

Transparency



bto News

Self Funding Acquisitions

In the current market it is proving very difficult for parties to access external bank finance to assist in the funding of company acquisitions. There are, however, some situations where with careful structuring the Vendors of the company can act as the funder by allowing for the payment of at least part of the purchase consideration on a deferred basis.

Historically, this type of transaction - often referred to as the VIMBO (a Vendor Inspired Management Buy Out) - has worked well in situations where there was either a management succession (management buy-out) or a family succession (power changing hands to the next generation in a family business). There is no inherent reason why this type of deal should not be utilised currently to facilitate company disposals in other more general circumstances.

One of the features of this type of transaction is that the Vendors will look for meaningful security for their deferred consideration from the resources to hand. For example, personal guarantees from the purchasers (if individuals) or from those individuals behind any Newco used as a vehicle for the purchase.

Alternatively (or in addition), the Vendors may look for some form of security from the company which they are selling, for example, a Standard Security over its property and/or Bond and Floating Charge over its assets and undertaking.

Until recently, this sort of arrangement constituted "financial assistance" and was illegal unless a strict statutory procedure called a "whitewash" was properly undertaken. However, since 1 October 2008, the prohibition on a private company providing financial assistance for the purposes of the acquisition of shares in itself or another private company has been repealed. This should make "self funding" transactions easier and significantly more cost effective to put in place, which is why this type of structure is particularly worthy of consideration.

It should be noted that the directors of the target company will still have to fulfil their fiduciary duties and give careful consideration to, and justification for, the ability of the company to give financial assistance and the commercial benefit that the company will derive from the arrangements under contemplation.

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Your questions answered regarding what EPCs are, who is required to take action and when.

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Do Nil Rate Band Discretionary Trusts still have a place in Wills?

Previously, these types of Trust were used to take advantage of the exempt amount in a person's estate rather than waste it by passing assets to the surviving spouse (where the accumulated assets would thereafter only have the benefit of one nil rate band). Using such a Trust could save up to £120,000 in Inheritance Tax.

The new IHT rules now mean that an unused nil rate band on the first death can be claimed on the second death, in addition to the survivor's own nil rate band. Given this, you may think that there is no longer any place for a NRB Discretionary Trust in your Will. However, this is not always the case.

Asset Protection

Assets within the Trust are protected against any future assessment for Nursing Home costs as they do not form part of the survivor's estate. Additionally, the



assets are secure from creditors if the survivor runs a business or has given any personal guarantees.

Second Marriages

NRB Discretionary Trusts are also useful to preserve assets for children of a previous marriage, while still allowing a second spouse access to income from the assets or allowing him/her to continue to live in the home.

Flexibility in Beneficiaries

It may be more tax efficient to pass assets to grandchildren instead of children. NRB Discretionary Trusts allow this without any further variation.

Future Tax changes

Finally, in order to claim the new exemption on the death of the survivor, the legislation must still be in place at that time. Given the current Government's track record in changing tax legislation, this might not be the case and by that time, it will be too late to consider other options.

If you would like to discuss NRB Discretionary Trusts or any aspect of Wills further please contact:

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Credit Crunch Bites

As the effects of the economic downturn begin to make themselves felt, the Recoveries and Dispute Resolution teams in **bto** have started to see the results.

There has been a volume of new instructions in cases seeking to recover possession of heritable property, asset and debt recovery, contested commercial litigation and insolvency work.

In the current economic climate, it pays to seek professional assistance at an early stage, whether you are pursuing a debt, or you find yourself in a difficult financial situation. **bto's** Recoveries team has a proven track record in the recovery of commercial debt and is active in seeking the appointment of Liquidators and Administrators to struggling companies.

If you are facing financial difficulties, then the best advice is usually to communicate early with creditors. It may be possible to reach an arrangement which keeps you or your business afloat while longer term issues are addressed. Or, if matters cannot be resolved, then we are well positioned to offer realistic advice.

The recent stance taken by the Royal Bank of Scotland in deciding not to pursue mortgage borrowers less than 6 months in arrears is an illustration of the reality

that creditors do not usually wish to enforce securities or take legal action. These paths are often seen as a last resort. Their interest is usually to secure the best possible return (even if less than contractually agreed) and a voluntary arrangement will often prove a better, more cost effective solution to all parties concerned.

This scenario endorses **bto's** ethos of offering pragmatic, commercially minded advice to our clients. We will ensure that you as a creditor make the best possible recovery in the circumstances; while we will strive to provide debtor clients with sensible, practical advice that they can live with, and act upon. In any event, the key is to seek professional help at the earliest possible stage.

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Energy Performance Certificates

There has been an important change in the law which may require you to take action. The Government has implemented the EU Directive on the energy performance of buildings with the aim of reducing the UK's CO₂ emissions. This Directive introduces the need for energy certification of buildings through Energy Performance Certificates (EPCs).

What is an EPC?

An EPC can be compared to an energy efficiency rating of an electrical appliance. It details the energy efficiency of a building and identifies the environmental impact of that building in relation to carbon emissions.

What information does an EPC contain?

EPCs describe a building's theoretical energy performance, assuming standard useage, based on its construction geometry, materials, heating, ventilation, cooling and lighting. EPCs also suggest improvements that can be made to a building to improve its energy performance.

How long are they valid?

10 years.

Who requires to take action and when?

From **4 January 2009** EPCs will be required for Scottish residential and commercial properties when sold or leased. An EPC will not be required for existing lets, assignments, renewals, extensions or on the surrender of a lease. However, if the sale of a homeowner's residential property triggers the requirement to obtain a Home Report, an EPC will be required from 1 December 2008. In relation to new build properties, an EPC must be attached to the completion certificate if the building warrant for the building was applied for after 1 May 2007.

Are there special provisions in relation to public buildings?

Yes. Public buildings must publicly display an EPC from 4 January 2009. In other buildings, the EPC must be located in a place which is easily accessible and protects the Certificate from damage.

What buildings are defined as "public"?

A building is classed as a public building if all of the following apply to the building:

- the conditioned (heated/cooled) area of the building is over 1000m²;
- the building is occupied by public authorities or provides public services to a large number of persons;
- the building is frequently visited, at least weekly, by members of the general public;
- the public have a right of access to the building, or parts of the buildings providing services directly to the public; and



- public funding, including part funding, is used to operate, for general upkeep, or to fund staff costs.

Are any buildings exempt from the new EPC requirements?

Yes. EPCs will not be required for the following:

- buildings which do not use fuel or power for controlling temperature;
- buildings that are ancillary to a dwelling, that stand alone and have an area less than 50m²;
- limited life buildings which have an intended life of two years or less;
- residential buildings used as emergency accommodation (12 week limit); and
- residential accommodation used for short term holiday letting (but letting the property to someone for a period of 12 weeks or more will trigger the requirement for an EPC).

Who prepares EPCs?

An EPC must be produced by a member of an accredited body. A list of the accredited bodies can be found online at:

www.sbsa.gov.uk/european_issues/epcprotocols.htm

Are there penalties for a failure to comply?

Yes, a fine of up to £5000. A criminal conviction can also be tagged onto the fine.

Failure to comply with the new regime could result in delays and complications in the sale or letting of property.

If this change in the law affects you or your business and you are unclear as to the steps you need to take, please feel free to contact **bto**.

James Dickson jd@bto.co.uk

bto Update

Avoiding Harassment at Work - Saving You Money

Nowadays, employers can be held liable for acts of harassment or discrimination carried out by an employee against a colleague, even if they are entirely unaware that these acts are taking place. What is more, there is no limit on what a Tribunal can award by way of compensation for discrimination.

To assist employers in evading large payouts and wasting valuable management time as a result of claims, **bto's** experienced employment team have created a package of products for employers.

The law does provide an employer with a potential defence to liability where their employees harass other employees. To succeed with such a defence, the employer must show that it took *all reasonably*

practicable steps to prevent the harassment taking place. This means, at least, having an Equal Opportunities Policy (EOP) in place. The policy should be publicised, staff should be trained on its application and active steps need to be taken to stamp out discriminatory behaviour.

bto's employment law package consisting of preparation of an EOP and training for management and staff, provides the appropriate tools for employers to succeed with such a defence. For more information on how you can avoid increased sickness absence, Court or tribunal claims for significant amounts of compensation and damage to your reputation, please contact:

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A Win for bto

bto is delighted to announce that following a successful tender process the firm has been selected to join **Brit Insurance Limited's** Scottish Panel of solicitors.

This appointment became effective on 1 November 2008 and will take the form of a one year rolling contract subject to review at 12 months. It involves **bto** providing claims handling and advocacy for **Professional Indemnity, Employers' Liability, Public Liability, Motor and Property Claims.**

bto has one of the largest Insurers' Representation teams in Scotland and

offers extensive expertise in this field. The Insurance team's vast experience and a team of nine in-house Solicitor Advocates make **bto** well equipped to execute this role.

Derek Allan, Partner and head of **bto's** Professional Negligence team said: "My colleagues and I look forward to building a close working relationship with Brit Insurance. We hope that our union will prove beneficial to Brit Insurance clients and our respective interests."

Derek Allan dja@bto.co.uk

Events

bto News wouldn't be the same without one of Jeremy's sailing photos.

Earlier in the year, Hallam Land Management braved the elements with Jeremy Glen and his faithful **bto** crew, James Dickson and Alan Borthwick, on a voyage to Tarbert, Loch Fyne....Now that's taking **bto** advertising a bit too far!



This year, bto will be donating to charity rather than sending Christmas cards. We wish you a very happy Christmas and a prosperous 2009.

Watch out for...

Renewable Energy

Recent statistics show that onshore wind now has more generation capacity than hydro schemes in Scotland and that the UK is now a world leader in offshore windfarms. Government policy means that wind - and other forms of renewable energy - will continue to be growth areas. There are opportunities for landowners, developers, funders and others. **bto** has been involved in the renewables sector for a number of years. We would be delighted to discuss with clients the opportunities that might be available to them.

Charity Law

OSCR's consultation on cross-border charities closes 23 December 2008:

www.oscr.org.uk/OpenConsultations.stm

Aged & Natural...

On 1 October 2008, it became necessary for all new companies to have at least one director who is a 'natural' person and the minimum age for a director is now 16.

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