

**Wedlake Bell**

# **Sports Bulletin**

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# Stadium builds – disaster awaiting or golden opportunity?

The history of development of sports stadiums has been a scary ride for many who have embarked on it. There are many projects that are casebooks of the 'how not to do it' variety, but there are others that have lived up to the words above.

What makes the difference? How do you steer your stadium development towards successful delivery and firmly away from a late, over budget, defect-laden project with which no-one wants to be too closely associated? We highlight pertinent steps below.

Accept that undertaking a major stadium development truly is a complex and difficult process that will inevitably be full of potential pitfalls at all stages. Many of these may be predicted and planned for, but some will be unexpected and must be promptly managed rather than ignored.

Fully appreciate the value of good design.

Resource your project properly at every stage and do not stint on obtaining the best advice available. It may appear you are saving money, but often all you are really doing is saving up problems that will compound and cost you far more in the long run than any short term saving.

Prepare a risk matrix for every stage of the project, which should be kept under review (not in a drawer), and use this as a checklist to make sure all identifiable items have been considered, allocated efficiently and are being actively managed.

Identify the sources of funding and consider the differing interests of the parties/sources involved and the demands those interests may place on the project structure, proposed risk allocation and rights and obligations under project documents.

Identify what is required to operate and maintain the stadium when complete, the nature of the agreements that need to be put in place and the essential integration with the design and construction of the project.

Adopt a client managed insurance package tailored to the particular needs of your project. Deal with this at the outset of the project to use insurance creatively and efficiently.

Most construction procurement for stadium development is on a 'design and build' basis, often with a design team engaged first by the client. Be careful in your selection of the design team and the main contractor. Involve the preferred main contractor and key supply chain members early in the design and procurement process. The main contractor must have an established and flexible supply chain (all key trades and suppliers required for the project).



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## 'World Cup Willie' saved for nation

Back in the 1960's before many readers were born a mascot was created for the 1966 World Cup, which of course was hosted in and won by England. The mascot 'World Cup Willie' was a cartoon type lion dressed in a Union Jack shirt and white trousers.

Many years later, in 2005, Jules Rimet Cup Ltd applied to register as a trade mark the words WORLD CUP WILLIE on their own and a device mark based on the World Cup Willie mascot together with those words.

When the Football Association (FA) got to hear of the applications they indicated to Jules Rimet Cup Ltd that they would oppose those applications if they were not withdrawn. They also informed a third party who had entered into a licence with Jules Rimet Cup that they had grounds to oppose the trade marks which were the subject of the licence and as a result that third party terminated its agreement with Jules Rimet Cup. This led Jules Rimet Cup to launch proceedings against the FA seeking a declaration that the FA had no grounds to oppose its trade mark applications. The FA launched its own attack in response, arguing that since the FA was the owner of the copyright in the original drawings of the World Cup Willie mascot, Jules Rimet Cup's use of its device mark amounted to an infringement of the FA's copyright. It also argued that by using the World Cup

Willie name and its device Jules Rimet Cup were guilty of passing off.

The Judge's decision on the copyright issue was like any match, one of two halves. He decided that the FA did own copyright in the drawing of the original mascot and that if a third party were to apply to register a device which copied that drawing doing so would infringe copyright. However, in a blow to the FA he also held that although the designer of the logo used by Jules Rimet Cup had based his original drawings on the original mascot, the final version actually used by Jules Rimet Cup did not reproduce a substantial part of the original drawing and so did not infringe.

On the question of 'passing off' the judge agreed with the FA that the goodwill created by merchandising activities leading up to the 1966 World Cup did belong to the FA, although the FA's position would have been far stronger if they had been able to point to written agreements with merchandisers acknowledging this ownership. He also agreed that contrary to Jules Rimet Cup's contention, this goodwill had not been abandoned – it had merely been put on the shelf pending potential use again in connection with a future World Cup staged in England. On the key question of whether the goodwill has survived to such an extent that the FA could now launch an application for passing off, in spite of the fact that 40 years had passed since any use of the World Cup Willie marks, the Judge agreed that there was residual goodwill in the name and character World Cup Willie that would have enabled the FA to succeed in a passing off claim. This therefore would be grounds for the FA to oppose the applications made by Jules Rimet Cup.

The final grounds that the FA argued that it could rely on in order to oppose the trade mark applications was that of bad faith. What the court has to decide in such a case is whether the knowledge of the applicant at the time of making his application was such that his decision to apply for registration would be regarded as being in bad faith by persons adopting proper standards. The Judge found that the applicants made their application knowing that there was residual goodwill in World Cup Willie. Having so found the next question to consider was whether they were acting dishonestly as judged by the ordinary standards of honest people. Jules Rimet Cup argued that the fact that they had sought legal advice should be a complete answer to any allegation of bad faith, however, they did not disclose the advice given or the information provided to their advisers. In the absence of so doing the Judge held that in spite of having sought advice, applying for the trade mark registrations in the knowledge of the residual goodwill did amount to bad

faith. Again this would give the FA grounds for opposing the applications made by Jules Rimet Cup.

At the time of writing it appears that the two applications are indeed the subject of opposition proceedings and it is therefore likely that unless a settlement is reached the marks will not proceed to registration.

The case highlights a number of important issues for sports bodies who may create mascots and other logos in connection with sporting events: ensure that any designers engaged to produce artwork assign all rights to you at the outset (the FA had to seek an order assigning rights to it); register your logos etc as trade marks and renew those marks if there is any scope for future use (this may avoid the need to prove the existence of residual goodwill, although a mark can be revoked for non-use if no genuine use is made for a period of 5 years); ensure that in any licensing of your marks and logos it is made clear that any goodwill generated is to be held for your benefit.



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## Energy Performance Certificates

Given that the building sector is thought to account for about 50% of the UK's total carbon dioxide emissions both energy efficiency and climate change issues are set to feature highly in the regulation of the property sector in 2008. In particular the European Directive on the Energy Performance of Buildings requires Energy Performance Certificates (EPCs) and Display Energy Certificates (DECs) to be provided for all buildings placed on the property market for sale or rent.

### When?

The requirements will be implemented in three phases during 2008 but for the purposes of sports stadium construction specifically from 6 April 2008 EPCs will be required for the construction, sale or rental of non-dwellings with a floor area greater than 10,000m<sup>2</sup>. This will also apply to all commercial buildings of more than 2500m<sup>2</sup> from 1 July 2008 and to all other commercial buildings from 1 October 2008.

## What?

An EPC will provide an energy rating for a building which is based on the performance potential of the building itself (the fabric) and its services (such as heating, ventilation and lighting). It will be accompanied by a recommendation report on how the energy performance of the building could be enhanced, this report must be retained and held with the certificate itself. From 1 October 2008 DEC's are required for all public buildings with a total useful floor area over 1000m<sup>2</sup> occupied by public authorities and by institutions providing public services must be placed in a prominent place clearly visible to the public.

## Why?

It is intended to inform potential buyers or tenants about the energy performance of a building, so they can consider energy efficiency as part of their investment or business decision to buy or occupy that building; an important consideration for company directors who now have a duty to have regard to the impact of their company's operations on the community and the environment.

## Who?

In the case of a newly constructed building, the building contractor will be responsible for providing the certificate to the owner; clearly this will now become an essential part of the commissioning process. For buildings that are to be let it will be the responsibility of the landlord. Government guidelines state that a valid EPC and recommendation report must be made available free of charge by a seller or landlord to a prospective buyer or tenant and at the earliest opportunity, which in any event must be before entering into a contract to sell or let. The guidelines do state, however, that a lease renewal or extension does not amount to a sale or let and therefore it seems that EPCs will not be required in these circumstances. Conversely buildings that are to be demolished may well require an EPC unless conditions such as a sale with vacant possession and intent to demolish can be proven.

Failure to obtain an EPC may result in a penalty charge. In most cases this will be fixed at 12.5% of the rateable value of the building, capped at a maximum penalty of £5000.

An EPC for a non-dwelling will last for 10 years. If there is a change of tenants but the EPC is still valid, a new certificate will not be required. EPCs and the reports are to be registered with the Local Authority and records kept for 20 years.

In terms of any potential impact that an EPC may have on a building's value it is thought that buyers may be in a slightly better position to negotiate a better price if the EPC shows a low rating. It is recommended that energy assessors are appointed at an early stage so that this can not lead to any delay in a transaction; there is some speculation that during this year there may not be sufficient numbers of assessors trained to handle the commercial property market. This could lead to inflated costs and delays.

## How will this affect the sports industry?

Although a stadium may not strictly fall under the definition of a building for the purposes of the regulations, developers and sports clubs and associations will still be under an obligation to ensure that the adjoining buildings comply with the regulations set out under the Directive. Such bodies firmly placed in the public eye may wish to take the lead in the implementation of such initiatives.

Last summer the ECB and their domestic test match sponsor Npower announced plans to work together on the first 'green audit' of a sport by a UK national governing body. This proposed to review energy use at the UK's seven test match grounds in order to reduce carbon emission by at least 10% by this spring.

## Commercial Implications

Clearly the better the energy efficiency rating of a building the lower fuel bills are likely to be. We have seen already the decision of certain US pensions funds not to invest in property that does not meet certain high environmentally friendly criteria. Other high profile companies such as Marks and Spencer have made notable, well publicised efforts to increase both the energy efficiency of their building stock and energy use in those buildings. This could well lead to a two tier market emerging that differentiates between improved, energy efficient properties commanding higher values and higher yields against those which are not improved and which will have lower values and yields.

It is not yet clear whether a poor EPC rating will actually compel landlords to implement measures to improve this. These reports and their recommendations are not mandatory. There is, therefore, scope for debate whether landlords should be required by tenants to undertake certain improvement works or whether landlords can enforce upon tenants requirements as to the efficient use of energy in their buildings. This could lead to the difficult situation where although landlords may be able to command a premium for a more energy

efficient building they may not be able to fully recoup the costs of improvements made to increase the energy efficiency of that building, and therefore to improve its EPC rating, because tenants may not be prepared, or even obliged under their leases, to repay these costs. However, it is the tenant that would benefit in the long run through savings in use or running costs.



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## Premier League in competition dispute over photos

The FA Premier League, which is the governing body for the English Football Premier League, is locked in a dispute over the use made of photographs taken at Premier League matches. At issue is the restriction which the Premier League seeks to impose on those photographers who are given access to football stadia. As part of the licence to enter stadia and take pictures, photographers are required to agree to certain conditions. One of those conditions states that photographers may not distribute their photos to any person for use in a magazine or periodical which is devoted solely to a single club or player.

The defendant, LCD Publishing Limited, publishes magazines which are devoted solely to a single player or club. In their action against LCD, the Premier League have, amongst other things, argued that by using photographs supplied to them in breach of the conditions of which they are aware, LCD have committed various economic torts such as conspiracy, knowing inducement of breach of contract and unlawful interference with contract. LCD have sought to defend this aspect of the Premier League's claim by arguing that the restriction imposed in the licences under which photographers operate are in unlawful restraint of trade and also breach Section 2(1) of the Competition Act 1998 which prohibits anti-competitive agreements. These are referred to as competition defences and are becoming an increasingly used tactic in litigation.

The Premier League sought to have the competition defences struck out. Unfortunately for them (since dealing with competition defences can become a costly exercise, especially since expert evidence is invariably necessary) the Judge refused to strike out the defence, which therefore lives to fight another day, but did require LCD to provide further particulars of its defence or face the prospect of it being kicked into touch.

It will be interesting to see how this case evolves and whether the competition defence does receive a full airing in court. Other sports bodies who include similar restrictions on photographers will no doubt be watching this case with interest.



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## Poach the coach

The issue of players moving clubs when contracted to a Premier League or Championship club has been the subject of various cases (the Bosman ruling being one example) and FA rules (compensation for youth players being another), and it is now a fact of life that clubs will have to pay a transfer fee in most cases. What has been less of an issue, at least publicly, is the poaching of managers who are under contract.

The case of *Crystal Palace FC (2000) Ltd v Dowie* gives an interesting insight into how the Courts will look at a situation in which a manager wishes to leave a club and the club's ability to prevent a manager from just "upping sticks" when he wants to join another club.

It is only relatively recently that football clubs appear to have realised the value of a competent manager, which is somewhat surprising given the obvious financial advantages of achieving promotion, and the perils of relegation.

In the case of Mr Dowie and Crystal Palace, the compensation provisions in Mr Dowie's employment contract included a term that £1 million would be paid to Crystal Palace if Mr Dowie left and joined another League or Premier League club before 30 June 2008. The term was designed to retain Mr Dowie and discourage him from leaving the Club prematurely. It was the operation of this clause which became the focus of the dispute between the parties.

Mr Jordan (the Chairman of the Club) alleged that Mr Dowie made fraudulent misrepresentations (about his intentions on leaving Crystal Palace) which induced the Club to enter into a compromise agreement with him. The main terms of the agreement were that Mr Dowie was released from his employment and agreed to waive his rights to make certain employment claims and the Club reciprocated by waiving its right to pursue any claim for the compensation of £1 million.

The Court held that Mr Jordan had been induced by Mr Dowie's fraudulent misrepresentations, but that the usual remedy of rescinding the compromise agreement and returning the parties to their previous positions i.e. reviving Mr Dowie's employment contract, would not be just and equitable in the circumstances – English law takes the view that it is against public policy to grant specific performance of contracts that require personal service. Furthermore, Mr Dowie, on leaving, was employed by Charlton FC and so the rights of the new club had to be considered, along with the fact that the relationship between Mr Jordan and Mr Dowie had broken down. The Court also held that the compensation clause would not be revived on its own. The appropriate remedy would be an award of damages or other financial relief.

Following on from this decision, Mr Dowie requested leave to appeal and in the meantime entered into settlement negotiations with Crystal Palace. Once he was granted leave to appeal, Crystal Palace tried and failed to convince the Court that a binding settlement had been reached with Mr Dowie pursuant to which he was to pay £350,000 in damages plus costs. The Court held that, on the evidence, it was clear that Mr Dowie had made an offer to pay damages and costs, but that his offer was conditional upon the settlement agreement containing a confidentiality clause. Since no mention had been made of such a clause in the final negotiations, there could not be a binding agreement.

Overall an unhappy outcome for Crystal Palace, but it is very difficult to protect against someone who is prepared to dissemble in negotiations.



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## Beware the pitfalls of 'claims made' insurance policies

A recent case in the Technology and Construction Court relating to the scope of a notification under a professional indemnity insurance policy provides a valuable reminder of the importance of making timely and accurate notifications if you want your policy to react to what you consider to be insured events.

The policy in question was a so-called 'claims made' policy which is a type of policy which not only provides cover for claims which are made during the period of insurance but also allows the insured to notify the insurers of circumstances that may give rise to a claim. Provided such circumstances are notified within the period of insurance, even if a claim is then made outside that period, the insurance policy should provide cover in respect of that notified circumstance.

The issue at stake in the case of *Kajima UK Engineering Ltd v The Underwriter Insurance Company Ltd* was whether defects which emerged in the period after a notification and the expiry of the insurance cover were effectively the subject of the previous notification and therefore covered by the insurance policy.

Kajima had been employed to design and build a block of flats. Shortly after practical completion, ponding of water occurred on the walkway balconies from the staircases to the front doors of various flats. Kajima carried out investigations into the cause of the ponding and concluded that it was due to excessive settlement which could distort adjoining roofing and balconies. Kajima notified its insurers, TUIC, accordingly in February 2001 and stated that further investigations were being carried out to determine the cause.

In July 2005, after the expiry of Kajima's insurance policy with TUIC and following further investigations and remedial works arising out of issues relating to the settlement problems, Kajima was informed by engineers that the wind loading calculations for the building had been badly underestimated and that, as a result, lateral stability was a serious problem. All of the tenants in the building were therefore evacuated, with the remedial works estimated at £7.25 million.

Kajima attempted to rely on its February 2001 notification to TUIC to claim under its previous insurance policy. Kajima argued that the investigation referred to in the February notification led in time to further investigations which meant that in effect the losses, costs and liabilities incurred by Kajima following the discovery of stability problems in July 2005 all arose from the notified circumstances.

The Court, however, disagreed holding that the notification was “only effective in relation to the specific circumstances which were notified”. It was not enough that “there was a historical ‘continuum’ of investigation by various parties which coincidentally revealed a number of defects or deficiencies” which may or may not have had anything to do with the notified circumstances.

It is therefore important if you want to make sure that an insured event is covered by your insurance policy, not only to inform your insurers at the earliest possible opportunity, but also to make sure that your notification is detailed and accurate enough to cover the potential future claim. As Kajima found out to its cost, if the claim is not covered by a timely notification, then the insurers will not be obliged to respond.



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