

Just How “Risk Free” is Construction Management for the Construction Manager?

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Introduction

Construction Management first became popular in the UK in the 1990's in relation to complex fit-out works and reflected the increasing reluctance of major contractors to undertake all risks inherent in a project. While, to date, Construction Management has not been used extensively in Asia, it is understood to have been used successfully on certain casino and resort projects in Macau and also in China where it has helped overcome some of the hurdles faced in securing regulatory approvals.

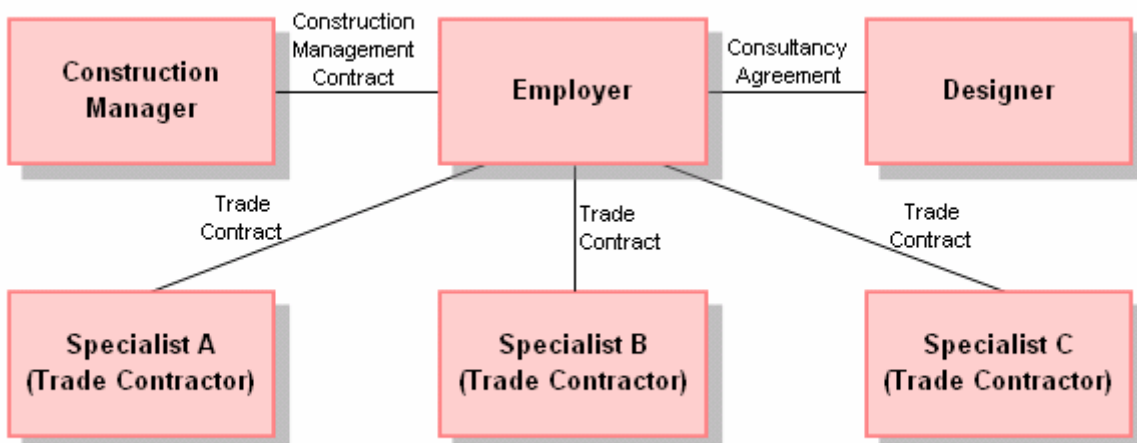
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How might Construction Management be described? The method was summarised as follows in the UK case of *Great Eastern Hotel Company Ltd. v John Laing Construction Ltd* (Technology and Construction Court 24 February 2005) (“*Great Eastern*”):-

“The Construction Manager manages the construction of the Project without accepting the principal risks of time and cost, which remain with the Client. Thus it is the obligation of a Construction Manager to plan, programme and organise the Project and the Trade Contractors who actually carry out the work, so that the Client’s risks in relation to time and money are minimised. The advantage to the Client of this form of procurement is that the responsibility for construction can be handed to professionals who can manage the risks and the work can be started before the whole design is complete. The disadvantage from the Client’s point of view is that he contracts directly with many Trade Contractors and retains the risk as to time and cost. From a Construction Manager’s point of view, these risks are borne by the Client and the Construction Manager simply receives his agreed fee for managing the construction of the job.”

This is obviously different to a traditional procurement method where an employer engages the quantity surveyor and the designer to produce the specification and drawings and then the contract is let to a main contractor. The main contractor then engages his own sub-contractors to carry out the works.

If the above description of Construction Management were to be set out in diagrammatic form, it might appear as follows:-



Construction Management's main advantages are that it facilitates fast track construction, allows an employer greater control and encourages co-operation between an employer and the trade contractors. Its disadvantages for an employer are that he takes on greater risk, there is no single point of accountability and the complex management structure often leads to greater administration costs. It is worth noting that there is no standard form of Construction Management contract (the form used must be created specifically for the required project).

The Great Eastern Case

While many contractors view Construction Management as being "risk free", that is, as made clear in the *Great Eastern* case, probably a very dangerous assumption. Here the Court was required to examine the nature of the duties owed by the Construction Manager and the circumstances in which he may become liable for project overruns resulting from inadequate management.

The Great Eastern Hotel Ltd ("GEH") appointed John Laing Construction Ltd ("JLC") as its Construction Manager under a Construction Management agreement for the redevelopment of a hotel. The agreement provided that JLC should exercise the reasonable skill, care and diligence to be expected of a properly qualified and competent Construction Manager and that it should also ensure that each trade contractor complied with the obligations under their respective trade contracts. The project overran and GEH claimed that JLC had caused the overrun by its mismanagement of the project.

The primary issue to be considered by the Court was the scope of JLC's obligations under the Construction Management agreement. GEH sought to argue that the Construction Management agreement should be construed as imposing an obligation on JLC to ensure that the various trade contractors complied with their respective trade contracts. GEH relied, in particular, on Clause 3.4 of the Construction Management agreement which provided:

"The Construction Manager shall further procure that each Trade Contractor complies with all of its obligations under and all the requirements of, their respective Trade Contracts."

It was argued that the duty to procure compliance with the trade contracts was an absolute obligation.

JLC argued that, as the Employer, GEH was liable for any delay by the trade contractors. JLC submitted that if it was held to be responsible for such delay it would be tantamount to imposing on it vicarious responsibility for the performance of the trade contractors and that this would result in JLC being treated as if it was a traditional main contractor rather than a Construction Manager. JLC further submitted that even if GEH could prove that JLC breached the Construction Management agreement, it could not show that such breaches caused loss or damage.

The Court held that the Construction Management agreement required JLC to manage the construction of the project but not to accept the principal risks of time and costs which remained with GEH. However, while JLC was not the guarantor of the project, it did owe clear professional obligations to GEH. In particular, JLC had an obligation to manage the project so that risks in relation to time and costs were minimised. It was held that JLC had

breached this obligation in that it had failed to manage the trade contractors with the degree of care to be expected from a professional in JLC's position and that GEH was entitled to substantial damages.

Conclusion

This is the first reported decision in which a Construction Manager has been found liable to an employer and clearly illustrates that Construction Management is not "risk free". A Construction Manager can be held liable for a failure to properly carry out the obligation to manage a project by not exercising the degree of skill and care to be expected of a Construction Manager on a similar project.

In summary then, a Construction Manager should be aware of the risks that exist on a project and ensure that, in so far as is reasonably possible, suitable contract terms are agreed limiting those risks.

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