14 APR 1999

THE MACFARLANE TRUST

Memo

To: The Chairman,
From: The Deputy Chairman
CC: The Administrator
Date: 09 April 1999
Re: CASE 1758

The genesis of this case is the failure of a commercial venture by the wife of the registrant, begun with an advance of regular payments, which failure has put at risk the marital home because mortgage repayments have been allowed to fall into arrears, which arrears have caused the Building Society to issue possession proceedings.

As an essential part of a rescue package prepared by an Insolvency Practitioner it has been proposed that the Trust makes a loan of £5,500 repayable with interest, to clear the arrears, and to be secured by a second legal charge on the property.

It is further proposed that to legalise this transaction, because the Trustees have no power to make loans from the Charity's assets, there should be a change in the objects of the Trust to give the Trustees power to make such loans, such change requiring all Trustees to be party to a Deed of Variation.

This Memorandum sets out the reasons why I do not think this development is in the interests of the Trust, or the beneficiaries in general, and the factors that, I feel, must be given much closer scrutiny before a fundamental change of direction is considered.

- First there is a procedural matter. I suggest it is not acceptable that the duress of one individual case is used to procure a hasty fundamental change in the objects of the Trust, requiring the Trustees to subscribe to yet another Deed of Variation of the Trustees' powers. Such fundamental change requires in-depth consideration of all the issues involved, and not just those prompted by a single case.

- The variation being proposed, to make the Trust a finance house offering loans at commercial rates, is so fundamental that it would be irresponsible to embark on that path without the approval of the Secretary of State for Health, notwithstanding that a Deed of Variation does not require the prior consent of either the Department of Health or the Charity Commission **PROVIDED** that any variation does not depart from or modify the objects of the Trust, and neither should it cause the Trust to cease to be a charity in law. The opinion of the Secretary of State that, in his view, the variation is not a departure from, or a modification of, the objects the Government itself set when promoting the formation of the Trust, is considered essential.

- The use of the description 'Finance House' may appear to be emotive, but it should be remembered that in responses quoted in the Strategic Review poverty and despair are common features, presaging a greater demand than hitherto for financial assistance by whatever means are available. Legal advice already received stresses that the Trustees must act consistently. That means that once it becomes known that the Trust has the power to make and has made a loan, it must act consistently and treat all beneficiaries in a fair and like manner. In this respect it is again worth reminding ourselves that if the current resources of the Trust were dispersed among all beneficiaries in receipt of benefit, each would receive just over £8,000.

- Is the proposal to make an interest bearing loan a proper and appropriate use of the Charity's funds? Remember, that in this case 1758 this is no more than replacing the burden of one debt and financial obligation upon the registrant, with another. And if it is to be meaningful, and not just another way of circumventing or cloaking the Grant policies of the Trust, then the Trustees must be disciplined and bold enough to sue in the event of default on repayment of the loan. To fail to do so will damage the credibility of the Trust, and its financial management, when it becomes common knowledge that default on the part of the registrant is an easy way to avoid repayment, particularly in those cases where no surety is offered.

- Within the present culture of the Trust I fear the Trustees will shy away from taking action for the recovery of money lent in the event of default by the borrowing beneficiary, and if that proves to be the case the grant of a loan in the manner, and upon the terms proposed, will become merely a cosmetic exercise with the loss of credibility and the consequences to which I have already referred. Furthermore, when it is recalled that in each case time and money will be spent in setting up a legal transaction tailor made for each individual borrower, involving lawyers, staff, Trustees, beneficiaries and their lawyers, is this a cost we can justify?

- The question has already been asked: Is a loan of a kind envisaged in this particular case a proper use of the Trust funds as governed by its objects? In attempting to answer that for the second time, it is relevant to recall that the purposes set by the Government when the Trust was established clearly indicate that the need the Government expected to be met was need arising directly from deterioration of health due to receiving infected blood products. In my opinion, it was not to foster a role of the Trust to underwrite risks taken in embarking on a particular lifestyle such as commercial ventures, and then to meet the financial loss when the lifestyle subsequently collapsed.

- It seems that little or no attempt has been made to investigate other issues associated with the fundamental change proposed. Lending institutions such as Banks, Building Societies, money lenders, etc. are strictly controlled by Government regulations and licensing, and if the Trust is to become such an institution we need to establish what regulations, if any, will govern our conduct, and if there is any risk that we may lose our charitable status. In addition, if we are seen to be 'trading' in loans, what are the consequences, if any, for our tax free status.

- It is hardly necessary to mention that in embarking on a loan policy the Trust is freezing resources that would otherwise be available to earn a greater return through investment, and it is denying liquidity for the benefit of the greater majority of beneficiaries. Furthermore, there will be greater pressure on Financial Management, including Officers and staff, arising from the need to set up a loan procedure and records, and to monitor the same.

I now turn to the proposed loan agreement drafted by Paisner & Co.

- So far it goes I have no comment, but it is my opinion it does not go far enough. Trustees should be reminded that when the Trust first contemplated an Equity Sharing arrangement (now withdrawn) the conduct of the borrower was very strictly controlled and the rights of the Trust very clearly established. The conditions that were imposed are too long to repeat here but, among other things, they called for monitoring of the financial affairs of the borrower, the use and occupation of the property, sub-letting, maintenance of the property, insurance, other borrowings etc. etc. If, notwithstanding my objections, Trustees are minded to proceed with the proposals that have been made, then for the sake of security of the Trust's funds, I commend an examination of the conditions to which I have referred, to assess if the conditions proposed by Paisners should be extended.

- It should not be forgotten that the Trust is being asked to bail out Abbey National Bank, by paying them funds to stop possession proceedings. One is bound to ask why they have allowed arrears to accumulate to the extent they have? And if there is some failure on their part to monitor the situation and failure to arrest it earlier, it would seem wholly unreasonable for the Trust to fund the whole of the arrears.

Given further time it is possible I would find other reasons, in addition to those above, to support my recommendation that no action is taken to embark on a policy of making loans to beneficiaries until all issues have been exhaustively examined, and certainly not before the Secretary of State's own view has been obtained.

GRO-C