



Aberdeen Schools Project Rescue Lead Role in PPP Restructure

The Firm's Projects Unit recently completed the complex re-structuring of the Aberdeen City 3R's PPP Project, originally funded by Icelandic Bank Landsbanki.

Perhaps inevitably the funding documentation had never envisaged a situation involving lenders being unable to maintain funding, and lawyers in the Firm's banking, projects, and construction units had to chart new territory, working closely with construction contractor Pihl UK Limited and Aberdeen City Council, to explore all the avenues for alternative funding while seeking to maintain continuity of construction work.

In addition, freezing orders had been imposed on Landsbanki in the course of the crisis and the re-structuring could only be completed once these had been lifted.

"McClures demonstrated that we have market leading expertise in tackling unprecedented situations in the PPP sector" commented Projects Partner Euan Mitchell, "and highlighted the advantages of our London office where



we drew upon our significant experience in banking and re-structuring matters to address the complex contractual and security issues in circumstances which were new to all concerned".

Separately, in another unexpected consequence of the credit crunch, McClures represented Waverley Housing Association in its £21m refinancing of its committed loan facilities which, although originally provided by Northern Rock, had been sold on to a division of Lehman Brothers. Working closely with the Board of Waverley and its other advisors we had to address once again a situation not

envisaged by the funding documents namely lender insolvency, and balance these against Waverley's statutory obligations under the Housing (Scotland) Act 2001 under the watchful eye of the Scottish Housing Regulator. However, the refinance was achieved with Barclays Bank in a tight lender market thereby ensuring that Waverley has stable and committed funding for its long term tenant needs.

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McClure's Help Client To Government Funding "First"

Glasgow based software client Vamosa was the first recipient in Scotland, and only the second in the UK, to receive support from Lord Mandelson's Capital for Enterprise Fund. The CFE was announced by HM Government in January 2009 as part of its "Real help for business" programme, aiming to provide equity or mezzanine funding of up to £2m for small and medium sized businesses with significant growth potential. It is part of the government's response to the difficulties faced by SME businesses in accessing funding from the clearing banks.

Vamosa, which has been a client of McClures since 2003, will receive £1m of mezzanine finance from the government to help with its expansion plans. Vamosa's software product allows large companies and government agencies to track their content and data and assist governance, compliance and risk.

For further information on growth funding or the CFE fund, contact **George Frier**, Head of Corporate on 0141 303 7797 or gfrier@mcclurenaismith.com.

Business Premises Renovation Allowance – Do You Qualify?

Philip Sim, Head of Property Unit

Business Premises Renovation Allowance (“BPRA”) is a 100% capital allowance available to property owners and tenants who renovate business premises in certain areas, to make them available for occupation. The allowance was introduced on 11 April 2007 and expires on 10 April 2012.

In the current property environment BPRA may be an attractive method of making developments viable, particularly where conversion for residential use was intended but is now uneconomic. Depending on the tax status of the property owner it may be necessary to find a purchaser or tenant with tax liabilities against which the capital allowance can be offset. The allowance is for 100% of the cost of renovation or conversion. To find out if your property qualifies read on....

What kind of buildings qualify for BPRA?

Firstly, buildings must be in disadvantaged areas. These are specified in a statutory instrument and include much of Scotland and Wales, all of Northern Ireland, many of the cities in northern England and certain areas in the Midlands and the south of England. Secondly, the building must previously have been in a business use. It must also have been empty for at least a year before the renovation works begin. Bearing in mind that expenditure must be incurred before April 2012, even if a property is currently occupied there would still be time to arrange vacant possession and start renovation works at least a year later.

BPRA is available only in respect of premises which were, and will remain, business premises. The property must not have been used as a dwelling and must remain as business premises after the renovation has taken place. It is not necessary that the property is occupied in order to claim the allowance, only that it is available for occupation.

Certain trades are excluded from BPRA: fisheries and agriculture, shipbuilding, coal or steel industry, synthetic fibres and the production of certain agriculture and dairy products.

What costs are covered by the Allowance?

The allowance covers capital costs arising from the conversion or renovation of the building incurred up to April 2012 and does not include capital expenditure incurred on acquiring the land, building extensions, development of adjoining land, or plant and machinery which does not become a fixture. In a typical

redevelopment, therefore, only a proportion of the expenditure will attract the allowance.

How can I check if my property is within an assisted area?

The definitive list of areas covered is available at tinyurl.com/opsiareas or you can do a postcode search at tinyurl.com/opsipostcode. However the postcode search is not completely accurate.

How does the relief work?

Individuals and companies who incur capital expenditure and hold the relevant interest in the building claim 100% relief and deduct it from their taxable income or profit. For landlords, the allowance will be treated as an expense of the property letting business while those without a property business or trade will be able to set the allowance against other income.

Can the allowance be clawed back?

The allowance will be clawed back if the property is sold, demolished or ceases to be used for qualifying purposes within 7 years after it was first used or first available and suitable for letting. It is therefore important that the taxable person who claims the allowance holds the property for 7 years after completion of the renovation.

There is no requirement that the building is actually used for a business use after renovation – only that it is available and suitable for letting. The allowance will not be clawed back, therefore, merely because the property is wholly or partly vacant.

Who will benefit in practice?

There are a number of ways in which this allowance may be used. Developer/investors who develop, let and hold property and already have a taxable income will be able to use and claim the allowance if they have or come across a suitable building in an assisted area which will have been vacant for twelve months before renovation starts. There will also be those who seek out opportunities purely to mitigate a large tax liability. Clearly there may also be scope to marry up developers and owners with suitable buildings on the one hand and those with large tax liabilities on the other hand. Developers or investors who have a suitable building but do not foresee having the necessary UK tax liability may find that the building has an enhanced value for investors with such a tax liability, and this will not preclude the developer contracting with those investors to retain some development and management role both initially and during the 7 year retention period. Finally, and simplest of all, occupiers, whether their interest is freehold or leasehold, who have vacant buildings they want to renovate and occupy, will be able to recover the cost through the BPRA.

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The Future For Non-Executive Directors

The firm recently hosted a stimulating and well-received "Question Time" debate on the question "Who would be a Non-Executive Director". The panel comprised the Firm's Head of Corporate, George Frier; Professor Nick Kuenssberg; Norman Yarrow of NVM Private Equity; and Chairman for the evening, Lord Smith of Kelvin, the Chairman of Weir Group plc and Scottish Southern & Energy plc as well as a holder of many current and former Non-Executive positions in both the public and private sector.

"The banking crisis led to many questions being asked both of the Executive Directors and of the roles, conduct and power of Non-Executive Directors" comments George Frier. "However while these high-profile cases highlight significant weaknesses in governance within the financial and

Act 2006. In the course of the Equitable Life litigation (ELAS –v- Bailey and Others 2003) the court confirmed that while the duties did not differ between the two classes of director in application it usually would: a company "could reasonably look to NED's for independence of judgement and supervision of the executive management." Indeed the supervision aspect is arguably the most challenging and the one which is liable to give rise to the greatest difficulty: particularly in larger companies, if NED's are expected to be independent and to rotate their positions with reasonable frequency, then there can be a very real challenge in the NED becoming sufficiently knowledgeable to be able to challenge particular strands of executive thinking. In the plc context, the "Combined Code" requires a balance between executive and non-executive

rightly criticised. The court commented "the lapse in judgement was a serious one, at precisely the moment and in the type of situation in which decisive, courageous and independent action was required by a non-executive director". Ironically the director who was responsible for the impropriety was disqualified for only four years but the non-executive director, three years for his misjudgement. Arguably, overly harsh as against the NED.

All types and sizes of organisations have the potential to benefit from the appointment of the right NED, particularly (outwith the listed sector) start up/growth companies and family companies.

"Growth companies have a very real need for business mentoring but it is essential that the company does diligence on the NED to be satisfied that the person will add value. This includes understanding their track record and also agreeing an appropriate reward structure. Very often monthly fees is the last thing that a growth company needs to be spending so deferred fees, options or equity investment allow a sharing of reward for success", observes Frier.

"In addition, in the family company context, the appointment of a good independent can assist to resolve tensions within the family, provide a sounding board for management and a means of facilitating succession planning as well as making the older generation understand the need for succession planning".



From left to right: George Frier, Lord Smith of Kelvin, Norman Yarrow, Prof. Nick Kuenssberg OBE

regulated sector, it would be tragic if the quality of corporate governance were to suffer because people were to be deterred from taking up these roles in the future. Arguably, the need for strong, independent, and knowledgeable non-executives is greater than ever. Their role shouldn't be to act as some kind of global policeman – but to act as a critical sounding board and devil's advocate on questions of strategy."

The law does not recognise any distinction between the status of non-executive directors (NED's) and directors in the legal duties they owe to their companies: They must all seek to promote the success of the company having regard to the members interests as whole : Section 172 Companies

directors such that no individual or small group of individuals can dominate board decision taking.

In smaller companies, the role of NED is liable to be much more guide, philosopher and "critical friend" but it is important that the NED remembers to stand up and be counted when it matters. In a stark warning of the consequences which can befall a NED who does not act when required, in the disqualification proceedings at the instance of the Secretary of State against Swan & North in 2005, the failure by a non-executive director adequately to investigate a "whistleblowing" allegation concerning impropriety by the Finance Director was



For further information on directors duties or any other aspect of corporate governance please contact **George Frier**, Head of Corporate on 0141 303 7797 or gfrier@mcclurenaismith.com.

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First Charge Under Corporate Manslaughter and Corporate Homicide Act 2007

On 23 April the first attempted prosecution under the 2007 Act was announced by the Crown Prosecution Service. A raft of charges were laid against the Company (Cotswold Geotechnical Holdings Limited) and the director. The Company was charged under the 2007 Act and the Health and Safety at Work Act 1974. The director was also charged with breaches of the 1974 Act.

imprisonment and an unlimited fine. There has been no conclusion to these proceedings yet but it is telling that the Company is relatively small with a turnover of circa £330,000. It had been the accepted intention that the 2007 Act would make the prosecution of larger companies more likely. We shall have to wait and see what further prosecutions commence.

It is under the 1974 Act that he could face

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CLT Scotland Freedom of Information and Data Protection Conference 2009, chaired by David Gourlay, McClure Naismith LLP – 28 October 2009, Edinburgh

Speakers include the Scottish Information Commissioner's Head of Enforcement and the Assistant UK Information Commissioner – Scotland. The Conference takes place in Edinburgh and is from 9.30 am to 5.00pm. As clients and contacts of McClure Naismith LLP you are entitled to a 20% discount off the conference fee. For more information and to register attendance book online at www.clt-scotland.co.uk



McClure Naismith Seminar Programme, 2009–2010

Details of our 2009 - 2010 seminar programme are now available. Our previous programme was hugely popular and we look forward to welcoming you to these sessions.

12.30–1.00pm Registration and Lunch
1.00–1.45pm Presentation and Questions
2.00pm Networking / close

DATE/VENUE	WHAT WE WILL COVER
28 October / GLASGOW	Cash Is Still King! Back to basics – cashflow and debt management, contracts, trading terms and conditions
29 October / EDINBURGH	
18 November / GLASGOW	Maximising Reward and Managing Risk Exploring the issues of how to grow your business through collaboration, partnering and joint ventures
19 November / EDINBURGH	
27 January / GLASGOW	Outsourcing in an Economic Downturn Reviewing and consolidating outsourcing arrangements to drive cost savings
28 January / EDINBURGH	
24 February / GLASGOW	Property Investment: Strategies, Structures and Survival Tax, investment and lending, legal developments, occupier pressures and property market conditions
25 February / EDINBURGH	
21 April / GLASGOW	New Horizons on Employment Law Topical HR issues reflecting employment legislation and the current job market
22 April / EDINBURGH	
19 May / GLASGOW	Avoiding a 'Red Card' How to avoid the legal pitfalls in relation to the marketing and promotion of products and services in and around major national and international sporting events
27 May / EDINBURGH	

To reserve your place, register online at www.mcclurenaismith.com/eventsignup or contact Jenn Scott – e-mail jennscott@mcclurenaismith.com with your contact details, or telephone **0131 272 8332**.



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