agents, nominees and custodians, etc.**

**22.**—(1) While the agent, nominee or custodian continues to act for the trust, the trustees—

- (a) must keep under review the arrangements under which the agent, nominee or custodian acts and how those arrangements are being put into effect,
- (b) if circumstances make it appropriate to do so, must consider whether there is a need to exercise any power of intervention that they have, and
- (c) if they consider that there is a need to exercise such a power, must do so.

(2) If the agent has been authorised to exercise asset management functions, the duty under subsection (1) includes, in particular—

- (a) a duty to consider whether there is any need to revise or replace the policy statement made for the purposes of section 15,
- (b) if they consider that there is a need to revise or replace the policy statement, a duty to do so, and
- (c) a duty to assess whether the policy statement (as it has effect for the time being) is being complied with.

(3) Subsections (3) and (4) of section 15 apply to the revision or replacement of a policy statement under this section as they apply to the making of a policy statement under that section.

(4) “Power of intervention” includes—

- (a) a power to give directions to the agent, nominee or custodian;
- (b) a power to revoke the authorisation or appointment.

**Liability for agents, nominees and custodians, etc.**

**23.—**(1) A trustee is not liable for any act or default of the agent, nominee or custodian unless he has failed to comply with the duty of care applicable to him, under paragraph 3 of Schedule 1—

- (a) when entering into the arrangements under which the person acts as agent, nominee or custodian, or
- (b) when carrying out his duties under section 22.

(2) If a trustee has agreed a term under which the agent, nominee or custodian is permitted to appoint a substitute, the trustee is not liable for any act or default of the substitute unless he has failed to comply with the duty of care applicable to him, under paragraph 3 of Schedule 1—

- (a) when agreeing that term, or
- (b) when carrying out his duties under section 22 in so far as they relate to the use of the substitute.

*Supplementary***Effect of trustees exceeding their powers**

**24.** A failure by the trustees to act within the limits of the powers conferred by this Part—

- (a) in authorising a person to exercise a function of theirs as an agent, or
- (b) in appointing a person to act as a nominee or custodian,

does not invalidate the authorisation or appointment.

**Sole trustees**

**25.—**(1) Subject to subsection (2), this Part applies in relation to a trust having a sole trustee as it applies in relation to other trusts, and references in this Part to trustees (except in sections 12(1) and (3) and 19(5)) are to be read accordingly.

(2) Section 18 does not impose a duty on a sole trustee if that trustee is a trust corporation.

**Restriction or exclusion of this Part, etc.**

**26.** The powers conferred by this Part are—

- (a) in addition to powers conferred on trustees otherwise than by this Part, but
- (b) subject to any restriction or exclusion imposed by the trust instrument or by any statutory provision.

**Existing trusts**

**27.** This Part applies in relation to trusts whether created before or after its commencement.