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| Borrowing and Mortgages |
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| OG22 |
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**OG 22 Borrowing and Mortgages**

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**Please note**

**Phase 3 of the Charities Act 2022 changed the statements that must be included in mortgage documentation. This OG sets the post-Charities Act 2022 position. Please note, the changes made by the Charities Act 2022 will not apply to statements in mortgage documents where the contract was entered into before 7 March 2024 but it only comes into effect after 7 March 2024. In these cases, the ‘old’ rules relating to s.125 statements and saving provisions will apply. If you are unsure which rules apply to your case, seek legal advice.**

# Casework Guidance

## Summary of the guidance

This OG contains guidance on borrowing by charities, the requirements of sections 124-126 of the Charities Act concerning mortgages of land by charities, the effects of Trusts of Land and Appointment of Trustees Act 1996 and the Trustee Act 2000 and the circumstances in which we need to be involved in such transactions.

In the context of this OG, a mortgage is a type of charge that a charity gives over its land to a third party as security for:

the repayment of a loan;

an obligation to repay a grant in the event that the conditions of that grant are not satisfied; or

less frequently, the discharge of some other obligation that the charity has to that third party.

### Top Ten things to know about borrowing and mortgages

|  |  |  |
| --- | --- | --- |
| 1. | **Why a charity might mortgage land** | A charity is only likely to mortgage land for one of two reasons: * to secure a loan (which is always intended to be repaid); or
* to secure a grant (which is not intended to be repaid but which becomes repayable in the event that certain conditions of the grant are not satisfied).
 |
| 2. | **Charities need to have the necessary power**  | * If the mortgage is to secure a loan, the trustees must have power to borrow.
* If the mortgage is to secure a grant or other obligation, the trustees must have power to accept a grant upon conditions or incur some other obligation and charge their property by way of security.
 |
| 3. | **Unincorporated charities** | A power to permit an unincorporated charity to borrow money and/or charge the charity’s property can be found: * in a charity’s governing document (if there isn’t one, the trustees may be able to adopt a power using the statutory power of amendment in s280A Charities Act 2011);
* in the Trusts of Land and Appointment of Trustees Act 1996 (TLAT 1996);
* in the Trustee Act 2000 (TA 2000); or
* by implication - an “implied power”.
 |
| 4. | **Companies and CIOs** | Charitable companies and CIOs usually have powers in their governing documents to charge property for the purposes of borrowing money. If not, they may be able to rely on the "sweeping up" power, which enables them to do such other things as are expedient in the interests of the charity. They should also be able to use the power of amendment in their governing documents to adopt a bespoke borrowing clause. |
| 5. | **When a mortgage falls within the statutory regime**  | Any mortgage or other security over charity land falls within the statutory regime in s.124 Charities Act unless it is: 1. authorised by a statutory provision or Scheme (e.g. a mortgage of glebe land or certain other ecclesiastical property authorised by a Church of England Measure)

NOTE: Until 19 May 2025 any mortgage for which the authorisation or consent of the Secretary of State is required under the Universities and Colleges Estates Act 1925 (UCEA 1925) will also sit outside the statutory regime pursuant to s.117(3)(a). After this date, the relevant provisions in the UCEA 1925 provisions will be repealed and so only those universities and colleges to which the UCEA 1925 applied and which have amended their statutes to provide suitable authority will be able to rely on this exemption and so remain outside this statutory regime. (See OG548 section E2.5)1. a mortgage granted by an exempt charity; or
2. a mortgage by a liquidator, provisional liquidator, receiver, mortgagee or administrator.

This applies to both incorporated and unincorporated charities.The statutory regime applies regardless of whether the land being mortgaged is (a) already owned by the charity or (b) being purchased. This is because the land will be held by or in trust for the charity on the date when the mortgage commences.It does not apply to mortgages secured over assets other than land. |
| 6. | **The default rule** | The default rule is that trustees cannot mortgage land unless they have obtained an order from the Commission (or court). But the default rule does not apply if the trustees have followed the procedures set out in s.124 (i.e. have obtained and considered written advice on the mortgage).  |
| 7. | **The written advice required** | If the mortgage is to secure the repayment of a proposed loan or grant, the trustees must have obtained advice on: 1. whether the loan or grant is necessary in order for the charity trustees to be able to pursue the particular course of action in connection with which they are seeking the loan or grant;
2. whether the terms of the loan or grant are reasonable having regard to the status of the charity as its prospective recipient; and
3. the ability of the charity to repay on those terms the sum proposed to be paid by way of loan or grant.

If the mortgage is to secure the discharge of any other proposed obligation, the trustees must be advised as to whether it is reasonable for the charity trustees to undertake to discharge the obligation, having regard to the charity’s purposes.(The “status of the charity” as the prospective recipient of the loan or grant in (2) above refers to the charity’s creditworthiness, and the risk which the charity presents to the lender or grantor.) |
| 8. | **The advisor** | The advice can be provided by a person:* who is reasonably believed by the charity trustees to be qualified by ability in and practical experience of financial matters; and
* who has no financial interest in relation to the loan, grant or other transaction in connection with which the advice is given.

This advice may be provided by a person who meets these requirements (s.128A Charities Act):* who is also a charity trustee or an officer or employee of the charity or of the charity trustees; or
* in the course of a person’s employment as an officer or an employee of the charity or of the charity trustees.
 |
| 9. | **Statements in the mortgage documentation and certification by trustees** | The mortgage documentation (including for exempt charities) must state:* that the land is held by or on trust for a charity;

 * whether the charity is an exempt charity; and

 * whether the s.124 requirements apply to the mortgage.

 If the s.124 requirements do apply, the trustees must certify that they have power under the trusts of the charity to mortgage the land and that the requirements have been complied with. |
| 10. | **Connected person** | Unlike most other land disposals, there is no separate requirement that the mortgagee must not (without our authority) be to a connected person. However, the charity trustees’ fiduciary duties may prevent them from granting a mortgage to a connected person as it is likely to involve a conflict of interest and, potentially, an unauthorised trustee benefit that must be managed. If such an issue arises, seek legal advice.  |

## 2. The provisions of s.124 Charities Act 2011

Under s.124 of the Charities Act, any mortgage of **land** held by or in trust for a charity (other than an exempt charity) requires an Order of the court or of the Commission unless:

* the mortgage is by way of security for the repayment of a loan or grant or for the discharge of other proposed obligations;

and

* the trustees, before executing the mortgage, have obtained and considered proper written advice as set out in s.124(3)-(4) (OG22 [B3 section 2)](#_2._Matters_on)

or

* the mortgage is excluded from the provisions of s.124 by s.124(9) (OG22 [B4](#_B4_Mortgages_to)).

In practice this means that in almost all cases trustees are able to proceed with these transactions without the need to come to us or the court for authorisation, as long as they comply with the requirements set out in s.124(3)-(4) – see (OG 22 [B3](#_B3_Mortgages_and)) for further details of this.

NOTE: s.124 applies not only to situations where land already held by a charity is charged to secure a borrowing, but also in cases where a charity is making a new purchase of land secured by a mortgage.

Under s.125 of the Charities Act every mortgage of charity **land** must include certain statements (this requirement also applies to an exempt charity).

## 3. When an Order under s.124 must be obtained

Where charity land is mortgaged to secure the discharge of any liability or other proposed obligation **other** than the repayment of a loan or grant to a charity, such as:

* a guarantee or indemnity given by the charity; or
* the payment of deferred consideration by the charity for a purchase which it has made.

an Order will not be required if the trustees have obtained and considered proper advice given to them in writing, as to whether it is reasonable for the trustees to undertake to discharge the obligation having regard to the charity’s purposes.

A mortgage to secure the repayment of a loan will typically secure **not only** the repayment of the loan but **also** the payment of interest under the loan.

S.124(2) covers only the former, but the giving of security for the payment of interest should be regarded as incidental. We should not say that an Order under s.124(1) is necessary, and that s.124(3) procedure is inapplicable, simply because a mortgage extends to securing the payment of interest as well as repayment of the loan itself.

The controls in s.124 of the Charities Act apply equally to mortgages and charges (s.129(2)) but they do not apply to liens or charges which arise by operation of law; for example, where the authority is contained in an Act of Parliament, Church of England Measure, a statutory instrument, or a Scheme of the court or the Commission.

## 4. Implied power

We take the view that trustees of unincorporated charities have an implied power to borrow in all cases except in the relatively rare circumstances where there is an express or implied prohibition in their governing document. The wide powers of management contained in TLAT 1996 and the TA 2000 and case law effectively give trustees of unincorporated charities a power to:

* borrow for any purpose which relates to the repair, maintenance, improvement etc, of the buildings and land which they own, or to the purchase of land; and charge the land as security for that borrowing (subject to s.124 of the Charities Act).

This is applicable both to:

* land already in the ownership of the charity trustees; and
* land which is being bought with the assistance of a loan.

This applies only to land which is held on trust. It does not apply to land which is part of the corporate property of charitable companies, which will usually be able to rely on the powers in their Articles of Association for the necessary power. Similarly, CIOs should be able to rely on the powers in their constitution for the necessary power to borrow.

Our policy on when trustees may rely on an implied power to borrow is set out in OG22 B1 section [2](#_2._Our_current).

## 5. Excepted charities and Exempt charities

The provisions of s.124:

* **do** apply to excepted charities
* **do not** apply to exempt charities

## 6. When will we be involved?

The purpose of the provisions in the Charities Act 2011 is to foster among trustees a greater sense of their own responsibilities and to relieve us of supervising trustees in carrying out duties which trustees ought to be able to carry out unsupervised. For this reason, we will become involved in a particular mortgage only when the trustees cannot comply with the appropriate statutory requirements or they have no power to borrow or incur some other obligation for which a mortgage is required by way of security – see OG22 [B3](#_B3_Mortgages_and).

## 7. Application of s.124 to land only

S.124 applies only to land and not to mortgages over other assets (see point 5 in table in section [1)](#_Top_Ten_things). For the purpose of s.124(2), a loan includes money borrowed on overdraft (see OG22 B5).

## B1 Power to Borrow

### 1. S.124 of the Charities Act 2011

Before trustees can mortgage land as security for a loan, they must have power to borrow. Before trustees can mortgage land as security for a grant or other obligation, they must have power to accept a grant upon conditions or incur some other obligation and charge their property by way of security. In many cases these powers may be implicit in their governing document – for instance, where a power to incur an obligation is given, a power to charge property by way of security may be implied.

S.124 does not confer on trustees the power to borrow or the power to charge property. S.124(2) merely removes the need to obtain an Order of the Court or of the Commission when mortgaging land in the circumstances set out in s.124(2).

## 2. Our current policy

Power to permit trustees of land to borrow money and/or charge the charity’s property can be found:

* in a governing document;
* in TLAT 1996;
* in the TA 2000; and
* by implication - see OG22 Casework Guidance [section 4](#_4._Implied_power).

Where trustees do not have the power to borrow and/or charge property, they can confer a suitable power on the charity by using the power of amendment for unincorporated charities (s.280A) or the power of amendment available to companies under the Companies Acts or the power of amendment in the constitution of a CIO. The exercise of any power of borrowing and/or charging property must be strictly in accordance with the terms of the power.

Unincorporated charities

The power in s.6(1) TLAT 1996, which confers on trustees of land all the powers of an absolute owner, includes the power to borrow money on the security of the property and to charge the property. S.8(3) TLAT 1996 provides that charitable trusts cannot disapply the s.6(1) TLAT 1996 power in their governing document. However, the s.6(1) TLAT 1996 power **can** be disapplied by a Commission Scheme or Order or by a court Order because s.6(6) TLAT 1996 provides that the s.6(1) power shall not be exercised in contravention of any order and s.6(7) provides that an “order” includes an order of the court or the Commission.

There may be cases where banks and other lenders will be unconvinced that the statutory powers in TLAT 1996 and TA 2000 do in fact authorise borrowing and/or the giving of security by the trustee of unincorporated charities and will question the trustees’ power to borrow in the absence of any explicit reference to it in the charity’s governing document. In that situation, the trustees can amend their governing document (as explained above) to include a suitable power.

Incorporated charities

The statutory trustee powers in TLAT 1996 and TA 2000 are not available to the trustees of charitable companies or CIOs, except in relation to funds of which the company/CIO is trustee. However, charitable companies and CIOs usually have suitable powers in their governing documents to enable them to charge property for the purposes of borrowing money. If they do not have sufficient power, the trustees can amend their governing document (as explained above) to include a suitable power.

The power to borrow for any purpose relating to the repair, maintenance, improvement, etc. of buildings and land which the charity trustees own also applies to unsecured loans. Our view is that this is within trustees’ land management powers. See section 6 below.

### 3**. Governing document**

The governing document of a charity may give trustees power to borrow. This is normally found in the powers recited in furtherance of the main object of the charity – eg “power subject to any consents required by law to borrow money and to charge all or part of the property of the charity with repayment of the money so borrowed”. The Commission’s model governing documents GD1, GD2 and GD3 and model CIO constitutions contain power to borrow.

Both charitable companies and CIOs will usually find suitable powers to borrow in the "powers" section of their Articles of Association or constitution respectively. If there is no such explicit power, they should be able to rely on their "sweeping up" power to do such other things as are expedient in the interests of the charity.

Where a charity has a power to accept grants on conditions or to give guarantees or enter into other types of obligation, a power to charge the charity’s property as security for such actions may be implicit.

## 4. Statutory power

From 1 January 1997, s.29 of The Settled Land Act 1925 was replaced by TLAT 1996. TLAT 1996 radically altered the statutory basis upon which charity land is acquired, managed and disposed. Almost all land which is held on charitable, ecclesiastical or public trusts is now subject to a "trust of land" as the result of TLAT 1996. TA 2000 and other statutes which define the powers and duties in relation to a trust of land are relevant to most charities other than companies. See OG86 B2.

The intention of TLAT 1996 is that charity trustees’ wide powers of management should give them a power to borrow for any purpose relating to:

* the **acquisition of land and buildings;**
* the **repair, maintenance, and improvement** of their land and buildings; and
* to charge the land as security for the borrowing of funds for these purposes.

TLAT 1996 does not expressly refer to this power but an absolute owner has power to borrow on the security of their property.

## 5. Borrowing to engage in primary purpose trading

A charity which carries out its charitable purposes by the exercise of a trade (eg a private hospital or independent school) will, if its governing document contains no express power to borrow, have an implied power **for the purposes of its primary purpose trading**. Otherwise, power to borrow will only be implied if there is a need to incur emergency expenditure. It would need to be shown that the expenditure was both necessary and cannot reasonably be financed without recourse to borrowing. These principles emerge from the decision of the court in Mansell v Viscount Cobham (1905) 1 Ch 568.

**IMPORTANT NOTE: Legal advice should be taken whenever there is any uncertainty about an implied power to borrow.**

## 6. Unsecured borrowing

The power to borrow for any purpose relating to the repair, maintenance, improvement, etc. of the buildings and land which the charity trustees own also arises in the case of unsecured loans. Our view is that this power to borrow is within the land management powers.

It is possible that a corporate lender may query the power of an unincorporated charity to borrow money, whether on an unsecured basis or by mortgage.

The lender may have legitimate concerns where any proposed loan is not secured on land belonging to the charity. These concerns arise from the supposition that trustees may not have power to borrow - whether with or without security - notwithstanding the statutory provisions. If trustees do not have this power, then they may not be entitled to indemnify themselves out of trust property for the repayment of the loan and the payment of interest. In that case, the lender would also not have the right, which it normally would have if the trustees were borrowing within their powers, to recover the payment of the loan and the payment of interest out of the trust property. OG22 [B8](#_B8_Unsecured_loans) explains in more detail the circumstances in which trustees can properly repay unsecured loans from their charity's assets.

In this situation, the trustees can amend their governing document (as explained above) to include a suitable power.

For guidance on trustees' indemnity when dealing with unsecured loans, see OG22 [B8](#_B8_Unsecured_loans).

## 7. Pressure from trustees' lenders

Lenders tend to be concerned that, even though the trustees have complied with the requirement to obtain proper advice, and certify this on the deed of charge, their security will be invalid if the trustees did not have the necessary power to enter into the mortgage in the first place. Despite the provisions of s.125(3) Charities Act 2011, the lender may attempt to influence the trustees to apply for an Order to safeguard its position. Our position is set out in sections 2 and 4 above, and we should in these cases follow the approach set out in section 8 below.

## 8. “Comfort” Orders

Section 6(1) of TLAT 1996 states that for the purposes of exercising their functions as trustees, the trustees of land have, in relation to the land subject to the trust, all the powers of an absolute owner.

The expression “in relation to land” has, in the similar context of section 28 of the Law of Property Act 1925, been the subject of judicial comment on a number of occasions.

These comments make it clear that the words “in relation to land” are not confined to powers of disposal. They extend to all actions which trustees may take in the management of land, including the raising and expenditure of money.

In our view the powers of an absolute owner clearly include a power to borrow money and/or to charge the land, and if the power is exercisable in relation to land comprised in the trust then the power to borrow and/or charge the land falls within the ambit of section 6(1) of TLAT 1996.

In practice, borrowing by charity trustees will almost invariably be for a purpose connected with the use of the land for the purposes of the charity. Borrowing for the purposes of acquisition, improvement, repair and maintenance and equipment of land and buildings are all within the scope of section 6(1) of TLAT 1996.

We do not make 'comfort' Orders in these cases. This means that we decline any request for a legal permission where there are no serious issues that would justify the exercise of our power and it is being sought simply to provide reassurance. If queried, we can refer to our general duties in s.16(4) of the 2011 Act, particularly that our regulatory activities should be targeted only at cases in which action is needed.

In any event, the trustees can amend their governing document to include a suitable power to borrow if so required by the lender (see section 2 above).

## B2 How we confer authority

### 1. Trustees' ability to confer power

If the trustees need to adopt an explicit power to borrow, our policy is that they should:

|  |  |
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| Unincorporated charities | Use the power of amendment in their governing document or, if they do not have one, adopt a power using s280A of the 2011 Act.Failing this (such as if there is a prohibition against borrowing or mortgaging land in a Commission Scheme or Order that the trustees are unable to remove themselves), the trustees will need to approach us and we may need to make an administrative Scheme to remove it.  |
| Companies | Use the power of amendment in their Articles of Association or in the Companies Acts. |
| CIOs | Use the power of amendment in their constitution or, if it does not contain one, the power in s.224 – 227 Charities Act 2011.  |

If the trustees use the power of amendment to give themselves an express power to borrow, the power which they adopt might be on the following lines:

“The trustees may borrow money upon such terms as they think fit and may mortgage the whole or any part of the property of the charity as security for the money borrowed subject nevertheless to complying with the restrictions on mortgaging imposed by s.124 of the Charities Act 2011.”

### 2. Authorising particular borrowing

An Order under s.105 of the Charities Act can be used to provide general powers as well as authority for specific transactions. A specific authority sanctions the use of a particular power in a more closely defined set of circumstances.

If we are asked to make an Order to authorise a particular borrowing, in the absence of a power to borrow, it will be made under s.105 of the Charities Act 2011. (If the trusts contained a prohibition against borrowing, the trustees would need to remove this first using a valid power of amendment before we could make the Order. If the trustees are unable to remove it the Commission would need to do so by Scheme.)

Where security is to be given for a borrowing, this must be reflected in the Order. In the case of a borrowing which is to be secured wholly or partly on land belonging to the charity, directions in the Order must make it clear that the authority which the Order confers is valid, **subject to the requirement** that the trustees comply with the restrictions on mortgaging imposed by s.124. This means that the trustees must take due care to ensure that the requirements set out in s.124(2)-(4) (where appropriate) are complied with, unless the circumstances of the case make it **necessary** that a further Order under s.124(1) must be obtained.

### 3. Order conferring general power to borrow

A general authority provides the trustees with powers on a long term basis without the need to seek a fresh authority from us each time they wish to exercise the power.

Where it is desired to confer a general power to borrow, this should be done by Order. It should be expressed in such a way as to make it clear that the borrowing may be secured by the charity. However, if the security is to consist wholly or partly of land belonging to the charity, then the exercise of the power is subject to the requirement that the s.124(3)-(4) (where appropriate) procedure is followed, **or** another Order of the Commission is obtained under s.124(1).

Whenever an Order gives a general authority, we must give suitable directions including, at the very least, a suitable duty of care. This is because s.105(2) of the Charities Act provides that anything done under the authority of an Order is to be treated as if it was properly done under the powers of the trustees. Where we provide a specific authority (as in section 2 above), we will have assessed the circumstances of the particular case and will be satisfied that the trustees can properly proceed. In cases where we are providing a general authority, we cannot know that in the future the trustees will always exercise the power properly. The inclusion of a duty of care (which mirrors the duty in the Trustee Act 2000 (see OG86 B6)) provides us with greater certainty on this point.

### 4.Removing prohibition on borrowing by Scheme

Where the existing trusts of a charity expressly prohibit borrowing, the trustees should be able to use a valid power of amendment to remove the prohibition – such as s.280A of the 2011 Act in the case of unincorporated charities.

Where there is no suitable power of amendment to remove the prohibition (and since we could not make a s.105 Order unless the prohibition was removed) we could consider making an administrative Scheme to confer on the trustees a suitable power to borrow. We would only do this where the trustees can show that the lack of a power to borrow is adversely affecting the administration of the charity.

### 5. Borrowing for investment purposes

In certain exceptional circumstances, we will be prepared to authorise trustees:

* to borrow for the purposes of investment; and
* to charge trust property by way of security for such borrowing (if land is to be included in the charge, the Order should contain directions requiring compliance with the restrictions on mortgaging imposed by s.124).

Normally, we would not confer a power which would allow trustees to put at risk any part of the charity’s funds by borrowing against them for the purposes of acquiring further investments. However, where trustees can demonstrate that such a practice would enable them to administer the charity more effectively and to make better use of its funds, we may agree to extend a charity’s investment powers for that purpose. (For example, borrowing may be appropriate where there is a short gap between a purchase of property and the maturing of a deposit, and borrowing would remove the need to realise other investments.)

Each case should be treated on its merits, but by way of illustration, we have in the past conferred power on a charity with assets of £7m to borrow for a period not exceeding three months, where the scale of the borrowing was limited to a maximum of 3% of the value of the trust fund. The purpose for which the trustees may borrow needs to be strictly and precisely defined.

## B3 Mortgages and s.124 of the Charities Act

### 1. Do the trustees need to ask for an Order?

S.124(1) of the Charities Act provides that subject to s.124(2) no mortgage of land held by or in trust for a charity shall be granted without an Order of the court or of the Commission. However, in many cases the trustees will not need to come to us for an Order, as long as they comply with the provisions set out in s.124(2). This subsection provides that s.124(1) shall not apply to a mortgage of any such land where the trustees have, before executing the mortgage, obtained and considered proper advice, given to them **in writing**, on the matters mentioned in s.124(3) in the case of a loan or grant, or s.124(4) in the case of any other obligation – see section 2 below.

If the trustees do not or cannot comply with these requirements, then an Order will be needed. For us to be able to make such an Order, we would need to consider the same sorts of information that the trustees would take into consideration when undertaking the transaction without our authority – see section 8 below.

### 2. Matters on which advice is needed

The matters mentioned in s.124(3), for when the mortgage is to secure repayment of a proposed loan or a grant, are whether:

* the loan or grant is necessary (ie to enable the trustees to pursue the course of action for which they are seeking the loan or grant) (s.124(3)(a));
* the terms of the proposed loan or grant are reasonable, having regard to the charity’s status as the prospective recipient of the loan or grant (s.124(3)(b)); and
* the charity can repay the loan or grant on the proposed terms (s.124(3)(c) (ie without prejudicing its other charitable activities).

The reference to the “status of the charity as the prospective recipient of the loan or grant” in bullet point 2 above refers to the charity’s creditworthiness, and the risk which the charity presents to the lender or grantor. In other words, the charity may represent a low risk to a lender or grantor and may therefore be able to negotiate terms which are more favourable than those generally available to other recipients of loans or grants. The opposite, can of course, be true, hence the need for proper advice.

If the trustees consider that they are unable to comply with these requirements, they should apply to us for an Order.

Where the mortgage is to secure the discharge of any other proposed obligation, the relevant matter mentioned in s.124(4) is whether it is reasonable for the charity trustees to undertake to discharge the obligation having regard to the charity's purposes.

### 3. Meaning of “proper advice”

“Proper advice” is defined in s.124(8) of the Charities Act as the advice of a person:

* whom the trustees reasonably believe to be qualified by ability in, and practical experience of financial matters; and
* who has no financial interest in relation to the loan, grant or other transaction in connection with which the advice is given.

Section 128A enables the advice to be given by charity trustees, officers and employees who meet the requirements above.

### 4. Credentials of adviser

In deciding whether a particular person has the ability and experience to advise them under s.124(8)(a), the trustees must consider the nature and complexity of the transaction upon which advice is being sought. We cannot consider the credentials of individual advisers on behalf of charity trustees. This is a matter within the trustees’ discretion. They must be satisfied that they can demonstrate that, if called upon to justify their choice of adviser, they have considered the matter properly.

### 5. Having a financial interest in the loan

For the purposes of s.124(8)(b), a person may be said to have a financial interest in relation to the loan, grant or other transaction in connection with which their advice is given if there is a possibility that they will enjoy a material financial gain as a direct consequence of the charity taking or incurring (or not taking or incurring) the loan, grant or other obligation. Similarly, there may be a financial interest if, as a direct consequence of the charity taking or incurring (or not taking or incurring) the loan, grant or other obligation, they avoid making a material financial loss.

### 6. Acting on advice

Trustees will not have fulfilled the requirements of s.124(8) if they decide to accept the terms of a proposed mortgage without having considered proper advice. Trustees would be unlikely to be regarded as having acted properly if they act against or ignore the advice of someone more experienced than themselves, without good reasons. (The standard generally required of a trustee is to take the precautions which a prudent person of business would take in managing their own affairs).

### 7. Trustees’ decisions on the mortgage

### 7.1 Taking decisions

The trustees’ consideration of the written advice which they have obtained under s.124(3)-(4), and their decisions based on that advice, should, where practicable, be made and minuted at a properly constituted trustees’ meeting. Alternatively, the trustees may consider the advice between themselves in correspondence, or orally. If oral approval is given, a written record should be made as soon as possible. We would expect all trustees to be party to the decision (they are jointly and severally responsible) but provided the meeting is quorate, a binding decision can be made.

### 7.2 Delegating decisions

The Trustee Act 2000 provides wide powers of delegation - see OG86 B3 - to unincorporated charities. If trustees wish to delegate decisions in relation to mortgage transactions, they must ensure that the following conditions are met:

* in delegating the matter, the trustees must comply with the duty of care at s. 1 of TA 2000;
* the terms of the delegation must be agreed by the trustees in accordance with their governing document and set out clearly in writing; and
* the terms of the borrowing grant or other obligation should be reported back to the trustees as soon as possible. It is particularly important to draw this requirement to the trustees’ attention if the charity’s governing document does not provide for it. Trustees may wish to consider using the power of amendment in the governing document (if one exists) to include a requirement for sub-committees to ‘report back’.

### 8. Our considerations when an Order is required

If trustees consider that they are unable to fulfil the requirements of s.124(3)-(4) and s.124(8), they will need to approach us for an Order.

We should make an Order under s.124(1) only if we are:

* satisfied that the proposed transaction is reasonable and in the interests of the charity;
* clear exactly what the transaction involves (this will need to be described in the Order) – for example how much money is being lent or granted, or what undertaking is being given – and that the trustees understand this;
* sure about the purpose of the transaction and how this advances the charity's objects; and
* satisfied that the trustees have identified any risks to the charity if they proceed and how these risks have been managed or minimised;
* satisfied about the reasons why the trustees cannot comply with the statutory requirements and that they were not simply applying for the sake of convenience rather than going through the s.124(3)-(4) procedures.

In all cases we should ask the trustees to provide us with:

* a copy of the advice received by the trustees – this would include information showing:
	+ that it is reasonable for the charity to enter the agreement on the proposed terms;
	+ the ability of the charity to discharge any obligation which may be imposed as a result of entry into those terms;
	+ possibly, reference to any existing borrowing or other liabilities of the charity,
* copies of all relevant documents and paperwork relating to the loan or grant;
* where there is doubt about the trustees’ legal power to enter into the arrangements, a copy of the advice the trustees have received from their legal adviser confirming the ability of the charity to enter into the arrangements;
* information about any source of finance for the project not provided by the loan or grant; and
* the reasons why the trustees consider they cannot comply with the statutory requirements.

### 9. Borrowing not covered by TLAT 1996

A borrowing to finance the purchase of a non-land investment by the charity would be an example of a borrowing which would not be authorised by TLAT 1996; see OG22 B2 section [5](#_5._Borrowing_for).

### 10. Further advances

Trustees may enter into a mortgage which permits them to take out further advances without the need to come to us for an Order and without the need to undertake an entirely separate transaction. This is detailed in s.124(6)-(7).

Where the trustees have executed such a mortgage they may add further lending if, before entering into the further transaction, they obtain and consider proper advice, given to them in writing, on the matters mentioned in s.124(3)-(4) as appropriate – see section 2 above.

This regime puts the onus back on the trustees to work through the same considerative process as they did for the first loan or grant but without the need for an Order from us.

## B4 Mortgages to which s.124 does not apply

### 1. Summary

Certain mortgages are excluded from the provisions of s.124 by s.124(9) which provides that nothing in that section applies to mortgages of land for which general or special authority is given as mentioned in s.117(3)(a). It also excludes mortgages granted by a liquidator, provisional liquidator, receiver, mortgagee or an administrator.

In executing such mortgages trustees will not need to follow any of the requirements of s.124, but where s117(3)(a) applies, the duty imposed by trust law to secure the best terms reasonably obtainable for the charity still applies.

S.117(3)(a) (which also applies to sales, leases and other disposals of land) provides in effect that any mortgage for which general or special authority is expressly given:

* in an Act of Parliament (which includes a Church of England Measure); or
* in a statutory instrument; or
* in a legally established Scheme;

is not subject to the requirements of s.124 **unless** the authority is subject to the making of an Order of the court.

NOTE: Until 19 May 2025 any mortgage for which the authorisation or consent of the Secretary of State is required under the Universities and Colleges Estates Act 1925 (UCEA 1925) will also sit outside the statutory regime pursuant to s.117(3)(a). After this date, the relevant provisions in the UCEA 1925 provisions will be repealed and so only those universities and colleges to which the UCEA 1925 applied and which have amended their statutes to provide suitable authority will be able to rely on this exemption and so remain outside this statutory regime. (See OG 548 section E2.5)

Where the authority **is subject** to the making of an Order of the court, s.124 does apply to the grant of the charge.

### 2. When the sanction of the Court is required

If the sanction of the court is required for the grant of a charge, and that sanction is required by something which is in the trusts of the charity, then we can authorise the grant of the charge (s.105(7)). We would normally include in our s.105 authority directions which would require compliance with s.124(1)-(2).

If the sanction of the court is required for the grant of a charge, and that sanction is required by general legislation, then the sanction of the court is necessary, because it is not then required by “the trusts of the charity” and s.105 cannot apply.

### 3. The Trusts of Land and Appointment of Trustees Act 1996

In our view, neither s.6(6) nor 6(8) of TLAT 1996 provide authority to mortgage land within the meaning of s.117(3)(a).

## B5 Overdrafts

### 1. Our authority not required

S.124(2) of the Charities Act extends to securing land for borrowing by way of an overdraft, and therefore it is not necessary for trustees to seek our authority under s.124(1). An overdraft is a loan within the meaning of s.124(2) (see section 2 below). Provided that lending institutions lend money for particular purposes, which are covered by s.124(2), the trustees may mortgage land as security for the repayment of a loan for that purpose, whether by way of overdraft or not. A “particular purpose” would include circumstances where the trustees have clearly identified a need for expenditure and taken proper advice on this point.

To illustrate this point, for example, the trustees of a school could borrow money by way of an overdraft secured against the charity's land without our authority under s.124(1) where:

* there was a clear purpose for the borrowing – for example, to refurbish a science block or pay salaries; and
* the trustees had taken proper advice covering the issues in s.124(3).

### 2. No statutory definition of loan

In the Charities Act 2011, the word “loan” is not defined. Where a statute does not distinguish between loans and overdrafts in the manner by which borrowing is taken, it is reasonable to conclude that the statute does not require any distinction to be made to effect its purpose. Certain statutes separately refer to loans or define them in terms which differentiate between different types of borrowing or the taking of credit. It is necessary to construe the word “loan” in its context within the statute in which it is being used, and the other statutes have no effect on the construction of the term as used in the Charities Act. It is immaterial whether the overdraft is a single advance or a series of advances. Neither does it matter whether the advance is for a specified amount or a fluctuating amount.

### 3. Ensuring that a charge given under s.124(2) is effective

For a charge to be validly granted under the s.124(2) procedure, it must be granted after that procedure has been completed. The substantial terms of the loan to be secured must be decided upon before the charge is granted. For example, the terms agreed may need to include fluctuations in the amount of the loan or the period for repayment.

However, if:

* the terms are changed after the charge has been given; or
* a new loan contract is substituted for the former after the charge has been granted; or
* if it is desired to add the new loan to the existing security,

then

* the trustees do not need to come to us for an Order if they comply with s.124(7) and obtain and consider proper advice given in writing on the matters mentioned in s.124(3)-(4) – see sections 2 and 12 of OG22 [B3](#_B3_Mortgages_and).

If they do not or cannot comply with these requirements, then an Order must be obtained.

## B6 Mortgages still subject to s.124

Where trustees propose to exercise a power of borrowing/mortgaging conferred by Scheme, which includes either the words “Subject to the authority of a further Order or Orders of the Commissioners” or the words “subject to such consents as are required by law”, the mortgage is, in our view, subject to the provisions of s.124 of the 2011 Act. See OG548 - Disposal of charity land.

**IMPORTANT NOTE: IF TRUSTEES DO NOT ACCEPT THE POSITION EVEN AFTER OUR VIEWS HAVE BEEN EXPLAINED TO THEM, THE CASE SHOULD BE REFFERED TO LEGAL FOR FURTHER ADVICE.**

Where, in the future, a Scheme or Order is needed to confer a power of borrowing/mortgaging on trustees, the procedure to be followed is that described in OG 500 Schemes and OG 501 Orders.

## B7 Interest rate swaps and other similar instruments

###  1. What is a swap?

“Swap” transactions are arrangements or agreements entered into by the trustees, by which they acquire the right to move from one type of interest rate for their borrowing to another. For example, a charity might take out a loan at a **variable** rate of interest and then swap the basis on which it pays interest to a **fixed** rate of interest. A glossary of terms is set out in OG22 [G1](#_G1_Glossary) defining the most common types of interest rates which staff will come across in dealing with transactions of this type. A “swap” in this context is not a re-mortgage. A swap would therefore not be caught by s.124 (even if the borrowing it relates to might) but may still require the Commission's authorisation – see section 3 below

### 2. Reasons for swaps

Swaps may be proposed:

* at the time the borrowing is first taken out; or
* in connection with an existing borrowing.

In either case, there may be a variety of reasons why such a transaction is proposed. The trustees may, for example, wish to have the certainty of a fixed rate of interest which will enable them to budget with some degree of certainty during the period of the loan. Alternatively, if interest rates are falling, trustees might wish to move from a fixed rate to a variable rate because the latter would be cheaper. In all cases it will be necessary for staff to explore in some detail why the swap is proposed and why the trustees consider it advantageous. It is important to bear in mind that the success of these transactions depends on interest rates falling or rising in conformity with the expectation of the borrower at the date of the swap.

### 3. Power to enter into a swap

The ability of trustees to enter into this type of transaction depends on whether trustees have the power to enter into the transaction; and if they do:

* whether its exercise would be consistent with their duties to exercise all trust powers in a trustee-like manner; and
* whether they have sought and considered appropriate advice.

The power to enter into the transaction will depend on what powers are conferred by the charity’s governing document (see OG22 B1 section [3](#_3._Governing_document)). It will only be in rare cases that an express power to enter into a swap transaction will exist. Normally, staff will have to determine whether the swap transaction can be seen as falling within the trustees’ powers as an incidental aspect to the exercise of a borrowing power. In the case of an existing borrowing, it may be more difficult to argue that the swap was incidental to the exercise of a borrowing power, although it may be easier to see the justification where a swap is in connection with a proposed new borrowing. The issue in each case should be carefully examined to decide whether the swap is:

* merely an integral part of managing the charity’s debt; or
* a speculative venture.

For example, a swap in relation to an existing borrowing might be justifiable where a charity enters into a borrowing in a period where borrowing rates are relatively stable, but subsequently, borrowing rates become unstable with wide fluctuations. In such a case, a charity may seek to stabilise its borrowing rate by taking out a swap. Clearly this would fall in the category of managing the charity’s debt and not a speculative venture.

If the charity has no power to enter into the swap, our authority by Order under s.105 will be required.

### 4. Trustees’ exercise of power

If the charity has a power to enter into a transaction, or we are considering authorising the transaction by Order under s.105, it will be necessary to determine whether the exercise of the power is consistent with trustee duties. In Hazell v Hammersmith and Fulham London Borough Council (1991) 2 WLR 372 the court considered the powers of local authorities to enter into swap transactions. Although the borrowing and investment powers of charity trustees are not the same as local authorities, the court made general observations which are relevant to any analysis of the duty of charity trustees in entering into transactions of this type. In his speech, Lord Templeman described swap transactions as those which “may involve speculation or may eliminate speculation” but speculation was “inherent in any transaction which was undertaken solely for the purpose of obtaining a profit by forecasting future interest rate trends”. Lord Templeman also said “Individual trading corporations and others may speculate as they please or consider prudent, but a local authority is not a trading or currency or commercial operator with no limit on the extent of its borrowing or with powers to speculate”.

In the case of a charity, the trustees must be satisfied that entering into the transaction is in the best interests of the charity, the terms are reasonable and the level of risk they are taking is appropriate.

If we are approached by a charity about their power to enter into a transaction, advice should be taken from Legal Services. Advice may also be needed from Accountancy about the terms of the transaction.

### 5. Swap transactions not akin to insurance

In the same case, Lord Templeman also dismissed the argument that swap transactions can be regarded as a form of insurance. He expressed the view that they were more akin to gambling than insurance and stated that “a local authority which borrowed in reliance on future successful operations would be failing in its duty to act prudently in the interests of the ratepayers". Lord Ackner gave a similar analysis of such transactions in his judgement on pages 398 and 399 of the law report.

### 6. Deciding if a transaction is appropriate

It follows from the remarks made by Lord Templeman that swap transactions which are entered into solely on the basis of forecasting future interest trends may not be consistent with the duties of trustees. Generally, where staff are dealing with an existing loan, and a swap transaction is proposed, they need to consider whether the transaction involves speculation on future interest rate movements, and , if so, whether that speculation is such that it may be in conflict with the duties of trustees. On the other hand, a charity may be proposing to take up a new borrowing and the trustees may see a swap as a means of enabling the charity to obtain a loan on terms which are in the charity’s best interests. This may well be an appropriate exercise of the trustees’ discretion. The following checklist of points may help staff in deciding the matter:

* What fee would be paid for the swap?
* Why is it proposed?
* What are the advantages to the charity?
* What risks are there and do the advantages outweigh any risks?
* What is the opinion of the trustees’ financial adviser?

**IMPORTANT NOTE: THIS TYPE OF TRANSACTION CAN BE VERY COMPLEX, AND THE ISSUE OF SPECULATION OR ITS ELIMINATION CAN BE VERY FINELY BALANCED. YOU SHOULD SEEK THE GUIDANCE OF ACCOUNTANCY. IF A CHARITY CONSIDERS THAT ITS POWERS OF INVESTMENT PERMIT IT TO ENTER INTO A SWAP TRANSACTION, LEGAL ADVICE MUST ALSO BE SOUGHT.**

### 7. Proposed charities

Staff in Registration should bear in mind that the decision in Hazell (see section 4 above) means that the inclusion of a power to enter into swap transactions in the governing documents of new charities should be questioned, as it is not usually appropriate for trustees to have the power to swap and any power to speculate.

**IMPORTANT NOTE: IF IT IS ARGUED THAT THE POWERS OF INVESTMENT OF ANY PROPOSED CHARITY SHOULD SPECIFICALLY INCLUDE SUCH A POWER, THE CASE MUST BE REFFERED TO LEGAL.**

## B8 Unsecured loans involving trustees' indemnity

**NOTE:** the guidance in this section B8 relates to unincorporated charities only. Charitable companies borrow money in their own name, which does not involve, in theory, trustees borrowing in their own names and relying on being indemnified from the charity.

Where trustees have a power to borrow money, and repayment of the money is not secured by a formal charge against any property of the charity, the lender will be limited to relying on the personal covenant of the trustees to repay the loan. But trustees who borrow funds to apply for the purposes of the charity will expect to be indemnified out of the charity’s assets rather than having to pay back the money personally. Such a right of indemnity will be secured by an equitable charge over the property of the charity. This charge arises by operation of statute law (s.30(2) of the Trustee Act 1925). It does not depend for its validity upon compliance with s.124 of the Charities Act.  **However**, the trustees’ right to an indemnity only exists if the trustees have, in incurring the loan, **and** when using the monies borrowed, been acting properly in the administration of the charity.

If the loan is called in early by the lender and the trustees approach us for advice on alternatives to the sale of land for the purpose of repaying the loan, we should encourage them to examine other options. Where it seems likely that the issue is a symptom of wider financial difficulties, we should refer trustees to our publication [Managing Financial Difficulties and Insolvency in Charities](https://www.gov.uk/government/publications/managing-financial-difficulties-insolvency-in-charities-cc12) ([CC12](https://www.gov.uk/government/publications/managing-financial-difficulties-insolvency-in-charities-cc12)).  Caseworkers may also find it useful to refer to OG30 on the same subject.

## C1 Statements and certifications in mortgages required by s.125-126

###  1. Extent of requirements

S.125-126 of the Charities Act require certain statements and certificates to be included in mortgages. S.125(1) and s.126(1) apply to all charities, including exempt charities, but s.125(1A) applies only to charities which either obtain our authority under s.124(1), or meet the requirements of s.124(2).

### 2. Content of statements

S.125(1) requires that any mortgage of land held by or in trust for a charity shall state that:

(a) the land is held by, or in trust for a charity; and **either**:

(b) the charity is an exempt charity;

(c) the mortgage falls within s.124(9) (ie that the mortgage is one for which general or special authority is given as mentioned in s.117(3)(a), or is granted by a liquidator receiver, mortgagee or administrator s.124(9)(aa));

**NOTE:** Until 19 May 2025 any mortgage for which the authorisation or consent of the Secretary of State is required under the Universities and Colleges Estates Act 1925 (UCEA 1925) will also sit outside the statutory regime pursuant to s.117(3)(a). After this date, the relevant provisions in the UCEA 1925 provisions will be repealed and so only those universities and colleges to which the UCEA 1925 applied and which have amended their statutes to provide suitable authority will be able to rely on this exemption and so remain outside this statutory regime. (See OG548 section E2.5)

**or**

(d) the mortgage is one to which the restrictions in s.124 apply.

Each mortgage must, therefore, contain two statements: that at (a) above and **one** of **either** (b), (c), or (d) (the latter three are mutually exclusive).

### 3. Prescribed forms of statement

Where the land to be mortgaged is registered land or is required to be registered under s.123(1) of the Land Registration Act 1925, the statement must be in a prescribed form (s.126(1)). “Prescribed” means prescribed by rule 180 of the Land Registration Rules 2003 (SI 2003/1417). It is the responsibility of the trustees or their solicitor to ensure that any statement required under s.125/126 is correctly produced in the prescribed form and included in the mortgage deed. The text of the SI can be found on the [Legislation.gov.uk](http://www.legislation.gov.uk/uksi/2003/1417/article/180/made) website. A full description of the requirements of the SI can be found in section 6.2.2 of the [Land Registry Practice Guide 14](https://www.gov.uk/government/publications/charities-advice-for-applications-to-be-sent-to-land-registry/practice-guide-14-charities), which is available on the [Land Registry](http://www.landregistry.gov.uk/professional/guides/practice-guide-14) website.

### 4. Content of statements

All mortgages of land held by or on trust for a charity must state:

(i) that the land is held by or in trust for a charity and

(ii) whether the charity is an exempt charity and

(iii) whether the mortgage falls within s.124(9) of the 2011 Act – i.e if the mortgage is:

* + authorised by a statutory provision contained in or under an Act (which includes a Church of England Measure) or any scheme legally established; or
	+ granted by a liquidator, receiver, mortgagee or administrator.

NOTE: Until 19 May 2025 any mortgage for which the authorisation or consent of the Secretary of State is required under the Universities and Colleges Estates Act 1925 (UCEA 1925) will also sit outside the statutory regime pursuant to s.117(3)(a). After this date, the relevant provisions in the UCEA 1925 provisions will be repealed and so only those universities and colleges to which the UCEA 1925 applied and which have amended their statutes to provide suitable authority will be able to rely on this exemption and so remain outside this statutory regime. (See OG 548 section E2.5). If the charity is NOT exempt and mortgage does NOT fall within s.124(9), the mortgage must include one of the following statements set out in s.125(1A):

* where s.124(1) applies to the mortgage, the mortgage must include a statement that it has been sanctioned by an Order of the court or of the Commission as the case may be; or
* where s.124(2) applies to the mortgage, the mortgage must include a statement that there is a power under the charity’s trusts to grant the mortgage and the requirements of s.124(2) (advice considered etc) have been complied with.

### 5. Statements and non-prescribed forms of certificate

Where there is no prescribed form of statement, or where a certificate by the trustees is required, it is for the trustees or their solicitor to devise a form of wording which will satisfy the statutory requirement. [The Land Registry Guidance 14 Charities](https://www.gov.uk/government/publications/charities-advice-for-applications-to-be-sent-to-land-registry/practice-guide-14-charities) sets out wording which charities may wish to consider when drafting such statements.

### 6. The s.125(6) certificate

In addition to including the statements in the mortgage deed required by s.125(1), where the mortgage has effect to secure the repayment of sums paid by way of loan or grant, or the discharge of other obligations undertaken, after the date of its execution (i.e. where s.124(6) and (7) apply), the charity trustees are also required by s.125(6) and (7) to certify that they have obtained and considered such advice as is required in relation to that transaction.

s.125(6) Charities Act 2011 requires that the “charity trustees” must certify this but does not state where or how this certificate must be provided. Therefore, whilst the statements required by s.125(1) must be included in the mortgage deed, there is no such requirement for the trustees’ certificate.

### 7. Protection of mortgagee’s and later interest in land

Where the s.125(1A) statement is included in the mortgage deed:

In cases where the mortgage deed includes the statement required by s.125(1A), s.125(3) protects the title of anyone who acquires an interest in the land for money or money’s worth either directly from the charity, or afterwards. In these cases, it is conclusively presumed in favour of such a person that the statement in the mortgage deed is true. This means that, even if the statement is found later on to be false, the mortgage in which the false statement was contained will be valid in favour of such a person.

As there is no requirement for the mortgagee being protected to have acted in good faith, their interest will be protected even if they were aware that the statement in the mortgage deed is false. However, where conflicts of interest have not been managed with the mortgagee and where there may have been unauthorised trustee benefit, caseworkers should consider whether there has been a breach of trust and misconduct and/or mismanagement by the trustees. **Caseworkers should consider whether to refer any such cases for compliance risk assessment following the usual referral process and, in particular, should always do so where there has been significant loss for the charity.**

The phrase “money’s worth” would include other forms of valuable consideration such as the provision of land or the erection of buildings for the charity.

Where s.125(1A) the statement is NOT included in the mortgage deed

S.125(5) applies in cases where the statement required by s.125(1A) ought to have been included in the mortgage deed but was not. In such cases, the mortgage remains valid in favour of the person who, in good faith, (whether under the mortgage or afterwards) acquires an interest in the land for money or money’s worth, in any of the following circumstances:

* where s.124(1) applied to the mortgage, and an Order of the court or the Commission was obtained to sanction it, but the mortgage deed did not include the relevant statement;
* where s.124(1) applied to the mortgage, but no order of the court or the Commission was obtained to sanction it;
* where s.124(2) applied to the mortgage, but the trustees did not have power under the charity’s trusts to grant it (regardless of whether or not the trustees obtained and considered the advice required);
* where s.124(2) applied to the mortgage, the trustees had power under the charity’s trusts to grant it, but the trustees did not obtain and consider the advice required; or
* Where s.124(2) applied to the mortgage and the trustees had power under the charity’s trusts to grant the mortgage and obtained and considered the advice required by that subsection, but the mortgage deed did not include the relevant statement.

Where conflicts of interest have not been managed with the mortgagee and where there may have been unauthorised trustee benefit, it is unlikely that a mortgagee has acted in good faith. If the position is unclear caseworkers should seek legal advice**.**

S.125(6) Certificate

Where the trustees have certified that they have complied with the advice requirements in s.124(7) (see section 6 above), it is conclusively presumed that the facts are as stated in that certificate in favour of a person who acquires an interest in the land for money or money’s worth.

As there is no requirement for the person who acquires the interest being protected to have acted in good faith, the facts will be presumed to be those stated in the certificate even if the person did not act in good faith.

## C2 Deposit of title deeds as security

### 1. Deposit of title deeds alone do not create an equitable mortgage

Before 1989, it was considered that the deposit of title deeds created an equitable mortgage over a charity’s land (ie no written charge is entered into as security; the lender merely holds the deeds). However, since the Law of Property (Miscellaneous Provisions) Act 1989 came into effect, it is no longer possible to create an equitable mortgage of land by deposit of title deeds alone. (See **United Bank of Kuwait Plc v Sahib** (1994) 2 WLR 94.) The deposit of deeds must now be accompanied by a written memorandum of the agreement between borrower and lender, as otherwise, no mortgage or charge will be created. S.124 applies to the creation of a mortgage or charge in this way.

If there is no written memorandum accompanying the deposit of title deeds, the mortgage or charge will be invalid, and the borrowing will simply be unsecured.

### 2. Where the charity is a company

If the charity is a company, then the unsecured loan will be repayable under the corporate covenant. In an insolvency situation, the loan will have its appropriate priority, in accordance with the usual insolvency rules. See OG30 - Financial difficulties and insolvency in charities.

### 3. Where the charity is not a company

### 3.1 Where the borrowing is within the trustees’ powers

If the borrowing is **within** the trustees’ powers, they will have their usual equitable charge over the property under their administration to secure their liability under the contract with the lender. This charge is created by statute (s.39(2) of the Trustee Act 1925) and is not subject to s.124 Charities Act 2011. In any case, a charge which arises by operation of law is not “granted” within the meaning of s124(1). Nor is it affected by the Law of Property (Miscellaneous Provisions) Act 1989; this only applies to contractually created interests, as in the United Bank of Kuwait case (see above). It accordingly extends to land belonging to the charity. Nothing is achieved by action under s124(1). The lender stands in the shoes of the trustees (subrogation). They have the same charge over the trust property, including the land, as they do.

If money is properly borrowed, say for investment, and authorised investments are purchased as a result, then the trustee may have the right to repay the loan out of the trust fund in full, even though the investments have declined in value.

Enquiries from trustees on this point may require referral to Legal Services.

### 3.2 Where the borrowing is outside the trustees’ powers

If the borrowing is **outside** the trustees’ powers, then, of course, there is no question that either the trustees or the lender will have any charge over the trust property for securing the borrower’s liability.

If monies are borrowed by a charity trustee and are then used for a purpose other than the purposes of the trust, then repayment is a personal, contractual obligation of the person who borrowed the money. Neither the trustee nor the lender will have any right to have the loan repaid out of the trust property.

## C3 Land vested in the Official Custodian for Charities

### 1. Power of trustees under s.91(3) of the Charities Act

Where trustees are mortgaging land vested in the name of the Official Custodian, s.91(3) gives them power in the OC’s name and on their behalf to execute the mortgage. This applies (subject to the exception mentioned in section 2 below) whether or not we have authorised the mortgage.

### 2. Limits to trustees' power

We have a range of powers under s.76-87 of the Charities Act 2011 which we may exercise to protect charity property that is at risk as a result of maladministration. These powers may be exercised at any time after we have instituted a statutory inquiry under s.46. One such power, at s.76(3)(c), is to make an Order vesting property at risk in the name of the Official Custodian. To prevent trustees mortgaging, without reference to the Commission, any land which has been so vested, s.91(4) provides that trustees may not exercise the power at section 1 above unless the mortgage has been authorised by an Order of the court or the Commission.

## C4 Levels of authorisation

Orders authorising or refusing borrowing/mortgages will be dealt with in accordance with our Authorised Officer policy – see OG702.

## C5 Guidance relating to Orders

### 1. Type of Order

Orders are made by sheet Order, using standard forms, drafted in accordance with divisional working instructions (Model Orders can be found in the Procedures and Practice Manual). The endorsed Order procedure is not normally used, as mortgage deeds are unlikely to be too complex or too involved to be set out in a Sheet Order.

### 2. Recitals

Unless an Order is authorising a second mortgage on charity property to a different lender, it is unnecessary for the Order to recite the particulars of previously authorised borrowings by the charity which are not fully repaid.

However, the charity should be keeping such records as a matter of best practice and we should have on record details of the original and second loan, including the parties, the sums borrowed and the key terms.

### 3. Repayment period

The period within which the trustees are authorised to repay the sum borrowed should normally run from the date of the Order and not from the date of the borrowing. However, the date of the Order may not always be appropriate in the case of fixed-term borrowing. For example, where trustees are borrowing a substantial sum for the purpose of providing or improving charity buildings, the work may take some time to complete. The sum concerned will be advanced by instalments, and the Order will direct payment within x years of the date of the final advance.

### 4. Metrification of land measurement

From 1 January 1995 the measurements of land described in the body of a Scheme or Order or in a schedule must be in metric by virtue of the European Community Units of Measurement Directive 1989.

## G1 Glossary

This glossary provides definitions of terms used in the guidance relating to SWAPS - OG22 [B7](#_B7_Interest_rate).

**BASE RATE -** The percentage rate of interest on a borrowing which is set from time to time by the Bank of England.

**FIXED RATE -** A rate of interest which is fixed throughout the period of the loan.

**INTEREST RATE -** The rate, normally expressed as a percentage of the amount borrowed, at which interest is paid on a loan.

**VARIABLE RATE -** A percentage rate of interest which may vary during the period of the loan. It is normally expressed as a certain percentage above the base rate.