



CONSTRUCTION MANAGEMENT

Jeremy Glover

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BUILDING

In *Building*, there has been an occasional series of articles that have discussed construction management. In one it was, somewhat despondently, suggested that “nobody is ever accountable under construction management”. One reason for this suggestion might be that whilst it is usually the obligation of a construction manager (“CM”) to plan, programme and organise both projects and the trade contractors who actually carry out the work, it is the client who contracts directly with those trade contractors and who retains the risks as to time and cost.

The recent widely reported decision in the case of *Great Eastern Hotel Ltd v John Laing Construction Ltd* has put the lie to this suggestion. This is the first time, we believe, a CM has been found publicly to be in breach of his obligations and liable to its client.

Here, the construction management agreement (“CMA”), provided that the CM should exercise all the reasonable skill, care and diligence to be expected of a properly qualified and competent CM, experienced in carrying out services for a project of similar size, scope and complexity. The CM was also required to procure that each trade contractor complied with all of its obligations under their respective trade contracts.

His Honour Judge Wilcox decided that this was not an absolute obligation but that the contract imposed obligations on the CM of a professional man performing professional services. This does not mean that Laing were the guarantor of the job or an easy target to blame because the job went wrong - and a job which overruns by a year and where the costs increased from £38.4million to £61million is a job which went very wrong. However, Laing did owe clear enforceable obligations to the client as an important member of the professional team. Laing’s responsibility under the CMA extended to selecting, managing, administering, planning and co-

ordinating the work with the trade contractors, scoping their works and doing so in a pro-active professional manner.

The CM must seek to minimise the elements of risk to the client. For example, Laing's responsibility extended to procuring satisfactory trade contracts (i.e. ones which protect and do not expose the client to uncertainty and risk) and imposing a regime of strict supervision and monitoring to ensure reasonable levels of performance by the trade contractors. To hide behind being ultimately unable to force trade contractor performance is not an answer: the CM must proactively seek the resolution of difficulties. This might include insisting upon additional resources being allocated or holding regular monitoring meetings with trade contractor directors.

Judge Wilcox described the CM as being "*at the centre of the information hub of the Project.*" The CM is uniquely placed on site. He has access to all of the information. It is the CM who is best placed to report to the client on the true position of the works at any given time. Further the CM would be expected to recognise the importance of the impact of any changes to the likely completion date. Where the completion date was subject to change, Laing had a clear obligation to accurately report any change from the originally projected completion date as well as the effect on costs.

If the client does not have accurate information on costs and the programming information is inaccurate, then the client may incur additional costs which might have been otherwise avoidable. Laing had a professional obligation under the CMA to protect their client by giving objective advice based on all available information. If that obligation were breached, the situation might arise whereby the client was encouraged to throw good money after bad trying to deal with a situation without knowing the true picture.

A key reason many clients adopt the CM procurement route is so that the CM can manage any delays and variations that may arise and thereby minimise their effect. The management of these problems includes not only dealing with problems that have arisen but also anticipating potential problems that may arise. A CM must investigate the risks involved in site activities and balance them against the potential advantages. Significantly, if major decisions are to be taken, a CM should provide accurate information to the client and then seek to involve the client in the taking of these decisions. If the CM did not do this, he may be responsible for money wasted by the client in pursuit of ill-informed decisions.

The failure to accurately report delays and face up to them significantly contributed to the problems at the Great Eastern Hotel. Had Laing accepted and reported the true nature and extent of delays, they would have had the opportunity to reorganise contracts before a number of the trade contractors commenced. Work-packages would have been properly co-ordinated in accordance with the actual progress on site - another of the key skills a CM should bring to any project. Laing's failure properly to report progress meant that they were unable to do this.

The under-reporting of the problems and delays to one of the key components of the project, the temporary roof, had the effect of masking both its critical importance and the fact that steps urgently needed to be taken to identify and deal with the problems. The under and mis-reporting also meant that the client and the professional team were unaware of the true position. Consequently their additional combined resources could not be brought to bear upon Laing and/or the defaulting trade contractors to secure better performance and safeguard the client's position. Laing did not take steps to minimise the elements of risk to the client.

The result of this was that as a direct consequence of Laing's breaches, the Great Eastern Hotel was exposed to claims from the trade contractors for prolongation, delay and disruption. On the evidence, the dominant cause of this trade contractor delay was found to be the delay to the project as a whole caused by Laing.

In addition, Laing was held liable for acceleration payments. Laing had suggested that the claim for acceleration costs must fail, because the payments made to bring about the accelerations measures were not wasted. That was not accepted. Again, the starting point was Laing's responsibility for the delay to the project as a whole. Even if some acceleration could be demonstrated, it followed that the delays to completion would have been greater, and thus Laing's liability for costs consequent on such delays would be that much greater, without this acceleration. The acceleration measures even if partially successful, were measures adopted in order to mitigate the growing losses and as such the cost of such measures were recoverable from Laing.

Another key responsibility of the CM is the scoping of the individual trade packages. This responsibility remains even though others may have had an initial responsibility to design and provide the contents. The ultimate obligation to make sure each package is workable and complete remained under the CMA with Laing.

The CM was again there to safeguard the client.

Here, Laing failed to take reasonable steps to include all of the subject works in the relevant packages. As a consequence instructions had to be issued to enable those omitted works to be carried out. The expert evidence demonstrated that carrying out work as a variation was not as economical as carrying it out as part of a competitively tendered trade package. Judge Wilcox held that what was recoverable was the element representing the enhanced cost caused by the failure to have the works carried out at the economical package rate, namely 15% of the cost of the instructed variation. Some will recall this concept was first judicially recognised in the 1997 case of *Turner Page v Torres Design*.

Finally, the *GEH* case has demonstrated again just how important it is that an expert understands and complies with the primary duty he owes to the court. Judge Wilcox here found that one of the experts had failed to understand that duty.

An expert must thoroughly research all the evidence available to him. What he should not do is uncritically accept the evidence put forward on behalf of those instructing him. This is particularly the case when the experts on the other side put forward evidence that challenges and contradicts that picture. In such circumstances an expert must revisit his earlier expressed views in accordance with his clear duty to the Court.

Judge Wilcox made it clear that the Court is looking for an expert who bases his conclusions upon sound and thorough research, who has extensive practical experience in the discipline he is claiming expertise (and it helps if he has relevant experience of operating under similar contractual provisions as exist in the particular case) and who is prepared to make concessions when his independent view of the evidence warranted it.

In conclusion, the *GEH* judgment is an important decision for both CM's and the wider industry, confirming that the CM is central to the professional team, at the centre of the information hub of the project.

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Fenwick Elliott LLP