
CC42-Appointing Nominees and Custodians: Guidance under s.19(4) of the Trustee Act 2000 (Version 02/01)

Contents

What is this publication about?	1
Definitions of “nominee” and “custodian”	2
The Trustee Act 2000	2
Purposes for using a nominee/custodian	7
The Commission’s guidance	7
The relationship between the nominee to be selected and the charity	9
The qualification and location of the nominee/custodian to be selected	11
The independence of the nominee and custodian	14
Reporting by nominees/custodians	16
Summary	17
Annex A - The present law on the use by trustees of nominees and custodians	19
Annex B - Tracing and following	24

What is this publication about?

1. This publication:
 - describes the provisions for the appointment of nominees and custodians brought in by the Trustee Act 2000; and
 - details the requirements with which trustees wishing to exercise these powers must comply.
2. In particular it contains in paragraphs 17-47 the statutory guidance given by the Charity Commission under s.19(4) of the Trustee Act

Definitions of “nominee” and “custodian”

2000, and with which trustees must also comply. Within these paragraphs, what constitutes the statutory guidance is indicated in bold.

3. For the purpose of this publication, a “nominee” is someone who holds the title to the property of a charitable trust (or some part of that property) on behalf of its trustees as a whole. The nominee is the person whose name will be entered on the share register of any company whose shares are held by the trust. In the case of registered land, the nominee is the person whose name is entered in the proprietorship register. A “custodian” is a person who, on behalf of the trustees as a whole, looks after assets of the trust, typically the documents or other evidence of the trust’s title to its property - for example share and land certificates. This is the sense in which these words are used in the Trustee Act 2000.

4. The same person may be both a “nominee” and a “custodian”: the expression “custodian” is sometimes used to describe a person who is both a nominee and a custodian, or who provides services in addition to those described in paragraph 3.

5. The Trustee Act 2000 (referred to as “the Act” from now on) was passed on 23 November 2000 and came into force on 1 February 2001. Subject to certain qualifications, the Act enables the trustees of a trust, including a charitable trust, to appoint a person to act as their “nominee” and/or the same or a different person to act as their “custodian” in relation to such of the assets of the trust as they determine.

6. The new statutory power is in addition to any power to appoint a nominee/custodian in the governing document of a charity, and will not replace the statutory power to appoint a

The Trustee Act 2000

custodian trustee. Nor will it replace, in the case of charity land, the trustees' power to request the Commission to transfer the title to the land into the name of the Official Custodian for Charities. Also, the Commission will still be able to confer on charity trustees powers to appoint nominees and custodians which are wider than those conferred by the Act, if this is expedient in the interests of the charity.

7. The new statutory power potentially applies to any property which is held on trust. It applies, therefore, to the property of charitable unincorporated associations, and other charities whose property is held on trust, as well as to the property of charitable trusts themselves. So, for the purpose of this guidance, "charitable trust" includes "charitable association" and any such other charity: the "charity trustees" will in each case actually be responsible for exercising the power. But the new power will not apply:

- To the property of common investment funds (other than pooling scheme funds) or of common deposit funds. Those managing these funds will continue to use the express powers to appoint nominees/custodians which are conferred in the schemes by which the funds are regulated.
- Where a charitable trust has a custodian trustee. A custodian trustee must hold the title to all the property of the trust of which it is the custodian trustee. It must also hold the documents of title to that property. So, the appointment of a separate person as nominee/custodian would not be compatible with the responsibilities of a custodian trustee.

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- To property held by the Official Custodian. Again, the appointment of a separate person as nominee/custodian would not be compatible with the statutory responsibilities of the Official Custodian.
 - To the corporate property of a charitable company or other charity which is incorporated by or under statute. Such property is not held on a trust.

8. The new statutory power will not be available where the governing document of a charitable trust expressly or by necessary implication forbids the use of a nominee/custodian.

9. The Act contains a provision that the trustees of a charitable trust which is not an exempt charity must act in accordance with any guidance given by the Charity Commissioners concerning the selection of a person for appointment as a nominee or custodian under the powers which the Act confers.

10. In the terms of the powers which it confers to appoint a nominee/custodian, the Act recognises that there are risks in, as well as benefits from, the appointment by trustees of nominees and custodians. A balance has to be struck between economy and convenience of trust administration on the one hand, and security for the trust property on the other. Any person appointed a nominee/custodian under the powers which the Act confers must be either:

- a person who carries on a business which includes acting as nominee/custodian; or
- a corporate body controlled by the trustees; or
- a solicitors' nominee company recognised under section 9 of the Administration of Justice Act 1985.

11. The provision of nominee/custodian services may, in certain circumstances, be a class of investment business for the purposes of the Financial Services Act 1986 (“FSA”).

12. Such provision will be a class of investment business if:

- the services provided by the nominee/custodian include “administration”, for example the nominee/custodian also deals with correspondence from the company whose shares are held, or handles tax reclaims on dividends, on behalf of the trustees; and
- the assets within the scope of the services provided by the nominee/custodian include “investments” within the meaning of the FSA (eg shares, debentures etc, but not land), or could, under the terms of the agreement between the nominee/custodian and the trustees, include “investments”; and
- the nominee/custodian is carrying on the business of providing the relevant services in the UK.

13. As indicated in paragraph 8, the new statutory power to appoint a nominee/custodian can be excluded by appropriate provision in the governing document(s) of a charity. However, the statutory power is expressed in terms which, if it is available, are wide enough to enable the fulfilment of the purposes referred to in paragraph 15 below.

14. The Act sets out the following general rules and duties in relation to the use of nominees/custodians under the power which it confers:

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- A sole trustee cannot appoint himself or herself as nominee/custodian, and a body of trustees cannot appoint one only of their number as a nominee or custodian, unless the nominee/custodian is a trust corporation.
 - The trustees have to discharge the statutory duty of care when selecting the nominee/custodian, and when determining the terms on which the nominee/custodian is to act. This means that each trustee must exercise such care and skill as is reasonable in the circumstances, having regard in particular to any special knowledge or experience which the trustee has, or holds himself or herself out as having. In the case of a professional trustee, account will also be taken of any special knowledge or experience which is reasonable to expect of someone in the relevant profession.
 - Only if it is reasonably necessary to do so, can the trustees appoint a nominee/custodian on terms which allow him¹ to appoint a substitute, or which limit the liability of the nominee/custodian or the substitute, or which allow the nominee/custodian to act in circumstances capable of giving rise to conflicts of interest.
 - The appointment of the nominee/custodian must be in, or be evidenced in, writing.
 - The trustees must keep under review the arrangements under which the nominee/custodian acts, and how those arrangements are being put into effect. They must consider whether circumstances make it

¹ In this publication, when referring to a nominee/custodian, which may be a person of either sex, but is often a body corporate, the masculine pronouns are used in their inclusive legal sense.

***Purposes for using
a nominee/custodian***

appropriate to give directions to the nominee/custodian, or to terminate the appointment, and if those circumstances do exist, they have a duty to give the directions or terminate the appointment as the case may be. The statutory duty of care referred to above also applies to this duty of review.

15. The use of nominees/custodians in the administration of a charitable trust serves the following purposes:

- It eliminates the need to transfer the title to trust property whenever there are changes in the trustee body: it also eliminates the administrative disadvantages which, in practice, ensue when the need to do this is overlooked.
- It facilitates the transfer of trust property into, and out of, the trust (for example, when shares are bought and sold).
- It reduces the risk of trust documents evidencing the title to the trust property being lost. Quite apart from the consequential risk of loss to the trust property itself, the replacement of such documents can be expensive.

16. But, at present, trust law imposes restrictions on the use by trustees of nominees and custodians. These restrictions, and why they exist, are explained in Annex A.

***The Commission's
guidance***

17. The Act recognises that, in the case of charities, there are particular concerns on the question of the security of trust property, which may not arise in the case of non-charitable trusts. Charities operate in the public interest, and without identifiable beneficiaries to look after

their own interests in the trust. Hence the provision under s.19(4) of the Act for guidance from the Commission. The duty to act in accordance with that guidance does not arise in the case of charities which are exempt from the Commission's regulatory jurisdiction.

18. This guidance covers four main areas:

- the relationship between the nominee to be selected and the charity (paragraphs 21-28);
- the qualification and location of the nominee/custodian to be selected (paragraphs 29-37);
- the independence of the nominee and custodian to be selected, from each other and from any person to whom the charity trustees have delegated the function of managing the charity's investments (paragraphs 38-42); and
- reporting by the nominee/custodian to be selected (paragraphs 43-47).

19. The guidance only applies directly to the exercise of the powers in the Act to appoint nominees/custodians. It does not apply directly to the exercise of any other power to appoint a nominee/custodian, but we recommend that charity trustees exercising such a power should nonetheless bear this guidance in mind. The statutory guidance itself is indicated in bold; the rest of the text in the paragraphs below is supporting information and advice.

20. The Act permits trustees to delegate the selection of a nominee or custodian to an agent; typically this will be in practice the trustees' discretionary investment manager. However, a nominee/custodian selected in this way is still selected on behalf of the trustees. The guidance below applies whether the trustees have selected

*The relationship between
the nominee to be
selected and the charity*

the nominee/custodian directly or through an agent such as a discretionary investment manager. Where the trustees have used an agent to select the nominee/custodian they will need to know who has been selected on their behalf and on what terms the nominee/custodian has been engaged. Without this information they could not properly discharge the review duties set out at the end of paragraph 14 above.

21. Under English law, the normal legal relationship between a nominee and the person on whose behalf he holds the property is that of trustee and beneficiary. On that basis, the title to the charity's property is held by the nominee, but the beneficial ownership is with the charity.

22. This beneficial ownership is not affected by the insolvency of the nominee: the property is not accessible by the nominee's other creditors. And if the nominee has made an unauthorised disposal of the charity's assets, it may be possible for the charity to recover the assets from the recipient ("following"). Or it may be possible for the charity to assert a proprietary interest in the assets which now represent the asset improperly disposed of, whether in the hands of the nominee or otherwise ("tracing"). What is meant by "following" and "tracing" is explained clearly in a recent court case (**Foskett v McKeown (2000) 3 All ER 97**): the relevant extract from this case, with a brief explanation of the limitations of any proprietary claim, is in Annex B.

23. It could be argued that the power which the Act gives to appoint a nominee **only** extends to the creation of the sort of relationship which is described in the previous paragraph. But even if it does confer a power to appoint a nominee where the relationship between the charity and the nominee is to be purely contractual, **charity**

trustees must normally avoid selecting a nominee who insists on a purely contractual relationship.

24. In such a case the nominee has both the title to the assets and the beneficial ownership of them. He therefore can have no more than a contractual liability to account to the charity for the value of the assets which he manages on its behalf. If the nominee becomes insolvent the charity is in no better position as regards the protection of its interests than any other unsecured creditor. If the nominee disappears beyond legal reach, the charity has no possibility of being able to recover property from a third party into whose hands that property or the property representing it might otherwise have been followed or traced.

25. As explained in paragraph 22, a trust is the basis of the charity's proprietary right. For the trust to exist, there must be evidence of an intention to create a trust, and the subject matter of the trust must be capable of proper identification. **It is, therefore, important for trustees to ensure that the proposed arrangements with the selected nominee:**

- **do, in fact, make it clear that the shares or other property which the nominee is to hold on behalf of the charitable trust do, in fact, belong to the trust** (under English law trusts cannot be recognised on company share registers - section 360 Companies Act 1985);
- will require the nominee to identify the property which he holds on behalf of the charitable trust, and to segregate it from any property which he holds on his own behalf. Arrangements which give an individual charity joint beneficial ownership of an asset with other clients of the nominee may be acceptable.

26. **The arrangements must be such as will enable the trustees, if necessary, to prove legally their beneficial sole, or joint, ownership of the assets held by the nominee on their behalf** (for example if the nominee becomes insolvent). If they are in any doubt about whether the arrangements proposed by the nominee to be selected will, in fact, have this effect they should take legal advice.

27. Trustees also have a clear duty under the Act to keep the agreed arrangements under review, and to take suitable steps to ensure that those arrangements are in fact being properly worked out by the nominee. If they do not carry it out, they could be personally liable for losses which are the result of the nominee's misconduct.

28. As indicated above, it is considered that, normally, the ability of the charity to assert a sole or joint proprietary interest in the assets held by the nominee is the most satisfactory way to protect its position. However, **there may be circumstances where a guarantee of the nominee's contractual liabilities from an insurance or other company of appropriate financial standing may be an acceptable substitute**. Charity trustees contemplating such an arrangement are advised to discuss the matter first with the Commission.

The qualification and location of the nominee/custodian to be selected

29. Unless the nominee/custodian is a company controlled by the trustees, or is a solicitors' nominee company, the Act requires the chosen person to be engaged in the business of providing nominee/custodian services. As indicated above, the provision of these services may be a class of investment business for the purposes of the FSA. However, the Act does not limit the identity of the nominees/custodians who may be selected by trustees under the

power which it confers, by reference to a requirement of authorisation or exemption under the FSA.

30. The powers in the Act are wide enough to permit the appointment of a nominee/custodian who is neither under the control of the trustees nor subject to the sort of regulatory control which would apply to someone engaged in investment business in the UK. **Charity trustees proposing to select such a nominee/custodian must be particularly careful to consider the individual qualifications and attributes of the person whom they propose to appoint as a nominee/custodian, and the suitability of the proposed terms of engagement.**

31. It is appreciated that where charity trustees make investments outside the UK, they may have no real choice but to use the services of a locally resident nominee/custodian, and to accept the lack of any regulatory protection comparable to that available when using similar services in the UK.

32. However, **charity trustees need to consider the legal risks associated with the transfer of the trust property to the jurisdiction in which the nominee/custodian is located. These risks should be factored into any decision as to whether the relevant location is or is not a suitable one for the investment of the charity's assets, and into the process of reviewing investments, which is, of course, a duty imposed by the Act.**

33. There are four elements in this risk:

- The legal system of the country concerned may not, in fact, provide any effective means of enforcing the obligations of the nominee/custodian under his agreement with the trustees, or of enforcing the

transfer of the charity's property back to the trustees if the trustees decide to terminate the agreement.

- The legal system of that country may not recognise the trust concept at all.
- The legal system may recognise the trust concept, but may not, in its insolvency law, recognise a distinction between trust property held by the person who is insolvent, and property which is beneficially owned by that person.
- The legal system may not have a satisfactory method of following or tracing trust property.

34. Charity trustees who are contemplating the appointment of a nominee/custodian who is located outside the UK need a clear understanding of the relevant aspects of the law in the country in which the person is located. They may need to take local legal advice.

35. Charity trustees must not transfer trust property, or the evidence of title to it, to a nominee/custodian who is located in a country where there is no effective means in practice of enforcing the obligations of the nominee/custodian, or of enforcing the transfer of the charity's property back to the trustees if the trustees decide to terminate the agreement. Where trust property is transferred to a particular jurisdiction which does not recognise the trust concept at all, or which does not, in its insolvency law, recognise a distinction between trust property and property which is beneficially owned, the charity is exposed to the possibility of having no more than an unsecured right of recourse against the nominee/custodian, should things go wrong. Charity trustees need to recognise the dangers; these are explained in paragraph 24.

36. It may be possible for trustees to protect the position of the charity in the manner indicated in paragraph 28, but again, charity trustees contemplating such an arrangement are advised to discuss the matter first with the Commission.

37. Even where the charity retains the beneficial ownership of property the title to which has been transferred to a nominee, there is always some risk that its proprietary claim may be destroyed by the unauthorised actions of the nominee/custodian. For example, if the charity's assets are sold to someone who is unaware of the lack of proper authority for the sale, and then the nominee/custodian dissipates the proceeds. However, as explained in paragraph 22, English law often allows a beneficiary the right to continue to assert a proprietary interest in an asset which has been transferred to a third party in breach of trust ("following"), or in the assets which represent the asset so transferred ("tracing"). **Charity trustees need to recognise the risks of transferring trust property to a jurisdiction which does not protect proprietary rights by allowing assets to be followed or traced.** In such a case, if there is an unauthorised disposal of the trust property, the charity may again be left simply with an unsecured right of recourse against the nominee/custodian.

The independence of the nominee and custodian

38. This means independence both from each other and from any person to whom the charity trustees have delegated the function of managing the charity's investments.

39. The Act permits the same person to be appointed as both nominee and custodian, and, in practice, administrative convenience and cost considerations may suggest that the same person should be appointed to discharge both functions on behalf of the charity. The Act also gives a power to delegate the function of discretionary

investment management; it allows the person appointed as discretionary investment manager also to be either nominee or custodian or both.

40. As explained in paragraph 14, only if it is reasonably necessary to do so should trustees appoint a nominee/custodian on terms which allow him to act in circumstances capable of giving rise to conflicts of interest. **Charity trustees need to recognise the possible risks associated with a lack of independence in the persons responsible for the process of administering the charity's investments on its behalf.** Conflicts of interest here may mean that the charity's interests are subordinated by the person with the conflict to his own interests, or to the interests of a third party.

41. Lack of independence may also remove the security which would have been provided by a division of functions between independent persons. For example, the risk of an unauthorised transfer of the charity's assets by the nominee (with the consequences described earlier in this guidance) will be increased if the nominee is also the custodian and so also holds the documents of title to the assets of the charity which are held in his name.

42. Whilst the increased risk may be negligible where the services are provided by a person who is authorised or exempted under the FSA, it may be more significant in the case of nominees/custodians who are outside the scope of financial services regulation. Again the extent of the risk may depend on the state of the law in the jurisdiction in which the person concerned is located, and again the trustees may need to take local legal advice.

Reporting by nominees/custodians

43. As explained in paragraph 14, trustees who appoint a nominee/custodian under the statutory power have a duty to keep under review the performance of the nominee/custodian. **It is important for charity trustees to ensure that any nominee/custodian whom they propose to select is prepared to agree to satisfactory reporting arrangements.**

44. What reporting arrangements will be necessary will depend on the circumstances, such as the value of the trust property, and whether or not the nominee/custodian is regulated.

45. Periodic asset statements are required to be sent to the customer by the IMRO conduct of business rules. But it is now common practice for those using the services of nominees and custodians also to request from the directors of the nominee/custodian periodic reports on the internal controls put in place by the nominee/custodian to ensure the safety of the customer's assets. These reports might cover:

- the overall control objectives which the nominee/custodian has established;
- arrangements for the physical security of assets and for the segregation of the assets belonging to particular customers;
- asset reconciliation procedures;
- computer processing controls;
- settlement procedures;
- stock lending procedures;
- procedures to ensure compliance with investment mandates; and
- systems monitoring procedures.

46. Where permitted by the agreement with the customer, the procedures for selecting and monitoring those to whom functions have been delegated might also be covered.

47. The report of the nominee/custodian on these matters may be accompanied by a review prepared by independent accountants.

48. Trustees must consider whether the agreements with nominees/custodians whom they propose to appoint need to contain provisions relating to the transmission of such reports to them.

Summary

49. The Charity Commission has, throughout the discussions which have led to the enactment of the Trustee Act 2000, supported the proposal to extend the powers of trustees of charitable trusts to appoint nominees and custodians in the way that the Act has now done. This will undoubtedly facilitate the administration of many charitable trusts. However there are real risks in the use of nominees and custodians, and it is important that these should be recognised and managed. The Act sets out the basic framework:

- Nominees/custodians must be professionally engaged in the provision of the service (or be controlled by the trustees, or be a solicitors' nominee company).
- Trustees should exercise proper care when selecting the nominee/custodian and determining his terms of reference.
- Certain terms of reference which enhance the risk to the property of the charitable trust should be avoided unless that is impracticable.

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- There should be a proper process for reviewing the performance of the nominee/custodian.

50. In addition this guidance:

- emphasises the importance of ensuring that assets held by a nominee/custodian do, in fact, still belong to the charity, and that the charity can prove this legally, if necessary;
- draws attention to the particular risks of appointing nominees/custodians whose business has no connection with the UK;
- emphasises the need for charity trustees to balance the advantages and disadvantages of appointing as nominees and custodians persons who are independent of each other and of any discretionary investment manager; and
- draws attention to the desirability of ensuring periodic reports from the nominee/custodian to the trustees on the controls put in place to safeguard the charity's property.

We aim to make our publications as useful and easy to read as possible. If you have any suggestions about how this booklet may be improved, please write to the Head of Publications at our Taunton office.

Annex A - The present law on the use by trustees of nominees and custodians

A1. One of the rules of trust law which evolved in the 19th century to protect the property of trusts from the risk of loss required that the title to **all** trust property should be held in the joint names of **all** of the trustees. The effect was that the participation of all the trustees was necessary in order for the title to trust property to be transferred effectively either to a new trustee or to or from a third party. This minimised the risk of the misappropriation of trust property or the proceeds of any sale. Allowing trust property to be held in the name of one or two trustees only, or in the name of someone who was not a trustee, on behalf of the trustees as a whole (a “nominee”), would have meant that the nominee(s) alone could effectively transfer the property to a third party, even though lacking the authority of the trustees as a whole for the transfer.

A2. Provided that the transferee (or any subsequent transferee from the original transferor) was a purchaser, and was not aware of the nominee’s lack of authority, the trust could not recover its property. Unless the trust could “follow” the property which had been improperly transferred, or could “trace” that property into something which now represented it, whether in the hands of the nominee or otherwise, it could only recover its loss from the nominee who was responsible for the unauthorised transfer. This might not be practicable, eg because the nominee had disappeared or was insolvent. What is meant by “following” and “tracing” is explained in Annex B.

A3. So the use by trustees of a nominee was only permitted if the person who set the trust up authorised this in the trust's governing document, or if the Court, or, in the case of a charity, the Commission, authorised it. But this high level of security for trust property came at a price. Every time there was a change of trustee, the trust had to bear the cost of transferring the title to all the trust property into the joint names of all the people who continued to be, or became, trustees. Every time there was a disposal of trust property to a third party, and every time property was acquired by the trust from a third party, all the trustees had to take part in the process of formally transferring the title to the property to or from themselves, as the case may be (subject, in the case of a charity, to the provisions now contained in section 82 Charities Act 1993).

A4. The need for transfers of title to trust property on changes in trusteeship would clearly be eliminated by having the title to the property held by a nominee. Where the nominee was a corporate body, which potentially existed indefinitely, there might never be any need to transfer the title to trust property. The title would, of course, continue to be held by the nominee, notwithstanding changes in the trusteeship, on behalf of the trust. Many people who set trusts up, including charitable trusts, considered that the administrative convenience and economy of this outweighed the risks of allowing trust property to be held by a nominee, and so authorised the use of a nominee. In practice the provision conferring such authority often included safeguards eg requiring the nominee to be a trust corporation, or at least two individuals.

A5. The Public Trustee Act 1906 gave anyone with a power to appoint the trustees of a trust (or the founder of the trust, or the court) the power generally to appoint a corporate "custodian trustee" of that trust. In what was seen at the

time as an appropriate balancing exercise between convenience and economy in trust administration, on the one hand, and security for the property of trusts, on the other, this statutory power enabled trust property to be transferred to a custodian trustee, effectively a nominee, but subject to certain safeguards.

A6. The custodian trustee was, in the interests of the security of the trust property, required by the legislation to be a corporate body possessing certain qualifications. The relationship between the custodian trustee and the “managing trustees” was elaborately defined in the 1906 Act, and could not be changed by agreement: specifically the custodian trustee was given a range of statutory responsibilities designed to safeguard the property of the trusts from loss. If a custodian trustee was appointed to a trust, **all** the trust property had to be transferred to it. The Official Custodian for Charities performs a function specifically for charities which is similar to that performed by a custodian trustee, but now generally only in relation to charity land.

A7. Transfers of property into and out of a trust can also be facilitated by the use of a nominee to hold the title to the property. The nominee is the only person who has to participate in the formal transfer process, thereby increasing speed and lowering cost. This consideration has assumed a particular importance in recent years with the increasing sophistication and speed in the process of settling stock market trades, and the dematerialisation of many stock transfers through the use of the “Crest” system. Other administrative aspects of investment management may also be facilitated by the use of nominees.

A8. Indeed, the current system for the transfer of stocks and shares in the UK resulting from transactions in the market has for many years necessitated the use of nominees in the process, and legislation has been passed to provide

trustees generally with the necessary authority (section 5, Stock Exchange (Completion of Bargains) Act 1976; article 33, Uncertificated Securities Regulations 1995). However, this legislation only authorises the use of nominees for the short period of time where this is an essential part of the modern stock transfer process. Where the use of a nominee is merely convenient, trustees must still normally rely on powers in their trust document, or authorities from the Court or the Commission.

A9. The statutory rules relating to custodian trusteeship have largely prevented this particular form of nomineehip from being a practical response to the demands of the modern system of stock transfer. For example, a custodian trustee would be prevented by the terms of the statutory relationship between itself and the managing trustees from making the sort of arrangements with the managing trustees which would be necessary to achieve the objective of speeding up the stock transfer process, and making it more convenient and economical.

A10. The trust law rule referred to in paragraph A1 required not only that the title to trust property should be held jointly by all of the trustees, but also that the evidence of that title – share and land certificates etc – should be in the possession of at least one of them. The rule did not generally insist on collective possession through deposit at, say, a bank to the order of the trustees jointly, although there is a statutory power to deposit trust documents of title at a bank or similar institution (section 21 Trustee Act 1925), and there is a statutory duty so to deposit bearer securities (section 7 Trustee Act 1925). If a custodian trustee is appointed, it has to have control of the trust's documents of title (the Official Custodian may allow the documents to be retained under the control of the trustees). Charity trustees have a statutory power to deposit trust documents of title with the Commission,

with our consent (section 30 Charities Act 1993). If trust documents are to be held by a non-trustee in any other circumstances, this must be authorised by the charity's governing document or by the Court or the Commission.

A11. This rule, no less than the rule requiring the title to trust property to be held by the trustees jointly, inhibits the modern system of stock transfer, and the Act extends the existing power to deposit trust documents of title. The existing duty to deposit bearer securities is preserved, with minor modifications.

Annex B - Tracing and following

B1. In **Foskett v McKeown (2000) 3 All ER 97**, Lord Millett explained tracing and following:

“Tracing and following are both exercises in locating assets which are or may be taken to represent an asset belonging to the beneficiaries and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another a claimant can elect whether to follow the original asset into the hands of the new owner, or to trace its value into the new asset in the hands of the same owner. In practice his choice is often dictated by the circumstances.”

B2. Where no asset can be identified as a substitute (eg because the original asset was dissipated) there can be no proprietary claim. And no proprietary claim can be asserted to an asset has passed into the hands of a bona fide purchaser for value without notice that the title of the vendor derived from a breach of trust.

Further Reference

For further information you may find it useful to refer to the following Charity Commission publications:

- CC2 Charities and the Charity Commission
- CC3 Responsibilities of Charity Trustees
- CC8 Internal Financial Controls for Charities
- CC12 Managing Financial Difficulties and Insolvency in Charities
- CC13 The Official Custodian for Charities' Land Holding Service
- CC60 The Hallmarks of a Well-run Charity
- CC61 Charity Accounts 2001: The framework

Mae nifer o'n taflenni ar gael yn Gymraeg erbyn hyn. Cewch y wybodaeth ddiweddaraf gan yr Uned Gyhoeddiadau yn ein swyddfa yn Taunton (Ffôn 01823 345182).

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Notes

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