

WJM contact

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Commonwealth Games: Licensed to Sell?

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Contact is published regularly by
Wright, Johnston & Mackenzie LLP

302 St Vincent Street
Glasgow G2 5RZ
Tel: 0141 248 3434
Fax: 0141 221 1226

40 Torphichen Street
Edinburgh EH3 8JB
Tel: 0131 221 5560
Fax: 0131 221 5570

Web Site: www.wjm.co.uk

Property Web Site:
www.wjmproperty.com

Email: enquiries@wjm.co.uk

Registered office: 302 St Vincent Street, Glasgow
G2 5RZ. A limited liability partnership registered
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Welcome to Contact. In this New Year issue we look at how employment law might be changing in 2008, introduce a Childcare Voucher product for employers and see how the 2014 Commonwealth Games might impact on Glasgow's traders. Franchising, fashionistas and family businesses also feature, as do changes in residential letting legislation.

Fashion, foodies and the fabulous

On 25 October 2007, Glasgow's new Silverburn Shopping Centre opened its doors in the first phase of its retail development. Servicing the fashionistas, the foodies and the downright fabulous, Silverburn is another jewel in the crown of Glasgow's expanding retail scene.

WJM's Commercial Property team acted for a number of tenants opening stores in this new and salubrious shopping haven.

With increased footfall, protection from the notorious Scottish climate and easy parking, shopping centres are attractive places to do business for retailers. But shopping centre leases can be very different from those of a stand-alone shop. For anyone looking to take on a lease in a shopping centre, such as Silverburn, service charge and turnover rents are important aspects of their lease.

Service charge arises where a number of tenants share common areas, services and facilities. The landlord maintains these areas, services and facilities and then recovers a proportion of the cost from each tenant through their lease. These charges can be

substantial and tenants need to have factored them into any financial projections for a retail unit. Another feature of shopping centre leases can be turnover rents. Here the tenant pays a pre-determined base rent which is "topped up" with a further contribution based upon how much money is generated through trading from the unit in question.

Additional clauses like these mean that shopping centre leases can often be lengthy and complex. When the pressure is on to gain entry and start trading, it becomes crucial that your legal team knows what they are doing. The WJM team has considerable experience in negotiating shopping centre leases having acted for landlords and tenants in shopping centres across Scotland. A key factor to us is the importance of finding out, at the outset, the issues that matter to our clients. This ensures that, during negotiations, we are able to take a commercial and practical approach towards achieving our client's goals.

If you are looking for retail premises, whether stand-alone or in a shopping centre, the team can help guide you through the process.



More information from Donna Kelly-Gilmour: dmgk@wjm.co.uk or Stacy McGill: sm@wjm.co.uk

WJM praised in top legal publication



Top left to right David Bone and Colin Brass. Bottom left to right Ken Long and Angus MacLeod

The Chambers Guide to Legal Services is an annual publication which takes an independent look at legal services in the UK. The 2007 edition has just been published and WJM and its solicitors are recommended in a number of areas. Some of the key comments from Chambers about the Firm and its lawyers are:

Corporate Finance – ‘Peers observe this firm’s profile seems to be increasing in line with its steady growth. Advising family businesses, family constitutions and family offices are noted team strengths’. Ken Long is ‘straight to the point, hard-working and efficient’.

Franchising – ‘Widely recommended for its prominent work in franchise litigation, has the specialised knowledge needed to excel in this field’. Angus MacLeod is ‘an authoritative, calm and practical lawyer with a powerful profile in the market’. Peers and clients rate his ‘in-depth knowledge and well-briefed approach’.

Projects and Energy – ‘The modestly sized but highly expert team is described by clients

as ‘knowledgeable and pleasant to deal with’. David Bone is considered ‘a standout figure in the sector’ whose knowledge of wind farms is ‘second to none’.

Real Estate – ‘WJM’s property team is an increasingly ambitious force in the marketplace ...it is renowned for its work for licensed properties ...clients appreciate the down-to-earth and plain speaking approach of the firm, while peers complement its full-service capabilities’.

David Bone, WJM’s Chief Executive, commented, “Following hard on the heels of our recommendations in Legal 500 which we reported on in November’s Contact, these comments from the team at Chambers show that we are delivering on our aim of providing clients with market leading legal services. I am delighted that WJM has been recommended in so many diverse areas of the law. It is a richly deserved public recognition for the individuals and practice groups mentioned.”

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

IN Brief

Enterprising Families – now a strategic priority

All enterprising families develop strategies to help them thrive in ever more competitive markets. WJM’s Family Business Team has been working to ensure that the adaptive and innovative strategies used by multi-generational family businesses are recognised and that enterprising families are placed firmly on the entrepreneurship agenda.

In the early 1990’s, Scotland’s business strategists began to focus on entrepreneurship. Since then, much work has been done in relation to innovative, high growth start-up businesses. However, this focus misses the entrepreneurial talent apparent in the majority of family businesses in Scotland – businesses which are the backbone of the Scottish economy.

Attitudes are now beginning to change. The Small Business and Entrepreneurship Conference held recently in Glasgow included, for the first time, workshop discussions on the importance of family businesses not only to the UK but worldwide. The focused workshops allowed advisers and academics to discuss the significance of family businesses in entrepreneurial economies and to develop research ideas to study multi-generational entrepreneurialism and the unique opportunities this brings to families and the wider economy.

WJM’s team are at the heart of a Scottish Enterprise task force on developing a culture of entrepreneurship over the next 10 years. For the first time, family businesses have been recognised as being part of Scottish Enterprise’s inclusive definition of entrepreneurship. We hope that this recognition will allow Scottish Enterprise to tailor the financial help they can provide to the specific needs of family businesses and underline their importance to the long-term prosperity of the Scottish economy.

More information from Louise Fisher:
lf@wjmc.co.uk

2014 Commonwealth Games – Licensed to Sell?

On Friday 9th November 2007, it was announced that Glasgow would be the host city for the 2014 Commonwealth Games. This ended a two-year campaign by politicians, sports men and women and business leaders to bring the games to Glasgow.

On top of the opportunity to bring a large sporting event to Glasgow, and the hopes of urban regeneration in the East End, there are exciting business opportunities. Such opportunities will bring around £300 million of investment in the run up to the Games; see the creation of 1,000 jobs; and bring an estimated 100,000 visitors to the Glasgow area during the Games. It is predicted that Scotland will receive a net gain of £80 million pounds with £26 million coming to Glasgow itself. There will also be a predicted 4% rise in tourism over the following three years which could bring an extra £30 million to the area.

However, businesses in Glasgow and beyond hoping to capitalise on the Games should be aware of a few spanners in the works. The spanners are hidden in the new Glasgow Commonwealth Games Bill being tabled by the Scottish Government to make provision for the Games.

The Bill will make it an offence to be involved in any street trading and advertising in the vicinity of a Games event.

A Games event will be any event held as part of the Games and any event held before or after the Games as specified by order of the Scottish Ministers.

The ban on advertising is to stop so-called “ambush marketing” as seen at the 1996 Olympics in Atlanta. Here the main rival of the Games major sponsor bought up all the advertising boards around the stadium and advertised their product. Needless to say,

having paid millions of dollars to sponsor the Olympic Games in their home city, the Coca Cola Company was somewhat incandescent to see bitter rival PepsiCo’s advertising all around the Games site.

However, here in Glasgow, the advertising caught by this offence is not only on billboards but all “promotional communication” – which, as the organisers are doing, can be interpreted very liberally.

For example – even if they have an existing licence, all street traders in the vicinity of a Games event will be banned. All advertisements in the vicinity of Games events will have to be specially authorised. Only those street traders and advertisers who are specially authorised by the Games organisers will be allowed in the vicinity of a Games Event. At present there is no indication of what distance from any Games venue will count as being in the “vicinity”.

Discretionary Trusts – Are they still appropriate?

With all the recent publicity surrounding the Government’s changes to the law on Inheritance Tax (IHT) and trusts, you could be forgiven for assuming that setting up new trusts is no longer appropriate.

While there are no longer significant tax benefits to including discretionary trusts in wills, the changes have not significantly affected lifetime discretionary trusts. These have been used for a variety of reasons, including tax planning, for many years. Now that the favourable rules for special types of trust for children or grandchildren have been removed, setting up discretionary trusts has become more attractive and should be considered.

Depending on whether you have made any other gifts, you can gift up to the IHT nil rate band (currently £300,000) into a discretionary trust with no immediate tax consequences. After surviving seven years from making the gift to the trust, the gift is no longer part your estate for IHT purposes as long as you reserve no benefit in the trust. The IHT saved by setting up a trust in this way could be £120,000, or even more when you consider that the growth on the assets held in trust is also outside your estate.

A major advantage of discretionary trusts is their flexibility – only a list of all of the potential beneficiaries of the trust need be included when the trust is set up. The trustees you appoint (which can include yourself and/or your spouse) will be able to use their discretion to distribute income and capital as and when they see fit, and in accordance with your wishes. Neither you, nor your spouse, can be beneficiaries of the trusts so they are only appropriate for people who will no longer need the funds or assets being given away. Trust funds could be used, for example, to pay school fees or fund university education or accommodation for children or grandchildren.

Another benefit of discretionary trusts is the ability to hold over gains on the transfer of assets into the trust. This is particularly attractive if you wish to give away investments which are showing substantial gains. Giving these away directly, rather than into a trust, would crystallise the gains and could land you with a large Capital Gains Tax (CGT) bill.

In view of the proposed changes to CGT announced in the recent pre-budget report, discretionary trusts may also have an



attraction to business owners intending to exit their business in the short to medium term. Transferring private company shares to a discretionary trust before the end of tax year 2007/08 without claiming hold over relief would crystallise the gains under the present rules allowing you to pay tax at the 10% rate rather than the proposed 18%.

As with all tax planning, there are pitfalls for the unwary, so taking professional advice at each stage in relation to your own particular circumstances, and having the correct documentation prepared, is essential.

More information from Graham Murray:
gnm@wjm.co.uk

With Games venues spread across Glasgow from Scotstoun to the East End and beyond to Jackton and Strathclyde Park, the chances of your business being in the “vicinity” of a Games event could be quite high.

It is expected that this very wide ranging piece of legislation will impact on the many businesses who are located in the vicinity of a Games venue and who may not have anything to do with the Games at all.

If you would like advice on how this proposed legislation will impact on your business or how you can capitalise on the opportunities that the 2014 Games will bring please contact Angus MacLeod.

More information from Angus MacLeod:
agm@wjm.co.uk.



Construction dispute? Adjudicate

WJM’s Construction team continues to go from strength to strength, having recently successfully acted in a substantial and detailed Adjudication procedure.

Adjudication is an alternative dispute resolution procedure common in construction contracts, and is often the required procedure which has to be followed. This means that your advisers need to be able to go beyond court, and offer this option in their arsenal, and WJM’s team can certainly do that.

The beauty of Adjudication is that it leads to a binding decision on your dispute very quickly, usually within 28 days, which allows the parties to “park” the issue to one side and continue working on the construction project.

You need to make sure you follow the procedures correctly though, and the dispute resolution rules in construction contracts are often riddled with traps for the unwary – make one mistake, and the whole claim can fail. Early advice is always your best option, and the WJM team is here to help.

More information from Steven Docherty:
sd@wjm.co.uk

Scottish Planning System in focus

The recent decision by the Scottish Government to ‘call in’ Donald Trump’s controversial proposals for a £1bn Trump International Links scheme at Aberdeenshire’s Menie Estate has brought aims of the planning system into sharp focus.

The power available to the Scottish Ministers to take certain controversial or important planning decisions out of the hands of local authorities is not new, although in the past the process itself has thrown up more than a few controversial decisions. However it might be said that the Government’s recent move hints at a more assertive attitude to ensuring that decisions which are considered to be of national importance are taken at ministerial level, with a view to ensuring the policy aims which Government seeks to promote through the planning system are being met.

Indeed, proposals are currently being put in place to class certain types of development as being of ‘national importance’. In a statement to Parliament on 13 September 2007, John Swinney, MSP, set out broadly the type of proposals which will be designated ‘national developments’. These include, amongst other things, developments which make a significant contribution to Scotland’s sustainable economic development; strengthen Scotland’s links with the rest of the world; make a significant contribution

to the achievement of climate change, renewable energy or waste management targets, or raise issues of more than regional importance.

Decisions on national developments will be taken by the Scottish Ministers. Importantly, the question of the need for a national development will not be up for discussion. Instead, any arguments at a Public Inquiry into the development will have to centre on other aspects such as precise location, size, and so on.

Arguably the proposals to allow the Government to prioritise certain developments, by designating them national developments, signals a view that the planning system should be used as a means to the end of sustainable growth, rather than as a ‘control’ or ‘red light’ to development. The change in terminology in the 2006 Act from ‘development control’ to ‘development management’ seems to underscore this shift in emphasis. It may be that as a result the Government can be expected to take an even more assertive role in dealing with large scale, and often controversial, developments where it considers them important to the furtherance of its stated policy aims.

More information from Fraser Gillies:
fzg@wjm.co.uk and **Andrew Wilson:**
ajpw@wjm.co.uk

Making charities fit for purpose in the 21st Century

Are you involved with a charity that has been around for many years? Does your charity find it difficult to fulfil what are now outdated objectives or find suitable beneficiaries? Or do the rules of the charity or its legal form make it difficult to administer effectively?

Recently, charities have been given an unprecedented opportunity to reorganise and modernise to make themselves more effective in the present day through the new Charities and Trustee Investment (Scotland) Act 2005 and the recently enacted Charities Reorganisation (Scotland) Regulations 2007.

In addition, the Office of the Scottish Charity Regulator (OSCR) has started a rolling review of all charities and their constitutions, which is taking place over the next few years. OSCR has replaced HMRC Charities office as the regulator for charities in Scotland and, following some high profile scandals, is taking a very active interest in the way charities are constituted and managed.

As a result of OSCR's review, charities whose constitutions are not up-to-date may receive a notice requiring them to take action to remedy difficulties with their constitution within a relatively short timescale with the threat of removal from the charity register. Charities are also expected to demonstrate their public benefit as this is no longer presumed. Charities can seize the opportunity to be proactive and review their constitutions and activities now before OSCR comes calling.

In particular charity trustees would be well advised to check:

- That the charitable purposes in the constitution still reflect what the charity does and would like to do, and that those purposes are still charitable under current legislation.

- That there are no clauses in the constitution which would jeopardise the charitable status of the organisation (such as a direction to distribute funds amongst members if the charity were wound up).
- That the rules in the constitution allow for the efficient administration of the charity and do not impose unnecessary or onerous requirements.
- That the legal form of the charity is appropriate to its activities (in particular, charities that carry out activities directly, or which own property, would normally be suited to having an incorporated legal form rather than being a trust or unincorporated association).
- That the charity provides public, as opposed to private benefit that outweighs any "disbenefit", and that conditions in obtaining the benefit are not unduly restrictive.

Some charities will have a procedure in their constitution which allows them to make changes, or even permit them to incorporate or transfer their assets to another body. In these cases, as long as the procedures laid

down in the constitution are followed and OSCR's consent is obtained, no further procedure is likely to be required.

Many charities, particularly those that have been in existence for many years, are simply not permitted to make changes by their constitution. For many years, their only option would have been to apply to the Court of Session for a judicial variation, a lengthy and expensive procedure which put most off taking action. The new legislation has introduced a procedure which allows charities to submit "reorganisation schemes" without going to court – a long overdue and very welcome change. Certain conditions have to be met, and an application to OSCR is required, who will publicise the proposed change on their website.

Charities should seize this opportunity to modernise and make themselves more effective. WJM's team of charity lawyers are familiar with the new regulations and can help with all aspects of reorganising, from reviewing and redrafting constitutions, to leading you through the process of incorporating, and dealing with OSCR on your behalf. We are currently working with a charity established in 1725 to help them bring their constitution and objectives up to date, and helping new charities become established.

We also help charities with their day-to-day administration and management, and an article on charity governance and the responsibilities of charity trustees will feature in the next edition of Contact.

More information from Graham Murray: gnm@wjm.co.uk

Residential Letting: The Housing (Scotland) Act 2006

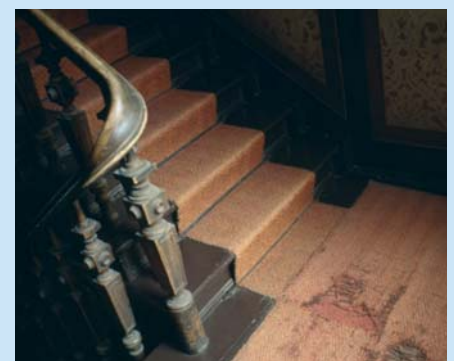
For the majority of residential landlords and tenants in Scotland, 3rd September 2007 marked the coming into force of new measures which redefined the landlord/tenant relationship. The Housing (Scotland) Act 2006 is underpinned by a desire to drive up standards in the quality of private sector rented housing.

With around 10% of Scots living in privately rented accommodation, the new regime will affect many households. Whenever a property is let for human habitation, the landlord now has specific duties and obligations towards the tenant. Under the new Act, the existing obligation on landlords to repair and

maintain rental property has been redrawn, extended and brought together for the first time. The introduction of a new 'Repairing Standard', which replaces the 'tolerable standard' featured in earlier legislation, gives a clear statement of the benchmark standards to be reached and maintained by landlords in rental properties.

Rental properties affected by the Act include tied accommodation occupied by an employee, but exclude some crofting, agricultural and small landholder properties.

All landlords, regardless of how many properties they have, are affected and the changes can be far reaching.



More information from Hilary Denholm: hdd@wjm.co.uk or Aileen McInnes: ajm@wjm.co.uk

Employment Law: Goodbye 2007, Hello 2008

2007 saw many changes to employment law. Two major changes were the implementation of the Age Discrimination Regulations and the increase in holiday entitlement. What's next for 2008? We have consulted our "crystal ball" and looked ahead to the important changes we expect to take place.



Age discrimination legislation – a welcome introduction?

The Age Discrimination Regulations have now been with us for over a year, during which there were around 390 Employment Tribunal claims under this legislation.

However, according to a recent ACAS survey, only 17% of employers have amended their employment and recruitment practices since the introduction of the Regulations, leaving them at risk of claims. We expect the level of claims to increase in 2008.

Increased Holiday Entitlement

Since October 2007, employees have been entitled to 24 days holiday per year. This has, inevitably, caused some difficulty to employers, and will continue to do so in 2008.

Of particular concern to employers has been the calculation of holidays for part-time workers and ensuring all contracts and policies are in line with the new rules.

Just as employers get to grips with this increase, another one is due in April 2009, when employees' holiday entitlement will increase to 28 days per year.

More information from Martin Stephen: mss@wjm.co.uk or Laura Kelman: lak@wjm.co.uk
Praesidium information from Geraldine Leonard: gl@wjm.co.uk

What's new in 2008? Changes to watch out for include:

Employment Simplification Bill

This will cause many exclamations of "hoorah" as common sense prevails. An impending Bill will repeal the much-hated statutory dismissal and grievance procedures, although it is not yet clear what they will be replaced with.

The procedures received an unwelcome reception in 2004, even though the thinking behind their introduction was sensible. The idea was that many employment disputes can be "nipped in the bud" before they get to a Tribunal. In practice, however, the Regulations have confused and frustrated employers and employees.

The Corporate Manslaughter and Corporate Homicide Act 2007 comes into force

In April 2008, a new offence of corporate manslaughter (corporate homicide in Scotland) will come into being. The legislation attempts to overcome some of the legal technicalities that have made it difficult to prosecute companies in the past. From April 2008, it will be possible for an organisation to be prosecuted if management failures cause a person's death and amount to a gross breach of the duty of care owed to that person.

Extension of the Information and Consultation of Employees (ICE) Regulations 2004

The ICE Regulations place an obligation on an employer to consult with its employees on key matters affecting employment where a valid request is received from the workforce. The employer will be obliged to enter into negotiations to establish procedures for informing and consulting staff. From April 2008, the Regulations will be extended to apply to all businesses employing 50 or more people in the UK.

Extension of the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006

These Regulations require employees to undertake consultation with employees if they plan to make changes to occupational or personal pension schemes. The consultation procedures will apply in certain circumstances, including increasing normal retirement age and closing schemes to new members.

Working with Children and Vulnerable Adults

Later in 2008, the Safeguarding Vulnerable Groups Act is due to come into force. This Act will introduce a centralised system for vetting people in case they have been banned from working with children or vulnerable adults. It will allow employers to carry out online checks so that they are not hit with fines of up to £5,000 for employing individuals who are on the list or for failing to make the relevant checks.

Get Protected

For employers, the proposed legislative changes for 2008 mean that it is more important than ever to ensure that contracts and policies are up-to-date.

If you would like to have your employee contracts and policies reviewed; have the ability to speak to a dedicated employment lawyer about any employment matters that arise, and have insurance cover to give you peace of mind in the event of a claim to the Employment Tribunal, all at a fixed annual cost, then contact Geraldine Leonard our Business Development Manager about the benefits of Praesidium Employment Law Protection.

Your franchise, your website?



One issue which crops up regularly, especially at the point when a franchise is coming to an end, is the question of what should happen with the franchisee's website.

More often than not, when the franchise is first set up, the franchisee is permitted to go out and register a domain name to allow him or her to set up a website for the new franchise. The domain name usually contains a variation on the name of the franchise (for example, if there was a franchise called Speedy Clean, the domain name for the Glasgow franchise might be speedy-clean-glasgow.com), and commonly the franchisee will register the domain name in his or her own name.

The problem arises because the franchisor will often have intellectual property rights in the name of the franchise. When the franchise comes to an end, and the parties go their separate ways, the domain name, still containing the trademarked or copyrighted name, might still belong to the franchisee. Franchisors need to protect their intellectual property rights, because there will be substantial goodwill in the name, which the franchisor has spent time on building up, and often that goodwill can be one of the main selling points of the franchise.

So if you are a franchisor, how do you avoid this situation? Very simply, you make sure that you retain control of the process of registering the domain names. You need to:

- Draft the Franchise Agreement so as to make it clear that the franchisee is not permitted to register any domain name containing the trademarked or copyrighted name.

- Dictate to the franchisee in the Franchise Agreement what domain name he or she should use, which should already have been registered by you.
- Make it clear to the franchisee, before taking their franchise fee, that you will register the domain name and will simply be granting him or her permission in the Franchise Agreement to use it for as long as the franchise lasts.
- Make it clear in the Franchise Agreement that, on expiry or termination of the agreement, the name reverts back to your control.

Sometimes, the franchisee comes into the franchise with a domain name already registered (for example, if they were particularly keen and registered it in anticipation of signing on the dotted line). In that case, the franchisor should get the franchisee to sign the necessary paperwork instructing transfer of the domain name to the franchisor, which can then be held until the end of the franchise. The franchisor knows that the name will be transferred across when the franchise ends, so that whatever goodwill has been built up in that domain name during the franchise accrues to the franchisor.

It is vitally important for franchisors and franchisees to take advice on this and many other subjects before signing a Franchise Agreement, and WJM's cross-disciplinary Franchising team is ready to assist.

More information from Angus McLeod: agm@wgm.co.uk or Steven Docherty sd@wjm.co.uk.

IN Brief

STEP'ing Up

STEP (the Society of Trusts and Estates Practitioners) is the worldwide professional body for trust and estates practitioners. Consulted by Governments, businesses and individuals, it is renowned for the calibre of its members and the excellence of advice they offer.

We are delighted to announce that WJM's Ian Macdonald has been confirmed as Deputy Chairman of the new STEP Family Business Group. This appointment recognises WJM's expertise in the complex field of advising family businesses. Separately, Ian has also been elected as the Scottish representative on the Council of STEP Worldwide. Information on STEP can be found at www.step.org.

More information from Ian Macdonald: im@wjm.co.uk

WJM involved in success at Green Energy Awards

At the recent Scottish Renewables Forum Green Energy Awards, WJM were delighted to play a small part in E.ON's success in winning the Best Renewable Energy Project Award for the Steven's Croft biomass power station near Lockerbie.

Steven's Croft is the UK's largest dedicated biomass plant at 44MW and will burn a combination of forestry residue and specially grown willow and, according to E.ON, will displace the emission of 140,000 tonnes of greenhouse gases every year.

The plant's manager, Andy Carling, described the project as 'a groundbreaking initiative' and said that E.ON was delighted to have been recognised with such a prestigious award.

David Bone, who worked on the Scottish legal aspects of the project over a two year period, said "E.ON deserve this award for their courage and hard work in putting together such an innovative project and we at WJM are delighted to have helped in a small way in pulling all the legal documents together".

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