

### CONTENTS

#### Fulham and Frank Disclosure

- Directors' Fiduciary Duties

#### Recent Transactions

#### Farming the Wind

- The Cornwall Light & Power Story

#### Client Profile

- Bennetts Associates

#### Enterprise Management Incentives

- Growth continues



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## Fulham and Frank Disclosure: Directors' Fiduciary Duties

The press reports this month that Fulham Football Club was on the market follows the announcement last year that its contract to sell its stadium, Craven Cottage, to Fulham River Projects Limited had been terminated "by mutual agreement".

The sale of its stadium fell apart following the litigation surrounding the contract for its sale. The case, known as *Crown Dilmum v Sutton*, examined the principle of a director's fiduciary duties and led to the unravelling of the confidential £50m contract to sell the stadium.

The saga began in 2002 when Mr Sutton, in his capacity as managing director at that time of property developer Crown Dilmum, was responsible for identifying suitable development opportunities. In this capacity he was offered the opportunity to buy Craven Cottage off-market.

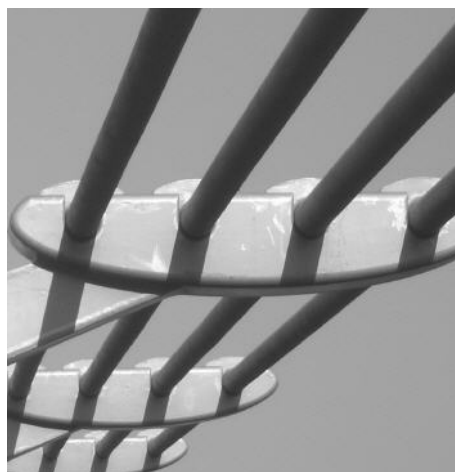
Without the knowledge of Crown Dilmum, he formed a new joint venture company (Fulham River Projects Limited or FRP) with a funding partner and in which he and his wife had a 49% stake. He then diverted the opportunity to FRP and negotiated the purchase of the stadium and its buildings on behalf of FRP.

*(Continued on back page)*

## Recent Transactions

**NELLEN** has recently advised:

- **The Cornwall Light & Power Co. Limited**, the owner and operator of the 5.6MW Goonhilly Downs Wind Farm on the Lizard Peninsula in Cornwall, on the sale of CLP to Renewable Energy Generation Limited.
- **Netkonect Communications Plc**, an established ISP and communications services company, on its sale to Mistral Internet Limited.
- **Global Healthcare Exchange Europe GmbH**, the operator of the largest European electronic healthcare exchange, on its investment in Tecsol Limited, a leading UK developer and supplier of software and eProcurement systems to the NHS.
- **Test Research Limited**, a market research company and part of the MORI group of research companies, on its sale to Ipsos UK Limited, a subsidiary of Ipsos SA.
- **Rayner & Keeler Limited**, the national optical retailer and lens manufacturer and a pioneer in the manufacture of intraocular lenses, on the introduction of an EMI Scheme.
- **Cath Kidston Limited**, the eponymous design, retail and mail order company, on an equity investment by a group of investors.



# Farming the Wind: The Cornwall Light & Power Story

Earlier this year NELLEN were retained as legal advisors, together with Ernst & Young as corporate finance advisors, in connection with the sale of The Cornwall Light & Power Co. Limited.

The sale was the culmination of a project which had begun in 1989, when Robbie Lyle, the then landowner of the Bonython Estate on the Lizard in Cornwall, began exploring the possibility of building a wind farm on a 200 acre area of the estate which was relatively unproductive in agricultural terms.

He approached Vestas, the Danish wind turbine manufacturers and arranged to carry out the necessary feasibility studies. These included measuring the wind speed and preparing an environmental impact assessment of the project.

## Complex Planning Process

The planning process was complex and took nearly three years to resolve.

After outline planning permission was obtained in 1992, the team was strengthened by Robbie's wife, Tessa, a former litigation partner at Herbert Smith who became managing director of The Cornwall Light & Power Co. Limited, the company formed for the purpose of the project.

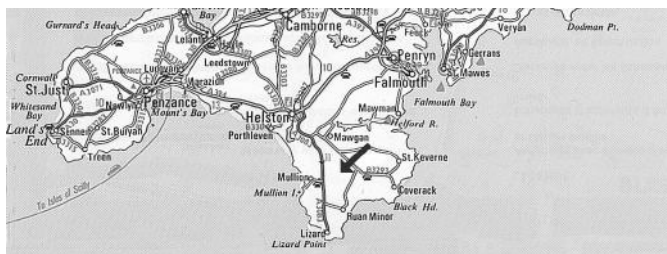
"It was very tense at that time", Tessa Lyle explained, "we were having to negotiate and settle a number of planning conditions whilst at the same time negotiating with the funders and keeping the proposed construction timetable alive while knowing that the project was less and less bankable as the delays ate into the fixed term electricity purchase agreement which had been secured".

Following sterling's exit from the ERM which occurred during the financing negotiations, the funding became so tight that it was necessary for Vestas to lend support to the project by agreeing to convert half its future maintenance fees into equity.

CLP entered into a turnkey contract with Vestas to build the project, whilst CLP itself assumed responsibility for building an electricity substation on the site and the connection to the grid.

## Energy production

Once built, the 14 turbines generated an average annual energy production of 11.5 GWh, equivalent to the annual electricity required by 3,500 homes. The cash flow from the sale of the electricity enabled CLP to repay all its bank borrowings by 1998.



"Once our bank borrowings had been repaid", Tessa Lyle explained, "the pressure eased but we entered a period of insecurity with low market prices for electricity. It was quite an adjustment moving from a 6 year fixed price contract to independent trading at a time of transition in the electricity market".

## Future Strategy

In 2004 the directors of CLP began considering their strategy for the future of the wind farm which included the possibility of replacing the turbines with the latest generation of turbines. But in the light of the developments that had taken place in the industry since the project's inception they concluded that such a major step could only be undertaken by a larger operator. They therefore took the decision to sell the wind farm company.

The interest generated was considerable, the successful purchaser being a newly created AIM listed company called Renewable Energy Generation formed in 2005 with an experienced team to invest in renewable energy projects.

# Client Profile: Bennetts Associates

Bennetts Associates leapt to public prominence in October 2005 when its Jubilee Library in Brighton won the Prime Minister's Better Public Building Award and it was shortlisted for the RIBA Stirling Prize for Architecture for the same building. This crowned a remarkable year for the practice which included the appointment to design the new Royal Shakespeare Theatre in Stratford-upon-Avon.

## Functional yet elegant

Bennetts Associates was founded by Rab and Denise Bennetts in 1987.

In stark contrast to some of the major office buildings it has designed, its own offices, which it built in 2002, are in a converted 18th century barn and a 1950's printworks in Clerkenwell, London. Yet this refurbishment demonstrates many of the qualities of its larger projects.

"The practice's aim", Rab Bennetts explains, "is to produce functional yet elegant architecture of the highest quality. Technical innovation, performance and delivery are therefore given as much weight as the conventional values of form, space and light.....it has achieved architectural prominence by creating well engineered, energy efficient buildings of all kinds."

## Eclecticism

The firm's notable cultural commissions belie the fact that it has won sixty awards since 1991 for a diverse portfolio of projects, ranging from major urban developments to educational buildings, and from public commissions to transport projects.

In recent years Bennetts Associates has completed well over 100,000 sq.m of office developments, including five substantial headquarters buildings for PowerGen, John Menzies, BT, Wessex Water and Sophos.

The firm is currently working on a major project in Holborn known as New Street Square which comprises four office buildings and retail space around a new public square.

Its work in the educational sector includes City University's Cass Business School, and its transport projects include the Heathrow Visitors Centre and a major extension to Gatwick's North Terminal.

Hampstead Theatre



Jubilee Library Brighton

## Appropriate Settings

The Hampstead Theatre is one of its most endearing buildings. Completed in 2004, the 332 seat theatre has added style to a depressing corner of Swiss Cottage, London. Like many of Bennetts Associates' projects it has helped to revitalize an area which had been neglected for decades.

The essential characteristics of the firm's work is best described by Peter Carolin, former Professor of Architecture at the University of Cambridge, in a recent book on Bennetts Associates entitled Four Commentaries: "It is perhaps in the practice's ability to create appropriate settings for human activity that the source of its success in making buildings that are a pleasure to use lies."

NELLEN advised Bennetts Associates Limited on the introduction of an EMI share scheme for its key executives.

# Directors' Fiduciary Duties

(continued from front page)

When the matter came to light, Crown Dilmum sued Mr Sutton who had in the meantime left the company. He raised a number of defences including the fact that he had a genuine belief that Crown Dilmum had no interest in the opportunity and that, in view of the fragile financial position of its parent company, it was not in a position to pursue the opportunity.

The court rejected his arguments and held that Mr Sutton was in breach of his fiduciary duty. It said that, even if he genuinely believed (which the court did not think was the case) that Crown Dilmum was not interested in the opportunity or could not have pursued it, this was irrelevant to the outcome of the case. He was obliged, nevertheless, under fiduciary rules applying to directors, to make full and frank disclosure of the opportunity to Crown Dilmum and to seek its approval for the diversion of the opportunity to another company.

Mr Sutton was held liable to account to Crown Dilmum for any profit which he had made, or which he might make. FRP was also held liable to account for any profit it made as it had participated in the breach of duty and, as a consequence of Mr Sutton's involvement as its controlling mind, had actual knowledge of his dishonesty.



Bennetts Associates Offices

Cass Business School Atrium



## Enterprise Management Incentives: Growth continues

The rate of introduction of Enterprise Management Incentives has accelerated in the last year. As of October 2005, a total of over 6,000 companies had notified HM Revenue and Customs that they had adopted EMIs. This is a 50% increase since the beginning of 2004.

The success of EMIs is due not only to the improved climate for share based rewards, but above all to the beneficial tax treatment - principally the fact that business assets taper relief begins from the date the EMI qualifying options are granted and not from the date they are exercised.

The qualifying criteria have been relaxed and expanded in the five years since EMIs were first introduced. For example, there is no longer any restriction on the total numbers of employees who can be awarded options, so EMI options are being used as incentives either for a single managing director or for the whole workforce.

However, not more than £100,000 worth of options (based on the market value of the shares at the time of grant) are capable of being awarded to a single qualifying employee. Although this limit is sufficient for most option awards when minority discounts are factored in, it reinforces the need for companies to put in place EMIs whilst their valuations are low.

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