

WJM contact

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THE MAGAZINE OF WRIGHT, JOHNSTON & MACKENZIE LLP · SOLICITORS

Harnessing Scotland's
renewable resources



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Wright, Johnston & Mackenzie LLP –
Putting the client first.

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Glasgow and Edinburgh

Telephone

Glasgow: 0141 248 3434

Edinburgh: 0131 221 5560

Web: www.wjm.co.uk

Email: enquiries@wjm.co.uk

Registered office: 302 St Vincent Street,
Glasgow, G2 5RZ.

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Welcome to Contact

Contact reports on WJM's renewable energy story, gives landlords some pointers on dealing with insolvent tenants and looks at new rights for co-habitees. We launch a combined service for individuals and, with swine flu in the news, give food for thought for employers.

Co-Habitants' Right to Claim Financial Provision on Death of a Partner



Until recently, if their partner had died without making a Will, co-habitees had no entitlement to anything from their partner's estate. Situations where no Will existed, leaving long-term co-habitees with nothing, has prompted changes.

Now, in certain circumstances, a co-habitee can claim, through the Court, from their partner's estate. There are four conditions: 1) the deceased left no Will; 2) the couple were domiciled in Scotland immediately before death; 3) the Court deems that the deceased and survivor were co-habiting immediately prior to death and 4) any claim by the surviving partner must be made within 6 months of the date of death.

To address the complexity of modern relationships, the Court has extremely wide discretion. If it finds that co-habitation existed, any claim is on what remains after tax, debts and any surviving spouse's prior rights have been paid. Any award cannot exceed the maximum entitlement of a surviving spouse or civil partner, and can be capital or property. Any award may take precedence over the deceased's children's legal rights.

To claim, the co-habitant must raise an action within 6 months of the date of their partner's death. The action is then 'defended' by the executors, usually next of kin. The Catch-22 is that executors must have been appointed

before an action can be raised, which may lead to families trying to defeat a claim by deliberately delaying appointing executors until 6 months has passed.

If families delay, then the claimant can, in a separate process, go to Court to try to have an executor appointed. If the claimant succeeds in getting an executor appointed, he or she can, in a second action, claim against the estate.

Whether the estate, or the executors personally, pays the costs of defending any action is still to be established. It is also unresolved whether, to avoid an action being raised, executors can negotiate a settlement with a surviving partner.

These new rights mean that the administration of many intestate estates will be delayed, while it is determined if a co-habitant's claim is being made. Executors must find out about any long-term relationships of the deceased, and the estate should not be distributed before the 6-month claim period has lapsed.

Cases in the Courts should produce clear guidance. They will not be a substitute for a suitable Will, backed up by a Co-Habitation Agreement.

Our Private Client team can help you, and your partner, with your Wills and a Co-habitation Agreement. Putting a Will in place now can save heartache, and Court costs, later. Conversely, if you are an executor, we can guide you through administering an estate.

More information from Lesley Elrick: lme@wjm.co.uk or Shona Brown: smb@wjm.co.uk

Combining forces to give advice

WJM realise that, to meet your objectives, you need a combination of legal, financial and tax advice. We also recognise that, unless all pieces of the jigsaw fit together, those objectives will not be met.

Individuals who need advice often have to use different sources for that advice. This model, illustrated below, leaves the individual trying to piece the jigsaw together. It can be a difficult task when each source of advice may have a different set of outcomes in mind when giving their advice!

Making sure all the jigsaw pieces fit together **before** speaking to you is the cornerstone of WJM's client centric approach. We look at the big picture, giving you a single point of contact who will co-ordinate all the advice we provide you with – all for a fixed annual fee.



Typically, individuals, whether in business or not, use us to help them manage their personal affairs. They know we combine legal, tax and financial advice to ensure all the pieces of the jigsaw fit together. They know that there will be just one point of contact for all advice whether tax, financial or legal. They know we make life easy for them. Could we make life easy for you?

If you would like to know more about our combined service, please contact your normal WJM adviser or contact Lesley Elrick, Graham Murray or Ian Ody.

More information from Lesley Elrick: lme@wjm.co.uk Graham Murray: gnm@wjm.co.uk or Ian Ody: irwo@wjm.co.uk

Surviving Swine Flu: The Legal Implications

This article is an extract from a detailed Briefing Note available from Neil Morrison: njm@wjm.co.uk

The swine flu pandemic is hogging media headlines but, so far, the impact on employers and business has been negligible. As the winter 'flu season' approaches, the pandemic's wider effects are expected to worsen.

Prudent employers should be taking steps to gauge the effects swine flu may have on their organisation. Briefly, employers should note:

1. They have a duty of care towards their staff, under both common law and health & safety legislation, to provide reasonable protection from the risk of infection.
2. They may be faced with employees refusing to come to work because the employees fear being infected with swine flu.
3. They may be put in a difficult position, if an employee, who is displaying symptoms of swine flu, wants to come to work.
4. High levels of staff absence, which could be detrimental to operating capacity, should be expected and employers should devise a contingency plan to cope with high levels of staff absence.
5. They should review existing sickness procedures and consider whether a special sick leave procedure should be established.
6. Insurances should be reviewed to ensure that the organisation is covered for the effects of the pandemic.

By preparing for the worst and ensuring some simple steps are taken, employers should be able to minimise the effects of swine flu. The expanded Briefing Note covers employers' liabilities to employees, suppliers and customers and gives more detail of the steps that can be taken. Email Neil Morrison for your copy.

More information from Neil Morrison: njm@wjm.co.uk

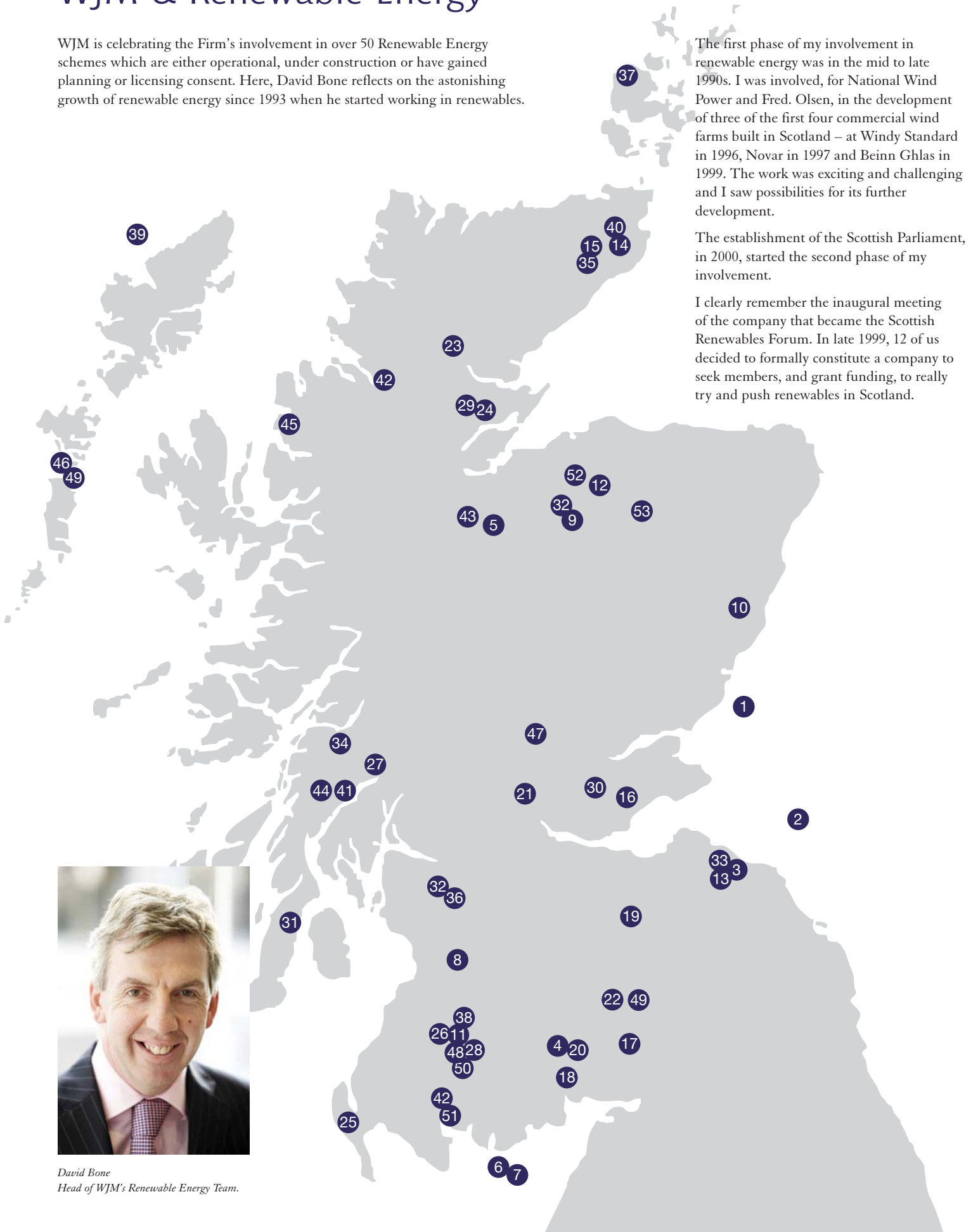
WJM & Renewable Energy

WJM is celebrating the Firm's involvement in over 50 Renewable Energy schemes which are either operational, under construction or have gained planning or licensing consent. Here, David Bone reflects on the astonishing growth of renewable energy since 1993 when he started working in renewables.

The first phase of my involvement in renewable energy was in the mid to late 1990s. I was involved, for National Wind Power and Fred. Olsen, in the development of three of the first four commercial wind farms built in Scotland – at Windy Standard in 1996, Novar in 1997 and Beinn Ghlas in 1999. The work was exciting and challenging and I saw possibilities for its further development.

The establishment of the Scottish Parliament, in 2000, started the second phase of my involvement.

I clearly remember the inaugural meeting of the company that became the Scottish Renewables Forum. In late 1999, 12 of us decided to formally constitute a company to seek members, and grant funding, to really try and push renewables in Scotland.



David Bone
Head of WJM's Renewable Energy Team.

That led to lobbying the new Scottish Parliament in 2000-2001 for amendment and clarification to the planning regulations, which was successful. The possibilities for the development of large-scale wind farms then became apparent to developers and, in the first half of this decade, my team (which by this stage had grown to three) and I were involved in legal work for developers which culminated in the construction of wind farms at Crystal Rig (2004), Causeymire (2004), Rothes (2005), Farr (2006) and Paul's Hill (2006).

It was also gratifying that WJM's position as true experts in Renewables was becoming well known, and I found myself being called in to help on sites where I had not initially been involved, such as Deucheran Hill and Bowbeat.

Up until this point, we had only acted for developers, but a new phase of our work began as land agents started to contact WJM, asking if I could help the owners on potential sites where I wasn't involved for the developer. This created a new dimension for the team and, to date, we have acted for the owners of the built wind farms at Green Knowes and Wether Hill. More are in the pipeline.

Further expansion of our work came when I was asked to act for a planning authority in helping them with the complex planning agreements that are a necessary part of wind farms. This interesting work is, principally, to ensure that land restoration at the end of the lifetime of the wind farm is adequately catered for. Wind farms

at Dalswinton and Minsca have been completed, a site at North Rhins is under construction with several more consented and, again, more in the pipeline.

The latest phase of the work for the WJM Renewable Energy team has been the most exciting. Renewable projects, and our work, have expanded from onshore wind farms into a whole host of other technologies – hydro, biomass, Cogen, wave and off-shore wind and more.

We have increasingly helped clients build hydro plants over the last 5 years, with sites including Braevallich, Inverbain and the River E. Helping E.ON build Scotland's largest biomass plant at Steven's Croft was another milestone.

Another first is helping RWE Npower on what is currently the world's largest consented wave energy site at Siadar off Lewis.

We were recently involved in an interesting Cogen power plant at Tullis Russell's paper mill. Tullis Russell is one of an increasing number of industrial sites generating their own power, often fuelling the plant with their own industrial waste.

And, although at early stages, the prospect of large off-shore wind farms off Scotland's coasts will take renewables to another level. We are delighted to be helping developers in the early stages of their work.

So – you name it, we've done it. On-shore wind, hydro, biomass, wave, off-shore wind and more.

WJM's involvement in Renewables has grown to the point, where work that I used to do myself, now requires a team. Within WJM's Renewables team, are Andy McFarlane, Jacqui Mitchell, Laura Boswell, Donna Kelly-Gilmour and Louise Cleary on the property side; Fraser Gillies helping clients on planning appeals; Angus MacLeod providing expertise in the commercial and intellectual property agreements that are involved in these transactions and Ken Long and Ewan Hall on the corporate side, helping develop funding packages that enable landowners to build their own schemes.

The pace of development is such that, in the first 8 years of working in Renewables, we had only been involved in the development of 62MW of generation; in the next 8 years that figure has grown to 600MW of built generating capacity and a staggering 2,251MW more of generating capacity either under construction, with planning consent or with off-shore exclusivity agreements.

Since we first drew our map, two more sites have passed planning, Berry Burn (No. 52 80MW) and Kildrummy (No. 53 16MW). The question is "How much more might the next 8 years bring?"

More information from David Bone:
djbone@wjm.co.uk

Key	Location	Rank	Type	MW	Key	Location	Rank	Type	MW
1	Inch Cape	1	Offshore Wind	905.00	28	Wether Hill	28	Wind	18.20
2	Forth Array	2	Offshore Wind	415.00	29	Novar	29	Wind	17.00
3	Crystal Rig II	3	Wind	180.00	30	Lochelbank	30	Wind	16.00
4	Harestanes	4	Wind	163.00	31	Deucheran Hill	31	Wind	15.75
5	Farr	5	Wind	92.00	32	Middleton	32	Wind	15.00
6	Robin Rigg A	6=	Offshore Wind	90.00	33	Crystal Rig Extension	33	Wind	12.50
7	Robin Rigg B	6=	Offshore Wind	90.00	34	Beinn Ghlas	34	Wind	8.40
8	Mark Hill	6=	Wind	90.00	35	Causeymire II	35	Wind	6.70
9	Paul's Hill	9	Wind	65.00	36	Ardoch/Over Enoch	36	Wind	6.50
10	Mid Hill 1a	10	Wind	62.50	37	Burgar Hill	37	Wind	5.00
11	Windy Standard II	11	Wind	60.00	38	Torrs Hill	38	Hydro	4.00
12	Rothes I	12	Wind	50.60	39	Siadar	39	Wave	4.00
13	Crystal Rig	13	Wind	50.00	40	Watten/Bilbster	40	Wind	3.90
14	Camster	14	Wind	49.90	41	Douglas Water	41=	Hydro	3.00
15	Causeymire	15	Wind	48.30	42	Inverlael	41=	Hydro	3.00
16	Tullis Russell	16	Cogen	45.00	43	River E	41=	Hydro	3.00
17	Steven's Croft	17	Biomass	44.00	44	Braevallich	44	Hydro	2.50
18	Minsca	18	Wind	36.80	45	Inverbain	45	Hydro	0.95
19	Bowbeat	19	Wind	31.20	46	Liniclate	46	Wind	0.90
20	Dalswinton	20	Wind	30.00	47	Stanley Mills	47	Hydro	0.84
21	Green Knowes	21	Wind	27.00	48	Forebush	48	Hydro	0.65
22	Whiteside Hill	22	Wind	25.30	49	Liniclate	49	Wind	0.60
23	Rosehall	23	Wind	25.00	50	Burnhead	50	Hydro	0.44
24	Novar II	24	Wind	24.00	51	Mannoch Power Station	51	Hydro	0.28
25	North Rhins	25	Wind	22.00	52	Berry Burn		Wind	80.00
26	Windy Standard I	26	Wind	21.60	53	Kildrummy		Wind	16.00
27	An Suidhe	27	Wind	20.70		Total MW			3,009.01

Using Trusts to Give

Trusts are not just for the very wealthy, they can be set up by, and for, anyone. People set up trusts to help them achieve their wishes – perhaps to make charitable donations or to help their children or grandchildren in the future. At its simplest a trust is a legal device that allows you to control the distribution of your assets, often with an overlay of protection. With a trust, you can have as little or as much control as you like – your involvement will depend on what you want your trust to achieve. Trusts can also be effective solutions to modern family life, often being used to ensure children or grandchildren are not disadvantaged by divorce or remarriage.

What types of Trust are there?

The majority of trusts are either a Liferent or a Discretionary Trust. Which trust is best for you will depend on what you want to do, which is where we come in. We have extensive experience in setting up trusts and can advise you on the type of trust that best meets your needs.

Discretionary Trust (see Margaret's Story)

A discretionary trust allows its trustees the discretion to allocate payments to your chosen beneficiaries. This type of trust can be set up during your lifetime or can be written into your Will.

Liferent Trusts (see Robert's Story)

Either set up in your lifetime or established in a Will, a Liferent trust gives one person or organisation (Catriona) the right to the income or benefits from an asset and another person or organisation (Robert's son, Stephen) the right to the eventual capital of the trust.



Margaret's story:

Margaret wants to give £250,000 each to her grandchildren, Jack and Harry. The snag is that Jack is 14 and Harry, just 12.

Margaret is 79 and quite robust but realises that she may not survive to see her grandchildren grow to maturity. She doesn't want her hard earned money being splurged on flash cars or designer wardrobes!

Under Scots Law, any direct bequest to her grandsons would be inherited at 16, so Margaret sees a trust as an ideal solution. She can make her wishes known and instruct her trustees not to release any money until each grandchild reaches a specific age.

A trust allows her to pass £250,000 each to Jack and Harry, knowing her trustees will control the money until each grandchild is old enough to use the money sensibly – probably at much older than 16!

Robert's Story:

Robert is divorced and has a son, Stephen, from his first marriage. He meets Catriona and they marry. Robert is keen to provide for his child and his new wife in his Will but thinks it only fair that his eventual heir is his son.

A trust is suggested. Robert's solicitor explains that this allows Catriona to continue to live in Robert's house but, on her death, the trust's capital and the house are passed to Stephen. The solicitor also suggests an independent trustee so there is no question of bias.

Setting up a trust can be easier than you think. You will need specialist advice and that's where we help. We can advise you on the correct type of trust for you, any tax advantages, the most efficient ways to manage assets and the most effective way to give to your preferred recipients.

More information from Lesley Elrick: lme@wjm.co.uk or Grant Johnston: wgj@wjm.co.uk

Directors in the Dock

Company directors can be criminally prosecuted following health & safety legislation breaches.

Construction company, Discovery Homes, and one of its directors, Richard Pratt, were convicted in the criminal court following an employee's death on a building site in 2008.

The case was only the second successful criminal prosecution of a Scottish company director for a breach of the Health and Safety at Work Act 1974 since 2003.

For a director, or a manager acting on a director's instructions, to be successfully convicted, it must be proved that he or she was:

- Either aware of what was going on and agreed to it;
- Was aware of what was going on but turned a blind eye, or
- Was directly neglectful.

Although he had very little construction experience, Mr Pratt was the site manager

and responsible for day-to-day site management, including health & safety.

He used a barrier normally used at road works sites at the top of a roof exhaust shaft. The barrier was totally unsuitable for protection of workers at heights and certainly not suitable for edging a 3m deep roof shaft.

As a result, bricklayer Andrezej Freitag fell down the shaft, dying from head injuries sustained in his fall. Subsequently, proper scaffolding was put in place.

Insolvent Corporate Tenants – Pointers for Landlords

If a tenant company runs into dire financial straits, relying on the most robust full insuring and repairing lease will not fully protect a landlord. So what can landlords do?

Landlords have two ‘sledgehammer’ tools:

1. The right to end the lease and repossess the premises; and
2. A preferential claim, to the value of any unpaid rent, on tenant’s property in the premises.

Sledgehammers should be tools of last resort. Before shouldering a sledgehammer, landlords should protect their position and minimise their loss by being:

- **Alert** – putting an effective system in place to detect missed payments or other breaches puts you ahead before any insolvency process commences;
- **Proactive** – if a breach occurs, discuss it with your tenant at the earliest opportunity, agree a workable solution and diligently follow up;
- **Communicative** – at all times, keep a dialogue going with your tenants – listen for early warning signs of financial troubles;
- **Shrewd** – if you obtained a personal guarantee, use it to recover outstanding debt at the earliest signs of default. When negotiating new leases, whilst having regard to commercial realities, take the maximum security available. If possible, obtain a personal guarantee and/or a rent deposit from your tenant;
- **Up-to-date** – ensure that your leases are reviewed and renewed at expiry, as there can be problems in enforcing an out of date lease. Modern leases minimise notice periods required from landlords where tenants are defaulting;

- **Organised** – deciding, in advance, a policy or action plan for enforcing lease terms, means you, and your agents, can act promptly when a breach occurs;
- **Realistic** – about your prospects of recovering debts from an insolvent corporate tenant and move swiftly to mitigate your loss.

If an Insolvency Practitioner (IP) is appointed, a landlord should:

- Ensure an immediate inventory is taken of tenant’s property at the leased premises;
- Initiate communication with the IP at the earliest opportunity, providing them with a copy of the lease and details of outstanding arrears. Often an IP is prepared to give an idea of their intentions for the insolvent tenant company, the property and its contents. This provides some forewarning of whether the IP is likely to continue to occupy the property, close the tenant’s business down or dispose of the tenant’s interest in the property by selling the company as a going concern to a third party (who will then become your new tenant);
- Lodge a claim with the IP for any money owed under the lease, attach the inventory of tenant’s property and intimate a preferred claim in respect of unpaid rent;
- Keep in regular contact with the IP and keep records of discussions and correspondence;



- Discuss with other creditors (if possible) in order to establish their position;
- Be decisive, but reasonable and realistic too – in consultation with your legal advisers, you need to decide if you want to recover possession. You should discuss the likelihood of recovering debts and how to recover them economically and discuss any impacts on sub-tenants or occupiers; and
- Consult with WJM. A landlord needs to decide an action plan and implement it swiftly to avoid any inaction being considered as acceptance of an unfavourable outcome.

Consulting with us as soon as you suspect tenants are in difficulties could be beneficial. WJM can advise on property issues, on insolvency issues through our Business Recovery team or on getting paid using our Debit Recovery services. If the worst comes to the worst, then our Commercial Dispute Resolution team are on call.

More information from Jillian Park:
jzp@wjm.co.uk

The breach, for which both the company and Mr Pratt were prosecuted, was the failure to provide a guardrail, barrier or similar protection to prevent someone from falling down the shaft.

The Court held the provision of a guardrail was clearly within Mr Pratt’s effective control and he could have taken the necessary steps to replace it with a suitable barrier but failed to take any obvious steps to prevent the offence. Mr Pratt was fined £4,000 and, due to the neglect of its director, Discovery Homes was fined £5,000.

As this case has shown, those directors found guilty of breaches under health & safety legislation can be fined and in some cases, could be imprisoned. Courts can, in some circumstances, also disqualify convicted directors.

The Corporate Manslaughter and Corporate Homicide Act 2007 gives courts further powers. If, as a result of senior management failings, a gross breach of health & safety legislation occurs which results in a death, the Act enables courts to impose additional, unlimited fines or force a company to publicise its conviction.

This case shows that directors must develop policies to avoid health & safety problems and respond quickly to new risks, through swift identification and taking professional advice. Workplaces can be dangerous and directors must guard against complacency creeping in.

If a director is responsible for health & safety issues, which are not monitored effectively, then that director could end up in court being brought to public account for their failings.

More information from
Steven Docherty: sd@wjm.co.uk or
Neil Morrison: njm@wjm.co.uk

Alternative Investments – Options Abound



Recent market turmoil has meant many people are looking at alternative investments. But what is an alternative investment? Two of the most popular alternative investments are forestry and gold.

Forestry

Few consider forestry as an investment as, until recently, it was the domain of landowners who did not need to realise their investment for many years. The increasing supply of forestry funds means that more investors are looking to trees as a home for their money. The key advantages of forestry funds are:

- After 2 years, the investment attracts Inheritance Tax relief.
- No Capital Gains Tax on the profits.
- Compared to land purchase, entry levels via funds, are relatively low.
- Funds normally have a defined exit strategy.

As with any other commodity, timber demand fluctuates, affecting fund growth. Growth is unlikely to be double digit, but solid returns have been seen.

Alternative investments may offer diversity in a portfolio and bring positive returns when other areas look bleak. If investing in alternatives, you should be fully aware of the risks and how you can get your money out of your investment.

WJM's Financial Planning team can advise on adding alternative investments to your portfolio.

More information from Ian Ody: irwo@wjm.co.uk

Gold

Those who invested in gold 12 months ago will be satisfied with the returns achieved. There are three ways of investing in gold:

- Buying shares in gold mining companies.
- Buying actual gold in the form of bullion, ingots, Krugerrands or Sovereigns.
- Buying gold derivatives.

Each investment route into gold has its advantages, disadvantages and specific risks, so proper advice should be sought by anyone who wishes to invest in gold.

Important points to remember when making an alternative investment are:

- What do you actually own – for example: do you own a share of a forest or shares in a forestry fund?
- What covenants and security do you have – for example: what happens if the gold mine you invest in runs dry?
- Are you comfortable with the structure of the investment – do you understand how the investment works?
- How much risk are you taking?

IN Brief

WJM at the Game Fair

WJM's Agricultural, Rural & Sporting Property team sponsored the falconry displays at the Scottish Game Fair.

"WJM has established a very solid and well regarded team in this unique market place and our presence at the Game Fair consolidates our position further. Recently, we have bought and sold a number of important estates for clients and a significant amount of forestry for both commercial and individual investment. Despite the economic conditions, top quality properties are still selling and demand is buoyant in this sector", said Alistair Anderson, the teams Head.

More information from Alistair Anderson: ara@wjm.co.uk



A 14 week old Eagle Owl visits the WJM stand.

We're moving

From 26th September 2009, our Edinburgh office will be at 18 Charlotte Square.

The new postal address is:
Wright, Johnston & Mackenzie LLP,
18 Charlotte Square
Edinburgh
EH2 4DF.

Directions to our new offices can be found on our website at: www.wjm.co.uk



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