# KC LEGAL UPDATE

Autumn 2015

In this issue...



KEATING CHAMBERS

# WELCOME

## TO THE AUTUMN 2015 EDITION OF KC LEGAL UPDATE

The content of our Autumn 2015 Issue demonstrates the highly-specialised work increasingly undertaken by Members of Chambers, in addition to the traditional strengths of domestic construction contract disputes and professional negligence in property and construction.

The big news in this respect is the recent announcement of the publication of Keating on Offshore Construction and Marine Engineering Contracts, which joins Keating on Construction Contracts, Keating on JCT and Keating on NEC3 as principal texts in their subject areas. A hall-mark of these works is that they are the products of co-operation from very senior editors and junior researchers. Thomas Lazur and James Thompson, members of the 'Keating Offshore' team, provide an inside view as to how the daunting task was successfully completed.

The oil and gas industry will undoubtedly be amongst the principal users of this text and those working in it will find further interest in Abdul Jinadu's article on the impact of a major Nigerian statute, the Nigerian Oil and Gas Industry Content Development Act, on domestic and expatriate operators alike.

Understanding the context, whether economic, political or cultural, in which overseas development projects are undertaken is a pre-requisite to advising on them. In Richard Harding QC, Keating Chambers has a noted Arabist; his leading article (opposite) contains moving reminders that the interests of stake-holders in such projects can be even weightier than commercial investment, amounting, in the case of water, to the means of life itself.

A similar thought occurs in the very different context of Paul Darling QC's article on developments in stadium safety since the Hillsborough disaster. The recognition of Paul's own distinguished service in this field was noted in the Summer 2015 Issue. In the article, he refers to a number of disputes, including reported cases relating to the design and construction of sports facilities. The legal, technical and commercial aspects of these cases, which are often substantial, have to be viewed in the light of what is ultimately at stake, which was horrifically illustrated at Hillsborough.

As indicated at the outset, negligence in design and construction is part of the traditional core of the workload of many members of Keating Chambers. Jane Lemon QC and Samuel Townend are co-authors (with Sir Peter Coulson) of the chapter on Architects Engineers and Quantity Surveyors for the authoritative loose-leaf work 'Professional Negligence' and they provide a useful update on cases relating to the consultant's duty to warn, to the status of architects' certificates and to the score of the Defective Premises Act.

**Professor Anthony Lavers**
Director of Research & Professional Development

**Al-Qaeda, Iran, nuclear weapons, ISIS – all are suggested as existential threats to the Middle East. But, the real crisis relates to water, as Richard Harding QC explains below.**

Although the anticipated 'water wars' have not materialized, the region remains desperately short of this vital resource. Sana'a in Yemen is predicted to be the first capital city in the world to run out of water. Such problems provide opportunities for Al-Qaeda to gain popular support by drilling wells to provide water where the government cannot.

Raqqa in Syria is now the capital of ISIS. But even before they took over, it was reported that its "water sources have run dry and hundreds of villages have been abandoned as farmlands turn to cracked desert…". It is little wonder such land is now fertile ground only for extremists. Iran is a stable and relatively wealthy country, but it is suffering similar problems. Its qanat system has conveyed water underground for over 2,000 years. However, when I was in Esfahan last year, the River Zayanderud, praised by the poet Hafez, and crossed by numerous famous bridges, was entirely dry.

There are solutions to these problems. Desalination is the obvious answer, but Saudi Arabia's plants burn over 100 million barrels of oil a year. This is clearly not sustainable. Nuclear power can produce cheap potable water, but few countries in the region are trusted with the necessary technology. Solar powered desalination may be the future, but it is still too expensive. Another solution is to transport water over long distances. In Jordan, water is being pumped 325km from the Disi aquifer to Amman. However, this is predicted to consume 4% of the country's electricity.

Why should any of this be of interest to readers of the KC Legal Update? The answer is that US$300bn is being invested in water infrastructure in the GCC countries. US$150bn is to be spent in Iran. The poorer countries are also likely to find funding for such projects, to avoid failed states and humanitarian crises. International arbitration is the only credible way of resolving disputes relating to these projects. No contractor, designer or investor can afford to take on the risks without some assurance that it will be treated fairly. Members of Keating Chambers, like many readers of this article, have precisely the skills and expertise needed to pursue (or decide) such disputes. Just bear that in mind next time you turn on the tap.

**Richard Harding QC**

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# Offshore

## Construction and Marine Engineering Contracts – Keating launches

By Thomas Lazur and James Thompson

Contributors to Keating Offshore Construction and Marine Engineering Contracts, Thomas Lazur and James Thompson, provide a 'behind the scenes' account of the team effort required to introduce this major new work (a significant addition to the Keating stable of principal texts).



*There was a gap in the market for a text that addressed issues in offshore construction and engineering and shipbuilding from the perspective of construction specialists.*

The members of Keating Chambers are regularly involved in drafting and updating practitioners' texts covering a vast range of topics. The latest edition of Keating on Construction Contracts, for example, involved 15 researchers, 19 contributors, 3 editors of specific chapters, and commentaries, and Stephen Furst QC and Sir Vivian Ramsey as the principal editors. Coordinating over two thirds of Chambers to carry out this work to the deadlines set by our publishers is a herculean task for the editors.

Most recently 12 members of chambers have been working with Adam Constable QC to produce Keating on Offshore Construction and Marine Engineering, which is due for publication in late September.

Writing a new book from scratch takes a phenomenal amount of planning. It all starts with the editor who has the initial idea about the subject matter for the book. In this case, Adam felt that there was a gap in the market for a text that addressed issues in offshore construction and engineering and shipbuilding from the perspective of construction specialists.

While many would think that construction lawyers would be the obvious choice for this sort of work, it is an area that has been historically dominated by general commercial practitioners within the commercial courts. This is principally because the sale of a vessel, for example, is traditionally seen as a sale of goods contract, where the vessel is built entirely at the contractor's shipyard. Shipbuiding has also often been seen as a adjunct to shipping, and undertaken by practitioners with an admiralty background. However, many of the issues in offshore construction and shipbuilding are the same faced by any complex construction contract.

Our collective experience of the offshore construction industry has been that there are some significant differences between the way a construction specialist would approach an offshore construction case and the approach that would be taken by our colleagues with general commercial practices. That difference offered us the opportunity to offer a practitioner's textbook with a new perspective in this area of law.

*"Many of the issues in offshore construction and shipbuilding are the same faced by any complex construction contract."*

The starting point was to convince a publisher that the idea was viable in the existing market. For this book, that process began in 2013. After formulating his own ideas as to the purpose, tone and content of the text to be drafted, the editor asked for volunteers from chambers, and externally, for assistance. A few meetings were held to discuss Adam's ideas and eventually a final formulation was arrived at.

*"There are some significant differences between the way a construction specialist would approach an offshore construction case and the approach that would be taken by our colleagues with general commercial practices. That difference offered us the opportunity to offer a practitioner's textbook with a new perspective in this area of law."*

In line with the initial concept, the structure of the book follows that of a traditional construction text. After introductory chapters explaining the nature of an offshore construction or shipbuilding contract, the standard forms used in this industry, and the general principles applicable to contracts of this sort, the focus turns to issues of payment, performance, change, time for performance and termination. Thereafter, the book deals with issues such as bonds, guarantees, insurance, and the passing of title. The book concludes with a chapter on dispute resolution. In each section, the intention has been to illustrate the law by examples and authorities deriving both from the offshore as well as, where applicable, the on shore construction industries.

With the structure in place, the first task was for researchers to investigate the standard forms of contract. We collectively identified 7 main forms of contract to be covered and divided them between a team of researchers. Each researcher obtained a copy of the standard form and prepared a commentary on the clauses relevant to each of the proposed chapters. They then carried out legal research on those clauses to ensure that all relevant authorities dealing with those clauses were captured. That work was passed on to specific individuals or teams who were responsible for the drafting of individual chapters. This work would involve researching all of the existing work both within the traditional construction industry and in shipbuilding texts. This would provide key areas of focus and topic areas to address before looking into the relevant case law both in the UK and internationally. This would develop into a structure for the chapter, which would in due course be submitted to the editor for approval.

*"The intention has been to illustrate the law by examples and authorities deriving both from the offshore as well as, where applicable, the on shore construction industries."*

Over the course of many months, with barristers balancing this work alongside numerous other commitments, the editor was able to arrive at a finalised structure for all of the chapters, imposing a house style where necessary. This is one of the most important tasks of the editor, who has to ensure that the book reads in a manner which is as consistent as possible, even though many individuals have contributed to the drafting of the text. If the editor can ensure that as many of these issues are ironed out at the planning stage, the job of editing the drafts becomes much more straightforward later on.

With everything in place, the chapter authors were left to produce full drafts of the chapters for which they were responsible. It is through this process that we tend to learn the most. Differences between authorities that were identified earlier needed to be resolved in the final text. New uncertainties and ambiguities are identified as we drill down into the detail. All of these need to be identified and discussed with the editor, and ultimately left to him for a final decision to be taken.

Once the drafts are produced, they are sent to the editor. It is at that point that we hold our breath to see if our work was up to scratch. Inevitably, the text is returned with a number of questions and requests for further detail. A good editor will ensure that complex issues are not skimmed over or, worse, avoided. It was also necessary to ensure that all of the chapters contained a similar level of detail. Where one author would produce 10,000 words on a subject, another may consider the issues adequately addressed by 2,000 words. What is necessary in the final text is consistency and, before Adam started work on delivering that with his own edits, he made sure that the authors had contributed all that they could toward that end.

It was therefore only around Easter of this year that drafts of all the chapters had been produced. This is when all of the responsibility shifted onto the editor's shoulders and, for the first time, the chapters were combined within a single document. Many weeks of work followed, during which Adam ensured that the text reflected his own style and there was consistency throughout the book, adding and taking away where necessary.

Once that work was done, the final tasks involved issues of detail. The text was sent to the publishers to be fully formatted in the house style. All of the footnotes needed to be checked for accuracy (an important task of Herculean proportions). Finally, there was the proof read, where each contributor was allocated a chapter, often different to the one we were originally responsible for drafting, and told to go through each sentence painstakingly to catch – with luck - every last error. This was also an opportunity to carry out a last sense-check on the contents.

*"A good editor will ensure that complex issues are not skimmed over or, worse, avoided."*

At the time of drafting this article, (the end of July 2015) two months before publication, that proof reading task is nearing an end. The final notes for edits will be passed to Sweet & Maxwell and the book will go to print.

The book will be launched with a foreword from Sir Vivian Ramsey and Sir Nicholas Hamblen (covering both the TCC and Commercial Court perspectives in the spirit of the book), and at a number of marketing events throughout the UK and abroad. At that stage, we will begin to hear what the industry thinks of our work. We all hope it will be well received.

# PROFESSIONAL NEGLIGENCE UPDATE —

By Jane Lemon QC and Samuel Townend

***In this article, Jane Lemon QC and Samuel Townend consider three of the recent authorities in the field of professional negligence. Jane and Samuel are co-authors, with Coulson J., of the chapter on Architects, Engineers and Quantity Surveyors for the practioners' text Professional Negligence and Liability (loose-leaf), published by Informa.***

It used to be assumed, reflecting upon the lack of reported decisions during the first 35 years or so after it came into force, that the Defective Premises Act 1972 ("the 1972 Act") was little considered and little used by new-build home-owners when seeking redress for construction defects contained in their homes (referred to in the 1972 Act as a "dwelling"). Given the lack of jurisprudence, designers, construction professionals and their professional indemnity insurers would have been forgiven if they gave the 1972 Act little thought when carrying out their work. In the light of a flurry of recent cases[1], however, that assumption must now be considered in doubt. In this update we consider one of those recent authorities, namely *Rendlesham Estates plc v Barr Ltd*.

In addition, we consider guidelines provided by the court in relation to a construction professional's duty to warn in *Goldswain & Hale v Beltec Ltd*.

Whilst this decision will be welcomed by the construction profession, as it emphasises the confined nature of any such duty, it highlights the importance to clients of ensuring that roles are clearly defined and risks catered for through contractual arrangements or insurance.

Finally, we look at the recent case of *Hunt v Optima (Cambridge) Ltd*, which considers the status of architects' certificates. These certificates are often required by mortgage companies for new-build residential properties in lieu of an NHBC or other insurer-backed warranty and are required by developers expressly for the benefit of prospective purchasers.

**Rendlesham Estates plc v Barr Ltd**

The most recent detailed examination of the application and scope of the 1972 Act was undertaken by Edwards-Stuart J. in *Rendlesham Estates plc v Barr Limited* [2014] EWHC 3968; [2015] BLR 37, a class action brought by owners of apartments in two seriously defective blocks in Concord Street, Leeds, against the design and build contractor, Barr Limited. Although no claim was brought against an architect or engineer, the case is important for all construction professionals because it is a practical example of the wide scope and breadth of duty under the 1972 Act owed by any person taking on work in connection with the provision of a home to future owners of that home.

The Court found that although a "*dwelling*" is limited to the parts of an individual apartment as described in the lease, together with any parts of the building to which the occupiers of that apartment have exclusive access, such as a balcony, the scope of the duty owed, which expressly provides that it shall apply to all persons "*taking on work for or in connection with the provision of a dwelling*", extends to the structural and common parts of each apartment block. The duty imposed by Section 1 of the 1972 Act therefore applies to structural and common parts as well as the exclusive demises. In case there was any doubt, the obligations imposed by the statute must be regarded as applying to consulting engineers and architects, even those with only a passing material involvement in the design of new-build residential accommodation.

The wide scope of the work to which the 1972 Act applies is matched by the wide range of types of loss which are potentially recoverable, including the cost of rectification of defects, earlier attempts at remedial work, loss of rent whilst remedial works are being carried out, the cost of alternative accommodation, removal and storage, (residual) blight, and general damages for distress and inconvenience.

Given that there are no privity of contract issues with such claims, it is thought to be only a matter of time before reported cases are brought under the 1972 Act against construction professionals.

**Goldswain & Hale v Beltec Ltd**

While the trend of decisions under the Defective Premises Act 1972 seems to be against construction professionals, the converse is perhaps true in the context of an engineer's (or other construction professional's) duty to warn. In *Goldswain & Hale v Beltec Limited* [2015] EWHC 556, the claimants, who wanted to convert the existing cellar of their ground floor flat into basement living accommodation, retained engineers, Beltec, to provide the permanent works designs for the excavation of the basement, the underpinning of the perimeter walls, and the provision of support as necessary. Unfortunately, the building contractor, AIMS, constructed the underpinning negligently, and around one month later, the building collapsed. Shortly afterwards, AIMS went into insolvency.

At trial, one of the allegations of negligence made against the engineer was that it had failed to warn the claimants (or AIMS) that the approach adopted by AIMS was inadequate. Akenhead J. conducted a review of the authorities, and summarised the relevant principles as follows:

> *"(a) Where the professionals (engineers in this case) are contractually retained, the Court must initially determine what the scope of the contractual duties and services were. It is in the context of what the professional person is contractually engaged to do that the scope of the duty to warn and the circumstances in which it may in practice arise should be determined.*
> *(b) It will, almost invariably, be incumbent on the professional to exercise reasonable care and skill. That duty must be looked at in the context of what the professional person is engaged to do…*
> *(c) Whether, when and to what extent the duty [to warn] will arise will depend on all the circumstances.*
> *(d) The duty to warn will often arise when there is an obvious and significant danger either to life and limb or to property. It can arise however when a careful professional ought to have known of such danger, having regard to all the facts and circumstances.*
> *(e) In considering a case where it is alleged that the careful professional ought to have known of danger, the Court will be unlikely to find liability merely because at the time that the professional sees what is happening there was only a possibility in future of some danger…"*

Beltec had no duty to supervise. Although it did visit the site on one occasion early in AIMS's work, there was nothing to suggest that there was any danger to the structure of the building at that time, nor was Beltec on notice of any lack of experience on the part of AIMS. The result was that the claimants were left without a remedy, save against the insolvent contractor, AIMS.

**Hunt v Optima (Cambridge) Ltd**

Finally, in *Hunt v Optima (Cambridge) Ltd [2014] BLR 613*, the Court of Appeal had to consider whether architects' certificates constituted negligent misstatements and enforceable contractual warranties as well as considering the extent of any

1 Bole v Huntsbuild [2009] EWHC 483, which summarised the law on the meaning of fitness for habitation which was appealed, reviewed and upheld [2009] EWCA Civ 1146. Harrison v Shepherd Homes Ltd [2011] EWHC 1811; (2011) Const LJ 709 was also appealed and upheld on the issue of the proper approach to adopt to diminution in value [2012] EWCA Civ 904.

*"Given the lack of jurisprudence, designers, construction professionals and their professional indemnity insurers would have been forgiven if they gave the 1972 Act little thought when carrying out their work. In the light of a flurry of recent cases, however, that assumption must now be considered in doubt."*

duty of care owed by the architects to the purchasers in respect of those certificates.

Optima (Cambridge) Ltd ("Optima") were developers who built two blocks of flats in Peterborough. They engaged Strutt & Parker (S&P) to carry out inspections of the building in the course of development and to produce "Architects certificates" in respect of the flats, for the benefit of the purchasers and their lenders. Before entering into the contract for sale, the purchasers were provided with drafts of the certificates which they were told they would receive following completion. Certificates were then subsequently provided, however, the flats contained multiple defects.

The purchasers successfully sued Optima for breach of the sales agreements, as well as winning at first instance against S&P on three grounds. First, the judge found that the certificates amounted to negligent misstatements. Second, he held that they were enforceable collateral warranties. Finally, he held that S&P were in breach of two separate duties, namely to take care both in carrying out the inspection and in compiling the certificates. The duty was owed to future purchasers and lenders to whom a certificate was issued or to whom it passed. S&P were in breach of the former duty as well as the latter. They attended the site and failed to spot the defects in construction which the judge found. Had they not been in breach they would have discovered the defects and Optima would have been required to remedy them.

However, the Court of Appeal reversed the first instance judge's decision. The action for negligent misstatement failed, as the purchasers were unable to show reliance on the certificates, since they had only been provided after the purchasers had committed themselves to the purchases. Furthermore, the certificates were held to be representations rather than contractually enforceable warranties and therefore any liability should be governed by the law of negligent misstatement. Finally, the Court of Appeal held that S&P only owed a single duty to take care in making the statements contained in the certificate. Although S&P had a contractual duty to carry out the work of inspection competently, they did not assume a responsibility to those to whom certificates might one day be issued until the stage where they decided whether to issue a certificate and if so in what form.

Architects' certificates do not, therefore, provide the same level of protection as an insurer-backed warranty such as an NHBC Warranty or Zurich Building Guarantee. However, this decision does not mean that such certificates have no legal effect. Had the purchasers received the certificates in advance of completing their sale agreement, they would have had a claim against S&P for negligent misstatement.



Gary Clement / Reuters

# KEATING CASES

## A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

**Reported case summaries**

### MW High Tech Projects Ltd v Biffa Waste Services Ltd & Another [2015] EWHC 949 (TCC)

This decision arises from a dispute on a project for the design, build and operation of a recycling facility for West Sussex County Council. A related decision in MW High Tech Projects UK Ltd v Haase Environmental Consulting GmbH [2015] EWHC 152 TCC was noted in the Summer 2015 issue of KC Legal Update. Biffa had entered into a contract (the EPC contract) for the design, construction, installation and testing of the plant, the completion date of which was to be determined by reference to the testing regime, with liquidated damages payable for non-completion.

MW High Tech, as the EPC contractor, was required to procure a parent company guarantee (from MW GmbH), the Second Claimant), a performance bond and retention bond.

The completion date was not achieved, for reasons which were disputed, and Biffa gave notice under the terms of the parent company guarantee of its intention to call on the retention bond, predicated on its assertion that MW High Tech was required to pay liquidated damages and had not done so.

The claimants succeeded in an ex parte application to restrain the bond call and any steps towards calling it: a temporary injunction was granted. MW GmbH, the parent company, was added as Second Claimant, to ensure that the undertaking in damages given could be supported.

On Biffa's application, the interim injunction was subsequently set aside. A typical on-demand bond can only be restrained where there is fraud or where the call is precluded by the terms of the underlying contract. The court would not accept that a term should be implied to the effect that the call on the parent company guarantee must be 'valid'. No such implication was justified. The parent company should be regarded as being given the opportunity to pay the underlying demand without recourse being necessary to the retention bond.

**Vincent Moran QC represented the Claimant**
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### Transformers and Rectifiers Ltd v Needs Limited [2015] EWHC 1687 (TCC)

This decision concerned the costs arising out of the defendant's application to adjourn the trial, and the various applications made by the parties that followed (by the claimant to restore the hearing, by the defendant to maintain the adjournment), culminating in a direction for a trial of some issues. (See [2015] EWHC 269 (TCC) noted in the Summer 2015 issue of KC Legal Update.) The claimant had been awarded its costs of those various applications. An issue arose as to whether a judge who had not made the costs order had jurisdiction to assess those costs on a summary basis. Coulson J held that a blanket prohibition would neither make sense nor be consistent with the overriding objective of the CPR, and on that basis proceeded to assess costs awarded by Edwards-Stuart J.

**Justin Mort QC represented the Claimant**
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### Gotch v Enelco Ltd [2015] EWHC 1802 (TCC)

The case concerned a contract for the construction of two residential buildings for the claimants by the defendant contractor. The claimants sought a declaration that the defendant was not entitled to refer a dispute under the contract to adjudication, because the claimants were residential occupiers within the meaning of s.106 of the Housing Grants Construction and Regeneration Act 1996. The defendants took the point that one of the houses was marketed as a holiday let and therefore was not a residence.

The judge held that the application should be stayed as there was no immediate prospect of reference to adjudication, but that the claimants had been justified in commencing the proceedings for the purposes of assessing costs.

**Krista Lee represented the Claimants**
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### GSK Project Management Ltd (In Liquidation) v QPR Holdings Ltd [2015] EWHC 2274 (TCC)

The claimant (now in liquidation) had carried out works at the ground of Queen's Park Rangers Football Club. The dispute arose on the final account, by which the claimant sought some £800,000 and the defendant counter-claimed for defective work. This judgment resulted from an ancillary dispute over the claimant's costs budget.

The court applied the approach adopted in the case of *CIP Properties v Galliford Try Investments* noted in the Summer Issue of KC Legal Update in assessing the proportionality of the costs budget to the sums in dispute.

**Abdul Jinadu represented the Claimant**
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### GB Minerals Holdings Ltd v Michael Short [2015] EWHC 1387 (TCC)

This was an application for the court's permission to bring proceedings for committal for contempt of court.

The underlying dispute concerned a contract for consultancy services in connection with a feasibility study for a phosphate project in Guinea-Bissau. The estimated contract sum was some £1.9 million, but variation orders were said to have taken the price to over £10.8 million.

The issues for the court were whether the facts met the threshold requirement of a strong prima facie case of dishonesty and whether it was in the public interest for committal proceedings to be brought. It was said that statements and certain evidence had been falsified, in particular the retrospective creation of variation orders. The court was satisfied that there was sufficient indication of dishonesty and that it was in the public interest that proceedings be permitted, although the committal proceedings should not be allowed to go forward until at or after the trial of the substantive case; there would therefore be no objection on the ground of interference with the defendant's case preparation.

An application for permission to appeal is pending.

**Samuel Townend represented the Respondent**
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### Caledonian Modular Ltd v Mar City Developments Ltd [2015] EWHC 1855 (TCC)

The defendant developer engaged the claimant contractor to carry out works at a site in North London. Following non-payment of a payment application, the contractor obtained an adjudication decision in its favour, which was subsequently enforced by the court. A second adjudication, in favour of the contractor for a further non-payment was now resisted by the defendant. The court held that, on the facts, the documents submitted by the contractor were not a valid application or payee's notice. The defendant had sought clarification of their status. The consequence was that there was no valid payment application which was not the subject of a pay less notice. An employer's failure to serve a pay less notice in time will usually result in full liability to pay the contractor, so if he is to be put at risk in this way, he must be given proper notice that the payment period has been triggered.

**William Webb represented the Claimant**
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By Paul Darling OBE QC

# *the long* Shadow *of* Hillsborough


***Paul Darling QC reflects upon the developments of stadium safety since the Hillsborough disaster, including the formation of the Football Licensing Agency and its remit under the Sports Ground Safety Authority Act 2011. He also considers the international recognition of the "Green Guide" and its significance to construction lawyers.***

Many of us will remember where we were when we heard about the tragedy at Hillsborough. Ninety six Liverpool fans who had left their homes in the morning to watch their beloved team compete in the semi- final of the FA Cup were not to return home. It is impossible to put into words the horror of what happened that day. It is to be hoped that the new inquest under the direction of Sir John Goldring, a retired Lord Justice, will get to the truth of what happened.

One of the consequences of Hillsborough and the Taylor inquiry which followed it was the decision of the Government to introduce an all seater requirement for the two top leagues. This involved the formation of the Football Licensing Authority, created by the Football Spectators Act 1989, hastily converted from its original purpose, abandoned after Taylor, of creating a fans membership scheme.

Under the provisions of the 1989 Act, the Football Licensing Authority ('the FLA') was required to operate a licensing scheme to regulate spectator viewing accommodation at football league grounds, and Wembley, and in due course, the Millennium Stadium, Cardiff. The FLA was also required to keep under review how local authorities discharged their functions under the Safety of Sports Grounds Act 1975 at those grounds.

The FLA had a unique remit. It was the only government funded body tasked specifically with providing advice and guidance on spectators' safety at football grounds in the UK. The FLA acquired a cadre of experienced professionals who started new careers as inspectors for the Authority. Some had backgrounds as senior Police Officers, some in the fire service, some in local authority building control and others in event management. They regularly gave advice to local authorities and to clubs. They attended Safety Advisory Groups, run by Local Authorities for each ground, colloquially referred to as 'SAGS'.

The ethos of the FLA was to collaborate and to provide advice. However, the FLA had an important regulatory role. A football league ground could not legally operate without a licence granted by the FLA. That involved, in particular, a need to comply in the first two divisions with the all seater requirement, but also to ensure that the stadium complied with a certain number of licensing requirements.

That is not to confuse the role of the FLA with the role of the local authority. It is the local authority that issues the Safety Certificate, although the FLA has power to impose conditions.

The FLA was very much a world leader but its role was confined, by statute, to football grounds. It did not have the power to give advice in relation to other grounds. This led to the rather absurd situation of an FLA inspector attending a Safety Advisory Group for a ground that had both football and cricket and leaving after the consideration of football, before the cricket was discussed, cricket being outside its remit.

The Government therefore decided that it would extend the powers of the FLA and allow it to advise in relation to other sports. Unfortunately, these powers had not been acquired by the time the 2012 Olympics came round, being regularly bumped out of government bills for more worthy causes. The absurd spectacle of the world's leading spectator safety organisation not being able to help at the Olympics in its own country was avoided by the device of the FLA seconding some of its inspectors to LOCOG.

Salvation came from a private members bill, which in due course became the Sports Ground Safety Authority Act 2011, which would extend the FLA's remit. By a cruel twist, however, at almost exactly the same time in the bonfire of the quangos, the new coalition government decided that the FLA should be abolished. Happily the SGSA, as it now was, was not abolished, the Government deciding in 2014 to retain it as a public body.

I was privileged to be appointed by the Minister for Sport to be the Non-Executive Chairman of the FLA in 2008. I became the first Chairman of the SGSA in 2011. Many of my barrister colleagues choose to sit as part-time judges as part of their public service. I preferred to give such time to the FLA and the SGSA. I had done many cases about sports grounds and stadia, one of which had involved guidance published by the FLA.

My role was to be a figurehead for the organisation and to deal with ministers, civil servants, local government officers and senior people within the football world including supporters' representatives. I was also responsible, with the Board, for directing strategy. As well as a high powered Chief Executive, I had the benefit of a high powered board, including a former Chief Executive of a Building Society, a former Operations Director of a large racecourse, an engineer with local government experience, a person with expertise in risk management, a sports architect, and a well-known former professional footballer. They provided powerful non-executive support to an executive led by a Chief Executive.

The Chief Executive ran a team of 14, including 9 inspectors. The budget of the entire organisation was in the region of a £1 million per year. That is a tiny sum in the football world – it is about half the average salary for a single premier league player.

For building lawyers, one of the real interests of the SGSA is its role in the publication of the Guide to Safety at Sports

*"The English legal profession has acquired very considerable expertise over the years in the issues around the design and construction of sports stadia."*

Grounds – referred to as the "Green Guide". The Green Guide is now in its fifth edition and includes a good deal of material on safety management. The Green Guide helps with the calculation of safe capacities and it gives guidance on management, planning, stewarding, medical and first aid provision amongst other crucial matters.

For those with an interest in construction law, the key sections are the ones that tell you how stadia should be designed and constructed. The guide deals with circulation, ingress, vertical circulation, concourses and emergency egress and emergency evacuation. It deals with how seating areas should be configured and how standing areas should work. It deals with electrical and mechanical services.

The Green Guide is used worldwide. It is one of the oddities of the system that it is available to download for free and it is regularly downloaded throughout the world. How one configures a sports ground anywhere in the world is now bound to be influenced by the Green Guide. When I was conducting a case recently in Singapore, I was invited to look at the new Singapore National Stadium, then in the final stages of construction. I asked, innocently, against what standard the stadium was being constructed and was told, rather as if it was a stupid question, "*the Green Guide*".

The Green Guide has itself been the subject of litigation. The arbitration which led to the decision of the TCC in *HOK v Aintree Racecourse* (2003) BLR 155 arose from the change in requirements between different editions of the Green Guide about how stands were to be configured. Capacity was lost because the crush barrier was required to be changed from a staggered to a continuous configuration with wider gangways. It was my involvement in that case as Counsel which triggered my application to chair the FLA.

Disputes about stadia have occupied construction lawyers in the UK and across the world regularly. Throughout the nineties and the early part of this century, there were many, many stadia cases. I was instructed in a number of them, often representing Birse or Ballast Wiltshier. The most memorable of them for me was a dispute between the main contractor and an M&E sub-contractor, about the Sunderland Football Ground. That was heard at first instance by a judge who was an infatuated Newcastle United fan. All those involved in the case were Newcastle United supporters except counsel for the sub-contractor, who supported Ipswich. This led to joke after joke by people who were perhaps embarrassed by their connection to Newcastle's inveterate rivals. Unfortunately, when the case reached the Court of Appeal, the jokes did not look quite as good on the transcript as they had in the Newcastle Technology and Construction Court. Happily, the parties were rescued from their embarrassment by the combined effect of one of the judges in the Court of Appeal also being a Newcastle United supporter and the other being Lady Justice Hale who memorably said, when I was trying to steer round one reference, "*Please don't worry Mr Darling, boys will be boys*".

All of these cases, of course, were but nothing compared with the many and long disputes about the new Wembley National Stadium. The same was not true of the Olympics. Everyone has their own theory as to why that was. Better form of contract? More realistic pricing? Patriotism by the contracting industry in a desire to avoid another Wembley? No doubt each of those played their own part. From my perspective, it was the simplicity of many of the structures compared with the other stadias which had given rise to disputes that made at least some of the difference. Earlier disputes were not about the construction of simple concrete stadia but were very often triggered by complexities such as the mechanical and electrical works for corporate hospitality facilities or their construction in difficult locations, by contrast to the comparatively open site of the Olympic Park.

Whatever the reason may be, it remains the case that the English legal profession has acquired very considerable expertise over the years in the issues around the design and construction of sports stadia. For my part, I was delighted to combine my professional work about stadia with public service to ensure that those who go to football matches return home safe. Those of us striving to this end are acutely conscious that we still do so in the long shadow of Hillsborough.

# NIGERIAN OIL AND GAS INDUSTRY CONTENT DEVELOPMENT ACT 2010

**In this article, Abdul Jinadu, who is a fluent Yoruba speaker and maintains well-developed links with his home country of Nigeria, considers the effects of legislation aimed at increasing the participation of Nigerian companies in the oil and gas sector. He outlines the major provisions of the principal statute and highlights some difficult issues arising under it, particularly in enforcement, concluding that review and reform are essential.**

The oil and gas sector contributes 14.4 per cent to Nigeria's GDP[2] and it is the principal source of Federal Government revenue and foreign exchange earnings[3] . While Nigeria has been exporting petroleum since the late 1960s and liquefied natural gas since the mid 1990s, the participation of indigenous Nigerian companies in the industry has been limited. In an attempt to correct this, and to ensure the transfer and domestication of skills in the industry and allied industries, the Nigerian Oil and Gas Industry Content Development Act 2010 ('the Act') was passed.

The Act has been the source of much comment and no small amount of controversy. While the intention behind the Act is clear, the codification of that intention in the terms in which the absence of decided cases dealing with the provisions of the Act.

This article will focus on the principal operative clauses and it will identify the most significant criticisms of the Act in operation.

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2 CNBC Africa 25th February 2015 3 Oil and gas directly accounts for approximately 70% of government revenue. When indirect taxes are added its contribution rises to about 85%. (The Economist 20 June 2015).



**Provisions of the Act**

Section 1 provides that the Act is to apply *"to all matters pertaining to Nigerian content in respect of all operations or transactions carried out in or connected with the Nigerian oil and gas industry."*

Section 2(1) of the Act requires that all regulatory authorities, operators, contractors, subcontractors, alliance partners and other entities involved in any project, operation, activity or transaction in the Nigerian oil and gas industry shall consider Nigerian content as an important element of their overall project development and management philosophy for project execution. 'Operator' is defined at Section 106 of the Act as the Nigeria National Petroleum Company (NNPC), its subsidiaries and joint venture partners, and any Nigerian, foreign or international oil and gas company operating in the Nigerian oil and gas industry under any petroleum arrangement.

Section 3(1) provides that Nigerian independent operators shall be given first consideration in the award of oil blocks, oil field licences, oil lifting licences and in all projects for which a contract is to be awarded in the Nigerian oil and gas industry, subject to the fulfilment of such conditions as may be specified by the Minister.

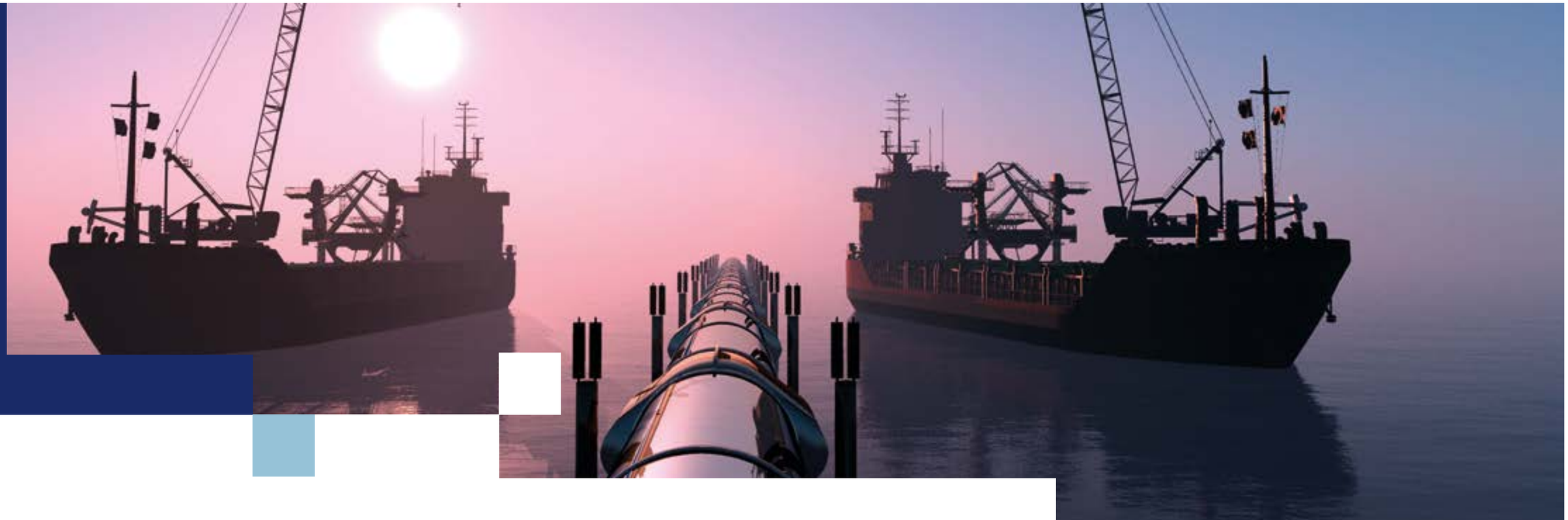
Section 3(2) provides that exclusive consideration shall be given to Nigerian indigenous service companies which demonstrate ownership of equipment, and Nigerian personnel, and capacity to execute such work to bid on land and swamp operating areas of the Nigerian oil and gas industry for contracts and services contained in the Schedule to the Act.

Section 3(3) provides that compliance with the provisions of the Act and promotion of Nigerian content development shall be a major criterion for award of licences, permits and any other interest in bidding for oil exploration, production, transportation and development or any other operations in the Nigerian Oil and Gas industry. Section 4 provides for the establishment of the Nigerian Content Development and Monitoring Board ("the Board"). Section 5 provides that the Board is responsible for implementing the provisions of the Act. A substantial part of the Act is taken up with the mechanics of the Board.

Section 6 provides, that upon the commencement of the Act, all subsequent oil and gas arrangements, agreements, contracts or memoranda of understanding relating to any operation or transaction in the Nigerian oil and gas industry shall be in conformity with the provisions of the Act.

Sections 7 - 10 set out the requirements for the provision to the Board, and approval by the same, of a plan before carrying out any project in the Nigerian oil and gas industry. The plan is required to demonstrate compliance with the provisions of the Act.

Section 11(1) is arguably, in practical terms, the most important provision,



*"The Act seeks to regulate the provision of ancillary services, such as legal, financial and insurance services, the aim being to indigenise the provision of these services."*

as it introduces the Schedule. Section 11(1) states that, as from the commencement of the Act, the minimum Nigerian content in any project to be executed in the Nigerian oil and gas industry shall be consistent with the level set in the Schedule to the Act. The Schedule contains a number of activities related to oil and gas projects and it sets out the required minimum Nigerian content for each activity.

Section 11(3) provides that all operators, alliance partners and contractors shall comply with the minimum Nigerian content for a particular project item, service or product specification, as set out in the Schedule to the Act.

Section 14 requires that operators and project promoters shall consider Nigerian content when evaluating any bid where the bids are within 1% of each other at the commercial stage and the bid containing the highest level of Nigerian content shall be selected, provided that the Nigerian content in the selected bid is at least 5% higher than its closest competitor.

Section 16 contains possibly the most significant departure from orthodoxy. Pursuant to it, the award of a contract shall not be solely based on the principle of the lowest bidder where a Nigerian indigenous company has capacity to execute the job and the company shall not be disqualified exclusively on the basis that it is not the lowest financial bidder, provided that the value does not exceed the lowest bid price by 10 percent. The section, on its face, would require that if there are two equally qualified bidders for a tender; one Nigerian and the other not, then as long as the Nigerian bidder's bid is not more than 10% higher than the non-Nigerian bidder's bid, the contract must be awarded to the Nigerian bidder, unless there is some other reason to prefer the non-Nigerian bid.

Sections 17 - 24 contain extensive reporting requirements to the Board, with which all operators awarding, bidding for or executing contracts valued at over $1m must comply.

Sections 25 - 27 contain provisions requiring the location of project offices within host communities. The sections make capitalised references to the Catchment Area of projects and Communities where projects are executed, without providing a definition in the Act of these terms.

Sections 28 - 49 are concerned with the employment of Nigerians in technical positions in preference to expatriates, the indigenisation of research and development activities, and the transfer of technology. In particular, Section 32 provides that expatriate positions are limited to 5% of management.

The Act seeks to regulate the provision of ancillary services, such as legal, financial and insurance services, the aim being to indigenise the provision of these services. Sections 49 and 50 deal with the provision of insurance and reinsurance, Section 51 deals with the provision of legal services, and Section 52 deals with the provision of financial services. On their face, the sections require that all insurance is placed with Nigerian insurance institutions, that all legal services are provided by a Nigerian legal practitioner or a firm of Nigerian legal practitioners whose office is located in Nigeria and that, in respect of all financial services, the services of Nigerian financial institutions or organizations must be retained, except where the Board is satisfied that this is impracticable.

There is a difficulty with applying these clauses as drafted because the Schedule contains provisions which are contradictory. For instance, under the heading Project Management/Consulting, legal consultancy is identified and the requirement is that 50% of contracts should be awarded to indigenous entities. Under the heading Finance and Insurance, the Schedule contains a number of activities where the requirement is less than 100%. How these provisions sit with Sections 49 - 52 is not clear.

Section 52(3)(f) requires that every operator, contractor and sub-contractor shall maintain a bank account in Nigeria in which must be retained a minimum of 10% of its total revenue accruing from its Nigerian operations. What this provision means in practice is difficult to ascertain. Does it mean that 10% of the total revenue (a term which is undefined) can never be remitted out of Nigeria or indeed even expended in Nigeria?

Sections 53 - 67 deal with miscellaneous matters, including the prohibition on the importation of welded products at Section 53, the provision of an annual Nigerian Content Performance Report by all Operators at Section 60, and the requirement to provide access to the Board at Section 64.

*"Despite its apparent success in increasing local participation in the oil and gas industry, the Act in operation has given rise to significant problems, the effects of which are in part or entirely being ameliorated by a policy of turning a Nelsonian blind eye to contravention of its provisions."*

Section 68 provides that an operator, contractor or sub-contractor who carries out any project contrary to the provisions of the Act, commits an offence and is liable upon conviction to a fine of five per cent of the project sum for each project in which the offence is committed or cancellation of the project.

Parts II and III of the Act are largely concerned with the setting up of the Board; however, Section 104 is concerned with the establishment of the Nigerian Content Development Fund, which is to be funded by the payment of the sum of one per cent of every contract awarded to any operator, contractor, subcontractor, alliance partner or any other entity involved in any project, operation, activity or transaction in the upstream sector of the Nigeria oil and gas industry. This sum is to be deducted at source.

**The Effect of the Act In Operation**

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There is some evidence that the Act has enjoyed a measure of success in its stated aim, as Nigerian companies now control over 35% of upstream business activities in Nigeria; this is a significant increase from less than 10% in 2010[4]. How much of this is due to the Act and how much is due to international oil companies divesting for other reasons is not clear.

What is clear is that there are a number of issues with the operation of the Act.

Contrary to belief in some quarters, the Act does not prohibit the participation of foreign entities in the Nigerian oil and gas industry, nor does it require the participation of such entities to be carried out in partnership with Nigerian entities. While it places restrictions on the participation of foreign entities in the Nigerian oil and gas industry, it is still legitimate for a foreign entity to undertake work in the Nigerian oil and gas industry so long as the conditions stipulated in the Act for participation are met.

However, significant difficulties have been experienced where the Act demands 100% or a high percentage of participation by indigenous companies but where there is a lack of capacity domestically. In some instances there are no Nigerian companies who have the capacity to provide some of the specialist services required. Anecdotal evidence suggests that the Board has quietly turned a blind eye to the continued provision of such services by foreign operators even where this is clearly in contravention of the Act. The alternative solution adopted by some has been to form special purpose vehicles with Nigerian partners where the Nigerians are given 51% of the shares, however the voting rights are arranged in such a manner that control remains in the hands of the foreign entity.

In instances where there has been violation of the provisions of the Act, other than stipulating that contravention of the Act is an offence punishable by a fine or cancellation of the project, the Act does not explain what the consequences are for failure to comply with its provisions. For example, if a contract is awarded in contravention of the terms of the Act is that contract void or voidable?

The Act does not make express provision for an individual to enforce its provisions. Although not expressly stated, it appears that the task of enforcing the terms of the Act is left to the Nigerian Content Development and Monitoring Board. This raises the question of what redress a party has if it has been deprived of an opportunity due to contravention of the Act.

**Conclusion**

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Despite its apparent success in increasing local participation in the oil and gas industry the Act in operation has given rise to significant problems, the effects of which are in part or entirely being ameliorated by a policy of turning a Nelsonian blind eye to contravention of its provisions. This is clearly an unsatisfactory state of affairs, and it is hoped that one of the first tasks taken up by the new Minister for Petroleum when appointed will be carrying out a comprehensive review and amendment exercise in respect of the Act.

4 Vanguard Newspaper27 June 2015

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