

# **THE ARCHER REPORT- POST REPORT DISTRIBUTION OF GOVERNMENT FUNDS TO INFECTED PERSONS AND DEPENDENTS**

Issues arising from a meeting between The Department of Health (DOH), The Macfarlane Trust and the Eileen Trust ("the Charities") and their respective advisers  
6th November 2009

## **CRITICAL PATH ANALYSIS**

### **ISSUES**

- 1. The need to establish as a matter of urgency whether the Charities could lawfully distribute the flat rate payments of £12800 to infected persons or whether a non-charitable entity would be needed to do so.**

Action to be taken- Graham Kent (DWP) and Moira Protani of Wilsons LLP to send a letter (text jointly agreed) to the Charity Commission seeking advice on this issue. A meeting with the Charity Commission to be arranged during week commencing 9th November 2009.

#### Progress

Letter agreed and sent to the Charity Commission on 6th November 2009. Telephone contact also made with the Commission asking for meeting in week of 9th November. Meeting with Charity Commission to take place on Thursday 12th November 3pm.

#### Outcome

At the meeting on the 12th November with the Charity Commission attended by Graham Kent and Moira Protani, the Commission confirmed that it would not be possible for any charity to distribute flat rate payments where there was no trustee discretion. A non-charitable vehicle would be necessary.

- 2. It was important that distribution of the flat rate payments should commence in December. It was not a practical proposition to set up a new non-charitable entity to do this in the time available. This was because of the amendments to legislation that would be needed. Subject to the resolution of Issue 1 then a possible solution would be to adapt the existing company Skipton Fund Ltd (which may already have the benefit of tax exemption and disregards for benefit payments). Wilsons LLP to explore the amendment of Skipton Fund Ltd. Graham Kent (DWP) to confirm the scope of present exemptions and concessions and likelihood of alteration to extend to the new amended Skipton Fund Ltd. The present agency agreement with the Secretary of State for Health will also need revisions.**

#### Action to be taken-

Wilsons LLP to brief its commercial department lawyer Andrew Roberts. He will examine scope for amendment of Skipton Fund Ltd and to prepare amended memorandum and articles. He will liaise with the Charities, and with Graham Kent (DWP) in agreeing revisions of company documents and the agency agreement with the Secretary of State for Health. Graham Kent (DWP) to supply Wilsons LLP with the details of the current tax and benefit concessions which apply to Skipton Fund Ltd. Graham Kent DWP to explore with DWP and HMRC the extension of the tax and benefit concessions to the revised Skipton Fund Ltd and to inform the parties of the outcome.

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### Bank account

MSPT2 will need a separate account to process the post Archer payments. This process is in hand.

**3. For a number of policy and public perception reasons, the use of the amended Skipton Fund Ltd (if it is necessary) as distributor of the flat rate payments is not regarded as an acceptable long term solution. It will be necessary to have in place by 1st April 2010 a new non-charitable company to distribute the flat rate payments. In addition, there will need to be in place the appropriate tax concessions and benefit disregards to protect the recipients and the paying company. There will need to be in place an agency agreement for the delivery of services between the Secretary of State for Health and the new company along the lines of the one in place for Skipton Fund Ltd.**

### Action to be taken-

Andrew Roberts of Wilsons LLP to be briefed on the issue. Adam Herbert of Wilsons LLP to be briefed with regard to tax issues. Wilsons LLP to liaise with Graham Kent DWP to achieve appropriate governing documents for the new company, ensure appropriate tax and benefit concessions are in place, and an appropriate agency agreement between the new company and the Secretary of State for Health is in place.

### Progress

Wilsons LLP lawyers briefed and advise that no changes to company documents necessary. Agreement with Secretary of State would need revision, and tax and benefit exemptions confirmed.

### *This option is no longer being pursued*

- 4. The discussions thus far have indicated that an amalgamation of the Macfarlane Trust and Eileen Trust was a preferred option by the Department of Health, but it is not clear if the Department is insisting on it. The Trustees of both charities are happy to discuss this issue at the meeting of the 17th November.**

Following discussions with DOH at meeting of 1st December 2009 it was accepted that neither MFT nor ET wished to merge, and that there was no pressure from DOH to do so. They were neutral on it.

- 5. Wilsons LLP to prepare critical path document setting out next steps to achieving the objectives set at the meeting**

Done.

- 6. A further meeting between all the parties pencilled in for the week commencing 16th November 2009 to check on progress. To be firmed up if found to be necessary.**

Meeting held on 17th November at Department of Health Richmond House Whitehall 3pm.

MSPT2 still the chosen path for flat-rate payments. This conclusion was subject to:

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Wilsons LLP to consider what tax issues may arise in the new arrangement. This is all subject to the agreement of the current directors of Skipton Fund Ltd. Peter Stevens will be briefing his fellow directors on the matter.

#### Progress

Andrew Roberts has been briefed on the issues and supplied with the documents relating to the Skipton Fund Ltd including the Memorandum and Articles of Association of the Skipton Fund Ltd, and the current Agency agreement with the Secretary of State for Health. Wilsons tax lawyer Adam Herbert and a colleague are briefed and on stand by to advise on any issues.

#### Further action

If the Skipton Fund Ltd solution is required then the directors will need to pass a resolution to approve the proposed course of action and to instruct Wilsons to proceed with any changes. Wilsons LLP to implement changes as soon as possible.

#### Outcome

Andrew Roberts of Wilsons has confirmed that Skipton Fund Ltd could handle the payments without any amendments being necessary to the company documents. The agreement with the Secretary of State would need revision, and the tax and benefits exemptions would need to be confirmed. For policy reasons this is not now regarded as an appropriate solution.

#### Alternative solution

It has been agreed between the parties that the Macfarlane Special Payments Trust No2 (an existing non-charitable trust) "MSPT2" should be amended to incorporate payments to the infected beneficiaries of the Macfarlane Trust and Eileen Trust. MSPT2 would deal with the pressing problem of instigating flat rate payments by 15th December 2009. MSPT2 will also be required to receive and hold the discretionary element of the post Archer funding, with a requirement to pass it on to Macfarlane Trust and Eileen Trust or any amalgamated body which replaces them. Further consideration will need to be given to whether MSPT2 continues to be the delivery vehicle in the longer term or whether a new non-charitable vehicle should be set up. Matthew Bennett of Wilsons LLP is producing a revised trust deed no later than 20th November 2009. Urgent issues to be considered in relation to MSPT2 are:

#### Trusteeship-

The trustees must ensure as far as is practical that there are 5 trustees. 3 trustees are appointed by Macfarlane Trust, and 2 by the Secretary of State. The present Macfarlane appointees are Peter Stevens, Alan Tanner and Clifford Grinstead. The last trustees appointed by the Secretary of State were only appointed for one year and they ceased to trustees by operation of law in April or May 2004. The only name known to us was Pat Spellman. The Secretary of State may wish to appoint new trustees, but if this is not possible, or possible within the timescale, the MSPT2 can in Wilsons' view function quite properly with its remaining trustees.

#### Tax and benefits

It needs to be confirmed that the payments will not be taxable in the hands of the recipients and that they will be disregarded for benefit purposes.

- (a) Data protection – Wilsons to advise on steps needed to enable charities to supply information to MSPT2 about beneficiaries.
- (b) Tax – DoH to obtain assurance from HMRC (to be expedited urgently) that flat-rate payments would be tax exempt for beneficiaries in line with Ministerial statement
- (c) Incorporation – Trustees to be replaced with corporate trustee structure
- (d) Indemnity – DoH to indemnify MSPT2 trustees against claims by beneficiaries, tax, costs and any other liabilities – confirmed at meeting – standard form wording to be supplied by DoH – to be included in amended MSPT2 trust deed.

**Outcomes:**

Data Protection: Advice given to MSPT2 by Andrew Roberts – consent of beneficiaries required

Tax: HMRC and DoH confirmed that tax exemption not available for beneficiaries for December payments. Legislation required for future payments. HMRC to discuss tax position with MSPT2 trustees and advisers. DoH has requested charities to accept December funding without being contractually required to distribute flat-rate payments in accordance with DoH formula – yet to be agreed by charities' trustees.

**7. Meeting between DoH, charities' representatives, MSPT2 and advisers on 1 December 2009**

- (a) HMRC has advised that it will treat December payments as "one off" capital payment free of income tax (no exemption from other taxes including inheritance tax)
- (b) Capital payments to be made to infected beneficiaries who were alive on 20 May 2009 (or to personal representatives if they have died since that date)
- (c) A formula for defining the recipients without disclosing the individual identities must be found for purposes of drafting amended trust deed of MSPT2
- (d) Trustees of MSPT2 must have strongest possible indemnity from DoH. As volunteers, they should not be exposed to any liabilities (tax or otherwise) for facilitating payments on behalf of DoH. DoH to send draft indemnity clause to Matthew Bennett at Wilsons for consideration.
- (e) For future payments (2010 onwards) a new corporate vehicle to be established (in similar format to Skipton Fund). DoH to discuss mechanism for securing tax exemptions with HMRC
- (f) The charities do not currently intend to merge their operations
- (g) DoH agreed to pay Wilsons' reasonable costs and agreed to rely upon Wilsons' clients for assurances that work carried out satisfactorily and in accordance with client agreements

**8. Documentation for revised MSPT2 and deadlines**

If the deadline of 15th December 2009 for the new payments is to be met then the documentation needs to be signed by Friday 11th December 2009. The documents are in circulation for signature and signature will be confirmed by emailed copies, the hard copies to follow later and to be sent to Matthew Bennett.