

**No. 70**

**Revised: March 2002**

This Information Sheet explains the different roles and responsibilities of managing and holding trustees in an unincorporated association, and how it is possible to incorporate the managing trustees as a body.

## **Community Association Trustees**

### **1. Introduction**

This information sheet explains the different roles of the Managing and Holding Trustees of a Community Association. Much of it will also be relevant to similar neighbourhood charities. It also goes into the pros and cons of incorporating the body of Managing Trustees. This is something that can be of benefit to the charity and, under the Charities Act 1993, is now easier to do.

A Community Association with objects identical to those in the model constitution published by Community Matters is established for charitable purposes. It is capable of being a charitable institution or 'trust', assuming its activities are in line with its declared objects; and has a statutory duty to seek to register as a charity with the Charity Commission. Those who manage the community association's affairs - the General Committee (or other main committee) - are the Managing (or Charity) Trustees.

The duties and responsibilities of Managing Trustees are described in more detail in section 3.

Unless a community association is incorporated as a company limited by guarantee, it cannot lawfully hold property in its own right. Holding Trustees, who can be named individuals or a suitable organisation, must normally therefore be appointed to hold the association's property (particularly land, premises or investment assets). More details are given in section 2.

However, an alternative option is also now available, whereby the trustees as a group are incorporated. What this means and how it can be achieved is described in section 4.

The question is often raised as to whether Holding Trustees can, or should, also be Managing Trustees. Although there is nothing in law to prevent this, Community Matters has always advised strongly against it. This advice has recently been reaffirmed by the Charity

© **Community Matters**

*Quoting from this information sheet is permitted with acknowledgement to Community Matters.*

*Reproduction of the whole sheet for **external** use is only permitted where an organisation holds a reproduction licence from Community Matters.*

Commission. The main reason is that Holding and Managing Trustees have different roles which occasionally may come into conflict.

## 2. Holding Trustees

Holding Trustees are the legal owners of the association's property. They may be a number of local individuals, or the Local Authority, or the Official Custodian for Charities. The latter two are usually referred to as Custodian Trustees.

The function of the Holding or Custodian Trustee(s) is merely to HOLD the property and to act on the lawful instructions of the Committee of the Association in transactions affecting the title, either for their lifetimes or until retirement, or, in the case of a body capable of having a permanent legal existence (such as the Local Authority or the Official Custodian), in perpetuity. Both Community Matters and the Charity Commission favour the last two 'permanent' Custodian Trustees on the basis that (a) they never need replacing and (b) they can be found by the Managing (or Charity) Trustees at a published address in connection with any transactions affecting the title to the property for which their concurrence is required. These advantages will not apply in the case of individual Holding Trustees who inevitably cannot be permanent. Should all of them be allowed to die without replacement, practical difficulties (and legal fees) will be incurred.

The name(s) of the original Holding (or Custodian) Trustee(s) will invariably appear at the beginning of the Conveyance, Lease or other Deed (in which they will usually subsequently be defined collectively as 'the trustees').

Holding Trustees are *not* normally responsible for an association's debts or obligations - the Managing Trustees *are*.

It should be emphasised that Holding Trustees are required solely because property (land, premises or investment assets) cannot

be held by an unincorporated association in its own right. They do not have authority over the Managing Trustees nor can they override the lawful decisions of the Managing Trustees.

## 3. Managing (or Charity) Trustees

The members for the time being of the Council/Management Committee/General Committee of the association, (whether expressly constituted in the relevant document or implied), being the persons having the general control and management of the administration of the association, will be technically the 'Charity Trustees' within the meaning of section 97 of the Charities Act, 1993, and as such will be subject to the requirements of the law relating to trustees generally.

### 3.1 Duties and Responsibilities of Managing Trustees

These notes are intended as guidelines only, not as an authoritative exposition of the law. Throughout the notes 'members' means members of the community association Council/Management Committee/General Committee.

1. In every case the powers and duties of the members as set out in the relevant constitution must be carefully examined.
2. Every member must take as much care in his or her business dealings on behalf of the association as would any reasonable man or woman in the case of his or her own personal business matters. This means that members must act rationally, sensibly and carefully.

They should not concur in any contract or other liability unless they are reasonably sure that the association will have adequate funds to meet any payment due from it.

Moreover, if a member gives a PERSONAL guarantee (i.e, without prior authorisation from the committee) for the fulfilment of a contract entered into on behalf of the association he or she will be personally liable on that contract to the limit of his or her own private resources -though court proceedings are normally only instituted as a last resort and after months - sometimes years - of prior negotiation and correspondence.

3. In practice, one of the main problems from the members' point of view is likely to be that of proving that they have at all times acted responsibly. It is, therefore, vital that: (a) proper minutes and records of all decisions and transactions are kept; and (b) notice (preferably written) is given at the time of any particular transaction to the supplier of the goods and/or services in question to the effect that the arrangements are being entered into on behalf of the association and not by the member(s) personally.
4. By taking the precautions outlined above, members should reduce the risk of individual personal liability, though the strict legal position is, broadly, as follows:-
  - a) Members are collectively and individually personally liable on all contracts entered into on behalf of the association (and on all covenants given in a Deed to which they are parties).
  - b) Whilst a member who has acted in accordance with the relevant trusts has a right of indemnity out of the association's funds (though only, of course, up to the limit of the property actually owned by the association, so that any deficit may have to be made up by the members out of their own pocket), the supplier of goods or services with whom he or

she has dealt is entitled to treat him or her as the person responsible for carrying out the relevant obligations. Moreover, a member cannot avoid ultimate responsibility by delegating power to others, for example, to the Secretary or other officer(s) of the association.

c) Although members may generally act by a majority decision, a dissenting minority will not escape responsibility unless they have at all material times actively and publicly dissociated themselves from the relevant decision.

d) Where the question at issue is an internal one between a member or members and the association itself, the members' personal liability to the association may be limited to the amount of the association's property passing through his, her or their hands.

e) Although the duties of a Trustee should never be lightly undertaken, individual committee members who have at all times acted prudently and have, whenever necessary, obtained professional advice (which is authorised by the Trustee Act, 1925, and can be paid for out of the association's funds) should in practice have little to fear. It should moreover be noted that members not only have the protection of the provision in the Trustee Act which allows the court to exonerate trustees where, in all the circumstances, they 'ought fairly to be excused' for a breach of trust. Under section 29 of the Charities Act, 1993, a charity trustee may also make written application to the Charity Commissioners for 'their opinion or advice in any matter affecting the performance of [the trustees'] duties as such'.

Such provisions do not, of course, in any way absolve the members from their GENERAL duty of care (so that no exoneration may be possible vis-a-vis third parties with whom managing trustees have entered into legally binding contracts).

f) In addition, under the provisions of the Trustee Act 2000, trustees are subject to a further specific statutory duty of care in relation to:

- investing in stocks, shares and similar investments;
- reviewing investments;
- acquiring land or exercising powers in relation to land (including buildings) - e.g. in taking a lease or a licence, or offering a lease or licence to a third party;
- Setting investment criteria;
- Selecting investment advisors, or choosing not to take advice;
- Selecting nominees, agents or custodians, and deciding or reviewing the terms under which such persons act on the trustees' behalf.

This statutory duty of care obliges every trustee to take such care and skill as is reasonable in the circumstances, to have regard to any specialist knowledge or experience that the trustee has or claims to have and, if acting in a business or professional capacity, to have regard to such knowledge or skill as can reasonably be expected in a person acting in such a capacity.

#### 4. Incorporation of Trustees

The Charity Commission can, by granting a special certificate, turn the Managing Trustees into a corporate body. This is not the same as the *charity* itself being incorporated, i.e. being a company or an industrial and provident society. But it does

carry some of the same advantages. These are:

- Property such as land, buildings and investments can be registered in the name of the corporation and will remain registered without any further action being required.
- When it is granted the Commission's certificate will vest any freehold or leasehold land in the charity's ownership in the corporation.
- Holding Trustees are no longer needed. Any stipulation in the constitution that there must be Holding Trustees is overridden by the certificate of incorporation. There is no longer any worry about finding new people to fill vacancies, or of transferring property into the name of new holding trustees.
- The corporation can never go out of existence unless it is dissolved by the Commission.

Are there any drawbacks? Not exactly but you should be aware of the following:

- It is of use *only* to charities which have land and/or investments such as stocks and shares.
- The Charity Commission alone can incorporate trustees in this way. An application form has to be filled in and the charity will have to give the reasons why it considers that incorporation will be beneficial.
- The charity will have to prove that the current committee members have been properly appointed in accordance with the constitution. Unless the Commission already has it the charity will be asked to provide a copy of any lease or conveyance of land made to the charity.

- After the certificate is granted, the charity will need to employ a solicitor to register the change of ownership of its land with the Land Registry. The charity will also have to inform its bank and any other organisation where it has investments or cash.
- Every year the charity will have to send a list of the names and addresses of the committee members to the Commission.
- If a seal is used it must be kept safely. Rules about who can sign documents in the name of the corporation (or witness the seal) must be made and adhered to.
- It is good practice to keep a record of all documents executed by the corporation, by giving each one a number and noting it in a book.
- Although the corporation is perpetual, the management committee still has to be formed as provided by the constitution. All the rules about elections, resignations and a quorum continue to apply.
- Incorporating the trustees does *not* limit their liability in any way.

Harmsworth House  
13-15 Bouverie Street  
London EC4Y 8DP  
☎ 0870 333 0123

2<sup>nd</sup> Floor  
Queens Dock  
Liverpool L3 4DQ  
☎ 0870 333 0123

Woodfield House  
Taunton  
Somerset TA1 4BL  
☎ 0870 333 0123

*Charitable Status: a Practical Handbook*, by Andrew Phillips obtainable from the Directory of Social Change, 24 Stephenson Way, London NW1 2DP  
☎ 020 7209 5151

## 5. Further Reading

It must be clearly understood that no note on this subject is capable of covering all cases. Managing trustees should consult their own professional advisers with regard to any particular problem. Further information is also available in the following publications:

Charity Commission leaflets:

CC2 - *Charities and the Charity Commission*  
CC3 - *Responsibilities of Charity Trustees*  
CC3(a) - *Responsibilities of Charity Trustees: A Summary*

available from the Commissioners' offices at: