

August 2007

# HILL DICKINSON

Commercial Property Newsletter



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## Welcome

Welcome to the August edition of Hill Dickinson's commercial property newsletter.

We are pleased to include two articles focusing on the work of our healthcare property team, one of the specialist teams operating within the Property and Construction Practice Group.

Back in July, the firm's partners hosted 'St Paul's Expo'. This was an opportunity for Liverpool staff to ask questions and generally become more acquainted with our new premises, No1 St Paul's Square, which we are due to move into in time for 2008. There were visual displays of the building and the surrounding landmark development, as well as a chance to sample food from our new caterers who will be joining us at No 1.

The relocation of the Liverpool office heralds a new and exciting chapter for the firm and we look forward to keeping you posted in coming editions of our progress in the run up to the move and as we settle in to our new premises.

Pamela Jones & David Swaffield  
Joint Heads of the Property and  
Construction Practice Group

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## Using RPI Leases to Fund Healthcare Centres

**The healthcare industry impacts on everyone's life in the UK. Few of us are fortunate enough to go through life without accident or illness and as we become older the risks increase. With an ageing population and increased fiscal pressures, the Government cannot hope to fund all aspects of the industry notwithstanding a commitment to the NHS. In this article, guest contributor Dave Kershaw of the Royal Bank of Scotland's Healthcare Team, examines the financial issues affecting the healthcare industry.**



### A capital intensive industry

Physical care nearly always requires premises with specialised equipment, resulting in very substantial building and premises costs. There is also the very long planning and approval process (often several years), which significantly adds to the cost and also to the uncertainty and economic risk. Banks must provide long-term funding to this industry if it is to grow.

However, there is a lot more to the process than simply providing a mortgage based upon some standard loan-to-value ratio. The natural response of a lender to uncertainty is to discount the projections more heavily and lend less money, but this can make many needed projects not economically viable.

According to Jonathon Thompson at RBS, a new approach to long-term lending was needed to help this sector grow. RBS realised that by getting involved with a project right at the start it could work closely with and advise the borrower from day one so as to minimise risk and maximise the lending value of the project, aware of the issues facing customers during the planning process and the additional financial demands this could place on them.

The RBS approach also involves a genuinely "joined up" approach across the provision of finance from the Commercial Banking Healthcare specialists with integrated risk management from the Bank's Treasury Solutions risk management specialists. RBS has organised its local teams across the UK to work closely together and develop a deep understanding of the financial risks facing customers in the healthcare business, thereby improving the quality of the bank's assessment of the project, potentially making it more willing to lend at higher values. This is not about simply taking on a higher level of risk, this is about knowing a project in more depth so as to reduce the bank's assessment of that risk.

### Managing the risks

Reducing financial risk is an important way to increase the financing a bank can make available to a client. The large amounts being borrowed and the long repayment terms pose a great exposure to movements in interest rates as borrowing is often on a floating rate basis tied to base rate. In the past it was very difficult to obtain an interest rate swap out of base rate, however RBS has built a major presence in base rate-to-fixed swaps to overcome this problem. Now borrowers can fully hedge their base rate exposure into a fixed rate, which increases the certainty of future projections and reduces financial risk.

An even more recent innovation has been the use of RPI hedging. The Government and local authorities have started to tie the revenue streams of their contracts to RPI, which adds a further element of uncertainty as the precise increases cannot be forecast. The RPI swap has proved to be an important financial tool for GP's surgeries and most primary healthcare locations where most of the revenue is RPI linked.

The ultimate in managing financial risk would be to achieve a contract on the revenue side and a long term borrowing for funding and for the precise rates of return on both sides to be known with certainty. This situation can be achieved by taking, for example, the revenue that is indexed to RPI and swapping it into a truly fixed cash flow to offset your liabilities.

## Case study

This case study highlights the additional value that can be added to businesses in the healthcare sector by following a joined up financing/risk management approach.

One of our Commercial Banking Healthcare specialists was approached by customers looking to fund the replacement of an existing healthcare facility with a new one capable of providing services to around 10,000 patients. This project can be broken down into 5 key phases:

### Phase 1

The initial ideas for the new facility were formed around 4/5 years ago. The circumstances were those commonly encountered - the doctors' practice would have found the existing premises too small, outdated and possibly not compliant with ever changing regulations and discussed with the Primary Care Trust (PCT) the possibility of creating a new facility. They determined that a new building was the best way forward and that the PCT would be willing to fund it.

At this point, and typical of these types of transactions, the doctors sought professional advice and appointed a firm of consultants/project managers and also took advice from their lawyers and accountant. Following this, the doctors (on advice from their accountant) set up a Special Purpose Vehicle (SPV) to borrow the money, hold the new asset and lease it back to the doctors, who would pay the rent out of income received from the PCT.

The consultant's role was to advise on the build and also to negotiate the lease details and notional rent with the PCT (who would also consult with the district valuer). The rental uplifts would have been agreed on a market uplift basis, which is generally accepted as standard.

The PCT (theoretically) can write leases in three ways;

1. Market rent
2. Fixed uplift
3. RPI uplift

Although the individual PCTs can decide and do not have to go down any particular route, it still needs to be deemed 'value for the public purse'.

The customer's consultant would then seek funding, typically done via a broker or business advisor.

### Phase 2

At this stage the build costs were estimated at over £4m. Our Healthcare specialist in Commercial Banking created a financial model of the transaction, and involved the local Treasury Solutions team for interest rate management assistance.

Assuming just a straight forward interest rate swap to generate a fixed interest cost and reduce interest rate risk, the debt was projected to reduce sufficiently and the finance and associated interest rate risk management was sanctioned.

### Phase 3

Due to raw material inflation, building regulation alterations etc, the fixed price build contract increased and the total borrowing required by the SPV increased to over £5m. However the rental income from the doctors at this stage did not reduce the residual debt at year 15 to a level that we would have been comfortable with.

Due to the close working relationship between our Commercial Banking Healthcare specialist and the local Commercial Treasury Solutions team, the consultant was aware that an RPI swap could potentially be used to increase the amount we may be willing to lend, and therefore provide a lower residual debt level. Critically, this required an RPI based lease to be put in place between the SPV and the doctors.

The benefits of this approach were discussed with the doctors and their advisors and it became clear that the only way we could fund this project would be if the lease was related to RPI. The customer's consultant then negotiated with the PCT and district valuer to get an RPI clause incorporated into the lease.

### Phase 4

The RPI clause in the lease was approved and the deal now worked, allowing us to take the residual debt to around 70% at year 15.

### Phase 5

This is when all parties sat down and went through the nuts and bolts of the two swaps that were required; the interest rate swap and the RPI swap.

We met with the practice partners and their advisors to agree on notional profiles and start dates, given that we could only estimate the profile as there are far too many variables to get it completely accurate.

The two swaps were completed, giving the customer a total risk management package covering their exposure to both interest rates and RPI movements:

1. 16 month + 15 year interest rate swap and accreting profile.
2. 15 year RPI income swap deferred by 16 months.

The important message is how a genuinely joined up approach across financing and risk management, blended with detailed knowledge of the mechanics of the customer's business, can be brought together to provide the solution the customer needs.

## Concluding remarks

The healthcare industry in the UK is one of the most important to our society and one going through enormous economic challenges. Demographics mean that we will live longer, require more healthcare as a society and will find it increasingly difficult to pay for this. Add to this a booming property market that creates incentives to sell off healthcare capacity for other purposes.

The bank is trying to respond to these challenges in both conventional and unconventional ways. The conventional response is to continue to provide the best financial solutions, from maximising money that can be leant against a project to providing the financial tools to minimise the inherent risks of debt financing.

However, in a challenging and competitive industry like healthcare, there is also a need for a bank to provide more than even the most sophisticated financial services. We also need to fully understand the underlying business risks to which these financial solutions are overlaid. This means detailed knowledge of a complex regulatory environment and a long term approach to any client relationship. Finding the right solution is not just important to our bank, or even our customers, but to all of society who will at some time come to need this essential service.

Dave Kershaw  
Healthcare Team, Royal Bank of Scotland, Liverpool

## Working with the National Health Service

**Hill Dickinson has unrivalled expertise in the healthcare market in the north west. Our dedicated team provides the full spectrum of legal services required by NHS and public sector clients, from high value development projects and NHS LIFT schemes to leases and service level agreements. Lisa Robotham explores the property issues facing the healthcare sector.**



### Background

The Department of Health identified 2006/2007 as a critical year in which the NHS needed to make substantial improvements in achieving robust financial health and implementing reform. The Department expects NHS Trusts to have a more rigorous approach to financial control, to cut down on waste, reduce costs and improve productivity and efficiency. The pace of reform continues with particular emphasis on patient based commissioning and movement of services into primary and community settings.

NHS Trusts must ensure their property is used effectively to support Government policy and patients' needs and must ensure appropriate healthcare facilities in the right locations in order to provide quality healthcare.

### Estatecode

NHS organisations are subject to the "Estatecode", which deals with all aspects of estate management including strategic planning, acquisitions, disposals and leasing arrangements. A large part of the Code sets out commercial aspects of managing property but it also deals with statutory controls and Department of Health mandatory requirements. The Estatecode has recently been updated to reflect changes within the NHS, including the introduction of NHS Foundation Trusts ("NHSFTs"). Estate managers should be familiar with Estatecode requirements and guidance and the power of that NHS organisation to enter into a transaction.

### Powers

NHS Trusts and health authorities are statutory bodies and therefore only have the powers given to them by statute which may be limited as set out in their Establishment Orders, Directions issued by the Secretary of State or by the Department of Health.

NHS organisations generally only have authority to enter into property transactions that are necessary or expedient for the carrying out of their functions and, as public bodies, must be able to demonstrate that they have exercised those powers properly and legally and in a reasonable manner, taking all factors into consideration. If patients may be affected by a change in the delivery of services then they must be informed and consulted. The question of "reasonableness" involves a consideration of the organisation's functions.

Subject to the above, the organisation must make what it considers to be the best decisions concerning its property and for the NHS as a whole.

### Functions

The functions of a Primary Care Trust ("PCT") are set out in Regulations from 2002 and include:

- Provision of medical, nursing and other care
- Making arrangements for family health services (including primary medical, dental, ophthalmic, and pharmaceutical services)
- An express statutory power to make premises available to contractors

Often a PCT will lead a transaction on this basis.

An NHS Trust's functions are set out in its Establishment Order and will principally be to provide goods and services for the purpose of healthcare provision.

Neither NHS Trusts nor PCTs can mortgage or charge any of their assets or use them in any way as security for a loan.

Whilst part of the NHS, NHSFTs are free from central government control and can decide locally how to meet their obligations. NHSFTs can borrow (subject to limits in their governing "terms of authorisation") but may not create floating charges on their property. NHSFTs require the approval of "Monitor", being the organisation which authorises and monitors NHSFTs, before disposing of "protected" property (being an asset required for the purpose of providing either mandatory goods or services or mandatory education and training).

Strategic Health Authorities ("SHAs") have no express power to acquire or dispose of land but the Secretary of State's power to do so is delegated to them, to be exercised by the SHA for the benefit of their geographical area or to secure the effective provision of services by PCTs and NHS Trusts within their area. SHAs can carry out property transactions in their own name but tend to do so in order to acquire offices for their own use.

NHS Trusts, PCTs and SHAs can acquire, manage and deal with property to raise money for improving healthcare services, provided it does not interfere with their duties and performance. They can also acquire property in order to enhance a disposal of surplus property, for example to provide access to it.

## Procedures and delegated limits

NHS organisations have standing orders and financial instructions forming part of their governing documents which set out:

- Procedures and delegated authority for agreeing, approving and executing documents
- Expenditure approval processes, including when expenditure needs to be on a tender basis
- The decision making process

Any decision taken must be properly considered and authorised and clearly documented in order to satisfy probity, governance and audit purposes. Contracts should be signed by an authorised person and not by someone who has negotiated the transaction or who has a personal interest in the matter.

Each NHS organisation (other than NHSFTs) has a delegated limit, set by the Secretary of State, above which they must submit a business case and seek the approval of the appropriate SHA for a transaction.

## Surplus land

The Department of Health must be notified of any surplus land. If required by another health organisation, the land will not be considered to be surplus. Surplus land will be offered to other central or local government departments before the private sector unless there are good reasons not to do so.

If the value of the land is likely to exceed £5 million or is likely to be difficult or complicated, professional advice and a valuation, independent of the selling agent, should be obtained. This independent advice may be obtained from the Valuation Office Agency.

NHS disposals frequently include provisions for overage and clawback where there is potential for increase in the value of the land being disposed of.

## New facilities

With many NHS buildings reaching the end of their “life” and with the Government’s drive to deliver modern, efficient, new facilities, estate managers need to examine and evaluate their estates.

A new facility may be procured through:

- Straightforward freehold and lease arrangements
- A third party developer
- Private Finance Initiative (PFI)
- NHS ProCure21 structure
- NHS Local Improvement Finance Trust (LIFT) scheme

The NHS organisation should take specialist tax advice with regard to the proposed transaction.

PFI schemes (requiring upfront transaction costs and fees) have been criticised as an expensive method of procurement and are thought to be more appropriate for projects exceeding £25 million.

NHS ProCure21 transactions are a procurement method for publicly-funded NHS capital schemes based on a partnering framework.

Under a LIFT scheme, a LIFT company (a public-private partnership) is set up to own the premises being developed. The LIFT company generally obtains finance against the premises and develops the premises, leasing them back to an

NHS organisation on a fully serviced basis through a “lease-plus agreement”. The landlord will carry out internal and external repairs to the building and repair costs throughout the term of the lease will be calculated and index-linked to provide a fixed annual charge rather than a fluctuating service charge.

NHS organisations are subject to the European Procurement Rules and Public Contracts Regulations 2006 in connection with the procurement of contracts for works, goods or services over specified financial thresholds.

In addition, EU Treaty principles such as equal opportunity and equal treatment, transparency and proportionality will apply. If a sale of property is linked to the procurement of new facilities or buildings, it is likely to be regarded as a public works contract and the EU Rules will apply. Any input into the specification for a new facility that will be let or partly let to an NHS organisation will generally bring the lease within the EU Rules. If the EU Rules apply, the transaction must be advertised in the Official Journal of the European Union and specific timescales and procedures must be observed to select the third party fairly and transparently.

NHS organisations must also have regard to all other applicable legislation, guidance, directions, orders and codes of practice. These will include legal and technical building, construction and planning requirements, and also best practice, for example the Code for Leasing Business Premises.

## Conclusion

It is essential that estate managers seek advice as early as possible when developing an estate strategy. Existing premises must be appraised and evaluated for their fitness from which to provide a modern efficient service. If premises are surplus then the proper disposal procedures must be followed. Existing premises may be suitable for development or it may be necessary for new premises to be acquired. Prospective partners of NHS organisations in the development of new facilities must understand the requirements and procedures that must be followed.

## Hill Dickinson’s role

Hill Dickinson has a dedicated NHS Property team headed by Lawford Martin (himself a former NHS employee) and fellow partner Peter Barlow (a lawyer with considerable public and healthcare law experience) and associates Lisa Robotham and Catherine Kennedy, providing advice to a large number of healthcare organisations including:

- The Secretary of State for Health
- SHAs/NHS Trusts/PCTs and NHSFTs
- General practitioners and dentists
- Private health organisations

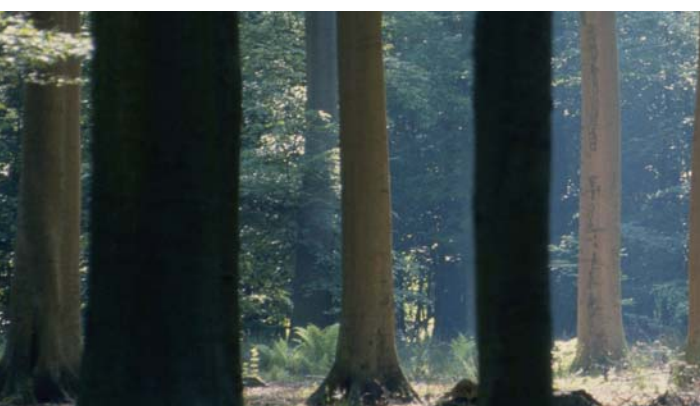
The Hill Dickinson team, drawing on its experience and expertise, can assist each organisation with all aspects of its property function, including:

- Advice on its powers, procedures and legal requirements
- Decision making and consideration of options
- Training on procedures and delegated limits
- Funding and procuring new facilities
- Advice on EU rules and procedures
- Assistance with the preparation of official adverts and tender documentation

## BREEAM: Implications for Construction Projects

**With the global drive to reduce carbon emissions and increase the overall efficiency and sustainability of developments, the BRE Environmental Assessment Method (BREEAM) of rating the sustainable construction of buildings, first established in the 1990s, is becoming a popular method of measuring the environmental efficiency of proposed developments. Helen Sutton of our Construction Team examines the BREEAM system and its implications for the parties involved.**

The construction industry is a major contributor to the world's emission of pollutants and it is perhaps unsurprising that part of the industry is striving for a reduction.



BREEAM provides guidance on minimising the negative effects of buildings on the environment by reducing energy consumption in the construction and management of a building and encouraging the development of energy efficient buildings which enjoy low running costs, healthy environments and higher sustainability with more flexibility to adapt to future changes in usage requirements. Assessors provide recommendations in a number of different design areas including land use, energy and water use, health and wellbeing, management and use of materials which can then be fed back into the design process. The system can be applied to a wide range of structures - residential or office use, new build or refurbishment.

It is for more than altruistic reasons that more buildings are being designed to achieve high BREEAM ratings. Developers end up with a property which is more lettable/saleable and which is able to command higher prices in the property market. These financial benefits may become more pronounced when (as seems likely) Government and business tackles the thorny issue of relating businesses' tax benefits and burdens to their carbon footprint.

Whilst there are good commercial and environmental reasons for incorporating the requirement for a high BREEAM rating in developments, it is not as simple as appointing an independent third party to make recommendations in respect of designs created by a fully appointed architect. In practice, developers, consultants and contractors alike ought to consider to what extent the appointment of a BREEAM assessor (and the production of their recommendations) affects the obligation of the design team to produce a design which achieves a contractually agreed BREEAM rating and who bears the cost where the recommendations result in a more expensive design.

By way of example, in a general lump sum design and build contract the contractor has liability for the consultants' designs and (unless they are due to an instruction of the employer) will bear any additional costs of design changes. If a BREEAM assessor is now introduced into the arrangement, does the contractor have to adopt their recommendations and, if so, are they variations for which he is entitled to be paid? Alternatively, can the contractor ignore these recommendations and proceed with his original design given that achieving a specified BREEAM rating is his risk?

At first glance developers may say that the contractor has liability for design and that changes required in order to achieve the design requirements are at the contractor's risk.

However, on further analysis the practicalities are not so straightforward. If the assessor makes a number of recommendations, not all of which are required to achieve the BREEAM rating, who decides which are adopted? Under design and build, without express agreement to the contrary, the choice belongs to the contractor so long as the design remains within the constraints of the employer's requirements.

Another issue (although perhaps unlikely) is what happens if, despite the assessor's recommendations being adopted, the required BREEAM rating is not achieved? This is a question of apportionment of liability for design. The primary position should remain that the designers have been employed to produce a compliant design and should ensure they discharge this obligation. From a developer's standpoint it may be advantageous to clarify this position in the building contract and consultants' appointments.

In summary, BREEAM is a useful tool and a definite step forward in the drive to create efficient and sustainable buildings. However, the appointment of the assessors throws up legal dilemmas which require careful consideration before any party decides to accept or relinquish potential rights and duties:

- Developers should ensure that any specific BREEAM rating required is communicated to the design team at an early stage and expressed as a contractual obligation in the building contract and the consultants' appointments;
- Developers and consultants should clearly define the consultant's liability for design and consider whether this ought to expressly provide what effect, if any, the recommendations of a BREEAM assessor have on the consultant's liability;
- Developers should consider whether, under a design and build contract, they are content for the contractor to choose which BREEAM recommendations to adopt. Whilst any recommendations not adopted by the contractor could be implemented by way of variation, the developer should consider whether a contractual procedure for dealing with BREEAM recommendations ought to be incorporated into the building contract.
- Consideration should be given as to whether the appointment of the BREEAM assessor should be retained by the developer so that, should a BREEAM rating not be granted due to the negligence of the assessor, the developer has both a contractual and tortious right of action against the assessor. Alternatively, if the assessor's appointment is novated an appropriate warranty may be obtained.

Helen Sutton  
helen.sutton@hilldickinson.com

## Take No Risks with Fire Safety

**1 October 2007 will mark the first anniversary of the new fire safety regime imposed by the Regulatory Reform (Fire Safety) Order 2005 coming into force. But, several months after commencement, many affected properties have still not been assessed. Bill Chandler analyses the potentially disastrous implications of non-compliance.**



On 1 October 2006 the Fire Precautions Act 1971 and its reliance on fire certificates was wiped away and replaced with a new regime based on risk assessment.

The new regime is of wider application than the fire certificate system and applies regardless of the size of the premises or the number of people who work there. Its scope includes:

- Virtually all non-domestic premises (with very few exemptions)
- Common parts shared between domestic premises
- External areas such as car parks, service areas and even landscaped areas
- Employers, the self-employed and the voluntary sector
- Vacant buildings

The main focus is on fire risk assessments carried out by the “responsible person”. You are likely to be a responsible person if:

- You are an employer or
- You have control of premises or
- You are the owner of premises (which includes superior tenants as well as the freeholder)

In tenanted business premises, identifying the responsible person(s) will depend on the allocation of control and repair responsibilities in the lease. In a multi-let scheme the tenants may be the responsible person for their own units, with the landlord being the responsible person in respect of retained parts, common areas and unlet units. A tenant who sublets whole or part but gives the subtenant less control over the premises may well retain “responsible person” status. And a landlord who regains let premises, whether on expiry, forfeiture or surrender, will immediately assume responsible person status.

And remember that once is not enough, the fire risk assessment must be continually reviewed and updated. Any changes, however minor, to the premises themselves or the way they are used may affect the fire risk assessment.

In addition to risk assessments themselves, the new regime imposes duties:

- to take general fire precautions
- to effect fire safety arrangements and emergency procedures
- to co-operate with other responsible persons in respect of the same premises
- to inform and train staff
- additional duties, for example where children are employed or a dangerous substance is involved.

There are some potentially very serious implications of failure to comply with the new regime, including:

- enforcement action by the local fire authority
- criminal prosecution
- claims by employees for breach of statutory duty
- **your insurer could refuse to pay out in the event of damage if the risk assessment has not been completed or updated or if recommendations have not been acted upon**

If you buy or take a lease of property where you are likely to be the responsible person, remember that the obligations apply immediately on completion. You therefore need to ensure that all is in order on completion or else you could have problems with your insurer (and your mortgagee) in the event of damage, not to mention the risk of enforcement action and/or criminal prosecution. Your mortgagee may even refuse to lend unless it is satisfied that all is in order.

A particular concern for landlords is the prospect of their insurance being vitiated by a tenant failing to carry out a risk assessment for a let unit. Landlords and their managing agents must be pro-active in ensuring that tenants comply with their statutory duties.

If you own, occupy or control property, make sure that you are aware of your full duties under the new regime and are complying with them. The Government (through DCLG) has published several guides for different types of premises (together with a fire risk assessment checklist), and HSE also offers guidance on fire safety and risk assessments. Hill Dickinson can also advise on individual cases or generally.

Bill Chandler

[bill.chandler@hilldickinson.com](mailto:bill.chandler@hilldickinson.com)

## Cracking the Code – Update

Many thanks to all of you who took the time to “join the debate” on the Code for Leasing Business Premises. The responses revealed:

- almost universal support for the Code in principle, even amongst landlords and their advisors;
- particular support for the idea of transparency (both during negotiations and throughout the term) and agreeing as much as possible at the Heads of Terms stage;
- few Landlords would feel comfortable adopting the Code in its entirety as a matter of course, due to concerns over investment values and/or management issues;

- an expectation that a fully compliant lease would command higher rents on grant and on review, by anything up to 20%;
- a suspicion that tenants may not want a fully compliant lease if it increases rents.

A positive start, but only time will tell how much impact the Code will have on the commercial lease market, both in terms of the content of leases but also in terms of how the parties deal with each other.

Bill Chandler

[bill.chandler@hilldickinson.com](mailto:bill.chandler@hilldickinson.com)

## About Hill Dickinson

Hill Dickinson offers a comprehensive range of legal services from offices in Liverpool, Manchester, London and Chester, and its associated firm Hill Dickinson International has offices in London and Greece. Collectively the firms have 152 partners and a complement of more than 1000 staff.

Hill Dickinson is a major force in insurance and is well respected in the company and commercial arena. The firm's marine expertise is internationally renowned and it has one of the largest marine practices in the UK following a merger with Hill Taylor Dickinson on 1 November 2006. The firm has an award winning property practice and is widely regarded as a leader in the fields of commercial litigation, employment, intellectual property, NHS clinical/health related litigation and private client.

## Hill Dickinson LLP:

### Liverpool Office

Pearl Assurance House  
2 Derby Square  
Liverpool L2 9XL

T: +44 (0)151 236 5400  
F: +44 (0)151 236 2175  
DX 14129 Liverpool

### Manchester Office

50 Fountain Street  
Manchester  
M2 2AS

T: +44 (0)161 817 7200  
F: +44 (0)161 817 7201  
DX 14487 Manchester 2

### London Office

Irongate House  
Duke's Place  
London EC3A 7HX

T: +44 (0)20 7283 9033  
F: +44 (0)20 7283 1144  
DX 550 City of London

### Chester Office

34 Cuppin Street  
Chester  
CH1 2BN

T: +44 (0)1244 896600  
F: +44 (0)1244 896601  
DX 19991 Chester

## Hill Dickinson International:

### Greek Office

2 Defteras Merarchias St.  
Piraeus, 185 35  
Greece

T: +30 210 428 4770  
F: +30 210 428 4777

### London Office

Irongate House  
Duke's Place  
London EC3A 7HX

T: +44 (0)20 7283 9033  
F: +44 (0)20 7283 1144  
DX 550 City of London

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[www.hilldickinson.com](http://www.hilldickinson.com)

## For further details please contact:

### Pamela Jones

Joint Head of Property and Construction  
[pamela.jones@hilldickinson.com](mailto:pamela.jones@hilldickinson.com)

### David Swaffield

Joint Head of Property and Construction  
[david.swaffield@hilldickinson.com](mailto:david.swaffield@hilldickinson.com)

### Peter Barlow

Liverpool Office  
[peter.barlow@hilldickinson.com](mailto:peter.barlow@hilldickinson.com)

### Michael Blakey

Manchester Office  
[michael.blakey@hilldickinson.com](mailto:michael.blakey@hilldickinson.com)

### Richard Taylor

London Office  
[richard.taylor@hilldickinson.com](mailto:richard.taylor@hilldickinson.com)

### Robin Jones

Chester Office  
[robin.jones@hilldickinson.com](mailto:robin.jones@hilldickinson.com)