

Urgent briefing

Great Eastern Hotel Company Limited

In an important decision on the responsibilities of a construction manager, a consortium of the Conran Hotel Group and Arcadian has been awarded approximately £10 million in damages for loss of profit and additional costs resulting from delays to the completion of the refurbishment of the Great Eastern Hotel in London which were found to have resulted from breaches by John Laing Construction Limited ('Laing') under a construction management contract. In reaching its decision the Court also considered (and confirmed) the approach to global claims in last year's *John Doyle v Laing* decision and commented upon the methods of programming analysis adopted by the parties.

Background

The scheme to refurbish and extend the Great Eastern Hotel was proposed by a consortium made up of Arcadian International plc and Conran Holdings Ltd (known as the Great Eastern Hotel). It was intended that the development would be carried out by specialist trade contractors, but that they would be managed by a construction manager, Laing, under a construction management contract with the option of converting this into a standard JCT 80 Private Edition Construction Contract. Following breaches of the construction management contract by Laing, there were significant delays to the project and increased costs which caused the consortium concern.

Issues

The parties agreed that delays to the procurement and erection of a temporary roof in turn caused a considerable delay to the project. However those delays worsened over the course of the project with the result that the hotel alleged that Laing was responsible for a total delay to the project of 44 weeks and had caused the total cost of the project to increase to £61 million rather than the budgeted £34.8 million. The hotel argued that Laing was also responsible for the loss of revenue over the increased period, the additional sums due to its professional team and the trade contractors which the hotel said were the result of the delay and the loss of the opportunity to make contra charges against trade contractors.

Laing, on the other hand, contended that if the contractual obligations were interpreted strictly as the hotel argued, it would result in a situation where Laing were, in effect, responsible for the performance of trade contractors as though they were a traditional main contractor rather than a construction manager. Laing also contended that even if breaches of the construction management agreement had occurred, the hotel was unable to prove that these breaches caused particular loss and damage. In any event, Laing's reporting was within the acceptable range of reporting and the hotel had no evidential basis for the claims in relation to the trade contractors.

The Decision

Judge David Wilcox in the Technology and Construction Court held that the construction management contract could not be interpreted as imposing an obligation on Laing to ensure that the various trade contractors complied with their trade contracts (as the hotel had argued) as this would go against the very principle of construction management. However, the primary obligation under the contract was that of a professional, that is, to exercise all the reasonable skill, care and diligence of a qualified and competent construction manager. The hotel was found to have established several such breaches of contract which has resulted in delay.

The hotel had also spent significant sums on acceleration in an attempt to fulfil a programme that was unachievable and Laing was also held liable for these sums. Laing was found to have submitted incorrect information with regard to the delays to the project and was consequently in breach of its contractual obligation to report accurately. In addition Laing was found to have failed to investigate fully the work involved from the trade contractors and as a result the hotel was able to recover the losses suffered as a result of having to pay increased sums to trade contractors to cover additional work which should have been more economically included in the original trade contractor packages. The hotel also was held to have proved its case in relation to the claims for loss of profit as the opening of the hotel was delayed due to Laing's breaches of the construction management contract.

In total, the hotel was awarded £8.9 million plus interest and costs, yet to be determined.

The global claims made by Great Eastern Hotels

The hotel transferred the global claims of the trade contractors which it had settled onto Laing, also on a global claims basis, but excluded from their claim anything that was not the responsibility of Laing. Judge David Wilcox applied the *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* approach and took a pragmatic line.

The impacted as planned method of delay analysis

The principal witnesses in relation to delay were programming experts and both used a different analysis for the main part of the project to ascertain the periods of delay and their causes. The expert for the hotel used the impacted as planned programme by which the project is analysed on a monthly basis to determine the actual impact of delay upon the critical path. The expert for Laing worked retrospectively from an as-built programme except in relation to concurrent delay where he was unable to assess the impact by any other means than the impact as planned analysis method.

Generally, Judge Wilcox accepted the evidence of the hotel's expert and therefore seemed to be in favour of the impacted as planned method of analysis. However, where this method was used by Laing's expert to analyse the effect of late design information, Judge Wilcox said that it took "*no account of actual events which occurred on the Project and gave rise to a hypothetical answer*". The expert had compared the timing of design information release against the as-planned programme rather than the programme as it was at the time the information was released, when the project was in serious delay. This method of analysis took no account of the fact that the design team would have been aware of the delay to the original programme and would have been able to prioritise design and construction accordingly.

Conclusion

In relation to global claims, it appears that the courts are willing to accept the hybrid global claim and implement the *John Doyle v Laing* approach. In terms of delay analysis, it seems that the court's attitude towards the impacted as planned method is less than favourable.

But light of this case what now for construction management? Whilst the Judge recognised the fundamental principles of construction management by finding that Laing was not under an obligation to assume that the trade contractors complied with their trade contracts, nevertheless it was required to perform its obligations to the standards of skill and care expected of a professional. It appears that the proposition that the client enters into contracts directly with trade contractors itself (and therefore takes the primary risk as to additional costs and delays) and that the role of the construction manager is one simply of management (i.e. organising, planning the works and programming) could both be called into question as a result of this decision. The construction manager is required to manage the works so as to minimise risks to the client and must be proactive in the resolution of problems; something which Laing was found to have failed to do in this case and for which it consequently paid the price.

However, in relation to both this case and the £431 million Scottish Parliament project, there seems to have been little effective communication between construction manager and client and an unwillingness by the client to involve itself fully in the project. In this case there was also the option to change the contract to a standard form of building contract which, although not exercised, did perhaps result in the team assigned to the project being experienced as contractors rather than construction managers. Therefore, so long as those involved understand this particular method of procurement and the need for communication between client and construction manager, construction management arguably does have a future role within the construction industry.

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LONDON BIRMINGHAM BRISTOL EDINBURGH GLASGOW LEEDS MANCHESTER BRUSSELS DUBAI HONG KONG SHANGHAI

T 0845 300 32 32 www.pinsentmasons.com

Should you have any questions please contact Catriona Dodsworth (0207 490 4000), Helena Grundell (0113 233 8905), or your usual Pinsent Masons adviser who will be able to assist you further.