

Appointment and substitution of trustees by the Pensions Authority under section 64 of the Pensions Act, 1990, as amended

Guidance notes

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General – section 64(1)

The Pensions Authority (the Authority) has the power, under section 64 of the Pensions Act, 1990, as amended (the Act), where there are no trustees of a scheme or the trustees cannot be found, if it considers it desirable to do so, to appoint a new trustee or trustees in substitution, where appropriate, for any existing trustee or trustees. In exercising this power, the Authority must do so in a manner consistent with section 64AC of the Act. Effective from 1 January 2022, section 64AC requires a scheme to have appointed a minimum of two trustees, or a body corporate as sole trustee with at least two directors, who effectively run the scheme. Accordingly, references throughout this guidance document to a trustee or trustees (or to trustee(s)) appointed or proposed for appointment under section 64 of the Act refers to a body corporate or two or more individuals, as appropriate.

No trustee or trustees cannot be found

The Authority may exercise its powers under section 64 of the Act only in circumstances where there are no trustees, or the trustees cannot be found. This might include, for example, circumstances in which a company, which had been the trustee, omitted, before the company's final dissolution, to appoint a replacement trustee.

It is advised to always read the trust deed and rules or other governing documentation to ascertain whether there is a power of appointment clause which can be exercised before initiating the section 64 application process.

Authority must be satisfied that it is desirable to appoint a new trustee(s)

The Authority must, prior to the exercise by it of its power under section 64 of the Act, satisfy itself that it is desirable to do so.

Generally, it is only in circumstances where all reasonable endeavours have been made:

- firstly, to locate trustees; and
- secondly, where reasonable, to exhaust all other avenues available to appoint a trustee such as under section 10 or section 25 of the Trustee Act, 1893,

that the Authority, where appropriate, will consider the appointment of new trustee(s) under section 64 of the Act. This reflects the intention of the Act to supplement rather than replace existing powers under other legislation or the trust deed.

Efforts to locate trustees would include either sending a registered letter to the last known trustees at their last known address (proof of this will need to be provided) and confirmation that there has been no contact with the last known trustees in the previous twelve months.

Section 10 and section 25 of the Trustee Act, 1893 are detailed in Appendix I and both options should be considered prior to making an application to the Authority.

Evidence/information required by the Authority

In order for the Authority to appoint trustee(s) to a scheme in circumstances where there are no trustees of a scheme or the trustees cannot be found, an application must be made to the Authority. The Authority will require a sworn affidavit with the relevant exhibits from an appropriate person in order to satisfy itself that there are no trustees or that the trustees cannot be found. The Authority would expect there to be an appropriate link between the party swearing the affidavit and scheme members. Such persons could include scheme members, providers, registered administrators, intermediaries, brokers and other service providers.

In addition to proving that all reasonable endeavours have been exhausted as set out in section 3 above, the Authority requires supporting information relating to the scheme in order for it to appoint new trustee(s). This will include the documents constituting the scheme such as the trust deed and rules along with any amendments made, annual reports and audited accounts, details of the previous trustees, details of remaining membership and assets, the company registration number and status of the employer, and information in relation to proposed fees and how they will be discharged.

The Authority may also seek any other relevant information which it considers necessary to assist in determining the application or establishing whether it is desirable to make such an appointment, including any record or document for the purposes of satisfying itself that the proposed trustee or trustees are fit and proper having regard to sections 59A and 64AE of the Act.

A template affidavit is included at Appendix II. This is a guide only and may need to be amended depending on the circumstances of the case.

Appointment/substitution of trustees and vesting of assets

The Authority, if it is satisfied that there are no trustees or that the trustees cannot be found, and considers it desirable to do so, may, by order under its seal:

- appoint a new trustee or trustees of the scheme in substitution, where appropriate, for any existing trustee or trustees; and
- vest, subject to any necessary transfers in the books of any bank, corporation or company, the assets of the scheme in the new trustee(s).

New trustee(s)

The new trustee(s) appointed by the Authority under section 64 of the Act may be:

- such body corporate or persons as may be nominated as part of the application and being, in the opinion of the Authority, a fit and proper person to act as a trustee, or
- such other body corporate or persons as the Authority shall decide.

Members and staff of the Authority will not be appointed by the Authority under section 64 of the Act.

Where an applicant is proposing trustees or a body corporate as sole trustee, the proposed trustees or the directors of a body corporate proposed as sole trustee, must provide a letter confirming their willingness, or the willingness of the body corporate, to act as trustee(s) and of their intention, or the intention of the body corporate, to discharge the trustee duties in accordance with trust law and the Act. They must confirm and provide supporting evidence demonstrating that they are a fit and proper person to act as trustee or as the directors of a body corporate proposed as sole trustee in line with the requirements of sections 59A(1) and 59A(1B) of the Act as appropriate, i.e., they:

- are, having regard to section 64AE of the Act, of good repute and integrity,
- have the qualifications and knowledge which, together with the qualifications and knowledge of the other trustees or other directors, as appropriate, are collectively adequate to enable all of them to ensure the sound and prudent management of that scheme,
- have experience which, together with the experience of the other trustees or other directors, as appropriate, is collectively adequate to enable all of them to ensure the sound and prudent management of that scheme, and
- at least one trustee or one director has been a trustee or, in the case of a director, a director of a corporate trustee, for at least two of the previous three years, which experience is of a type that is adequate for the trustee or director to ensure the sound and prudent management of the scheme.

More detailed information on the fit and proper requirements which apply to trustees is set out in the Authority's [‘Code of practice for trustees of occupational pension schemes and trust retirement annuity contracts \(trust RACs\)’](#).

Notice of appointment – section 64(2)

Within 21 days of the date of the order the Authority will publish a notice, giving details of the order in a daily newspaper published in and circulating throughout the State.

Appeal to the High Court against the making of an order – section 64(4)

A person having an interest may, within 21 days after the publication of the notice referred to in section 7 (or such longer period as the court may allow), appeal to the High Court against the making of the order. The Authority, the trustees, the employer and the members of the scheme can be represented and heard on any such appeal.

Operative date of order

An order under section 64 of the Act will come into operation 21 days after the date of the publication of the notice referred to in section 7 or, if an appeal is brought against the order, after the determination of the appeal or any appeal from that determination or the withdrawal of either such appeal.

Ancillary and consequential matters (including fees and expenses) – section 64(5)

An order under section 64 of the Act may make provision for such ancillary and consequential matters as the Authority considers necessary or expedient, including the making of payments from the resources of the scheme or from the employer to the trustee(s) appointed by the order in respect of fees, expenses or other matters relating to their duties as trustee(s).

Body corporate – section 64(7)

A body corporate appointed under section 64 may act as sole trustee notwithstanding that the rules of the scheme provide for or require the appointment of more than one trustee.

Appendix I – Section 10 and 25 of the Trustee, Act 1893

It should be noted that both of the below options should be considered prior to making an application to the Authority.

| | |
|---|---|
| <p>Section 10 of the Trustee Act 1893:</p> | <p>This section provides that where a trustee has died, is out of the jurisdiction for longer than 12 months, refuses to act or is incapable of acting as a trustee then the person(s) nominated for the purpose of appointing new trustees by the trust deed, or if none, the personal representative of the last surviving or continuing trustee, may, in writing, appoint another person(s) to be a trustee in the place of the trustee being incapable to act.</p> <p>This may not be possible when the trustee is a corporate entity that has been wound up, as it does not have a personal representative and therefore there is no other person in whom the power to appoint under section 10 rests.</p> |
| <p>Section 25 of the Trustee Act 1893:</p> | <p>This section provides that the court can appoint a new trustee in cases where it is inexpedient, difficult or impracticable to do so without the assistance of the court.</p> <p>Such applications are often not feasible by virtue of the costs and time involved in making such an application.</p> |



Appendix II – Template affidavit

PROMPT (please delete this section after completion) – this template may not be suitable for all cases and should be amended accordingly. Please include exhibits as appropriate.

PENSIONS ACT 1990 AS AMENDED (the “Act”)

IN RE: APPLICATION TO PENSIONS AUTHORITY FOR APPOINTMENT OF TRUSTEE
TO THE
"[NAME OF SCHEME]" UNDER SECTION 64 OF THE ACT

AFFIDAVIT OF [NAME]

I, [NAME], [position] "[Company name and address if appropriate]", aged 18 years and upwards **MAKE OATH** and say as follows:

1. I am a [position] of [company] or "[individual's details]" and I make this affidavit on behalf of the members of the "[Scheme name]" (the “Scheme”) and have their consent to do so. **[If appropriate – Insert details of relationship with the scheme.]**
2. I make this Affidavit from facts within my own knowledge, save where so otherwise appears and whereso appearing I believe the same to be true.
3. The Scheme was established with effect from [date] pursuant to "[insert details of governing documentation]". The first trustee(s) of the Scheme was/were "[trustee(s) name and address]". **[Insert details of scheme assets and how they are held.]**
4. [Outline Scheme’s original power of appointment and removal].
5. [Outline why section 10 of Trustee Act, 1893 is not appropriate].
6. [Outline why section 25 of Trustee Act, 1893 is not appropriate].
7. I say and believe that “[there is/are no trustee(s) of the Scheme] OR [the trustee(s) cannot be found, and all reasonable endeavours have been exhausted in attempting to contact the trustee(s)]”. **[Letters and receipt of**

postage to be exhibited with the affidavit.]

8. I therefore say that in accordance with section 3 of the Pensions Authority's Guidance Notes in relation to the appointment and substitution of trustees by the Pensions Authority under section 64 of the Act that all reasonable endeavours have been exhausted.
9. I say and believe that the Pensions Authority is being requested to appoint "[Company name] as [sole corporate trustee] OR [individuals' names] as [trustees]"¹ to the Scheme. **[Detail reasons why and how this appointment is in the best interests of the member(s) of the scheme. Provide an outline plan of action for the scheme and details of any charges that will be imposed and who will pay such charges.]** By letter dated the "[]" of "[month]" "[year]", the said "[sole corporate trustee] OR [trustees]"² confirmed "[its] OR [their]" consent to act as trustee(s), and to comply with all trustee duties following on from "[its] OR [their]" appointment. The "[trustees] OR [directors of the sole corporate trustee]"³ have confirmed in writing and provided supporting evidence demonstrating that they satisfy the requirements of section "[59A(1)] OR [59A(1B)]"⁴ of the Act, and I am satisfied that is the case. I beg to refer to a copy of said letter and related supporting evidence upon which marked with letter "A" I have signed my name prior to the swearing hereof.⁵
10. I say that it is "[Company name] OR [individuals' names]"⁶ view that the appointment does not prejudice the position of any beneficiary under the Scheme.
11. I therefore request on behalf of "[Company name] OR [individuals' names]" the appointment of "[Company name] OR [individuals' names]"⁷ as "[sole corporate trustee] OR [trustees]" to the Scheme in substitution of [], the existing trustee(s).
12. I further request that the order of the Pensions Authority under section 64(1) of the Act vests the assets of the Scheme in "[Company name] OR [individuals' names]"⁸ as "[sole corporate trustee] OR [trustees]" to the Scheme. **[Insert**

¹ Amend as appropriate by inserting name of corporate trustee entity or names of individual trustees.

² Delete as appropriate.

³ Delete as appropriate.

⁴ Delete as appropriate.

⁵ All exhibits included as appropriate should be referenced in the affidavit in this manner.

⁶ Amend as appropriate by inserting name of corporate trustee entity or names of individual trustees.

⁷ Amend as appropriate by inserting name of corporate trustee entity or names of individual trustees.

⁸ Amend as appropriate by inserting name of corporate trustee entity or names of individual trustees.



any consequential or ancillary matters to be included in the order such as fees and expenses.]

SWORN by the said [NAME]

on the day of

in the year

at

in the County of

Before me a Commissioner for Oaths/Practising
Solicitor and I know the Deponent

COMMISSIONER FOR OATHS/
PRACTISING SOLICITOR