

U 6 APR 1999

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Ann Hithersay  
The Macfarlane Trust  
Alliance House  
12 Caxton Street  
London SW1H 0QS

YOUR REF:

OUR REF: AMP/8667.15

DATE: 1 April 1999

Dear Ann

## The Macfarlane Trust ("the Charity")

I write with reference to your telephone conversation with Sarah on 29 March and enclose a draft Loan Agreement.

## The Position

My understanding of the position is as follows:-

1. A beneficiary of the Charity, who receives monthly payments from the Charity, has mortgage arrears the Abbey National Building Society plc ("the Abbey National") in the region of £5,500 ("the Arrears").
2. The Abbey National has a first legal charge over the beneficiary's home. The Abbey National has issued possession proceedings, which have been adjourned to give the beneficiary time to find a way to settle the Arrears.
3. The Charity is considering making a loan to the beneficiary to enable the beneficiary to settle the Arrears in full. The loan repayments will be deducted from the monthly payments which the beneficiary receives from the Charity.
4. There is a possibility that the Charity will be able to take out a second legal charge over the beneficiary's home but this is something into which the Charity will need to look into further.

H M PAISNER  
M D PAISNER  
G J HAYHURST  
M S POLONSKY  
K G STELLA  
A B SHELLIM

D N LEVY  
S E LEVINSON  
D A PARKIN  
S M ROSEFIELD  
N M RUSSELL  
S S LAZARUS

J J SACHER  
C J ADAMS  
J R KROPMAN  
S J NELSON  
J W THOMAS  
H FRYDENSON

C A FISHER  
J AUCLAND  
C Y MURRAY  
H J H NICHOLLS  
S R MARSHALL  
M TOFALIDES

S N P PHELPS  
L FAZZANI  
D U LEIBOWITZ  
C A BAYLIS  
A M PIPER  
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D A COLLINS  
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J M GREGSON  
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### The Draft Loan Agreement

I trust that terms of the draft Loan Agreement are self-explanatory. However, I would draw your attention, in particular, to parts 1 and 3 of the Schedule to the Agreement on pages 4 and 5.

I have provided in part 1 of the Schedule that the repayments will be deducted from the monthly payments which the beneficiary receives from the Charity, but if the beneficiary dies before the loan has been repaid in full then it shall be treated as a debt of the beneficiary's estate.

Of course, it will be open to the Trustees to turn the loan into a grant, either before or after the death of the beneficiary.

### The Legal Position and the Way Forward

First, needless to say, before making the loan the Trustees must satisfy themselves it will be an appropriate use of the Charity's funds. The Charity must also act consistently. For instance, it must treat other beneficiaries in similar situations in a like manner or alternatively be able to justify that this is an exceptional case, either in respect of the initial loan or any decision to convert the loan into a grant.

As mentioned in the Report which I prepared for the Charity last year in respect of the equity share arrangements, the Charity's Trust Deed does not give the Trustees power to make loans from the Charity's assets. Therefore, if the Trustees decided to proceed with the loan it would first be necessary to execute a Deed of Variation to include such a power.

A Deed of Variation is a simple document to prepare and we will not need to obtain the prior consent of either the Charity Commission or the DOH before it is executed.

I look forward to hearing any comments you have on the Loan Agreement and whether you wish to proceed so that I can finalise the agreement and prepare a Deed of Variation. If you have any queries please do not hesitate to contact either me or Sarah.

Yours sincerely

GRO-C

ANNE-MARIE PIPER

GRO-C

Enc.

*P.S. I do not have on any file the Christian names of K Bellamy and K Lawson*

**DATED** \_\_\_\_\_ **1999**

(1) **MACFARLANE TRUST**

(2) [*name of Borrower*]

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**LOAN AGREEMENT**

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Draft (1): 01.04.1999

## LOAN AGREEMENT - MACFARLANE TRUST

This Loan Agreement is made on

1999

Between:-

- (1) The Reverend Prebendary Alan John Tanner of [GRO-C] London [GRO-C]  
Clifford H. Grinstead of [GRO-C] Sussex [GRO-C]  
[GRO-C] Christopher Hodgson of [GRO-C]  
Hampshire [GRO-C] [GRO-A] [GRO-A]  
Katherine Stubbs of [GRO-C] Hampshire [GRO-C] N  
Lawson of [GRO-C] Middlesex [GRO-C] ("the Society  
Trustees"), Dr Mark Winter of [GRO-C]  
[GRO-C] Kent [GRO-C] Patrica Winterton of [GRO-C]  
[GRO-C] Kent [GRO-C], Timothy Hunt of Social Work Department, University  
Hospital of Wales, Heath Park, Cardiff CF4 4XW and K Bellamy of [GRO-C]  
[GRO-C] Middlesborough [GRO-C] ("the DOH Trustees"), (together "the  
Trustees")

- (2) [name of Borrower] (the "Borrower")

### 1. Interpretation

- 1.1 In this Agreement the following expressions shall, unless the context requires otherwise, have the meanings shown:-

"Abbey National"	Abbey National Building Society plc;
"Advance"	the amount specified in Part I of the Schedule to be lent by the Charity to the Borrower/s in accordance with clause 3;
"Arrears"	outstanding mortgage arrears with the Abbey National in respect of the Borrower's family home in the region of £5,500;
"Business Day"	a day other than a Saturday, Sunday or a public holiday;
"Charity"	the Trustees and their successors as trustees of the Macfarlane Trust charitable trust established by a Trust Deed dated 10 March 1988 as subsequently varied by Deeds of Variation 20 March 1989 and 23 November

1996 respectively, a Deed of Confirmation and Variation dated 23 November 1998 and a Deed of Variation dated [ ] 1999;

“Event of Default”	any of the events specified in the Part I of the Schedule;
“Loan”	the amount from time to time owed by the Borrower/s to the Charity pursuant to this Agreement;
“Repayment Date”	the date specified in Part I of the Schedule;
[“Security”	security for the Loan in accordance with Part I of the Schedule;
“Security Documents”	the document or documents executed to give effect to the Security].

- 1.2 References in this Agreement to any clause or to “the Schedule” are references to clauses in and the schedule to this Agreement.

## **2. Introduction**

- 2.1 The Society Trustees and the DOH Trustees are the present trustees of the Charity.
- 2.2 The Borrower is a beneficiary of the Charity and is currently in receipt of a payment of [£ ] per month from the Charity.
- 2.3 The Arrears are still outstanding.
- 2.4 The Abbey National has issued possession proceedings against the Borrower which have been adjourned until [date] to give the Borrower the opportunity to find a way of settling the Arrears.
- 2.5 To prevent the Borrower losing his/her family home the Trustees have agreed to make the Advance to the Borrower so that he/she can settle the Arrears.

## **3. The Loan**

- 3.1 The Charity has agreed to lend to the Borrower the Advance in accordance with the Agreement and on the terms set out in Part I of the Schedule.
- 3.2 The Borrower undertakes to the Charity in accordance with Part II of the Schedule.
- 3.3 Unless otherwise agreed between the parties in writing and in advance every sum payable by the Borrower under this Agreement shall be paid in full without set-off, counterclaim, or deduction.

#### **4. Default**

4.1 The Borrower shall upon learning of an Event of Default immediately give notice of the same to the Charity.

4.2 On learning of an Event of Default the Charity may:-

- (1) serve a notice on the Borrower requiring the same to be remedied within the period specified in the notice, if any; or
- (2) serve a notice on the Borrower requiring repayment of the Advance in full in accordance with the terms of the notice; [or
- (3) declare the Security to be enforceable and take such steps to enforce the same as the Charity shall decide.]

#### **5. Notices**

Any notice under this Agreement shall be delivered personally, sent by post or facsimile to the following address (or such other address as shall be notified in writing):-

**Charity**

**Borrower**

Fax No.

#### **6. Assignment**

The Borrower shall not assign or transfer any of his/her rights and or obligations under this Agreement.

#### **7. Waivers**

No delay or omission on the part of the Charity to exercise any right or power under this Agreement shall be construed as a waiver thereof nor shall any single or partial exercise of any right hereunder preclude any other or further exercise thereof or the exercise of any other right. The rights and remedies in this Agreement are cumulative and not exclusive of rights or remedies provided by law.

.....  
Signed by  
for and on behalf of the Charity

.....  
Signed by  
for and on behalf of

## THE SCHEDULE

### PART I - LOAN TERMS

<b>Advance</b>	The sum of £5,500.00.
<b>Purpose</b>	To settle the Arrears.
<b>Drawdown</b>	Following execution of this Agreement.
<b>Repayment Date</b>	The sum of [£     ] shall be deducted at source from the monthly payments which the Borrower receives from the Charity until the Advance has been repaid in full or, if the Borrower dies before the Advance has been repaid in full, the Advance shall become due and payable in full on the date of the Borrower's death.
<b>Security</b>	[A second legal charge over the property described in Part III of this Schedule ("the Property")]
<b>Interest</b>	<p>Payable on the Repayment Date at the rate of 2.5% above the published Base Rate of [     ] Bank.</p> <p>Interest shall accrue from day to day and be calculated on the Advance on the basis of actual days elapsed and a 365 day year.</p>
<b>Pre-payments</b>	Shall be permitted subject to two days prior notice.
<b>Events of Default</b>	<ol style="list-style-type: none"><li>1. Failure to pay any sum due under this Agreement or the Security Documents on the due date.</li><li>2. Any breach of or failure to observe any of the Borrower's obligations or undertakings under this Agreement or the Security Documents.</li><li>3. Any adverse change in the financial position of the Borrower which would materially affect his/her ability to perform his/her obligations under this Agreement.</li><li>4. If any representation or warranty made by the Borrower pursuant to this Agreement or in any statement delivered or made pursuant to it is incorrect when made.</li><li>5. If it becomes unlawful or impossible for the Charity to make, maintain or fund the Loan or if any of the obligations as being assumed by the Borrower under this Agreement ceases to be valid, legal and binding and enforceable against the Borrower in accordance with its terms.</li></ol>

## **PART II - BORROWER'S UNDERTAKINGS**

1. To give notice to the Charity immediately upon learning of an Event of Default.

## **[PART III - THE PROPERTY**

*[If charge to be taken over Borrower's Property - details of the Property]*

.....  
Signed by  
for and on behalf of the Charity

.....  
Signed by  
for and on behalf of

23 APR 1999

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YOUR REF: 0414/PAIS

OUR REF: SLC/8667.16

DATE: 22 April 1999

Dear Ann

## Macfarlane Trust ("the Trust") - Loan Agreement and variation to the Trust Deed

Thank you for your fax of 14 April together with the enclosed memo from Clifford Grinsted.

I enclose:-

1. A draft Third Deed of Variation; and
2. A second draft of the Loan Agreement.

## The Legal Position

First, I think it would be helpful if I clarified the legal position regarding the Trust's powers to make loans.

At the meeting on 28 September 1998 (and in paragraph 18 of our Report which was presented at the meeting), I advised that as there is no express power in the Trust Deed to make loans, before the trustees enter into any more equity sharing arrangements or before they make further loans of any kind, they will need either to obtain the prior consent of the Charity Commission or amend the Trust Deed to give them the necessary powers.

In his memo, Clifford Grinsted says that the proposed amendments to the Trust Deed (ie, the inclusion of a power to lend, to enter into mortgages and to give guarantees) represents a fundamental change in the objects of the Trust. In law, this is not quite correct. The proposed Deed of Variation will give the trustees additional powers to enable them to pursue the objects of the Trust but it will not actually amend the objects. Furthermore, the existing powers and the proposed new powers are permissive (rather than obligatory) and, before using such powers, the

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trustees must satisfy themselves it would be appropriate in all the circumstances to do so.

Clifford Grinsted is also concerned that if the Trust makes regular loans to the beneficiaries it will be deemed to be a "lending institution" which may jeopardise the Trust's charitable status and could lead to the Trust incurring tax liabilities. I do not agree; loans made to beneficiaries of the Trust are simply one way of furthering its charitable objects and thus will not jeopardise the charitable status or tax position of the Trust. Of course, the position would be different if the Trust were making loans to persons other than those who qualify as beneficiaries of the Trust as defined in clause 4 of the Trust Deed.

### **Deed of Variation**

Clause 1 of the enclosed draft (on page 2) provides that an additional power will be inserted to enable the trustees to make grants (which, of course, is already implied); to make loans on such terms and conditions as the trustees consider appropriate; to guarantee money and to use the assets of the Trust as security for contracts entered into to further the objects of the Trust (ie. to enter into mortgages). This is a fairly standard clause of a kind found in most modern Trust Deeds.

Although the prior approval of the Secretary of State for Health is required before any amendments are made to the Eileen Trust Deed, this is not the case for the Macfarlane Trust. In view of the fact that it took more than 12 months to obtain the courtesy approval of the Secretary of State for the last Deed of Variation I would not recommend that we do so on this occasion.

You will note that I have left spaces on page 4 of the draft Deed for the dates of the retirement of Sheila Cowe and the appointment of N. Lawson and K. Bellamy to be inserted. I should be grateful, therefore, if you would let me have these dates together with the full names of N. Lawson and K. Bellamy.

### **The proposed loan**

As mentioned in my letter of 1 April, before making the loan the trustees must satisfy themselves that it will be an appropriate use of the Trust's funds. Unfortunately, there is often no black and white answer to this question. The trustees must therefore consider the Trust's overall resources, the facts of the present case and the likelihood of similar situations occurring in the future.

As I also mentioned in my letter of 1 April, if the trustees decide to proceed with the loan then they must also treat other beneficiaries in similar situations in a like manner or be able to justify that this is an exceptional case.

In his memo Clifford Grinsted also mentions that the role of the Trust is not "to underwrite risks taken in embarking on a particular lifestyle such as commercial ventures and then to meet to the financial loss when the lifestyle subsequently collapsed". I do not know the exact circumstances leading to Mrs and Mrs GRO-A's financial difficulties but the fact that the financial difficulties arose wholly or partly due to a commercial venture will not, in law, preclude assistance from the Trust.

Clifford Grinsted also mentions that if the Trust makes loans it should not be "just another way of circumventing or cloaking the grant policies of the Trust .... the trustees must be disciplined and bold enough to sue in the event of default on repayment of the loan". Converting a loan into a grant is fine so long as there is a justifiable reason for doing so; the Trust has sufficient resources and the trustees bear in mind that they must act consistently in the future. If, however, at the outset the trustees intend to convert a large proportion of the loan into a grant then they should first weigh up the legal and other costs involved in making the loan against the amount of the loan which they envisage that the Trust is realistically likely to recover.

Clifford Grinsted also suggests that "monitoring" provisions are included in the terms of the Loan Agreement. With this in mind, I have included, for the trustees' consideration, a section headed "Annual Review" on page 5 of the Schedule to the enclosed draft.

This brings us on to the question of whether the Trust should take a second charge on the GRO-A home, given that there is currently negative equity of about £5,000. Although a charge will be of little value at the moment, the situation may change in the future. Of course it is always preferable to be a secured rather than an unsecured creditor and I would therefore recommend that the Trust takes the a second charge to give added protection.

Finally, Clifford Grinsted says "it should not be forgotten that the Trustees are being asked to bail out Abbey National Bank, by paying them funds to stop possession proceedings". Presumably, the Abbey National have delayed issuing proceedings in the hope that the GRO-A could catch up with the arrears. In my view, the Trust will not be bailing out the Abbey National but will be preventing it from issuing possession proceedings and thus it will be assisting the GRO-A.

I hope the above is helpful but please do not hesitate to contact me if you have any queries or require further assistance in this regard.

With best wishes,

Yours sincerely

GRO-C

ANNE-MARIE PIPER

cc Reverend Prebendary Alan Tanner OBE, Chairman  
Mr Clifford Grinsted JP, Deputy Chairman

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YOUR REP:

OUR REF: SLC/8667.16

DATE: 28 June 1999

Dear Ann

## The Macfarlane Trust

Thank you for your letter of 11 June together with its enclosure.

## Equity sharing loan agreements

The short and the definitive answer to GRO-A's question is that the original loan to Mr and Mrs GRO-A was legal.

As mentioned in my letter of 12 May, the Trustees relied on a "catch all provision in the Trust Deed which gives them the power "to do all such lawful things as may be calculated to further the attainment of the Trusts' objects". However, in the interests of prudence, my advice is that before the Trustees enter into any more equity sharing arrangements or before they give loans of any kind, they should either (a) obtain for each case the prior consent of the Charity Commission or (b) amend the Trust Deed to give the Trustees an express powers to lend etc. This is a precautionary measure only and is not a reflection on the legality of the original loan. However, I suggest that you do not elaborate on this.

I confirm that we are holding the title deeds for Mrs GRO-A's property, GRO-C

## Loans to Trust Registrants

I note your comments.

[illegible]

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**Charity Commission Consultation - User Trusteeship in Charities**

I note your comments and I would be happy to discuss this further with you. Of course, it is not obligatory to have "User Trustees" but if the Trustees decided that this was desirable then User Trustees could either be nominated by a particular body or selected by either the Trustees as a whole or the "Society Trustees" only. The Trust Deed would, of course, need to be reviewed and amended accordingly.

**Trustee Succession**

I note that, as usual, the Department of Health is being slow in appointing a successor to replace Kenneth Bellamy!

I hope the above is helpful but if you have any queries please do not hesitate to contact either me or Sarah.

Yours sincerely

GRO-C



27 SEP 1999

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YOUR REF: 0826/PAIS.AH

OUR REF: SLC/8667.16

DATE: 23 September 1999

Dear Mr Shepherd

Equity Share Arrangement - GRO-A Leamington Spa

I understand that GRO-A wishes to sell GRO-A and purchase another property in London. If the Trust is minded to allow GRO-A to continue with the Equity Share Arrangement it will be necessary for the Legal Charge in favour of the Trust over GRO-A to be redeemed and for the Trust to take out a fresh charge over GRO-A's new property.

I understand that if GRO-A is sold and the Trust enters into a new Equity Sharing Arrangement with GRO-A, the charge on the new property will represent 58% of the Market Value of GRO-A as defined in clause 6 of the Charge. This seems a sensible way to calculate what percentage charge the Trust should take although the Trust is free, of course, to use whatever formula it considers appropriate.

I should add that if GRO-A sells GRO-A the Trust is under no legal obligation to enter into another Equity Share Arrangement, although I appreciate that the Trust does wish to assist GRO-A.

As mentioned previously, I would not advise the Trust to enter into any more Equity Share Arrangements or make any further loans without either (a) obtaining for each case the prior consent of the Charity Commission or (b) amending the Trust Deed to give the trustees express powers to lend etc.

If the trustees are likely to consider other similar changes then it will probably be cheaper and quicker to pursue option (b). To do this the trustees will need to execute a Deed of Variation (before GRO-A sells GRO-A).

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K G STELLA	N M RUSSELL	H PRYDENSON	M TOFALIDES	A C MAGNUS	A K ROWLAND	D ROSENTHAL	I DE FREITAS	R S PHILLIPS	NON SOLICITORS	P A KRAUS
A R SHELLIM	J J SACHER	C A FISHER	S N P PHELPS	D A COLLINS	T P DE SOUZA	D A COX	R J LEEDHAM		824 ATTORNEY	G F L PROCTOR

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Back in April we prepared a Deed of Variation for this purpose which has not yet been signed. However, there have since been changes in trusteeship and so if the trustees decide to proceed I will need to send you a fresh document reflecting those changes.

**Summary of procedure**

Ann Hithersay has asked for clarification of the procedure if the Trust decided to enter into a new Equity Sharing Arrangement with GRO-A the initial stages of which I will set out below:-

1. First it will be necessary to execute a Deed of Variation.
2. I agree that it will be necessary to obtain an independent valuation of GRO-A in order to determine its current Market Value. However, in my opinion, one such valuation will be sufficient, provided that it is obtained by the Trust (i.e. it will not be sufficient to rely on one obtained by GRO-A).
3. GRO-A will need to provide the Trust with details of the property in London that she wishes to buy and the Trust should not obviously agree to "transfer" the loan until it has seen a full surveyors' report on that property.
4. I suggest that if and when the Trust gets to stage 3 then this matter is passed to Jo Anand in the Property Department here.

I hope the above is clear but if you have any queries please do not hesitate to contact me.

Yours sincerely

GRO-C

 **ANNE-MARIE PIPER**

CC. The Reverend Prebendary  
Alan Tanner, OBE, Chairman

