Legal Aspects of Marina Development and Operation

Sarah Dromgoole©

Lecturer in law, Faculty of Law, University of Leicester

Nicholas Gaskell©

Senior lecturer in law, Institute of Maritime Law, Faculty of Law, University of Southampton

Malcolm Grant©

Professor of Law, Department of Land Economy, University of Cambridge, U.K.

[This is a version of a chapter entitled "Legal Aspects of Marina Development and Operation", written with Dromgoole, S. and Grant, M. In: Blain, W., ed., *Marina Developments*, Southampton, Computational Mechanics Publications, 1993, Chapter 2 (17-59)]

Introduction

The law relating to the planning, building and operation of marinas is remarkably complex. There are problems arising from the distinct jurisdictional boundaries affecting land, foreshore, harbours, seabed, rivers and estuaries, each of which has its own structure of land ownership and is subject to different systems of regulatory control. And there is further complexity in the interrelationship between different sources of law: the common law relating to rights of ownership and navigation, the numerous private and local Acts of Parliament under which common law rights have been modified on a local and piecemeal basis, and general statute law, some of which applies to all property development, some of which is specific to certain areas (such as coastal protection), and some of which yields to modifications made by local Acts. This is not merely a conceptual problem: there may be very real practical difficulties in actually finding the documents containing the local legislation, or the charts and records referred to in them.

In short, there is in Britain no co-ordinated legal framework regulating river and coastal zone management and use. This chapter attempts to establish an outline structure, drawing together the provisions relating to marina development and operation. It is necessarily introductory rather than comprehensive. In other countries, the law may differ significantly, particularly where public control is concerned. Nevertheless, many of the problems discussed will be common to most systems.

It appears that the notion of a marina is changing from a boat yard offering simple berthing facilities towards the concept of a marina village. The essence of this marina village is that it is a combination of developments on land and water, usually developed and operated by a single corporate group, and designed to provide mooring facilities for pleasure craft allied to extra land-based facilities. The latter will now often include expensive, high class housing and/or commercial offices and shops. It is apparent that the varying sizes and purposes of marinas mean that it is not possible to discuss them as if all the problems relating to them are identical. Some are wholly

new constructions, others are extensions of existing facilities; some are designed to attract the public generally to the area, others are designed mainly for those whose boats are to be moored there; the proportion of houses, shops and offices will vary with each.

1 Private authorisation

1.1 Land ownership

The first step is to identify who owns what proprietary rights in the land affected by the development. There are two main categories: possessory rights of landowners and leaseholders, and proprietary rights exercisable by neighbouring owners, such as easements and restrictive covenants.[1] Development which interferes with any private rights is actionable in trespass, which may result in the granting of an injunction and/or the award of damages. Private rights may be overcome only by negotiated consent, or under statutory authority. In some cases Parliament has delegated powers to Ministers to authorise interference with private rights, and to convert these rights into entitlements to compensation (for example, the compulsory purchase of land); in other cases it may be necessary to seek Parliamentary authority directly by promoting a private Bill.

The distribution of land ownership hinges to a large extent upon the location and nature of the site. This results from the different legal regimes affecting dry land, foreshore, the bed of a non-tidal river, enclosed harbour or seabed. The first raises no particular problems peculiar to marina development, but the others require further comment:

Foreshore At common law, the foreshore comprises the soil between the high and low water mark of medium tides. About 55% of the foreshore of the UK. is owned by the Crown, and most of the remainder is in the Duchies of Lancaster and Cornwall. The Crown acts through its agents, the Crown Estate Commissioners (CEC), whose land management policies are therefore of importance in marina development, and are discussed further below. Various natural processes may lead to either a recession of tidal waters or to an encroachment of tidal waters onto land. In cases where the change is imperceptible in time there is a presumption of law that ownership rights change with the changed conditions.[2]

Sea bed Virtually all the seabed lying below mean low-water is owned by the Crown as far as the limit of territorial waters (12 miles).3 However, in some cases the ownership of the bed of a harbour has been vested in the harbour authority by grant or charter from the Crown, or by prescription. In other cases, parts of the seabed have been sold or leased.

Non-tidal rivers At common law, there is a presumption that a conveyance of land bounded by a non-tidal river conveys ownership of the river bed to the middle point of the river. This presumption does not apply from the point at which the river becomes tidal, where, as discussed above, the Crown is the prima facie owner of the foreshore and the seabed. However, riparian owners retain the right to have access to the sea at all times for the purposes of navigation.

Harbours Most harbour authorities do not own the bed of their harbour although they may own parts of it, such as the land enclosed within the docks. Instead, they may lease the seabed or foreshore from the Crown. They will own commercial land around the port itself. Their landownership rights may be restricted by local legislation.

From the above it will be clear that two landowners are liable to be particularly important in relation to marina development:

1.1.1 Crown estate commissioners

Where it is proposed to build a marina complex which will involve works below highwater mark it may be necessary either to purchase or lease the site from the CEC. In practice, the Crown Estate is very reluctant to sell freehold and it is much more likely that a lease or licence will be granted. In fact much of the foreshore is already held and administered, usually by local authorities or port authorities, under regulatory leases. In such cases, developers may need to approach both the lessee and the CEC. In other cases, the CEC have granted licences in respect of the foreshore or seabed and an area like the Solent is covered by a network of leases and licences.

In an era when public bodies are expected to operate efficiently, the practice of the CEC can be seen to have changed. At one time the CEC might have granted very long leases, for instance of 125 years. Now developers are finding that the term of the lease is much less[4] and the Crown Estate requires a share of the profit.[5] Their 1989 Report acknowledges that there is extensive scope for the Crown Estate to become involved in the further development of marinas.

1.1.2 Port or harbour authority

Most harbour authorities have inherited powers created by private Acts of Parliament which may well impose restrictions or limitations on the power to sell or lease surplus land. Since privatisation, ports have become even more aware of the need to operate on commercial lines. Transactions outside the statutory powers could be ultra vires. Thus it is necessary to consider the precise powers given by each Act. However, in practice, the special legislation of most harbour authorities in major ports contains a general power to dispose of land belonging to them in such manner as they think fit.[6] Sometimes this power is limited to land no longer required for the purposes of the harbour undertaking. It is arguable whether the creation of a marina falls within the general purposes of running a harbour.

1.2 Other rights concerning land

Leases Leaseholders of land falling within a proposed development will normally exercise all the powers of an owner and must be 'bought off' in the same way, unless the landlord can find some reason to forfeit the lease.[7] Of course, leaseholders can only transfer such interest as they have, for example for the unexpired portion of the lease.

Other property rights In land law the buyer takes subject to existing property rights such as easements and restrictive covenants. An easement is a right created by one property owner in favour of another property owner by agreement or through the passage of time. Thus, a lessor of a fitting-out shed may have had access to the river for many years and this could well have become a property right which would need to be bought out, or protected. Similarly, a restrictive covenant, imposing some kind of restriction on the use of land, may be created. Thus, land may be sold subject to a restriction, for example against the creation of places of entertainment. This would preclude development of pubs and restaurants unless the other property owners agree.

Ancient rights In certain places the Crown has granted areas of foreshore (and possibly even seabed) to manorial lords and others and such rights continue to

exist, for example over the bed of the River Beaulieu. In order to discover the extent of such rights, it would be necessary to discover the terms of the original grant or prescription.[8]

Licences Third parties may have a licence[9] to use, or gain access to, land or water. For instance, at an existing boat yard permission may have been given, expressly or impliedly, for neighbouring owners to put vessels in the water, or for the owners of vessels to moor at a quay or at buoys. These licences may be either gratuitous or contractual. The former, being created at will, could presumably be determined on notice. In the case of contractual licences, they must be terminated on the contractual period of notice or (in the absence of such a provision) within a reasonable period.

Private nuisance Landowners are entitled to be protected from nuisances which affect their use and occupation of land. An example of a private nuisance might be a case where excessive noise is generated, for example by the running of machinery or by party revellers. This may be particularly relevant where pubs and leisure facilities are included in residential marinas.

2 Public authorisation

2.1 Planning powers

2.1.1 Local planning authority

The scope of town and country planning controls The main system of public control over property development in Britain is now laid down in the Town and Country Planning Act 1990.10 Under this Act, building and engineering works are lawful only if they have planning permission or are exempted from that requirement. Marina development raises particular problems for planning control.

Local administration of planning control is vested in district councils and county councils. The county councils, which now exist only in the shire areas, have responsibility for strategic planning, and for control over development involving mineral extraction or waste disposal. The districts have responsibility for all other development control work, although they are required to consult extensively with the county and with other public agencies and private sector interests. All applications for planning permission are required to be made to the district council, but its powers in respect of applications extend only to land within the Local Government Boundary Commissions for England and Wales.

Where a river is used as an administrative boundary, it is customary for the boundary to be drawn along its centre line. Administrative jurisdiction then extends out to that point, and planning control is prima facie exercisable. For coastal boundaries the issue is more complex. The mean low-water mark is the normal limit, but there are several exceptions, such as enclosed bays and harbours for which the local planning authority is the harbour authority. Also, the limits may have been extended by local Act of Parliament.

The Local Government Boundaries Commission is given express power to review existing county boundaries, so as to extend them to include any area of the sea not included in another county, or to exclude an area of the sea presently included But there is a conflict between those provisions, and section 72 of the Local Government Act 1972, which automatically annexes to the parish (and hence to the district and county within which it lies) 'every accretion from the sea, whether natural or artificial, and any part of the sea-shore to the low water-mark'. This is the line which is accepted by the Department of the Environment, which maintains that the mean low-

water mark is the limit of local planning authority jurisdiction, although there are a number of exceptions, such as enclosed bays, and harbours for which the local planning authority is the harbour authority.

The Government's view is that this provides a sensible boundary:

> 'Once one goes beyond it, the normal considerations which local planning authorities take into account when considering planning applications, which relate mainly to the appropriateness of the proposed land use to the uses of neighbouring land, become of less importance. Once out at sea, issues of navigation and fishery have to be considered on which even coastal local authorities do not have, and generally do not need to have, any expertise.' 12

Local authorities generally have planning jurisdiction only in respect of land within their administrative boundaries and thus construction works in relation to a marina may fall outside their planning control. But there will usually be some on-shore component, such as access, parking or ancillary buildings, which will require planning permission. Where there are doubts about limits to off-shore jurisdiction, it will often be convenient for the developer and the local planning authority to agree that the project should be considered as a whole. But the further the development extends seaward, the greater the likelihood that private Bill authorisation (see further below) will be required and that planning issues will be dealt with by Parliament rather than the local planning authority.

Another potential difficulty with planning control over marina development is that control is limited to what the Act defines as 'development', which is 'the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land'. In their general analyses of the scope of this control so far as it applies to so-called 'operational development', the courts have drawn a distinction between works which permanently affect the physical state of the land involved, such as the erection of a building, and those which lack any permanent attachment to the land, such as the stationing of a caravan, which would not constitute operational development. In the context of marina development, the construction of moorings that were permanently attached to the land (or, subject to the arguments above, to the sea bed) would constitute 'development', but floating moorings secured by nothing more than an anchor or weight simply resting on the sea bed would not.

Planning permission is required for all development of land,13 but it is not always necessary to apply for it to the local planning authority. There is a series of general permissions granted by the General Development Order 1988,14 of which two have particular implications for marina development.

First, there is development which is specifically authorised by a private Act of Parliament, or by a harbour revision or empowerment order, or by any other Parliamentary order approved by both Houses of Parliament.[1s] The reasoning behind this provision is that works which have specific Parliamentary approval should not then have to cross the further hurdle of local planning control. Planning matters are taken into account in the course of Parliamentary proceedings on the Bill or order. But the local planning authority's approval is still required, before development, to detailed plans and specifications where the development consists of the construction of any building or pier.

The second category of development permitted by the GDO is development by statutory undertakers on operationalland.[16] A statutory undertaker is somebody carrying on an undertaking for which there is statutory authorisation, and the class includes dock, pier, harbour, water transport, canal and inland

navigation undertakings. In order to qualify for this permission, the works must satisfy three principal requirements. First they must be on operational land, which is land which is actually used for, or held for future use for, the purposes of the undertaking; as opposed to land simply owned by the undertaker. Secondly, the works must be undertaken by the statutory undertaker itself or its lessee. Thirdly, there is a functional test, namely that the development must be:

'(a) for the purposes of shipping, or

(b) in connection with the embarking, disembarking, loading, discharging or transport of passengers, livestock or goods at a dock, pier or harbour, or with the movement of traffic by canal or inland navigation or by any railway forming part of the undertaking.'

Finally, certain types of development are excluded altogether from that permitted by the GDO. Thus, the building of hotels is excluded, which may have implications for leisure developments in marinas. Similar rules apply to commercial buildings outside the area of the dock, pier or harbour concerned.

The extent to which this GDO permission might extend to marina development is probably very limited. The functional test, which dates back to 1948, was formulated with a view to the requirements of working docks, although paragraph (a), 'for the purposes of shipping', is prima facie wide enough to encompass marina development. But the main obstacles to reliance upon the permission lie in the requirement that it be operational land, and in the restrictions on the types of building allowed. It would be difficult to describe land that was no longer used for the purposes of a working port as operational land.[17]

Further, the exclusion of buildings not required in connection with the handling of traffic would restrict anything but the most basic marina scheme, though the permission might be useful in relation to small scale ancillary works. The GDO rights also have practical significance in setting the baseline for what the port authority might be able to do if planning permission were refused for the particular proposal, and this may be sufficient to induce the planning authority in a marginal case to accept the planning application as the lesser evil.

Applying for planning permission Where planning permission is required for marina development, a planning application must be made to the district council as local planning authority. That authority will normally have responsibility for dealing with the application, although aspects of it, for example, deposit of waste materials to reclaim land or to infill an existing dock, may fall to be determined by the county planning authority. The authority has eight weeks in which to determine the application, unless a longer time has been agreed with the applicant. The applicant has a right of appeal to the Secretary of State for the Environment.

Two features of the planning system are of particular importance to marina applications: environmental assessment and development plan criteria.

An EEC Council Directive[18] on environmental assessments has produced a number of pieces of D.K. subsidiary legislation. Under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988,19 planning applications for certain types of development must be accompanied by an environmental statement, and be subjected to a process of environmental assessment. Marina development is not within the category ('Schedule 1 ') for which assessment is mandatory in every case, but a 'yacht marina' is listed in Schedule 2 as a development where assessment may be required by the local planning authority if in their opinion the development 'would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location'.

The Secretary of State has advised[20] authorities that in general terms environmental assessment will be needed for Schedule 2 projects in three main types of case:

'(i) for major projects which are of more than local importance;

(ii) occasionally for projects on a smaller scale which are proposed for particularly sensitive or vulnerable locations;

(iii) in a small number of cases, for projects with unusually complex and potentially adverse environmental effects, where expert and detailed analysis of those effects would be desirable ai1d would be relevant to the issue as to whether or not the development should be permitted.'

If the applicants disagree with the planning authority's requirement, they may apply to the Secretary of State for a determination.

The 1988 regulations apply only to development for which planning permission is required. But for development falling outside the planning system there are parallel obligations concerning harbour revision or empowerment orders, under the Harbours Act 1964, and harbour works carried out below medium low-water mark for which planning permission is not required, and which are not authorised by a harbour revision order or private Act of Parliament. The procedure there is triggered by the need for consent to certain operations under the Coast Protection Act 1949 and the Merchant Shipping Act 1988.[21]

The local planning authority (and, on appeal, the Secretary of State) must determine planning applications having regard to the provisions of the development plan so far as material to the application and to any other material considerations. Development plan policies on river and coastal development are therefore of considerable importance. These will be found both in the structure plans prepared by the counties, though at a fairly unspecific level, and in local plans. In some cases there are subject plans - local plans which, instead of dealing comprehensively with the planning issues of a defined territory, deal with a particular subject such as mineral extraction or recreation. Some authorities also have a range of non-statutory policies, which have not been formulated through the statutory procedures, but which nonetheless are in principle capable of amounting to a 'material consideration' in determining planning applications. The decision-making process is open structured: the fact that plan policies favour marina construction is no guarantee that permission will be granted, nor vice versa.

2.1.2 Parliament

Private Bill procedure It is a fundamental principle that no citizen may, without lawful authority, interfere with any public or private rights. Lawful authority may be conferred by consent, or by an authorisation from a public authority exercising statutory powers. For the most part, authorisations required for marina development are so obtainable, but where there is no other means of obtaining an authorisation such as for obstructing public rights of navigation - it may be necessary to seek specific legislative authority from Parliament by means of a private Act. The circumstances in which private Bill procedure is normally resorted to were outlined in a speech in the House of Lords on April 27, 1988, by the Minister of State in the Department of the Environment (the Earl of Caithness) :22

'Firstly, it is to authorise activities not within the scope of planning legislation, such as dredging or works extending beyond planning boundaries - that is, as I have said,

seaward of mean low water; secondly, to amend existing legislation governing the development of the site; thirdly, to establish the developer as a controlling authority for the development, with the powers necessary for the proper regulation of the development; fourthly, to deal with the question of giving the developer immunity against actionable nuisance for infringing any common law rights, such as navigation and fishing, within the area of the development - I should mention here that a marina would otherwise be subject to these rights, and anyone could legally disrupt its operation by exercising those rights within it. Finally, legislation may be needed to overcome the problem of land which is subject to a public trust - for example, where a local authority wishes to develop a site which it owns for purposes not covered by existing powers.'

Resort may be had to private Bill procedure only when the necessary authority cannot be obtained elsewhere, and the promoter is obliged to prove that this is the case. The only exception to this rule arises with harbour revision orders, where the right to proceed alternatively by private Bill is reserved by legislation.

The effect of authorisation by private Act is that planning permission is granted automatically for the development, under Part 11 of the GDO, discussed above. This may have advantages to developers, because the Parliamentary route to approval may be swifter than through planning control and the likelihood of a protracted public local inquiry. But the Parliamentary route may be equally perilous. In 1988 the House of Lords unpredictably overturned the decision of its own select committee and threw out the Swanage Yacht Haven Bill at Third Reading on the apparent ground that a town poll had shown that there was strong local opposition to the measure. There is a body of opinion within Parliament as well as outside that Parliament lacks the time and the expertise to scrutinise the planning implications of such development proposals.

In 1988 the Joint Select Committee on Private Bill Procedure recommended that the permitted scope of orders under the Harbours Act 1964 (see below) should be broadened, so as to allow general powers to be included and a wider range of development, including marinas, to be authorised. Its Report was debated in both Houses and the Government has now published its formal response in the form of a consultative document.[23] The Government announced its broad acceptance of the Committee's recommendations with regard to harbours. In particular, the Government proposes to remove the limitation which at present restricts the use of harbour empowerment orders to developments directed towards the transport of goods and passengers by sea (see below). This will make it possible to use empowerment orders for the creation of marinas and recreational harbours.[24] Once comments received in response to the Consultative Document have been taken into account, the Government intends that this and its other proposals be implemented at an early opportunity.

Harbour revision and empowerment orders In order to avoid some of the problems caused by the recurring need to return to Parliament for amending private Acts every time there was some need for a change in the organisation of a port, Parliament enacted the Harbours Act 1964. This introduced a simplified set of procedures called Harbour Revision Orders (see s.14). These Harbour Revision Orders could be made, for instance, to reconstruct the harbour authority, or for varying or abolishing certain duties or powers imposed or conferred on the authority by local and private Acts. S.14(2A), added by the Transport Act 1981, extended the range of Harbour Revision Orders to include 'repealing superseded or obsolete or otherwise unnecessary local statutory provisions ... '. The circumstances under which a revision order can be made are accordingly very wide and the Secretary of State is given much discretion. However, there are doubts as to how far the Secretary of State can legislate using such orders to

repeal or amend existing local Acts in order to accommodate a marina development.[25]

Harbour Empowerment Orders under s.16 permit the construction of harbours where there are no existing powers. At present the use of Harbour Empowerment Orders is restricted to developments directed towards the transport of goods and passengers by sea. Therefore, they are only applicable where the harbour is for commercial, rather than leisure, purposes. The Government has proposed reform in this respect (see above).

2.1.3 Problems with existing private legislation

Reference has already been made to the need to check on the powers of the harbour authority, or other body authorised by private legislation, to undertake development. The powers of the harbour authority in Southampton, for instance, can only be established by consulting a huge range of Acts. The applicable legislation includes the Southampton Harbour Acts 1863-1947, the subsequent legislation involving the nationalisation and privatisation and the current bye-laws. The legislation has incorporated the Harbours and Docks, Piers Clauses Act (HDPCA) 1847. Reference must also be made to the various Southampton Docks Acts that may continue to be relevant.

A typical enabling power would state that in 'constructing the works ... the Company may deviate laterally from the lines thereof as shown on the deposited plans to any extent not exceeding the limits of deviation shown on those plans and they may deviate vertically from the levels of the said works ... to any extent not exceeding five feet upwards and ten feet downwards. Provided that no deviation either lateral or vertical below high water mark shall be made without the consent in writing of the Board of Trade [now the Department of Transport] .. .'.26 This type of provision, giving a margin of error, is quite common in the private Acts, but it does give rise to measurement difficulties years later. There will always be a question of whether the Act does in fact authorise the particular works in question.

How far do these Parliamentary quay lines bind persons other than the statutory undertakers? In general they should not. They are development limits put on particular undertakers who may have needed a private Act for a variety of reasons, not all of which will be relevant to later developers. However, Parliamentary quay lines may bind a wider class of persons. In the Southampton Docks Act 1843 s.55, Parliamentary quay lines were imposed on the development of the River Itchen by any persons. The section recites that, as there had already been expensive litigation about whether recently constructed wharves were 'common nuisances' (as they obstructed traffic), it was 'expedient for the interests of all parties and of the public that such rights should be defined by the authority of Parliament'. The section then referred to a line of inclosure and embankment along the river that would not be prejudicial to navigation. S.56 declared that it shall be lawful for any owner of any mudland between highwater mark and the Parliamentary quay line laid down by the Act to enclose or embank the mudland to or from a wharf quay or landing place, or other convenience. Any works which project beyond the line shall be deemed and declared a common nuisance and liable to be abated and removed accordingly. The effect of this section was to create an irrebuttable presumption that the works were a nuisance.

A further complication was introduced by s.58. This provided that it shall not be lawful for the Dock company or any person acting by virtue of the Act to construct or carry on any work below highwater mark without the consent of the Admiralty [now the Department of Transport]. Once again, a very careful legislative search is required

to ensure that powers are extant and relevant. To be sure that none of these private Act provisions have been repealed or superseded may involve tracing the whole legislative history of a port.

Private Acts may also contain agreements which are given statutory force and which could remain binding on successors in title. The South Western Railway Act 1909, s.17, gave effect in its Schedule to an agreement made between the Railway Company, the City Council and Harbour Board whereby land was sold to the Company to construct works. Clause 5 of their agreement states that the Company should not on this land 'construct or permit any public promenade or pier to which the public shall have access as a public walk or promenade either free or on payment of a toll nor shall they in any way interfere with injure or prejudice the traffic at the Town Quay or Royal Pier but shall use [the land] for the exclusive purposes of the dock undertaking'. This agreement would probably have effect as a binding contract,27 although it could presumably be varied by the consent of the parties (for example the City Council and ABP, the inheritors of the works).28

2.2 General administrative powers

2.2.1 Department of transport

There are many different statutory mechanisms by which the Department of Transport (Dtp) may be involved in marina development. The Secretary of State may be the appropriate person, taking on the role of the Board of Trade or the Admiralty, to give consents required in particular private Acts. There may also be involvement in harbour revision or empowerment orders. Most recently, there may be wide powers to ensure there are adequate security arrangements in marinas. The Dtp may also be entitled to intervene in casualties or emergencies in marinas under the Prevention of Oil Pollution Act 1971, or (ultimately) the Dangerous Vessels Act 1985.

(i) Protection of navigation

The main interest of the Dtp in marina development and operation concerns the safety of navigation and arises under the Coast Protection Act 1949. S.34 requires the written consent of the Secretary of State for Transport before certain operations take place on the seabed. First there is the construction, alteration or improvement of any works on, under or over any part of the seashore lying below the level of mean highwater springs. These works would include piling, the installation of pontoons, jetties and moorings. The second type of operations are those involving the deposit of any object or any materials on the seashore. The third type of operation covered is the removal of any object or any materials from any part of the seashore lying below the level of mean low-water springs. These operations would cover both land reclamation and even the placing of the smallest mooring base. However, all three types of operation are subject to the overriding condition that 'obstruction or danger to navigation is caused or is likely to result'.

The attitude of the Dtp to the operation of s.34 is that any works placed in tidal waters where there is navigation would, almost by definition, constitute obstructions to navigation, although the degree of hazard to navigation will obviously vary. Therefore, the Department's prior consent in most cases is required and it is the practice for the Dtp to consult navigational interests before deciding on a case. If consent is given, conditions would invariably be attached. The most important would cover marking (where necessary), promulgation to the mariner, and abatement, i.e. removal when finished with.

The EEC Council Directive on environmental assessments, to which reference has already been made, also has effect where the Secretary of State has to consider s.34

cases (or where a harbour authority gives notice under the Merchant Shipping Act 1988 s.37 that application has been made for a licence to carry out works). The Harbour Works (Assessment of Environmental Effects No.2) Regulations 1989[29] lay down detailed rules affecting developers including, inter alia, requirements as to environmental assessments and local publicity. Failure to supply the statement could result in abatement of the works.

A number of significant operations are excepted by s.35 of the 1949 Act. Three in particular may be mentioned. The first excepts operations on the seashore lying within any area enclosed by a lock or other artificial means against the regular action of the tide. The second exception concerns dredging operations (including the deposit of dredged materials) authorised by any local Act (see also 3.1.4, below). Many harbour authorities are empowered to permit dredging and this exception would prevent conflicting decisions. But the private legislation must be scrutinised closely in order to see whether it does actually 'authorise dredging'.30 Thus, the dredging and deposit of material for reclamation would require the consent of the land-owner (for example the CEC) and either the Secretary of State or the harbour authority. The third exception would be coast protection works by the developer which had already been approved by the Secretary of State.

Under s.36 the Secretary of State can serve a notice requiring removal or alteration of the works by the undertaker. In an appropriate case the Secretary of State may have them removed.

As noted below, local legislation may give the harbour authority a licensing power over harbour construction. Before the Secretary of State can give his consent under s.34 it is often necessary for the licence to be granted.[31] To avoid this duplication of effort, and to reduce the inevitable delays, the Merchant Shipping Act 1988 s.37 empowers the Secretary of State to promote regulations which would extend the licensing power of the local harbour authority by giving it the type of powers now exercised by the Secretary of State himself under ss.34-36 of the Coast Protection Act 1949. In effect, the detailed decision making powers would be transferred in the first instance to local level. However, the regulations could require that full notice be given to the Secretary of State[32] and that licence applications and grants should be advertised to the public. There could also be an appeal to the Secretary of State against decisions to grant or renew a licence and in respect of conditions attached to any licence.

Even if there is no appeal, the Secretary of State can, under subs. (3), serve a notice on the authority (within 60 days of its decision) stating that he is going to redetermine the decision.

It should be noted that the Merchant Shipping Act 1988, s.36, remedied a particular defect of the s.34 procedure, namely that it did not allow the Secretary of State to take account of the use that will be made of the works once they have been completed. The Secretary of State will now be able to take account of the effect which vessels using the marina might have on navigation and will be able to impose conditions on its usage. The powers are only exercisable in relation to obstructions or dangers to navigation and not to prevent general inconvenience to local residents, for example by increased motor traffic.

The new s.34(4A) of the Coast Protection Act 1949 makes it clear that the conditions of use may bind not only the persons undertaking the works, but also any person owning, occupying or enjoying the use of them. This could cover yachts permanently moored at a marina as well as those visiting. The type of condition to be expected can be seen from s.34(4A)(c) which relates to the provision of lights and other aids to navigation, such as guard ships. The Secretary of State is given express power to vary the details relating to such

equipment, even after the main construction work is completed.[33] The intention was to take account of changes in shipping patterns, for example by requiring the updating or upgrading of markings.

A new s.36A was added to give the Secretary of State power to deal with emergencies, for example where a vessel collides with the works. The person to whom the consent was originally given may be required to install navigational aids, such as emergency lighting. If that person fails to perform the work the Secretary of State may arrange for it to be done and later charge the costs to him. But the expense may also be charged to any of the others specified in the new s.36(4A), i.e. those who own, occupy or enjoy the works.

(ii) Security measures

Many marina operators will try by contract to impose security conditions on those using their facilities (see generally 4.2, Liabilities in Contract and Tort, below). The operators may now face security burdens imposed on them by the Government. The Aviation and Maritime Security Act 1990 has been enacted to extend to ports and harbours the wide powers already granted to the Secretary of State in respect of airport security. These powers were considered necessary to combat the threat from terrorists. There have been recent incidents involving ships in the Mediterranean, for example in 1987 the attack on the Greek passenger ship *City of Poras* and the hijacking of the French pleasure craft *Silco.* While the threat to a small marina might be slight, there may be greater risks if the marina forms part of a port complex where there is commercial shipping.

Under the Act harbour authorities may create temporary or permanent 'restricted zones' (S.20.) for example around passenger terminals. There is no right of compensation if such zones restrict marina operations. Moreover, those carrying on 'harbour operations' may be required to promote searches of persons and property on their land (S.23.) or prevent acts of violence against ships within areas controlled by them (S.24.). All this may involve expense in the hiring of private security guards.

The mechanism by which the Secretary of State will enforce security is through the issuing of statutory 'Directions', backed by enforcement notices (S.29.). The Directions could even require buildings to be constructed, altered or demolished for security purposes (S.24 and see s.26(6)). Such Directions in respect of land within harbour areas would override planning laws and private property rights, for example where a harbour authority is obliged to construct a security wall on marina land.[34] There are limited rights of compensation for third parties whose property interests are affected by such building work, but the payment will be made by the person who received the Direction, rather than the Dtp. (S.43 and Schedule 2.)

Wide powers of inspection are given to maritime security inspectors authorised by the Secretary of State (S.36). Ships (and yachts) may be inspected and detained (Ss.35, 36 and 21).

The 1990 Act provides a framework which may be used by the Secretary of State in relation to each port, requiring differing levels of security in each. At this stage it is impossible to predict the extent of any restrictions: what is clear is that marina operators (and those living and working near them) may face inconvenience and expense in complying with security requirements.

2.2.2 Docks and harbours

It appears that many marinas are built within the limits of jurisdiction of harbour authorities and most harbours themselves are managed under statutory powers.[35] Most of the private Acts that established the various ports made use of the general code of

powers contained in the HDPCA 1847. The private legislation may prevent persons other than the harbour authority from constructing works below high-water mark. A marina developer who needed to construct piling for pontoons would then have to obtain a licence from the harbour authority. There is some doubt as to whether this licence can have the effect of preventing the developer being liable for a nuisance by obstructing the navigation. If so it may remove the need to obtain separate legislation permitting the activity. The answer will depend on the particular wording of the private legislation and whether there is a necessary inference that the giving of permission must conclusively grant rights to perform the work. There is some support for this inference.[36] It might be different where the wording merely requires the 'consent' of the authority. In any case the permission of the Secretary of State under s.34 of the Coast Protection Act 1949 will still be required.

In many ports the harbour authority could have a potential conflict of interests in that it may wish itself to become involved in leisure developments. The question arises as to whether, as an authority, it is entitled, when exercising its licensing discretion, to take into account its own commercial interests and refuse consent to a particular marina developer. There is authority to suggest that competition with authorised works is a relevant factor.[37] The contrary argument is that this would be an abuse of powers and subject to judicial review.

The day to day *regulation* of harbour users will be undertaken by the harbour masters and their subordinates, who will either exercise powers given directly by the]847 Act or under the bye-laws. S.51 of the 1847 Act allows the harbour master to give 'directions'. These may regulate times and manner of entry to berths, mooring positions and places to land passengers. Specific powers are given, for instance, to remove vessels that are obstructions. None of these powers specifically allow the harbour master to prohibit the creation of a marina, although they can seriously impair its use. The powers would not normally be available to the private harbour master of a marina.

Most bye-laws are concerned with operational matters and may restrict the common law right of navigation which marina users would otherwise expect to exercise. It will be common to have a provision that forbids the laying down of moorings or buoys without the permission of the harbour master. This could cover pontoons and other marina moorings. The bye-laws may also prohibit the discharge of rubbish or other material. The rules as to compulsory pilotage are unlikely to affect the marina operator or user as, under the Pilotage Act 1987 s.7(3), a pilotage direction shall not apply to ships of less than 20 metres in length.

Conservancy functions include the lighting and buoying of the harbour, the removal of wrecks and other obstructions and maintenance dredging, i.e. to maintain harbour channels. The harbour authority will normally wish to charge for its various services and facilities. Harbour dues have traditionally been charged against ships using a port, but there is a practical difficulty in collecting dues from large numbers of individual yachtsmen. The harbour authority may wish to simplify matters by charging marina operators, leaving them to collect contributions from berth users. The Harbours Act 1964 ss. 26-27 A removed many restrictions on the charging of dues, but largely left the right to charge dues (other than those in respect of ships, passengers and goods) to local legislation. It will be necessary to scrutinise it very closely to see if charges may be made against individuals and at what level. In practice, there is likely to be a wide provision such as that applying to ABP under the Transport Act 1981, Sch. 1, para. 3(1) whereby ABP is given powers 'to make such reasonable charges for its services and facilities as it thinks fit'.

The right to charge persons for operating moorings may arise through this sort of power or through the power under bye-laws to impose conditions on the placing of

moorings.

Marina operators themselves may need to undertake periodic dredging - for example in Lymington the two marinas are responsible for their own dredging subject to control by the harbour authorities. The private legislation in many harbours may prevent persons other than the harbour authority from dredging without first obtaining permission in the form of a licence from the authority.38

2.2.3 Water authority jurisdiction

The Water Act 1989[39] provided for the privatisation and restructuring of the water industry. The National Rivers Authority (NRA), a public body, was 'established to undertake the functions of the former water authorities in relation to the control of river and coastal pollution, land drainage and flood defence, fisheries and navigation.[40] Much of the prior legislation on these areas remains, but there are significant changes in the field of water pollution. Part 11 of the Control of Pollution Act 1974 has been replaced and there are a number of new pollution-prevention measures.

The Land Drainage Act 1976[41] gives the NRA certain powers in relation to drainage. The NRA is responsible, in respect of its land drainage functions, for the 'main rivers'. It is likely that any river in which a marina is built will be a 'main river' for these purposes. It is unlawful to erect any structure in, over or under a watercourse which is part of the 'main river', except with the consent of, and in accordance with, plans and sections approved by the NRA.42 Further, no person shall, without consent, undertake any work of alteration or repair on any structure in, over or under such a watercourse if the work is likely to affect the flow of water in the watercourse or to impede any drainage work. The NRA must not unreasonably withhold its consent, but it may impose reasonable conditions as to the manner in which the work is carried out. It appears that the granting of NRA consent for marina developments is virtually a formality. The NRA's only consideration is whether the development will adversely affect land drainage. It is not concerned with the hydrological aspects of the river. Before taking a decision on a planning application relating to development in the bed of, or on the banks of, a river or stream, the district authority is required to consult with the regional NRA.43

If any work is done in contravention of these provisions, the NRA may remove or alter the work and recover the expenses incurred.

2.2.4 Local authority bye-laws

Local authorities are empowered by the Public Health Acts to make bye-laws to regulate certain recreational activities on the coast and these powers may extend 1,000 metres seaward of low-water mark. Such bye-laws will not affect construction of the marina, but they could have an impact upon the operation of boats using the marina.

2.2.5 Other bodies

H.M. Customs and Excise The Commissioners of Customs and Excise (CCE) exercise authority under the Customs and Excise Management Act 1979. Under s.19 they may appoint as a port for the purposes of customs and excise any area of the U.K.

The basic difference between a marina and a commercial port is that for the marina no formal Customs approval is needed in advance for the construction and operation of the facilities such as moorings and wharves. The commercial port may be defined by Order and will probably be surrounded by a Customs fence. Pleasure craft are not required to enter any particular port or place and if developers wish to

construct a marina in an obscure creek, the CCE cannot stop them. It might be argued that Customs controls could be improved if all visiting yachts were obliged to land in approved areas. But the sheer difficulties of enforcement would be daunting.

S. 81 gives the CCE power to regulate small craft (i.e. ships under 100 tons registered). Accordingly, in the Pleasure Craft (Arrival and Report) Regulations[44] the Commissioners have used their powers to require inward reporting and to regulate the unloading and removal of imported goods (S.44.) in respect of pleasure craft.

The biggest worry of the Customs when considering marinas is drug smuggling.

There are real resource problems in policing a major pleasure craft area such as the Solent, which may have 50-60,000 vessels. It is apparent that the Customs may require certain facilities to be present in order to make these provisions work. There is no obligation on the developer to supply the Customs with land accommodation or a berth for mooring patrol craft. There is no tight to a waterside presence as such. However, there is a right of access given by s. 82.

Although there is no obligation to provide a post box and a telephone box, their provision could possibly be made the subject of planning approval. And, in practice, the marina operator will keep a stock of forms and a box as a service to clients.

H.M. Immigration Office The Immigration Service receives its authority from the Immigration Act 1971. It has no right of veto over marina developments, although a number of offences may be committed. Schedule 2 of the 1971 Act gives power to Immigration Officers to examine any person who arrives in the U.K. by ship in order to determine whether they have, or should have, leave to enter. In practice, the Immigration Office's requirements are dealt with via the Customs reporting form (see above).

H.M. Coastguard The Coastguard is responsible for rescue, safety and pollution. It has few legal powers, such as it does have relating mainly to Customs and Excise, Sea Fisheries and Receiver of Wreck duties.

Port Health Authority Port Health Authorities (PHA's) are constituted under the Public Health (Control of Diseases) Act 1984, s.2. The respective powers will be governed by the Public Health Acts 1936 onwards and subordinate legislation made under them.

The PHA's main concern with marinas is over the importation of animals, although it will also enforce health legislation relating, for example to food hygiene on vessels and the relevant parts of the Control of Pollution Act 1974. The PHA may be the responsible authority to deal with rabies control under the Animal Health Act 1981 and it will also be responsible for enforcing the general rules, for example relating to animal welfare and hygiene.[45]

In none of its functions can the PHA require its consent as a precondition for marina development or operation. It is not unusual for the PHA to be consulted in the planning stages and it will normally express a view on the provision of adequate public toilets and shore reception facilities for wastes produced onboard vessels. Under the 1981 Act it may enforce animal quarantine anchorages. Like the Customs, they do have extensive enforcement powers of which the operator ought to be aware.

Health and Safety Executive The Health and Safety Executive (HSE) is governed by the Health and Safety at Work Act 1974 and the detailed regulations made under it. The HSE is not given any specific powers to regulate marinas or to veto them on the grounds that the marina is inherently unsafe or is being operated in an unsafe way. It is much more likely to become involved after an accident to an employee or member of the public or if a specific complaint has been made to it.

However, HSE inspectors have very wide powers (see s.20). Under s.21 they can

issue an improvement notice requiring remedial action to be taken. Under s.22 they can issue a prohibition notice in respect of activities involving a risk of serious personal injury. Such a notice in relation to a lock gate might cause serious commercial disruption. Moreover, prosecutions may be brought if facilities such as fences or walkways are unsafe.

As already noted the I-ISE does not have a formal role in consents: it is not a licensing body, but a law-enforcer. Nevertheless, its informal consultative role cannot be ignored, particularly as it is likely to be influential in the planning process. There will usually only be direct involvement if the proposed marina is near to a 'notifiable installation' from which there may be a risk of danger. The relevant regulations are the Notification of Installations Handling Hazardous Substances Regulations 1982.[46] As most marinas are situated in ports there may be many industrial plants near the proposed site which could be a threat. In order to prevent accidents arising from industrial activities involving dangerous substances, the EEC Council adopted a Directive in 1982 which is implemented in Britain by the Control of Industrial Major Accidents Hazards Regulations *1984Y* Under the 1984 Regulations there would be some form of consultative zone around the site. In accordance with its general advisory functions the HSE would probably feel itself obliged to consult with the local authority and to advise it of the safety implications of constructing nearby a residential marina. There will probably be few occasions when its advice would not be accepted. In the case of a planning authority disagreeing with advice that such a marina would be unsafe, the HSE does have a direct line to the relevant Secretary of State (in this case Environment) and could ask the Secretary of State to call-in the planning application so that it may be dealt with by the Minister directly.[48]

3 Interference with other coastal interests and activities during development and operation

Coastal areas are under increasing pressures from various activities, uses and interests. Such activities are potentially conflicting with one another and they are controlled by a multiplicity of organisations. It is necessary to distinguish interests which may involve legal restrictions upon a marina's development or operation, from those where some form of consultation would be appropriate - or even expected - although this is not a legal requirement.

3.1 Commercial activities

3.1.1 Pipelines, cables and sewage outlets

Many pipelines and cables exist on the seabed and they are owned by a number of different bodies, for example British Telecom, public gas suppliers, Electricity Boards, the NRA and water companies, the MoD and oil companies. The Crown Estate grants leases or easements of the seabed and foreshore in order that pipes or cables can be laid. Such leases generally extend some distance either side of the cable or pipe in order to form a protection zone.

Some pipelines and cables are marked on Admiralty Charts and there are certain defined pipeline and cable areas in which anchoring is prohibited by statements on the Charts. It appears that these prohibitions have, in themselves, no legal force and simply act as a warning. However, within a harbour area they may well be given legal force by the harbour authority's bye-laws. It appears that a pipeline does not qualify as an 'installation' for the purposes of the Petroleum Act 1987, which provides for automatic safety zones around certain offshore installations.[49]

The general position regarding subsea cables and pipelines is that their owners may have a cause of action in negligence and possibly also in criminal law (see

below) if damage is caused to their installation. There do not appear to be any statutory powers to impose exclusion zones in this regard. The various owners listed above would expect to be consulted regarding the location of a proposed structure to avoid the risk of damage to their installations.

The Submarine Telegraph Act 1885 provides a criminal sanction for subsea cable or pipeline damage caused wilfully, or through culpable negligence.[50]

3.1.2 Fisheries

There are various public and private rights to fishing in certain areas and infringement of these rights by marina developers or operators may give rise to civil or criminal liabilities. A fishery owner who has suffered damage to his fishery may be able to bring proceedings for trespass, nuisance or negligence.

Two bodies - local fisheries committees and the NRA - have powers to regulate and protect fisheries. The Sea Fisheries Regulation Act 1966 (s.l) establishes local fisheries committees[51] to regulate fisheries within Sea Fisheries Districts. One of their particular concerns is to protect shellfish beds.[52] The NRA is particularly concerned with freshwater fish, such as salmon and trout, and with damage to fisheries caused by pollution. 53 Both bodies have power to make bye-laws.

Under the Sea Fisheries (Shellfish) Act 1967 (s.l), a fishery for shellfish can be established on any part of the shore and bed of the sea, or of an estuary or tidal water. It is an offence, within the area of a shellfish bed or private oyster bed, to disturb or injure (except for a lawful purpose of navigation or anchorage) the shellfish, the bed or the fishery; to dredge for any substance except under a lawful authority for improving the navigation; to deposit any substance; to place anything prejudicial or likely to be prejudicial to the shellfish bed except for a lawful purpose of navigation or anchorage (s.7).

A marina operator who puts into any waters containing fish any liquid or solid matter so as to cause the waters to be poisonous to fish or the spawning grounds, spawn or food of fish also commits an offence.[54]

3.1.3 Dumping

The Food and Environment Protection Act 1985 Part II regulates dumping operations. A licence is required from the Minister of Agriculture, Fisheries and Food for the deposit of substances or articles in the sea within U.K. territorial waters from, inter alia, a vessel or 'marine structure' (s.5).

Certain operations that do not need a licence are specified in the Deposits in the Sea (Exemption) Order 1985.[55] These include: the deposit from a vessel or marine structure of sewage originating on the vessel Or marine structure; and the deposit of domestic waste originating in, or on, the vessel or marine structure, so long as it is not bulky waste. However, the deposit at sea of dredged spoil does require a licence and this may be relevant in marina construction.

3.1.4 Aggregate extraction

In order to dredge for marine aggregates (i.e. sand and gravel), licences may be required from: the Crown Estate Commissioners (CEC),56 the coast protection authority (CPA),57 the Dtp,58 and the port authority. 59 Areas of the seabed are licensed in blocks and information regarding which areas are licensed may be obtained from the licensing authorities.[60]

Many marina developments involve extraction, either for the purpose of achieving better access, or for the purposes of reclamation, or both. Under s.2 of

the Coast Protection Act 1949 CP A's or Boards may be set up 'for the protection of land'. CPA's are normally the council for the maritime district in question. Under s.18 it is unlawful to excavate or remove any materials on, under or forming part of any portion of the seashore to which the section is applied. S.18 does not apply automatically to every area. A CP A has to make an order applying the provisions of the section to the seashore within its area.

For these purposes the 1949 Act excludes a large number of ports. The rationale for the exclusion of larger ports is presumably that they have a harbour authority which will make the decision on the basis of its powers to restrict dredging.

There is the possibility of applying to the CPA for a licence to carry out the proposed works. The licence would not legitimate, however, action that would otherwise be unlawful, for example if it created a public nuisance.

3.2 Environmental interests

3.2.1 Nature conservation

Areas with some kind of conservation status, for example National Parks, Nature Reserves, Sites of Special Scientific Interest and Areas of Outstanding Natural Beauty extend over many coastal areas and marina developments could conflict with conservation considerations.

Sites of Special Scientific Interest (SSSI's) are created under the Wildlife and Countryside Act 1981, s.28 and in general they are protected from development. The owner or occupier of SSSI land must give written notice to the Nature Conservancy Council (NCC) of any plan to carry out operations specified by the *NCC* as likely to damage the features of special interest. In order to undertake such operations one of three specified conditions must be fulfilled. These are that: the *NCC* has given written consent; the operations are carried out in accordance with a management agreement with the *NCC;* or the landowner has given four months notice before carrying out any of the operations notified to him. Within this period the *NCC* or the County Council may seek an agreement restricting the proposed activities and such agreement may provide for payments to be made to compensate the landowner. It is a reasonable excuse for a person to carry out an operation if it is authorised by the grant of planning permission, but before granting a planning application for development in an SSSI, the district authority must take into account the views of the *NCC.* In any event, it seems likely that a proposal for development of a marina on such land would trigger the requirement for an environmental assessment (see 1.1, above).

The Wildlife and Countryside Act 1981 (s,29) creates a procedure for the special protection of certain SSSI's, known as 'Super SSSI's'. Conditions are similar to ordinary SSSI's except that, during a three month period, the *NCC* may acquire the land compulsorily.61

Control over development in such areas as National Parks and Areas of Outstanding Natural Beauty (AONB's) is exercised through the ordinary planning procedure. The national importance of these areas will be a material consideration which must be taken into account by the local planning authority in coming to its decision on the planning application. It should be noted that the authority may make bye-laws for such areas for the preservation of order and the prevention of damage.

Further conservation areas need to be considered. National Nature Reserves, designated by the *NCC* under the 1981 Act, are reserves considered to be of national importance. 'Ramsar' sites, designated by the Secretary of State for the Environment, are wetlands of international importance under the Ramsar Convention 1971. Special

Protection Areas are areas for the protection of rare and migratory birds under the European Community Wild Birds Directive (409/79).62 Marine Nature Reserves can be created in sea areas up to high-water mark.[63] The *NCC* may make bye-laws to prohibit or restrict entry into the reserve.[64] But an MNR and any bye-laws may not interfere with any functions conferred by an enactment or any right of any person.

3.2.2 Control of pollution

There are a variety of pollution regulations which might be relevant to the marina operator if discharges are to be made into water and there may be a need to obtain consents. The Water Act 1989, ss.103-124 constitutes the central body of law regulating water pollution in England and Wales.[65] S.107 contains key water pollution offences. It prohibits the entry of any poisonous, noxious or polluting matter or any solid waste matter into 'controlled waters'. It also prohibits the discharge, without consent, of any trade or sewage effluent. A11 waters within three miles of the baselines from which the breadth of the territorial sea is measured, such other parts of the territorial sea as are prescribed and a11 estuarine waters up to the fresh-water limits of rivers and watercourses, are 'contro11ed waters' for the purposes of the Act. The whole of the Solent, for example, would therefore appear to be included. However, a person is not guilty of an offence if he obtains a licence or consent from the NRA. The NRA may also make bye-laws prohibiting or regulating the washing of things and the use of boats with sanitary appliances in contro11ed waters.[66]

If any oil or oily mixture is discharged from the marina into U.K. waters the occupier commits an offence under the Prevention of Oil Po11ution Act 1971. There is also an offence if oil or any mixture containing oil is discharged or escapes from a vessel into a U.K. harbour. There is a general duty to report discharges to the relevant harbour master.

3.2.3 Land drainage

Marina construction and operation may be affected by the Land Drainage Act 1976 (as amended by the Water Act 1989) which aims to protect land and property from flooding and to conserve water in rivers. The Minister of Agriculture, Fisheries and Food has overall responsibility for implementing the Act, but several bodies have powers under the Act, in particular the NRA, which exercises its functions via regional and local land flood defence committees. The NRA is responsible for 'main rivers' which are watercourses[67] shown as 'main rivers' on a main river map.

In respect of its land drainage functions the NRA is concerned that the flow of water in a main river is not obstructed and that nothing is done to damage the banks. It may therefore make bye-laws for these purposes. Where any watercourse is in such a condition that the proper flow of water is impeded then the NRA may serve notice on the person concerned to remedy the condition.[68]

A further function of the NRA and the regional flood defence committees is to maintain drainage works, for example groynes, beaches and banks, as sea defences. Again there are powers to make bye-laws. In practice there appears to be little conflict between marina developments and the water authorities' land drainage or sea defence functions.

3.2.4 Coast protection

The Coast Protection Act 1949 (as amended) aims to ensure there are adequate sea defences and also regulates the extent to which works of various kinds may restrict navigation (see also 2.2.1 and 3.1.4, above). The CPA is given fairly wide powers to carry out work to protect the land in its area[69] and, under s.16, the written consent of the ePA is required by any person who carries out 'coast protection work' (other than

maintenance or repair). Coast protection work is defined as meaning 'any work of construction alteration improvement repair maintenance demolition or removal for the purpose of the protection of any land'. The creation of piles for pontoons, or the demolition of an old pier to make way for them, would not be for the protection of land. But some marina works may involve alterations to sea walls. It is arguable that this might require consent as they may be designed to prevent erosion or encroachment of the sea (see s.49). Harbour authorities do not need permission to carry out s.16 work, nor do persons on whom powers or duties relating to the protection of land have been conferred or imposed by or under any enactment.

3.3 Recreational uses

The coastal area is used for many recreational activities, for example bathing, sailing, windsurfing, water-skiing and subaqua diving and local authorities have powers to make bye-laws to regulate certain of these activities,70 for example regulating the speed and navigation of pleasure boats (s.76). Where any part of a local authority area is bounded by or is to seaward of the low-water mark, the authority may exercise these bye-law making powers for any area of the sea within 1,000 metres to seaward of low-water mark.[71] It may also make byelaws to provide for the preservation of good order and good conduct among persons using the seashore[72] and such bye-laws may apply, for example, to party revellers at a marina. Harbour authority bye-laws too may well regulate such activities.

3.4 Other interests

3.4.1 Public rights of way

All rights to land, including those of the Crown may be subject to a variety of public common law rights. Interference with those rights, for example by development, may give rise to a number of civil and criminal actions.

Public highways A preliminary question for any developer will be whether there is any public right of way73 over the area to be developed. A highway may exist over artificial structures, such as embankments, sea walls and piers.[74]

Foreshore Contrary to common belief, there is no general public right of way over the foreshore. Nor is there a common law right for the public to use the foreshore for the purpose of bathing.[75] This applies whether the foreshore is owned by the Crown or privately. It is possible to have a right by custom or prescription which is enjoyed by a limited and identifiable class of persons rather than the public as a whole, but clear proof of a custom will be needed. The right of the foreshore owner could be enforced, in a suitable case, by an injunction and/or a claim for damages.[75] It is theoretically possible for a highway to exist across the foreshore when the tide is out,75 or (when the tide is in) there may be a right of navigation over it. The rights of the public over the foreshore, of fishing and of navigation, are affected by accretion/alluvion or dereliction to the extent that those rights follow the foreshore wherever it may be at any material time.

Fishing rights At common law the public has a right to fish in the tidal reaches of all rivers and estuaries and in the sea within the limits of territorial waters. The right extends to high-water mark and thus extends over the foreshore when it is covered with water and must be exercised reasonably. The public has no right when fishing to go on land above high-water mark, such as marina jetties, or to use the foreshore when the tide is out, except where there is special custom or statute. The common law right of fishing can be excluded or modified by statute.

Navigable highways The question of whether a stretch of water is a navigable

highway and whether it has been so obstructed as to cause a public nuisance is a difficult one. Prima facie, all waters which are tidal, and in which navigation is possible, are subject to a public right of navigation. But it is also necessary to show that a particular stretch of water is in fact used as public navigable water. In theory, the public right of navigation in tidal waters is a right which extends to the whole space over which the tide flows, and is not suspended when the tide is out.

The right of navigation is not a property right, but a right to pass and repass, and to remain for a reasonable time. It must be exercised reasonably and for a reasonable purpose. That normally includes recreation, for example navigation to and from marinas. Although there are certain incidental rights to the public right of navigation including the rights, in the ordinary course of navigation, to anchor, to remain for a convenient time and to load/unload in the waterway or on the foreshore this does not include the right to land persons or goods where one pleases on the foreshore. There are limited rights to cross the foreshore in the case of peril or necessity.

It has been said that there is a 'fundamental difference' between the right of navigation and a public right of way over land, as the latter could exist only if it went from one point to another, following a prescribed route. The argument follows that such a right could not exist over water, where no one is obliged to follow a particular route.[76] Although this distinction may appear technically valid, it is also true that there are great similarities. The fact that public rights of way could exist would produce, in legal parlance, a highway and such a right of navigation could properly be described as a right of way.77 It has recently been held that s.l of the Rights of Way Act 1932 [now s.31 of the Highways Act 1980] can apply to public rights of navigation over a non-tidal river.[78] The Act deems a way to be a dedicated highway if it has been enjoyed by the public for 20 years' as of right'. 79 The decision, if upheld in the House of Lords, appears to widen considerably the possibility of asserting public rights, although there will still be disputes about proving the necessary public user.

In a river marina where the pontoons jut out from the shoreline it will be much more likely that the area immediately outside the pontoons is a public highway, whereas if the marina is in a closed dock newly created there will not be public navigation rights. In between these extremes there may be more problems. In *Anglo-Algerian v. Houlder* 80 it was held that such a private dock was not a public highway, albeit that the statutory obligation to keep it open was akin to the obligation of a common carrier to accept goods for carriage.

Obstructions To obstruct navigable waters by constructing works below high-water mark is a public nuisance. Most marina constructions, whether of pontoons or jetties, are likely to obstruct navigation to some extent. But, having established that the waters below high-water mark are navigable waters it is only a public nuisance if there is actual or apprehended interference with the navigation. In one extreme case it was held that there was a nuisance when a wharf owner drove piles into the river bed between high- and low- water mark, extending so as to occupy 3/60ths of the space available for navigation.[81] But the mere fact of placing a pontoon slightly into ~he water does not necessarily mean that there is a nuisance. In a very narrow river any encroachment could affect navigation.

The courts may perform a balancing act between trivial encroachments and the general public benefit. That general benefit could include the enhancement of a run down area of a port by turning it into a marina.[82] The court would take into account where the public navigation was exercised in practice and the extent of any possible movements in the river that might make the area in question one which might be needed for navigation in the future.[83] In another case, the obstruction occupied about

1/3rd of the bed of a tidal river. An injunction was granted even though there was no serious injury to the riparian owner of the opposite bank.[84] If the obstruction was trivial the court could refuse to grant an injunction, merely granting a declaration.

Remedies In theory there is a limited right of self-help, known as abatement, given to private persons who suffer special damage as a result of obstructions to navigation, but this is more appropriate to blocked footpaths than marina developments. A public nuisance consisting of blocking a navigable river can also be the subject of criminal proceedings, and civil proceedings in which the remedies of damages and injunction are possible. The latter will normally only be available when damages are not an adequate remedy.

A civil action can be brought by a local authority for the protection of inhabitants of the area under the Local Government Act 1972, s.222(1); by the Attorney General on behalf of the Crown (in respect of its prerogative right of conserving navigation), or at the relation of an individual; or by a person in his own name if that person suffers special damage. Anyone suffering special damage, for example someone who owned a nearby berth whose access was blocked or, possibly, a shipowner whose ship was detained[85] would be entitled to claim compensation. An injunction would also be possible.

Statutory approval If an actionable obstruction is likely to be caused it may be necessary for a developer to take the precaution of obtaining the authorisation of a private Act of Parliament,86 a harbour revision order,87 or a harbour empowerment order.[88] Where Parliamentary approval is obtained, the position is as follows:

> 'It is well settled that where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works that convey with it an authority to do what is allowed with immunity from an action based on nuisance. The right of action is taken away ... To this there is made the qualification, or condition, that the statutory powers are exercised without "negligence" - that word here having a special sense so as to require the undertaking, on a condition of absolute immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other users .. .'89

In the *Tate and Lyle* case a jetty owner recovered dredging expenses made necessary because of the construction of ferry terminals which caused siltation. Thus, when the Hythe Marina, in Southampton Water, needed a wavescreen to be put at its entrance for boats waiting to enter, a private Act was needed. As the development had not needed a private Act originally there was no statutory authorisation for later works into the navigable part of the Water. But where the statutorily approved limits are exceeded, there will be no defence. Hence it is vitally important to pay attention to the plans giving parliamentary quay lines and the deviations permitted under the private legislation.

3.4.2 Archaeology

Although it may be thought unlikely that a marina could ever be near a marine wreck or archaeological site, this may not necessarily be the case. The remains of the *Grace Dieu* lie in the mud of the River Hamble and it is not inconceivable that other wrecks could be similarly buried on the foreshore. An ancient village long since covered by the sea might also be discovered. The remains of both might be found during piling work and the marina developer could then face the same sort of problems as those encountered by the developer of the Rose Theatre site in London.

Legal protection may be afforded to a monument on the foreshore or seabed by

both the Ancient Monuments and Archaeological Areas Act 1979 and the Protection of Wrecks Act 1973.

In theory, a monument situated on, under, or in the seabed within U.K. territorial waters may be scheduled as an ancient monument. In order to interfere in any way with a scheduled monument, permission is required from the Department of the Environment (DoE). Consent may be granted conditionally, for example to enable the prior excavation of a site. It has been the practice of the DoE to leave sites on the foreshore and in the territorial sea to be protected by the Dtp under the Protection of Wrecks Act 1973.[91]

Protection may be afforded by that Act to a wreck in any area submerged at highwater of ordinary spring tides and, therefore, the provision includes wrecks which lie on the foreshore. Designated sites are protected by a 'restricted' zone which usually has a radius of between 50 and 300 metres. The fact that these zones are 'restricted' rather than prohibited provides some flexibility in that activities such as boating and bathing can be undertaken within the area. Although licences can be granted by the Dtp they will be given only to those who wish to survey and excavate the site, rather than to developers. It would appear that a marina could be created partly within a restricted area without necessarily committing an offence. Only if the wreck itself is tampered with or damaged, or if something is deposited on the seabed is it possible that an offence will be committed. However, there is likely to be strong objection from the Dtp if there were proposals for a marina development within or near a restricted zone.

If a development was likely to cause interference with a wreck not given such statutory protection, it would be necessary to discover the owners in order to obtain their permission. Discovery of the owners or their successors in title may prove quite difficult.

3.4.3 Ministry of Defence

In certain areas the MoD has mining grounds, exercise grounds, anchorages, artillery ranges, forts, etc. In order to discover the extent of these interests, consultation with the MoD is required.

The Protection of Military Remains Act 1986 secures the protection from unauthorised interference of wrecked military aircraft and vessels and of associated human remains. A vessel or an area may be designated as a protected site. It is probably unlikely that such a wreck would be near a marina, but dredging operations might be affected. Interference with the site may be an offence, although the Secretary of State has power to grant licences. Sites may be designated within the U.K. or in U.K. territorial waters.

4 Marina operations

Once the planning and development stage has been completed the focus of attention moves from the functions of the developer to those of the operator. The legal problems relating to the marina operator tend to be very different to those of the developer. There is some overlap, for example where maintenance or enlargement works are necessary. In that case the regulatory system has to be confronted once more. But, in the main, the legal questions may be more concerned with private, rather than public law. This section will concentrate particularly on those aspects concerned with the liabilities of the operator and ways in which risks may be minimised.[92]

4.1 Control

What control can the marina operator exercise over persons using the marina? So far as the land developments are concerned, the operator can regulate access and conduct of visitors in the ordinary way, i.e. by exercising the rights of a landowner to exclude disruptive persons. For the water developments the operator may well have his own 'harbour master', but the functions of this private harbour master must not be confused with those of the statutory harbour master for the area in question. The operator will probably find that the latter will have a superior authority within the powers given to him. The marina harbour master can only exercise the rights given to a landowner under general property law, or those given by contract with the individual users of the marina - unless special powers have been given by a private Act. Members of the public visiting the leisure areas would not usually have entered contractual relations with the operator, although they may in some circumstances be bound by notices which have been properly drawn to their attention.

Although the marina operator would generally have the right to regulate access in between the pontoons, outside that area there may be existing public rights of access - depending on whether the area concerned is a public highway or not (see 3.4.1, above). The basic rights to control the water between the pontoons will derive from the proprietary rights arising from the ownership or leasing of the seabed.

4.2 Liabilities in contract and tort

The developer of a marina will run the risks of creating liabilities during construction and in later operation. Most of these will be common to ordinary developments, for example tortious liabilities to workmen, or contractual disputes with builders. But there may be other contractual or tortious liabilities that could be relevant, for example in respect of visitors. Visitors to the marina may include those with whom individual mooring contracts are made, tradesman and members of the general public. In relation to these persons the marina operator is merely the provider of a service or access.

In most developments it is characteristic that the developer will retain some continuing interest in the marina: it will not normally be a question of selling all the buildings and pulling out. Normally some service function will remain. Indeed, the change in function to an operator of services from developer means that the operator must be aware of all the usual incidents of being an occupier of land, including liabilities arising under the Occupiers' Liability Acts 1957 and 1984 to members of the public who have access to the marina. Paying visitors to marinas, for example visiting boat owners, would be entitled to rely on the terms as to performance and price implied by the Supply of Goods and Services Act 1982 and there may be problems in seeking to exclude liabilities to such consumers in view of the Unfair Contract Terms Act 1977.

The extent of any possible liabilities will always depend on the number of responsibilities undertaken.

4.2.1 Protection against liabilities

Developers and operators will seek to protect themselves in the ordinary commercial ways from liabilities that could arise. Three of these methods will be considered.

Corporate structure The first precaution against unwanted liabilities being assumed by the developer is to take care to produce a corporate structure that isolates the various component parts from liabilities incurred by the others. It is thus normal to have an operating company for each marina legally separate from the developing company,

even if the developer has an interest in a number of marinas.

So far as the marina residents and users are concerned it is important that there is a clear identification of who is the landlord and who the operator. There is always a risk that the companies will be so structured that the original developer loses interest in the marina with all the responsibilities for maintenance and operation being thrown on a company that is undercapitalised and poorly run. Care is needed to check that the interlinking series of obligations between the various companies are complete and that there is no room for one company failing and undermining the organisation of the marina as a whole.

Insurance It is vital that commercial organisations have effective insurance cover. Occupiers liability insurance will be needed as will a general liability policy. For there is always the possibility that the marina operator could be held liable for damage to visiting craft, caused for instance by fire. The operator will also need cover against other people's liabilities. It is interesting to note that a mutual insurer was launched in 1990 to cover the needs of the marine leisure sector.[93] By providing a single policy for a wide range of bodies, such as marina operators, boat builders and repairers, brokers, chandlers and surveyors, the Marina Mutual Insurance Association should help to ensure that there are few gaps in liability insurance cover at marinas. Prospective tenants of marinas would be well advised to enquire whether the marina operator is entered in this Club, which is run by those with extensive experience of P and I Clubs.

It is noticeable that many marina terms and conditions require the owners of vessels to take out insurance cover up to a certain limit, for example £500,000.

Contractual protection The third way the developer/operator will seek to minimise exposure to liabilities is by the use of suitably drafted contractual terms. These may either exclude his own liability or consist of indemnities to be paid by other parties. The contracts with individual building contractors will probably be in standard form, but cannot be considered here. A number of particular issues arise from the contracts undertaken between the developer/operator and potential clients.

4.2.2 Position of marina residents

The extent to which developers give undertakings to house or office owners, or boat owners, as to the operation of the marina or their rights to use it will vary with each development. Moreover, the clients will want some assurance that the marina is going to continue, at a certain standard and for a certain cost.

Negotiations Much care is needed in negotiations to ensure that promises can be honoured. Where such promises have not been reduced to writing in any final agreement there will be difficult questions as to whether they can be sued upon as collateral contracts, or whether there may be a cause of action in misrepresentation, for example under the Misrepresentation Act 1967. Clients may be able to seek the remedies of damages and rescission could be available under s.2(1).

The developer might try to exclude liability in the lease or sale contract, for example by saying that all the terms are contained on the written document and that nothing else influenced the purchaser in any way. The extent to which this is effective will depend upon the effect of s.3 of the 1967 Act which only allows a term to be used if it would have been fair and reasonable to have included it in the contract given all the facts known to the parties at the time of the contract. There is some uncertainty about the effectiveness of a 'conclusive terms' clause in a sale, although a court might find such terms reasonable, particularly given the legal advice customarily available.

Right to a berth Where individuals purchase (or lease) a residential marina property

with the promise of a berth they may be under the assumption that they have somehow 'bought' the berth. In theory they could be sold the seabed immediately under a finger pontoon, but that would be extremely unlikely and rather impractical. Likewise, part ownership of the pontoon itself would raise unnecessary difficulties over access and the right to moor the pontoon. The land under the mooring will usually be retained by the developer, who has probably leased it from the Crown Estate Commissioners or a harbour authority. In practice, it seems that the sale contract or lease will give the buyer an exclusive right to use a particular berth. This is, at least, a contractual licence. The status of this right as a form of proprietary interest must be somewhat uncertain. What is to happen when the pontoon deteriorates and is replaced? If the developer sold the interest in the subsoil, would a new owner be bound or is the right personal between the developer and the buyer? If there are problems, they are likely to arise in 50 years time when conditions of operation and use change. It may be possible, it seems, for the buyer to argue that an easement has been created, but there are technical difficulties with this approach. In some developments there may be no linkage between the sale of properties and the availability of berths.

Berth leasing Many members of the yachting fraternity live away from the coast and need somewhere to leave their vessels throughout the year. The usual practice has been for them to rent a berth at a marina. In such a case it would not usually be possible to argue that they have a proprietary right in the form of an easement (as might be the case with marina residents). Their rights would be entirely contractual and there would not usually be any possibility of claiming some form of security of tenure. They would only have a year's rent to pay, but with no right to stay on at the end of the year or to object to an enormous rise in the charges.

A recent practice, introduced from the D.S.A. is the concept of berth leasing.

This is designed to replace the annual berthing contracts. There is nothing unusual about the concept, as such, although there have been complaints about undue pressure being put upon potential clients by operators having near monopolistic positions.[94] The advantage for the client is that there is some long term security and often the right to sublet (although in practice this right is often strictly curtailed). Care must nevertheless be taken to ensure that the landlord does indeed have proprietary rights over that area of land under a floating pontoon. Otherwise, the tenant may have only a bare contractual right against the lessor, a company that might not be solvent in 45 years time (the length of a common berth lease). It is understood that one District Land Registry has been persuaded that a 45 year berthing lease is an 'interest in land', capable of registration, where the lessor owned the freehold of the river bed and where easements were taken over adjoining land.

Like most leases, berth leases contain long lists of obligations - mostly on the part of the tenant. Many of these could impose quite high liabilities throughout the life of the lease. Of particular concern has been the somewhat unpredictable nature of the service charges that are to be charged (Referred to in more detail, below). There may also be wide indemnity clauses whereby the tenant undertakes to indemnify the landlord for liabilities resulting from the use of the berth. Such clauses are not uncommon in commercial contracts, although individual boaters may find them onerous given the fact that the obligation lasts for the duration of the tenancy. It is very important, therefore that the tenant obtain full insurance cover. Indeed, it is often a term of the contract that liability cover is maintained.[95]

The prospective tenant will make a financial judgment as to the savings to be made by paying in advance to avoid inflation, but legal advice should always be sought for such a long term commitment. The tenant must also be satisfied that the berth leased is adequate to meet future needs as the premium will be dependent on

size: there will be no automatic right to demand a larger berth and the tenant will have the obligation to find a suitable sub-tenant if another berth is desired.

Services and maintenance Where the developer 'sells' a house and berth there is both the creation of some form of proprietary right and the undertaking to provide some sort of continuing service. The concept of a seller of property retaining a continuing commitment to provide some form of service is not unusual in property law: most developers of flats will enter into service contracts with the leaseholders. In the case of marinas the extent and type of the services may be different.

In the marina there are all the usual managerial needs to provide maintenance to the communal parts but there are two main differences. First, the communal parts are likely to be extensive and to include parts that are more than usually expensive to maintain, such as sea walls and hydraulic locks. Secondly, the marina operator is likely to have to provide services of a very wide nature. There may have to be crane drivers to lower and raise boats, lock keepers, some security staff, attendants for fuel supply and reception facilities for visitors. It may be necessary to have a harbour master and assistant to perform some of these functions and to exercise some control over the movements of boats. These persons may be expected to provide advisory functions, including weather and tide forecasting. Some form of communication system will be needed for visiting boats in order for them to communicate with the marina harbour master. Extensive provision for emergencies will need to be made. Functions such as dredging will be required from time to time and skilled personnel will need to be retained to install and operate navigational equipment. Furthermore the attraction of the marina to the purchasers will consist of the overall services available. The marina will probably be advertised as being able to offer many ancillary marine facilities. These may include the provision of a chandlery and a yacht servicing and/or repair facility.

To the purchaser, two questions will need to be raised. Who will guarantee the standard and performance of the work necessary to make the marina function for its intended purpose? How are the charges to be calculated?

As regards the first question care will again have to be taken to ensure that the company which is to provide the service will be identified precisely and that it is properly capitalised and not likely to be an early candidate for insolvency.

Maintenance contracts will always require close attention to make sure that a sufficient floating fund has been created and that it is set at a sufficiently high level to meet future liabilities and that charges are to be apportioned fairly. Where the developer has retained some land for commercial development, extra care will be needed to ensure that it bears a fair proportion of the cost.

Most difficulties will arise because of a failure to ensure that the exact nature and extent of the maintenance obligations are stated with sufficient particularity, and with a minimum of discretion to the operating company, to ensure that standards are maintained. If in time the lock gates develop defects at what stage should they be replaced? The wording of the landlord's obligations in a lease may be rather vague - which presents considerable risks for tenants. The maintenance of some facilities which the tenant considers essential may rest only upon the landlord's discretion as to what is reasonable. The depth of water at an individual berth, or the regular and efficient functioning of lock gates, may be a vital matter for a particular tenant. A residents association can make representations to the operating company, but there are probably no rights to demand immediate services. It is extremely unlikely that there will be an express obligation that certain facilities, such as the village shop, yachtbroker and chandlery, will continue to exist. This is a separate problem to the one of maintaining properly those that do exist. If, after a few years, their operation

becomes uneconomic, there seems to be no guarantee that they will continue.

In a long term agreement, such as a berth lease, it is the sheer unpredictability of the service charge in 20 years time that poses problems. The extent of the services that may be necessary means that the burden could be a lot higher than for equivalent 'land-based' contracts. The costs of security services to meet requirements under the Aviation and Maritime Security Act 1990 (see 2.2.1(ii), above) are likely to be passed on, in one form or another, to the tenant.

4.2.3 Standard terms and conditions

There are no standard terms applicable to all marinas, although there are great similarities between them. Partly, this results from the widespread influence of the 'General conditions of berthing, mooring and storage ashore' produced jointly in July 1988 by the National Yacht Harbour Association and the British Marine Industries Federation.

An operator is generally free to include such terms as he wishes, for example in relation to price. Most operators will have a set of standard berthing terms which may apply to visiting boaters as well as those taking out an annual mooring contract: residents in some developments where there is no right to a berth may also face the same terms.

Residents, and berth lessees, will probably have committed themselves in their leases to abide by a separate document, often referred to as 'Marina Regulations'. It should be emphasised that these will not normally have statutory force (except where they are, in effect, byelaws made under the power of an enabling private Act). Nevertheless, the contents would have contractual effect as the tenant will have signed a document of incorporation. Sometimes the 'regulations' are expressed to cover all those entering a marina, it being said that entry entails acceptance of the various terms therein. This is not automatically the case and an operator would have to prove that reasonable steps had been taken to bring the notices to the attention of visitors.[96] Hence the provision of prominent notices at lock entrances. It is essential for the marina operator to establish a uniform procedure whereby contracts are signed immediately. Otherwise, a boat owner could claim the contract was made at or near the time of mooring and a later reference to the terms would be irrelevant. Also, the more unusual the clause sought to be relied on the greater the notice that is required.

This is not the appropriate place to discuss mooring terms in general, but a number of common features of the standard contracts may be noted.

Liability It is common for the operator to exclude liability for most risks. These liabilities, as already noted, could arise from basic liability in negligence (for example where employees cause damage or loss to the boat or its passengers by dropping equipment from the quayside), poor performance of service contracts (for example by inadequate boat repairs) or through a lack of care in bailment (for example by storing a vessel too near to a paint-spraying facility). Assuming that it has been effectively incorporated into the contract, or that appropriate notice has been given, any exclusion must satisfy at least two tests. It must clearly exclude the loss which occurs and it must not offend against the Unfair Contract Terms Act 1977. In the past the courts have been hostile to exclusion clauses, but in two fairly recent House of Lords cases exclusion and limitation clauses of a security company were upheld. The second case *Ailsa Craig Fishing Co Ltd v. Malvern Fishing Co. Ltd* 97 involved the negligent provision of security services in a port as a result of which a vessel sustained fouling damage.

Each exclusion clause would also need to satisfy the Unfair Contract Terms Act 1977, especially the reasonableness test in s.ll. Would it be fair and reasonable to

allow reliance on the clause given the facts known to both parties at the time the contract was made?

Terms excluding liability for personal injury or death arising from negligence would be invalid under s.2(1) of the 1977 Act, so clauses putting 'all risks' of using the marina at the door of the visitor are of doubtful validity. Even in the case of property damage, such clauses may not be deemed sufficiently precise.

One common omission in such clauses concerns the failure to extend the contractual protection to all employees likely to be liable particularly those employed by sub-contractors or those employed by an associated company. Unless there is a satisfactory *Himalaya* clause an injured party could sue the person directly liable, who would not be entitled to rely on the main contract as he was not a party to it. In view of the common practice in marinas of having many separate companies within one group performing different functions, careful drafting is needed to ensure that all are protected.

Services It has been noted that operators might provide services, such as cranage, storage or repairs. Standard terms will seek to deal with basic issues such as the degree of care expected and the charging system. Attempts may again be made to exclude or restrict liabilities, particularly when an owner has failed to remove his vessel or pay for the services. One term that should be referred to relates to the condition or safety of the berth, particularly where mud-berths are concerned. One of the most famous contract cases concerned a wharf owner who was held liable for damage to a vessel on grounding on the basis that he had impliedly contracted that the berth would be safe, or at least that steps would be taken to warn users if it was not, (see *The Moorcock).98*

Control The standard terms and/or the Marina Regulations will normally lay down the basis on which the operator is entitled to manage and control the marina. The contract may regulate, inter alia, where and when cars may be parked; when and how locks can be used; when sailing within the marina is allowed; when work on boats may be undertaken; where equipment can be stored; when marina employees can move vessels; when persons may live on board vessels and for how long; where refuse may be discharged. The harbour authority bye-laws can be enforced by the criminal law. The internal marina rules do not have that support. Failure to obey is a breach of contract: the sanction is a claim for damages if any loss results, or to terminate the contract. In order to make clear exactly what sort of breach entitles the operator to terminate the contract it is wise to include a cancellation or termination clause. This may give the right to terminate on a certain period of notice.

Remedies of the marina operator Most standard terms deal with the problem of unpaid bills and vessels which appear to have been abandoned. The contract should be drafted so as to take account of the Torts (Interference with Goods) Act 1977 rights in relation to unclaimed goods. It is normal to find some sort of express lien clause in respect of unpaid bills. It is also helpful if the operator is given the right of possession in some circumstances. It is customary for the operator to require a key to be left with a manager of the marina to enable a vessel to be moved, but it may be doubted if this alone in all circumstances grants sufficient possession to support a possessory lien. It may be that a general lien for unpaid bills could be drafted so as to give the right to possession, in the same way that a garage has an unpaid seller/repairer's lien. The practice of taking possession of keys could expose the operator to potential liabilities where they are released to the wrong person.

Where repairs are carried out by the operator there would also be the unpaid

repairer's lien - the same as that for a car repairer.

Most standard terms include provisions whereby the operator is entitled to an indemnity from the tenant or user, for example in respect of liability arising to third parties from breach of the rules and regulations. The operators may also seek to rely on benefit of insurance clauses.

Work on vessels and marina operator's commission It seems usual for the operator to restrict the rights of a vessel owner to have work done on the vessel. This is obviously designed to prevent the marina being turned into a permanent shiprepair yard. In some cases the operator may also charge a commission to outside contractors who are given permission to carry out such work (charged for example on the value of the work done). It is also usual to provide a limit on the number of vessels that a person may sell privately in one year. There may also be a clause requiring a captive shipbroker to be used if the seller wants to have an agency sale. In any case the private seller may find that a commission has to be paid (to the broker or the operator) if he wants to sell the boat in situ. This is designed to prevent the marina being simply a display yard while guaranteeing business to the resident shipbroker. There is no reason in principle why such terms should not be enforceable, although it is doubtful if the outside contractors could be made liable to pay anything unless their attention is specifically drawn to the existence of the clause before they start work.

4.3 Application of general maritime law

4.3.1 Limitation of liability

Even where there is a liability created towards boat owners or visitors, it may be that there is a further way in which exposure may be limited: that is by the traditional maritime law relating to limitation of liability. This is certainly a novel feature for a developer, but it should also be noted that the principle is also available to boatowners - including visiting boatowners.

The type of situation that may arise is illustrated by *The Ultorian*[99] where a visiting pleasure yacht docked at the Washington Park Marina, on Lake Michigan. A fire erupted destroying the vessel and a large part of the marina and several other boats. The damages were $275,000. As it happens the owner tried to plead limitation of liability, but failed. There was not the sort of traditional maritime activity to give rise to *V.S.* Admiralty jurisdiction and hence limitation of liability (the boat was worth only $800). In the *V.K.* that owner (and ultimately his insurers) would have been able to limit his liability under the Merchant Shipping Act 1979 according to the size of the boat. The limit would probably be about £65,000 for property damage (more for personal injuries). To the marina operator, that is a very small amount given the danger of fire.

The existence of the principle of limitation of liability certainly confirms the need for insurance. It may also require care in the drafting of contracts between the marina operator and boating users of the marina facilities. A simple clause transferring liability or risk to the boat owner will not be sufficient, as the Act applies the limit even in respect of claims brought by recourse or for indemnity under a contract. This is probably a change in the law existing before December 1986 when this part of the Act came into force. However, it is probable that the limitation provisions of the Act can be expressly waived by contract, although this has never been tested. It is not clear that compulsory insurance clauses in marina contracts take full account of the fact that the vessel owner's liability may be legally limited.

It should be noted that the marina operator can also benefit by these limitation rules. In the first place, if the operator owns a boat which causes liability he can limit in the ordinary way. Many operators of larger marinas use work boats for the moving

of equipment or supplies or to perform minor towage services. If these cause damage to other boats the limitation provisions will be available.

Of more benefit to the marina operator is the rather obscure Merchant Shipping (Liability of Shipowners and Others) Act 1900 under which it may be possible for the 'dock' owner himself to limit liability to the owners of visiting vessels. That is something that would not be available to a defendant landowner whose faults caused damage to a visiting truck. The extensive definition of dock in the Act should cover the owners of even the smallest marina. [100] The actual limit may be very hard to calculate as it is based on the formula of the largest registered British ship which in the previous five years, has been in the area over which the dock owner performs any duty or exercises any power. 'Registered' here probably means under the ordinary ship register, now under the Merchant Shipping Act 1988, and not the small ships register under the Merchant Shipping Act 1983. It may be that the area concerned is either too difficult to define, or too small. In a river marina it would not include passing ships. At a closed marina, it may be that no registered vessels have ever visited.

There are also problems with the Act when the claimant sues an employee of the dock owner. In any event the limit does not apply to personal injury or death claims.

4.3.2 Other maritime principles

The marina operator ought to be aware that other principles of private maritime law might affect him. It is clear from the decision in The Goring[101] and the Merchant Shipping Act 1988 that salvage services may be performed in most marinas, including those fully enclosed behind lock gates such as Hythe. Thus it may be worthwhile maintaining extra fire-fighting equipment, or a launch capable of towage, as a salvage reward may be quite valuable. Such a reward is based on the value of the vessels saved and could be quite high in the event of a fire which threatened to engulf a marina full of expensive yachts. But it would not be payable if the marina operator was already bound by contract with the boat owners to perform such services, for example under the terms of a maintenance or mooring contract.

An operator should also note that special maritime provisions exist for the enforcement of claims. In particular it may be possible to arrest a vessel to act as security. This could mean that a berth is occupied for some time while a legal wrangle is sorted out, for example between a yacht owner and a mortgagee. The marina operator might also have a claim himself against the vessel in which case difficult questions of priority will arise in relation to other debtors. The important practical point to note is that if the operator actually has possession of the boat then he will have a high priority, for example over the registered mortgagee (even a mortgage earlier in time to the possession). The continuing expenses of storage (if charged to the Admiralty Marshal) would probably have priority over most claims, but other claims by the operator (for example for supplies) may be postponed to other claimants, especially those suing for earlier damage or salvage. But so long as possession is retained, there will be priority over a mortgagee.

Acknowledgement

We would like to record our thanks to all those who have assisted us, although we are unable to include in this chapter all the information received. Particular thanks are due to the following who granted us interviews: R. Hancock, M. Ridge, G. Thomas (ABP); R. Prescott (Hants County Council); G. Beck (Southampton City Council); M. Sedgley (Dean & Dyball). The legal position is stated as at August 1990.

Notes

1. There may also be public rights relating to footpaths and navigation (see 3.4.1).
2. For example, where water imperceptibly encroaches upon land which was formerly situated above the high-water mark, that land becomes the property of the owner of the foreshore and the ownership of the land which was formerly part of the foreshore passes to the owner of the bed of the tidal water. However, where the change is sudden or the result of artificial reclamation, the legal presumption does not apply and there is no change in land ownership.
3. The Territorial Sea Act 1987.
4. In some cases twenty, fifty or sixty year leases are now being offered.
5. The CEC are also asking for a percentage of the rental user of the marina, e.g. 7%-20% of the mooring fee income. The percentage may be based on a deemed figure for a marina of that type in the particular area.
6. Care must be taken when considering the powers of small harbour authorities operating under dated legislation.
7. CL *ABP v. Bailey* [1990] 1 All E.R. 929, where ABP was baulked in its attempt to get rid of tenants of a dry dock wanted as part of the redevelopment of Barry Docks.
8. See e.g. *Lord Fitzhardinge v. Purcell* [1908] 2 Ch. 139, at pp. 155 et seq.
9. The essential difference between a lease and a licence is that a lessee holds a legal estate or interest, a licensee does not. A licensee is simply permitted by the landowner to enter the land for an agreed purpose and a licence is basically an authority which justifies what would otherwise be a trespass.
10. This is the principal one of four Acts which have consolidated planning legislation. The 1990 Act came into force on 24 August 1990 when the whole of the Town and Country Planning Act 1971, together with various other planning provisions, were repealed. The consolidation process permits no changes of substance to existing legislation. The Act effects minor corrections to the pre-1990 legislation.
11. Local Government Act 1972, s.71.
12. Earl of Caithness, H.L. Debates, Vo!. 496, Cols. 286-288 (April 27, 1988).
13. Except by the Crown which is exempt from planning control, but which undertakes to comply with a shadow set of planning procedures. Although this exemption extends to development by the Crown Estate Commissioners, it does not extend to others owning an interest in Crown land. Note also the exception provided by the Aviation Security Act 1990, s.34, 2.2.2.1
14. S.l. No. 1813.
15. GDO 1988, Sched. 2, Pt. 11. Harbour orders and private Bills are considered later.
16. GDO 1988, Sched. 2, Pt. 17.
17. The Transport Act 1981, Sched. 3, paras. 1 and 6, in defining the powers of Associated British Ports, draws a distinction between the general power 'to operate its harbours and to provide port facilities at them', and the wider power 'to develop in such manner as it thinks fit land belonging to it or to any of its subsidiaries'. The latter power is restricted to development which is undertaken with a view to disposal after it

is completed, so that it would not normally be regarded as operational land.

18. 85/337/EEC
19. S.l. No. 1199.
20. DOE Circular 15/88.
21. These two sets of regulations are referred to later.
22. H.L. Debates, Vo!. 496, Cols. 286-288.
23. *Private Bills and New Procedures - A Consultative Document,* Cm.11I0, 1990.
24. The Government also proposes to remove the choice which promoters presently have of proceeding either by harbour order or by the private bill procedure.
25. See Redoubles, G. Geen, *Harbour and Pilotage Law,* (3rd ed 1989) Chapter 10.
26. South Western Railway Act 1909 (c.31) s.5.
27. *Pyx Granite v. Ministry of Housing and Local Government* [1958] 1 All E.R. 625.
28. Note also the power of the Secretary of State to repeal obsolete provisions given by the Transport Act 1981.
29. S.l. No. 424.
30. See Douglas, p. 25, referring to the Medway Ports Authority Act 1973 s.38(4) which specifically draws a distinction between authorisation and licensing.
31. Indeed there may be an appeal to the Secretary of State under the local legislation against the decision to refuse a licence.
32. It is on receipt of the notice from the harbour authority that the Secretary of State may have to consider whether an environmental assessment should be made.
33. Complying with such a condition could be very expensive particularly if the Secretary of State requires that completely new equipment be installed. That expense may now fall on subsequent purchasers of a marina.
34. Naval dockyards are governed by Order in Council under the Dockyard Ports Regulation Act 1865. These orders contain the regulations, similar to byelaws, under which the dockyard operates and set out the detailed powers of the Queen's harbour masters.
35. S.24 and s.34(2)
36. See Douglas, p 24, citing Lord Templeman in *Tate and Lyle Industries v. Greater London C07tncil* [1983] A.C. 509 at 538.
37. See *R v. Pod of London Authority, ex p Kynoch* [1919] 1 K.B. 176.
38. Deposits at sea of dredged spoil need to be licensed under Part II of the Food and Environment Protection Act 1985 (see below).
39. The Act was given Royal assent on 6 July 1989 and all its provisions were in force by 1 April 1990.
40. Limited liability companies succeed each regional water authority in respect of its water supply and sewerage functions.
41. As amended by the Water Act 1989, ss.136-140, Schedule 15.

42. The NRA may require the payment of an application fee by a person who applies to it for consent under this section (see the Water Act 1989, Schedule 15). It should be noted that this section applies also to works executed by harbour authorities (see s.29(8) and s.112(5)).

43. GDO 1988 art.18.

44. 1979 (S.l. No. 564) (in force 1.7.79).

45. See the Animal Health Act 1981 and the regulations issued under it by MAFF.

46. S.I.No.1357.

47. S.l.No.1902.

48. An indication of the policy adopted by the HSE in deciding on what are tolerable risks for residential properties may be found in the various Consultative Documents issued by the HSE (e.g. that in 1978 on notification and survey) and in the Reports of the Advisory Committee on Major Hazards. See e.g. First Report 1976, Second Report 1979, Third Report 1984. In 1989 the HSE issued a document entitled 'Risk criteria for land-use planning in the vicinity of major industrial hazards'.

49. See the Petroleum Act 1987, s.24(1)(b). It seems unlikely that a marina would be sited near an oil rig.

50. This section applies to all telephonic or telegraphic cables, high-voltage power cables and to all pipelines under U.K. territorial waters: see the Continental Shelf Act 1964 s.8(1) and the Petroleum and Submarine Pipelines Act 1975 s.45.

51. A harbour authority may be given the powers of a local fisheries committee (s.18).

52. A sea fisheries district may comprise any part of territorial waters up to highwater mark and any part of the adjoining coast.

53. The area of the NRA's fisheries functions includes those tidal waters and parts of the sea adjoining the coast to a distance of six nautical miles. See the Water Act 1989, s.141, Schedule 17.

54. Salmon and Freshwater Fisheries Act 1975 s.4.

55. S.l. No. 1699.

56. A licence will normally be issued only after consultation with various government departments and others whose interests may be affected. This takes place under the 'Government View' consultation procedure, as revised in 1989. The licences would be contractual licences from the Crown Estate as landowner. There dredging is to take place on an area of the seabed not owned by the Crown, the permission of the landowner will be required. Note that the licensing procedure has recently been reviewed: see The Crown Estate, Report of the Commissioners, 1990 and the memorandum 'The Crown Estate Licensing System', (July 1990).

57. By statutory licence under the Coast Protection Act 1949, s.18, (see below).

58. Coast Protection Act 1949, s. 34.

59. Where local legislation so requires, e.g. where there is a restriction on dredging taking place within port limits.

60. For maintenance dredging, see Docks and Harbours, earlier.

61. This procedure does not apply to Crown land without the consent of the CEC.

62. According to the DOE Draft Planning Policy Guidance (DOE PPG7 revised), when planning authorities are considering planning applications relating to these areas, additional weight must be given to protecting special interests.

63. Under the Wildlife and Countryside Act 1981.

64. It may not prohibit or restrict the exercise of any right of passage by a pleasure boat except with respect to particular parts of the reserve at particular times of the year.

65. Replacing Part II of the Control of Pollution Act 1974.

66. S.114. These powers are similar to those contained in the former legislation, the Control of Pollution Act 1974, ss.31(6) and 33(1), although they are now applicable to a more extensive range of waters, which could now include coastal marinas.

67. A 'watercourse' includes all rivers and streams (s.116).

68. The NRA may impose tolls in respect of the navigation of vessels in those waters that are not subject to control by a harbour, conservancy or navigation authority.

69. These include power to enter onto private land for the purposes of maintenance.

70. Public Health Act 1961, s.76(2).

71. Local Government (Miscellaneous Provisions) Act 1976, s.17(1).

72. s.82 Public Health Acts Amendment Act 1907.

73. Easements of all kinds may be acquired over the foreshore in exactly the same way as they may be acquired over any other land, provided that they do not interfere with public rights (see above).

74. See *Halsbury's Laws of England* (4th ed) Vol 21 p.13, citing *Tyne Improvement Commissioners v. Imrie, A-G v. Tyne Improvement Commissioners* (1899) 8 LT 174, 179.

75. *Blundell v. Catterall* (1821) 5 B & Ald 268, 106 ER 1190; Brinckman v. Matley [1904] 2 Ch 313.

76. *Evans v. Godber* [1974] 3 All E.R. 341, 118 Sol. Jo. 699.

77. See *Orr-Ewing v. Colquhoun* (1877) J, App. Cas. 839, 846.

78. *A-G v. Brotherton* The Independent 8 August 1990.

79. S.1(8) provided that land should include land covered by water.

80. [1908] 1 KB 659

81. *All. Gen. v. Terry* (1874) L.R. 9 Ch. 423 (C.A.). The assumption was that the users had a right to the whole space and it was no defence to say that vessels could with care navigate safely.

82. See *Orr-Ewing v. Colquhoun* (1877) 2 App. Cas. 839 (H.L.).

83. Ibid, per Lord Blackburn at p 850.

84. *A-G v. Earl of Lonsdale* (1868) L.R. 7 Eq 377. See also *Iveagh v. Martin [1960]* 1 Q.B.273.

85. *Rose v. Miles* (1815) 4 M and S 101, 105 E.R. 773, *Anglo-Algerian v. Houlder.*

86. Care will need to be taken to ensure that any private Act which purports to extinguish

navigation rights also operates to remove the deemed dedication of the river as a highway under what is now s.31 of the Highways Act 1980: see *A-G v. Brotherton* The Independent 8 August 1990.

87. Under s.14 of the Harbours Act 1964 (in the case of a harbour managed under statutory powers).

88. Under s.16 of the Harbours Act 1964 (in the case of a prospective harbour).

89. Per Lord Wilberforce in *Alien v. Gulf Oil Refining Ltd.* [1981] A.C. 1001 at 1011. The dicta of Lord Wilberforce were approved by Lord Templeman in *Tate and Lyle Industries v. Greater· London Council* [1983] A.C. 509 at 538.

90. Ancient Monuments and Archaeological Areas Act 1979, s.53(1).

91. The 1973 Act has only been used to give protected status to approximately thirty wreck sites in U.K. territorial waters.

92. Most reputable developers and operators would seek to comply with the 'Code of Practice for the Construction and Operation of Marinas and Yacht Harbours', (2nd ed., 1983), produced by the National Yacht Harbours Association.

93. P and I International, July 1990, 12.

94. See for example *Yachting Monthly,* March 1990,80.

95. The precise relationship between such clauses and the right to limit, Section 2.4.3.1, will depend on the wording of the clause in question.

96. *Interfoto v. Stiletto* [1988] 1 All KR. 348.

97. [1983] 1 WLR 964.

98. (1889) 14 PD 64.

99. [1989] AMC 609 (7 Cir).

100. Dock is defined widely to include wet docks and basins, tidal docks and basins, locks, cuts entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages landing places and jetties.

101. [1988] 1 Lloyd's Rep. 397.